




Lawyer's Manual on Domestic Violence

REPRESENTING THE VICTIM, 5TH EDITION


Edited by

Jill Laurie Goodman and

Dorchen A. Leidholdt

Supreme Court of the State of New York

Appellate Division, First Department








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"This introduction to the legal and practical challenges of representing victims of domestic violence provides indispensable guidance for attorney and judges alike."

Honorable Judith S. Kaye
Chief Judge of the State of New York

"We're making progress in the struggle against domestic violence, and books like this are one of the reasons."

Honorable John T. Buckley
Presiding Justice, Appellate Division, First Department

"A must read for anyone who cares about the most vulnerable litigants in our court system."

Honorable Betty Weinberg Ellerin
Associate Justice, Appellate Division, First Department
Chair, NYS Judicial Committee on Women in the Courts

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Hon. John T. Buckley, Presiding Justice

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Acknowledgements

ALEXIS MCNAUGHTON KNOX
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Jill Laurie Goodman
Dorchen A. Leidholdt

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Part I

Introductory Matters



1

The Evolution of the Justice System's Response to Domestic Violence in New York State

by Julie A. Domonkos

The anti-domestic violence movement began in the 1970s as a grass-roots feminist response focusing on creating emergency shelters for women and children fleeing violent family members. Immediate safety has been and always must be the first priority of the movement. However, activists in the field quickly saw that a short stay in an emergency shelter would not make battered women and their children safe in the long-run, nor bring their abusers to justice. Advocates increasingly turned to the civil and criminal justice systems to hold abusers accountable, create longer-term safety strategies for victims, and demand economic justice.

Although steps were taken over the years, it was not until the 1990s that the anti-domestic violence movement produced a sea change in the way police, prosecutors, lawyers, legislators and the courts responded to cases of domestic violence. The last decade of the twentieth century produced a mature legal specialty in the area of domestic violence, the emergence of lawyers specializing in the field, and a justice system that became responsive to the issues and needs of these victims and their children.

The progress that has been made in the last decade is impressive. However, many barriers to safety and justice remain for battered women and their children.

The Progress

For New York State, 1994 was a watershed year. The New York State Legislature passed the Family Protection and Domestic Violence Intervention Act,[1] an omnibus bill that revolutionized the New York justice system's response to cases of family violence. The Act eliminated an anomaly of New York law

that had long plagued victims and their advocates and that was misleadingly known as the "right of election." Far from being a right, this law limited victims of domestic violence to a choice between pursuing their claim in Family Court or Criminal Court within 72 hours after an act of domestic violence. No other state forced victims to choose between civil and criminal remedies. The 1994 Act also imposed a state-wide mandatory arrest law, requiring police officers to make an arrest for domestic violence felonies, violations of stay-away orders of protection, and family offenses committed in violation of an order of protection. For domestic violence misdemeanors, the Act mandated arrest unless the victim requests otherwise. The Act eliminated the coercive police tactic of asking victims at the scene of the crime whether they wished to have an arrest made.

The Act also created a statewide registry of orders of protection so that police and judges could easily determine whether a valid order had been violated and whether there was a history of domestic violence. A new police form called a "Domestic Incident Report" was mandated by the Act, so that any potential domestic violence case could be recorded and tracked as such. Longer Family Court orders of protection were allowed upon a showing of specified aggravating circumstances, and training for police, prosecutors and the judiciary was mandated.

In the same year, the federal Violence Against Women Act[2] was passed. VAWA, as it became known, created a new federal civil rights remedy for victims of gender-based crimes and instituted new penalties for interstate crimes of domestic violence. VAWA also created a large funding stream for domestic violence and sexual assault programs, which led to a rapid growth of anti-violence programs in non-profit organizations, prosecutors' offices, and the courts. Legal programs to help victims of domestic violence and enhance the arrest and prosecution of batterers were no longer a rarity. VAWA also provided the statutory framework for states to give full faith and credit to orders of protection issued by other states. This was an important advance because domestic violence victims frequently relocate in order to escape their abusers.

Two years later, the New York State Legislature mandated that courts consider proof of domestic violence in all child custody and visitation cases.[3] Although courts were always free to hear and credit such proof, they often failed to do so, hampered by the same lack of understanding about the nature of domestic violence and its serious effects on children that is prevalent in the general population. Advocates called for this legislative action because courts, law guardians and forensic evaluators frequently labeled victims hysterical or dishonest when they would allege domestic violence in their cases, and judges

would often fail to protect — or rule against — victims and their children after they took the risk of revealing the abuse.

In 1997, the Legislature acted to address a problem that arose after the 1994 passage of the mandatory arrest law. Under mandatory arrest, police officers began arresting both parties in a domestic dispute if both alleged or showed physical signs of injury. This meant that victims frequently were arrested (or threatened with arrest if they pursued charges against their abuser) because either they had fought back to defend themselves or their abuser made a false allegation against them. In response, the Legislature enacted what is commonly known as the "primary physical aggressor law."[4] This law requires police officers to attempt to determine which of the parties in a misdemeanor-level domestic dispute is the primary physical aggressor and arrest only that party. Police are mandated to consider specific factors such as a prior history of domestic violence, the comparative extent of injuries to the parties, and whether one of the parties acted defensively. The problem of dual arrest persists but has been at least somewhat alleviated by the primary physical aggressor law.

In 1999, New York joined all of the other states in enacting anti-stalking legislation.[5] While hardly progressive — New York was the last state to take action against this particular type of criminal activity — New York did benefit from seeing what other states had done and crafted a bill that addressed a broad range of stalking activities while avoiding Constitutional problems. The New York anti-stalking law was a big advance because it recognized the lived experiences of stalking victims, most of whom are women and most of whom are stalked by current or former intimate partners. The law had long understood the fear and harm experienced by victims of classic assault cases like barroom brawls. Now the law had evolved to take into account the unique fear that stalkers invoke and the subtle and insidious tactics stalkers use against their victims.

Changes in the structure of the court system paralleled substantive law changes in the arena of domestic violence. The 1990s saw the introduction of specialized domestic violence courts. Pilot domestic violence courts sprang up in New York in Criminal Court and in Family Court. Ultimately, the model of the "integrated domestic violence court" emerged, through which all issues — criminal and civil — confronting a family impacted by domestic violence would be heard by one judge. These courts continue to evolve and, under the leadership of Chief Judge Judith Kaye, are planned for every county in New York.

The development of domestic violence courts signaled an enormous shift in how the justice system viewed its role in responding to domestic violence. Previously, there was a pervasive sense that courts were compromising their

impartiality by learning about domestic violence and applying that knowledge to the cases before them. It took a conscious effort by the leadership of the court system to shift that paradigm and point out that courts simply could not do justice in these cases unless they received training from experts about the nature of domestic violence, its effects on adult and child victims, and the tactics abusers commonly use to manipulate the justice system.[6] Far more emphasis was placed on holding abusers accountable. Excuses for battering such as substance abuse and anger management problems were exposed as baseless, and courts stopped sentencing abusers to programs in lieu of true criminal sanctions. Referrals to batterer intervention programs continue to be made but with an understanding that they do not "change" the batterers, do not make victims safe, and do not substitute for penal sanctions.

Progressive developments also occurred in police departments and prosecutors' offices. Domestic violence training was mandated for police officers, and some larger departments, such as those in New York City, formed specialized domestic violence units. Many of these units work hand-in-hand with local domestic violence service providers so that victims can receive confidential supportive services as their criminal cases go forward. Prosecutors learned that connecting victims to supportive services makes it more likely that the victim will assist in the prosecution. They developed the idea of "evidence-based prosecutions" so that cases could be pursued even when the victim was unavailable to testify.

In the last ten years, the law has recognized a new expertise of domestic violence. Courses and clinical programs on domestic violence are available at law schools, continuing legal education programs are offered on the topic, bar associations have formed domestic violence committees, and specialized legal services programs hire attorneys to represent abuse victims. Domestic violence has come into its own as a legal movement. Nevertheless, there is a great deal more progress to be made.

Challenges Ahead

There are some tough truths that must be bravely faced if the justice system is to help bring true safety for domestic violence victims and full accountability for abusers. First, gender inequities corrode our justice system just as they do the world at large. Everyone with a role in the justice system must be open to the knowledge that has been accumulated about domestic violence and vigilant

in fighting against gender stereotypes. Domestic violence is, at its core, an issue of gender inequality. The batterer's goal is to beat the equality out of his victim. Systemic gender inequities facilitate the batterer in this effort. These inequities play out in countless ways when victims seek help from the justice system. Advocates have storehouses of anecdotes, such as when victims are labeled "hysterical" or "incredible" because they allege abuse, or when police refuse to enforce orders of protection because they feel sorry for the abuser denied access to his children, or when courts allow abusers to delay paying child support or maintenance. In April 2002, the New York State Judicial Committee on Women in the Courts issued a follow-up report to its groundbreaking 1986 analysis of gender bias in the courts.[7] The findings and recommendations of the initial analysis and the follow-up report show clearly how gender bias can — and still does to some extent — permeate and corrupt the administration of justice in the court system. In the section on domestic violence, the report notes, for example, that victims of domestic violence often face a higher standard of credibility than their abusers, that many judges still need a better understanding of the effects of domestic violence on victims and the grave danger they face, that some judges grant abusers access to their children without sufficient regard for the safety of the children or their mothers, and that law guardians and forensic evaluators often fail to recognize domestic violence and its effects on children.[8] When battered women have to fight against gender bias in the courts, they are doubly abused. Courts simply cannot do justice when they make the blind assumption that the parties in domestic violence cases come before them equal in status. Comprehensive and continuous efforts to wipe out gender bias in the justice system are a top priority.

A related problem is the pervasive presumption that, while domestic violence may harm the adult victim, it is not necessarily harming the children in the family. If not for the gender bias that clouds our vision, common sense would say clearly that a father who hurts the mother of his children is, by definition, hurting his children. This has been borne out by advocates' anecdotal experience and fortified by years of social science research, which shows without question that children are harmed by domestic violence. From 30 to 60% of children in homes where a parent is physically abused are also physically abused, and many of the rest show signs of psychological harm and trauma.[9] Our current system gives abusers the benefit of the doubt and cuts off access to their children in only the most egregious of cases. This puts children at risk. A fundamental law change is needed so that a parent who chooses to use violence in his relationship

must bear the burden of proving that he presents no risk to his children before he is granted the privilege of rearing them.

Another tough truth that must be confronted is that money counts when it comes to access to justice. Poor battered women who cannot afford an attorney are often left to represent themselves or are provided piecemeal representation by attorneys without resources or perhaps even background in domestic violence. Under current law, poor people who cannot afford an attorney are not entitled to appointed counsel in matrimonial or child support matters. This has a devastating impact on domestic violence victims who need self-sufficiency in order to stay free of their abusers. Without the benefit of effective and zealous advocacy, many women are forced to give up their fair share of the family assets to get legal custody of their children (and thereby keep them safe from the abuser). New York State needs a comprehensive plan to provide seamless and effective legal representation for all battered women and their children. In the meantime, courts must ensure that battered women are promptly and safely given the child support to which their children are entitled and that non-monied battered women spouses in divorce actions receive pendente lite relief from the beginning of the action so that they can obtain the best possible legal representation and their fair share of the marital estate.

A final and perhaps most important challenge is to remember that the justice system alone cannot solve the problem of domestic violence, either for society as a whole or for individual victims. The work to end domestic violence is not a criminal justice movement. It is a social change movement that requires a fundamental shift in every part of our culture. No lawyer, police officer, prosecutor, judge, or probation officer can guarantee the safety of a victim. Each can use the law as one tool, in partnership with the victim, to help her in her quest for safety and self-sufficiency for herself and her children. It is a critical mistake to think that the justice system has all the answers for battered women and their children and that we should therefore dictate to them what to do and reject or punish them if they choose another path. The legal tool must be used in conjunction with other social service tools in a holistic approach to helping abused family members make a new life. While the justice system has made huge advances in the effort to help victims and children over the past decade, it must never presume to be the cure.

Notes

1. Laws of 1994, ch 222, 224.
2. Violence Against Women Act of 1994, Pub L No. 103-322 (1994).
3. Laws of 1996, ch 85.
4. Laws of 1997, ch 4.
5. Laws of 1999, ch 635.
6. For example, abusers frequently make false police complaints, file for orders of protection, or accuse their victims of child abuse as a means of deflecting the court's attention away from their own illegal conduct.
7. *Women in the Courts: A Work in Progress; 15 Years After the Report of the New York Task Force on Women in the Courts*, New York State Judicial Committee on Women in the Courts, April 2002. The New York State Judicial Committee on Women in the Courts has been long and heroically chaired by the Honorable Betty Weinberg Ellerin, former Presiding Justice of the Appellate Division, First Department.
8. *Id*. at 12-13.
9. *See e.g. In Harm's Way: Domestic Violence and Child Maltreatment*, National Clearinghouse on Child Abuse and Neglect Information; M. McKay, *The Link between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, Child Welfare, Vol LXXIII, No. 1 (Jan.-Feb. 1994).

2

Interviewing Battered Women

by Dorchen A. Leidholdt

Meeting Your Client

Your first interview with your client is crucial. If she feels that you are untrustworthy, judgmental, or unable to relate to her experience, she will censor herself and you will not get the information you need to represent her effectively.

At this first meeting, you will have an opportunity to gather vital information that may not be available again. Memories dim and bruises fade.

In the course of your relationship, you will give her advice — some that she may not want to hear. If she trusts you, it is far more likely she will be able to hear bad news — like the fact that some form of visitation between her children and her batterer is probably inevitable — without feeling that you are the enemy. With an attorney-client relationship predicated on trust, she will be far more likely to make sound decisions and act in a way that is in her, and her children's, interest. Such a relationship may not be easy to achieve, however, particularly since she is emerging from a relationship in which her trust has been repeatedly betrayed.

It is very important to understand the disparity in power between you and your client, so that it will not inadvertently be used against her. You will probably have knowledge, skills, access, and credibility that she will not have. You very likely will have privileges based on race, class, education, gender, facility with the English language, or a combination of these factors that she will not have. You will be able to use these privileges on behalf of your client to help her become a full participant in her case, to make her situation understandable to the court, and to enhance her credibility. Don't let this power differential work to her disadvantage.

For all of these reasons and more, it is important that you do everything possible to make your first interview a success for both you and your client. There are some concrete steps you can take, and there is some less tangible but even more important preparation you can do.

Preparing for the First Interview

Your first interview with your client begins with your initial telephone contact. Try to determine if it is safe to call her at home or leave a message. If she is still living with her abuser, or if he or his friends or family members frequent her home, he may intercept or learn about your call and punish her for seeking help. Find out when and where you can safely call her. Ask her if there is a friend or relative with whom you can leave messages without endangering her. If you call her home and someone else answers the phone, do not just hang up. That could create suspicion and trigger a beating. Instead, ask for someone else and apologize for dialing a wrong number.

If your client is in shelter, ask her for the telephone number of her counselor and/or the shelter's reception desk. With her permission, introduce yourself to her counselor, who will likely be an important resource.

When you choose the date of the first meeting with your client, explain that it is important that she be punctual and to call you in advance if she needs to reschedule. Some domestic violence victims' lives are in so much flux that it is difficult for them to keep appointments. This is especially likely if the abuse was recent or is ongoing or if the victim was forced to flee her home. It is helpful to let your client know what your expectations are, and it is important that those expectations be realistic and take into consideration her difficult circumstances.

Isolated by her abuser from family and friends and impoverished by his economic control or her flight from her abuser, your client may have child-care problems. If that is the case, see if you can make arrangements with someone in your office to watch the children. If the children are school age, ask the client to bring books that they can read in the waiting room under the watchful eye of the receptionist. If the children are young, child-care presents more of a problem. See if the client can bring someone to wait outside with the children. Of course, it is not a good idea to bring children, except newborns or sleeping infants, into the interview unless it is confined to a discussion of financial information.

I welcome the opportunity to meet my client's children and to observe her interaction with them, especially if there is an actual or potential custody or

visitation case. Seeing her with her children can give you information about her strengths as a parent that will make you a stronger advocate. Problems in the way your client relates to her children may become an issue in court. You need to be alert to any such problems so that you can make swift and appropriate referrals to parenting groups or therapists.

Remember that, until a law guardian has been appointed, you can interview your client's children. Older, verbal children can be a source of valuable and reliable information, such as which parent they prefer to live with or what they observed in their home on a particular occasion. Be sure that you have your client's permission to interview the children and clear any questions you ask them with your client in advance. Also be sure that any questions you ask the children are "open-ended" and that you do not inadvertently lead or insinuate.

Ask your client to bring to the first interview all court papers, police reports, hospital records and appointment slips relevant to the domestic violence, and marriage and birth certificates. New York State domestic incident reports, issued by the police when they arrive on the scene of a domestic dispute, contain contemporaneous accounts of the incidents by both your client and the responding police officer and are especially useful. Ask her if she keeps a calendar or journal; if she does, ask her to bring it to the interview. If she does not keep a journal, tell her that it is a good idea to begin to keep one so that you will know the exact date and time on which events occur, like drop-offs and pick-ups for visitation or harassing phone calls.

Be sure to explain to your client each and every part of the legal process. Do not ignore her phone calls or blame her for the abuse (e.g., "Why did you stay with him for ten years if he was so bad to you?"). You can help empower your client or you can be part of the system that keeps her down.

If your client is from a different ethnic or religious group or if she is an immigrant, guard against the stereotypes about her or her culture (e.g., that Asian or Muslim women are submissive). Avoid imposing on her or her culture your own ethnocentric judgments (e.g., she is a bad parent because her infant sleeps in her bed, a common practice in many cultures, rather than alone in a crib). Learn about any religious beliefs and cultural customs that may become an issue in court. You may have to become your client's cultural interpreter to the court, forensic expert, or law guardian. Be alert to religious holidays and avoid scheduling court dates and trial preparation sessions on those days. Be aware that violence against women often takes different forms in different cultures.

There are a number of organizations that serve victims of domestic violence from particular ethnic groups, such as the Korean-American Family Service

Center, Sakhi for South Asian Women, and the Arab-American Family Support Center. Advocates from these organizations not only can provide emotional support for your client but also can provide you with crucial information about your client's culture.

Understanding the Dynamics of Domestic Violence

It is also essential, before you interview your client, to have an understanding of the profile of a batterer and the dynamics of domestic violence. This is important for a number of reasons.

First, your client needs to understand what she is dealing with at home and that she is not alone. Many women blame themselves for being in abusive relationships. Recognizing that the domestic violence is the product of his need to dominate and control and not her psychology or behavior can lift a burden from her shoulders. Realizing that there are other women in the same boat can help end her isolation.

Second, you may need to educate the court, the law guardian, and even the forensic psychologist about the dynamics of domestic violence and their relevance to your case. These days many psychologists, lawyers, and judges have received some domestic violence training. It does not necessarily prepare them, however, to apply the lecture's abstract principles to the real human beings before them or rid them of deeply held biases.

Third, you will need to help her assess her safety needs and what to expect from her abuser. Will he stalk her? Is he so dangerous that she needs to go into shelter? Is he so dangerous that she should not initiate a family court action that will place her in close proximity to him? Will he use the legal system instead of his fists to continue the abuse once she has left? Information about how batterers think and behave will help you prepare her for what may be in store.

You probably have heard of the "battered woman syndrome." This is a constellation of characteristics ostensibly shared by domestic violence victims who have been subjected to battering over a period of time. A central feature of "battered woman syndrome" is "learned helplessness" — the inability of battered women to seek help or escape even when these options are available.[1]

This syndrome, while useful when trying to explain to a criminal jury why a horribly abused woman was acting in self-defense when she shot her sleeping husband, has proven detrimental to women in other legal contexts. "Battered

woman syndrome" has been especially harmful to domestic violence victims fighting for custody of their children: if battered women suffer from learned helplessness and cannot protect themselves, then how can they protect their children? "Battered woman syndrome" also suggests that battered women are not victims of oppression but rather suffering from psychological pathology. "Battered woman syndrome" has undermined domestic violence victims in a variety of legal contexts by becoming a rigid pigeonhole: if the woman was resourceful, assertive, and a fighter — clearly not suffering from "learned helplessness" — then her story of victimization must not be true.

"Battered woman syndrome" includes the notion that battering is characterized by a "cycle of violence": a stage of tension-building followed by a stage of acute battering followed by the honeymoon stage when the abuser begs for forgiveness.[2] The problem with this theory is that, while the cycle of violence describes some abusive relationships, it does not describe all of them. Some batterers never apologize. Some battering remains low-level, chronic, and marked by constant criticism and verbal abuse. Unfortunately, the "cycle of violence" became as rigid a pigeonhole as "learned helplessness," calling into question women's stories of abuse when they did not fit this pattern.

The psychological understanding of domestic violence has changed. Thanks to the work of scholars like Evan Stark and Julie Blackman, the focus has shifted from the victim's mental state to the abuser's attitudes and behavior, which Stark characterizes as "strategies of coercive control."[3] What is definitive, Stark argues, is not whether the victim ended up in the hospital, but whether her abuser was carrying out a campaign of physical and psychological strategies to bend her to his will.

Psychologists and advocates have identified a set of behaviors and attitudes common to abusers. They are careful to point out that not all abusers share all characteristics. I find it very helpful to review this list with my clients. It often elicits important information that would not surface otherwise. Being able to understand and identify the characteristics of batterers and their strategies of control can be very helpful to your client, diminishing her abuser's authority and lessening her feelings of self-blame.

Jealousy and Possessiveness

Jealousy and possessiveness are two of the most common characteristics of abusers. Often they are initially interpreted by the victim as signs of her partner's passion and devotion. Soon, however, it becomes apparent that they underlie his acts of domination and control. Jealousy in the context of an abusive relationship

can take many different forms, some overtly paranoid. The abuser of one of my clients hid tape recorders around the apartment in the hope of catching her with a lover. Another client's abuser forced her to lower her eyes whenever she walked outside; he was convinced that she was flirting with every man she encountered. Abusers often accuse their victim of sleeping with everyone from her boss to her best friend.

Controlling Behavior

This is often related to the abuser's jealousy. Since he is convinced that she wants to sleep with anyone and everyone, he has to monitor her every move to prevent her infidelity. He will not let her work outside the home, go to the store, or wear lipstick.

Battered immigrant women must often contend with abusers who attempt to use their immigration status as a weapon of control. Frequently, their abusers will seize their passports and other travel documents. If the women are undocumented, their abusers will threaten to report them to immigration officials and have them deported. If the women have conditional resident status, their abusers will threaten not to accompany them to their INS interview for removal of the condition. Battered women from Islamic countries may return home for a visit with their families only to discover that they are unable to leave the country because their abuser has issued a decree preventing them from doing so. One of my clients was held prisoner by her abuser in Algeria for years until she promised to obey him in all matters; only then did he permit her to return to the United States.

Quick Involvement and Manipulative Behavior

In abusive relationships, the dating period is often brief and intense. Almost immediately, the abuser expects his partner to meet all of his needs, build her world around him, and submerge her identity in his. Again, this behavior is often initially interpreted by the victim as passion and devotion; eventually she realizes that it is her prison. During the courtship period, abusers often present a smooth facade. As one of my clients said, "He was the perfect gentleman." The perfect gentleman beat her for years and would have killed her had a neighbor not intervened.

Batterers are often skilled manipulators, adept at deceiving criminal justice and child welfare authorities. They often turn their powers of manipulation on their own children, persuading them that mommy is to blame for the fact that the family is no longer together.

Isolation

Abusers frequently attempt to isolate their victims. He hates her family and tries to persuade her that they are horrible to her. He tells her that she has to choose between them and him. To maintain the relationship, she moves away from her parents and cuts off contact with her sister. He wants her to quit her job and stay home with the kids. He hates her friends and tries to persuade her that they are just using her. He wants her in the home, where she is totally under his control. Any social contact becomes a threat.

When a batterer isolates his victim, he is cutting off her exit routes. This is a strategy that makes a great deal of sense from the batterer's point of view. She has no one to help her understand what is happening to her, to bolster her self-esteem, and to offer assistance when she needs to leave.

Blame and Incessant Criticism

The batterer is never at fault and never accepts responsibility for any of his actions. She is always to blame. She is fat, stupid, too emotional, a terrible cook, a terrible mother, bad in bed, looks like a whore or a hag, and is responsible for his poor work performance, his poor relationships with other people, and above all, his violence to her. The barrage of constant criticism undermines her self-esteem, often rendering her even more dependent on him.

Cruelty to Animals or Children

One client told me that, after she left the relationship, her children reported that during court-ordered visits her abuser would hit and kick the dog exactly the way he used to hit and kick her. In another case, the batterer became jealous of my client's much loved miniature poodle, and, one day in a rage, threw him against the wall, killing him.

Batterers are disproportionately likely to abuse their children as well as their partners. Studies show that in approximately half of domestic violence cases, children are also abused. Child abuse by batterers may take the form of depriving them of the love and care of their mothers. I have seen many cases in which batterers have abducted the children to another country after the mothers fled the abusive relationship.[4]

Abusive and Violent Sex

One of the things I found the most surprising when I began to represent battered women was the pervasiveness of sexual abuse in domestic violence.

In the course of preparing a petition for an order of protection, I would learn that she was not only threatened by her abuser — she was raped repeatedly by him.

Often I did not learn this information on the first interview because my client was ashamed of the sexual abuse and found it so hard to talk about. Although there has been no marital rape exemption in New York State since the Court of Appeals rejected it in 1984,[5] and rape is a serious crime — a B Felony — rape in the context of domestic violence is rarely ever prosecuted, both because victims are understandably reluctant to come forward and because the system still sees marital rape as something less than a real crime.[6]

Sexual abuse in the context of domestic violence often means the abuser pressuring or forcing his victim to participate in unwanted, degrading sex: picking up prostitutes, going to a strip show or sex club, taking pornographic pictures of her, making her perform sexually for him and his friends, making her prostitute herself and making her act out what he likes in pornography. In one custody case, the batterer introduced into evidence at trial pornographic pictures of his bruised victim. He seemed to think that it was irrelevant that he had taken the pictures and that they documented his abuse. Fortunately, the judge did not and rejected his bid for custody.[7]

Sexual misconduct, rape, and other sexual offenses are not "family offenses" as defined by the Family Court Act and the Penal Code. The acts and injuries involved, however, may make out the elements of a family offense such as assault (if there is "physical injury") or harassment.

Verbal Abuse

Batterers usually subject their victims to an unending barrage of verbal abuse. The epithets "bitch" and "whore" are staples of domestic violence, along with threats and obscenities.

Threats

Threats go hand in hand with physical abuse. Some batterers control their partners with threats punctuated by an occasional act of violence. Ask your client specifically, "Did he ever threaten you?" Some victims do not see threats as acts of abuse. One of my clients was frequently awakened in the middle of the night by her husband, who would show her a length of cord or a sash. During the day, he made frequent, approving references to O. J. Simpson. Frequently he would push or slap her. She lived in terror that he would kill her but did not believe that she was a victim of domestic violence.

Rigid Sex Roles

Batterers often demand that their partners conform to rigid sex roles. She is supposed to be passive, obedient, solicitous, pretty, a great cook who always has dinner on the table just when he is ready for it, and sexually available to him whenever he is in the mood.

The First Interview

At the beginning, review the statement of the client's rights and responsibilities. This is a good opportunity to set certain ground rules with your client, and to assure her that you are aware of and will abide by your obligations to her. Do not just hand the statement to her to read. Discuss it with her. Explain that she will make decisions about objectives and settlement, but that it is your job to make decisions about how best to achieve those goals.

Confidentiality

Explain to your client that her communications to you are protected by attorney-client privilege. Describe the privilege in simple lay terms: it means that everything she tells you is in confidence ("between you and me") and that you can disclose what she tells you only if you have first secured her permission.

Be careful not to inadvertently disclose client confidences in conversations with the law guardian, child welfare workers, or forensic experts. If it would be advantageous to disclose certain information about your client to them and it is arguably confidential, get her permission first.

Inform your client that these principles of confidentiality will not apply when she talks with the forensic psychologist, the law guardian and his or her social worker, the judge's assistant, the child welfare worker, or anyone other than you or someone from your office working for you. Anything she communicates to this list of professionals will very likely be communicated to the judge in a report. In dealing with them she will have to learn how to be an effective advocate for herself and walk a fine line: she must be able to convincingly and specifically describe the history of domestic violence without sounding embittered, angry, obsessive, or hostile to her abuser's relationship with their children.

Legal Issues and Legal Needs

It is very important to go into the first interview understanding the primary legal issue, the burden of proof, and what your client will probably have to establish to prevail. For example, if it is a custody case, you will need to establish by a preponderance of the evidence that it is in the best interest of your client's children for her to be the custodial parent. Learn the best interest factors[8] and know that the court must consider proof of domestic violence. Or, if your client wants a three-year, exclusionary order of protection, she will have to establish by a preponderance of the evidence that her abuser has committed a family offense against her and that there are "aggravating circumstances." Know the elements of the family offense you will have to prove. Or, if your client has conditional resident status, in order to obtain permanent residence status she will need a battered spouse waiver establishing that her marriage was in good faith and that she was subjected to extreme cruelty. Your interview should be structured around obtaining the information you will need to meet the evidentiary burden.

In the course of the interview, you may discover that your client has other legal needs. It is not unusual for a domestic violence victim to have a range of different legal matters proceeding simultaneously. Typically, your client will have an order of protection and a custody or visitation matter in family court and a criminal case pending in criminal or supreme court. She may also be involved in a matrimonial action and an INS proceeding. You must be alert to all of these matters, actual or potential, and attempt to determine how you can comprehensively address her legal needs.

For example, your client says she wants a divorce but her batterer is stalking and threatening her. Her immediate need is for police action and an order of protection. You will want to advise her about calling the police. It may be helpful to intervene with the police on your client's behalf.

Or your client wants custody but thinks that there is a pending criminal prosecution against her abuser for beating her up. It has been months since she has talked with the prosecutor. You may need to serve as a liaison between your client and the district attorney's office to make sure they understand that she is cooperating and wants a conviction. That conviction will be very helpful in the custody case.

Nonlegal Needs

Also be alert to the fact that your client may have nonlegal needs that must be addressed.

For Safety

You may learn that your client is living with her abuser and that the abuse is ongoing. She may tell you that he will ignore an order of protection and may seriously hurt or kill her. You will need to find out if she wants to go into a battered woman's shelter or if there are family members or friends she can live with. If she wants to remain in the home with her abuser, you will need to talk with her about strategies should the abuse resume (alerting a sympathetic neighbor, for example) and a plan for quick escape. Be sure that she has all of her important documents in a place the abuser does not have access to. She will need to explore safety precautions such as having her locks changed and installing window guards.

For Counseling

She may tell you that she feels so alone and isolated that she is thinking about going back to her abuser. Tell her that there are support groups for domestic violence victims that can help create a supportive community. Then assist her by making an appropriate referral.

For Therapy or Psychiatric Help

She may tell you that she feels depressed and sometimes considers suicide; she has constant nightmares; she is terrified to leave her home even though she is certain her abuser does not know where she lives. She may describe recurrent nightmares, attacks of insomnia, or intrusive flashbacks to incidents of abuse, all symptoms of post traumatic stress disorder. You will want to urge her to get psychological evaluation and treatment.

You may be thinking, I'm a lawyer, not a social worker. The truth is that this kind of representation does not just entail grappling with legal issues. However, no one expects you to be a social worker or a psychologist. There are many multi-service domestic violence agencies throughout New York State that provide shelter, counseling, and other services. They can assist you with information and referrals to meet your client's needs.

Obtaining the History of Domestic Violence and Gathering Evidence

Almost all cases require a detailed history of the domestic violence. You need to know (1) when each incident occurred; (2) in an order of protection case, whether the occurrences together or separately constitute family offenses; (3) what kinds of injuries she sustained; (4) what her feelings and reactions were; and (5) what kind of corroborating evidence exists (hospital records,

eye-witness accounts, police reports, etc.). Taking her through the elements of the power and control wheel can be an effective way to elicit the full range of the abuse she has received.

As mentioned above, be alert to the fact that you may have key evidence in your office that will not be around for your next interview: bruises, red marks, scratches, and torn or bloodied clothing. Preserve that evidence by taking photographs or asking your client to allow you to keep her bloodied, ripped shirt. Ask her if he damaged her property. If so, she should document it either by saving the property or photographing it. Such evidence will probably enable you to meet your burden of proof at trial. It may also give you the edge to obtain an extremely favorable settlement.

If she has the original receipts for property he damaged, she should send them to you. They can be introduced into evidence in the dispositional phase of her family offense case when she is pursuing restitution.

Ask her about witnesses to the abuse. Even if the beatings happened in private, there may be neighbors who heard her screams or friends who observed her injuries afterward. She may have made "excited utterances" to friends or coworkers. Get the names, addresses, and phone numbers of these individuals, and contact them as soon as possible before their memories fade.

Were the children present? What did they see or hear? How did they react? What changes in their behavior did you observe? The impact of the domestic violence on your client's children will be relevant in almost every kind of representation — from family offense and custody to matrimonial and immigration. (You can interview the children if a law guardian has not yet been appointed, but if you do so proceed with caution.) Find out what steps your client took to protect the children from the abuse, including by ending the relationship. It may be important to establish that your client knew the domestic violence was harmful to the children and tried to prevent them from being exposed to it.

Contested custody cases require that you know everything about your client's relationship with the children: her history of care-taking; the children's social, psychological, and intellectual development; the children's relationship with the batterer; the children's relationship with extended family members; even your client's and her abuser's life histories. Gathering this extensive information may require several interviews.

An interview for an uncontested divorce will be much more focused and less time-consuming. After you learn the history of domestic violence within the

last five years to establish the ground of cruelty, you will need very straightforward financial and biographical information.

