DOMESTIC VIOLENCE
PRACTICE
IN LOUISIANA

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Foreword

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INTRODUCTION
Domestic violence is the leading cause of female poverty and homelessness in America. It is the number one health and crime problem facing women. Most abusers also beat their children and thus perpetuate a cycle of violence that plagues our society. Domestic violence exists in all levels of our society.

Holistic legal assistance is essential for the protection of domestic violence victims and their children. The major reasons that women cannot leave their abusers include fear of retaliatory attacks, lack of economic resources, concern for their children and lack of effective law enforcement. Virtually all civil law practice areas provide opportunities to help abused women protect themselves and their children from abusers—many of whom are career criminals, child abusers or molesters.

HOW ATTORNEYS CAN HELP DOMESTIC VIOLENCE VICTIMS
A 2003 study found that legal aid is the most effective service for reducing domestic violence in the long run. Lawyers make a difference in victims’ lives!

Examples of how civil legal assistance can make a difference in victims’ lives include:

1. Protective Orders
Protective orders don’t guarantee safety. However, battered women’s advocates estimate that they end violence in at least 40% of all cases. A protective order criminalizes conduct which usually would not be a criminal offense, e.g., contact by telephone or third parties. They can also help a victim get effective service from the police and support from family, employers, landlords and others.

2. Divorce
Divorce can help end the violence. Some abusers no longer view their spouses as property after a divorce is obtained. Divorce can provide the victim with certain financial protections.

3. Child Custody and Visitation
Many abusers use child custody litigation to continue their harassment and abuse of their victims. The proper resolution of child custody and visitation is essential for the protection of women and children. Many abusers also physically, sexually or emotionally abuse their children. Most children are witnesses to family violence and are traumatized by it. Visitation, if not properly structured with safeguards, can endanger the woman and her chil-

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1 Domestic violence victims do include men. 75% of indigent legal services clients are women and many have domestic violence problems which are further complicated by their poverty and economic dependence. This manual’s use of the word, “her”, in connection with the term, “domestic violence victim” is done for simplicity and is not intended to suggest that men are never the victims of domestic violence.

2 A recent New Orleans Police Department study found that 84% of all persons subject to a stay away order pursuant to a misdemeanor domestic violence conviction were “career criminals.” Other national studies have found that many domestic violence perpetrators have serious criminal histories. See e.g., National Bulletin on Domestic Violence Prevention, vol. 5, no. 9 (Sept. 1999)


4 Some studies suggest an effectiveness rate as high as 85% in the short run. A study of 18,000 offenders by the Massachusetts probation office found that 15% violate their restraining orders within 6 months.
dren. If there is a “history of family violence”, Louisiana law creates presumptions which effectively prohibit perpetrators from obtaining sole or joint custody of their children.

4. Spousal and Child Support
   Many women need support to remain independent from their abusers. Abusers are half as likely as non-abusers to pay child support. They often stop paying support to force the victim to return to them. The traumatic, and often disabling, effects of abuse can make it difficult for victims to get employment.

5. Community Property
   The right to a home, car or pension may be essential to avoiding homelessness, keeping a job or securing economic independence.

6. Housing
   Up to 50% of all homeless women and children are fleeing domestic violence. National studies indicate that it costs a victim about $5,000 for each housing relocation. Even in Louisiana, finding a new apartment and moving there can easily cost $1,500 even without counting all the personal property the abuser may have destroyed or the victim had to abandon. An abuser’s conduct may cause a landlord to evict the victim. Eviction for a lease violation can cause a subsidized tenant to lose her rent subsidies for several years. Victims in subsidized housing need special help to protect their housing rights. Abusers may also force a housing emergency by failing to pay the home mortgage.

7. Employment
   Abusers often harass their victims at work or take other action to get them fired. Abuses harass 74% of employed battered women at work either in person or by phone. Bureau of Justice Statistics, Female Victims of Crimes, 1991. Absences from work due to court appearances and abuse can also lead to problems with employers. Job protection is essential to economic independence from the abuser.

8. Public Benefits
   A victim may need help with welfare, disability benefits and unemployment compensation. Domestic violence is a hardship exemption from the 24 and 60 month limits on TANF. However, no Louisiana woman has ever received a hardship exemption for domestic violence.

9. Taxes
   A battered woman should not file joint returns with the abuser since she can incur unexpected tax liabilities. Abusers often keep their spouses in the dark about financial information. Innocent spouse, injured spouse and equitable relief may be available to victims who face tax liabilities caused by the abuser. Victims may also need help in securing their rights to dependency exemptions and the Earned Income Credit, which can improve their financial situation.

10. Consumer Debt
    Economic independence can be supported by the reduction of consumer debt through bankruptcy and non-bankruptcy strategies.
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11. Immigration

An immigrant battered spouse who leaves her abuser may face deportation. Abusers often fail to file INS documents on spouses as a means of coercion. She may, however, self-petition (file a petition in her own name) the INS for legal resident status or suspension of deportation. LSC attorneys may represent immigrant battered spouses with non-LSC funds.

12. Victim Compensation Funds

Victims may be eligible for reparations under the Crime Victims Reparations Act, La. R.S. 46: 1801 et seq.

SAFE LAWYERING IN DOMESTIC VIOLENCE CASES

No lawyer can absolutely protect her client from a determined domestic violence criminal. We can however act to minimize the risks to our clients, ourselves and others. Safety tips for lawyers include:

- Screen to determine whether your client is a domestic violence victim. (You may want to use the Power and Control Wheel in your screening). You should be on alert if the man accompanies your client to the office, listens to your phone conversations or if he is excessively litigious. These are often signs that domestic violence is involved.

- Assess the level of risk to your client and make sure she has a safety plan. (See Lethality Assessments, infra).

- Keep all client information confidential. Train office staff on office security procedures and the importance of absolute confidentiality. Safeguard any client files that are taken out of the office.

- Protect the confidentiality of your client’s address in pleadings and discovery to the extent possible. In Louisiana, only R.S. 46:2135-36 protective orders expressly allow the victim’s address to remain confidential.

- Let your client know ahead of time about legal developments so that she may take extra safety precautions.

- Practice safe communications with your client. Always speak only to your client. Do not call her on the phone unless it is safe to do so. Do not tell a family member that you are a lawyer. If possible, block caller id when you call. Always ask her if it is safe to talk. Do not leave messages on answering machines. Ask your client whether it is safe to mail documents to her at home. Have a code word or expression for her to signal that she is in danger.

- Court hearings pose special risks to victims. You should arrive early in court so that your client is not alone with the abuser. Your client should be escorted to the courthouse by someone if possible and should be kept away from the abuser. Introduce your client to a court officer and identify the abuser. If the courthouse does not have a safe place for victims, advise your client to stand near a deputy or court officer and identify herself and the abuser. Never leave your client alone with an abuser. You should sit between your client and the abuser. Ask the court to hold the abuser until your client can leave the courthouse escorted by a security officer if available. Be aware that the abuser’s relatives may also attack your client.

6 In Louisiana, only R.S. 46:2135-36 protective orders expressly allow the victim’s address to remain confidential.
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• Hold depositions in safe settings, e.g., a courtroom with a metal detector. Follow the safety rules for court appearances. If necessary, try to quash depositions that seek the personal attendance of your client in the presence of the abuser.

• Victims should not be kept in a public waiting room in your offices when safety is an issue. Consider the use of telephone or shelter intake when needed.

• Abusers’ attorneys are often inexperienced in domestic violence or family law and may create more safety risks.

LETHALITY ASSESSMENTS

You should review the risk of lethality or danger to your client. If the case has been referred by a shelter or another battered women’s organization, ask for their assessment of lethality. A simple rule of thumb is whether your client is afraid she will be killed or hurt.

Separation from the abuser is the most dangerous period for women. Abusers who violate protective orders, commit violence in public, stalk or escalate the violence are particularly dangerous. Note that the “escalation of violence” period may be quicker for men over 40.

The following may be used to assess whether the abuser has the potential to kill his partner:

1. Threats of homicide or suicide
2. Fantasies of homicide or suicide
3. Stalking
4. Depression or other mental health issues
5. Access to or use of weapons
6. Obsessiveness about partner or family
7. Centrality of battered woman to abuser’s life
8. Substance abuse
9. Rage or separation violence
10. Frequency of violence
11. Escalation of violence
12. Violation of protective order
13. Prior criminal history or protective orders
14. Hostage taking
15. Abuse of pets

The more of these factors present, the greater the risk of severe harm to your client.

SAFETY PLANNING

Ideally, your client will have developed a safety plan with a battered women’s counselor. Inquire to ensure that she has a safety plan. If she does not have a safety plan, discuss the need for one with her.
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The American Bar Association Lawyers’ Handbook on Domestic Violence and other guides recommend that you advise your client to:

- ALWAYS keep a protective order on her person and extra copies of protective orders at home and at work.\(^7\)
- Visit her local police station. Meet the officers and ask them to place protective order on file.
- Make the home as safe as possible and go to a safe place with the children if necessary.
- Develop an escape route and a safety plan for the family.
- Keep a bag packed and hidden in case flight becomes necessary.
- Keep a copy of all essential documentation, phone numbers and addresses in a safe location other than home.
- Tell neighbors and co-workers the abuser’s identity.\(^8\)
- Enroll in a reliable self-defense course.
- Alter routines and trade cars with a friend or relative.
- Travel to and from work with another person.
- Stay alert and prepared to flee while exiting or entering vehicles.
- Keep your addresses and telephone numbers confidential.
- Screen incoming calls and keep a diary.
- If affordable, a cell phone to call the police at 911 should be purchased. Most cell phones even when not activated can be charged and programmed to call 911.
- Protective orders should be given to school authorities to prevent the abuser from picking up the children.\(^7\)

INTERVIEW TIPS FOR DOMESTIC VIOLENCE CASES

1. Shame, fear and ignorance may prevent a victim from talking about abuse. Women often minimize the abuse as a way of coping or out of fear.
2. The Power and Control Wheel and the Woman Abuse Scale are good interviewing techniques to help a victim to describe her relationship and the abuse. Work gradually toward direct, factual questions to elicit information, e.g., are you afraid of him, has he ever hurt you or threatened you, has he ever pushed, hit, kicked or choked you.
3. Many women will minimize the effect of the violence on their children as a means of coping.
4. If you feel your client is minimizing the danger, tell her that you are concerned for her safety and the safety of her children.
5. Never blame the victim. Respond to her in a non-judgmental way. She is a crime victim and you should see her as such.

\(^7\) Louisiana law requires the clerk of court to file protective orders by with the state’s protective order registry. This enables the police in any parish to check the state registry. Caveat: there are clerk’s offices in Louisiana that do not follow this law.

\(^8\) Photographs may be helpful. The client should consider notifying her supervisor. Apartment complex security should be notified.

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6. Do not ask what she did to cause him to beat her. There is nothing about her or actions that could prevent or justify the crimes committed against her.

7. Do not ask why she did not leave sooner or why she went back.

8. Do not refer to the abuser by his relationship (e.g., husband, boyfriend). Refer to him by his first name.

9. The danger of death, serious injury, ongoing trauma and the welfare of her children are the immediate “life” issues that the client faces. After the client knows that you will handle her immediate problems, explore all of her legal options for safety, economic resources and housing.

MYTHS ABOUT DOMESTIC VIOLENCE

There are many myths about domestic violence. Some that impair effective counseling of a victim are:

**Myth:** Victims are poor, uneducated, helpless, emotionally fragile and often minorities.

**Fact:** Domestic violence affects all socioeconomic, ethnic, age, educational levels and psychological make-ups.

**Myth:** Victims have a psychological make-up that causes them to stay in violent relationships.

**Fact:** Victims are crime victims. Domestic violence can happen to anyone. There are many reasons why some victims do not immediately leave a relationship or return to a relationship.