Evaluate how your client will sound and appear to the judge, law guardian, and any forensic evaluators, and what kind of witness she will make at trial. How does she tell her story? Is it consistent and believable or is her account vague, confused, and contradictory? Is she easily rattled? Is her affect appropriate or is she blank and numb? Is she so emotional that she cannot stop crying? Does she dress appropriately?

By considering these issues you are not standing in judgment of your client; you are identifying the most effective strategy to help her get the legal remedies she needs. If she would not make a good witness, it might be best to try to settle the case. Or you might want to call an expert witness to explain her demeanor. Or you might be able to work with her to help her learn to present herself in a way that does justice to her case. One of my clients laughed nervously every time she described the abuse she had suffered — behavior that led the law guardian and judge to doubt her account. When I pointed it out to her, she was able to control her nervous reaction and become an effective witness on the stand.

If court-appropriate clothing is a problem, consider referring her to a program like New York City's Dress for Success, which offers domestic violence victims professional-looking clothing for appearances in court.

During the interview, take detailed and accurate notes. Explain to your client that you are taking notes because what she is saying is very important and that you do not want to forget the details.

Knowing the Worst

Tell your client that her abuser will probably try to make her look bad in court. Explain that you need to know what he is likely to say about her in advance of the court date so that you can quickly respond to his allegations. Ask her, "What is the worst thing he is going to say about you?" If she responds, "That I'm crazy or that I'm a drunk," you will need to ask specific questions. Ask her if she has had psychiatric hospitalizations or seen a therapist and, if so, when, where, why, and for what period of time. Ask her if she has ever had a drug or alcohol problem. If so, find out when, what was the substance, the extent of her addiction, and whether she was in a program. Ask her if her children have ever been removed or if there have been any child welfare investigations. Phrase the

questions in such a way that your client understands that you are not judging her but are getting information necessary to help her.

Longstanding abuse, especially abuse that follows earlier abuse, often causes psychological problems and trauma. Battered women may suffer from depression, post-traumatic stress disorder (hyper-arousal, intrusive thoughts, disassociation), and fears or paranoia.[9] It is not surprising, for example, that a domestic violence victim might use alcohol and drugs to numb the pain and ward off feelings of despair. Zealous representation means understanding the worst, doing whatever is necessary to help her overcome the worst, and then, if her problems surface in the proceeding, helping evaluators understand their source, the steps she is taking to overcome them, and the strengths she displays in spite of them.

Ask your client how she disciplines the children. Although the law prohibits only excessive corporal punishment, any corporal punishment that comes to the law guardian's or court's attention will reflect poorly on your client. Tell her that. And, if she is disciplining the children inappropriately, refer her to a parenting skills course.

Problems in the Interview

There are certain problems that you may encounter during your representation of your client. Usually they surface during the first interview.

She Minimizes or Erases the Abuse

This is a very common problem in the representation of battered women and far more likely to occur than exaggeration or fabrication. In part, this is a function of denial, a common psychological reaction to abuse. If you realize that she is minimizing, tell her that it is very common for victims of domestic violence to understate the abuse, that it is a way of trying to survive something very painful. Help her understand the severity of the violence she experienced (e.g., "He forced you to have sex with him even though you said no and tried to push him away? That is the crime of rape. It is a felony to force sex on anyone, even if that person is married to you").

She Has Difficulty Remembering When the Incidents Occurred

This often is a function of repression, another common psychological reaction to abuse. It also may be the result of the repetitive nature of the abuse — it is hard to remember specifics of events that occur daily or weekly.

Ask your client to bring calendars, diaries, and any records she keeps that will help her place events in time. Clients with children often can remember when events took place by thinking about how old their children were when they occurred. Help her hone in on the probable date by asking her what season the incident occurred in, then help her place it on or around a holiday or birthday during that season. Reassure her that it is very common not to remember the date of events that occurred months or years ago.

She Goes off on Tangents

This may be the result of a thought disorder, a sign of a psychological problem. Or it may occur because your client wants to avoid painful subjects. It may also be the function of her lack of experience with interviews. If your client does not respond to your questions, remind her to listen carefully and confine her answers to what you have asked. If she continues to be unresponsive, gently cut her off and repeat the question.

She Asserts Herself Inappropriately

Clients who have been controlled by someone for years are often struggling with issues of assertiveness and control. Now that she is free of her abuser, she may have vowed never to let anyone bully her again. She may attempt to take charge of her situation, her legal case, and the courtroom. Clients struggling with issues of self-assertion may ignore your advice to keep quiet in court, reject your advice to comply with a court order, insist on strategies that are counterproductive, and become aggressive and even hostile when you give them bad news. Do not engage, and do not take such behavior personally.

Determine if there is an unmet need behind behavior that seems inappropriate. I once assisted a domestic violence victim who, in the middle of her custody case, wrote a letter to the judge stating that she wanted one of her daughters to live with her husband. The letter seemed inexplicable, especially since her husband had battered both her and this daughter's older sister. During my meeting with the client, I learned that she had a severely disabled young son and was overwhelmed by the demands of caring for him. By assisting her with getting

the help she needed — in this case, a home attendant to help care for her son — the client was better able to cope with her daughter's demands.

Some Don'ts

Don't ask victim-blaming questions that shift the responsibility. They often start with "why:"

- Why did you stay?
- Why didn't you just leave?
- Why did he hit you?

Don't dismiss her fears or concerns. Address them seriously.

Don't let her go into any court-related situation (e.g., a meeting with a child welfare caseworker or the law guardian's social worker) without knowing what to expect and what will be expected of her. Warn her about possible pitfalls, such as openly expressing anger toward her abuser. Explain how important her appearance and demeanor will be in court.

Don't dismiss her thoughts and suggestions about strategy. Consider them seriously. If you disagree, just explain that you have learned that does not work and why.

Don't ignore her phone calls or get irritated with her for calling you, even if you think she is calling you too often. Understand that she is going through a frightening process and needs reassurance. If you feel she is calling you excessively, try making appointments to talk with her and setting time limits on calls. Remember that emergencies often happen in domestic violence cases and there may be urgent reasons for her call.

A Successful Attorney-Client Relationship

The best attorney-client relationships are built on trust and teamwork. When this becomes the dynamic that informs your relationship with your client, there are mutual benefits. Not only will your task be easier and more rewarding, but your client's encounter with the legal system will be a positive experience — one that affirms her value and equips her with the tools she needs to build a safe and independent life.

Notes

1. The "battered woman syndrome" was first identified by Lenore E. Walker in The Battered Woman (1979).
2. *Id. at* 65-70.
3. Evan Stark, Anne Flitcraft, *et al*., *Wife Abuse in the Medical Setting: An Introduction for Health Personnel*, Domestic Violence Monograph Series, No. 7 (Washington, D.C., Office of Domestic Violence, 1981); Julie Blackman, Intimate Violence: A Study of Injustice (1989).
4. *See* Evan Stark and Anne Flitcraft, *Women and Children at Risk — A Feminist Perspective on Child Abuse*, International Journal of Health Services 10, No. 1 (1988); Linda McKibben *et al*., *Victimization of Mothers of Abused Children: A Controlled Study*, Pediatrics 84, No. 3 (1989); Lee H. Bowker, *et al*., *On the Relationship Between Wife Beating and Child Abuse*, in Feminist Perspectives on Wife Abuse, ed. Kersti Yllo and Michele Bograd (1988).
5. *People v Liberta*, 64 NY2d 152 (1984).
6. Susan Estrich, Real Rape, at 72-79 (1987).
7. *See* Ann Jones, Next Time, She'll Be Dead: Battering and How to Stop It, at 106-128 (1994).
8. *Eschbach v Eschbach*, 56 NY2d 167 (1982).
9. *See* Judith Lewis Herman, Trauma and Recovery (1992). Herman compares the trauma of victims of domestic violence to that of combat veterans and survivors of political torture.

3

Thinking About Danger and Safety

by Jill Laurie Goodman

As a lawyer you may find yourself helping a domestic violence victim with public assistance when something she says makes you realize the depths of the fears she harbors about the man who should be paying child support. Or, interviewing a woman about her immigration case, you may become aware that your client's biggest challenge is not getting a green card but staying alive. You may begin to wonder what is going to happen to her when she leaves your office — and what more you can and should be doing for her.

You can't guarantee your domestic violence client's safety, but neither do you need to stand by helplessly. You can provide information, give advice, and direct your client to resources, all steps that may better the odds of your client avoiding harm.

Assessing Danger

No matter what the overt legal issues for which your domestic violence client consults you, safety is on the agenda. Lawyers should ask intelligent questions and keep alert for signs of danger as they counsel victims, even though assessing the degree of danger in the lives of women who are victims of domestic violence is difficult and predicting violence with any degree of certainty is impossible.

As you talk with your client in the process of gathering information for her case, look for signals that suggest danger. Some of these signals have been identified in research on the risks of lethal attacks on domestic violence victims.[1] At the top of the list of factors researchers have found correlating with femicides by abusive partners are guns and death threats: women threatened or assaulted with guns are twenty times more likely to be murdered by their abuser, and

women whose abusers have threatened to kill them are fifteen times more likely to meet their death at their abusers' hands.[2] Other kinds of violence also translate into greater risks of murder. Forced sex and abuse during pregnancy both correlate with lethal attacks.[3] So do incidents of choking;[4] indeed, 25% of women killed by their abusers are choked or strangled to death.[5] Frequent and recent violence, even if not particularly severe, also correlates with greater chances of murder.[6]

As domestic violence victim advocates well know, violence often escalates when a woman separates from her abuser. The violence is more frequent and more dangerous. It also becomes more lethal.[7] Leaving or trying to leave is particularly dangerous for women whose abusers are controlling or extremely jealous.[8]

Besides the nature of the violence in the relationship, some demographic and socioeconomic factors correlate to higher risks of murder. When abusers are unemployed and when they live with a child who is not their biological child but rather a stepchild, chances of femicide are heightened.[9] Habitual drug use and drinking to excess correlate with increased risks.[10]

All of these correlations are only red flags. Their absence is no assurance of safety — one fifth of the abused women who are murdered by intimate partners were never assaulted by their abuser before their deaths.[11] By the same token, the presence of these factors does not predict with certainty death or further serious physical injury at the hands of an abuser.

Another source of information — and maybe your best — is your client. You can ask her if she feels she needs to find a new place to live or if she is worried about telling her abuser she wants to leave. If she is no longer living with him, you can ask her if she would feel better if he didn't know how to find her or if she needs to keep her address and social security number confidential. You can ask her whether she would rather avoid seeing her abuser in a courtroom or during dropping off and picking up children for visitation. And you can ask her, straight out, if she feels safe.

Moving Towards Safety

Experts can help with safety planning. If you are new to representing victims of domestic violence or not well-versed in techniques for counseling abused women, you might want to refer your client to a domestic violence agency or to someone with expertise in safety planning. Calling on experts,

however, is not always feasible. A situation may require immediate attention. You may not have the time to wait for a consultation or your client may not want or be able to talk to anyone else. As her lawyer, you may be her only practical source of information.

The first step you can take — after asking her if she feels safe — is to say that you are worried about her and that you think she may be in some danger. You may be confirming something she fears or alerting her to something she may not fully realize. She may deny the danger. In any case, the fact of communicating your concerns may be helpful.

If she is living with her abuser, you can help her analyze the dangers of staying and the dangers of leaving.[12] She may have thought through the pros and cons fairly thoroughly, and undoubtedly she knows a great deal about staying safe, but you can make suggestions she might not have considered. You can ask if she has thought about what to do if an argument erupts, and you can suggest she avoid the kitchen, the bathroom and other places where potential weapons like knives are readily at hand or where escape would be difficult. As long as she remains under the same roof as her abuser, she probably should formulate plans for an emergency escape. You might suggest that she find a safe place outside of her home for money, extra keys, a spare credit card and documents, such as birth certificates or immigration papers. If possible, she should identify a friend or a relative who has a home where she can take refuge. You can help her acquaint herself with domestic violence hotlines and local agencies. You should also discuss with her the pros and cons of calling the police. If she thinks making the call herself will enrage her abuser and put her in more danger, she may be able to ask a friend, neighbor or relative to call for her.

If your client is thinking about leaving, she should plan carefully, since separating from an abuser increases the risk of violence. You can talk through the steps she might make to ease the transition. Opening a bank account, getting a credit card, keeping lists of important phone numbers, making copies of documents such as birth certificates, medical records, immigration papers; talking to friends and family about helping out with a place to stay or money; and moving a few essentials, such as clothes for herself and her children, into a temporary home are all the kinds of things she should consider. How to keep her plans secret might be another topic to discuss. Carefully planning the actual departure is always important; leaving when her abuser is not around may save her from a difficult or violent confrontation.

After your client has left her abuser, she has another set of safety concerns. Getting an order of protection may — or may not — be helpful, and you might

talk to her about the possibility of going to Family Court. You might suggest that she look over her house or apartment to see how safe she would be if her abuser tried to break in. She should consider buying better locks or stronger windows and doors. Making herself difficult to find by getting a new job, a new place to live, or a new social security number, if feasible, may be a good course of action. An unlisted telephone number, caller ID, or a post office box may be helpful. If she is being stalked, you might suggest that she alter her appearance — color her hair or wear a different coat — and change her daily routes to work or to school. If her abuser knows where she works, she might talk to her employer about a different job assignment, away from the telephones or the public or at a different worksite, and she may be able to enlist workplace security personnel in her safety planning.

Children can both help and complicate safety planning. Sometimes a client's children can be taught to make collect calls to friends or relatives, to dial 911, or to go to a neighbor's for help. Code words can be arranged to signal danger and the need to act. But children should be warned not to try to intervene in an argument because they can get hurt. Also, an abuser may try to use children as a means of gaining access to your client. Visitation transitions can be violent, so you might encourage your client to think about arranging pick up and drop off at a police station or a public place. Teachers and other adults in your clients' children's life should be told about any order of protection and warned against letting anyone besides designated caregivers pick up the children.

Just as your client is a critical source of information on danger, so too is she an indispensable source of information on safety. She knows her own life, and, equally importantly, she knows her abuser — she is probably an expert on his habits and his ways of thinking. The New York State Office for the Prevention of Domestic Violence has a good safety checklist (reproduced on the next page) for victims to fill out themselves that you might suggest to your client,[13] but you also should encourage her to think creatively and independently about her own safety because ultimately the decisions about how to protect herself are in her hands.

Appendix

Safety Planning Checklist

Reprinted from *Domestic Violence: Finding Safety and Support,* with thanks for permission from the New York State Office for the Prevention of Domestic Violence.

PERSONALIZED SAFETY PLAN

BEING READY FOR A CRISIS

I can get help

- ☐ I can tell _____ about the violence and request they call the police if they hear noises coming from my house.
- ☐ I can teach my children how to contact the police. I will make sure they know our address and telephone number.
- ☐ I can teach my children how to go to a _____ (eg., neighbor, business, etc.) for help if it is not possible to use the telephone.
- ☐ If I have a programmable phone, I can program emergency numbers and teach my children how to use the auto dial.

I can use my judgement

- ☐ When I expect my partner and I are going to argue, I will try to move to a space that is lowest risk, such as _____. (Try to avoid arguments in the bathroom, garage, kitchen, near weapons or in rooms without an outside exit.)
- ☐ I can also teach some of these strategies to some/all of my children, as appropriate.

I can leave

- ☐ If I decide to leave, I will _____. (Practice how to get out safely. What doors, windows, elevators, stairwells or fire escapes would you use?)
- ☐ I can keep my purse and car keys ready and put them _____ to leave quickly.
- ☐ I will leave money and an extra set of keys with _____ so I can leave quickly.
- ☐ I will keep copies of important documents or keys at _____.
- ☐ If I have to leave my home, I will go to _____. If I cannot go to the above location, I can go to _____.
- ☐ The domestic violence hotline number is _____. I can call it if I need shelter or information.
- ☐ If it's not safe to talk openly, I will use _____ as the code word/signal to my children that we are going to go, or to my family or friends that we are coming.
- ☐ I will use _____ as my code word with my children or my friends so they will call for help.

Safety Planning Checklist *continued*

PLANNING TO LEAVE

- ☐ I will call a domestic violence program and get help making my plans. The hotline number for the nearest program is _____.
- ☐ I will keep copies of important documents or keys at _____.
- ☐ I can leave extra clothes with _____.
- ☐ I will keep important numbers and change for phone calls with me at all times. Since my partner can learn who I've been talking to by looking at phone bills, I can see if friends will let me use their phones and/or their phone credit cards.
- ☐ I will check with _____ and _____ to see who would be able to let me stay with them or lend me some money.
- ☐ I will leave money and an extra set of keys with _____ so that I can leave quickly.
- ☐ I can leave my pets with _____
- ☐ I can increase my independence by opening a bank account and getting credit cards in my own name; taking classes or getting job skills; getting copies of all the important papers and documents I might need and keeping them with _____.
- ☐ Other things I can do to increase my independence include: _____ _____ _____
- ☐ I can rehearse my escape plan and, if appropriate, practice it with my children.

AFTER I LEAVE

- ☐ I can change the locks on my doors and windows.
- ☐ I can replace wooden doors with steel/metal doors.
- ☐ I can install security systems including additional locks, window bars, poles to wedge against doors, an electronic system, etc.
- ☐ I can purchase rope ladders to be used for escape from second floor windows.
- ☐ I can install smoke detectors and put fire extinguishers on each floor in my home.
- ☐ I will teach my children how to use the phone to make a collect call to me if they are concerned about their safety.
- ☐ I can tell people who take care of my children, including their school, which people have permission to pick them up and make sure they know how to recognize those people.
- ☐ I will give the people who take care of my children, including their school, copies of custody and protective orders, and emergency numbers.

Safety Planning Checklist *continued*

AT WORK AND IN PUBLIC

- ☐ I can inform my boss, the security supervisor and/or Employee Assistance Program about my situation. My workplace EAP number is _____.
- ☐ My workplace security office number is _____.
- ☐ I can ask_____to screen my calls at work.
- ☐ When traveling to and from work, I can vary my route.If there's trouble, I can _____.
- ☐ I can change my patterns— avoid stores,banks,doctor's appointments,laundromats and _____, places where my partner might find me.
- ☐ I can tell _____ and _____ that I am no longer with my partner and ask them to call the police if they believe my children or I are in danger.
- ☐ When leaving work, I can _____.

WITH AN ORDER OF PROTECTION

- ☐ I will keep my order of protection _____.(Always keep it on or near your person.)
- ☐ I will give copies of my order of protection to police departments in the community in which I live and those where I visit friends and family.
- ☐ I will give copies to my employer, my religious advisor, my closest friend, my children's school,day care center, and _____.
- ☐ If my partner destroys my order of protection or if I lose it, I can get another copy from the court that issued it.
- ☐ If my partner violates the order of protection, I can call the police and report a violation, contact my attorney, call my advocate,and/or advise the court of the violation.
- ☐ I can call a domestic violence program if I have questions about how to enforce a court order or if I have problems getting it enforced.

ITEMS TO TAKE WHEN LEAVING

- ☐ Identification for myself
- ☐ Children's birth certificates
- ☐ My birth certificate
- ☐ Social Security cards
- ☐ School/vaccination records
- ☐ Money, checkbook, bank books, ATM cards, tax returns
- ☐ Credit cards
- ☐ Medication
- ☐ Keys:house,car, office
- ☐ Driver's license/car registration
- ☐ Insurance papers
- ☐ Public Assistance ID/Medicaid Cards
- ☐ Passports, green cards,work permits
- ☐ Divorce or separation papers
- ☐ Lease, rental agreement or house deed
- ☐ Car/mortgage payment book
- ☐ Children's toys,security blankets, stuffed animals

Safety Planning Checklist *continued*

MY EMOTIONAL HEALTH

- ☐ If I am feeling down, lonely or confused, I can call _____ or the domestic violence hotline _____.
- ☐ I can take care of my physical health needs by getting a checkup with my doctor, gynecologist and dentist. If I don't have a doctor, I will call the local clinic or _____ to get one.
- ☐ If I have concerns about my children's health and well-being I can call _____.
- ☐ If I have left my partner and am considering returning, I will call _____ or spend time with _____ before I make a decision.
- ☐ I will remind myself daily of my best qualities. They are: _____
- ☐ Sentimental items, photos
- ☐ My Personalized Safety Plan
- ☐ I can attend support groups, workshops, or classes at the local domestic violence program or_____ in order to build a support system, learn skills or get information.
- ☐ I will look at how and when I drink alcohol or use other drugs.
- ☐ If I need help around my drinking or drug use, I can call _____.
- ☐ Other things I can do to feel stronger are:_____ _____

REDUCE YOUR RISK

No battered woman has control over her partner's violence, but women can and do find ways to reduce their risk of harm. This safety plan is a tool to assist you in identifying options, evaluating those options and committing to a plan to reduce your risk when confronted with the threat of harm or with actual harm.

There's no right or wrong way to develop a safety plan. Use what applies. Change it or add to it to reflect your particular situation. Make it your own, then review it regularly and make changes as needed.

If you can't find a safe place to keep a written safety plan where your partner won't find it, maybe you can ask a friend to keep a copy for you. If not, you can ask your local domestic violence program to keep your plan for you. Whether it's safe to write down your plan or not, it's still important to make one.

You don't have to figure it all out on your own.

You can ask a domestic violence advocate for help.

Notes

1. Jacquelyn C. Campbell *et al*., *Assessing Risk Factors for Intimate Partner Homicide*, 250 National Institute of Justice Journal 14 (Nov. 2003) [Campbell, *Assessing Risk Factors*]; Jacquelyn C. Campbell *et al*., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 American Journal of Public Health 1089 (July 2003) [Campbell, *Risk Factors for Femicide*]; Neil Websdale, *Reviewing Domestic Violence Deaths*, 250 National Institute of Justice Journal 27 (Nov. 2003).
2. Campbell, *Assessing Risk Factors*, *supra* n 1*,* at 16.
3. Campbell, *Risk Factors for Femicide*, *supra* n 1; Campbell, *Assessing Risk Factors*, *supra* n 1*,* at 16.
4. *Id.*
5. Carolyn Rebecca Block, *How Can Practitioners Help an Abused Women Lower Her Risk of Death?* 250 National Institute of Justice Journal 3, 6 (Nov. 2003) [Block, *How Can Practitioners Help an Abused Women Lower Her Risk of Death?*].
6. *Id.* at 5.
7. *Id.* at 6.
8. Block, *How Can Practitioners Help an Abused Women Lower Her Risk of Death?, supra* n 5*,* at 5; Campbell, *Assessing Risk Factors*, *supra* n 1*,* at 16; Campbell, *Risk Factors for Femicide*, *supra* n 1*, at* 1090-1092.
9. Campbell*, Risk Factors for Femicide, supra* n 1*,* at 1090-1092.
10. *Id.*
11. Block, *How Can Practitioners Help an Abused Women Lower Her Risk of Death?, supra* n 5*,* at 5.
12. The New York State Office for the Prevention of Domestic Violence's (OPDV) pamphlet *Domestic Violence: Finding Safety and Support* has an excellent section on safety planning, which is a principal source of this chapter's advice. *Finding Safety and Support* is available through the OPDV's website, http://www.opdv.state.ny.us. The National Center for Victims of Crime also has a website with its own Safety Plan Guidelines. Its website is http://www.ncvc.org.
13. The New York State Office for the Prevention of Domestic Violence pamphlet *Domestic Violence: Finding Safety and Support, Id.*


Part II

Family Offense Cases



4

The Practitioner's Guide to Litigating Family Offense Proceedings

by Elizabeth Murno

Civil protection orders are one of the most commonly sought legal remedies available to protect domestic violence victims. In fact, obtaining a final order of protection has been associated with a significant decrease in future violence.[1] Still, many domestic violence victims do not pursue legal relief. One reason may be the lack of available civil legal assistance. A recent study underscores the importance of access to civil legal assistance and found that it is more effective in protecting victims than hotlines, shelters and counseling programs.[2] Still some practitioners may be unnecessarily hesitant to represent domestic violence victims because of their limited trial experience or knowledge of the substantive law.

While mastering the substantive law governing family offense proceedings, the proceeding in New York State by which certain family or household members can obtain civil protection orders, can seem challenging to the new practitioner, it need not be. A good starting point is a thorough review of Article 8 of the Family Court Act, the primary statutory authority governing these proceedings. The statute, which is relatively straightforward and concise, comprehensively addresses many of the legal issues raised in this practice area. After mastering the statute, the more daunting challenge confronting the first time practitioner is the actual practice of litigating a family offense proceeding. What happens on the first court date, when will a case proceed to trial, what if the opposing party is not served or does not appear are all common questions. Unfortunately, the answers to these questions cannot be gleaned from studying the Family Court Act. Rather, only with frequent practice and first-hand experience is a practitioner able to definitively answer these questions and confidently provide effective legal representation.

To assist with this learning curve, this guide provides a basic introduction to the practice of representing domestic violence victims in family offense proceedings. This guide, together with a comprehensive understanding of the

Family Court Act and the needs and concerns of domestic violence victims, should prepare the new practitioner to provide critically needed legal representation, while at the same time gaining practical courtroom experience and trial skills.

Preliminary Considerations

Deciding Whether to Seek a Family Court Protection Order

A preliminary consideration when counseling a domestic violence victim is whether she should pursue a family offense case. Too often, victims are encouraged to seek family court relief without an individualized assessment of their safety needs or a comprehensive exploration of the potential risks and benefits of initiating a proceeding. In some instances, pursuing a family offense case provides essential protection, while in others it significantly jeopardizes victim safety. Because victim safety is the foremost consideration, a careful assessment of the safety risks and repercussions is crucial before pursuing any relief in family court.

Disclosure of Confidential Location

Initiating a family offense case may jeopardize the confidentiality of a client's residence. For a victim who has fled an abusive relationship and relocated to a confidential location, maintaining that confidentiality is often a pressing concern from a safety and psychological standpoint. To alleviate this concern, the Family Court Act specifically authorizes a victim to maintain a confidential address in court papers if disclosing it compromises her safety.[3] For victims residing in domestic violence shelters this protection is mandatory.[4] However, while the statute prohibits disclosure to the adverse party, the victim's confidential address is maintained in the court database for service of process and is sometimes inadvertently revealed.

Even when a victim's exact address is not disclosed, her general whereabouts may be. For example, victims residing in emergency domestic violence shelters are routinely instructed to seek family court protection orders, which often results in disclosing the county where the shelter is located and, hence, where the victim is residing.

To prevent disclosure, several steps can be taken that may provide limited protection. For example, a victim who has relocated to another county may elect to file a petition in the county where she initially resided, provided the abuse

occurred there, or where the abuser resides.[5] This strategy ensures that a domestic violence victim does not inadvertently reveal the county where she resides by the mere act of filing for relief there. Similarly, a victim may designate another party for service of process to avoid disclosing her address to the court.[6] If she has legal representation, the attorney may be authorized as the agent for service. Alternatively, she may seek to designate a responsible relative or friend for this purpose.

Ongoing Contact with the Batterer

Family court proceedings also provide a batterer with ample opportunities for ongoing contact with his victim. To obtain a final protection order, a victim must appear in court with the batterer, oftentimes on multiple occasions. Repeat court appearances afford a batterer significant contact with his victim both inside the court in the waiting area, in the conference room and in the courtroom as well as outside the court before and after the case is heard and during lunch breaks. Because the initial court appearance is on an *ex parte* basis without the batterer present, a victim may not realize this.

To reduce the extent of contact, some counties have court-based victim service programs that offer separate victim waiting areas and transportation services. Alternatively, a victim may choose to forgo a family court case entirely and pursue a protection order in criminal court since New York law provides for concurrent jurisdiction.[7] Proceeding in criminal court is often preferable to family court, in part, because it entails considerably less interaction. In a criminal proceeding, the victim serves as the state's witness and is generally only required to appear on trial dates. Also, because the victim does not regularly appear, it is clear that the state, not the victim, is pursuing the case against the batterer. However, a criminal court action generally requires an arrest to commence and since not all family offenses require an arrest,[8] this option may not be readily available.

Potential for Retaliatory and Unwanted Litigation

Another consequence of bringing a family offense case is the risk of retaliatory or unwanted litigation. Oftentimes the mere filing of a family offense petition incites batterers and encourages them to initiate cases or claims they may not have otherwise pursued. For example, a batterer served with a temporary protection order may retaliate by filing a cross-petition in which he alleges he is the victim and seeks a protection order. While family court policy discourages the issuance of mutual, *ex parte* protection orders, courts occasionally issue them. In these instances, a victim becomes subject to New York's mandatory arrest law requiring the arrest of a suspect alleged to have violated a protection order.[9] In fact, some batterers intentionally use this statute to have victims

arrested on false charges to intimidate them, control them and discourage them from pursuing family court relief.

A batterer may also respond by filing a visitation, custody or paternity petition. Occasionally, as in cases when the batterer has had limited involvement with the children, the primary motivation for filing a visitation or custody petition may be to ensure ongoing contact with the victim. Because visitation is routinely ordered, a victim may wish to avoid such proceedings. A victim may also want to avoid a paternity proceeding that can result in a batterer obtaining legal rights that did not previously exist. Such is the case of a non-marital father who must establish paternity to have standing in a custody or visitation case.[10] While a batterer may initiate any of these proceedings on his own, a pending family court action may increase the likelihood.

Defining Goals and Realistic Outcomes

Before initiating a family offense case, attorneys should have candid discussions about the available legal remedies and the likelihood of obtaining them. Domestic violence victims have a multitude of pressing needs, the vast majority of which cannot be resolved with litigation. Too often, victims overestimate the family court's remedial power and seek relief in the form of counseling, anger management or batterers' education programs to "cure" the batterer. Clients need to be advised that the likelihood of obtaining court relief that "treats" or "cures" a batterer is extremely remote and that the main goal is to ensure their safety and obtain a final protection order.

Clients should also be advised that, while the statute authorizes a broad range of remedies including probation,[11] restitution,[12] and in cases of violations, incarceration,[13] these remedies are generally imposed only after a trial and even then they are not guaranteed. Congested court calendars can delay trials for months and in some cases up to a year. Even after a trial is complete and a final order entered, the court has limited resources to monitor and ensure compliance with its terms and conditions. As a result, the burden of monitoring compliance with orders is disproportionately borne by the victim, which may raise significant safety concerns.

Substantive Law

Article 8 of the Family Court Act is the primary statutory authority governing family offense proceedings. Practitioners should also familiarize themselves with Family Court Act Articles 1, 2 and 11, outlining the structure and authority

of the family court, procedural issues involving protection orders and rules governing appeals, as well as the Penal Law defining the family offense crimes. Additionally, there is a substantial body of family and criminal case law governing family offense proceedings, a significant portion of which is reported solely in *The New York Law Journal*. Attorneys researching case law on specific issues are well advised to routinely consult *The New York Law Journal* in addition to officially reported decisions.

Who May Seek Relief in a Family Offense Proceeding?

To determine whether a client is eligible to seek relief in family court, an inquiry must be made into the nature of her relationship with the abuser. Under the current statutory scheme, individuals eligible for relief are specifically limited to "family and household members," defined as persons who (1) are related by blood, (2) are legally married to one another, (3) were married to one another or (4) have a child in common regardless of whether the parties have been married or lived together.[14] Victims who do not meet this definition may attempt to pursue relief in criminal court.

What is a Family Offense Proceeding?

A specific list of enumerated crimes constitute family offenses; they are:

1. disorderly conduct;[15]
2. harassment in the first[16] and second degree;[17]
3. aggravated harassment in the second degree;[18]
4. stalking in the first,[19] second,[20] third,[21] and fourth degree;[22]
5. menacing in the second[23] and third degree;[24]
6. reckless endangerment in the first[25] and second degree;[26]
7. assault in the second[27] and third degree;[28] and
8. attempted assault.[29]

Practitioners should exercise caution when trying to establish any of the designated family offenses, such as third degree assault, that require proof of physical injury. Physical injury as defined in the Penal Law requires either an impairment of physical condition or substantial pain.[30] While the case law interpreting physical injury clearly states that a victim's incapacitation is not required,[31] criminal courts have required proof of scarring,[32] substantial injuries[33] or some limitation of a victim's capacity[34] to satisfy the threshold definition. In contrast, family courts may impose a lower threshold and sustain a finding

of physical injury when the victim suffers bruises, swelling or red marks. Nevertheless, attorneys should be prepared to argue that the injuries sustained satisfy the threshold applied in criminal court.

How is a Family Offense Proceeding Commenced in Family Court?

A family offense case is initiated by the filing of a petition. Victims can and usually do initiate family offense cases on their own. A victim planning on filing a petition should arrive at the courthouse no later than 9:00 a.m. By arriving early, a victim may avoid the inconvenience of having to appear on repeat court dates to obtain a temporary protection order and increase the likelihood that her wait to have the case heard will be shorter.

Where Can a Family Offense Proceeding Be Commenced?

A family offense case can be initiated in the county in which (1) the act or acts referred to in the petition occurred, (2) the family or household resides or (3) any party resides.[35] Victims who have fled abuse and relocated to a new county are permitted to seek relief in the county in which the abuse occurred or their batterer resides.

What Relief is Available in a Family Offense Proceeding?

The principal form of relief in a family offense case is a protection order and the family court has broad authority to fashion orders, both temporary and final, that best serve the purpose of protecting the victim. Among other terms, the family court can enter an order that directs a respondent to (1) be excluded from the home,[36] (2) stay away from a party, her school and her job,[37] (3) refrain from committing a family offense or any criminal offense,[38] (4) participate in a batterer's education program,[39] (5) surrender firearms and have a firearms license suspended,[40] and (6) pay temporary child support.[41] The court may also award custody of a child to a parent during the term of a protection order.[42]

Orders can last from a couple days, when a temporary exclusionary order is entered, to five years in duration. Generally, a temporary order entered on the initial court date extends until the return date, sometimes several months away depending upon the relief granted and the county in which the order is issued. Temporary orders are routinely continued at subsequent court dates until a final disposition is reached. At disposition, family courts have the authority to enter final protection orders for up to two years in routine cases and up to five years when aggravating circumstances are found[43] or an order of protection is violated.[44]

Frequently protection orders will be referred to as full or limited. A full protection order is one in which a batterer is excluded from the home or directed to stay away while a limited order is one in which the abuser is prohibited from committing any crimes against his victim.