**Myth:** The victim’s behavior caused the battering.

**Fact:** The victim does not cause and cannot control the abuser’s behavior. He chooses to abuse his partner regardless of her behavior.

PROTECTIVE OR RESTRAINING ORDERS

1. Overview

Louisiana has 5 civil statutes that provide for temporary restraining orders, protective orders and injunctions against domestic violence:

- La. R. S. 46: 2131 *et seq.*, Domestic Abuse Assistance Act
- La. R.S. 9:361 *et seq.*, Post-Separation Family Violence Relief Act
- La. R.S. 9: 372 & 372.1
- La. Children’s Code art. 1564 *et seq*.


All protective orders, including Code Civ. Proc. art. 3601 injunctions, must be entered on a Uniform Abuse Prevention Order form or LPOR. The Supreme Court’s webpage (www.lasc.org) has these LPOR forms. The clerk

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of court must file the protective orders with the Louisiana Protective Order Registry immediately.\(^\text{10}\)

Domestic abuse or family violence “includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injury and defamation, committed by one family or household member against another.” See R.S. 46:2132 (3); R.S. 9: 362; Ch. C. art. 1565 (1). The courts generally limit protective orders to physical abuse, sexual abuse or an offense against a person. \textit{Harper v. Harper}, 537 So.2d 282 (La. App. 4th Cir. 1988). A battery, even if not injurious, can constitute domestic violence. \textit{Michelli v. Michelli}, 655 So.2d 1342 (La. App. 1st Cir. 1995). Threatening another without touching her can be an assault under R.S. 14: 36 \textit{et seq.}, and therefore constitute grounds for a protective order. \textit{Harper v. Harper, supra.}

Most domestic violence victims seek protective orders under La. R.S. 46: 2131 \textit{et seq.} A temporary restraining order under R.S. 46: 2135 requires “good cause” which is defined as “immediate and present danger of abuse.” R.S. 46:2135 A. La. Code Civ. Proc. art. 3603.1 further provides that notwithstanding R.S. 46: 2131 \textit{et seq.}, R.S. 9: 361 \textit{et seq.}, R.S. 9: 372, Ch. C. art. 1564 \textit{et seq.} or Code Civ. Proc. art. 3601 \textit{et seq.}, no temporary restraining order or preliminary injunction prohibiting harm of another person or going near her shall issue “unless the complainant has good and reasonable grounds to fear for his or her safety or that of the children, or the complainant has in the past been the victim of abuse by the other spouse.”\(^\text{11}\)

Different judges use different standards to determine whether an interlocutory injunction should issue. For example, some judges will not issue an interlocutory injunction unless the abuse occurred within x weeks. You need to know the personal practices of each judge. By comparison, the standard for issuance of a R.S. 46: 2136 protective order (as distinguished from a TRO) is simply that the court “may issue any protective order ... to bring about a cessation of abuse of a party, any minor child....”\(^\text{12}\)

A protective order may be granted if there is a “possibility” of abuse. \textit{Wise v. Wise}, 833 So.2d 393 (La. App. 5th Cir. 2002). In \textit{Wise}, a protective order was granted on the wife’s testimony of prior violence even where the husband denied the violence and his relatives testified that they did not know of any domestic abuse. Notably, the Wise court upheld a protective order to the wife even though the husband was still in jail and could not immediately harm the wife. The courts of appeal have applied the abuse of discretion standard to review the issuance or denial of protective orders. See \textit{Mitchell v. Marshall}, 819 So. 2d 359, 361 (La. App. 3d Cir. 2002).

\(^{10}\) Despite this statutory mandate, there are some clerk’s offices that will not submit the Uniform Abuse Prevention Order to the registry unless you request it. If there is no protective order in the registry, it will be easier for the abuser to purchase a gun in violation of federal law.

\(^{11}\) Code Civ. Proc. art. 3601 \textit{et seq.} do not say whether “spouse” includes unwed cohabiters or divorced couples. However, R.S. 46: 2131 \textit{et seq.} refers to such individuals as “spouses.” R.S. 9: 361 \textit{et seq.} refers to divorced spouses as “spouses.”

\(^{12}\) Note, however, that LPOR Form 3 (R.S. 46:2131 protective order) includes boilerplate findings of immediate and present danger of abuse and good and reasonable grounds to fear for safety as the reasons for issuing the protective order.
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A protective or restraining order may not be granted to a party who has not requested such relief by written pleading. *Bays v. Bays*, 779 So.2d 754 (La. 2000). Mutual or reciprocal injunctions should be opposed since they re-victimize the victim and may disadvantage the victim in subsequent litigation.

The requirements and features of the primary civil protective and restraining orders are set forth below. Protective orders under the Children’s Code and R.S. 9:372 are included in the Appendix.

2. **La. R.S. 46: 2131 et seq. (Domestic Abuse Assistance Act)**
   a. **Eligible Plaintiffs**
      * Family members:* spouses, ex-spouses, parents, stepparents, foster parents, children, stepchildren, foster children, grandparents, grandchildren
      * Household members:* person of opposite sex presently or formerly living with defendant as spouse, whether married or not.
      * Dating partners:* person who is or has been in a social relationship of a romantic or intimate nature.

      Most unwed heterosexual couples will proceed under La. R.S. 46: 2131 *et seq.* This statute now protects unwed couples who have cohabited even if no minor child lives in the residence. Act 1180 of 2001 enacted R.S. 46: 2151 *et seq.* which extends the full protections and remedies of R.S. 46: 2131 *et seq.* to dating couples who have not cohabited and homosexual couples.

   b. **Courts With Jurisdiction**
      Any court which is empowered to hear family or juvenile matters. R.S. 46:2133 A.

   c. **Venue**
      Venue lies in any of the following parishes:
      * Parish of household or marital domicile
      * Parish where petitioner or defendant resides
      * Parish where abuse occurs
      * Parish where divorce or annulment action could be brought (domicile of petitioner or defendant or last matrimonial domicile).

   d. **Available Relief**
      The Court may order a temporary restraining order and, after a contradictory hearing, a protective order. The temporary restraining order may be entered without bond. La. R.S. 46: 2135. These orders may provide the following relief:

      **Temporary Restraining Order (La. R.S. 46: 2135)**
      * Prohibit abuse, harassment, contact or interference with petitioner
      * Prohibit going near residence and place of employment of petitioner and minor children
      * Award use of jointly owned or leased property such as an automobile
• Award use of residence to petitioner and evict defendant (unless solely owned by defendant or solely leased by defendant who has no duty to support petitioner or person on whose behalf petition is brought)
• Prohibit either party from transferring, encumbering or disposing of property mutually owned or leased by the parties
• Award temporary custody of children
• Allow a party to return once to residence but only with law enforcement escort to retrieve personal clothing and necessities

**Protective Order (La. R.S. 46: 2136)**

- Same relief as provided for temporary restraining orders in R.S. 46: 2135
- Where there is a duty to support, order temporary support or provision of suitable housing
- Award temporary custody or establish temporary visitation
- Order counseling or medical treatment for defendant or abused person or both
- Order perpetrator to pay court costs, attorney fees, expert witness fees and medical and psychological care for abused adult and children necessitated by domestic violence. R. S. 46: 2136.1

**e. Duration of Restraining and Protective Orders**

There appear to be conflicting provisions as to the duration of temporary restraining orders under the Protection from Family Violence Act, R.S. 46: 2121 et seq. R.S. 46: 2135 provides that the temporary restraining order may last for up to 20 days from the judge’s signature and that it can be reissued for 10 days if the hearing is continued. La. Code Civ. Proc. art. 3604 (C) further provides that a temporary restraining order remains in effect until the hearing or 30 days, whichever occurs first. If the initial rule to show cause is heard by a hearing officer, the temporary restraining order may remain in effect for 15 days or until the district judge signs the protective order, whichever occurs last. Code Civ. Proc. art 3604 (C) also allows temporary restraining orders to be extended for 30 days.

The protective order may be for up to 18 months. It may be extended beyond 18 months, after a hearing, if the petitioner applies for an extension prior to the order’s expiration. The law is silent as to how long the protective order may be extended. Presumably, it may be extended for another 18 months.

**Caveat:** Child custody and support orders may expire with the expiration of the R.S. 46: 2136 protective order. An advantage of a protective order for an eligible plaintiff under R.S. 9:361, 372 or 372.1 is that the protective order may be permanent. However, note that a “spousal” support order in a R.S. 46:2131 action may (1) last longer than an interim spousal support order in a divorce action and (2) survive a reconciliation defense. See *Doskocil v. McInnis*, 880 So.2d 240 (La. App. 2d Cir. 2004).
f. Penalties for Violation

Violations of a R.S. 46: 2135 or 2136 order may be punished as civil contempt. The penalties include jail for up to 6 months and/or fine up to $500. Also, the court must terminate all court-ordered visitation. The defendant may be arrested and criminally prosecuted under R.S. 14:79 for violation of the TRO after served or violation of the protective order after issued.

3. La. R.S. 9:361 (Post-Separation Family Violence Relief Act)

a. Eligible Plaintiffs

Abused parent or parent on behalf of an abused child. The Post-Separation Family Violence Relief Act (PSFVRA) may be used even if the parents are separated or divorced. Abused parents, who were never married to the abuser, may use the PSFVRA for relief. See Evans v. Terrell, 665 So.2d 648 (La. App. 2d Cir. 1995). The PSFVRA is often used where it is the first pleading in litigation between the parties.

b. Courts with Jurisdiction

Any court having jurisdiction over the parents or children at issue.

c. Venue

If filed in conjunction with a divorce, where the divorce can be filed, i.e., domicile of either parent or last matrimonial domicile.

If filed in conjunction with custody, refer to venue rules for custody actions.

d. Available Relief

The Court may provide the following relief:

• Prohibit contact with abused parent or children except as approved by court
• Bar abuser from going within 50 yards of home, school, employment or person of abused parent or children
• Bar abuser from going within 50 feet of automobile of abused parent or children
• Order only supervised visitation of children, conditioned on abuser’s completion of treatment program
• Visitation supervisor may not be relative, friend, therapist or associate of abuser. Costs of supervision must be borne by abuser. Police officers, sensitive to domestic violence or juvenile issues, are often the best supervisors because they are willing to intervene to stop harmful interactions with children.
• Bar abuser from overnight visitation or visitation in abuser’s home
• Bar sole or joint custody until abuser has completed treatment program
• Bar sexual abuser of child from all contact with children until completion of treatment program. Thereafter, allow only supervised visitation. (Criminal conviction is not a prerequisite for this relief).

13 However, La. Ch. Code art. 1570 (F) may be invoked to bar all visitation until the child is 18 years old. Buchanan v. Langston, 827 So.2d 1186 (La. App. 2d Cir. 2002).
• Order abuser to pay court costs, attorney fees, evaluation fees, expert witness fees and medical or psychological care for abused parent and/or children resulting from abuse

e. Duration of Restraining or Protective Orders

The rules for civil injunctions at La. Code Civ. Proc. art. 3601 et seq. govern. Normally, a temporary restraining order lasts for 2 to 10 days and may, at any time before its expiration, be extended for good cause for up to 10 days. However, Code Civ. Proc. art. 3604 (B) provides that a temporary restraining order issued in conjunction with a rule to show cause for a preliminary injunction prohibiting a spouse from harming the other spouse or child shall remain in force until the hearing on the preliminary injunction.

The preliminary injunction hearing is required to be set for 2 to 10 days after service of the notice. La. Code Civ. Proc. art. 3602. The preliminary injunction remains in effect until the hearing on the permanent injunction or until dissolved. R.S. 9: 361 et seq. does not expressly waive the bond requirement for interlocutory injunctions. However, R.S. 9: 361 et seq. may be used in conjunction with a R.S. 46: 2131 et seq. proceeding and R.S. 46: 2135 does waive the bond requirement for temporary restraining orders. R.S. 9: 361 eligible plaintiffs would also be R.S. 46: 2131 eligible plaintiffs.

A permanent injunction does not expire. However, a pre-divorce injunction may be extinguished if it is not specifically mentioned in the divorce judgment. Steele v. Steele, 591 So.2d 810 (La. App. 3d Cir. 1991). Note that R.S. 9:366 requires that all divorce, child custody and child visitation orders and judgments in “family violence” cases shall contain an injunction as defined in R.S. 9: 362.

f. Penalties for Violation

Penalties for violation of a PSFRA injunction include civil contempt and termination of visitation. Contempt is punishable by up to 12 months in jail and a fine of up to $1,000. The defendant may be entitled to a jury trial on the contempt motion. The defendant may be arrested and criminally prosecuted under R.S. 14:79 for violation of the TRO after served or violation of the preliminary or permanent injunction after issued.


a. Eligible Plaintiffs

Anyone who seeks protection from abuse. Code Civ. Proc. art. 3601 is the only relief available to adult victims who are ineligible for relief under R.S. 46: 2131 et seq., 46: 2151 et seq. and 9:361 et seq. The plaintiff must show irreparable injury and post a bond to secure an interlocutory injunction.

14 Note that a plaintiff eligible for relief under R.S. 9: 361 et seq. should also be eligible for relief under R.S. 46: 2131 et seq. See language of these statutes and R.S. 46: 2139.

15 Code Civ. Proc. art. 3604(B) does not say whether “spouse” includes unwed cohabiters or divorced couples. However, R.S. 46: 2131 et seq. refers to such individuals as “spouses.” R.S. 9: 361 et seq. refers to divorced spouses as “spouses.”

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b. **Courts with Jurisdiction**
   District court.\(^\text{16}\)

c. **Venue**
   Parish of defendant’s domicile or where behavior enjoined is likely to occur.

d. **Available Relief**
   Prohibit abuse which may result in irreparable harm or injury.

e. **Duration of Order**
   The temporary restraining order lasts until the preliminary injunction hearing. La. Code Civ. Proc. art. 3604 (B). The preliminary injunction lasts until the trial on the permanent injunction. A permanent injunction against abuse does not expire. It is for life unless modified.

f. **Penalties for Violation**
   Penalties for violation of a C.C.P. art. 3601 *et seq.* injunction include civil contempt. Contempt is punishable by up to 12 months in jail (6 months if a city court injunction) and a fine up to $1,000. The defendant may be entitled to a jury trial on the contempt motion. The defendant may be arrested and criminally prosecuted under R.S. 14:79 for violation of the TRO after served or violation of the preliminary or permanent injunction after issued.

5. **Comparison of the Civil Protective Order Statutes**
   The Domestic Abuse Assistance Act, R.S. 46:2131, is the only statute which provides for the confidentiality of the petitioner’s address. Relief is available to victims who do not have children. The restraining orders can issue without bond. The protective order can be heard within 20 days and can provide broad relief. Relief available under Post-Separation Family Violence Relief Act, the custody and visitation rules for family violence cases, is available in a R.S. 46:2131 proceeding. See R.S. 9:368. The duration of a R.S. 46:2131 protective order is shorter than that for a R.S. 9:361 or 9:372 protective order.

   An advantage of R.S. 46:2131 is that immediate use and occupancy of the family home can be obtained in the temporary restraining order prior to a contradictory hearing on the final protective order. In addition, “use of the family home” relief can be obtained without filing a divorce action. Presumably, the order may last for the life of the protective order. R.S. 9:361 *et seq.* and R.S. 9:372 do not independently provide for family home use and occupancy orders. Plaintiffs proceeding under these statutes could ask for such relief under R.S. 46:2131 *et seq.*

   Protective orders under R.S. 46:2131 *et seq.* may not award use and occupancy of a home owned solely by the abuser. However, a “spouse” may use R.S. 9:374 to seek temporary use of a home that is the abuser’s separate property. R.S. 9:374 relief can only be ordered after the filing of a divorce and a contradictory hearing. A R.S. 9:374 award of the family home lasts until the partition of community property or until 180 days after the divorce, whichever occurs first. Under R.S. 9:374, one spouse may be

\(^{16}\) City and parish courts may also have jurisdiction.
awarded the use of a home, that is community property, until further orders of the court.

6. **Filing and Pleading Considerations**

Some plaintiffs will be eligible for protective orders under both R.S. 46: 2131 and R.S. 9: 361. Both statutes may be pleaded. See e.g., LPOR Form 19.

If a divorce is pending, a protective order application under R.S. 46: 2131 should be filed in the divorce action. See R.S. 46: 2134 E.

Filing fees may not be charged for civil protective order petitions or the issuance of a protective order. Act 430 of 2001, codified at La. R.S. 46:2134 (F) and La. Code Civ. Proc. art. 3603.1. Furthermore, Act 430 expressly prohibits a court from casting a petitioner with court costs. Thus, a court may not cast a petitioner with court costs if it denies the protective order.

Act 430 obviates the need to seek in forma pauperis status for protective order petitioners. The petition, orders and process are free for protective order petitioners. For other family law pleadings, persons whose incomes are below 125% of poverty or receiving public assistance are presumptively eligible to proceed in forma pauperis, i.e., to file and litigate an action without prepayment of filing fees. See La. Code Civ. Proc. art. 5181 et seq.

It is common for a victim not to have access to community assets since they are controlled by the abusive spouse or the victim is in flight from the marital home. Thus, a "nonindigent" spouse may be temporarily eligible for in forma pauperis depending on the circumstances. Victims often seek temporary haven with relatives or friends who may lend them financial support. The income, assets and support of such household members should not be counted in determining the victim's eligibility for in forma pauperis. See Hollier v. Broussard, 220 So. 2d 175, 177 (La. App. 3d Cir. 1969). Victims may not be able to obtain a third party financial affidavit because they have been isolated by the abuser or they are in flight or seclusion. Some courts will waive the third party affidavit on the victim's motion.

7. **Evidentiary Issues Related to Protective Orders and Family Violence Cases**

a. **Prior Bad Acts or Convictions (La. C. E. art. 404)**

Prior bad acts or crimes should be admissible in many protective order cases since a key custody issue under R.S. 9: 364 is whether there is a "history of family violence." See Rainey v. Wren, 722 So. 2d 54, 58, 62-63 (La. App. 1st Cir. 1998); Michelli v. Michelli, 655 So.2d 1342 (La. App. 1st Cir. 1995). Even acts that occurred prior to a custody decree should be admissible. Wren, supra.

Prior bad acts may also be admissible to prove a greater likelihood of abuse in the future and the need for protective measures. See Wise v. Wise, 833 So.2d 393 (La. App. 5th Cir. 2002); Cruz- Foster v. Foster, 597 A.2d 927, 930 (D.C. App. 1991) (abuser's past conduct is perhaps the most important evidence of his future conduct).

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17 See also Coburn v. Coburn, 674 A.2d 951 (Md. App. 1996) (prohibition against admission of prior bad acts doesn't apply because past abuse is an element of the cause of action).
In the protective order context, prior bad acts may be relevant to prove intent, motive or absence of mistake. La. C.E. art. 404 B, 402. A defendant may claim that the plaintiff is fabricating the abuse charges to gain advantage in a divorce or custody case. Evidence of prior abuse rebuts this defense.

b. Police Reports

Louisiana law requires the police to write a report whenever they respond to a domestic violence call. In Louisiana, police reports are generally inadmissible. La. C.E. art. 803 (8)(b); State v Sigur, 578 So.2d 143 (La. App. 1st Cir. 1990) writ denied 582 So.2d 1303. You may be able to introduce a police report if the defendant does not object. Police reports (or testimony about them) may be admissible in child custody actions under the limited applicability rules of La. C.E. art. 1101. See Gautreau v. Gautreau, 697 So.2d 1339 (La. App. 3d Cir. 1997) writ denied 703 So.2d 1272. Police officer witnesses may use the police report to refresh their recollection. A well written police report will include the defendant’s admissions, excited utterances by those present and a description of injuries. In practice, many judges do not follow La. C.E. art. 1101 and will make a victim’s proof of domestic violence more difficult by excluding police reports. By ordinance or policy, a police report may be free to domestic violence victims in your parish. Check local law.

c. Admissions Against Interest

Abusers may make admissions to the investigating police officers relative to acts of violence. Abusers tend to minimize their behavior. Nonetheless, even the minimized behavior may constitute battery or assault which would constitute grounds for a protective order or finding of family violence. Such admissions are admissible as an exception to the hearsay rule. La. C.E. art. 804 B (3).

d. Former Testimony

Former testimony in another hearing may be admissible if the defendant is an “unavailable witness” because of his refusal to testify in current proceeding. La. C.E. art. 804 B (1); State v. Adams, 609 So.2d 894 (La. App. 4th Cir. 1992).

e. Audiotapes

Audiotapes of the defendant’s statements or threats, even secretly recorded telephone conversations, may be admissible. State v. Jeanlouis, 683 So.2d 1355 (La. App. 3rd Cir. 1996) writ denied 692 So.2d 446; Briscoe v. Briscoe, 641 So.2d 999 (La. App. 2d Cir. 1994). 911 tapes can be very compelling evidence. Defendants may leave threats on an answering machine.

f. Excited Utterances

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition. La. C.E. art. 803 (2). Well-written police reports may contain excited utterances by the victim or children to which the police officer may testify.
g. **Child’s Hearsay Statements**

A child’s hearsay statements to a doctor, mental health professional or abuse expert may be admissible. *G.N.S. v. S.B.S.*, 796 So.2d 739, 750-51 (La. App. 2d Cir. 2001).

h. **5th Amendment**

The defendant may assert the 5th Amendment privilege in a protective order hearing if there is a concurrent criminal prosecution. His silence can be construed against him in a civil proceeding. *See e.g., Miles v. Louisiana Landscape*, 697 So.2d 348 (La. App. 5th Cir. 1997). The existence of a criminal prosecution should not constitute grounds for continuance of a protective order hearing. R.S. 46: 2135 mandates that the protective order hearing be held within certain delays. A finding in a protective order or hearing cannot be res judicata in a subsequent proceeding. R.S. 46: 2134 E. It is not a violation of due process or the 5th Amendment for a criminal defendant to have to defend a related civil proceeding. In a criminal contempt proceeding for violation of a protective order or injunction, you must be prepared to prove your case without the defendant’s testimony since he may assert the 5th Amendment right against self-incrimination.

i. **Relaxed Evidentiary Rules in Child Custody Cases**

La. C.E. art. 1101(B)(2) states that, in child custody cases, the specific exclusionary rules contained in the code of evidence “shall be applied only to the extent that they tend to promote the purposes of the proceeding.” Art. 1101 has been held to apply to child custody actions under the Post-Separation Family Violence Relief Act, R.S. 9: 361 et seq. *Folse v. Folse*, 738 So.2d 1040 (La. 1999); *D.O.H. v. T.L.H.*, 799 So.2d 714, 717 (La. App. 3d Cir. 2001).

In *Gautreau v. Gautreau*, 697 So.2d 1339 (La. App. 3d Cir. 1997) *writ denied* 703 So.2d 1272, a police officer’s testimony about a police report was admitted under C.E. art. 1101 despite an objection by the opposing party. In practice, many judges do not follow La. C.E. art. 1101 and will make a victim’s proof of domestic violence more difficult by excluding police reports.

j. **Discovery**

Abusers manipulate the system. Do not rely on the abuser to respond honestly to discovery. Whenever possible, try to get the information directly from a third party, e.g., employer, hospital, day care center, Internal Revenue Service, etc. Approach depositions with caution. Consider taking the deposition in a secure setting, such as a courthouse with metal detectors, and do not allow the abuser to be alone with the victim.