Practice Tips and Suggestions

Deciding Whether to Amend a Family Offense Petition

In many instances, domestic violence victims do not have access to advocates or attorneys on the initial court appearance and, as a result, their petitions may be inartfully drafted. Either because victims may not realize the significance of specific incidents of violence or only later recall them, critical information may be missing from the petition. An attorney retained after the initial court date must then decide whether to draft and file an amended petition. In making this decision, a practitioner should consider whether aggravating circumstances have been pleaded, whether the client is seeking an exclusionary order, whether incidents for which there is corroborating evidence are included and whether a custody or visitation petition has been or might be filed.

This assessment should be made promptly and, ideally, before the time to amend as of right expires. Amendments as of right must be made within twenty days after service of the initial petition, at any time before the period to respond to it expires, or within twenty days after service of a responsive pleading.[45] After this period, permission from the court or stipulation of the parties is required to amend a petition.[46]

What to Plead in a Family Offense Petition

When drafting or amending petitions, a good strategy is to describe the incidents of violence in reverse chronological order, beginning with the most recent allegation. The petition should include the most recent incident, the most severe incident and any incidents in which there has been physical violence or injury or the use of a weapon or dangerous instrument. Practitioners should also include incidents for which there exists physical or documentary evidence such as medical records, photographs, or torn or bloodied clothing that can be used to encourage a favorable settlement or introduced at trial. Incidents involving aggravating circumstances should also be included because they may entitle the victim to a five-year protection order.[47]

Attorneys should also consider making creative arguments to enhance the court's understanding of domestic violence. For example, classic power and control dynamics, including efforts to isolate a victim from family and friends or monitor and control her whereabouts, are behaviors that may not appear to fit squarely into any of the designated family offenses. Nevertheless, because such behaviors are the hallmark of domestic violence, it can be valuable to include them in the petition. One way to accomplish this is to argue that they constitute the crime of harassment in the second degree, which involves a course of conduct or repeated acts that alarm or seriously annoy and serve no legitimate purpose. Clients will then need to be thoroughly prepared to provide testimonial evidence that counters attempts to show that the acts served a legitimate purpose.

Another tactical decision must be made about older incidents. Often, a victim will have endured a lengthy history of violence while the incident for which she seeks a protection order may be considerably less serious. It is often critical to include these earlier incidents because they may constitute aggravating circumstances, offer insight into the pattern of abuse throughout the relationship or influence custody or visitation decisions. While some courts may be reluctant to consider older incidents, the Family Court Act does not specify any statute of limitation for family offenses. Even applying the Civil Procedure Law and Rules,[48] which provides for a six-year statute of limitation,[49] would warrant permitting testimony about incidents that occurred as long as six years ago.

Finally, petitions should be carefully drafted to ensure that every element of a family offense has been pleaded, and pleaded in non-conclusory language. For example, an assault allegation might state that the respondent, with the intent to cause physical injury, repeatedly punched petitioner in her face and caused her to sustain physical injury including lacerations to her face, a bloody nose and ruptured blood vessels. Such specificity will not only ensure that every allegation is fully described but also that the petition is facially sufficient to withstand a motion to dismiss.

What Happens on the Initial Application Date?

On the initial court date, the vast majority of domestic violence victims seeking protection orders are unrepresented. After drafting their petitions with the assistance of a court clerk or victim advocate, litigants are directed to the intake part where new cases are heard. The intake judge may ask questions and, if good cause is shown,[50] enter a temporary order. While a well-drafted petition should include the specific relief sought, it is a good idea to ask on the record as well.

The relatively low threshold for issuing temporary protection orders may mistakenly lead advocates to assume that courts will automatically issue them. However, some courts are reluctant to issue orders, especially on an *ex parte* basis or when an exclusionary order is sought, so caution should be taken when advising clients to avoid creating false expectations. Victims seeking exclusionary orders should be prepared to demonstrate that they have suffered physical harm, by displaying injuries or producing medical records, or that they are in imminent danger. If possible, it is advisable to have an attorney or advocate represent a victim seeking an exclusionary order.

When the family court is closed, the statute grants emergency jurisdiction to the criminal court to hear initial applications and issue temporary orders.[51] While in theory this provision provides relief to domestic violence victims, it is rarely used since no formal mechanism exists to navigate the criminal court system. Rather, clients are frequently advised to return to family court the next day it is in session.

How is Service Made?

At the conclusion of the initial hearing, a client will be issued a summons, petition and protection order, if one has been issued, that must be served on the respondent. Because the protection order is enforceable only after it has been served, it is important to complete service as soon as possible. Service must be made personally (hand delivered to the respondent) and can be made on any day of the week including Sundays and at any hour of the day.[52] To be valid, service must be made at least 24 hours before the return court date.[53]

In no instance should a victim attempt to personally serve a batterer. Not only is this method of service improper, it exposes the victim to potential harm. Instead, the statute specifically directs the police to effectuate service.[54] This is accomplished by delivering copies of the papers to the precinct where the opposing party can be located. The client can either accompany the police to serve the respondent or provide them with a photograph to identify him. In either circumstance, the client must obtain a signed statement of personal service from the police to verify that service was completed.

If, after reasonable efforts, the papers cannot be served, an application for substituted service can be made.[55] The request should document all the attempts that were made to obtain service. Alternatively, an attorney can request a warrant. Warrants directing a respondent to be brought before the court are authorized in certain limited circumstances when, for example, aggravating circumstances are present or the summons cannot be served or is deemed to be ineffective.[56]

Litigants unfamiliar with the court process can sometimes be confused by the rules governing service. They may not understand that they cannot serve the batterer themselves or that they must return a signed and, in some cases, notarized affidavit of service to the court. Because defects in service can result in unnecessary delays and repeat court appearances, it is worthwhile to explain service fully.

What Happens at an Inquest?

If, after service of the papers, the respondent fails to appear, the court may issue a default judgment or proceed to an inquest, an uncontested fact-finding hearing. It is preferable to request an inquest because the client will not be subject to cross-examination and the court will make a finding about whether a family offense was committed. On occasion, a court may not immediately proceed to inquest but adjourn the case to allow the respondent another opportunity to appear. Because of its advantages, it is important to be proactive and request an inquest in the respondent's absence. Before making the application, it is important to ensure that service has been proper and that the affidavit of service verifying it is completely and accurately filled out since the court cannot proceed if it is defective.

Because it is impossible to predict whether a respondent will appear, attorneys should routinely prepare clients to testify at an inquest. At an inquest, a client will be required to offer direct testimony in support of her case and occasionally answer questions from the court. Attorneys should also exercise discretion and appropriately limit the extent of their client's testimony, possibly reducing the number of incidents testified to, if the case has been conclusively established and additional testimony would only serve to further traumatize the client.

Court Conferencing, Negotiation and Settlement

When an opposing party appears on the return court date, the case will often be conferenced. This entails the judge or the judge's court attorney meeting with the parties to ascertain their positions and assess the likelihood of a settlement. In a typical settlement a respondent consents to a protection order being issued against him without any admission or finding of wrongdoing. Alternatively, a respondent can make an admission of wrongdoing and consent to the entry of an order, a preferable but relatively uncommon settlement. Still another possible resolution may be that the petitioner withdraws her case because she obtained a criminal court order providing similar relief or she wishes to reconcile with the batterer. Rather than agree to an outright withdrawal, it is advisable to counsel a

client to pursue a limited protection order. Limited protection orders allow parties to live together but trigger New York's mandatory arrest law if violated.

In cases involving cross-petitions, mutual protection orders or mutual withdrawals are often proposed. Because victims often wish to avoid contact with their batterers, they may readily agree to mutual protection orders. However, clients should be strongly cautioned against this option as it exposes them to severe penalties including arrest and jail for any alleged violation. In most cases, it is preferable to proceed to trial or withdraw a petition rather than consent to an order being issued against a victim.

An advantage to settling is that it often results in a speedier disposition of the case. Congested court calendars severely limit available trial time. Cases that do proceed to trial often require numerous adjourn dates over a period of months and sometimes up to a year. On each court date, the petitioner may have to take time off from work, possibly jeopardizing her employment. Repeated court dates also present ample opportunities for a batterer to have continued contact with a victim.

A settlement also relieves a victim of having to testify. Often, victims are extremely reluctant to testify. They are fearful of publicly confronting their battterers and ashamed of the abuse they have endured. These fears are exacerbated in cases in which a batterer is representing himself and entitled to cross-examine the victim.

On the other hand, a settlement rarely results in a finding of wrongdoing, which may be important in a custody or visitation proceeding. A 1996 amendment to the Domestic Relations Law requires courts to consider the effect of domestic violence on a child in a custody or visitation case, provided the violence is in a sworn pleading and proven by a preponderance of the evidence.[58] While domestic violence allegations can be separately litigated in a custody or visitation case, a better strategy is to establish the violence at the earliest point in the proceeding. In fact, establishing violence earlier may avoid unfavorable visitation decisions or forestall a custody battle.

Settling may also preclude a victim from obtaining a protection order in excess of two years. The Family Court Act clearly authorizes protection orders for up to five years if there is a finding of aggravating circumstances or that a protection order has been violated. The statute also permits a batterer to consent to a protection order provided the consent is knowingly, intelligently and voluntarily given.[59] Thus, a batterer should clearly be able to consent to protection orders in excess of two years; however, some courts may not permit it.

Finally, settling may preclude a victim from obtaining certain forms of relief such as probation, restitution or a batterer's education program. Because a family offense petition is civil in nature and not punishable by jail time, batterers are less inclined to consent to these terms and would rather risk proceeding to trial.

When Will a Case Proceed to Trial?

Courts routinely encourage settlements and it is often only after repeated attempts fail that a case will be scheduled for trial. On the first return date, commonly called the return of process date, a court will generally address preliminary matters such as ensuring that service was made, scheduling adjournments to obtain counsel or assigning court-appointed counsel if eligible. That being said, practice varies widely by county and even within a county, so attorneys should be prepared for trial on the first return date, although in most instances at least one adjournment will be permitted.

What Happens at a Trial?

The Family Court Act provides that family offense petitions be heard in two phases, a fact-finding[60] and a dispositional phase,[61] although it is not uncommon for courts to combine them. During the fact-finding stage, the court hears evidence to determine whether a family offense has been committed. To sustain a finding of wrongdoing, the allegations must be proven by a fair preponderance of the evidence.[62]

Evidence commonly introduced at the fact-finding stage includes hospital records and photographs. Photographs are fairly easily admitted through a witness who can testify to what is depicted in the photographs, to the approximate date the photographs were taken and that what is depicted in the photographs is a fair and accurate representation of the subject at the time it was taken.

Hospital records can be admitted provided they are properly certified or authenticated.[63] Practitioners should note that, while hospital records are admissible, only statements that are relevant to the diagnosis, prognosis or treatment of the patient fall within the business records exception to the general rule prohibiting hearsay.[64] Thus, statements contained in hospital records that identify the abuser as the perpetrator have been deemed admissible within the business record exception.[65]

A practitioner may also seek to introduce physical evidence such as torn or bloodied clothing, weapons, broken or destroyed household or personal items or photographs depicting them. For example, if the batterer damaged or

destroyed property in the house, photographs of the damaged items may be admissible into evidence.

Attorneys should not be discouraged if no physical or documentary evidence exists. In most domestic violence cases, the only available evidence is the victim's testimony. As such, clients must be thoroughly prepared to testify. This often requires several meetings with a client because the history may be lengthy and recounting the abuse painful.

To prepare for trial, attorneys should develop a trial brief that sets forth the theory of the case; the family offenses to be established and the elements of each; the direct testimony; and any anticipated cross-examination or objections. It is also a good practice to prepare a straightforward and succinct opening statement. While opening statements are infrequently used in family offense cases, there is a tremendous advantage to delivering a brief statement on the theory of the case and the offenses to be established. Because trials often occur over a series of court dates with lengthy adjournments in between, delivering an opening statement provides a unique opportunity to present the entire history of abuse to the court in narrative form. Since some courts do not require an opening statement, an attorney may request to make one.

Similarly, attorneys should prepare a closing statement that concisely and comprehensively summarizes the case. The closing statement should list the family offenses committed and highlight the testimony and evidence offered in support. Often, a court will hear the closing statement only after the dispositional hearing. On rare occasions, a court may request a written summation, in which case it is necessary to obtain the court transcripts to adequately prepare.

At the conclusion of a fact-finding hearing, the court should proceed to a dispositional hearing, the purpose of which is to fashion an appropriate remedy. Because evidence admissible at disposition need only be material and relevant,[66] hearsay is admissible. Commonly introduced evidence can include statements to friends or witnesses or uncertified medical and police records.

Attorneys should prepare a client to testify explicitly about the terms she is seeking and why they are necessary for her safety. Frequently victims want children included on final protection orders. While the practice varies, some courts are reluctant to enter a final order prohibiting contact between a batterer and his children. Rather, courts are more receptive to a provision that prohibits the batterer from committing any crimes against the children. When a court agrees to order the batterer to stay away from the children, there is often an exception providing for any court-ordered visitation.

What Happens After a Protection Order Has Expired?

As the expiration date of a final protection order approaches, a victim may seek to have it extended. A relatively unknown and infrequently used provision of the Family Court Act states that a protection order may be extended for a reasonable time if special circumstances exist.[67] The limited case law interpreting this provision deals exclusively with the issue of whether a hearing is necessary and fails to expound on the definition of special circumstances,[68] so practitioners are free to make creative and persuasive arguments to warrant extending an order.

Notes

1. Victoria L. Holdt *et al*., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence,* 288 JAMA 588-594 (2002).
2. Amy Farmer and Jill Tiefenthaler, *Explaining the Decline in Domestic Violence,* 21 Contemp. Econ. Policy 158-172 (2003).
3. Family Court Act § 154-b(2)(a).
4. Family Court Act § 154-b(2)(b).
5. Family Court Act § 818 provides that a family offense proceeding may be commenced in the county in which the act or acts occurred, the family or household member resides or any party resides.
6. Family Court Act § 154-b(2)(c).
7. Family Court Act § 12(1), Criminal Procedure Law § 530.11(1).
8. Criminal Procedure Law § 140.10(4).
9. Criminal Procedure Law § 140.10(4)(b).
10. Domestic Relations Law § 70.
11. Family Court Act § 841(c).
12. Family Court Act § 841(e).
13. Family Court Act § 846-a.
14. Family Court Act § 812(1).
15. Penal Law § 240.20.
16. Penal Law § 240.25.
17. Penal Law § 240.26.
18. Penal Law § 240.30.
19. Penal Law § 120.60.
20. Penal Law § 120.55.
21. Penal Law § 120.50.
22. Penal Law § 120.45.
23. Penal Law § 120.14.
24. Penal Law § 120.15.

25. Penal Law § 120.25.
26. Penal Law § 120.20.
27. Penal Law § 120.05.
28. Penal Law § 120.00.
29. Penal Law § 110.00/120.00 or 120.05.
30. Penal Law § 10.00(9).
31. *People v Tejeda,* 78 NY2d 936 (1991).
32. *People v Fallen,* 194 AD2d 928 (3d Dept 1993) (victim who was struck with candlestick suffered laceration to finger that bled profusely, required stitches and resulted in scarring that was visible at the trial).
33. *People v Brodus,* 307 AD2d 643 (3d Det. 2003) (after being repeatedly punched in the face, victim suffered swollen eye, ruptured eye vessel, scrapes, welts and bruising that lasted three weeks); *People vs. Azadian,* 195 AD2d 565 (2d Dept 1993) (victim was punched in the face, stomach and head, was bitten on the face, and suffered a bruised throat, abrasions to the nose and tenderness in the jaw and neck).
34. *People v Moise,* 199 AD2d 423 (2d Dept 1993) (victim's thumb was in a splint and victim could not return to work for four days on treating doctor's advice).
35. Family Court Act § 818.
36. Family Court Act § 842(a).
37. *Id.*
38. Family Court Act § 842(c).
39. Family Court Act § 842(g).
40. Family Court Act § 842(a)
41. Family Court Act § 842(i).
42. *Id*.
43. Family Court Act § 842.
44. *Id*.
45. CPLR § 3025(a).
46. CPLR § 3025(b).

47. Family Court Act § 842.
48. Family Court Act § 165(a) provides that, where a method of procedure is not prescribed in the Family Court Act, the provisions of the Civil Practice Law and Rules shall apply to the extent they are appropriate.
49. CPLR § 213(1).
50. Family Court Act § 828(1)(a).
51. Family Court Act § 154-d(1).
52. Family Court Act § 153-b(a).
53. Family Court Act § 826(a).
54. Family Court Act § 153-b(c).
55. Family Court Act § 826(b).
56. Family Court Act § 827(a).
57. Criminal Procedure Law § 140.10(4)(b).
58. Domestic Relations Law § 240(1)(a).
59. Family Court Act § 154-c(3).
60. Family Court Act § 832.
61. Family Court Act § 833.
62. Family Court Act § 2.
63. CPLR § 4518(c).
64. *Williams v Alexander,* 309 NY 283 (1955).
65. *People v Swinger,* 180 Misc 2d 344 (Crim Ct, NY County, 1988).
66. Family Court Act § 834.
67. Family Court Act § 842(i).
68. *Matter of J.G. v B.G.,* NYLJ, Nov. 18, 1999, at 25.


Part III

Battered Women and Children



5

Litigating Custody and Visitation In Domestic Violence Cases

by Kim Susser

Custody disputes occur frequently in cases with a history of domestic violence. For victims, a custody dispute often means a new cycle of abuse by their batterers. In the course of the legal proceeding, victims may be pathologized or stigmatized; their parental fitness may even be questioned. Many issues in contested custody cases can only be understood if considered within the context of domestic violence. The greater the appreciation attorneys and judges have of the dynamics and history of domestic violence, the less likely they will be to misinterpret symptoms of abuse as indicia of parental unfitness or instability and the more likely they will be to make appropriate custody and visitation determinations based on the best interest of the child.

The American Psychological Association recognizes that victims of domestic violence are likely to be at a disadvantage in custody cases if the court does not consider the history of violence:

> . . . behavior that would seem reasonable as protection from abuse may be misinterpreted as signs of instability. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization. Terms such as "parental alienation" may be used to blame the women for the children's reasonable fear of or anger toward their violent father.[1]

This tendency to regard allegations of domestic violence with skepticism and disbelief, coupled with misinterpretation of victims' behavior, is the primary reason that custody cases are so challenging for attorneys representing victims. Battered women need help to avoid presenting themselves in court or during law guardian interviews and psychological evaluations in ways that undermine their credibility.

For example, a victim may re-enact her adaptations to living in a hostile environment when she is in court by "becoming agitated, over-emotional or stupefied into silence. Attorneys as well as judges frequently react negatively to such behavior, particularly if the abusive partner appears calm, collected and sure of himself."[2]

For these reasons a custody trial can be arduous and challenging. Attorneys must carefully consider whether a decision to proceed to trial is in the client's interest. Early on, moreover, attorneys for domestic violence victims should consider carefully whether even initiating a custody case is the best course of action. If the victim has de facto custody of her children and the abuser is not likely to disrupt the arrangement, it may not be necessary or a good idea to file for legal custody. And, of course, be sure that paternity has been legally established before seeking custody; if the child's father has no standing to pursue custody, your client is the legal custodian of the child and need not endure the rigors of a custody proceeding. Finally, consider whether initiating a family offense case may prompt the abuser to file a retaliatory petition for custody or visitation. This could lock your client in a time-consuming and exhausting court battle that drags on for years and forces her into contact with the very person she wants to escape.

The Legal Context

In New York State, the legal standard for both custody and visitation is "the best interest of the child." Therefore, custody and visitation issues will be addressed together in this article. The broadly interpreted best interest standard guides the way in which courts consider the issues emerging from domestic violence in custody and visitation matters. Courts have generated a large body of case law regarding the factors to be weighed in making best interest determinations. These factors include the child's preference; the parent's stability; primary caretaker; parental fitness, including abandonment, neglect and substance or alcohol abuse, and mental illness; willful interference with visitation rights; nature of the parent-child relationship; religious beliefs; and the parties' relative financial positions. Although some consideration of domestic violence is now inevitable, until 1996, the consideration of domestic violence was left to the discretion of the court and courts rarely paid much attention to it.

In 1996, the NYS Legislature attempted to afford protection to domestic violence victims and their children involved in custody disputes by requiring courts to consider proof of domestic violence in custody and visitation cases. The statute states, in pertinent part, that where there are allegations of domestic violence in any

action for custody or visitation, "and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section."[3]

The Legislature made specific findings regarding domestic violence in the new law:

> The legislature finds and declares that there has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases. . . .
>
> The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse. . . .
>
> Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore. . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family. . . .[4]

Although the Legislature explicitly rejected the rebuttable presumption against awarding custody to a batterer that many other states have adopted,[5] the new law is clearly meant to impose restrictions on visitation and custody for the parent who has been found to have committed violence against the other parent. The legislative history plainly states that domestic violence "should be a weighty consideration."[6] Furthermore, since domestic violence is the only best interest factor specifically codified, arguably it should be given more weight than factors identified in the decisional law.

The legislative history is a persuasive body of material that can be used in several ways during litigation. First, it can be cited during oral argument when the court is determining temporary orders of custody and visitation. The victim's attorney can also ask the court to take judicial notice of the findings at any point during a hearing, and they can be used in lieu of expert testimony on the effects of

domestic violence on children. The legislative history provides material for cross-examination of experts: an expert's credibility could be seriously undermined if he or she is not familiar with the psycho-social research referenced in the legislative findings. Finally, they can be cited in any written motion, answer or summation.

Court decisions that have been reported since the 1996 law entered into effect indicate that judges deciding custody cases are giving considerable weight to domestic violence.[7] In *E.R. v G.S.R.*, for example, the court declined to accept either the expert's recommendation, because he "skims over the many episodes of domestic violence," or the Law Guardian's, because she "discounted the history of domestic violence."[8] The Second Department has reversed and remanded cases to the Family and Supreme Courts when courts failed to consider the mother's allegations of domestic violence perpetrated against her by the father.[9]

Appellate courts ruling since the passage of the 1996 domestic violence custody law have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.[10] Courts have considered acts of domestic violence in determining a parent's fitness for custody.[11] Domestic violence has been held to be a factor in relocation cases,[12] has been articulated as a basis for ordering supervised visitation,[13] and constitutes "extraordinary circumstances" in cases in which a non-biological party seeks custody.[14] Courts also view violence committed by a parent against a new spouse as an important concern.[15] Recently, New York adopted the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)[16] elevating the importance of domestic violence in determining jurisdiction over custody issues.

In 1998, the custody and visitation provisions of the New York State Domestic Relations Law (DRL) and Family Court Act (FCA) were further amended to prohibit courts from granting custody or visitation to any person convicted of murdering the child's parent.[17] Under this statute, the court is not even permitted to order temporary visitation pending the final determination of custody or visitation.[18] Exceptions include situations where a child of suitable age and maturity consents to such an order and where the person convicted of the murder can prove that it was causally related to self-defense against acts of domestic violence perpetrated by the deceased.[19]

While the statutory factor of domestic violence is being accorded increasing weight by judges presiding over custody and visitation cases, it always is considered in relation to the other "best interest" factors, sometimes in ways that are helpful to victims and other times in ways that are decidedly problematic. It is critical for attorneys representing victims of domestic violence to develop litigation

strategies that ensure that the court's consideration of the traditional "best interest" factors reflects awareness about the harm of domestic violence on victims and their children. In the following section, I will identify these factors and suggest ways in which they can best be dealt with in domestic violence custody litigation.

Moral, Emotional and Intellectual Development

Courts have found that batterers are poor role models for children. The court in *Rohan v Rohan*[20] accorded significant weight to the father's history of perpetrating domestic violence against the mother, stating that the batterer's "reprehensible behavior demonstrate[d] his unfitness to be a parent."[21] His violent history, the court found, proved that he was "manifestly unsuited for the difficult task of providing [the child] with moral and intellectual guidance."[22] In *Spencer v Small*,[23] the Appellate Division, in affirming the award of custody to the mother,[24] found that the father's "failure to acknowledge the traumatic environment" he created for his children because of his volatile temper revealed "a character which is manifestly ill-suited to the difficult task of providing young children with moral and intellectual guidance."[25]

In *Farkas v Farkas*, a groundbreaking decision that preceded the 1996 legislation, the court recognized that children who witness domestic violence often emulate such behavior in their own relationships. The court reasoned that "a man who engages in physical and emotional subjugation of a woman is a dangerous role model from whom children must be shielded."[26]

These judicial decisions are supported by a growing body of literature by social scientists and legal experts alike who have concluded that it is impossible for abusive parents to provide proper moral, emotional, and intellectual guidance to their children. The consensus is that violence is a learned behavior; it is "cyclical and self-perpetuating. Children who live in a climate of violence learn to use physical violence as an outlet for anger and are more likely to use violence to solve problems while children and later as adults."[27] Some studies suggest that girls who have been exposed to or who have experienced violence in their families may be at greater risk for violence in their own relationships.[28] More conclusively, it has been demonstrated that boys who are exposed to violence in their homes are at major risk of becoming batterers.[29]

Stability

Generally, courts have held that continuity of care and a stable home environment is in the child's best interest.[30] This factor can be problematic for battered mothers who have had to flee their abusers or move frequently to avoid

them. The factor of stability can also create difficulties for battered mothers who gave their abusers or a third party custody of the child while they were attempting to secure their own safety and locate a new home for their child. In both of these situations, the attorney representing the victim must elicit testimony about the reasons behind her decision to move or temporarily surrender custody.

The preference for maintaining a stable environment with custodial continuity is not absolute.[31] In *Rohan v Rohan*, the Appellate Division held that, given the father's history of domestic violence, the Family Court's reliance upon the factor of maintaining stability as the principle ground for granting physical custody to the father was misplaced.[32] The court concluded that, in light of the father's egregious acts of spousal abuse, his claim that the mother consented to his assumption of custody was "unworthy of belief."[33] The court also noted that the family court's award of custody had the undesirable effect of rewarding the father's abusive conduct.[34]

Children's Wishes

Although not controlling, the express wishes of the child should be accorded considerable weight when the child is of a sufficient age and maturity to articulate his or her needs and preferences to the court.[35] (See discussion of Law Guardians.) The wishes of the child, even a child of more than sufficient age and maturity, are not dispositive, however, when those wishes appear to be the result of domestic violence.

In *Wissink v Wissink*,[36] the Appellate Division gave a thorough and important analysis of the weight courts should give a child's wishes when there is domestic violence in the home. In that case, the law guardian supported the father as the custodial parent, despite ample evidence of his violence against the child's mother, because that was what his sixteen-year-old client said she wanted. The Appellate Division found that, given the findings of domestic violence, the law guardian had a duty to further examine the underlying reasons for the child's wishes.

Prior Agreement

Prior agreement of the parties is another factor courts consider in deciding custody. It is not uncommon for a victim of domestic violence to agree to a custodial arrangement that is not in the child's interest, or in her own, in an attempt to placate the abuser. In this situation, the victim's attorney must argue that she ought not be bound to any agreement that occurred without representation, or under duress, or that is not in the child's best interest. The parties cannot bind the court to an agreement that does not comport with the child's best interest.[37]

Primary Caretaker

Courts place considerable emphasis on the stability and continuity a parent offers her children by virtue of her role as primary caretaker.[38] Since the victim of domestic violence is often the primary caretaker of the children, if the court is reluctant to address the issue of domestic violence, it may help to rely on the primary caretaker factor. Whether or not your client was the primary caretaker, you should always elicit testimony about this issue. Testimony should either describe your client's role as the primary caretaker or explain why she was prevented from performing this role.

Spousal Abuse and Parental Unfitness

In addition to being a factor in determining the best interest of the child, spousal abuse must also be considered in assessing parental fitness. In a 1986 report, the New York Task Force on Women in the Courts urged legislators to enact a law making domestic violence evidence of parental unfitness a basis for visitation termination or a supervised visitation requirement. Courts have repeatedly found spousal abuse indicative of parental unfitness.[39]

Friendly Parent

Whether the parent encourages the child's relationship with the other parent is a weighty factor in custody determinations. A plethora of court decisions have held that it is inimical to the child's best interest to interfere with the visitation rights of the non-custodial parent.[40] The "friendly parent" factor is also applied to the non-custodial parent. For example, an attorney may try to use this factor to limit the child's visitation with a parent who disparages the custodial parent to the child. More often, however, the "friendly parent" factor is used against domestic violence victims who want to restrict the other parent's visitation because they are aware of that parent's propensity for violence. (See discussion below of parental alienation.)

Trial Practice

Joint Custody

Courts have long held that an award of joint custody to parents with an antagonistic and embattled relationship is improper and contrary to the child's best interest.[41] Courts often pressure parties to agree to joint custody in an attempt to resolve the case quickly. Attorneys representing domestic violence victims in

custody cases should cite the case law in response to any proposed settlement that includes joint custody. Citing case law is an easy way to protect your client from being blamed for not agreeing to such a "reasonable" disposition.

Orders of Protection

An order of protection issued on consent in a family offense case is not sufficient to prove domestic violence in a custody case.[42] Attorneys who anticipate a battle over custody or visitation should resist succumbing to pressure from the judge and/or court attorney to accept a batterer's offer to consent to the order. Instead, as long as your client has sufficient evidence to meet her burden, and as long as there are no other issues that might prevent her from testifying, especially issues that go to her credibility such as mental illness or substance abuse, you probably should request a fact-finding hearing on the family offense case. A finding of domestic violence can be key to limiting visits and winning custody, especially when the findings specify that the child was subjected to or witnessed the batterer's violence.

In determining whether to file a family offense petition, attorneys need to consider whether the abuser will retaliate by seeking custody or visitation. Often the abuser files for custody or visitation within days of having been served with the family offense petition. If this happens, it may be a good idea to file an answer to his petition in order to help the court understand the issues and facts favorable to your client early on in the case. If the abuser obtains a temporary order of custody, you will have to file an order to show cause or a writ of habeas corpus for the return of the child. Temporary orders are often in place for up to a year or more if a custody case is pending. These motions are not only critical tools for achieving a speedy return of the child during the pendency of the case but also provide an important opportunity early on in the case to convey to the court the victim's experience of the violence and other relevant facts.

Children as Witnesses

The impact of domestic violence on children has been the subject of much academic and legal discussion in recent years. Often, children are the primary or sole witnesses to incidents of violence in their homes. As a result, they may be a valuable resource for information, and/or potential witnesses at a hearing.

While a child's testimony may be important, most judges do not believe it appropriate to call the child as a witness and put him or her in the middle of a custody or visitation dispute. However, it can be valuable in developing your litigation strategy to understand the child's position and to learn what the child

witnessed and how the domestic violence affected him or her. Such knowledge may help you better understand the strengths and weaknesses of your case and assist in fashioning a settlement. If the child is not represented by counsel or the law guardian gives you permission to speak with the child, he or she can be interviewed like any other witness. Once the child has been assigned an attorney, however, it is unethical to communicate with him or her without the law guardian's permission.[43]

It is advisable to interview the child individually and separately from your client in a comfortable environment and to ask open-ended questions. The attorney should assess the credibility of the child's recollection of any incidents of violence or the household environment; determine whether the child remembers any facts your client may have forgotten or omitted; and try to understand the nature of the relationship between the child and the abuser, particularly what type of custodial or visitation arrangement the child wishes. While the child may tell each parent what he or she thinks that parent wants to hear, the child may be more inclined to give honest answers to you.

If the child has information that is pertinent and unavailable elsewhere, consider requesting the appointment of a law guardian in order to articulate the child's wishes and provide information to the court. The law guardian will act as an advocate for the child's position and can also assist the victim's case by offering additional witnesses to the court in the presentation of the child's case. The law guardian will also be able to cross examine the witnesses for both the petitioner and respondent and may be able to elicit further information not obtained through the direct examination. If the batterer acts or speaks inappropriately during visitation or custodial periods, the law guardian can monitor and report to the court and make the appropriate motions to protect the child from any harassment or badgering. Courts will usually give more weight to these arguments if they come from the law guardian rather than you. On the other hand, a law guardian may minimize or ignore allegations of domestic violence. (See discussion of Law Guardians.) So consider all possibilities before requesting the appointment of a law guardian.

If the child's wishes are for your client to have custody or for a visitation arrangement your client supports and the child is a credible and reasonably articulate witness, move for the child to be interviewed by the judge in the judge's chambers, referred to as an "in camera" interview. This type of testimony offers the court the child's perspective without the trauma to the child of having to confront the violent parent. It also spares the child cross-examination by the batterer's counsel.[44] Such a motion to the court should be supported by facts about the harm the child would sustain should he or she be forced to testify in

open court and any other danger that would result from the child testifying. It is considered an error to hold the in camera interview off the record and without the law guardian present.[45]

You and your opponent will not be present during the interview but likely will be given an opportunity to give the court or law guardian a list of questions for the child.

Section 1046(a) of the Family Court Act establishes that statements made by children pertaining to possible abuse or neglect are admissible as evidence in a proceeding under Article Ten. Case law holds that such statements are also admissible in custody and visitation proceedings.[46] Therefore, children's statements pertaining to domestic violence are admissible in custody and visitation cases. You may elicit from your client any of the child's reactions and statements regarding any incident of violence he or she observed or heard.

Law Guardians

Because of the great weight courts give to their positions, it is critical to understand the duties and role of law guardians in custody and visitation cases when domestic violence is an issue. The law guardian's position can be the determinative factor in your client's success or failure.

Historically, there have been two approaches taken by law guardians — the strict advocacy approach and the substituted judgment approach. Strict advocacy is when the lawyer advocates for the child's wishes, regardless of whether the lawyer considers those wishes to be in the child's best interest. Substituted judgment is when the lawyer substitutes his or her own judgment for the child's. Determining which approach is more appropriate depends on factors such as the age and maturity of the child, the facts of the case, and the predilection of the individual law guardian. The Statewide Law Guardian Advisory Committee (LGAC), established by the Office of Court Administration in 1996, endorses the strict advocacy approach except in cases in which the law guardian fears that the child's position would place the child in harm's way. It also supports the notion that, even when the law guardian is substituting his or her own judgment, the child's wishes ought to be made known to the court.[47]

In 1994, the New York State Bar Association (NYSBA) set forth standards and commentary for law guardians in custody and visitation cases, which recognize two critical dimensions of law guardian representation. The first is the inherent conflict that may emerge between the child's stated wishes and what the law guardian believes to be in the child's best interest. The second is the fact that the appearance of neutrality gives the law guardian's position great weight.

NYSBA argues that it is the lawyers' responsibility to "avoid actions or positions based on pre-conceived notions about sexual, racial or class roles or stereotypes and seek to protect the child's interests without trying to impose the attorney's own value system or sociological theories on the child or family."[48] This statement holds particular significance in domestic violence cases. The dynamics of domestic violence and its impact on children has been recognized and codified by the legislature and case law; it is not a sociological theory upon which law guardians can ruminate. Law guardians, like many people, may have preconceived notions or stereotypes about domestic violence that should be overcome. The NYSBA standards thus stand for the proposition that law guardians must investigate facts, participate fully in the proceedings, and take a position.[49] Referring to them, you may ask that the law guardian be specifically appointed on any concurrent family offense case so that he or she can participate in, or at least observe, those proceedings in order to understand the history of domestic violence and its impact on the child.

Courts have also addressed the role of the law guardian. In *Koppenhoefer v Koppenhoefer*, the Appellate Division held that the failure of the law guardian to take an active role in the proceeding was grounds for vacatur.[50]

In *Wissink v Wissink*,[51] the law guardian supported the father as the custodial parent because that was what his client said she wanted. This position appears to comply with the strict advocacy approach defined by the LGAC. However, the law guardian ignored the history of domestic violence perpetrated by the father against the mother and did not understand the dynamics. The Appellate Division made clear that it was the responsibility of the law guardian to understand the dynamics of domestic violence, to apply that understanding to the adolescent girl's denigration of her abused mother and her stated desire to reside with her abusive father, and to advise the court accordingly.

Lawyers for domestic violence victims have reported that too often law guardians assigned to represent their client's children have disregarded the domestic violence in spite of the statutory mandate and have regarded their clients' allegations as suspect even in the face of strong evidence supporting the victim's account. When the law guardian's bias is clear, it may be necessary to move to recuse him or her. Such an effort may be an uphill battle, however. In *Eli v Eli*,[52] the court denied a motion for the recusal of the law guardian based on bias, holding that disqualification will only be granted upon a showing of one or more of the following: (1) the law guardian's violation of the Code of Professional Responsibility; (2) a violation of the Rules of Judicial Conduct; (3) a dereliction of the law guardian's duties to the children or the court; or (4) the

law guardian is unqualified pursuant to the standards imposed by law, the judiciary, or court administrators.

Many law guardians request an interview with each parent as part of their investigation. Like any other lawyer wishing to speak with a party who is represented by counsel, the law guardian must first have the consent of that party's attorney. Together with your client, you will need to decide whether to agree to this interview and whether you need to be present. Your decision will depend heavily on your client's ability to tell her story coherently and the extent to which you believe the law guardian understands the dynamics of domestic violence. As explained above, many law guardians ignore allegations of domestic violence or view them as suspect while prioritizing the child's relationship with the non-custodial parent even when that parent is an abuser. When deciding whether to permit the law guardian to interview your client, balance the danger of appearing to be hiding something against the likelihood of your client enlightening the law guardian about her history with her abuser and their child. Generally, it is best to permit your client to meet with the law guardian. If you are concerned that she will not be a good advocate for herself or that the law guardian does not understand domestic violence, attend the interview.

Either way, you must prepare your client for her interview with the law guardian. Domestic violence victims often assume mistakenly that just because the law guardian represents the child, he or she will support the victim's position. What the law guardian views as the child's best interest, however, may differ from what the victim perceives as the child's best interest. Your client must understand that the purpose of the interview is to help the law guardian decide what position to take and that any information shared with the law guardian can be reported to the judge. Tell her that it is probably best that she not volunteer any negative information, but that she must tell the truth when questioned. Together with your client, decide which facts the law guardian should know. Go through her history with her so she can tell her story coherently, highlighting the most significant aspects, such as the impact the violence had on the children. Help her understand that her answers should be child-centered rather than self-centered. Tell her to bring police or hospital records with her to corroborate the violence, but remind her that the most important information is her own account of it. Warn her that overemphasizing the domestic violence can backfire by making it appear that she is obsessed with the negative aspects of her relationship with the other parent or hostile to him. Work with your client on her affect and demeanor so that she can describe the domestic violence she endured without appearing to be overly emotional, angry, or exaggerating. It is important that she

tells the law guardian that she understands the importance of the relationship between the other parent and the child.

Forensics

Along with the position taken by the Law Guardian, the conclusions of forensic reports, also known as psychological evaluations or mental health studies, are likely to profoundly influence the outcome of the custody or visitation case. Although judges are encouraged by the Appellate Division to be independent,[53] they are also encouraged to order, and accord significant weight to, forensic reports.[54] In most instances, courts tend to rely heavily on experts.

Legal precedent requires forensic evaluators to address domestic violence, although it is not uncommon for evaluators to minimize its impact on the child. In *Wissink v Wissink*,[55] the Appellate Division reversed an order of custody to the father and held that "the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea [the child] expressed her unequivocal preference for the abuser while denying the very existence of the domestic violence that the Court found she witnessed."[56] The court found that the forensic evaluation failed to adequately address the reasons the teenager expressed a desire to live with her abusive father and directed the lower court to order a comprehensive psychological evaluation.

Section 722C of the County Law permits the use of experts paid by the City. Most experts are chosen from lists provided by the 18b panel, and choices are generally made by reputation in the community. It is crucial that you investigate any expert you are considering recommending or suggesting to opposing counsel or the law guardian, not just by getting a copy of the curriculum vitae or resume, but by speaking with the expert and specifically asking what his or her experience has been with domestic violence. For additional information, speak to other advocates and practitioners to see if they have had experience with the expert.

Prepare your client for her interview with the forensic evaluator much in the same way that you prepared her for the interview with the law guardian. This preparation is of critical importance to the outcome of the case so be sure to spend at least one session with your client on it. Work with your client so that she is able to recount clearly and without an angry or overwrought affect the history of the domestic violence and to demonstrate her commitment to her safety and that of the child. At the same time, unless the batterer was abusing the child or involved in activities that posed a direct threat to the physical safety of the child, she must also communicate her awareness of and support for the child's relationship with that parent. This is not an easy task to say the least.

Explain to your client that although the expert is a doctor, he or she is not the client's therapist — this is not the time to explore her feelings or unburden herself of her conflicts — and that her discussions with the expert are not confidential. A good expert will observe each parent interact with the children separately; prepare your client for this possibility.

You may wish to contact the expert directly and offer to provide court documents, such as an Administration for Children's Services report or an Investigation and Report from Probation. You can offer to provide the expert with literature about domestic violence.[57] Since many experts do not know about the law mandating consideration of domestic violence in custody and visitation cases, consider providing them with a copy of the statute that contains the legislative intent section. The legislative history written into this law is extremely valuable, especially because it cites research into the impact of domestic violence on children even where they are not the direct targets of the violence. Remember to send your adversary and the law guardian a copy of any written communication you have had with the expert.

If the forensic report ignores or minimizes the domestic violence, is hostile to your client, and/or makes inappropriate recommendations, you will need to prepare to cross-examine the expert. There is a host of psycho-social literature on the impact of domestic violence on children which you may use as material for this task. Introduce this literature and the legislative history into evidence, and then ask the expert whether domestic violence was considered in his or her recommendation and what weight was it given in light of its established negative impact on children. When cross-examining an expert who performed personality tests, be aware that domestic violence victims tend to score higher on the "paranoia scale" of the Minnesota Multiphasic Personality Inventory (MMPI) than others because the scale measures not only paranoia but fear in general.[58] Attorneys representing domestic violence victims who have been administered such tests by experts have frequently found that the experts misinterpret the data or fail to understand how experience as a domestic violence victim can skew the results.

You will also wish to obtain impeachment material for your cross-examination of the expert.[59] One of the richest sources of such material is likely to be the expert's own notes, especially if your client reports that she discussed the history of violence with the evaluator but there is no mention in the final report. Although there are some lower court decisions denying pre-trial disclosure of the notes of forensic experts,[60] there is no appellate ruling on the issue of obtaining such data and there are strong arguments to be made in favor of such disclosure.[61]

The American Psychological Association (APA) has set forth sixteen guidelines for forensic evaluators in custody case, which can be very valuable in cross-examination. The guidelines require that the expert gain specialized competence, that he or she be aware of personal and societal biases, that he or she use multiple methods of data gathering and maintain written records, and that the scope of the evaluation be determined by the evaluator based on the nature of the referral question.[62] Many experts in domestic violence custody cases do not use multiple methods of gathering data, for example, by interviewing collaterals. Experts in domestic violence cases often do not limit the scope of their evaluation to the assigned task but instead attempt to mediate. The guidelines also require the expert to "gain specialized competence" in conducting child custody evaluations. This includes an understanding of applicable law, child development, substance abuse, and domestic violence.

If the attorney concludes that cross-examination will not be sufficient to undermine the expert's recommendation, an additional expert may be retained by the client. However, if the judge will not permit the expert to examine the child a second time, this may not be particularly helpful. A motion for funds to retain an additional expert may be made pursuant to Section 722C of the County Law.

Parental Alienation

The issue of parental alienation often arises in domestic violence cases. Frequently, the batterer or his attorney will accuse the victim of communicating messages to the child that alienate him or her from the abuser. The victim's efforts to protect herself and her children may be misinterpreted by courts, lawyers, and experts as parental alienation. Neither psychological theory,[63] nor case law,[64] supports this interpretation, and the attorney for the victim should vigorously challenge it.

Visitation

The initial temporary order for visitation will likely determine the course of visitation throughout the case. Visitation is easily expanded but rarely restricted. Therefore, the schedule of visits between the abusive parent and the child should start slowly, expanding gradually, if all goes well, from supervised visits, to several hours of unsupervised visits, to full days, and then to overnight and weekend visits.

Often in cases involving allegations of domestic violence, the visitation is initially supervised. This arrangement protects the child and gives the victim peace of mind. There are many possibilities for supervised visitation: supervision

by staff or volunteers at an agency providing this service, or by friends or relatives of one or both parents. The decision about which kind of supervised visitation is best requires an exploration of a variety of factors. For example, would a report to the court be helpful? If so, supervised visitation at a reputable agency, where trained staff supervise the visits, is preferable. Such agencies supervise visits either free of charge or for a small fee; visits are usually held once a week for one hour; and supervisors usually provide a written report to the court. If the batterer has abused the child or poses an ongoing danger to the victim, visitation should be supervised by professionals at an agency. Be sure that the agency will protect your client's safety by ensuring that she does not encounter her abuser when she brings the child and leaves with him or her.

Is supervision necessary for the long term? Agencies that specialize in supervising visits typically will supervise for a limited period of time, such as during the pendency of the court case. If long-term supervision is what is needed, supervision by a mutually agreed upon friend or family member, if available, may be an alternative. If visitation is unsupervised, the exchange should be conducted at a safe place, either a police precinct or a public location, such as a popular fast food restaurant or a library. Some judges and lawyers believe that an exchange at the police precinct is harmful to a child. If the visitation exchange should take place at a police precinct in order to protect your client's safety, cite the literature and case law demonstrating that exposure to domestic violence is harmful to children and then point out that it would be far more damaging to the child to be exposed to domestic violence than to be exposed to the police.

Although theoretical support exists for the proposition that visitation ought to be supervised when there has been a finding of domestic violence,[65] obtaining a final order for supervised visits is difficult and usually requires evidence that the batterer engaged in conduct that placed the child at the risk of significant harm or continues to be violent to your client. Obtaining an order suspending visits between the batterer and the child is even more challenging, usually requiring such conduct as sexual abuse of the child, repeated physical violence directed at the child, and severe substance abuse and/or mental health issues. Expert testimony will probably be needed to obtain an order of permanently supervised or suspended visits.

Modification of Custody/Visitation Orders

Batterers often attempt to continue their abuse through incessant litigation. If your client is harassed by her abuser filing new petitions for custody or

visitation after the case has been decided, argue that modification of the custody or visitation order requires a showing of change of circumstances. In *David W. v Julia W.*,[66] the court held that to "automatically grant a hearing to a non-custodial parent would simply facilitate a disgruntled party in harassing his or her spouse compelling the latter to expend considerable time, money, and emotional anguish in resisting the loss of custody."

Conclusion

Although the New York State legislature and appellate courts require factfinders to give significant weight to domestic violence in custody and visitation matters, litigating these cases continues to pose challenges to lawyers representing victims. In spite of this powerful legal precedent and the social science research that supports it, victims and their advocates still encounter lawyers, judges, and experts who downplay the significance of domestic violence, who fail to understand its impact, and who stereotype or blame victims. Attorneys for domestic violence victims can overcome these challenges by educating themselves about the new developments in domestic violence law and social science literature, by understanding how domestic violence implicates the traditional "best interest" factors in custody law, by developing strategies to bring information about domestic violence and the law to the key decision makers, and by helping their clients negotiate a court system that too often is confusing and insensitive to victims. While the effective representation of domestic violence victims in custody and visitation cases requires knowledge, sensitivity, and hard work, such litigation can be uniquely rewarding. Just as the threatened loss of her child often instills the greatest fear in the battered mother, preventing such a loss may constitute the greatest gift.

Notes

1. Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), at 100 (*hereinafter APA Report*).
2. Evan Stark, *Building a Domestic Violence Case*, in Lawyer's Manual on Domestic Violence: Representing the Victim (Anne M. Lopatto and James C. Neely eds, 1st ed 1995).
3. Laws of 1962, ch 85.
4. *Id*. at 273-74 (emphasis added).
5. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 Alb L Rev 1345, 1350 (1997); *see also* Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 Fam & Conciliation Cts Rev 393, 395 (1999); *see e.g.* Ala Code 1975 § 30-3-131; Ariz Rev Stat Ann § 25-403 (West Supp 1999); Ark Code Ann § 9-13-101(c) (Michie 1997); Colo Rev Stat Ann § 14-10-124 (1.5) (West 1999); Del Code Ann tit 13, § 705A (Supp 1998); Fla Stat Ann § 61.13(2)(b)(2) (West Supp 1999); Haw Rev Stat Ann § 571-46(9) (Michie Supp 1998); Idaho Code § 32-717B(5); La Rev Stat Ann § 9:364 (West Supp. 1999); Minn Stat Ann § 518.17(2)(d) (West Supp 1999); Nev Rev Stat § 125.480(5) ([year]); NJ Rev Stat Ann § 458:17 (1993); NM Cent Code § 14-09-06.2(1)(j) (1997); Okla Stat Ann tit 10 § 21.1(D) (West 1995); Tex Fam Code Ann § 153.004 (West 1996); Wash Rev Code Ann § 26.09.191 (2)(a)(iii) (West 1997); Wis Stat Ann § 767.24(2)(b)(2)(c) (West 1993); Wyo Stat Ann § 20-2-113(a) (Michie 1999).
6. Laws of 1996, ch 85.
7. *See E.R. v G.S.R.*, 170 Misc 2d 659 (Fam Ct, Westchester County, 1996); *J.D. v N.D.*, 170 Misc 2d 877 (Fam Ct, Westchester County, 1996).
8. *Id*. at 262.
9. *Finkbeiner v Finkbeiner*, 270 AD2d 417 (2d Dept 2000); *Samala v Samala*, 309 AD2d 798 (2d Dept 2003).
10. *See* Lee Elkins and Jane Fosbinder, New York Law of Domestic Violence, 591 (1998).
11. *See Farkas v Farkas*, NYLJ, July 13, 1992, at 31 (Sup Ct, NY County); *Rohan v Rohan*, 213 AD2d 804 (3d Dept 1995).

12. *See e.g. Mitchell v Mitchell*, 209 AD2d 845 (3 Dept 1994); Olmo v Olmo, 140 AD2d 677 (2d Dept 1988).
13. *See e.g. Anonymous G. v Anonymous G.*, 132 AD2d 459 (1st Dept 1987).
14. *See e.g. Peters v Blue*, NYLJ, June 23, 1997, at 29 (Fam Ct, NY County); *Pratt v Wood*, 210 AD2d 741 (3 Dept 1994).
15. *See Kaplan v Chamberlain*, NYLJ, Sept. 17, 1993, at 27 (Fam Ct, NY County); *TI v PS*, NYLJ, June 5, 1995, at 31 (Fam Ct, NY County, 1995).
16. Uniform Child Custody Jurisdiction and Enforcement Act § 207; Domestic Relations Law § 76.
17. *See* Laws of 1999, ch 378.
18. *Id*.
19. *Id*.
20. 213 AD2d 804 (3d Dept 1995).
21. *Id*.
22. *Id*.
23. 263 AD2d 783 (3d Dept 1999),
24. *Acevedo v Acevedo*, 200 AD2d 567 (2d Dept 1994).
25. *Spencer v Small*, 263 AD2d 783, 785 (3d Dept 1999).
26. NYLJ, July 13, 1992, at 31, col 1 (Sup Ct, NY County).
27. Laws of 1996, ch 85.
28. Fields, M. D., *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State,* 240 Cornell J L and Pub Pol 221 (1994).
29. American Psychological Association Presidential Task Force, Report on Violence and the Family (1996), at 37.
30. *Moorehead v Moorehead*, 197 AD2d 517, 519 (2d Dept 1993). The Court found that the parties were "equally able to care for their children" and therefore, stability was of central importance. The court also considered the young ages of the children who were 1.5 and 2 years old.
31. In *Moorehead*, the court found that a long-term custody arrangement may be disrupted if it would serve the best interest of the child. *Id*. at 519-520.

32. 213 AD2d 804, 806 (3d Dept 1995).
33. *Id.*
34. *Id.*; *see also Labow v Labow*, 86 AD2d 336 (1st Dept 1983). In reversing a trial court's transfer of custody from the mother to the father, the court cited the trial court's failure to consider the father's manipulative yet apparently successful technique of bringing about a change in custody by failing to comply with court orders and the impact that this technique would have on the child's thinking. "It hardly seems to be in the best interests of a child for him to learn the efficacy of such a technique and to observe it practiced by his father and approved by the court."
35. *Koppenhoefer v Koppenhoefer*, 159 AD2d 133 (2d Dept 1990).
36. 310 AD2d 36 (2d Dept 2002).
37. *Eschbach v Eschbach*, 56 NY2d 167 (1982).
38. *Hall v Keats*, 184 AD2d 825, 827 (3d Dept 1992); *Diane L. v Richard L.*, 151 AD2d 760, 761 (2d Dept 1989); *Moon v Moon*, 120 AD2d 839, 839 (3d 1986).
39. *See Farkas v Farkas*, NYLJ, July 13, 1992, *supra*; *Rohan v Rohan*, *supra*, at 806; *Acevedo v Acevedo*, 200 AD2d 567 (2d Dept 1994).
40. *Entwhistle v Entwhistle*, 61 AD2d 380 (2d Dept 1978); *Bliss v Ach II*, 56 NY2d 995 (1982).
41. *Braiman v Braiman*, 44 NY2d 584, 589-92 (1978); *Forsyth v White*, 266 Ad2d 743 (3d Dept 1999).
42. Domestic Relations Law § 240, which refers to the Family Court Act, requires that a finding of domestic violence be made by the preponderance of the evidence in order for the judge to have to consider the domestic violence in determining the best interest of the child.
43. *Cooperman v Cooperman*, NYSBA Opinion 656, DR 7-104(a)(1) of Professional Responsibility.
44. *See Lincoln v Lincoln*, 30 AD2d 786 (1st Dept 1968).
45. Family Court Act § 664(b); CPLR Rule 4019; *see Fleishman v Walters*, 40 AD2d 622 (4th Dept 1973); *Matter of Buhrmeister v McFarland*, 235 AD2d 846 (3d Dept 1997); *Matter of Kathleen OO*, 232 AD2d 784 (3d Dept 1996); *Matter of Sellen v Wright*, 229 AD2d 680 (3d Dept 1990).

46. *LeFavour v Koch*, 124 AD2d 903 (3d Dept 1986) (custody); *Albert G. v Denise B.*, 181 AD2d 732 (2d Dept 1992) (termination of visitation).
47. The Statewide Law Guardian Advisory Committee, Law Guardian Program Administrative Handbook, at 2-3.
48. NYSBA Standards; *see also* Appellate Division First Department *Law Guardian Definition and Standards*.
49. *See* Nancy Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 Fordham Urb L J 817 (2000), for a thorough review of the standards and how the consideration of domestic violence expands the role of the law guardian.
50. *Koppenhoefer v Koppenhoefer*, 159 AD2d 113 (2d Dept 1990).
51. *Wissink*, 301 AD2d 36 (2d Dept 2002).
52. *Eli*, NYLJ, November 12, 1998, at 25.
53. *See Alanna M. v Duncan M.*, 204 AD2d 409 (2d Dept 1994).
54. *See In the Matter of Rebecca B.*, 204 AD2d 57 (1st Dept 1994); *Rentschler v Rentschler*, 204 AD2d 60 (1st Dept 1994).
55. 301 AD2d 36 (2d Dept 2002).
56. *Id*.
57. Some of the relevant literature includes: American Psychological Association Presidential Task Force, Report on Violence and the Family, 1996; American Bar Association Commission on Domestic Violence, The Impact of Domestic Violence on Your Legal Practice, 1996, ch 5; *The Impact of Spousal Abuse on Children*, Marjory Fields, 3 Cornell J Law and Public Policy, No. 2 1994; Ann Jones, Next Time, She'll Be Dead: Battering and How to Stop It, 1994, ch 3; Lundy Bancroft and Jay Silverman, The Batterer as Parent, 2002.
58. Lynne Bravo Rosewater, *Clinical and Courtroom Application of Battered Women's Personality Assessments*, Domestic Violence on Trial: Psychological And Legal Dimensions of Family Violence, ed Daniel Jay Sonkin, (1987).
59. CPLR 3120; *see also Kessler v Kessler*, 10 NY2d 445 (1962).
60. *Ochs v Ochs*, 193 Misc 2d 502 (Sup Ct, Westchester County,, 2002); *Feuerman v Feuerman* 112 Misc 2d 96 (Sup Ct, NY County, 1982); *Nicholson v Nicholson*, NYLJ, January 5, 2004, at 19, col 1.

61. Tippins, *Custody Evaluations, Part 4: Full Disclosure Critical*, NYLJ, January 15, 2004, at 3.

62. American Psychologist, Vol 49, No 7, at 677-680 (1994).

63. The American Psychological Association determined that, "although there are no data to support the phenomenon called parental alienation syndrome, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization. Terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father." Report on Violence and the Family, at 40, 100.

64. No cases were found in New York allowing for the admission of expert testimony on parental alienation syndrome. *People v Loomis* 172 Misc 2d 265 (Crim Ct, NY County, 1997). That court also noted that in Florida, such testimony was not generally accepted under the Frye rule; *see also Darla N. v Christine N.*, 289 AD2d 1012 (4th Dept 2001); *Zafran v Zafran*, 191 Misc 2d 60 (Sup Ct, Nassau County, 2002); *JF v LF*, 694 NYS2d 592.

65. Some states, though, have a presumption that the abusive parent have only supervised visits unless he can rebut the presumption by showing he is fit to have unsupervised visits, for example, by completing a batterer's education program.

66. 158 AD2d 1 (1st Dept 1990).

6

Representing Domestic Violence Victims in Child Welfare Cases

by Jill M. Zuccardy

The Law Regarding Child Welfare and Domestic Violence

For domestic violence victims who face child neglect proceedings, the Court of Appeals decision in *Nicholson v Scoppetta*[1] changed radically the legal landscape in which they defend themselves against charges that they have failed to protect their children from harm. Prior to 2004, the decisions of the different appellate divisions regarding issues of domestic violence in child welfare cases could not be harmonized. The confusion traced its origins to the 1998 decision in *In re Lonell J.*,[2] in which the Appellate Division, First Department, held that expert testimony is not necessary to establish that exposure to domestic violence causes harm to children rising to the level of impairment under the statute governing child neglect. Some, but not all, lower courts seemed to interpret *In re Lonell J.* as holding that a child who witnesses domestic violence *per se* suffers harm sufficient to support a finding of neglect against the victim-parent as well the perpetrator-parent.[3]

In October, 2004, the New York Court of Appeals issued its landmark decision in *Nicholson v Scoppetta*.[4] The Court held that a parent may not be charged with neglect solely on the grounds that the parent is a victim of domestic violence and the child has been exposed to the violence. The Court also held that a presumption of emotional harm is impermissible by law because not every child exposed to domestic violence suffers harm or even a risk of harm as defined by the neglect statute. The Court made clear that *In re Lonell J.* stood only for the proposition that expert testimony is not required to prove that a child exposed to domestic violence has suffered harm under the statute but that it did not dispose with the requirement that emotional harm be proven.

The Court further emphasized that even if emotional harm to a child from exposure to domestic violence is proven by particularized evidence, a battered

mother still may not be found neglectful unless it is shown that she failed to exercise a minimum degree of care and that there is a causal link between her actions or inactions and any proven harm to the children. A court must assess the battered mother's actions or inactions by an objective standard, considering what a reasonable parent would have done under the circumstances "then and there existing." The inquiry must be detailed, with the court considering risks attendant to leaving, risks attendant to staying and suffering continued abuse, risks attendant to seeking assistance through government channels, risks attendant to criminal prosecution against the abuser, risks attendant to relocation, the severity and frequency of the violence and resources and options available to the mother. While the Court noted that its ruling "does not mean that a child can never be 'neglected' when living in a home plagued by domestic violence," it recognized that a neglect finding against a battered mother based on domestic violence would be appropriate only under the most egregious of circumstances.

The Court's ruling in *Nicholson v Scoppetta* is consistent with the holding in the federal class action lawsuit, *Nicholson v Williams*.[5] In *Nicholson*, a federal court found that it is unconstitutional to remove children from battered mothers solely or primarily on the grounds that there is domestic violence in the home, to charge those battered mothers with child neglect and to mark cases against them as "indicated" at the New York State Central Register of Child Abuse and Maltreatment (SCR).[6] The federal district court issued an injunction against New York City's child welfare agency, the Administration for Children's Services (ACS), prohibiting it from such behavior in child welfare cases involving domestic violence.[7] Upon ACS appeal of the federal case, the Second Circuit Court of Appeals certified questions of state law to the New York Court of Appeals, resulting in the decision in *Nicholson v Scoppetta*. Subsequently, the Second Circuit remanded the case to the district court for consideration in light of *Nicholson v Scoppetta*. On December 17, 2004, the parties settled the case with ACS explicitly recognizing that the New York Court of Appeals decision accurately sets forth the applicable law that ACS must follow.

In December, 2004, the parties settled the federal case with ACS explicitly recognizing that the New York Court of Appeals decision accurately sets forth the applicable law. Since *Nicholson*, state appellate courts have by and large declined to uphold findings of neglect against battered mothers where the sole or primary grounds for the finding is that the mother was a victim of domestic violence,[8] while at the same time emphasizing that *Nicholson* does not preclude findings against perpetrators of domestic violence.[9] It remains imperative that practitioners representing domestic violence victims in child welfare proceedings

hold child welfare agencies, attorneys, and lower courts to the standards enunciated by the Court of Appeals in *Nicholson*.

The Myths Regarding Child Welfare and Domestic Violence

Battered mothers have at times been charged with neglecting their children when they have done little or nothing more than endure abuse by an intimate partner. The theory underlying a neglect prosecution against a battered mother is that she "failed to protect" her children from domestic violence. Use of the generic phrase "failure to protect" in the context of domestic violence is misguided:

> The word failure implies circumstances that are controllable, that is, the opportunity was available not to fail. In the context of domestic violence, this suggests that the failure was due to the mother not taking some action that would have protected her children. However, domestic violence is unlike other acts of omission, such as failure to provide medical care, because the probability for a successful outcome — protecting the children from witnessing further abuse — may be relatively low.[10]

Another misconception in many neglect prosecutions against battered mothers is that all the victim had to do to protect her child was leave the abuser. Outsiders often conclude that separating from the abuser is a way to end the violence. Yet, as the New York State Legislature found "studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties."[11] The Court of Appeals too, in its ruling in *Nicholson*, has recognized that separation should not be used as a litmus test for assessing a battered mother's commitment to her children's safety and well-being.

A battered mother also may be judged harshly if she did not pursue criminal action against the abuser although battered mothers often have good reason to forgo criminal remedies. The Court of Appeals, in *People v Alexander*, recognized that, "[a]lthough the abusers' guilt may be clear and provable, many victims of domestic violence decide not to pursue charges for a host of reasons, including fear of retaliation, financial dependence and threats of violence. . . .,"[12] and in *Nicholson* added that declining to prosecute may itself be an exercise of care.

The concept of safety planning, which has long been the cornerstone of domestic violence intervention, is premised on the belief that a battered mother usually is the best judge of what actions are most likely to keep her and her

children safe. The Court in *Nicholson* recognized the myriad factors that a battered mother must consider in planning for her safety, dispelling some of the myths about what a battered mother "should have done."

The CPS Investigation

There are two ways that a battered mother may come to the attention of a child protective services agency (CPS). In some jurisdictions, the Family Court will institute a court-ordered investigation as part of a custody, visitation or family offense case. The role of the CPS caseworker is to collect information and issue a report to the court.

More typically, a battered mother comes to CPS attention through a complaint made to the SCR. Mandated reporting to the SCR is not triggered merely because a child has witnessed domestic violence[13] and, if such a report is made, the SCR should not accept the complaint. When the complaint is accepted, it is sent to the local CPS office for investigation. CPS must commence its investigation within 24 hours and make face-to-face contact with the child, parent and other household members.[14] The extent of that contact may depend upon the severity of the allegations and safety information in the complaint. CPS caseworkers must offer services to the family, but they also must inform parents that they are not required to participate in services unless they are ordered to do so by a court.[15]

CPS has 60 days to complete its investigation. At the conclusion of the investigation, CPS marks the report "indicated" or "unfounded" and notifies each subject of the report of the outcome. A finding of indicated means that CPS has determined that "some credible evidence of the alleged abuse or maltreatment exists."[16] The record of an indicated report remains at the SCR until ten years after the eighteenth birthday of the youngest child named in the report.

If the case is indicated against the battered mother, the attorney should immediately send a letter to the SCR requesting a copy of the documents on file with the SCR and administrative review of the determination. The letter also should request a fair hearing if the determination is not reversed at administrative review. The attorney also should request a copy of the mother's file from the local CPS to obtain the details of the investigation. In both instances, an authorization for the release of the records must be attached. If the attorney cannot represent the mother in a fair hearing, the attorney should help the mother file her request pro se.

Advocacy During a CPS Investigation

A parent has a legal right to refuse entry into, and inspection of, her home by a CPS caseworker, but, in most circumstances, asserting that legal right is not advisable. If access is not granted, the caseworker may summon the police, seek a warrant or ask the Family Court to authorize removal based solely on the allegations. Once the CPS investigation goes forward, it is more feasible for a mother to decline continued home inspections, especially if the abuser and not the mother is alleged to be placing the child at risk, and she may instead offer to bring the child to the CPS office for interviews. However, when a mother is residing in a confidential domestic violence shelter, an attorney should oppose CPS entry into and inspection of the "home." A domestic violence shelter is a government-licensed and inspected facility and is already confirmed to be a safe and appropriate environment for children. The risks of a breach of confidentiality are too high to justify revealing the location to CPS caseworkers and supervisors. The address of the shelter also will appear in CPS records to which the abuser is entitled, by law, to have access. Revealing the address puts not only the subject of the investigation at risk but also endangers other residents and their children.

If an attorney knows that CPS intends to interview the mother, the attorney may attend the interview or identify someone else — preferably a social worker, but also a paralegal or intern — to attend the interview. The attorney should develop a contingency plan with the mother should it appear that the children will be removed without an opportunity for the mother to be heard in court. The mother should identify relatives or friends who could take the children in the short term. The attorney should explore whether the mother would be willing to go into a domestic violence shelter or relocate in the short term if it is a way to avoid removal of her child. These decisions may need to be made quickly and, as frightening as it may be for the mother, the attorney should explore them in the early stages of the investigation.

CPS must interview the mother at a separate location from any interview with the abuser. The CPS caseworker should not merely ask the abuser to step into the other room while she queries a mother about his violent tendencies. CPS also must provide an interpreter if needed; a battered mother cannot be expected to discuss difficult family issues in a language in which she is not fully conversant or to use a friend or neighbor to translate. A child should never be used to translate.

During the interview, a battered mother faces a conundrum in determining what information to share. If she discloses serious abuse in the home, she risks having her child removed, having a neglect case filed against her or having the

CPS caseworker take precipitous action, such as confronting the abuser, which will increase danger. On the other hand, if the mother minimizes the violence, CPS may conclude that the mother is unwilling or unable to take steps to protect the child.