8. **Trial**

Object to a pro se abuser approaching your client during cross-examination. Be aware that many abusers are adept at charming and manipulating judges. A victim may not make as favorable an impression because of intimidation and the effects of abuse. R.S. 9: 364 A states that the fact that a victim suffers from the effects of abuse shall not be grounds for denying her custody.
9. Coordination with Criminal Proceedings Involving Abuse

Some judges have incorrectly refused to issue a protective order or hold a contempt hearing for violation of a protective order because of a related criminal proceeding against the abuser.18 Double jeopardy is not a bar to a subsequent criminal prosecution for the same act for which a civil protection order is issued. Double jeopardy does not prevent a battered woman from enforcing a civil protection order through a criminal contempt motion while the government proceeds with a criminal prosecution for crimes committed against the woman at the time the abuser violated the civil protective order. See United States v. Dixon, 509 U.S. 688 (1993).

10. Drafting the Protective Order

The protective order must be reduced to a Uniform Abuse Prevention Order form. The judge will expect you to complete this form. All necessary relief should be checked.

Some judges will refuse to enforce a protective order that specifically designates the petitioner’s residential address that the abuser cannot go near if the petitioner has moved. This practice hurts petitioners who move. The LPOR Forms provide a space for the petitioner’s protected residential address. Since petitioners often move, the better practice may be to omit a specific address or to write “anywhere the petitioner may reside” in this space.

Visitation and custody provisions should be drafted to minimize the risk to the petitioner and her children. Joint custody and general “reasonable visitation” clauses should be avoided. Fully utilize the protections of R.S. 9: 361 et seq. if applicable. Provisions should be specific and easy to understand.

A protective order cannot be issued in favor of a party unless he has requested this relief in a written pleading with reasonable notice to the other party.19 Bays v. Bays, 779 So.2d 754 (La. 2001). Mutual protective orders generally should not be agreed to. An attorney should be prepared to present evidence that the victim was not the aggressor and to distinguish a victim’s self-defensive measures from aggression. Mutual protective orders, if not factually justified, revictimize the victim and provide an abuser with another vehicle to harass the victim.

11. Service of the Protective Order

The protective order should be served on the defendant at the close of the hearing. The petitioner should leave the courthouse with certified copies of the protective orders. She should have 3 to 4 copies so that she can keep one at home, one on her person, one at work, and one for school officials if children are involved. The law does not allow the court to withhold judgments or certified copies thereof from in forma pauperis litigants. Savoy v. Doe, 315 So.2d 875 (La. App. 3rd Cir. 1975); Carline v. Carline, 644

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18 See also Crowley v. Crowley, 680 So.2d 661 (La. 1996) wherein the Supreme Court ordered the district judge to rule on a domestic violence victim’s contempt motion.

19 The Violence Against Women Act, 18 USC § 2265, provides that mutual protective orders cannot be enforced in non-issuing states unless the respondent actually filed written pleadings for the order and the court made specific findings that the respondent was entitled to a protective order.
So.2d 835 (La. App. 1st Cir. 1994). Furthermore, Act 430 of 2001, codified at La. R.S. 46: 2134 (F) and La. Code Civ. Proc. art. 3603.1 (C), mandates clerks of courts to immediately file and process temporary restraining or protective orders regardless of the petitioner’s ability to pay court costs.

12. Status of Protective Orders

Protective orders are valid until they expire or are modified. (Caveat: a subsequent divorce judgment may supersede a protective order if it fails to restate the injunctions against abuse. See e.g., Steele v. Steele, supra). Reunification does not nullify a protective order. They are orders of the court. A petitioner’s actions do not excuse a violation of the court’s order.

13. Foreign Protective Orders

The Violence Against Women Act requires states to give full faith and credit to orders of protection entered in other states. 18 USC § 2265. The police may enforce foreign protective orders which have not been made executory in Louisiana. La. R.S. 13: 4248 provides that a foreign protective order may be made executory in Louisiana by the filing of an ex parte petition. See LPOR Form E.

The disadvantage of filing a petition to make a foreign order executory is that it will put the abuser on notice that the petitioner is in Louisiana. The petitioner can keep her address confidential. R.S. 13: 4243 B. However, the abuser will be sent notice of the filing of the petition. The advantages to an executory order are that police are more likely to enforce the order and can verify the order through the Louisiana Protective Order Registry. The police may be reluctant to enforce a foreign protective order if it does not indicate on its face that the abuser was served. In addition, a Louisiana court can hold the abuser in contempt of a Louisiana order.

It is a federal crime to cross a state line to violate a protective order. 18 USC § 2262. The FBI and U.S. Attorney’s Office should be contacted if an interstate violation of a protective order occurs.

14. Criminal Stay Away Orders

Criminal courts may issue “stay away” orders pursuant to peace bonds (C.Cr. P. art. 26), bail restrictions or conditions of release (C.Cr.P. art 327.1 & 335.1), or conditions of probation and sentencing orders (C.Cr.P. 895 & 871.1).

Pre-1974 home rule charter local governments may have ordinances that expressly criminalize domestic violence by persons in dating relationships. See e.g., New Orleans Criminal Code § 54-525 et seq. Criminal stay away orders cease when the prosecution is dismissed or the probation is completed. These events may trigger the need for a civil protective order.

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20 A child custody provision within a protective order will need to comply with the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act in order to be entitled to full faith and credit. However, an order prohibiting the abuser from going near a child is not a custody order and will be entitled to full faith and credit under the Violence Against Women Act. Pre-2001 foreign protective orders for dating or homosexual couples should be entitled to full faith and credit in Louisiana even though the petitioner would have been ineligible for protection if she had originally applied in Louisiana.

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15. Interstate Domestic Violence

It is a federal crime to cross state lines to commit domestic violence or violate a protective order.

16. Prohibitions on Gun Possession or Ownership

18 USC § 922 (g) makes it unlawful for a person to possess or purchase a firearm if he is subject to a court order that:

1. was issued after a hearing of which he received actual notice and had an opportunity to participate;

2. restrains such person from harassing, stalking or threatening an intimate partner (or child) or engaging in other conduct that would place an intimate partner (or child) in reasonable fear of bodily injury; and

3. includes a finding that such person represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

In addition, 18 USC § 922 (g) prohibits persons who have been convicted of a misdemeanor crime of domestic violence from purchasing or possessing a firearm. There are exceptions for law enforcement and military personnel.

Thus, a protective order that expressly prohibits use of physical force or has a finding that the abuser poses a credible threat to the physical safety of the intimate partner or child would invoke federal law prohibitions against the abuser having a gun. The LPOR forms carry this warning that federal law prohibits purchase or possession of firearms.

If the abuser has a gun, you should ask the court to expressly order him to turn his guns into law enforcement officials and to produce proof of said surrender to the court. Violations of 18 USC § 922 may be prosecuted by federal authorities. These authorities should confiscate the guns in the course of arresting the abuser.

Some abusers may be willing to consent to a protective order on the theory that 18 USC § 922(g) would be inapplicable to them since “no hearing occurred.”

17. Miscellaneous Safety Assistance

Notify the U.S. Post Office of any protective order and request that it protect access to information about the victim’s address or post office box as required by the Violence Against Women Act. 42 USC §§ 13951, 14014.

Notify the state department of motor vehicles to restrict release of information about the victim. 18 USC § 2725.

The director of a local Social Security office has the authority to issue a new Social Security number on behalf of a victim whose life, or that of a child in her care, is in serious danger. The Social Security office will require written affirmation of domestic abuse from a third party, e.g., shelter staff, medical provider or law enforcement official. See SSA Publication No. 05-10093 (Jan. 2004).
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Consider whether to contact the U.S. Attorney’s Office about the victim entering the witness protection program where the abuser is involved in drug related federal criminal activity.

18. Attorney’s Fees

Many abusers continue their harassment of the victim through protracted custody and visitation litigation. R.S. 9: 367 provides a powerful deterrent to such litigation. It mandates that all attorney’s fees must be paid by the abuser in a “family violence” case. Thus, once “family violence” has been found, the abuser must pay all of the victim’s attorney’s fees incurred in furtherance of the Post-Separation Family Violence Relief Act. The abuser is liable for reasonable attorney’s fees even if he is the prevailing party. Jarrell v. Jarrell, 811 So.2d 207 (La. App. 2d Cir. 2002) (almost $10,000 in fees awarded to victim who unsuccessfulty opposed greater visitation).

DIVORCE

A married woman’s maiden name is her legal surname. La. Civ. Code art. 100. Marriage does not change her legal surname. The divorce judgment should be drafted to confirm your client’s maiden name. This will facilitate the use of her maiden name.

A divorce judgment in a family violence case shall contain an injunction against abuse as defined in R.S. 9: 363. See R.S. 9: 366.

CUSTODY AND VISITATION

1. Introduction

This section will discuss some of the special custody and visitation issues that arise in family violence cases. A discussion of the general rules for custody and visitation can be found in the family law chapter written by Sachida Raman.

2. Applicability of Post-Separation Family Violence Relief Act

Family violence traumatizes children. Most intimate partner abusers also abuse their children. Abusers use custody and visitation litigation to continue their harassment. Visitation exposes an abused spouse and her children to continuing injury.

The Post-Separation Family Violence Relief Act, R.S. 9:361 et seq., addresses these problems.21 It establishes mandatory standards for the determination of custody and visitation disputes where there is a history of family violence. Most significantly, it effectively prohibits the award of sole or joint custody to the abusive parent.22 The presumption that the abusive parent cannot be a custodial parent can only be overcome if he proves completion of a treatment program (typically 6 months in duration), that he is

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22 This statutory presumption against awarding abusers custody is an important reform. It removes the burden from the victim to show the connection between spouse abuse and harm to the children. It strips the abusers of the power to threaten taking custody of the children in a divorce proceeding. The statutory presumption denies discretion to judges who may be uneducated or biased on the issue of domestic violence.
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not abusing alcohol or drugs and that the best interest of the children requires his participation as a custodial parent because of the abused parent’s absence, mental illness, substance abuse or such other circumstances which affect the children’s best interest. The fact that an abused parent suffers from the effects of the abuse cannot be grounds for denying her custody.

Similarly, R.S. 9: 364 limits the abuser to supervised visitation until he proves that he has completed a treatment program, is not abusing alcohol or drugs, poses no danger to the child, and that unsupervised visitation is in the child’s best interest. Several courts have held that supervised visitation cannot begin until the abuser has completed a treatment program. See e.g., *Duhon v. Duhon*, 801 So.2d 1263, 1265 (La. App. 3d Cir. 2001); *Morrison v. Morrison*, 699 So.2d 1124, 1127 (La. App. 1st Cir. 1997); cf. *Folse v. Folse*, 738 So.2d 1040 (La. 1999); *Crowley v. Crowley*, 680 So.2d 661 (La. 1996) (stayed visitation where family violence found). On the other hand, the Second Circuit appears to have allowed supervised visitation before completion of the treatment program. See *Lewis v. Lewis*, 771 So.2d 856 (La. App. 2d Cir. 2000).

The PSFVRA applies to custody and visitation disputes which involve a history of family violence whether the parents are unwed, married or divorced. See *Evans v. Terrell*, 665 So.2d 648 (La. App. 2d Cir. 1995). The PSFVRA provisions apply to family violence cases without regard to the parents’ marital status. See e.g., R.S. 9: 362 (1)-(4), 363, 364. Custody rules applicable to married or divorced parents are applicable to unwed parents. Cf. La. Civ. Code art. 245.

The courts must apply the standards of R.S. 9:361 et seq. when a history of family violence is proven. *Hicks v. Hicks*, 733 So.2d 1261 (La. App. 3rd Cir. 1999); *Ledet v. Ledet*, 865 So.2d 762 (La. App. 5th Cir. 2003); *Lewis v. Lewis*, 771 So.2d 856 (La. App. 2d Cir. 2000). Some trial judges do not like R.S. 9: 364 custody and visitation rules and will refuse to apply them. However, it is legal error for the judge to refuse to apply R.S. 9:364 when a history of family violence exists. *Hicks v. Hicks*, supra; *Lewis v. Lewis*, supra. It is also error for a judge to only award “interim” sole custody to the victim when a history of family violence has been proven. A judge’s refusal to apply R.S. 9: 364 is reversible error. *Hicks v. Hicks*, supra; *Crowley v. Crowley*, 680 So. 2d 661 (La. 1996) (trial court ordered to take appropriate action under PSFRA).