A battered mother is best served by simply telling the truth. While she should not mistake the CPS caseworker for a confidante and should not volunteer extraneous information, she should be straightforward in response to specific questions. She should avoid advocating for the abuser or providing excuses for his behavior. She should not try to protect the abuser or align herself with him based on the mistaken impression that this will cause CPS to close the case. In most investigations involving allegations of domestic violence, the interests of the mother and the alleged abuser are not aligned and presenting a united front may result in removal of the child from both parents. Further, CPS caseworkers have access to records of abuse in the home by police, the courts, the hospital or other service providers. It does not serve the mother to back-peddle from any prior reports.

The attorney's focus should be on providing information necessary to establish that the child is currently safe and that the battered mother has taken, and will continue to take, steps to keep the child safe. Letters from service providers or proof of involvement with social services are helpful. A battered mother is not required to accept CPS mandates.[17] However, if the mother disagrees with the safety measures suggested by CPS, she should be prepared to articulate an alternate safety plan. If the CPS agency has a domestic violence specialist, the attorney should reach out to the specialist — or ask the caseworker to — if any problems arise.

The attorney and mother should identify CPS tools or resources that could help the mother. CPS can bring the power of the government to bear against the abuser. CPS has the authority to apply to the court to exclude the abuser from the home, advocate with the police to have the abuser arrested or file a neglect case against the abuser. CPS also serves as a resource for referrals to, for example, counseling, child care, Head Start programs, housing and culturally and linguistically appropriate services. It is imperative that dialogue with the victim be the center of any CPS intervention to avoid the unintended consequence of increasing danger.

The most challenging scenario is one in which the mother wants to reconcile or remain with the alleged abuser. Whether CPS seeks removal or files a neglect petition will depend on factors such as the frequency and severity of the abuse, the abuser's relationship to the child and the abuser's willingness to become involved with services. While it is the attorney's role to advocate the mother's position, a mother who wishes to reconcile or remain with an abuser must

understand the pitfalls of this course of action, particularly the potential for removal of her children should another incident of violence occurs. An attorney for a mother in that situation should encourage her to develop a well thought-out safety plan that she can share with the CPS caseworker and to pursue an order of protection which, while allowing the parties to continue to live together, restrains the abuser from verbal or physical abuse against her and the child.

An attorney may also provide information to, or advocate directly with, CPS as long as there is no pending Family Court case. The attorney should ask whether the caseworker intends to file in court or seek removal, so that the attorney may be present if such a filing occurs and may request a hearing *before* a removal. If the attorney believes that removal or any other legal action is forthcoming, the attorney may ask the caseworker to provide contact information for a CPS attorney. The mother's attorney also may contact the CPS legal services unit directly. If removal or court action appears imminent, the attorney should notify the CPS legal services unit in writing that the attorney represents the mother and must be informed of any court filings.

Procedural and Substantive Requirements for Removal

The removal of a child from a parent is one of the most serious exercises of government power that our constitution permits. The Court of Appeals recognizes that "the liberty of a parent to supervise and rear a child" is one of the "[f]undamental constitutional principles of due process and protected privacy. . . ."[19] The Court also recognizes that it is in a child's interest to be raised by his/her parent, and that relationship should not be interfered with absent grievous cause or necessity.[20] Thus, exacting procedural safeguards are applied when the government seeks removal.

The law requires CPS to obtain a court order authorizing removal of a child. The only exception is when CPS determines that there is an imminent danger of serious injury to the children's life or health and the risk of harm is so immediate that there is no time to obtain a court order.[21] The court must then hold a hearing prior to continuing the removal made without court order.[22] CPS also may file ex parte but must give the mother notice of its intention to do so and, again, a hearing must be held. Upon any application for removal, the court must determine whether reasonable efforts were made to eliminate the need for removal or, if such efforts were not made, whether the lack of such efforts was appropriate under the circumstances and whether an order of protection would ameliorate the danger.[23] At the conclusion of the hearing, the court may decline to order

removal or issue a "remand" order, i.e., an order placing or continuing the child in CPS custody for a period of a few days until the neglect petition is served. Children must be placed with relatives if possible.[24]

A mother may challenge a removal through what is commonly known as a "1028 hearing," named after the section of the Family Court Act which provides for it.[25] She may file a Demand for Return of Child (which causes the scheduling of a hearing) even before CPS commences a proceeding. If the attorney has been retained after the removal but before the next court date, the attorney may file for a hearing and the court date will be advanced. The hearing takes priority over all other matters in the Family Court, must occur within three days, and cannot be adjourned without consent. Because the standard for continued placement in foster care is "imminent danger," a mother has a right to seek a 1028 hearing at any point prior to disposition, even during fact-finding, if imminent danger no longer exists. A parent does not waive the right to a hearing merely by declining to exercise that right at the commencement of the case.

The FCA § 1028 Hearing

The attorney must weigh whether and when to request to a 1028 hearing. Although those decisions will depend on the facts of the case, requesting a 1028 hearing while a case is newly before the court is often best. The request emphasizes the serious nature of removal of a child and causes an immediate conference about the case. The request itself may result in the return of the child. Further, even if the child is not returned as a result of a 1028 hearing, the hearing focuses the parties and the court on what steps CPS and the mother must take so the child can be returned as soon as possible. Reasonable efforts by CPS virtually always can eliminate danger, but such efforts can only be ordered by the Family Court when the case is before it. In challenging removal the attorney must focus not only on the issues of "imminent danger" but also on "best interests of the child." The court is required to weigh any risk to the child against any trauma or damage to the child from being removed from his/her home.[26]

The battered mother's attorney must assure that this balancing of harms is explicitly considered. The Court of Appeals has recognized that "the psychological trauma of removal" is so great that sometimes it may "threaten destruction of the child"[27] and that "[i]f removed from the home of her primary care giver, a young child would be expected to have a 'normal grief reaction,' including crying, aggressiveness, eating or sleep disturbances, nightmares or night terrors, as well as temporary regression in developmental skills."[28] The attorney also

should challenge any attempt to categorize placement in foster care as the "safer course" or "erring on the side of safety." The Court of Appeals has rejected this standard, holding that it "should not be used to mask a dearth of evidence or as a watered-down impermissible presumption."[29]

Upon seeking a 1028 hearing, the attorney should obtain the case record and ask whether CPS intends to call any witnesses other than the caseworker. Since CPS has the burden to prove imminent risk, CPS will present its case first. The caseworker who investigated the complaint is likely to be the only witness since hearsay is admissible. Upon the conclusion of the petitioner's case, the attorney may make an oral motion to deny the removal petition if CPS does not meet its three-prong burden of showing imminent danger of harm; that removal is in the best interests of the child; and, that no reasonable efforts will ameliorate the danger. If that motion is denied, the attorney must consider what evidence and witnesses to present on the mother's case. Documentary evidence of safety and best interests should be submitted. Witnesses may include a therapist, doctor, clergy, or others with knowledge of the mother and child's safety and well-being.

An attorney must consider whether the mother should testify. If the mother does not testify, CPS is likely to ask that a negative inference be drawn. Whether the mother testifies will depend on the facts and circumstances, the strength of the case without her testimony, how the mother will present as a witness and the judge before whom the application is being heard. The downside of having the mother testify is that CPS is likely to focus on past violence rather than current safety. The attorney should object to that line of questioning.

At the conclusion of the hearing, the court will either return the child to the mother (referred to as a "parole"), continue the child's remand in foster care or order the direct placement of the child with a relative or other person. All parties have the right to an immediate appeal of the decision. If the court orders the child to be returned, CPS does not have a legal basis for holding the child to complete its internal protocols such as a discharge medical examination. However, CPS may assert its right to an automatic stay of the return of the child until 5 p.m. the next business day after the day on which the order was issued.[30] If the court orders removal or continued removal, the mother's attorney also should consider seeking an immediate stay of the removal order from the Appellate Division.

If the mother does not prevail at the hearing, the attorney should ask CPS, the court and, where applicable, the Law Guardian, to articulate why they believe that the child remains in "imminent danger" and how to eliminate the hurdles to reunification. When services are identified, the attorney should seek a court order mandating CPS to provide them as well as an order providing for frequent visitation under the least restrictive circumstances.

Non-Respondent Mothers

CPS may file a neglect petition against the abuser exclusively, without naming the mother. The non-respondent mother will be notified of the proceeding against the abuser and has a right to appear as an interested-party intervenor and to participate in all arguments, fact-finding and dispositional hearings insofar as they affect the custody and well-being of the child.[31]

Participants in a child welfare proceeding involving domestic violence tend to categorize a non-respondent mother as "cooperative" or "uncooperative," but the reality of the non-respondent mother's involvement in the case is not so simply defined. An allegedly uncooperative mother is frequently nothing more than a mother who has her own position on what is necessary for the protection of herself and her child, a position that is based on the reality of her daily life and her intimate knowledge of the habits of the abuser. The attorney may need to remind CPS that the goal is ensuring safety of the child and that a neglect prosecution against the abuser may undermine that goal.

A battered mother also should be encouraged to take advantage of the protections offered to her in a neglect proceeding against the abuser. CPS will take responsibility for arranging safe visitation between the abuser and the child, thereby relieving her of this difficult task. CPS has the power to obtain an order of protection on behalf of the mother and child including exclusion of the abuser from the home, in some instances until the child's eighteenth birthday.[32] A neglect finding against the abuser may be used in custody or visitation proceedings that occur after CPS ceases its involvement with the family.

A non-respondent mother must decide whether she should file separate custody or family offense petitions. Since the non-respondent mother has the right to participate in the neglect proceeding, these petitions may complicate and delay the case procedurally and may offer her no greater relief. On the other hand, the other proceedings assure that the mother can assert her right to seek independent and continuing relief beyond what CPS pursues and guarantee that, if a neglect finding is not entered, the court continues to have jurisdiction over the issues of visitation and protection. If the mother files her own custody or family offense petitions, she should seek to have them consolidated with the dispositional phase of the child welfare case.

If the battered mother is a non-respondent in a neglect case against the abuser, the attorney usually will not put on a case at trial but rather will provide relevant evidence through cross-examination or at disposition. However, CPS is likely to call the non-respondent mother to testify. The attorney should prepare her to testify and may even offer proposed questions to the CPS attorney.

Respondent Mothers

A child neglect proceeding may not be maintained against a non-offending battered mother solely or primarily on the grounds that her child was exposed to domestic violence.[33] As the law shifts away from holding battered mothers responsible for the violence perpetrated against them, cases in which a battered mother is named as a respondent are more likely to include allegations in addition to, or instead of, domestic violence. An attorney should be alert to whether other issues are a pretext for an unlawful prosecution based on domestic violence.

When CPS identifies other issues, such as alleged drug use or mental illness, as the basis for the removal or neglect charges, the attorney must be vigilant in ensuring that domestic violence is not brought in through the back door at trial to imply maternal deficiency. Further, throughout any neglect case involving allegations of domestic violence, the attorney must insist upon distinguishing between the behavior of the battered parent and that of the abusive parent. The petitioner bears the burden of proof to show by a preponderance of the evidence that the parent has neglected her child as defined by law.[34] The Family Court Act defines a neglected child as, among other things, a child:

> whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, . . . or by any other acts of a similarly serious nature requiring the aid of the court . . . .[35]

With regard to alleged emotional harm, the standard of impairment for a finding of neglect is "substantially diminished psychological or intellectual functioning."[36] There must be proof of serious harm or potential harm, and the harm must be "near or impending, not merely possible."[37] Further, any impairment to a child "must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child."[38] The statutory standard is minimum degree of care, "not maximum, not best, not ideal."[39] Thus, in domestic violence cases, as in other neglect cases, a court must consider both whether the child suffered harm or risk of harm *and* whether the domestic violence victim exercised "a minimum degree of care. . . under the circumstances then and there existing." The petitioner, usually CPS, also is bound to show a causal link between the two.

Pre-Trial Practice

Aggressive litigation forces all parties and the court to focus on the case more intently and may result in moving it along more quickly. Immediately upon being retained, the attorney should serve a Notice to Produce and a Demand for a Witness List upon CPS. If the case record is provided early in the case, the attorney must see to it that she receives updated records as the case progresses. A non-respondent parent also is entitled to discovery and, at minimum, the attorney should request the case record. If discovery is not provided, the attorney may make a motion to compel.

The attorney also should consider filing a Demand for a Bill of Particulars. The mother is entitled to know when and where the incidents are alleged to have occurred, and under what circumstances. In particular, in cases in which CPS argues that the battered mother was "offered services" and "failed to cooperate," CPS must identify what services were allegedly offered and how they would have contributed to the safety of the child.[40]

If there is a foster care or preventive services agency involved, the attorney also should subpoena its records and interview the foster care worker. The foster care agency is not represented by CPS counsel and may be contacted directly, although the agency may have internal policies that prohibit the caseworker from speaking to a parent's attorney.

The attorney also should consider filing a motion to dismiss all or some of the neglect charges, especially those related to the domestic violence. Although only the Court of Appeals decision in *Nicholson* is binding on state courts, the federal *Nicholson* decision also contains an excellent discussion of the issues at hand in child welfare cases involving domestic violence. The attorney also should consider filing a motion under the Family Court Act on the grounds that the court's "aid is not required on the record before it."[41] Since the intent and purpose of the Family Court Act is not to punish but rather "to help protect children,"[42] it follows that if the child is safe there is no need to expend judicial resources on the family.

The attorney also should consider whether to seek appointment of a social worker for the mother if she is indigent to assist her in navigating the social services systems with which she comes in contact and to assist the attorney in assessing the issues in the case.[43] If appropriate, the social worker also may be a fact witness at trial.

The attorney should be creative in locating expert witnesses: local domestic violence agencies or shelters frequently employ or have access to dedicated professionals who will serve as experts at no charge. The expert witness should not necessarily interview the mother, but should review the pleadings, case record and other documentary evidence and, when possible, be present for the mother's testimony. The expert witness can testify about domestic violence generally and can assess whether the safety measures employed by the mother were reasonable and rose to a statutory "minimum degree of care" as defined in *Nicholson*.

Settlement

A non-respondent mother has an interest in the settlement of a neglect case against the abuser. The attorney should ensure that no settlement is offered or agreed upon without input by the non-respondent mother. In particular, any settlement should include an order of protection for the non-respondent mother as custodial parent.

With regard to a respondent mother, when a child is safe and the abuser is no longer in the picture, the attorney should urge CPS to consent to dismissal because the aid of the court is no longer required[44] or to withdraw the petition outright. Again, the attorney must remind CPS that the purpose of the Family Court Act is protection, not punishment. More likely, if there is a pre-trial settlement offer it will take the form of an adjournment in contemplation of dismissal (ACD). With an ACD, the mother makes no admission of neglect but agrees to submit to certain terms including a period of supervision by CPS that is likely to range from three months to the maximum permissible period of a year. During the period of the ACD, the mother may be required to continue counseling, enforce an order of protection or cooperate with other services. She may be required to testify against the abuser. If the mother complies with the supervision, there will be no further court appearances and, at the end of the ACD period, the petition will be dismissed. If CPS alleges that she has not complied with the terms of the ACD, CPS may file a violation petition, prove that the terms of the ACD were violated, and reinstate the neglect case. While an ACD is not an ideal outcome, it may be a practical way to avoid protracted litigation. As always, the decision is the mother's to make.

CPS also may offer to accept what is called an "admission."[45] With an admission, the mother does not actually admit to neglect but rather agrees to submit to the jurisdiction of the court and to the entry of a neglect finding. An admission is appropriate where the facts alleged constitute neglect under existing

case law *and* the facts are likely to be proven. This settlement may be advisable if there is a pending criminal case against the mother because she will not be admitting facts that could be used against her in criminal court or if the attorney believes that the evidence at trial may lead to a harsher disposition. An admission, like an Adjournment in Contemplation of Dismissal, will cause the case to progress to disposition more quickly.

Trial

The attorney should review carefully the rules of evidence in a child protective proceeding as set forth in the statute.[46] In particular, although most evidence at a fact-finding hearing must be competent, hearsay statements of a child are admissible and may form the basis for an abuse or neglect finding if they are corroborated.

As prosecutor, CPS presents its case first. It is imperative that the attorney carefully assess each element of the case to ensure that CPS and the court do not rest on improper presumptions, such as the presumption that the mother failed to exercise a minimum degree of care merely because she did not separate from the abuser or that a child suffered emotional harm from exposure to the domestic violence. With respect to allegations of emotional harm in particular, it is important to restrict the caseworker's testimony to her observations unless she otherwise qualifies as a mental health expert.

If CPS makes out a prima facie case, the burden shifts to the respondent to defeat the charge of neglect. Usually, the respondent will testify along with any other fact witnesses. It is imperative that a battered mother testify about her help-seeking efforts and safety decisions. Where appropriate, the attorney should present an expert witness to discuss the reasonableness of her behavior under the circumstances existing at the time. The expert witness also should be used to disprove impairment and causation, the other statutory requirements for a finding of neglect. The expert can challenge the notion that all children are affected in the same way from exposure to domestic violence and that all impairment is attributable to exposure to the domestic violence. The expert can testify about the mother's imperfect options and, if impairment is established, the unlikelihood that it was she who caused it. An attorney also may challenge assumptions about impairment through reference to established literature.[47]

The Law Guardian typically presents her case last. Oral closing statements are the norm, although an attorney may request an opportunity to submit a written

summation if the issues are complicated or the law unsettled. After summation, it is common for the court to rule from the bench. If the neglect petition is dismissed, CPS no longer has the authority to be involved with the family. CPS may try to continue its involvement in the family's lives; however, if the neglect case has been dismissed the mother is justified in refusing further interaction with CPS. If a finding of neglect is made, the court will either proceed directly to disposition or adjourn the case for a separate dispositional hearing.

Disposition

There are a range of dispositional options. The child may be returned to the respondent parent, placed or continued in foster care, or released to the custody of the non-respondent parent or another person. The court is likely to impose a period of CPS supervision of up to a year and to set forth terms and conditions, such as counseling and enforcement of an order of protection against the abuser. For a non-respondent mother, a finding against the abuser may mean that CPS remains in her child's life, for example to arrange visitation. The non-respondent mother must cooperate with CPS as the agency monitors the child's relationship with the abusive parent, but cannot herself be supervised or ordered to participate in services.

Hearsay is admissible at disposition and evidence that the attorney may not have been able to authenticate at trial may be offered. In addition, post-petition developments should be explored when helpful. For an attorney representing a non-respondent mother, disposition offers an opportunity to obtain custody, supervised visitation and an order of protection against the abuser.

At every stage of a child protective proceeding involving domestic violence, as in all child welfare cases, an attorney must consistently emphasize that the child is, and will be, safe in the mother's care. At the same time, the attorney representing the battered mother in a child welfare case also must present evidence, arguments and expert testimony about the series of complex choices that a battered mother makes in trying to assure the safety of herself and her child and about the reality of her life, her resources and her options.

Notes

Portions of this article are modified from Lauren Shapiro and Linda Holmes, *Representing Domestic Violence Victims in Neglect Proceedings*, Lawyer's Manual on Domestic Violence: Representing the Victim, eds Julie A. Domonkos and Jill Laurie Goodman (3d ed 2000) and the brief filed with the New York State Court of Appeals in *Nicholson v Scoppetta*, 3 NY3d 357 (2004), prepared by Jill Zuccardy, Carolyn Kubitschek and David Lansner.

1. 3 NY3d 357 (2004).
2. *In re Lonell J.*, 242 AD2d 58 (1st Dept 1998).
3. *Matter of Tali W.*, 299 AD2d 413 (2d Dept 2002); *In re H/R Children*, 302 AD2d 288 (1st Dept 2003); *Matter of Dominique A.*, 307 AD2d 888 (1st Dept 2003). *But see e.g. In re Deandre T.*, 253 AD2d 497 (2d Dept 1998); *Matter of Michael G.*, 300 AD2d 1144 (4th Dept. 2002).
4. 3 NY3d 357 (2004).
5. The New York Court of Appeals chose to denominate the case *Nicholson v Scoppetta* while the federal court's decisions were issued under the names *Nicholson v Williams* and *In re Nicholson*.
6. 203 F Supp 2d 153 (EDNY 2002).
7. In New York City, the preliminary injunction in *Nicholson* provided, among other things, that ACS may not remove the child from the battered mother solely or primarily because of domestic violence except under very limited circumstances. *In re Nicholson*, 181 F Supp 2d 182 (EDNY 2002). Although the injunction expired on December 31, 2004, ACS is bound by the principles of law underlying the injunction and an attorney who suspects that ACS has violated the law as set forth in *Nicholson* should contact class counsel immediately.
8. *E.g. Matter of Rebecca KK*, 19 AD 3d 763 (3d Dept 2005); *Matter of Eryck N*, 17 AD 3d 723 (3d Dept 2005); *Matter of Daniel GG*, 17 A.D.2d 722 (3d Dept 2005); *Matter of Ravern H*, 15 A.D.2d 991 (4th Dept 2005). *But see Matter of Paul U*, 12 AD 3d 969 (3d Dept 2005) (neglect finding upheld because respondent placed child with father despite orders of protection).
9. *E.g. Matter of Richard T*, 12 AD 3d 986 (3d Dept 2004); *Matter of Karissa NN*, 19 AD 3d 766 (3d Dept 2005); *Matter of Michael WW*, 20 AD 3d 609 (3d Dept 2005).

10. Magen, *In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect*, 4 Child Maltreatment No. 2, at 127 (May 1999).
11. Laws of 1996, ch 85 §§1, 8.
12. *People v Alexander*, 97 NY2d 482, 487 n 4 (2002).
13. SCR Intake Procedure Manual, § F at 53.
14. Social Services Law § 424(6).
15. *See* Social Services Law § 424(10).
16. Social Services Law § 412 (12).
17. Social Services Law § 422.
18. *See In re H/R Children*, 302 AD2d 288 (1st Dept 2003).
19. *Matter of Marie B.*, 62 NY2d 352, 358 (1984).
20. *See Ronald FF. v Cindy GG.*, 70 NY2d 141 (1987); *Spence-Chapin Adoption Service v Polk*, 29 NY2d 196, 204 (1971).
21. Family Court Act § 1024; *see also Tenenbaum v Williams*, 193 F3d 581 (2d Cir 1999).
22. Family Court Act § 1027(a).
23. Family Court Act §§ 1022(a),1027(b)(i).
24. Family Court Act § 1017.
25. If the mother appears on the day that removal is requested rather than after removal has occurred, the same hearing is held under Family Court Act § 1027 and is called a "1027 hearing." A hearing on a removal application prior to the filing of the petition is held under Family Court Act § 1022.
26. *Nicholson v Scoppetta*, 3 NY3d 357 (2004).
27. *Bennett v Jeffreys*, 40 NY2d 543, 550 (1976).
28. *John B. v Niagara County Department of Social Services*, 289 AD2d 1090, 1092 (4th Dept 2001).
29. *Nicholson v Scoppetta*, 3 NY3d 357 (2004).
30. Family Court Act § 1112(b).
31. Family Court Act § 1035 (d).

32. Pursuant to Family Court Act § 1056, the Family Court may issue an order of protection against a person who is not the father of subject child, until the child's eighteenth birthday. Some courts also have permitted or upheld orders of that duration even if the respondent is the biological father. *See Matter of A.G.*, 253 AD2d 318 (1st Dept 1999); *Matter of Victoria H.*, 255 AD2d 442 (2d Dept 1998); *Matter of CSS o/b/o Kanisha W.*, 233 AD2d 325 (2d Dept 1996).
33. *Nicholson v Scoppetta*, 3 NY3d 357 (2004).
34. Family Court Act § 1046(b)(i).
35. Family Court Act § 1012(f)(i)(B).
36. Family Court Act § 1012(h).
37. *Nicholson v Scoppetta*, 3 NY3d 357 (2004).
38. Family Court Act § 1012(h).
39. *Nicholson v Scoppetta*, 3 NY3d 357 (2004).
40. *See In re H/R Children*, 302 AD2d 288 (1st Dept 2003); *Nicholson v Williams*, 203 F Supp 2d 153 (EDNY 2003).
41. Family Court Act § 1051(c).
42. Family Court Act § 1011.
43. County Law § 722-c.
44. Family Court Act § 1051(c).
45. Family Court Act § 1051(a).
46. Family Court Act § 1046.
47. The Greenbook, http://www.thegreenbook.info/documents/greenbook.pdf, and the Minnesota Center Against Violence and Abuse, http://www.mincava.umn.edu/, are excellent starting points.

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Moving On: UCCJEA, The Hague Convention, and Relocation

by Liberty Aldrich and Lauren Shapiro

This article is a practical guide for attorneys litigating custody cases in New York State in which the client, typically the mother of the child or children, is a victim of abuse and has fled either to or from New York. Specifically, this article addresses several questions commonly asked by clients:

- Can I leave New York with my children and, if so, what happens if the abuser files a custody case in New York?
- Can I file for custody in New York even though I recently moved here from another state?
- Could I or my abuser be charged with kidnapping if one of us leaves with the child without the court's permission? and
- What do I do if he takes the child out of the country?

These are complicated areas of practice and each case has to be carefully analyzed on its own particular facts. To help advocates begin that analysis, the first part of this article, "Applicable Law," provides a brief synopsis of each of the critical applicable laws, including the the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Hague Convention and the New York State Penal Code's kidnapping statue. "Escaping Violence" addresses some common scenarios and covers critical paternity issues and New York's relocation case law.

Applicable Law

New York State Custody Law/Uniform Child Custody Jurisdiction and Enforcement Act[1]

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) governs interstate custody cases.[2] New York's Act is based on a model adopted by the Uniform Commissioners in 1997. As of May 2004, 35 states had adopted some form of the Act.[3]

New York's UCCJEA explicitly addresses domestic violence issues. While considerably more complicated in practice, the Act states that its legislative intent is to improve protections for abused parents and children. It states that the Act is intended:

> to provide an effective mechanism to obtain and enforce orders of custody and visitation across state lines and to do so in a manner that ensures that the safety of the children is paramount and that victims of domestic violence and child abuse are protected. It is further the intent of the legislature that this article be construed so as to ensure that custody and visitation by perpetrators of domestic violence or homicide of a parent, legal custodian, legal guardian, sibling, half-sibling or step sibling of a child is restricted.[4]

Since the UCCJEA is central to understanding your clients' options in interstate custody cases, the most important provisions are outlined here as a preface to a fuller discussion on legal strategies for victims fleeing domestic violence. In becoming more familiar with this area of the law, attorneys should also review the UCCJEA model petitions and orders that were developed by the New York State Office of Court Administration (OCA) and are posted on the OCA website.[5] The National Center on Full Faith and Credit of the Pennsylvania Coalition Against Domestic Violence is an excellent resource on interstate custody issues.[6]

Bases for New York's Jurisdiction: Initial Custody Proceeding[7]

The central issue in interstate custody cases is: which court should decide? The UCCJEA answers that the court in the child's "home state" has jurisdiction to decide custody issues. New York's UCCJEA (and that of the other states that have adopted the model code's formulation) defines the term "home state" as the state where the child lived for six consecutive months before a custody petition

was filed. There can only be one home state, so if the child moved out of New York 5.5 months ago, but lived here for six consecutive months before that, then New York is the home state. The UCCJEA and comments repeatedly emphasize that in initial custody determinations, i.e., cases in which there has never been a custody order from a court, the home state determination is controlling.

But what if the child has moved around so much that there is no clear home state? What if the child had been overseas prior to the court filing? What if the child had lived in another state until 5.5 months ago but his entire extended family is in New York and has always been in New York? The UCCJEA recognizes these possibilities. If no state "claims" this family, then even if New York cannot technically qualify as the home state, it may still have jurisdiction to make the initial custody determination. In these cases, the court will consider, first, whether another state can or is claiming to be the home state. If not, then the court will ask whether the child and at least one parent have "significant connections" with New York and substantial evidence is available in this state concerning the child's care, protection, training and personal relationships. If another court clearly has "home state" priority but declines to exercise it because it determines that New York is more appropriate, then New York can accept jurisdiction.[8]

Continuing Jurisdiction[9]

The UCCJEA helps clarify not only which court should make the initial custody determination, but also which state should hear any modifications to an initial custody determination. Essentially, the UCCJEA states that the court that issued the initial custody decision gets a right of first refusal over the case regardless of how long ago the order was entered: if that court, whether it is a New York Court or another state, decides that it is no longer the appropriate forum to hear the case because one or both the parents and the child no longer live there, then another state is free to modify the order, but, in general, courts will want to retain jurisdiction over their own orders. In *Vernon v Vernon*,[10] for example, the Court of Appeals held that New York retained continuing jurisdiction over modifications of a New York divorce custody judgment even though the mother and child had been living in Wyoming for ten years. This heavily-weighted deference to the original court can prove very problematic for domestic violence victims who are seeking protection in a new jurisdiction.

Temporary Emergency Jurisdiction[11]

UCCJEA's provision on temporary emergency jurisdiction is one of the major innovations of the UCCJEA and key to litigating interstate custody cases that involve domestic violence. The UCCJEA, as opposed to its predecessor, the

UCCJA, took a step forward in providing safety for domestic violence victims by clarifying that judges in New York may assert temporary emergency jurisdiction not only when there is a risk to the child but also when there is a risk to the mother. Specifically, it states that the court may take jurisdiction if the child has been abandoned or jurisdiction is necessary to protect the child, a sibling or parent of the child.

While this is a big plus for domestic violence victims, the UCCJEA is clear that while the New York court may assert jurisdiction and issue a custody order, it is only temporary. The jurisdiction and any order last only until an order is obtained from the state having appropriate home state jurisdiction. If the New York court is informed that a custody proceeding has been filed in another state, as attorneys are required to do, the court must "immediately communicate with the other court" about which state should take the case. What happens if there is no other case? If a New York court issues a temporary custody order, that determination may become final if the temporary custody order so provides and this state becomes the child's home state or the other state declines jurisdiction.[12] The order must specify a period that the court considers adequate to allow the person to obtain an order from the state having jurisdiction.[13] If a child is in imminent risk of harm, then the order shall remain in effect until a court having jurisdiction has taken steps to insure the child's protection.

Inconvenient Forum[14]

Even if it has home state jurisdiction, a court in New York may decline to exercise jurisdiction if it determines that it is an inconvenient forum and that a court of another state is a more appropriate forum. In making this determination, the court considers various statutory factors, including:

- whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future;
- which state could best protect the parties and the child;
- the length of time the child has resided outside the state;
- the distance between the two courts;
- the relative financial circumstances of the parties;
- agreements regarding jurisdiction;
- the nature and location of evidence and witnesses;
- the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

- the familiarity of the court of each state with the facts and issues in the pending litigation.

If the New York court decides it is an inconvenient forum and another forum is more appropriate, the court can stay the proceeding on the condition that a child custody proceeding is started promptly in another state.[15]

Communication Between Courts[16]

The New York court may communicate with a court in another state about jurisdiction. This is generally done through a telephone conference with the two judges. The court may allow the parties to participate in the communication. If not, the parties must be given the opportunity to present facts and arguments before a decision is made. Most importantly, a record must be made of the communication, and the parties have a right to the record.

Modification of Custody Orders[17]

Generally, a court order of custody or visitation from another state may only be modified by that other state if neither the child nor the parents live there. New York also may modify a custody order from another state if New York has either home state or significant connection jurisdiction and the state that issued the order decides that it no longer has jurisdiction or that New York would be a more convenient forum.

Unclean Hands[18]

New York's UCCJEA directs courts to decline jurisdiction if the parent trying to invoke jurisdiction has "engaged in unjustifiable conduct," but it protects domestic violence victims who flee with a child. The statute says that a removal of the child from the jurisdiction should not be considered as a factor weighing against the petitioner, "if there is evidence that the taking or retention ... was to protect the petitioner from domestic violence ..."[19] This is consistent with the model UCCJEA, which states that "domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal."[20]

Information to Be Submitted to Court[21]

New York law requires each party in a custody proceeding to file, under oath, certain information, including the child's present address and the names and addresses of the persons with whom the child has lived within the past five years, but domestic violence victims may ask for confidentiality. If the person seeking custody lives or has lived in a domestic violence shelter, the address cannot be revealed and the law provides for the designation of an agent for service of process.

Parental Kidnapping Prevention Act of 1980

The Parental Kidnapping Prevention Act (PKPA)[22] is a federal law passed in 1980 in response to the problem of parents who flee a state jurisdiction to avoid custody disputes. It establishes a national system for locating the parents and children and national standards for deciding these disputes. One of the principle reasons for enacting the UCCJEA was to conform New York law more closely to the PKPA. Specifically, the UCCJEA reinforces the PKPA's handling of emergency jurisdiction and continuing jurisdiction. Now that New York has enacted the UCCJEA, state and federal law are largely consistent.

The PKPA remains useful in interstate custody cases principally to resolve conflicts with the minority of states that have not yet adopted the UCCJEA. The PKPA was amended by the Federal Violence Against Women Act (2000), which explicitly extended full faith and credit of orders of protection, including custody orders within orders of protection, issued by other states, ensuring that courts could not relitigate domestic violence findings.

Criminal Charges/Kidnapping and Custodial Interference

Many abusers threaten to bring criminal charges against their victims, and many victims of domestic violence are concerned about the criminal consequences of fleeing with their children. While such charges are rare and the threats on the part of the abuser may be part of a pattern of control, it is important to know and advise clients of the possible criminal consequences of leaving the jurisdiction.