You should consider appropriate appellate remedies when a judge refuses to follow the PSFRA. *Crowley v. Crowley*, supra, illustrates the Supreme Court’s commitment to enforcement of the PSFRA. In *Crowley*, the district judge found a history of family violence in a June 1996 trial, but failed to order sole custody. The judge also took a contempt motion under advisement. On September 24, 1996, the victim filed a motion for contempt and sole custody. The district judge denied temporary sole custody and set the trial for January 27, 1997. The victim’s writ application to review the district judge’s failure to order sole custody and promptly decide the con-

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23 Regardless of which of these positions is correct, a court would have the authority or discretion to deny supervised visitation until completion of the treatment program. Cf., *Harper v. Harper*, 764 So.2d 1186 (La. App. 2d Cir. 2000).
tempt motion was denied by the court of appeal. On October 2, 1996, the victim filed supervisory writs with the Supreme Court which immediately stayed visitation. On October 11, 1996, the Supreme Court granted the writ and ordered the district judge to hold a contempt hearing within 30 days and to take appropriate action under the PSFRA.

Ledet v. Ledet, supra, provides another good example of appellate remedies where the trial court ignores "family violence" allegations. In Ledet, the trial court refused to hold an evidentiary hearing on the abuse allegations and suspended ruling on the abuse allegations for 60 days. The appellate court ordered the trial court to (1) hold and complete a hearing on the "family violence" allegations within 15 days, (2) make findings on the "family violence" allegations, and (3) set custody in accordance with those findings and the PSFVRA.

What constitutes a "history of perpetrating family violence" which will trigger the application of R.S. 9: 364 to custody and visitation? In 1995, the Legislature amended R.S. 9: 364 to define "history of perpetrating family violence" as either (1) one incident of family violence resulting in serious bodily injury or (2) more than one incident of family violence. R.S. 9: 364 A.

"Family violence" includes physical or sexual abuse and any offense against the person as defined in the Criminal Code, except negligent injury and defamation, committed by one parent against the other parent or any of the children. R.S. 9: 362 (3). Duhon v. Duhon, 801 So.2d 1263 (La. App. 3d Cir. 2001) (unjustified corporal punishment of child constituted "family violence"); G.N.S. v. S.B.S., 796 So. 2d 739 (La. App. 2d Cir. 2001) (sole custody based on violence to child).

"Family violence" includes battery, even if merely offensive and not injurious, threats to injure without touching and forced sex. See Michelli v. Michelli, 655 So. 2d 1342 (La. App. 1st Cir. 1995) (battery); Harper v. Harper, 537 So.2d 282 (La. App. 4th Cir. 1988) (assault); Hicks v. Hicks, supra (forced sex). It does not include reasonable acts of self-defense by one parent to protect herself or the child from the family violence of the other parent. R.S. 9: 362 (3). A trial court determination of "family violence" is entitled to great weight and will not be disturbed on appeal absent clear abuse of discretion. Buchanan v. Langston, 827 So.2d 1186, 1189 (La. App. 2d Cir. 2000).

Hicks v. Hicks illustrates the correct methodology for determining whether a history of family violence exists. The court should look at each alleged incident of family violence and determine whether it was proven and whether the proven incidents meet the statutory definition of history of family violence, i.e., one incident resulting in serious bodily injury or more than one incident. Accord, Michelli v. Michelli, supra. The violence does not have to be frequent or continuous. Michelli, supra.

24 Note that this amendment apparently occurred in response to a bad decision in Simmons v. Simmons, 649 So. 2d 799 (La. App.2d Cir. 1995) which refused to apply the PSFRA even though the husband admitted to hitting his wife several times—but never in the presence of the children or because he was "provoked" by her wife’s adultery. The Simmons definition of history of family violence has been legislatively overruled. As noted by Hicks v. Hicks, supra, the outdated Simmons test for history of family violence is wrong. Caveat: cases on "history of family violence" decided before the 1995 amendment are likely to be wrong.

25 A father’s abuse of the stepmother does not allow the mother to invoke the PSFVRA to restrict custody and visitation. Hollingsworth v. Semerad, 799 So.2d 658 (La. App. 2d Cir. 2001).
In *Hicks*, the wife testified to several incidents of family violence which were not refuted by the husband or his witnesses. Where the victim’s testimony on family violence is unrefuted, she does not have to come forward with corroborating evidence (of course, it is advisable to do so) to prove family violence. *Hicks, supra* at 1264. The trial judge did not apply R.S. 9:364 to his custody determination. Instead, he applied the 12 factors under Civil Code art. 134 and found that it was in the children’s best interest to live with their father.

On appeal, the *Hicks* court of appeal found that a history of family violence had been proved. Accordingly, as mandated by R.S. 9:364, it reversed the joint custody/primary residence order in the abusing husband’s favor and awarded sole custody to the abused wife. Once PSFVRA is triggered, the Civil Code art. 134 factors relative to best interest are inapplicable until the perpetrator has complied with all the requirements of the PSFVRA. *Hicks, supra* at 1266.

R.S. 9:364 should preclude any attempt by an abuser to invoke the jurisprudential reformation rule, i.e., that abatement of prior misconduct makes evidence of the prior misconduct irrelevant for determining fitness for custody. Cf. *Crowson v. Crowson*, 747 So. 2d 107 (La. App. 2d Cir. 1999).

### 3. Mediation Prohibited

A party who shows that she, or any of the children, has been a victim of family violence perpetrated by the other spouse or parent may not be ordered to mediate a divorce, child custody, visitation, child support, alimony or community property proceeding. R.S. 9:363.

### 4. Custody Evaluations

Under La. R.S. 9:333, courts often appoint mental health professionals to conduct evaluations of the parties and children to assist with custody determinations. In a “family violence” case, you should oppose the appointment of a custody evaluator until the court has ruled on the allegations of “family violence.” If a history of family violence is proven, La. R.S. 9:364 prohibits the court from awarding sole or joint custody to the abuser. In such situations, the court’s custody determination is mandated by La. R.S. 9:364, and the child’s best interest does not become and may never become an issue. The rationale for appointment of a custody evaluator is to enable the court to determine the child’s best interest and minimize risk to the child. See e.g., *Scott v. Scott*, 665 So.2d 760 (La. App. 1st Cir. 1995), *Clark v. Clark*, 539 So.2d 913, 917 (La. App. 2d Cir. 1989). This rationale does not exist if a “history of family violence” is proven. Thus, the court’s appointment of a custody evaluator before ruling on the “family violence” allegations, would be improper.

Under La. R.S. 9:364, the abuser cannot have unsupervised visitation or move for custodial rights until he has completed anger management training, which usually takes 6 months, and is free from drug and alcohol use. Even then, the abuser can only get unsupervised visitation if it is in the child’s best interest. Custodial rights are even more difficult for an abuser to obtain. The abuser must prove that the child’s best interest requires his participation as a custodial parent because of the other parent’s
absence, mental illness, substance abuse or *such other* circumstances which affect the child’s best interest. Also, the fact that the abused parent suffers from the effects of abuse shall not be grounds for denying that parent custody. There should be a contradictory hearing before appointing a custody evaluator. R.S. 9:331 (mental health evaluation may only be ordered for good cause shown). It should not occur before an abuser has completed anger management training and is free from alcohol and substance abuse. The motion for a custody evaluator should be denied unless it alleges that the child’s best interest requires his participation because of the other parent’s absence, mental illness, substance abuse or such other circumstances affecting the child’s best interest. The evaluation must be paid for by the abuser, and not split by the parties. La. R.S. 9:367

5. **Mental Health Professional Qualifications**

R.S. 9: 365 mandates that any mental health professionals appointed by the court to conduct a custody evaluation in a case where family violence is an issue must have current and demonstrable training and experience in working with perpetrators and victims of family violence. Many mental health professionals do not have this training since it is not a required course in professional schools. A minimum of 40 hours of specialized domestic violence training should be expected for court appointed evaluators. An untrained mental health professional could botch the evaluation and endanger the parties. A trial court should allow a party to contest an evaluator’s qualifications under R.S. 9: 365. See *e.g.*, *Ledet v. Ledet*, 865 So.2d 762, 765 (La. App. 5th Cir. 2003). Failure to object to an unqualified court appointed evaluator at the time of appointment could waive the objection. See *Evans v. Terrell*, 665 So. 2d 648 (La. App. 2d Cir. 1995).

6. **Custody**

Jurisdiction should exist under the Uniform Child Custody Jurisdiction Act (UCCJA), R.S. 13: 1700 *et seq.* Home state generally primes the other bases for custody jurisdiction. Unlike 47 other states, Louisiana has not yet adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) which amends the UCCJA to expand emergency jurisdiction to include domestic violence situations. However, the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738(A) has been amended to expand its “emergency jurisdiction” concept to include violence against the child’s parent. In states with the UCCJEA, a victim may be able to obtain emergency jurisdiction there and persuade the home state (Louisiana) to decline jurisdiction because of the domestic violence.

R.S. 46: 2135-36 authorize the court to award “temporary” custody at the protective order hearing. The “temporary” custody award under a R.S. 46:2136 protective order may only last for the duration of the protective order or until modified. However, if the petition stated other bases for relief, the child custody orders may last longer. *Cf. Anders v. Anders*, 618 So. 2d 452 (La. App. 4th Cir. 1993). Custody must ultimately be resolved through settlement or another procedure. A pleading that asserts R.S. 9: 361 *et seq.* would not be limited to “temporary” custody awards.
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Findings and rulings made in connection with R.S. 46: 2136 protective orders are not res judicata or collateral estoppel in any subsequent proceeding. R.S. 46: 2134 E. This means that the family violence has to be relitigated in subsequent proceedings, most notably a custody proceeding under R.S. 9: 361 et seq. which seeks sole custody for the victim. Therefore, you should be prepared to prove incidents of family violence again.

Note that acts that occurred before a stipulated or considered custody decree may or may not be admissible in a custody modification. See Rainey v. Wren, 722 So. 2d 54, 58 (La. App. 1st Cir. 1998). A balancing test is used to determine the relevance of the evidence. The court should articulate its reasons for admitting or excluding such evidence. Id. The majority opinion in Wren is unclear. The concurring opinion is the better view:

Evidence of ...history of family violence is relevant in determining... fitness as domiciliary parent...because evidence proving ... alleged violent disposition tends to make his unfitness as a parent more probable. La. C.E. Art. 401. This is true regardless of whether the alleged family violence occurred before or after the consent decree. Wren, supra at 62-63.

See also Smith v. Smith, 615 So.2d 926 (La. App. 1st Cir. 1993), where the court found that the trial court erred in a custody modification case by excluding evidence of physical and verbal abuse that occurred prior to the stipulated custody judgment. The court found that the trial court erred because the parties did not have previous opportunity to litigate the issue.

Consent agreements should be court approved so that the abuser may be held in contempt if he violates the agreement. See R.S. 46: 2136. Be sure to read the consent agreement on the record since abusers often refuse to sign the consent agreement. See Doskocil v. McInnis, 880 So.2d 240 (La. App. 2d Cir. 2004) (consent judgment read into record becomes legal judgment even if not reduced to writing); Alogdon v. Guertin, 701 So.2d 480 (La. App. 4th Cir. 1997) writ denied 704 So.2d 1201 (La. 1997) (same).

7. Visitation

Visitation orders should be drafted to minimize harm to the abused parent and her children. Provisions should be specific and clear so that conflict between the parties is minimized. Specific times should be indicated for visitation. The term, “reasonable visitation” should never be used in family violence cases. Exchanges for visitation should be structured to minimize harm. Exchanges may need to be conducted by third parties and/or in public places including police stations.

One study found that during visitation contacts, 5% of abusive fathers threaten to kill the mother, 34% threaten to kidnap the children and 25% threaten to hurt the children. J. Drye, The Silent Victims of Domestic Violence: Children Forgotten By The Judicial System, 34 Gonz. L. Rev. 229, 234 (1998-99).
DOMESTIC VIOLENCE

A parent with a history of family violence is only allowed supervised visitation, conditioned upon his participation in and completion of a treatment program for abusers. R.S. 9: 364 (C). These treatment programs take 6 months to complete. The Third and First Circuits have held that no visitation may occur under R.S. 9:364 (C) until the abuser has completed a treatment program. See Duhon v. Duhon, 801 So.2d 1263, 1265 (La. App. 3d Cir. 2001); Ford v. Ford, 798 So.2d 316, 318 (La. App. 3d Cir. 2001); Morrison v. Morrison, 699 So.2d 1124 (La. App. 1st Cir. 1997). See also Folse v. Folse, 738 So.2d 1040 (La. 1999)(sex abuse case–all visitation suspended until completion of treatment program). In Ford, the court held that visitation could not be awarded until the "history of family violence" allegations under the PSFVRA are fully litigated. In at least one case, the Second Circuit has allowed supervised visitation before completion of the treatment program. Lewis v. Lewis, 771 So.2d 856 (La. App. 2d. 2000). Notwithstanding Lewis, a trial court in the Second Circuit should have the discretion to deny supervised visitation before completion of the treatment program. Cf. Harper v. Harper, 764 So.2d 1186 (La. App. 2d Cir. 2000).

Unsupervised visitation may be allowed only upon proof that the abuser (1) has completed a treatment program, (2) is not abusing alcohol and drugs, (3) poses no danger to the child, and (4) such visitation is in the child’s best interest. Ineffective treatment programs may be challenged in a hearing on a request for unsupervised visitation. See R.S. 9:362(7), 364; D.O.H. v. T.L.H., 799 So.2d 714 (La. App. 3d Cir. 2001); Jarrell v. Jarrell, 811 So.2d 207 (La. App. 2d Cir. 2002).

The issues of whether the visitation is in the child’s best interest and the risk of danger to the child will usually be the contested issues in an abuser’s motion for unsupervised visitation. Treatment programs often fail to cure an abuser. One study reported a 47% recidivism rate for abusers who completed a treatment program.

It may never be in the best interest of a child who has herself been subjected to physical or emotional abuse to have unsupervised visitation with the abuser. Children generally witness violence against the abused parent and are traumatized by it. Continued contact with the abuser causes confusion and fear. Whether the child was herself subjected to abuse or witnessed it against a parent, it can take a long time (and a lot of therapy) before unsupervised visitation would be in her best interest.

For supervised visitation, the best supervisors are often police officers with some sensitivity to juvenile or domestic issues. These officers are more willing and able to intervene to prevent harm to the child during a visit. Social workers in your community may also be available for supervision. These trained supervisors will also be able to assist the court in determining whether unsupervised visitation is appropriate after the abuser has completed his various treatment programs. You may specifically request that the court appoint a police officer or competent professional as the supervisor. R.S. 9:362 (6). Your community may have a supervised visitation center.

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The visit should never occur outside the sight or hearing of the supervisor and cannot be overnight or in the abuser’s home. R.S. 9:362 (6). The supervising person may not be a relative, friend, therapist or associate of the abuser. Id.; cf., Hollingsworth v. Semerad, 799 So.2d 658 (La. App. 2d Cir. 2001) (trial court judgment amended to require “unbiased” supervisor even where PSFVRA held inapplicable). The abuser must pay for the costs of supervised visitation. Id.

8. Mandatory Termination of Visitation

An abuser’s visitation rights must be completely terminated if either of the following occurs:

- He violates an injunction (protective order) as defined in R.S. 9:362. See R.S. 9:366. (This termination appears to be permanent).28
- It is proven by clear and convincing evidence that he sexually abused his child. R.S. 9:364 (D). Supervised visitation only may be allowed if the abusive parent proves that he has successfully completed a treatment program for sexual abusers and that supervised visitation would be in the child’s best interest.29
- He physically abuses his child. R.S. 9:341. (Terminated until abusive parent proves that visitation would not cause physical, emotional or psychological damage to child, and then, visitation must be restricted to minimize risk of harm to child).

9. Relocation

Many domestic violence victims need to relocate their residences for their safety and economic well-being. R.S. 9:355.1 et seq. requires notice of proposed relocation to the other parent in the following situations:

(a) if the custodial parent plans to relocate outside of Louisiana; or
(b) if there is no court custody award, 150 miles from the other parent; or
(c) if there is a court custody award, 150 miles from the domicile of the primary custodian at the time the custody decree was entered.

You must insure compliance with R.S. 9: 355.1 et seq. to preserve your client’s custody rights and safety. A “relocation” does not trigger the statute if the change in residence is less than 60 days or a temporary absence. R.S. 9: 355.1.

**Exception for Family Violence Orders:** Fortunately, R.S. 9: 355.1 et seq. does not apply when an “order” is issued pursuant to R.S. 46: 2131 et seq., R.S. 9: 361 et seq., R.S. 9: 372, Children’s Code art. 1564 et seq., or any other restraining order, preliminary injunction, permanent injunction, or any protective order prohibiting a spouse from harming or going near the other spouse is in effect. R.S. 9: 355.2.

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29 However, if sex abuse is proven, La. Ch. Code art. 1570 (F) may be invoked to suspend visitation until the child is 18 years old. Buchanan v. Langston, 827 So.2d 1186 (La. App. 2d Cir. 2002).
Clearly, a protective or restraining order, that is in effect, exempts the custodial parent from these child custody relocation rules. Advise your clients about these rules and the possible need to extend nonpermanent protective orders or injunctions (particularly Title 46 orders) if they plan to relocate.

R.S. 9: 355.2 also states in part that “an order issued pursuant to ...the Post-Separation Family Violence Relief Act....” renders the relocation statute inapplicable. Sometimes, sole custody decrees are entered under the Post-Separation Family Violence Relief Act (Part IV) without a protective order being entered. If this is your case, you should carefully assess whether compliance with the relocation statute is required. There do not appear to be any appellate decisions on this issue.

In any event, R.S. 355.12 (11), as amended in 2003, mandates that the court consider family violence and substance abuse when considering opposition to a relocation.

If your client is not exempt because of a current order or injunction that qualifies for exemption, she must notify the other parent of her intent to relocate. R.S. 9: 355.3-4. Absent consent, court authorization is required to relocate a child before a final decision on the proposed relocation. R.S. 9: 355.5. Relocation is not a change of circumstance warranting a change of custody. However, moving without prior notice or moving in violation of a court order may warrant a modification of custody. R.S. 9:355.11. The factors for determination of a contested relocation are listed at R.S. 9: 355.12-13. The relocating parent must show that the relocation is in good faith and the child’s best interest. R.S. 9: 355.13.

**“SPOUSAL” SUPPORT**

Domestic violence victims often need spousal support in order to survive. Years of abuse cause many victims to have serious health problems which adversely impact their ability to support themselves. This section discusses special issues that arise when a domestic violence victim claims spousal support.

To get final spousal support, a spouse must show that she was free from fault in the dissolution of the marriage and that she lacks the means of support. *Bowes v. Bowes*, 798 So.2d 996 (La. App. 4th Cir. 2001). Physical abuse or threats of violence may prevent a finding of fault. See *e.g.*, *Almor v. Almor*, 718 So.2d 1073 (La. App. 1st Cir. 1998); *Richards v. Richards*, 525 So.2d 163 (La. App. 3d Cir. 1988); *Firstley v. Firstley*, 427 So.2d 76 (La. App. 4th Cir. 1983).

Abandonment without lawful cause is a common ground for finding “fault” that bars final spousal support. However, threats of violence constitute lawful cause for abandonment and thus justify abandonment. *Caldwell v. Caldwell*, 672 So.2d 944 (La. App. 5th Cir. 1996), writ denied 679 So. 1351 (La. 1996).

Reconciliation often occurs in violent relationships prior to the final separation. Reconciliation that follows misconduct which constitutes “fault” nullifies the prior fault. *Doane v. Benenate*, 671 So.2d 523 (La. App. 4th Cir. 1996). Thus, the critical question is the alleged misconduct that occurred between the last reconciliation and the filing of the divorce action.
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Many victims suffer from mental illness or alcoholism because of physical abuse.30 “Misconduct” caused by mental illness is excused and will not bar final support. Doane v. Benenate, supra; Eppling v. Eppling, 537 So.2d 814 (La. App. 5th Cir. 1989), writ denied 538 So.2d 619 (La. 1989). The mental illness must precede the misconduct. In these cases, expert medical testimony on the mental illness and the causal relationship to the misconduct is highly recommended, but not required. Compare Scarenegos v. Scarenegos, 606 So. 2d 9 (La. App. 5th Cir. 1992), with Dolese v. Dolese, 517 So.2d 1279 (La. App. 4th Cir. 1987).

A victim’s habitual intemperance may be excused by mental illness. Anderson v. Anderson, 379 So. 2d 795 (La. App. 4th Cir. 1975). One study found that 67% of batterers frequently abuse alcohol.31 The batterer’s intemperance may preclude a finding of fault. A course of conduct, such as drinking, when approved and consented by both spouses, cannot constitute mutual fault. Jenkins v. Jenkins, 882 So. 2d 705 (La. App. 2d Cir. 2004).

Do not overlook a victim’s right to get psychological and medical care for herself and her children, necessitated by the family violence. Victims and their children often need several years of psychological therapy to overcome the effects of family violence. Under La. R.S. 9:367, the abuser shall pay the costs of the medical and psychological care necessitated by family violence.32 This is not discretionary with the judge if there is a finding “family violence.” The abuser must be ordered to pay for such medical and psychological care. Such support should be in addition to any spousal support ordered. It should not be limited by the abuser’s income or denied because of the victim’s means. Necessary medical and psychological care must be assessed against the abuser even if the court finds the victim to be at “fault” in the break-up of the marriage.

In Doskocil v. McInnis, 880 So.2d 240 (La. App. 2d Cir. 2004), a consent judgment to pay support to a spouse in a PSFVRA action was determined to be effective for 18 months. The court rejected the argument that reconciliation extinguished the support judgment since the judgment was not entered in a divorce action.

USE AND OCCUPANCY OF FAMILY HOME OR APARTMENT

Housing is one of the most important needs of a domestic violence victim and her children. Abusers take the following actions to prevent their victims from having a place to live: (1) deny them financial support, (2) cause them to be evicted, (3) fail to pay the home mortgage or (4) damage the house to make it unliveable.

There are two statutory procedures for a spouse or parent to obtain use and occupancy of the family home or apartment. R.S. 46: 2135 and R.S. 9: 374.

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31 R. Irons & J. Schneider, *supra*.

32 The stress of domestic violence often causes substance abuse. Untreated substance abuse will severely affect a victim’s employability. Substance abuse is expensive. Ask your client if she is interested in getting medical treatment for substance abuse.
R.S. 46: 2135

Under R.S. 46: 2135, a domestic abuse temporary restraining order or protective order may grant possession of the residence or household to the exclusion of the defendant, by evicting him or restoring possession to the plaintiff where:

- The residence is jointly owned in equal proportion or leased by the defendant and the plaintiff or the person on whose behalf the petition is brought;
- The residence is solely owned by the plaintiff or the person on whose behalf the petition is brought;
- The residence is solely leased by the defendant and the defendant has a duty to support the plaintiff or the person on whose behalf the petition is brought.