It is extremely unlikely that your client would be charged with kidnapping. A person is guilty of kidnapping in the second degree when he or she abducts another person,[23] but it is an affirmative defense to kidnapping that "the defendant was a relative of the person abducted, and his sole purpose was to assume control of such person."[24]

The charge of custodial interference is designed to fill the gap created by this affirmative defense. It is possible, therefore, that litigants in a custody case could face a criminal charge of custodial interference. Custodial interference in the second degree, a class A misdemeanor, is established by showing that a relative of a child under 16 acted with intent to hold that child permanently or for a protracted period and knowingly without right took the child from his or her lawful custodian.[25] Custodial interference in the first degree, a class E felony, includes all elements of the second-degree offense plus the added elements that the perpetrator acted with intent to remove the child from the state and removed the child from the state *or* exposed the child to risk of harm.[26]

One issue that arises is whether one can "knowingly without right" take a child from his or her lawful custodian if there is no custody order and both parents have rights to the child established through marriage or paternity. Unfortunately, there is no clear answer to this question. Courts have given a broad and flexible interpretation of what is sufficient to constitute a custody order for the purposes of a charge of custodial interference. In *People v Morel*,[27] the Appellate Division upheld an indictment of custodial interference in the first degree when the parties had agreed in open court that the mother was to have exclusive physical custody of the child and that the terms of the stipulation had made the mother the "lawful custodian."[28] In *People v Lawrow*,[29] a trial court refused to dismiss a charge of custodial interference in the second degree although the defendant-parent had not been served with a custody order. However, the court held that the State bears the burden to prove beyond a reasonable doubt that the defendant had knowledge of the custody order even if he had not been served.

Statues Governing International Issues

Custody cases frequently cross international borders. When they do, the same issues that have dogged interstate cases cause substantial controversy in international law:

- When should a particular country take jurisdiction over a custody case?
- What should the court do to protect victims of abuse? and
- When may one country modify the decision of another country's custody order?

UCCJEA

The UCCJEA explicitly authorizes New York Courts to analyze international cases in the same way that it treats interstate cases. Section 75-d states that "a court of this state shall treat a foreign country as if it were a state of the US for the purpose of applying this article." Indeed, New York courts have looked first to the UCCJEA when considering international custody cases. Courts therefore ask the same questions when determining international jurisdiction as they do in interstate cases: Where has the child lived in the last six months? Is there an existing court order? Is there an emergency that justifies asserting temporary jurisdiction?

Although the questions are the same, the application of the home state rule can be even more problematic in international cases than in interstate cases and the stakes can be even higher. Should the home state rule apply even if the child

or children were taken without the parent's consent? Should New York courts accept the home state priority for countries that routinely rule against women and fail to take domestic violence into account? These questions and others frequently arise where children are taken out of the country by the abusive parent.

There are several arguments that advocates can make in these cases. If the children have been taken out of the country, advocates first need to persuade the court that the foreign jurisdiction does not have "home state" priority. Advocates may be able to argue that the absence is "temporary" and should not be included within the six month time period necessary to establish home state priority in the foreign jurisdiction. New York courts have looked to the "totality of the circumstances" to determine whether or not the absence should be considered temporary,[30] including the intent of the parties.[31]

Additionally, advocates should be prepared to argue that the foreign jurisdiction should not be deemed the home state because it does not provide conventional human rights protections for women in litigation. Allowing a country that simply will not credit women's testimony to take jurisdiction would circumvent established public policy. Additionally, if the children are living in the foreign jurisdiction with someone other than a parent, i.e. the child's grandparents or anyone without a custody order, advocates should look to the definition section of the UCCJEA to argue that that jurisdiction cannot be the home state because a home state is one in which "the child lived with a parent or a person acting as a parent for at least six consecutive months."[32]

If the children are in New York but there may be a foreign home state, advocates should similarly argue that it is not in the children's interest for New York to defer to that jurisdiction if that jurisdiction has arguably waived its claim. In *Hector G. v Josefina P.*,[33] the Bronx Supreme Court based its decision to assume jurisdiction and modify an existing custody order from the Dominican Republic on the UCCJEA provisions concerning appropriate forum and its concern for protecting victims of domestic abuse.

Hague Convention

Although New York courts will generally look to the UCCJEA to determine jurisdiction, if your client has fled to New York from a country outside the United States or is considering fleeing to another country with her children, provisions of the Hague Convention on the Civil Aspects of Child Abduction (Hague Convention) will also be relevant.[34] Additionally, the Hague Convention is important if a mother fears the father of her children and will flee the United States with the children or has fled. Of course, the Convention only applies to countries that have ratified it, which many have not.

The Hague Convention was originally adopted by member nations of the Hague Conference on Private International Law to address the growing problem of international removal or retention of children by one of their parents.[35] The United States signed the Convention in 1981 and ratified it in 1988. Implementing legislation was enacted in the same year.[36]

The Hague Convention creates a mechanism for expeditiously locating and returning children who have been removed to a different country. The central idea of the Convention is analogous to the UCCJEA. It holds that any child who has been wrongfully removed from his or her country of habitual residence should be returned to the habitual residence and to the person petitioning for return. The concept of country of habitual residence — which is not defined in the Convention itself but through judicial interpretation — is similar to that of the home state. Removal or retention is defined as wrongful when it is in breach of a parent's custody rights under the law of the country of habitual residence.[37] There does not have to be a court order of custody for removal or retention to interfere with the other parent's custody rights and thus to be "wrongful" within the meaning of the Convention.

All signatories to the Hague Convention must establish a Central Authority responsible for locating children and assuring their return. The merits of any custody dispute will then be determined in the country of habitual residence. In the United States, the Central Authority is the State Department.

The Hague Convention offers some protection to abused mothers by creating certain exceptions to the requirement that a wrongfully removed child be returned. Article 13(b) provides that authorities in the state of refuge are not bound to order the return of the 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."

Although domestic violence certainly creates a risk of physical or psychological harm to the child (especially if violence has been directed against the child as well as against the mother), you will need strong evidence to make your case. The exception is narrowly construed and is not intended to be used as a vehicle for litigating the best interests of the child.[38] The person who invokes it has the burden of establishing the exception by clear and convincing evidence[39] — a higher standard than the usual civil, preponderance-of-the-evidence standard of proof. The risk must be a serious one and the harm must be "a great deal more than minimal."[40] Even if the exception applies, the United States court only has the discretion to order return of the child; it is not required to do so by the terms of the treaty.

Courts in New York and other states have applied the "grave risk" exception based on evidence of domestic violence. In *In Re Rodriguez*,[41] there was evidence of physical and psychological abuse of one of the two children and of the mother by the father; a psychologist testified that both children and the mother suffered from Post Traumatic Stress Disorder as a result of the father's actions. In *Blondin v Dubois*[42] the father frequently hit and threatened to kill the mother and one of the two children. In this case, too, there was expert testimony that both children suffered from psychological trauma and would be further traumatized if returned to France, the country from which the mother had fled.

In *Walsh v Walsh*[43] the First Circuit Court of Appeals went even further and held that evidence of spousal abuse was enough to trigger Article 13(b)'s grave risk exception, even without taking into consideration evidence that violence had been directed at the children, because the father had "demonstrated an uncontrollably violent temper." According to the court, the social science literature indicated that "serial spouse abusers are also likely to be child abusers," and the court added that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."[44] The court stated that it was fundamental error for the district court to discount "the grave risk of physical and psychological harm to children in cases of spousal abuse."[45]

International Parental Kidnaping Act

The rights of a client with children fleeing an abuser or a client fearing abduction of her children may also be affected by the federal international Parental Kidnapping Act. This law makes it a crime to remove a child from the US or retain a child outside the US with the intent to obstruct the lawful exercise of parental rights. Violators are subject to a fine and imprisonment up to three years. A parent fleeing an incident or pattern of domestic violence, however, may use the abuse as an affirmative defense to prosecution under this statute.

Escaping Violence: What to Consider When Advising Your Client

In New York State, courts assume, absent evidence to the contrary, that it is in the child's best interest to have a close relationship with both parents; therefore, relocating any distance from the other parent is generally discouraged. Although courts are obligated to consider proven domestic violence, you will find that this de facto presumption against relocation pervades New York

practice. This section is intended to help advocates for domestic violence victims negotiate these realities.

What to Consider if Your Client Wants to Leave New York

To protect your client's safety, it may be tempting to advise her just to leave with the children even without a court order. If your client is considering this option, the first thing you should determine is the father's legal status and whether there are any pending cases or prior court orders.

Has Paternity Been Established?

Whether paternity has been established is an important factor for victims to consider in deciding whether to seek a court order to relocate before leaving the jurisdiction. If paternity has been established, then the father has a right to seek custody and visitation of the children and the mother probably should not leave the jurisdiction without seeking a court order. There is less risk in leaving without a court order when paternity has not been established, but it is still not an easy decision. Although staying in the jurisdiction to obtain an order must always be weighed against dangers, before advising your client that she can freely leave, you should consider: the severity of the domestic violence, the age of the child, the nature of the relationship between the father and the child, and the amount of their contact. The closer and longer the relationship between the abuser — even if he is not legally the children's father — with the children, the greater the risk of leaving without a court order. In such a case, a court would be more likely to require the victim's return to New York. Keep in mind that even an unacknowledged father may file for paternity and custody or visitation. If he does this, your client still may have to come back to the jurisdiction.

Some clients may want the certainty of a custody order even though the father has not established paternity. Some clients may believe that the father will hunt them down and that they will need a custody order in hand. If a client decides she will not feel safe without the order and paternity has not been established, she will have to serve paternity and custody papers on the father. In general, it is advisable to obtain a court order where possible.

How Do I Know if Paternity Has Been Established?

Clients are often not sure whether or not paternity has been legally established. Paternity can be established in three ways: through marriage, an order of filiation, or a validly executed acknowledgment of paternity signed after July 1, 1993.

Marriage: Children born to a marriage are presumed to be the children of the marriage.[46] If your client is married to the child's father, then he has an equal right to custody of the child and no proof of paternity is required for him to seek visitation or custody. A child's birth father establishes paternity if he marries the mother, even after the birth of the child. If your client was married to someone other than the father at the time of the child's birth, the husband at the time of the birth is presumed to be the father of the child. Only a court order can overcome this presumption. The husband would have the right to seek custody, and the mother would have to prove he is not the father. The biological father would have to file for and prove paternity.

Order of Filiation: Either parent can file a petition in court to determine paternity.[47] A paternity petition can be filed in New York State if the mother, child, or putative father resides here, even if the child was not born in New York State.[48] Once paternity has been established, the court will enter an "order of filiation." If your client is or was ever on welfare, an order of filiation may have been entered without your client's knowledge because the Department of Social Services establishes paternity when filing for child support on behalf of the mother. Also, if your client is receiving child support pursuant to a court order, paternity has probably been established.

Acknowledgment of Paternity: An Acknowledgment of Paternity is signed in the hospital after the birth of a child and has the same force and effect as an order of filiation.[49] Your client may not remember whether an acknowledgment of paternity was signed. If the child was born after 1995, if the father was at the hospital during or shortly after the birth, and if his name is on the birth certificate, he probably signed an acknowledgment of paternity.

Paternity Has Been Established But There is No Court Order Concerning Custody

Although courts often find that domestic violence is a legitimate reason for taking children from the jurisdiction, domestic violence victims should be cautious about leaving New York if paternity has been established even if there is no custody or visitation order. The father could file a custody or visitation petition in New York even after a victim leaves the jurisdiction, and if he files within six months New York will almost certainly have home state jurisdiction. If she leaves without the father's consent and New York is the child's home state, the father may be able to obtain a writ of *habeas corpus* directing that she return the child to New York immediately. He will have a strong case for a writ if the parties were living together with the children prior to her departure or he was regularly visiting with the child.

If the father obtains a writ, even if he is an abuser, your client will be required to return to New York, but she will have an opportunity to be heard. You should be prepared to argue that she did not "wrongfully" deny him access to the child and that her conduct was not "unjustifiable."[50] You should document the domestic violence and establish that leaving was important for her and the child's safety. *Sheridan v Sheridan*[51] may be a helpful case. Although decided before the UCCJEA was passed, it held that there were exceptional circumstances, including domestic violence and economic necessity, warranting relocation of the mother with her child to Puerto Rico even though it was undisputed that the move would clearly deprive the father of "regular and meaningful visitation."[52]

If the father files for custody in New York after she flees but within six months, the first issue is whether your client wants to respond only in New York or whether she also wants to file for temporary emergency jurisdiction in her new location and ask that New York decline to exercise its home state priority. In most cases, your client would like to litigate in the refuge state for reasons of safety, travel, and cost considerations, but arguing that New York decline jurisdiction over the final custody decision will probably be a very tough sell. Additionally, it may be in your client's interest to litigate in New York where the law supports domestic violence victims and where she has an attorney.

In either case, you should ask the New York court to allow your client to retain temporary custody and to relocate immediately to her new location. Your success will largely depend on whether the court finds that the allegations of domestic violence are credible and that it is in the child's best interest to remain where he or she is currently living. New York courts have awarded custody to domestic violence victims in such cases, even if they have relocated without a court order.[53]

Although you may have an uphill battle, you can ask New York to decline to exercise its home state jurisdiction; the court can do so under the inconvenient forum provision of the UCCJEA.[54] The UCCJEA specifically delineates domestic violence as a factor for the court to consider in deciding whether or not to exercise jurisdiction.[55] Although decided under the UCCJA, the court in *Swain v Vogt*[56] declined to exercise jurisdiction when the mother was forced to flee New York due to violence. The Court held that "[i]t is axiomatic that Family Court, having not yet made a decree concerning custody in this case, may decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make a custody determination."[57]

If, on the other hand, your client has decided to seek a court order allowing her to relocate before leaving New York, she should file a petition for custody and permission to relocate. As explained more fully in the discussion of New York's relocation case law below, you should include as many supporting affidavits and exhibits documenting the abuse and reasons for relocation as possible.

If your client already has been served with a custody petition, she is required to appear in court, and the court could issue a warrant if she does not appear. You should read the petition carefully along with any court orders to determine whether the court has directed your client to remain in the jurisdiction until the court appearance. If not, she may leave until the court date but should be prepared to return.

Relocation Cases: New York State Order of Custody/ Visitation in Place

Many domestic violence victims feel trapped by the law into staying where their abusers can harass them. Domestic violence often does not cease once the parties have separated and an order of custody and visitation has been issued. In many cases, the violence escalates, and harassment during pick-ups and drop-offs for visitation is common. Relocation law and the penalties for failing to follow court orders were not designed to protect women and children at risk of violence, yet courts expect their orders to be followed and a victim of abuse who does not follow them risks a finding of contempt, loss of custody, or even criminal penalties. Additionally, interstate custody laws were designed to prevent a parent from moving to a new state and relitigating issues even if the move was intended to escape abuse.[58]

If a court order granting your client custody already exists, it is generally necessary to file a petition to modify the visitation order and to seek permission to relocate prior to leaving the state. You should review the original order carefully. Should your client fail to seek the court's approval, she may be violating the court order and could be found in contempt. If there is a visitation order in place, you should strongly advise your client to seek court permission before relocating.

Relocation cases are governed by case law, which applies to both inter and intra-state cases. In considering a petition for relocation, the court must determine whether relocation is in the best interest of the child under the totality of the circumstances. *Tropea v Tropea*,[59] the Court of Appeals' seminal relocation case, held that the court should consider, among other factors, the existing relationship between the children and the non-custodial parent, any potential damage to that relationship if relocation is allowed, the reasons given for

relocation, and whether a change in custody would be in the child's best interest. A history and/or threat of domestic violence has a bearing on all of these factors. Domestic violence influences the nature and quality of the relationship between the abuser and the children; it is also a compelling reason for seeking to relocate.

New York courts have allowed a parent to relocate when the parent is a victim of domestic violence. In *Bodrato v Biggs*,[60] the father's physical assault on the petitioner was a factor in the court's decision to modify a joint custody order, grant sole legal and physical custody to petitioner and allow her to relocate to New Jersey with the parties' two children. In *Spencer v Small*,[61] the lower court's decision to grant sole custody to the mother, enabling her to move from New York to Florida, was upheld in light of the father's history of domestic violence against the mother. In *Hilton v Hilton*,[62] a court's decision to award custody of the parties' children to the mother despite her relocation to a new home 400 miles from the father's residence was upheld because the father had a history of acts and threats of violence against the mother.[63]

In deciding relocation cases, courts have also acknowledged the negative impact on the children resulting from continued or exacerbated hostility between the custodial and non-custodial parent.[64]

Because relocation cases involve the best interests of the children, relocation petitions should include more than information about the domestic violence in the family. Courts also consider the potential economic benefits to the parent and children in relocating.[65] Thus, economic factors should be highlighted in the petition. The more specific your client can be about her plans in the new jurisdiction, the better; a general intention to move is not sufficient.[66] Moving for family support is also an important factor in relocation cases, so if your client is moving to be closer to her family that should be fully presented to the court.[67]

Obtaining an order of relocation may be especially challenging if your client wants the father to have limited or supervised visitation. Courts generally order longer visitation periods if the custodial parent is allowed to relocate, and visitation for more than one hour is not generally available from supervised visitation programs. One solution is to find a family member who is willing to supervise extended visits. Of course, if the domestic violence is severe, you may also argue that any visitation is unwarranted until, at least, the abuser completes a parenting and/or domestic violence course — and maybe never.

Seeking Refuge in New York: Emergency Jurisdiction

If you are representing a domestic violence victim who has moved here from another state, you will find that the legal issues are similar to those for

clients who want to leave New York. In particular, you need to know whether the parties are married or whether paternity has been established to help decide whether or not to file a custody case in New York immediately or whether you should wait.

An Existing Custody Order From Another State

The first issue is whether a custody order is already in place from the original state, the terms of such order, and whether the order was on consent, after trial, or on default. A New York court may not modify an existing out-of-state custody order unless the court that rendered the decree declines to assume jurisdiction and New York has a significant connection to the case.[68] However, even if New York does not have jurisdiction (or while a determination is being made regarding jurisdiction) and there is a custody or visitation order from another state, New York can assert temporary emergency jurisdiction if necessary to protect the parent.[69] In *Hector G. v Josefina P.*,[70] the Court "assume[d] temporary emergency in order to investigate further the domestic violence allegations." After asserting temporary jurisdiction, the court found that it had jurisdiction to modify the final custody order because the original court declined jurisdiction and the children and the mother had "significant connections" with New York. Specifically, the court noted that the children had lived in New York for a year, went to school here, and had a pediatrician here. In addition, a report had already been completed by the Administration for Children's Service, the local child protective agency. The court decided to exercise jurisdiction since New York was the more convenient forum.

Any court may punish a party who willfully violates an existing court order, and most courts will punish a parent who removes a child from the jurisdiction when the parent was specifically prohibited from doing so. Courts can also hold a party in contempt for failing to respond to other orders of the court, such as a subpoena, an order to appear in another state's court, or an order to produce the child. If the court finds after a hearing that your client willfully violated the order, she may be held in contempt of court. In more extreme situations, your client may face criminal sanctions for custodial interference. You must argue that she fled for her safety and not to relitigate an unfavorable custody or visitation decision. Fleeing an incident or pattern of domestic violence is an affirmative defense to international kidnapping;[71] you should argue that while this defense was enacted for international crimes, it is federal law and the rationale behind the defense should be applied to interstate crimes as well.

No Court Order

When no prior court order exists, the non-custodial parent has parental rights to the child, and your client has fled to New York, she has several different options.

Should she file a custody proceeding?

The first strategic issue facing your client is whether to file a custody case in New York. In some instances, initiating a proceeding may not be in your client's best interest. While a domestic violence victim may be able to keep her residence confidential, the court papers will necessarily reveal the state in which your client is located. Also, in order for any court case to proceed, your client will be required to serve the other party, which can be difficult in another state. (You can contact the sheriff or marshal in the county where the other parent lives.) Sometimes a parent who in the past has expressed no interest in the children, in the face of being served with court papers, may show a new or renewed interest in the children. He may file for custody in the state your client fled, forcing her to return to litigate the case there. Therefore, it may be a better option to wait to file a petition for the requisite six months and allow New York to become the home state. While filing for an emergency temporary order of custody may give your client the security of having a custody order in hand, even if only temporarily, it is unlikely that the final custody order will be decided in New York and you must therefore be prepared to have the case litigated in her original jurisdiction.

If you do decide to go to court immediately for a temporary order, you will need to prove the existence of the domestic violence and show its harmful effect on the children. From the outset you should assess the seriousness of the abuse, its duration, and the evidence of the abuse you can introduce in court. Discuss with your client whether she already has any police reports, medical records, photos, witnesses, or orders of protection. She may want to file a police report in New York as soon as possible. You should obtain certified copies of any orders from the other state.

If the parent who was left behind files for custody in the home state, you should try to find an attorney in that state to represent your client. Once the proceeding is filed in that state your client should file a custody proceeding in New York. You should suggest that the other attorney argue that the court decline jurisdiction on the grounds that the forum is inconvenient. If there are two proceedings pending, the courts should communicate and decide which court should hear the case, but again, it is likely that the ultimate custody decision will be made by the home state.

At the hearing, you should ask the court to appoint a law guardian and to order an investigation. Consider using an expert witness to establish imminent risk and asking the court to appoint a forensic expert. You can also ask the court of the state in which the custodial parent resides to prepare a home study for the hearing. If a case is pending in the home state, the batterer may seek a dismissal or stay of the action in New York. In response you can argue that the home state should decline jurisdiction because defending the action in that state would put the parent and child at risk and that New York is the more convenient forum.

Conclusion

Interstate cases can take a long time to make their way through the courts, and, in the meantime, hinder your client's ability to protect herself and her children from continued abuse. Although the UCCJEA and other statutes provide advocates with some tools to argue on behalf of domestic violence victims, overcoming the presumption in favor of home state jurisdiction can be difficult. If an interstate case is commenced, the jurisdictional argument can end up being the key to winning. The choice between litigating long-distance or returning to an unsafe jurisdiction can overwhelm even the most persistent parent, but continued pressure and the threat of a court order can succeed in returning improperly removed children. Similarly, careful advocacy and safety planning can help support your clients' efforts to find refuge in a new jurisdiction.

Notes

1. New York's law is codified in the Domestic Relations Law, art 5-A, § 75 *et seq*. (amended 2004).
2. The UCCJEA has been interpreted to apply to cases in which the other jurisdiction is a different country, not just another state; *see Hector v Josefina P.*, 2 Misc 3d 801 (Sup Ct, Bronx County, 2003).
3. *See* http://www.nccus1.org for updates.
4. Domestic Relations Law § 75.
5. http://www.courts.state.ny.us/forms/family_court.
6. The National Center on Full Faith and Credit of the Pennsylvania Coalition Against Domestic Violence can be reached at (800) 256-5883.
7. Domestic Relations Law § 67(1).
8. This is the mirror to Domestic Relations Law § 76-f, which gives New York courts a basis to waive home state jurisdiction where the court determines that the home state is inappropriate.
9. Domestic Relations Law §§ 76-a and 76-b.
10. 100 NY2d 960 (2003).
11. Domestic Relations Law § 76-c(1).
12. Domestic Relations Law § 76-c(2). *See e.g. Hector G. v Josefina P.*, 2 Misc 3d 801 (Sup Ct, Bronx County, 2003).
13. Domestic Relations Law § 76-c(3).
14. Domestic Relations Law § 76-f.
15. Domestic Relations Law § 76-f(3); although not decided by a New York court, *Stoneman v Drollinger*, 314 Mont 139 (2003), offers a clear explanation of the UCCJEA's application in inconvenient forum cases involving domestic violence.
16. Domestic Relations Law § 75-i.
17. Domestic Relations Law § 76-b.
18. Domestic Relations Law § 76-g.
19. Domestic Relations Law § 76-g(4).

20. *See Solving the Puzzle: Applying Jurisdictional Statutes in Interstate Custody Cases to Protect Survivors and her Children*, National Center on Full Faith and Credit, at 11.
21. Domestic Relations Law § 76-h.
22. 28 USC § 1738A (1980).
23. Penal Law § 135.20.
24. *Id.* § 135.30; *But see People v Dianna Brown*, 264 AD2d 12, which denied a biological mother whose parental rights had been terminated the right to assert this defense.
25. Penal Law § 135.45.
26. Penal Law § 135.50.
27. 164 AD2d 610 (2d Dept 1992).
28. *See* Penal Law 2d § 134.45(1).
29. 112 Misc 2d 494, 495 (District Ct, Nassau County, 1982).
30. *Koons v Koons* 161 Misc 2d 842 (1994).
31. *In re Marriage of Howard*, 291 Ill App3d 675 (1997).
32. *See* Domestic Relations Law § 75-a(7). For a copy of a model brief outlining these arguments, contact Sanctuary for Families at (212) 349-6009, ext. 252.
33. 2 Misc 3d 801 (Sup Ct, Bronx County, 2003).
34. Opened for signature Oct. 25, 1980, 19 ILM 1501 (1980).
35. Gloria DeHart and William M. Hilton, *International Enforcement of Child Custody*, in Child Custody and Visitation: Law and Practice (Sandra Morgan Little, ed, LexisNexis (looseleaf), 2003) § 32.02(1)(a).
36. The legislation is codified at 42 USC § 11601 *et seq*. and known as the International Child Abduction Remedies Act (ICARA).
37. Hague Convention art 3
38. DeHart and Hilton, *supra* note 2 at § 32.02(3)(d).
39. 42 USC § 11603(e)(2)(A).
40. *Walsh v Walsh*, 221 F3d 204, 218 (1st Cir 2000).
41. 33 F Supp 2d 456 (D Md 1999).

42. 78 F Supp 2d 283 (SDNY 2000), *affd* 283 F3d 153 (2d Cir 2001).
43. *Walsh, supra* note 7; *see also Elyashiv v Elyashiv*, case no 03-CV-1491, filed Jan. 28, 2005 (EDNY), also finding a "grave-risk" exception for a battered mother and her children pursuant to Art. 13 of the Hague Convention.
44. *Id.* at 220.
45. *Id.* at 219.
46. Domestic Relations Law § 24.
47. Family Court Act § 522.
48. Family Court Act § 521.
49. Public Health Law § 4135-b.
50. Domestic Relations Law § 76-g.
51. 204 AD2d 777 (3d Dept 1994).
52. *Id.* at 773.
53. *See e.g. Jeanne E.M. v Lindey M.M.*, 189 Misc 2d 669 (Family Ct, Albany County, 2001).
54. Domestic Relations Law § 76-g.
55. *See e.g. Jacoby v Carter*, 167 AD2d786 (3d Dept 1990); *Sheridan v Sheridan*, *supra*.
56. 206 AD2d 703 (3rd Dept 1994).
57. *Id.* at 781.
58. Whether she can make a successful claim for emergency jurisdiction in her refuge state will depend on the law in that state.
59. *See e.g. Tropea*, *supra*, and *F.M. v P.M.*, NYLJ, Aug. 8, 1998 at 29, col 2 (Sup Ct, Bronx County).
60. 274 AD2d 694 (3d Dept 2000).
61. 263 AD2d 783 (3d Dept 1999).
62. 244 AD2d 902 (4th Dept 1997).
63. Courts have found domestic violence to be a sufficient reason for allowing relocation even under the more stringent pre-*Tropea* "extraordinary circumstances" standard. In *McGee v McGee*, 180 Misc 2d 575 (Sup Ct,

Suffolk County, 1999), a mother was permitted to relocate from New York to Pennsylvania, in part, because of the father's physically violent and intimidating behavior toward her. In *Sheridan v Sheridan*, 204 AD2d 711 (3d Dept 1994), the court affirmed the lower court's order of custody even though the mother had relocated to Puerto Rico without permission. In *Desmond v Desmond*, 134 Misc 2d 62 (Family Ct, Dutchess County, 1986), a trial court permitted a mother's relocation to allow her to create a more tranquil environment for herself and her children. Due to the father's emotional, sexual and physical abuse of the mother, there was little hope that the parties' relationship could be "an umbrella of security necessary for these children's emotional peace." *Id*.

64. *See Tropea*, 87 NY2d at 740; *see also Spencer*, 263 AD2d at 785; *Lazarevic v Fogelquist*, 175 Misc 2d 343, 346 (Sup Ct, NY County, 1997).
65. *See e.g. Miller v Pipia*, 297 AD2d362 (2d Dept 2002).
66. *See e.g. Matter of L.G. v A.H.*, NYLJ, Nov. 5, 1998, at 25, col 1 (Fam Ct, Nassau County).
67. *See e.g. Tropea*, *supra*, and *F.M. v P.M.*, NYLJ, Aug. 24, 1998, at 29, col 2 (Sup Ct, Bronx County).
68. Domestic Relations Law § 76-b.
69. Domestic Relations Law § 76-c(1).
70. 2 Misc 3d 801 (Sup Ct, Bronx County, 2003).
71. 18 USC § 1204.

8

The Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA] and Domestic Violence: A Case Study

by Mary Rothwell Davis

In April 2002, New York became the 15th of now 48 states to adopt the new Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]. Replacing the prior statutory scheme known as the UCCJA (Uniform Child Custody Jurisdiction Act), the UCCJEA is now codified at Article 5-A of the Domestic Relations Law and contains important new provisions for victims of domestic violence. While intended to discourage interstate kidnapping by a non-custodial parent, the UCCJA did not distinguish between custodial interference and instances in which a victim of domestic violence flees with her children in order to secure safety from a batterer. With this new statutory scheme, the drafters stated that:

> It is the intent of the legislature in enacting this article to provide an effective mechanism to obtain and enforce orders of custody and visitation across state lines and to do so in a manner that ensures that the safety of the children is paramount and that victims of domestic violence and child abuse are protected.[1]

The UCCJEA and Disputes of Foreign Origin

Just six months after the UCCJEA took effect, the Bronx County Integrated Domestic Violence (IDV) Court was presented with the first opportunity to consider whether this statutory scheme permitted it to assume jurisdiction of an ongoing custody matter involving allegations of domestic violence that had originated in the Dominican Republic.[2] The IDV Court hears cases with both criminal and family law matters involving allegations of domestic violence within a family. In *Hector G. v Josefina P.*, Mr. G. was arrested in the Bronx in

November 2002 and charged with threatening Ms. P., his ex-wife and the mother of their twin sons. Because Mr. G. filed, in Bronx Family Court, a writ of habeas corpus claiming that Ms. P. had interfered with his custodial rights pursuant to default order of a Dominican court, both the criminal and family law cases were transferred to the IDV Court to be heard by a single judge. Very shortly thereafter, Ms. P. filed a petition for custody and a family offense petition, both alleging that Mr. G. had subjected her to severe domestic violence.

For purposes of analysis, the Dominican Republic was determined to be the equivalent of any other state. Because the Dominican Republic is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction,[3] that law did not come into play. While the drafters spoke of the UCCJEA as addressing custody disputes "across state lines," in fact the Act is expressly made applicable to foreign disputes as well, so long as the determination was made "in substantial conformity with the jurisdictional standards of this article."[4] Thus the principles of the UCCJEA properly governed determination of this dispute — even though the Dominican Republic was not similarly bound by a reciprocal act.[5]

Defining the Home State

Because the overriding purpose of the UCCJEA is to eliminate jurisdictional competition between courts in matters of child custody, jurisdictional priority is always conferred to a child's "home state," and many of the Act's provisions are intended to assist a court in determining which jurisdiction is the "home state."[6] A jurisdiction does not become a child's "home state" unless the child has lived in that state with a parent or "person acting as a parent" for at least six consecutive months prior to commencement of the action.[7]

In the *Hector G.* case, New York was not the "home state." A final order of custody from a court in the Dominican Republic had been affirmed on appeal just weeks before Mr. G.'s arrest, and Ms. P. and the children had only just arrived in New York State. The IDV court had to determine whether it could or should assume jurisdiction of the matter at all or must simply refer the parties back to the Dominican Republic court.

Temporary Emergency Jurisdiction

Different standards govern cases in which there is no prior custody decree[8] and those in which a court of another jurisdiction has already assumed jurisdiction of the custody matter.[9] A court has much more latitude in cases involving initial child custody determinations, as there is no competing jurisdictional claim.[10] As a general rule, once a court has made a valid child

custody determination, that court has "exclusive, continuing jurisdiction" over any subsequent related matters, unless it decides that another jurisdiction would be a more appropriate forum or the child and the child's parents no longer reside in that state.[11]

The *Hector G.* case thus presented a more complicated scenario because another jurisdiction had already issued a custody order and, presumably, might claim "exclusive, continuing jurisdiction." The question was whether New York might nevertheless be able to take some constructive action upon the case. Here the UCCJEA differs significantly from its predecessor, the UCCJA. The statute permits a court to assume "temporary emergency jurisdiction" of a custody matter if there are allegations of domestic violence.[12] The order issued remains in effect until "an order is obtained from the other state within the period specified" *or*, "where the child who is the subject of a child custody determination . . . is in imminent risk of harm, . . . until a court of a state having jurisdiction under sections seventy-six through seventy-six-b of this title has taken steps to assure the protection of the child."[13] If there is no prior or simultaneous custody proceeding but New York is not the child's "home state" under DRL §§ 76 – 76-b, the court may make any orders necessary and they may remain in effect until the home state steps in or until New York becomes the home state.[14] Where, as in the Bronx IDV case, there is a valid prior child custody order, New York may issue a temporary order in order to enable the party seeking relief to apply to the home state court, and the temporary order remains in effect until the home state has taken sufficient steps to protect the child.[15]

Pursuant to these provisions, the Bronx IDV court determined to keep the case before it in order to resolve questions concerning the safety of the children and their mother, given the new criminal charges pending against the father. The court directed official translation of all Dominican Republic court documents, and ordered the Administration for Children's Services [ACS] to interview all the parties. The report from ACS detailed an extensive, severe history of domestic violence, on occasion requiring the mother's hospitalization for treatment of injuries. The children, now enrolled in New York City public school, were described by their teacher as her "best" students, and had made a good adjustment.

Contacting the Home Court

With a basis for "temporary emergency jurisdiction" now well established, the Bronx IDV court was next obligated, by statute, to contact the home state court in order to "resolve the emergency, protect the safety of the parties and the

child, and determine a period for the duration of the temporary order."[16] Accordingly, the Bronx IDV court held a telephone conversation, which was transcribed by a court stenographer, with the judge in the Dominican Republic who had issued the original custody decree. DRL § 75-i requires that such communications be recorded, and that the parties be given an opportunity to participate or present facts and argument concerning jurisdiction. The end result was that the Dominican court declined to reassert jurisdiction, allowing that New York was the better forum upon the assumption that both parents were now domiciled in New York. The court also stated that it understood the parties' custody agreement to allow custody to revert to the mother once she was settled in the United States.

Determining Residence

Although the father attempted to argue that he was still domiciled in the Dominican Republic, the IDV court determined — based on the statements that he had made to probation authorities when seeking release on his own recognizance in the criminal matter — that the father had claimed in that proceeding to be a businessman who had resided in New York City for the previous two years. Demonstrating how an integrated court prevents parties from presenting different faces to different courts, the IDV court declined to credit the father's subsequent contradiction of those assertions as part of his bid to have jurisdiction remain in the Dominican Republic. Thus, the IDV court could assume modification jurisdiction because "a court of this state or a court of the other state determines that the child, [and] the child's parents . . . do not presently reside in the other state."[17]

The Bronx Court found additional, independently sufficient reasons why it was appropriate to assume modification jurisdiction. The UCCJEA permits assumption of jurisdiction if "the court of the other state determines it no longer has exclusive, continuing jurisdiction."[18] The Dominican judge had indicated that, according to an original custody agreement, the parties intended that custody revert to the mother once she settled in the United States, as she now had, and the court gave its express consent to transfer of the matter to New York. Notably, the determination that a child no longer has a "significant connection" with the home state can only be made by the original court; another court cannot determine that issue for it.[19] Thus it was only for the Dominican court, and not New York, to come to that important conclusion. Either the original or new court, however, may determine that the child and the child's parents do not presently reside in the original home state.[20]

Safety Issues

Even when the foreign court refuses to relinquish jurisdiction, a concerned New York court can take significant steps to ensure that domestic violence is addressed by the foreign court. In Matter of *Noel D. v Gladys D.*,[21] the New York court, deeply troubled by a default award of custody in Illinois to a parent with an extensive history of mental instability and violence that was unknown to the Illinois court, retained temporary emergency jurisdiction until such time as it could be assured that Illinois would address the significant safety issues, even though the Illinois court refused to give up continuing, exclusive jurisdiction.

Like the court in *Noel D.*, the Bronx IDV court was presented with a default order of custody granted without adequate knowledge on the part of the original court about the history of domestic violence in the home. In both cases, the courts had concerns about the capacity or willingness of the originating court to protect the safety of the parties before it. The *Noel D.* court determined to hold on to the case until the Illinois court could assure the safety of the mother and child. The Bronx IDV court, in *Hector G.*, examined whether the court in the Dominican Republic would ever be in a position to protect this mother and her children, since the UCCJEA permits a court to assume jurisdiction if foreign proceedings do not conform to our basic jurisdictional standards.[22]

It cited the Department of State Country Report on Human Rights Practices for the Dominican Republic,[23] noting that the Dominican Republic had no laws against domestic violence until 1997, that domestic violence was "widespread," affecting 40% of the country's women and children, and that there were *no* shelters for battered women there, as of March 2003.[24]

Logistical Concerns and Determination of "Convenient Forum"

Whether there are sufficient resources for the family in the other jurisdiction is a factor to be considered under the analysis of "convenient forum."[25] Even where a court can take jurisdiction — as when the originating judge agrees to it — the new court may nevertheless consider whether it should take jurisdiction, based on assessment of whether it is an "inconvenient forum" and another forum may be more appropriate. Here the court must consider multiple factors:

1. whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child;
2. the length of time the child has resided outside this state;

3. the distance between the court in this state and the state that would assume jurisdiction;
4. the relative financial circumstances of the parties;
5. any agreement of the parties as to which state should assume jurisdiction;
6. the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
7. the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
8. the familiarity of the court of each state with the facts and issues in the pending litigation.[26]

While the difficulty of taking evidence in a particular jurisdiction is a factor to be considered, the UCCJEA nevertheless contains multiple provisions intended to make interstate litigation easier by including measures that can ease or eliminate logistical concerns. One party may be required to bear the cost of transportation for the other.[27] More innovatively, the UCCJEA sets forth procedure for "taking testimony in another state, including testimony and deposition by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state."[28] The UCCJEA also allows courts of different jurisdictions to cooperate fully in management of a custody matter. A court of one state may request a court of another state to hold an evidentiary hearing, order a person to produce evidence, or order an evaluation with respect to a child involved in a pending proceeding; forward transcripts of proceedings; direct a party to appear, with or without the child; and enter orders.[29] Thus even when a jurisdictional ruling is disappointing to one's client, application can still be made to conduct significant parts of the litigation in the alternate jurisdiction.

Unjustifiable Conduct Exemption

Lastly, in the case before the Bronx IDV, the father alleged that the mother had violated a Dominican court order by failing to return with the children after an authorized visit, instead taking them to, and retaining them in, New York. While the UCCJEA denies protection to a person who has engaged in "unjustifiable conduct," there is an express exemption for "any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was to protect the [party] from domestic

violence or the child or sibling from mistreatment or abuse."[30] Here, Ms. P. could explain her conduct under this provision.

Conclusion

This brief overview is only that. The UCCJEA is a complicated statutory scheme, replete with cross-references and multi-layered analyses that demand careful study. A practitioner would do best to spend some time becoming familiar with the overall structure of the Act, which is divided into three areas: Title I, "General Provisions"; Title II, "Jurisdiction"; and Title III, "Enforcement." Because of the extensive interplay of the various provisions, it would be a mistake to go forward with a UCCJEA application based only upon a partial reading of the statutory scheme. While a particular provision may seem exactly on point, and even dispositive, it will no doubt be subject to modification by some other provision, such as "inconvenient forum" analysis. Thus any claim must be assessed in light of the statutory scheme in its entirety.

Preservation of continuing and exclusive home state jurisdiction remains an important purpose of the UCCJEA. Where there is no compelling reason to upend that jurisdiction, and a parent still remains in the original jurisdiction, a foreign court faced with a request for modification will most probably reject the application, and a client's chance of success is low.[31] If, however, both parents and the child have left the original jurisdiction, a new jurisdiction will be much more inclined to assert modification jurisdiction.[32]

Another overriding goal of the UCCJEA is to prevent forum-shopping. Forum-shopping is not the same, however, as an effort to find relief in a jurisdiction that will be sensitive to the safety needs of a parent and child fleeing a batterer. Both *Hector G.* and *Noel D.* show how general jurisdictional priorities can be set aside when domestic violence is a factor in the parent's relocation to the new jurisdiction, even when that relocation is in violation of an existing court order. If there is something about the original jurisdiction that makes it a particularly unsafe venue for a client, that should be described in detail to the new court. Whether the concern is community or judicial indifference to domestic violence, an inability to protect from threatened harm, particular support or resources available only in the new jurisdiction, these factors should all be placed before the court in support of a request for temporary emergency jurisdiction.[33] Domestic violence advocates in the alternate jurisdiction, if there are any, can be contacted for insight into how

matters are treated in that locale. If there are no organized services for battered women, that is an important fact to bring before the court's attention.

Although the UCCJEA does expand to an important degree the power of a court to assume at least temporary jurisdiction of cases involving domestic violence, the statutory scheme should not be regarded, where there is already an order of custody in place, as a means of avoiding a relocation hearing under *Matter of Tropea*.[34] Absent real evidence of risk to the parent seeking refuge in a new jurisdiction, the UCCJEA does not authorize much more than referral back to the court that made the initial custody determination. Where such risk can be shown, however, particularly when combined with evidence that the new jurisdiction is a supportive one to the parent and child, the UCCJEA can now offer real relief that was not previously available to victims of domestic violence and their children.

Notes

1. Domestic Relations Law § 75.
2. *See Hector G. v Josefina P.*, 2 Misc 3d 801 (Sup Ct, Bronx County, 2003).
3. *See* 42 USC § 11601 *et seq*.
4. Domestic Relations Law § 75-d(2).
5. *See* Sobie, Practice Commentaries, McKinney's Domestic Relations Law of New York, Book 14, DRL § 75-d at 48.
6. *See* Hoff, The Uniform Child Custody Jurisdiction and Enforcement Act, Office of Juvenile Justice and Delinquency at 4 (US Dept of Justice, Dec. 2001); *see also* UCCJEA Prefatory Notes and Comments, National Conference of Commissioners on Uniform State Laws (NCCUSL) at 3-30, 1997.
7. Domestic Relations Law § 75-a(7).
8. Domestic Relations Law § 76, "Initial child custody jurisdiction."
9. Domestic Relations Law § 76-b, "Jurisdiction to modify determination."
10. *Id*.
11. Domestic Relations Law § 76-a(1)-(2), "Exclusive, continuing jurisdiction."

    The most effective way to ensure that a foreign state will exercise comity with respect to a client's custody order is to register that decree pursuant to the UCCJEA. DRL § 77-d; *see also* DRL § 75-e. Thus if your client has a custody order from a New York court but must send her child for court-ordered visitation in, for example, Ohio, she should register her custody decree in Ohio. Once properly registered, a foreign decree is treated as the equivalent of a decree of both states and, once registered, any further contest to the decree is precluded. DRL § 77-d. Even where an order has been registered, however, a new proceeding relating to domestic violence — about which the court must be notified — can affect an existing order. DRL § 77-g(2)(c).

    See http://www.courts.state.ny.us/forms/familycourt/uccjea.shtml for forms.
12. Domestic Relations Law § 76-c.
13. Domestic Relations Law § 76-c(3).

14. Domestic Relations Law § 76-c(2).
15. Domestic Relations Law § 76-c(3).
16. Domestic Relations Law § 76-c(4).
17. Domestic Relations Law § 76-b(2).
18. Domestic Relations Law § 76-b(1).
19. Domestic Relations Law § 76-b(1)(a).
20. Domestic Relations Law § 76-b(1)(b).
21. *Noel D. v Gladys D.*, 6 Misc 3d 1017A, (Fam Ct, NY County, 2005).
22. Domestic Relations Law § 75-d(2).
23. Such reports are available at the web site of the Department of State, http://www.state.gov.
24. *Hector G. v Josefina P.*, 2 Misc 3d at 820.
25. Domestic Relations Law § 76-f, "Inconvenient forum."
26. Domestic Relations Law § 76-f.
27. Domestic Relations Law § 76-i.
28. Domestic Relations Law § 75-j(2).
29. Domestic Relations Law § 75-K(1)(a)-(e).
30. Domestic Relations Law § 76-g(4).
31. *See Stocker v Sheehan*, 13 AD3d 1 (1st Dept 2004); *Karen W. v Roger S.*, 8 Misc 3d 285 (Fam Ct, Dutchess County, 2004).
32. *Diane H. v Bernard H.*, 2 Misc 3d 1101A, (Fam Ct, Erie County, 2004).
33. *See* http://www.courts.state.ny.us/forms/familycourt/uccjea.shtml for pleadings.
34. *Matter of Tropea*, 87 NY2d 727 (1996).

9

Representing Abused Mothers in Hague Convention Cases

by Betsy Tsai

The Hague Convention on the Civil Aspects of International Child Abduction[1] ("Hague Convention") is an international treaty that was designed to address child abduction by a parent. It provides parents with a civil remedy — the prompt return of their children. The underlying purpose of the Hague Convention is to prevent international abductions and restore the status quo while the courts of the country from which the child was taken resolve underlying custody and visitation issues. Once a prima facie case under the Hague Convention has been established, the Convention, in most instances, mandates return of the child.

The drafters of the Hague Convention assumed that abducting parents are most often non-custodial parents, and the treaty does not contemplate instances in which women flee with their children to escape domestic violence. The Convention does, however, provide some exceptions to the return remedy, and, although very narrowly tailored, these exceptions may be useful when litigating Hague Convention cases on behalf of abused mothers.

Background

The Hague Convention was drafted in 1980 by the Hague Conference on Private International Law. Although the United States signed the treaty in 1981, the Hague Convention did not become law in the United States until 1988 when the International Child Abduction and Recovery Act (ICARA),[2] its implementing legislation, was passed. The Hague Convention is only applicable between and among countries that have ratified the Convention, otherwise known as Contracting States, or countries that have acceded to it. A

list of Hague Convention party countries and their effective dates with the US can be found on the US Department of State's website, which is a valuable resource for many Hague Convention issues.[3]

Purpose

The primary purpose of the Hague Convention is to effect the prompt return of abducted children to their countries of habitual residence. The focus of the Hague Convention is on remedying wrongful removals rather than deciding custody issues. The Hague Convention does not allow Contracting States to hear the merits of any underlying custody disputes, thereby creating a disincentive for parents to abduct their children in search of more favorable jurisdictions. The objects of the Hague Convention are only "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[4]

Application of the Hague Convention

What is the Central Authority?

Each Contracting State must establish a Central Authority whose functions include cooperating with Central Authorities in other Contracting States, attempting to locate an abducted child, coordinating Hague Convention applications requesting the return of a child from other countries, initiating legal proceedings, and securing counsel for foreign litigants. The United States has designated the Department of State's Office of Children's Issues as the Central Authority. The National Center for Missing and Exploited Children processes applications requesting the return of children in the United States on behalf of the State Department.[5]

When Does the Hague Convention Apply?

The Convention has a number of limitations. First, the Hague Convention applies only between Contracting States, so if a parent abducts the child to a country that is not a signatory to the Hague Convention, these provisions do not apply. Second, the Hague Convention applies only to children under sixteen years of age. Finally, the child must have been habitually resident in a Contracting State immediately prior to the removal by the parent.

How Does a Party Bring a Hague Convention Claim?

A parent seeking the return of an abducted child may make an application directly to a court in the Contracting State to which the child has been taken. The parent may also submit an application to the Central Authority in his or her own country, which then forwards the application to the Central Authority in the abducted-to country. These options are not mutually exclusive, so a party seeking return of a child under the Hague Convention may use both avenues of relief.

What are the Elements of a Hague Convention Claim?

Wrongful Removal

To make out a prima facie case under the Hague Convention in the United States, the parent seeking return of the child must first establish, by a preponderance of the evidence, that there was a "wrongful removal." A wrongful removal occurs if the child was taken from his or her habitual residence in breach of the other parent's custodial rights that were being exercised at the time of removal.

Habitual Residence

The Hague Convention does not define what constitutes "habitual residence," and courts have developed this concept through caselaw. Habitual residence, unlike domicile, does not necessarily depend on the long-term intentions of the parties but is a concept used to identify where the children and family are settled. As one court stated, habitual residence depends on "a 'degree of settled purpose,' as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there. The focus is on the child rather than the parents."[6] Another court, explaining the concept of habitual residence, stated that "technically, habitual residence can be established after only one day as long as there is some evidence that the child has become 'settled' into the location in question."[7]

Rights of Custody

Wrongful removal occurs only if the child was taken from his or her habitual residence in breach of the other parent's custodial rights, which were being exercised at the time of removal. The Hague Convention defines rights of custody as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[8] This term was intended by the Convention drafters to be interpreted broadly. For more specificity on what constitutes custody rights, it is important to look to the laws of the child's country of habitual residence.

To establish that custody rights were actually being exercised at the time of removal requires very little evidence on the part of the party with the custody rights. In fact, the Convention assumes that the person with rights of custody was exercising them, and places the burden of proof on the alleged abductor to show that custody rights were *not* actually being exercised at the time of removal.

Defenses and Exceptions to the Return Remedy

The Hague Convention provides various defenses and exceptions to the requirement that an abducted child be returned. First, if more than one year has passed since the allegedly wrongful removal and the child is well settled in the new environment, the court may decline to return the child.[9] Second, if the party requesting that the child be returned was not actually exercising rights of custody at the time of removal or had consented to the removal, return of the child is not mandated.[10] Third, a court may not return an abducted child if there is a "grave risk" that such a return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[11] Fourth, if the child objects to returning to the country of habitual residence and the child is of sufficient age and maturity, the child's views may be taken into account to oppose return.[12] Finally, courts may refuse to return a child if doing so would not comport with "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[13] These exceptions are intended to be narrowly construed.

Using the Hague Convention Exceptions on Behalf of Battered Women

The Hague Convention can pose serious problems for abused women who flee to the United States seeking safety. Because the various exceptions are designed to be narrowly construed and may be difficult to establish, lawyers representing abused women should first explore other avenues of relief, such as arguing that the child was not wrongfully taken from the country of origin. If necessary, however, exceptions to the Hague Convention may be successfully litigated.

The Article 13(b) grave risk of harm exception is the most commonly litigated exception in Hague Convention cases and potentially useful for women fleeing abusive partners, although it has traditionally been a difficult exception to establish. The 13(b) exception allows courts to circumvent their obligation to return the child to the country of habitual residence if the opposing party can demonstrate that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an

intolerable situation." The party opposing the return has the burden of proof and must demonstrate the applicability of the 13(b) exception by clear and convincing evidence. Because the Hague Convention does not provide a definition for what constitutes "grave risk," it is important to examine judicial interpretation of the 13(b) exception.

Traditionally, US courts have interpreted the 13(b) exception very narrowly. The Second Circuit has stated:

> A "grave risk" exists in only two situations: (1) where returning the child means sending him to "a zone of war, famine, or disease"; or (2) "in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[14]

Recently, however, despite the traditionally narrow interpretation of the 13(b) exception, the Second Circuit, has found grave risk in a number of cases in which mothers have fled abusive partners.

In *Blondin v. Dubois*, a leading case that resulted in four published decisions,[15] Marthe Dubois fled from France to the United States with her two children, Marie-Eline (age eight) and Francois (age four), to escape her abusive husband, Felix Blondin. The district court found that Blondin had repeatedly abused Dubois throughout the course of their relationship and had also beat Marie-Eline, twisted an electrical cord around her neck, and threatened to kill her. On two other occasions, Dubois had attempted to leave Blondin, fleeing to a battered women's shelter for a total of approximately nine months. The district court held that the 13(b) grave risk exception applied and denied return of the children because return "would present a 'grave risk' that they would be exposed to 'physical or psychological harm' or that they would otherwise be placed in an 'intolerable situation.' "[16] On appeal, the Second Circuit, although in agreement with the district court's finding of grave risk, remanded for consideration of "whether other options are indeed available under French law — options that may allow the courts of the United States to comply *both* with the Convention's mandate to deliver abducted children to the jurisdiction of the courts of their home countries and with the Convention's command that children be protected from the 'grave risk' of harm."[17] On remand, the district court not only considered and rejected other options by which the children could be safely returned to France, but also relied on uncontroverted expert testimony from a child psychologist that returning the children to France would likely trigger severe symptoms of post-

traumatic stress disorder. The court declined to order the return of the children.[18] As part of its grave risk analysis, the district court also considered that the children were well settled in their new environment and that Marie-Eline objected to return. On further appeal, the Second Circuit affirmed.[19]

In another important case, *Elyashiv v. Elyashiv*,[20] Iris Elyashiv fled from Israel to the United States with her three children to escape, in the words of the court, "severe domestic violence." Mr. Elyashiv, a martial arts instructor who kept three swords and a gun in the house, verbally and physically abused Ms. Elyashiv throughout the course of their marriage, beating her, attempting to strangle her, and threatening to kill her if she left him. The court also found that Mr. Elyashiv physically abused the two older children, hitting them with a belt, shoes, or his hand approximately once or twice a week. As in *Blondin*, the court relied on the uncontroverted expert testimony of a child psychiatrist who said that returning the children would result in "a full-blown relapse of their [post-traumatic stress disorder] symptoms." After also finding that the children were well settled in the United States and that "there are no alternative arrangements that could effectively mitigate the grave risk" to the children if they were returned to Israel, the court concluded that the 13(b) grave risk exception applied, and the father's petition for return of the children under the Hague Convention was denied.

Finally, in *Reyes Olguin v. Cruz Santana*, Maria del Carmen Cruz Santana fled from Mexico with her two children to escape her abusive husband, Noel Stalin Reyes Olguin. Throughout the course of their relationship, Reyes Olguin would beat Cruz Santana, sometimes in front of the children; he attempted to throw her down the stairs and insisted on two occasions that she get an abortion, beating her when she refused to comply. After first arguing unsuccessfully that the court had no jurisdiction to hear the case because the father did not have custody of the children, Cruz Santana established that the 13(b) grave risk exception applied, and the court declined to return the children to their father's abusive household in Mexico.[21] As part of its grave risk analysis, the court not only considered the expert testimony of a child psychiatrist, but also looked at whether the children were well settled into their new environment and whether the children objected to returning to their country of habitual residence. Then, in keeping with *Blondin IV*, the court here also looked at "whether any ameliorative measures might mitigate the risk of harm to the child and allow him to return safely pending a final adjudication of custody." Finding no sufficient measures existed in Mexico to mitigate the grave risk of harm to the children, the court denied the petition and declined to return the children.

Conclusion

Litigating Hague Convention cases on behalf of abused mothers is challenging in light of the Convention's primary purpose of ensuring prompt return of abducted children to their country of habitual residence. In the Second Circuit, however, the Article 13(b) grave risk exception has been successfully used on behalf of battered women who have fled abusive households with their children. Expert testimony from a child psychiatrist, as well as an exploration of alternative arrangements in the country of habitual residence that would protect the child from "grave risk" are of critical importance in the court's analysis. Whether the children are well settled in their new environment and whether they object to the return are also important factors to consider.

Despite the Hague Convention's primary purpose to maintain the status quo and return children to their countries of habitual residence, the 13(b) grave risk exception provides a potential avenue by which mothers and children may flee to another country, escape their abusers, and avoid returning to an abusive household.

Notes

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, 19 ILM 1501 (1980).
2. International Child Abduction Remedies Act, 42 USC § 11601 *et seq*.
3. *See* http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html.
4. Hague Convention, Article 1.
5. *See* http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html.
6. *Brennan v Cibault*, 227 A2d 965, 966 (NY App Div 1996) (citing *Feder v Evans-Feder*, 63 F3d 217, 224 (3d Cir 1995)).
7. *Brooke v Willis*, 907 F Supp 57, 61 (SDNY 1995).
8. Hague Convention, Article 5(a).
9. *Id*. at Article 12.
10. *Id*. at Article 13(a).
11. *Id*. at Article 13(b).
12. *Id*. at Article 13.
13. *Id*. at Article 20.
14. *Blondin v Dubois*, 238 F3d 153, 162 (2d Cir 2001) (*Blondin IV*) (quoting *Friedrich v Friedrich*, 78 F3d 1060, 1069).
15. *Blondin v Dubois*, 19 F Supp 2d 123 (SDNY 1998) (*Blondin I*); *Blondin v Dubois*, 189 F3d 240 (2d Cir 1999) (*Blondin II*); *Blondin v Dubois*, 78 F Supp 2d 283 (SDNY 2000) (*Blondin III*); *Blondin v Dubois*, 238 F3d 153 (2d Cir 2001) (*Blondin IV*).
16. *Blondin I*, 19 F Supp 2d at 127.
17. *Blondin II*, 189 F3d at 242.
18. *Blondin III*, 78 F Supp 2d at 294.
19. *Blondin IV*, 238 F3d at 168.
20. 353 F Supp 2d 394 (EDNY 2005).
21. *Reyes Olguin v Cruz Santana*, 2004 WL 1752444 (EDNY Aug. 5, 2004); *Reyes Olguin v Cruz Santana*, 2005 WL 67094 (EDNY Jan. 13, 2005).

10

Representing a Victim of Domestic Violence Who Needs Child Support

by Judy Reichler

Domestic Violence and Money

Domestic violence is strongly linked to family economic issues, and money is often used to gain power and control. An abuser may withhold money or take money, to possess, humiliate, intimidate, intrude upon, and isolate his partner. So that you can provide the best assistance to your client, explore with her how she and her partner handled their money.

While the couple is living together, an abuser may exercise complete control over the money in the household. He may insist on doing all the shopping or accompanying her to every store, including the laundromat. He may hold all the money, distributing it only on an "as needed" basis. He may provide his partner with an allowance, from which she is expected to make all, or certain, household expenditures. He may not have had a problem with her doing the shopping, but insist on reviewing all receipts. He does this not just to keep track of the money, but to make certain she went where she said she was going and that she has not made any "unauthorized" purchases or bought something that will reveal another lover or plans to leave him.

Some abusers bring in no income themselves, yet, through the use of threats and intimidation, are able to gain complete control of the money that enters the house. Sometimes the only income in the family comes from public benefits received by his partner, yet the abuser is able to come and go, insisting that these benefits be used to meet his shelter, food, and entertainment needs.

Even after the parties have separated, money may continue to be used to keep control. An abuser who seemed generous while the parties were together may suddenly become stingy with money. He may be unwilling to provide any support for a child who does not live with him. He may question the need for

things that he had happily provided when the family lived together, thus requiring constant requests for money, with each request giving rise to further arguments. If his partner was supplying him with money while they were together, he may continue to drop by and insist that she give him some of her money.

Many of the same problems exist even if the couple never lived together. An abuser may believe he should be able to spend all of his money on himself, except for certain expenses he deems necessary, such as diapers, baby formula, and an occasional toy.

An abuser may react badly to the initiation of a divorce action or a court proceeding for child support. He could become violent in court, or outside the court. He may refuse to comply with an order and cause your client to remain entangled with him while she seeks compliance. Or, if he pays, he may insist on handing over the support money personally and use the occasion for continued abuse.

Because of these concerns, dealing with an abuser and child support is a bit like stepping into a mine field. It can be done, but no one should rush into it blindly.

Is it in Your Client's Best Interest to Establish Paternity and/or Seek Child Support?

Explore Possible Repercussions

If you have a client who has been a victim of domestic violence, take special care to assure that an effort to obtain child support will not place her in additional danger. It is never a good idea to simply jump at the chance to help your client seek child support without an exploration of the potential for success and possible repercussions.

Victims of domestic violence — sometimes the ones in greatest need — are often afraid to seek support from the father of their children. This fear is not to be taken lightly. It is, unfortunately, quite justified in many cases. In addition to physical danger, there are other unwanted repercussions that should be explored. For example, the mother of a non-marital child must prove paternity before she can seek child support.[1] If she does this, it will give the father certain rights, such as the right to seek custody and/or visitation. He can, of course, obtain a paternity determination on his own, but might not do so if left alone. You and your client should consider the possibility that the father will seek custody as a weapon or use

visitation as an opportunity for continued contact with her. Be certain the potential difficulties don't overwhelm the advantages of receiving support.

Ways to Provide Safety

Obtain an Order of Protection

Consider seeking an order of protection. The best way is to file a separate petition at the same time the child support petition, or the divorce complaint, is filed, with a request for a temporary order of protection that can be served along with the child support petition. It is also possible to request an order of protection after the child support proceedings have commenced, if the need arises.

Provide an Alternative Address

If the abuser is likely to pay, but your client doesn't want contact with him, the order can require payments to be mailed to a post office address. If payments are made by check, however, the cancelled check that gets returned to the abuser will contain information about your client's bank and general area of residence, possibly even her bank account. This can be avoided by having someone else pick up the check, deposit it in a different bank, and write a check, or give cash, to your client. The client needs to be alert so that location information is not inadvertently revealed to the batterer.

Have the Order Made Payable through the Support Collection Unit

The court can order that payments be made to New York State's Support Collection Unit (SCU), for forwarding to your client. Through this mechanism, all payments are made to a central account, from which a separate check is drawn and mailed to the intended recipients. The SCU will also deduct the money from the abuser's income so that he doesn't have any active part in the payment. This procedure helps put distance between the parties and ensure that no address information is exchanged. It also eliminates any excuse the abuser might make for coming to your client's house.

Assess the Likelihood of Success

Ask your client some questions to determine whether or not it is worth the effort to seek a child support order. What kind of work does he do? Does he work for someone, or is he self employed? Does he work "off the books"? Will she be able to help the court determine how much he earns? Will you be able to enforce an order after it is made? If he does not work, does he receive social security, unemployment, disability, or worker's compensation benefits? Did he have cash around the house when they were together? If so, does she know how much was there? Does he receive public assistance or SSI benefits? If so, only a

very low order will be entered. Did they eat out a lot when they were together? Take expensive vacations? Have expensive clothes or furnishings for the house? Can she prove it? Does he have any other children? If so, is he providing child support for them?

This information will alert you to the possibility that the father has a marginal income and really can't even take care of himself. You may have a client who cannot prove her figures or is up against someone who has hidden or shielded his income and assets so that it would be prohibitively costly to pursue enforcement.

When You Decide Not to Seek Child Support

Even when child support may be of immense assistance, it will sometimes be better to forego it — at least until the possibility of danger has been reduced. Whenever a decision is made not to pursue child support, however, every attempt should be made to assure that the reasons are valid, and not the result of the client's — or the attorney's — timidity or unfounded fear.

First, determine if it is possible to overcome any obstacles so that support can safely be obtained for the child. If not, make sure nothing is done that would eliminate the possibility of seeking support later, if circumstances change. For example, don't let your client enter into an agreement foregoing child support. Even though this may not be strictly enforceable, it will require a showing of a change of circumstances to get support at a later date. If an agreement is signed, a better practice would be to provide that child support is not requested "at this time," but that it may be sought later "without the necessity of showing a change of circumstances."

If the Mother Is Receiving Public Assistance

Benefits

If your client is receiving, or applying for, public benefits, there will be some overlap with child support. A custodial parent applying for public assistance is required to assign support rights to the state,[2] which will pursue the "absent parent" for child support to recoup some, or all, of the cost. This will be true even if the mother or the child receives only Medicaid.

There are several benefits to this arrangement. The first is that she will receive consistent payments of public assistance whether or not the agency is able to obtain child support from the father. Another is that she will receive the

first $50 per month that he pays in current child support — in addition to the full amount of public assistance benefits she receives.[3] A third benefit is that the agency may be able to succeed in obtaining, and enforcing, a child support order that is much higher than the amount she receives in public assistance, and she will be able to leave that system. Although the agency's initial incentive for obtaining a child support order is to recoup benefits it provides, the court is not permitted to limit the amount of the order to the amount of benefits received by the family.[4]

Another benefit is that, if she states that she is a victim of domestic abuse, she will be referred to a domestic violence liaison, who is supposed to provide her with additional services.[5]

Drawbacks

In addition to the difficulties of relying on public assistance, with its insufficient funds, there are particular requirements regarding child support that could place a victim in danger.

Sanctions for Failing to Cooperate in Obtaining Child Support

A custodial parent applying for public assistance is required to assign support rights to the state, and the state takes steps to obtain child support. In addition, she is required to provide any information she has that would help in locating the father, establishing paternity, discovering any income or assets he may have, and obtaining an order for child support.[6] She must also appear as a witness in court, if requested by the agency.

Once started, however, she may have difficulty stopping a proceeding, even if she believes it would be dangerous for her or for the child. If she refuses to cooperate, she could be sanctioned by having her portion of the public assistance budget removed from the grant, although the agency may not delay or deny the *child's* benefits because of the parent's failure to cooperate. The grant for the children can be made in the form of a protective payment — either to the sanctioned parent or to a substitute caretaker.

Waiver of Cooperation Requirement

In recognition of the special needs of victims of domestic violence, the state has put in place some exceptions to the requirement to cooperate in obtaining child support.[7] Each public assistance agency is required to have a domestic violence liaison, who can determine whether it is appropriate for a particular parent to receive a waiver from the cooperation requirement.

A waiver is available if the parent can show she has "good cause" for refusing to cooperate. No sanctions will be applied if it can be shown that cooperation

would not be in the best interests of the child for any *one* of these reasons — *and* the agency believes that proceeding to establish paternity or secure support would be detrimental to the child:

1. cooperation is reasonably anticipated to result in serious physical or emotional harm to the child;
2. cooperation is reasonably expected to result in serious physical or emotional harm to the custodial parent (or caretaker relative), which will reduce the caretaker's ability to adequately care for the child;
3. the child was conceived as a result of incest or rape (other than statutory rape), or adoption proceedings for the child are pending, or the parent is attempting, with the help of a social services agency, to decide whether to keep the child or relinquish it for adoption.

Before imposing sanctions, the agency must comply with due process requirements. The agency must inform the applicant or recipient, in writing, of her obligations and rights with regard to child support and the consequences of refusing to meet the obligations. The agency must allow the applicant or recipient to make a claim of good cause for refusal to cooperate, and it must make a written determination as to the validity of the claim. Although the applicant or recipient has the burden of establishing good cause, and she must provide any evidence she has to corroborate her claim of good cause, the agency must assist her in obtaining documents and other evidence, if she requests it. The agency can even conduct its own investigation. The agency must pay benefits to the family while it considers the good cause claim, and, as in any other fair hearing situation, benefits must be paid pending a determination if her claim is denied by the agency.

Care must be taken in reading these rules because buried in them are certain restrictions on the occasions when "good cause" may be found. For example, in regard to "physical or emotional harm," the harm must be "serious," and a finding of good cause for emotional harm [to the child or to the caregiver] may be based only upon a demonstration of an emotional impairment *that substantially affects the individual's functioning.* It would be helpful to show, for example, detriment from past contacts, and from even the prospect of having him enter their lives. The harm may be poor school performance or other indicia of physical or emotional stress, such as frequent trips to doctors. If the child has developed a relationship with another man who she thinks of as her father, it

could be detrimental to the child to begin proceedings against a person the child views as a stranger.