This relief can be obtained on a temporary restraining order without a contradictory hearing. Use and occupancy of the residence can be continued by protective order for up to 18 months. In addition, a protective order issued under R.S. 46: 2136 may order the provision of suitable housing. R.S. 46: 2136 A (2). Protective orders under R.S. 46: 2131 et seq. may not award use and occupancy of a home owned solely by the abuser. Plaintiffs proceeding under R.S. 9: 361 or R.S. 9: 372 should be able to request use and occupancy of the home under R.S. 46: 2131 et seq. if needed.

R.S. 9: 374

R.S. 9: 374 provides for a spouse’s use and occupancy of a residence whether or not family violence exists. Under this statute, the court can only award use and occupancy after the filing of a divorce (or a separation of property in the case of community property) and a contradictory hearing.

Where the family residence is the separate property of either spouse, the spouse who has physical custody or has been awarded temporary custody of the minor children of the marriage, may petition for use and occupancy. After a contradictory hearing, the court may award the use and occupancy of the family residence and use of community movables or immovables pending partition of the community property or until 180 days after termination of the marriage, whichever occurs first. R.S. 9: 374 A.

Where the family residence is community property, either spouse may petition for use and occupancy. The court may award use and occupancy pending further orders. R.S. 9: 374 B.

Use and occupancy awards should be based on the best interest of the family. Id. Ordinarily, occupancy by the spouse who has custody of children is in the best interest of the family. Burrell v. Burrell, 437 So.2d 354 (La. App. 4th Cir. 1983). In cases involving a “history of family violence”, the court must award sole custody to the victim. R.S. 9: 364. Thus, these victims will have a strong case for occupancy of the family home.

Prior to 2004, rent for use of family home could not be retroactively assessed unless agreed by the parties or ordered by the court. McCarroll v. McCarroll, 701 So.2d 1280 (La. 1997). Under the pre-2004 law, a rent order could only be rendered at the time of the award of the family home. Chance
For an excellent discussion of this subject, see S. Reif & L. Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, 34 Clearinghouse Review 20 (May/June 2000).

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*v. Chance*, 694 So. 2d 613, 616 (La. App. 2d Cir. 1997). Act 668 of 2004 amended R.S. 9:374 (C) to require the court to decide at the time of an award of use of the family home whether or not to award rent for the use, and, if so, the amount of the rent. Act 668 allows the parties to agree to defer the rent issue. If the rent issue is deferred, the court may order rent retroactive to the award of use of the family home.

**SUBSIDIZED HOUSING LAW**

Many domestic violence victims live in subsidized housing. Several aspects of subsidized housing law impact victims.

1. **Right to Use of Subsidized Housing**

   Federal law governing Section 8 vouchers allows the victim to request the housing authority to remove the abuser from the lease and transfer the leasehold rights to the victim. See 24 CFR § 982.315, § 982.54(d)(11). If a court order or settlement in a divorce action determines use of the family residence, the housing authority should honor that determination. *Id.* Other factors to determine which family members retain the Section 8 residence are the interests of minor children and actual or threatened violence by a spouse or other household members. There does not appear to be a similar federal regulation for deciding who retains a public housing authority apartment.

2. **Portability of Vouchers**

   Your client may need to relocate to another jurisdiction to flee abuse and/or obtain financial support. Determine whether your client qualifies under portability rules for transfer of her housing voucher to another jurisdiction. Recipients who have resided in an issuing jurisdiction for 12 months before receiving a voucher are permitted to use tenant based assistance to rent a unit outside the issuing housing agency's jurisdiction. 42 USC §1437f(r)(1)(A); 24 CFR § 982.353. Housing authorities have discretion to exempt domestic violence victims from the 12 month residency requirement for portability to another jurisdiction. 64 Fed. Reg. 56905. The right to portability can be jeopardized if a tenant moves out of an assisted tenancy in violation her lease. Therefore, it is important to work out early lease terminations with the landlord and the housing agency.

3. **Rent Decrease or Minimum Rent**

   The exclusion of the abuser from the tenant household should warrant a rent decrease for public housing tenants and Section 8 voucher holders if the household income is thereby reduced. The decrease should take effect in the month after the reporting of the income change. Public housing tenants may apply for an exemption from the minimum rent rule due to economic hardship.

4. **Transfers**

   Housing authorities should be open to requests for transfers in certain domestic violence cases. Each housing authority must have a written trans-
fer policy. 24 CFR § 960.204(a)(3)(iv). If the transfer is denied, the tenant may request a grievance hearing.

5. Early Lease Termination

Some victims may need to terminate their leases early in order to flee abuse. Try to negotiate an early lease termination so that a victim will not be penalized or excluded from subsidized housing in the future. In some subsidized housing programs, domestic violence may be “good cause” for a tenant’s early lease termination.

6. Admission Preferences for Domestic Violence Victims

Public housing is not ideal for victims who need confidentiality. Timely admission is unlikely since waiting lists are long. However, it may be the only housing that some can afford. Federal law encourages housing authorities to grant admission preferences for domestic violence victims. 24 CFR § 960.206 (b)(4). Housing authorities have discretion in the adoption of their preferences. Their admissions policies are supposed to be part of their annual PHA Plans which are subject to tenant input and public comment.

7. Evictions for Reasons Related to Abuser’s Crimes

Subsidized housing tenants may face eviction and subsidy termination for crimes or other acts committed by the abuser, whether he is a guest or household member. An abuser may assault the tenant or destroy the landlord’s property. The victim may be arrested for defending herself since many police officers wrongly make mutual arrests in domestic violence cases.

Act 444 of 2004, codified at R.S. 40: 506(D), now prohibits public housing authorities from evicting victims because of domestic violence committed against them. Also, public housing authorities have discretion not to evict an innocent family member. 24 CFR § 966.4(l)(5). They may permit the remaining family members to stay in the apartment. Id. Louisiana courts, on the basis of equity, have the discretion to decline to grant a landlord cancellation of lease even though such right appears to otherwise be available to him. See e.g., Housing Authority of Lake Charles v. Minor, 355 So.2d 271 (La. App. 3d Cir. 1977). A housing authority also has discretion not to terminate Section 8 housing assistance to the innocent family members. 24 CFR § 982.552 (c)(2)(i).

A victim should not be evicted for crimes by an abuser over whom she had no control. The proper course of action would be to exclude the abuser from the household. Protective or restraining orders should help the victim preserve her subsidized housing. Eviction of a domestic violence victim may be unlawful sex discrimination under the Fair Housing Act. Bouley v. Young-Sabourin, No. 1:03CV320 (D.Vt., 3/10/2005)

8. Evictions for Absence to Flee Abuser

Victims who must be temporarily absent from their apartment to escape their abusers may face eviction. Housing authorities should have a policy on absences in their PHA plans. See 24 CFR § 982.312.

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WELFARE BENEFITS

A client’s options for welfare income should be explored. Food stamps may be applied for on an expedited basis. TANF takes longer to get. The 24 month and 60 month limits on TANF (welfare) may be waived for domestic violence victims. R.S. 46: 460.9, LAC 67: III.1126; FAM-4 E-330-FTAP. Battered immigrant women may be eligible for TANF and Medicaid.

UNEMPLOYMENT COMPENSATION

Battered women may be fired from their employment because of workplace harassment by the abuser, court appearances, absenteeism or injuries caused by the abuser. Other women may have to quit their jobs to relocate for safety reasons. Only a very small percentage of indigent women receive unemployment compensation when they are fired or compelled to quit. Will a battered woman be able to claim unemployment compensation in these common situations?

An employee fired because of harassment by an abuser could be eligible for unemployment compensation since the discharge is not for “misconduct.” Workplace harassment by another worker, where the employer fails to protect, may entitle a victim to unemployment compensation if she quits. See e.g., Gautreaux v. Whitfield, 520 So.2d 979 (La. App. 3d Cir. 1987).

Generally, an employee who is unable to perform her job because of injuries is ineligible for unemployment compensation. However, if the injuries are disabling and the employer failed to accommodate under the Americans with Disabilities Act (ADA), there may be a viable claim for unemployment compensation and damages.

Currently, Louisiana law does not recognize a domestic victim’s need to relocate as “good cause” for leaving one’s employment. However, some other states do. If the claimant quit a job in another state to flee to Louisiana, she may have entitlement to unemployment compensation under that state’s laws.

Domestic violence victims may miss work due to legal and health problems caused by the abuse. The reason for absences is usually critical as it can prevent a finding of intentional misconduct which would disqualify a claimant from unemployment compensation. See e.g., Harris v. Houston, 722 So.2d 1042 (La. App. 4th Cir. 1998). Domestic violence often adversely impacts victims’ job performances. Substandard job performance may not be disqualifying. Victor v. Administrator, 676 So. 2d 1123 (La. App. 3d Cir. 1996).

EMPLOYMENT

1. The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) provides covered employees with the right to unpaid leave for a serious health condition. The employer must continue health insurance benefits during the leave and must provide the employee with the same or equivalent job after the leave.


35 For example, North Carolina, California, Maine and New Hampshire have passed laws that expressly make domestic violence victims who have quit their jobs due to domestic violence eligible for unemployment compensation. Domestic violence victims may qualify for unemployment compensation in Arkansas, New York, Pennsylvania and other states where quitting due to “compelling circumstances” does not disqualify a claimant.
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An employee is covered by the FMLA if she has a serious health condition, has worked at least 12 months, has worked at least 1250 hours (or about 25 hours per week) during the 12 months before the leave, and her employer has at least 50 employees.

2. Court Appearances

26 states have enacted laws that permit a crime victim, including domestic violence victims, to take time off from work to testify in criminal court without being fired. Louisiana law only encourages employers to cooperate with employees who are crime victims. In Louisiana, an employee may be fired for attending mandatory court hearings in criminal or civil cases. However, a female employee who is fired or disciplined for asking for permission to attend a protective order hearing may have a discrimination claim if male employees are treated differently.

3. Sexual Discrimination

An employer may violate employment discrimination laws if it does not act to stop the workplace harassment of an employee by another employee. Employers must treat male and female employees equally. It may be unlawful employment discrimination if an employer treats an employee differently than an employee of the opposite sex because she is a victim of domestic violence. See Employment Protection for Domestic Violence Victims, 38 Clearinghouse Rev. 3 (May- June 2004).

4. Worker’s Compensation

A domestic violence victim may be eligible for worker’s compensation if the abuser injures her at work or in the course of her employment.

5. Employer Domestic Violence Policies

It may difficult for a victim to decide whether or how to tell her employer about her domestic violence problems. Fortunately, progressive employer domestic violence policies are becoming more common as employers realize how costly and dangerous domestic violence can be to business.36

INSURANCE

La. R.S. 22: 250.20 prohibits health insurers denying or limiting coverage to domestic abuse victims because of their abuse status. It also prohibits differential premium rates and denial of claims because of abuse status. A victim who is covered as a dependent on an abuser’s individual policy has the right to convert such dependent coverage to an individual policy without medical underwriting upon judgment of divorce from the abuser.

COBRA, 29 USC § 1169, provides rights to continuation of health insurance coverage. An employee on an authorized leave pursuant to the Family and Medical leave Act has a right to continuation of her health insurance.

An employee who becomes disabled because of domestic violence may be able to make a claim on her employer’s disability insurance policy.

36 The Louisiana Attorney General has model employer policies for the protection of domestic violence victims and other employees at its web site, www.ag.state.la.us/Violence.aspx.
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TAX

Many legal services clients are domestic violence victims. What are some of the tax issues and considerations that affect them?

1. **Stop Filing Joint Returns**

   The economic advantages of a joint return will probably be outweighed by the economic disadvantages and the threat to your client’s security. A joint return makes the victim jointly liable for taxes. She is unlikely to have access to the financial information necessary to sign a joint return.

   If your client has been separated for the last 6 months of the year, she may be able to claim the favorable head of household tax rates and the earned income credit. The additional tax refunds could help the victim’s plan for financial independence.

   After separation, a victim should file an IRS Form 8822 to receive deficiency notices relative to joint returns.