3. Agency Can Proceed with Case without Imposing Sanctions

Even if the agency does not sanction the mother for refusing to cooperate and does not require her to provide information, it can still proceed on its own without her cooperation if it determines it can do so without risk of harm to her or the child.[8] To do so, the agency must put the risk of harm determination in writing, including its findings and basis for determination, and enter it into the case record. The parent (or caretaker relative) has a right to be notified that the agency intends to proceed and, presumably, a right to a hearing on the risk of harm issue.

If your client is convinced that harm will result from attempts to obtain child support, and she is unsuccessful at getting the agency to agree with her, she will have no option but to withdraw her application for assistance and rely on some other method of support. This is a decision you can help her make, after weighing all the benefits and possible repercussions.

Should Support Be Made Payable through the SCU?

Assuming your client has decided to seek a child support order, you should next discuss whether payments should come directly to your client or be sent to the Support Collection Unit (SCU), for forwarding to her.

If your client has applied for, or is receiving, public assistance benefits for the family, she will have no choice, because she has assigned her support rights to the state. As long as the family continues to receive public assistance, support orders must be made payable to SCU.

If your client is not receiving public assistance, she has a choice. She can have the order payable through SCU, or it can be payable to her — either directly or through payroll deduction, if the father has a regular income. If your client wants the order made payable through SCU, she must indicate this choice in her petition.

Advantages and Disadvantages

Among the advantages is that SCU maintains records of payments. This can be very useful later if it is necessary to return to court for enforcement. However, because the agency does make mistakes, your client should keep her own records of payments. She should also avoid taking payments directly from the noncustodial parent because the SCU will have no record of it.

SCU also may provide the necessary distance between the noncustodial parent and a family who is afraid of his violent or threatening behavior. If the noncustodial parent resists paying support to her, he may not be so resistant to making payments to the SCU. Payment of child support may then come to be seen like any other obligation — not money he advances when he's feeling generous and retracts when things are a little tight or don't go his way.

If support payments are made payable through the SCU, enforcement of the order will be handled by the agency. Although some of the enforcement methods used by the agency are also available through the court (e.g. salary deduction), there are several methods of collection that are only available when the order is payable through the SCU (e.g. interception of tax refunds and lottery winnings). These methods may be particularly effective in collecting from persons who change jobs frequently or who are self employed.

However, your client will have no control over the enforcement method used. Most of the enforcement methods are computer-generated and automatically triggered. This means that, even if your client knows that a particular method of enforcing an order will be likely to inspire violence from the payor (e.g., the suspension of a driving license), she cannot request that it not be used. She can, of course, terminate the SCU services, but she will have to return to court to request that the order be modified so the money can be payable directly to her.

Some of the Services Provided by the SCU[9]

Statewide Register of Child Support Orders

All orders for child support — including orders entered by the Supreme Court — must be forwarded to the statewide register of child support orders in Albany. This makes it easier to determine which of several orders is valid and to track payments.

Access to Private and Governmental Information

The SCU has authority to obtain information from certain private and governmental agencies. The information includes such things as marriage and birth information from the Bureau of Vital Statistics, state and local income tax returns, and vehicle and registration information from the Department of Motor Vehicles. This cannot be obtained through the court.

Data Matches with Financial Institutions

The SCU can find out information about an obligor's bank accounts through a direct matching program. This is not available through the court.

Employment Information

The SCU receives daily reports of new hires and can quickly track an obligor who changes jobs. This is not available through the court.

Immediate Income Withholding

Whenever a new or modified order for child support (or combined spousal and child support) is made on behalf of a person who has requested the services of the SCU, an income execution for support enforcement will immediately be issued against the wages or other income of the noncustodial parent — unless the court finds, and sets forth in writing, the reasons there is "good cause" not to require immediate income withholding.[10] "Good cause" for not directing the immediate issuance of an income execution for support enforcement is defined as "substantial harm to the debtor." The absence of an arrearage or the mere issuance of an income execution cannot constitute good cause. The court can also issue an order[11] requiring an employer or other income payor to make deductions from the noncustodial parent's income and send it directly to your client. If this is the only enforcement method your client will need, it may not be necessary to have the order payable to the SCU.

Automatic Cost-of-Living Reviews

The SCU has conducted a review of all orders of support issued on behalf of persons in receipt of family assistance prior to September 15, 1989, to determine if they are eligible for a one-time cost-of-living adjustment. Anyone else who has an order made payable through the SCU may request a determination of eligibility for such an adjustment.

In addition to the procedures for adjustment, either party may petition the court for a modification of the amount if circumstances have changed since the order was entered.

Federal and State Income Tax Refund Interception

If there are arrears, the SCU can intercept any federal or state income tax refunds due the non-custodial parent and direct it to your client (unless she is receiving public assistance, in which case the payment goes to the agency). This is not available through the court.

Suspension of Professional and Driver's Licenses

Where a sufficient amount of arrears has accumulated, the SCU can take steps to suspend a non-custodial parent's driver's licence. The SCU can also suspend professional licenses (e.g. teachers, doctors, dentists, lawyers, real estate brokers), as well as sporting licenses (e.g. hunting and fishing) and business licenses (e.g. liquor). This is useful if the noncustodial parent works off the books or is

otherwise out of range of most regular enforcement methods. The court can do much of this, as well, but often the judge is not as familiar with these methods.

Liens and Seizure of Property

If there are arrears, the SCU can intercept or seize periodic or lump sums due the obligor from state or local agencies, attach and seize bank accounts as well as public and private retirement funds, and impose liens against real and personal property and force the sale of such property. Although certain procedural protections apply, there is no requirement to return to court for a money judgment.

Provide Information on Arrears to Credit Reporting Agencies

Whenever child support arrears exceed $500, this information is reported to credit reporting agencies. This is especially useful where the obligor is self employed. The information will show up on credit reports, which will affect the obligor's ability to obtain a credit card, borrow money or obtain a mortgage to purchase property. This is not available through the court.

In Court

Support Magistrates

All child and spousal support cases in the Family Court are heard by support magistrates, who are specially trained in establishing and enforcing support orders. Support magistrates have the same authority as a family court judge with regard to support, except that they cannot order a parent jailed for nonpayment. Appeals from a support magistrate's order are made by the filing of an "objection" within 30 days after receipt of the order. The decision is then reviewed by a family court judge. Support magistrates have no authority over custody, visitation (including allegations of visitation interference as a defense to nonpayment of support), orders of protection, or exclusive possession of the home.

Order of Protection

If it will help keep the petitioner or the children safe, an order of protection can be obtained in the context of a support proceeding, without the need to file a separate petition alleging a family offense.[12] Upon receiving a request, the support magistrate will refer the matter to a judge.

Address Confidentiality

You may file a motion requesting that your client keep her address confidential, if it is necessary to keep your client and her children safe.[13] By demonstrating that the disclosure of address or other identifying information would pose an unreasonable risk to the health or safety of your client or the children, the court may authorize your client not to disclose any identifying information in any papers submitted to the court.

The statute provides that, pending a finding on the request for confidentiality, any address or other identifying information of the child or the party seeking confidentiality must be safeguarded and sealed in order to prevent its inadvertent or unauthorized use or disclosure. If you are contemplating making a motion for confidentiality and you believe it would be unsafe to disclose the information, the best practice would be to withhold the information from the beginning, since the safeguards presently in place in the court are unreliable. You should designate a disinterested person to be served with process, or request that the court designate the clerk of the court to do so.

Address confidentiality is particularly troubling in child support matters because the respondent has a right to discover financial information about your client. All paychecks and other financial documents must be redacted, and it may be necessary to request in camera inspections of the documents before the case can proceed. Because of all the extra work required to keep the information out of the hands of the respondent, it will be important to have a frank discussion with your client to determine if the confidentiality is absolutely necessary. If the abuser already knows where she lives or works, an order of protection may provide sufficient protection.

Telephonic Testimony

If you believe it would be too traumatic, or unsafe, for your client to be in the same room with her abuser, consider requesting the court to permit your client to testify by telephone. The Family Court Act authorizes a court to permit a party to testify by telephone or other electronic means where it determines that it would be an undue hardship to testify at the court where the case is being heard.[14]

As with confidentiality, this request should only be made when it is absolutely necessary, both because it causes a lot of disruption in court and because it means your client will not be in front of the support magistrate and her credibility cannot be compared with that of her abuser.

Safety in the Courtroom

Few people — even in the court — realize the risks a victim of domestic violence takes when she seeks child support. Because your client may be attempting, for the first time, to take control over an area over which her partner has always had control, you must always prepare for the worst.

Inform the court personnel, especially the security officer, so they will be alert and can let the judge or support magistrate know there is a possible problem. Arrange for the parties to wait separately, if possible. In the courtroom, be sure they are seated far away from each other — with as many obstacles between them as possible. Make certain the security officer keeps an eye on them during the hearing. Don't hesitate to ask for a recess if it looks like the abuser is getting restless or has a mood change.

Leaving the courthouse can create an opportunity for additional danger, if it is not handled properly. While it is tempting to ask to have the abuser escorted out while you and your client remain safely in the arms of the court, this is a mistake. Always ask to have your client escorted from the courthouse first. If possible, ask the officer to delay the abuser (maybe to go over papers) while your client leaves the courtroom. It is important that your client leave first, not the other way around. The reason is this: if he leaves the building first, he can wait for her and stalk her. If she leaves the building first, she can be long gone before he comes out.

Integrated Domestic Violence (IDV) Courts

Integrated domestic violence courts are available in several counties. These courts are designed to handle multiple related cases pertaining to a single family, where the underlying issue is domestic violence. Typically, a case in an IDV court will involve a criminal matter, such as violation and misdemeanor family offense cases and violations of orders of protection, and a family court case, such as family offenses or custody and visitation disputes. As the model is developing, support proceedings will be included, and the support portion of the case will be heard by support magistrates.

If your case is being handled by an IDV court, the support case will be flagged as involving domestic violence, and the support magistrate will be specially trained to deal with the safety and control issues that will be present in your case.

Negotiating an Agreement

When an Agreement May Be Desirable

Reaching an agreement allows the parties to include terms that might not be ordered by a court — even provisions that cannot be ordered by a court. Some examples follow:

1. Extending child support obligation to the obligor's estate or beyond the child's twenty-first birthday (in order to finish college or because of a handicapping condition).
2. Penalties for failure of visitation. An agreement might include a requirement that the custodial parent can be compensated by payment of a stipulated amount if the obligor parent fails to comply with the visitation set out in the agreement.
3. Income tax provisions, such as who may take the dependency exemption, which belongs to the custodial parent;[15] who may have head of household filing status;[16] what portion of the payment will represent tax-deductible spousal support;[17] and who may take the child care credit.

Pitfalls of Negotiation

Vigilantly guard your client's right not to compromise simply because she has agreed to discuss settlement. Remember that the end product of a negotiation or mediation session need not be an agreement. Fight the myths that work against the custodial parent seeking adequate child support. For example, the custodial parent is sometimes cast as the litigious one if she refuses to accept offers made during negotiation, while the abuser is seen as not willing to meet her unreasonable demands. A victim of abuse may be particularly susceptible to such insinuations, and her attorney should dispel them. The non-custodial parent who will not agree to the presumptive amount of child support is the one who is refusing to settle and is causing your case to go before the court.

Be particularly wary of requests by the abuser — or the court — to enter into mediation. If your client did not fare well in negotiations with her abuser while they were together, if he has withheld financial information from her, or if she has any fear of him, they are not good candidates for mediation. Many mediators are aware of this imbalance of power and will decline to serve once it becomes clear that domestic violence is involved, but you cannot count on this and may have to be insistent. Mediation is not appropriate for a victim of abuse.

Pro Se Non-Custodial Parent

It is highly likely that you will find yourself negotiating the issue of child support with a person who is not represented by counsel. This is always more difficult because the pro se litigant may not know the law and what is legally permissible. In addition, he may be so emotionally involved that agreement is not possible. Combine this with a history of belligerence, abuse, and control, and productive communication is unlikely. Avoid being alone in a room with your client and her abusive partner. If this happens, you should cease negotiations immediately and rely on the court to make the decisions.

Public Assistance Recipients

When entering into an agreement with a client who is receiving, or who plans to apply for, public assistance or other public benefits (such as food stamps or public housing), care must be taken to assure that the agreement doesn't inadvertently make her ineligible for assistance. Similarly, if receipt of child support payments would remove the family from public assistance, but not enough to make up for the loss of the $50 pass-through and other public benefits, some other arrangement might be preferable.

If the client is receiving family assistance, she has assigned to the state her rights to child support and alimony. All payments must be made to the SCU and not to her for so long as she continues to receive public assistance. If she leaves public assistance and there are arrears that accumulated before she left, that money must also go to SCU, although she can receive current support payments.

New York's Child Support Standards Act (CSSA)

Both the Family Court and the Supreme Court are required to use the CSSA in setting child support orders.[18]

How the CSSA Works

Passed in 1989 to comply with a federal mandate, the CSSA provides a step-by-step method of determining the level of child support to be ordered. The CSSA rests on the principles that children are entitled to share in the income and standard of living of both parents, whether or not they are living together, and that child support should be the first obligation to be met, not the last. Briefly, the CSSA defines the level of support as a percent of parental income,

depending on the number of children to be supported. Rules for deviating upward or downward from this amount are also provided.

After the court determines the income of each parent and applies certain deductions, the incomes are combined and multiplied by the percentages set forth in the CSSA. This amount is then divided between the parents in the same proportion as each parent's income is to the combined parental income. In addition to this amount, the court must pro-rate the cost of reasonable medical and child care expenses, and can order payment of a portion of educational expenses and certain other child care expenses provided they meet the criteria provided in the statute. The amount indicated by the formula, increased by any medical, child care and education expenses, is the "basic child support obligation." This amount must be ordered unless the court finds that the noncustodial parent's share is unjust or inappropriate and increases or decreases the amount based upon consideration of the ten factors enumerated in the statute. The factors considered by the court and the reasons for the level of support ordered must be set forth in a written order — a requirement that may not be waived by either party or by counsel.

No distinction is made between orders made on behalf of marital children and those made on behalf of non-marital children. The law applies to children who receive public assistance. It applies to parents with little or no income, although provisions are made to limit the amount under certain circumstances. It applies to parents with high incomes. It applies to orders entered pursuant to agreements or stipulations.

How Parental Income Is Determined

All Income from All Sources

Although the definition of income in the CSSA is lengthy and appears complicated, it can be stated very simply: all income from all sources, whether actual or imputed. The last income tax form that was filed is only a starting point — it isn't the end of the trail. Pension deductions and income that is voluntarily deferred — such as credit union savings accounts and any type of tax-deferred annuity — are included in income. If the noncustodial parent is self-employed or works in a partnership, look for deferred compensation, i.e., compensation that may be paid in a later year for work performed this year, and request the court to impute the income to the current year.

Income from Public and Private Benefits

Income derived from the following public benefits is included in income: workers' compensation, private and governmental disability benefits, unemployment

insurance benefits, social security benefits, veteran's benefits, pension and retirement benefits, fellowships and stipends, and annuity payments. Income from public assistance and supplemental security income (SSI) are excluded from income because they are given to meet the parent's own subsistence needs and are not sufficient to support an additional person.

Business Deductions that Reduce Personal Expenditures

Certain expenses deducted from business income really represent personal expenditures. There are countless ways in which a person who is self-employed — especially if he is the sole owner of a business — may deduct things from business income which really represent personal expenditures. This practice has the effect of artificially reducing the amount of income that will be declared and could have a significant impact on the amount of child support to be ordered.

It will be important to question each expense as to its relevance to the business. For example, a person may attempt to deduct all expenses related to a car when, in fact, it is the only car in the family. Naturally, the family runs errands, shops for food and household items, goes on trips, etc. If you can determine what portion of the car's time is used for non-business purposes, that amount of the deduction can be added back to income. A similar exploration can be done with telephone, electricity, heat and repair bills — even meals and entertainment expenses.

Also, look at such things as paying a relative (or a mate) as an employee of the business. You will need to explore exactly what that person does in order to determine whether it is a valid business expense or just a way to give an allowance and have a business deduction at the same time.

Imputed Income

The court may attribute or impute income to resources that are available to the parent, such as non-income-producing assets. This is nothing more than examining the parent's priorities to make sure he is not cash poor simply because he has invested in things at the expense of his children — even if not intentionally. For example, the parent may collect classic cars or invest in expensive paintings or other collections.

Another area in which the CSSA suggests the imputation of income is when meals, lodging, membership, automobiles and other perquisites are provided as part of compensation for employment that really substitute for personal expenditures or confer personal economic benefits. Typical examples of these are a house or apartment that is supplied along with the employment. A superintendent or doorman in a building, a gardener at an estate or a businessman who lives part of the year in one area of the country and part of the year in another might be likely

candidates for this type of benefit. Another example would be a truck or car that was supplied by the employer, which the employee was allowed to take home for personal use. A similar analysis can be made of fringe benefits that are provided as part of compensation for employment.

Still another area fertile for imputation of income arises when a noncustodial parent claims he has little, or no, income. The court can base an order on ability to earn, rather than the claimed economic situation. Or you may find that the parent meets certain expenses somehow (especially such things as car payments and mortgage payments, repairs to a house, rent or meals eaten at restaurants), or owns something of value that requires upkeep (e.g., an expensive house or boat). You can then ask the court to impute at least that amount of income.

Money, Goods or Services Furnished by Others

Income can also be imputed to money, goods or services furnished by relatives and friends. Frequently, a parent comes to court professing to have no income and to be living off the charity of friends and/or relatives. This is the person who is living with his mother or whose girlfriend is supporting him, while he, himself, makes "absolutely no income." In such a case, it will be useful to find out exactly how much income the friend or relative has, not so much in order to impute any of it to the noncustodial parent, but to show that this couldn't be possible, given the expenses the friend or relative must have, even without supporting him. The court may then be persuaded to attribute the money, goods or services as income.

Income Based on Prior Earnings

The court can impute an amount of income based upon the parent's former resources or income if it determines that the parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support. You will need to show that the unfortunate business failure, for instance, or the sudden inability to get overtime work was connected to an upcoming child support obligation and not to an economic downturn.

What May be Deducted from Parental Income

The CSSA requires the court to deduct certain expenses before arriving at the income available for child support.

Unreimbursed Employee Business Expenses

Unreimbursed employee business expenses may be deducted from income only if the money was not spent for personal purposes. Union dues are not included as deductions from income because the employee usually receives benefits from these payments, such as dental, vision or legal services.

Alimony Paid to Another Spouse

Income may be reduced for maintenance, or spousal support, actually paid, pursuant to a court order or written agreement, to a spouse who is not a party to the action. There must be proof that the payments are actually being paid. Mere allegations, or even several receipts, will not suffice.

Alimony Paid to Spouse in the Current Action

The third deduction is somewhat more complicated. It instructs the court to deduct maintenance, or spousal support, actually paid or to be paid to a spouse who is a party to the action, but only if the order or agreement provides for a specific adjustment in the amount of child support that will be paid when maintenance payments terminate.

Child Support Paid to Another Child

The court must deduct from a parent's income child support actually paid, pursuant to court order or written agreement, on behalf of a child whom the parent has a legal duty to support and who is not subject to the action.

Care also must be taken to assure that the obligor has not colluded with the mother of another child for the purpose of getting an amount deducted from his income in your case. Look to see when the agreement or order was made. If the amount was established after your client obtained a temporary order or already had an order in place, it may be assumed that the deduction was already obtained in that case and a double deduction should not be allowed.

FICA and Municipal Income Taxes

The last two permissible deductions are somewhat self-explanatory, but also have pitfalls: New York City or Yonkers income or earnings taxes actually paid and FICA (Social Security and Medicare) taxes actually paid.

The Child Support Percentages

Once combined parental income is determined, it is multiplied by the following percentages:

17% for one child

25% for two children

29% for three children

31% for four children

no less than 35% for five or more children

While all income is available for a determination of child support, the law treats combined income in excess of $80,000 differently from income below

that amount. The court must use the percentages to determine the amount for the combined income below $80,000. This amount is then pro-rated between the parents based on each parent's proportion of the total income, and the court will order the noncustodial parent to pay his or her pro rata share to the custodial parent. In determining the child support amount based on the income over $80,000, the court may use the percentages or may find that a greater or lesser amount is appropriate based on the ten factors for variation.

In a simple case, with each parent earning $40,000 per year, their combined income is $80,000. If they have two children, the preliminary combined child support obligation is 25% of $80,000, or $20,000. Since the noncustodial parent's income is 50% of the combined income, his share of the obligation is $10,000 per year, or $833 per month. This is the amount the noncustodial parent will be ordered to pay to the custodial parent, plus any additional amounts that might be appropriate.

Mandatory Additional Amounts

After a preliminary amount is established through use of the percentages, the court is instructed to examine the need for additional amounts of support for certain designated expenses.

Health Care Expenses

The court is required to order the parents to extend health insurance coverage to the children if it is available through an employer or organization. In addition to the order for support, the court must issue a separate "qualified medical support order" to effectuate its order for medical coverage.

The CSSA also requires the court to order the non-custodial parent to pay his or her pro rata share of the child's future reasonable health care expenses not covered by insurance. Where appropriate, the court may order the payment to be made directly to the health care provider.

If there is an opportunity for agreement, it would be a good idea to include some of the standard expenses that will be considered "reasonable," such as check-ups, prescription and non-prescription medication, doctor's visits for any medical purpose, emergency treatment (including crutches, etc.), optometrist, glasses, dental work, orthodontist.

In the absence of an agreement, the decision on reasonableness will be left to the custodial parent. If the noncustodial parent feels a particular expense is not reasonable, he is free to return to court for a ruling. If possible, obtain a provision in the order requiring the noncustodial parent to make the pro rata

payment pending a determination of reasonableness. This way the custodial parent — who must, in most instances, pay the doctor's bill at the time of treatment — will not always be the one who is without the money while the court makes its decision.

Child Care Costs

The CSSA also requires the court to order the noncustodial parent to pay a pro rata share of the reasonable child care expenses incurred by the custodial parent while she is working or in school. This amount must be added to the child support amount determined through the percentages and must be paid to the custodial parent.

Optional Additional Amounts

After determining if there are any mandatory additions, the court has discretion to make additional orders.

Child Care Costs

The court may apportion reasonable child care expenses between the parents where it is determined that the custodial parent is seeking work and incurs such expenses as a result.

Education of the Children

The CSSA directs the court to determine whether or not it would be appropriate for the child to receive — presently or in the future — post-secondary, private, special or enriched education. This section leaves a determination of appropriateness to the discretion of the court, which will look at several factors, including (a) the educational background of the parents, (b) the child's academic ability, and (c) the parent's financial ability to provide the necessary funds.

Life Insurance

The court may order a party to purchase, maintain, or assign a policy of accident or life insurance on the life of either party and, in the case of life insurance, to designate the persons on whose behalf the petition is brought as irrevocable beneficiaries.

Additional Support from Non-Recurring Payments

In addition to the basic child support amount, the court may allocate a portion of any non-recurring payments from extraordinary sources a parent is receiving, or may be entitled to receive. Since payment from these sources isn't made on a regular basis, they are easy to overlook. The sources can include such

things as money received from life insurance policies, gifts, inheritances, lottery winnings, and personal injury recoveries.

Reduction for Non-Custodial Parent with Little Income

In enacting the CSSA, the legislature provided for a significant reduction of the child support required of a low-income noncustodial parent. While it may seem complicated at first, the basic premise is that, where the annual amount of the basic child support obligation would reduce a noncustodial parent's income below the poverty level for one person, no more than $25 per month may be ordered.

A similar protection, in the form of a maximum order, is provided to other noncustodial parents with slightly higher incomes. The statute provides that, where the annual amount of the basic child support obligation would reduce the noncustodial parent's income below something called the "self-support reserve" (135% of the poverty level), the obligation will be $50 per month, or the difference between the noncustodial parent's income and the self-support reserve, whichever is greater.

Since these figures change each year, you are cautioned to keep up to date on the yearly changes in the poverty level.

Factors for Rebutting the Presumption

The amount established according to the formula creates a rebuttable presumption as to the appropriate amount of child support, and this amount must be ordered unless the court finds this amount to be unjust or inappropriate based upon consideration of certain factors.[19]

The argument most often raised by a custodial parent for deviating from the formula amount is contained in factor three: "the standard of living the child would have enjoyed had the marriage or household not been dissolved." Under this factor, counsel may be able to increase child support by demonstrating that the obligor parent has the ability to provide support beyond the amount that could be ordered by straight application of the percentage to acknowledged income. Another factor, "the educational needs of either parent," provides an opportunity for counsel to argue for a temporary increase in the amount if the client needs certain education to be able to adequately support the children. This may be particularly important for a client who is not married to the other parent and, for that reason, not eligible for spousal support to increase the amount of support available from the other parent.

Counsel should prepare for the two most popular arguments noncustodial parents raise for reducing the amount derived from application of the percentages: the costs of visitation and the needs of other children.

A noncustodial parent may be able to receive a reduction in support for extraordinary expenses incurred in exercising visitation or for the increased expenses of extended visitation — but only if the child is not receiving public assistance and only if the increased expenses substantially reduce the custodial parent's expenses. Even if the parties have joint custody, or the parents equally share their time with the child, the court must first establish the amount of child support by utilizing the percentages before reviewing the expenses and other circumstances of the parents to determine if a reduction in support is warranted, keeping in mind the duplication of costs that is often required when custody is shared by the parents.

The noncustodial parent may also receive a reduction in support if he has other children he is obligated to support, but not pursuant to a court order. This reduction is only available if the court reviews the resources of the other parent of those children and determines that resources available to support the other children are less than the resources available to support the child under consideration.

Whenever the court varies from the formula, the court is required to include in the order the factors it considered and the reasons for the level of support ordered. Except in the case of temporary orders, this requirement may not be waived by either party or counsel.[20]

Sanctions for Failure to Disclose

Even though complete financial disclosure is compulsory, resistance is common. Noncompliance with compulsory financial disclosure is punishable by granting the custodial parent the relief requested or by precluding the obligor parent from offering evidence about his ability to pay.[21]

It will be your job to see that the other parent is not rewarded by refusal to disclose financial information.

Counsel and Expert Fees

Both the Supreme Court and the Family Court are authorized to order one party to pay counsel fees in order to enable the other to carry on or defend an action or proceeding.[22] In addition, the court is required to order counsel fees in any action or proceeding for failure to obey a support order if the court finds that the failure was willful.[23]

Conclusion

In summary, the most important things you will need to know before rushing into court to get an order of support are the following:

1. Will your client be safe during the process and can she safely receive the money?
2. Does the father have sufficient income to make a difference to your client, and will she be able to prove it?
3. Will she be able to enforce an order once it is made?

Helping victims of domestic violence obtain child support has its many rewards. As long as you remember that you are dealing with a potentially volatile situation and conduct the case accordingly, you will have the satisfaction of knowing that you have helped your client in an essential area that will allow her to gain the ability to function on her own.

Appendix A

Child Support Statutes and Regulations

State Laws

Civil Practice Law and Rules - §§ 211, 213, 2301-2304, 2308, 4518, 5101, 5205, 5222, 5230, 5232, 5234, **5241, 5242** and 5252

Domestic Relations Law - §§ **236B, 240, 240-b, 240-c,** 241, 244-b, 244-c and 244-d

Family Court Act - Articles 4, 5, 5-A and **5-B;** and §§ 115, 153, 154 and 154-b

Social Services Law - Titles 6-A and **6-B;** and §§ 23, 111, 131, 143, 153 and 366

Alcohol Beverage Control Law - § 119

Banking Law - § 4

Education Law - §§ 441, 6501, 6502, 6509-b and 6509-c

Estates, Powers and Trusts Law - § 4-1.2

General Obligations Law - § 3-503

Insurance Law - § 320

Judiciary Law - § 90

Labor Law - §§ 21-d, 512, 537 and 596

Lien Law - §§ 65 and 211

Public Health Law - §§ 4135, 4135-b and 4138

Real Property Law - §§ 440-a, 441 and 441-c

Tax Law - §§ 171-a, 171-c, 171-d, 171-g, 171-h, 658, 686, 697 and 1613-a

Vehicle and Traffic Law - §§ 502, 510, 511, 530, 2101, 2103, 2105-a, 2116, 2118 and 2122

Workers' Compensation Law - § 141

State Regulations

New York Code of Rules and Regulations - Part 18, §§ 345-347 [18 NYCRR 345-347]

Federal Law and Regulations

Social Security Act - Title IV-D, §§ 651-669 [42 U.S.C. 651-669]

Code of Federal Regulations, Title 45, §§ 300-307 [45 C.F.R. 300-307]

Appendix B

Child Support Blockbuster Cases

Tompkins County Support Collection Unit o/b/o Chamberlin v Chamberlin, 99 NY2d 328 (2003).

Held that, when a cost-of-living adjustment is sought by the SCU and challenged by one of the parents, Family Court Act § 413-a directs the court to review the order to determine if an adjustment was warranted based on the child support guidelines, and not merely whether a cost of living adjustment should be applied. This adjustment was distinct from a modification based on a change in circumstances, so the parties' right to seek modification was not impermissibly expanded.

Gravlin v Ruppert, 98 NY2d 1 (2002).

Reiterated the standards for modification of a child support order based on a written agreement, previously established in Brescia (based purely on the needs of the child) and Boden (an unforeseen change in circumstances and a concomitant showing of need), and held that a complete breakdown in the visitation arrangement, which effectively extinguished respondents' support obligation and had been the reason for deviating from the CSSA, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations.

Clara C. v William L., 96 NY2d 244 (2001).

Established that a family court's perfunctory approval of a "516 paternity compromise agreement," without any determination as to its adequacy, fails to satisfy the requirements of the statute so that the putative father may not invoke the statute to bar a proceeding for a declaration of paternity and an increased support order. The court specifically did not consider the constitutionality of this statute or pass upon the continuing viability of *Bacon v Bacon* (46 N.Y.2d 477), decided nearly a quarter-century ago.

Dutchess County Department of Social Services o/b/o Day v Day, 96 NY2d 149 (2001).

Established that CSSA must be used to determine support from parents even when child is in foster care and it is a govenmental unit that is seeking

reimbursement for expenditures made to secure that care. Agreed that it might be appropriate to deviate from the statutory amount based on the parent's need to maintain a home for the child and the child's periodic visits to the parent's home.

Bast v Rossoff, 91 NY2d 723 (1998).

Reiterates that the court must apply the CSSA in all cases, regardless of the custodial arrangements. After determining the amount in accordance with the formula, the court may then deviate from this amount if it is found to be unjust or inappropriate.

Dox v Tyson, 90 NY2d 166 (1997).

Establishes that the mere delay in enforcement of a child support order does not amount to an implied waiver of child support.

Graby v Graby, 87 NY2d 605 (1996).

Sets forth the method for considering Social Security Disability benefits received by a child. Since this money is for the benefit of the child and does not affect the income of the paying parent, it is impermissible to use the amount of these benefits to offset the noncustodial parent's child support obligation. The child support amount must be established the ordinary way, through use of the formula, and can be changed only if the court finds it would be unjust or unreasonable.

Powers v Powers, 86 NY2d 63 (1995).

Sets the standard for finding that a failure to pay child support is willful. Proof of arrears constitutes a prima facie case. The burden is then on the respondent to show that nonpayment was not willful.

Cassano v Cassano, 85 NY2d 649 (1995).

Established that the Child Support Standards Act shifts the emphasis from "a balancing of the expressed needs of the child and the income available to the parents after expenses" to "the total income available to the parents and the standard of living that should be shared with the child." Whether the court uses the formula or the variation factors, it must articulate its reasons.

Rose v Moody, 83 NY2d 65 (1993).

It is constitutionally impermissible for the statute (CSSA) to require an order of $25 per month for a person with little or no income. Presumption must be rebuttable.

Commissioner of Social Services o/b/o Wandel v Segarra, 78 NY2d 220 (1992).

Established that a parent's duty to support is not abrogated by a child's receipt of public assistance.

Notes

1. In the interest of keeping this article a manageable length, detailed citations are omitted. For additional case law and an elaboration of the material discussed, you are referred to New York Civil Practice: Matrimonial Actions, Lansner & Reichler, eds, ch 43.
2. 42 USC § 602(a)(26)(A); 45 CFR § 232.11(a)(1); Social Service Law § 349-(a)(b); 18 NYCRR § 369.2(b).
3. 18 NYCRR §§ 347.13(b) and 352.15.
4. *Wandell v Segarra*, 165 AD2d 655 (1st Dept 1990).
5. 18 NYCRR § 351.2.
6. 18 NYCRR § 369.2(b).
7. 18 NYCRR §§ 347.5 and 369.2(b)(4).
8. 18 NYCRR §§ 347.6(i) and 351.2(l).
9. *See generally* Social Service Law § 111 and 18 NYCRR § 346. Additional statutory references are provided in Appendix A.
10. 18 NYCRR § 347.9.
11. *Pursuant to* CPLR § 5241 or CPLR § 5242.
12. Family Court Act § 446.
13. Family Court Act § 154-b(2).
14. Family Court Act § 433(c)
15. 26 USC § 152(a).
16. *See* 26 USC §§ 2(b) and 7703(b).
17. 26 USC §§ 71 and 215.
18. The major provisions are found in Domestic Relations Law §§ 236(B)(7) and 240(1-b) and Family Court Act §§ 413(1) and 513.
19. Family Court Act § 413(1)(f); Domestic Relations Law § 240(1-b)(f).
20. For further information on the way the factors can be used or rebutted, you are referred to New York Civil Practice: Matrimonial Actions, Lansner & Reichler, eds, ch 43.

21. *See* Family Court Act § 424-a and the penalties described in CPLR § 3126.
22. Domestic Relations Law § 237; Family Court Act § 438; "Expenses" include accountant fees, appraisal fees, actuarial fees, and investigative fees.
23. Domestic Relations Law § 237(c); Family Court Act § 438(b).