2. **Divorce and Custody**

   Resolution of divorce and custody litigation before the end of a tax year may strengthen a victim’s rights to head of household tax rates, the earned income credit and dependency exemptions. A court decree allowing the victim use of the marital home may help her qualify for these tax benefits.

   Generally, the custodial parent is entitled to the dependency exemption under IRC § 152(e). However, Louisiana courts have held that they have jurisdiction to order a reallocation of the dependency exemption. See *e.g.*, *Rovira v. Rovira*, 550 So. 2d 1237 (La. App. 4th Cir. 1989). Any change in the dependency exemption allocation should be considered with respect to the child support award. *Zatzkis v. Zatzkis*, 632 So.2d 307 (La. App. 4th Cir. 1994). See La. R.S. 9:315.18 B. Restrictions, e.g., timely payment of child support, can be placed on the reallocation of an exemption. See *e.g.*, *Flatt v. Comm’r.*, TCM 1986-495. Under federal law, the parent who meets the relationship, age and residency tests gets the earned income credit.

3. **Innocent Spouse Relief, Separate Liability Limitation and Equitable Relief**

   A victim may be able to avoid or minimize liability for a past tax return through either innocent spouse relief or separate liability limitation. Abuse and threats of violence are factors that may strengthen an IRS Form 8857 application for innocent spouse or equitable relief. See *Kistner v. Comm’r*, 18 F. 3d 1521 (11th Cir. 1994); Rev. Proc. 2003-61. A divorce decree requiring the other spouse to pay the tax helps a claim for equitable relief. Rev. Proc. 2003-61, IRB 2003-32 (eff. Nov. 1, 2003). Be sure to file for relief within the applicable deadline. For a detailed explanation of innocent spouse relief, see *Tax Practice for Legal Services and Pro Bono Attorneys* herein.

   The IRS has taken steps to protect domestic violence victims who apply for innocent spouse relief. IR-2001-23. A domestic violence victim who fears that filing a claim for innocent spouse relief would result in retaliation should write “Potential Domestic Abuse Case” at the top of the IRS...
Form 8857. The IRS will not release to a current or former spouse information relative to a new name, employer phone number or other information that could endanger the safety of domestic violence victims.

4. **Tax Liability in Community Property States**

If separate tax returns are filed by a married couple in a community property state, each spouse must report one-half of the community income. *United States v. Mitchell*, 403 U.S. 190, 196-97 (1971); Reg. § 1.66-1. The higher income spouse will want this community property law to apply, whereas the lower income spouse will want to argue that an exception to this rule exists.

The Internal Revenue Code establishes 4 exceptions to the rule that a spouse has to report one-half of community income:

1. The spouses lived apart for the entire year, filed separate returns and did not transfer more than a *de minimis* amount of earned income between them.37 IRC § 66 (a); Reg. § 1.66-2.

2. The taxpayer was not notified by the other spouse of the nature and amount of the income before the due date (including extensions) for the filing of the taxpayer’s return and the spouse acted as if solely entitled to the income.38 IRC § 66 (b); Reg. § 1.66-3.

3. Traditional innocent spouse relief39 from community property laws under IRC § 66 (c) for an item of community income if:
   a. the requesting spouse did not file a joint return for the tax year;
   b. the income item omitted from the gross income of the requesting spouse’s income would be treated as the other spouse’s income under IRC § 879(a);
   c. the requesting spouse proves that she did not know of, and had no reason to know of, the item of community income; and
   d. taking into account all of the facts and circumstances, it is inequitable to include the item of community income in the requesting spouse’s individual income.


Some community property income may be excludable from a spouse’s income by other laws. For example, the spouse who does not receive an IRA distribution is not taxed on her community property share of the IRA distribution. *Bunny v. Comm’r*, 114 T.C. 259, 262 (2000). Similarly, this spouse

37 IRC § 66 (a) relief is automatic if the requirements are met. For purposes of § 66 (a), any amount of income transferred for the benefit of the spouses’ child is not treated as a transfer to the spouse. Reg. § 1.66-2 (c).

38 The IRS may deny a spouse the federal income tax benefits of community property law on items of community income. Under the regulations, a spouse will not have acted as solely entitled if the income was “used or made available for the benefit of the marital community.” Reg. § 1.66-3 (a). It is not clear whether a small amount of funds paid for family support would bar the IRS from invoking IRC § 66 (b) against a taxpayer.

39 If a married couple filed a joint return, IRC § 6015 would govern requests for innocent spouse relief. IRC§ 66 (c) does not apply to joint filers.
would not be liable for the IRC § 72 (t) additional tax on an IRA distribution. *Morris v. Comm’r*, TCM 2002-17. Some state laws may treat income acquired during the marriage as “separate” and that classification will govern for federal tax purposes.

5. **Threats By Batterer**

A batterer may threaten to hurt a victim in order to get her to forgo a dependency exemption. Explore this with your client. If she has been threatened, advise her of any available civil or criminal remedies.

If a spouse establishes that she signed a joint return under duress, the return is not a joint return. Reg. §1.6013.4; Rev. Proc. 2003-61, §2.03. The standard for determining duress is subjective. Long-term mental intimidation is not required. The taxpayer must prove that she was unable to resist the other spouse when she signed the return and that she would not have otherwise signed the return.

**IMMIGRATION**

Battered immigrant spouses who leave their abusers may face deportation. They may, however, self-petition the INS for legal resident status or suspension of deportation. See, J. Dinnerstein, *Immigration Options for Immigrant Victims of Domestic Violence*, 38 Clearinghouse Rev. 427 (Sept./Oct. 2004). LSC attorneys may represent battered immigrant spouses with non-LSC funds. Recently, the Violence Against Women Act was amended to allow the use of VAWA funds to represent battered immigrant spouses.

Immigration law is complex and frequently changes. You should develop a relationship with an immigration expert for cases where a battered immigrant spouse needs legal help to avoid deportation.

Some basic rules for representing battered immigrant spouses include:

- Do not obtain a final divorce order for any battered immigrant client before filing a VAWA self-petition. A divorce decree will preclude a self-petition.
- A client should always speak to an immigration law expert before speaking with the INS. INS may arrest them and deport them before they have a chance to speak to a lawyer.
- Clients should not sign INS documents without first speaking to an immigration lawyer.
- A self-petitioning domestic violence victim must show battering or extreme cruelty. A state court proceeding that builds the factual record can help a self-petitioning victim.
- Findings in the custody case may help a self-petitioning immigrant prove “extreme hardship” if deported.
- Consider including a provision in the protective order that prohibits the husband from withdrawing the application for permanent residence that he filed on his wife’s behalf. The evidence needed for an application for permanent residence is lower than that required for a self-petition under the VAWA.
TORTS

A victim has a tort claim against the abuser for assault and battery. Others who may be liable in tort to a victim include:

- Mental health professionals who fail to warn potential victim of threats by their patients.
- Employers who permit domestic violence to occur at the workplace.
- Police for not protecting battered women.

MILITARY

The military does not tolerate family violence. The military services have Family Advocacy Programs which help reduce family violence. Commanding officers can ensure that victims receive victim advocacy services, medical care, risk assessments, safety planning, Military Protective Orders, counseling and legal assistance.

Military Protective Orders are similar to civil protective orders. They may be issued by commanding officers and formal hearings are not required. They are usually issued for up to 10 days. If a longer order is needed, the commanding officer gives the victims and alleged offenders an opportunity to respond.

A commanding officer must direct or make a formal inquiry into charges of domestic violence against a service member. The offender may face nonjudicial punishment or courts-martial.

If an abuser is discharged from the military because of abuse, his family members may be eligible for monthly Transitional Compensation payments for up to 36 months. In addition, commanding officers of military medical treatment facilities may assist victims in obtaining “Secretarial Designee Status” so that they may receive up to 1 year of medical and/or dental care for injuries resulting from the abuse if the abuser is discharged from the military because of family abuse.

OCCUPATIONAL LICENSING BOARDS

If an abuser is a member of a profession or occupation that is regulated by a licensing board, he may be subject to rules of professional conduct that prohibit spouse abuse. For examples, attorneys have been disciplined for abusing their spouses. See e.g., In re Magid, 655 A.2d 916 (N.J. 1995); In re Nevill, 704 P.2d 1332 (Cal. 1985).
RESEARCH

1. Treatises
   Domestic Violence Civil Law Institute (ABA 2000)
   L. Jordan et al., The Domestic Violence Civil Law Manual: Protection Order and Family Law Cases (ABA 2002)
   A. Stehr, Battered Women and Louisiana Courts: A Quest for Justice (LCADV 1999)

2. Internet
   American Bar Association Commission on Domestic Violence, www.abanet.org/domviol
   The Violence Against Women Office, www.ojp.usdoj.gov/vawo
   National Council of Juvenile and Family Court Judges, http://ncjfcj.unr.edu
   NOW Legal Defense and Education Fund, www.nowldef.org
   National Coalition Against Domestic Violence, www.ncadv.org
   Family Violence Prevention Fund, www.fvpf.org

3. Helpful Books to Understand the Victim's Situation
   M. Dugan, It's My Life Now: Starting Over After an Abusive Relationship or Domestic Violence
APPENDIX

1. **La. R.S. 9:372**
   
a. **Eligible Plaintiffs**
   
   Only spouses.
   
b. **Courts with Jurisdiction**
   
   Any court empowered to hear family matters.
   
c. **Venue**
   
   Domicile of either party or last matrimonial domicile.
   
d. **Available Relief**
   
   La. R.S. 9:372 provides for an order prohibiting harassment or physical or sexual abuse of spouse or a child of either party. Act 750 of 2003 added R.S. 9: 372.1 to provide for an order prohibiting harassment. No physical abuse is required for a 372.1 injunction. No bond is required for a R.S. 9: 372 injunction. See La. C.C.P. art. 3944. One court has held that a R.S. 9:372 injunction cannot be issued after the completion of a divorce where the divorce decree is silent as to any injunction. *Lawrence v. Lawrence*, 839 So.2d 1201 (La. App. 3d Cir. 2003).
   
e. **Duration of Order**
   
   The temporary restraining order lasts until the preliminary injunction hearing. La. Code Civ. Proc. art. 3604 (B). The preliminary injunction lasts until the trial on the permanent injunction. A permanent injunction against abuse does not expire. It is for life unless modified. However, a predivorce injunction may be extinguished if it is not specifically mentioned in the divorce judgment. *Steele v. Steele*, 591 So.2d 810 (La. App. 3d Cir. 1991).
   
f. **Penalties for Violation**
   
   Penalties for violation of a La. R.S. 9: 372 injunction include civil contempt and termination of visitation. Contempt is punishable by up to 12 months in jail and a fine of up to $1,000. The defendant may be entitled to a jury trial on the contempt motion. The defendant may be arrested and criminally prosecuted under R.S. 14:79 for violation of the TRO after served or violation of the preliminary or permanent injunction after issued.

2. **La. Children's Code art. 1564 et seq.**
   
a. **Eligible Plaintiffs**
   
   Family or household member if minor child(ren) live in household. Some courts have allowed same sex couple partner to file for protective order under the Children’s Code. Child protection or the district attorney also may file on behalf of a minor child or alleged incompetent adult.
   
b. **Jurisdiction**
   
   Any court with juvenile jurisdiction.

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40 Historical notes to R.S. 9:372.1 state that this amendment did not change prior law.
DOMESTIC VIOLENCE

c. Venue
Parish of the household or marital domicile, parish where plaintiff or defendant resides, parish where abuse occurred, or parish where divorce may be brought.

d. Available Relief
Temporary Restraining Order
• Prohibit abuse, harassment, contact or interference with petitioner
• Prohibit going near residence and place of employment of petitioner and minor children
• Award use of specified community property such as an automobile
• Award use of residence to petitioner and evict defendant (unless solely owned by defendant or solely leased by defendant who has no duty to support petitioner or person on whose behalf petition is brought)
• Prohibit either party from transferring, encumbering or disposing of property mutually owned or leased by the parties
• Award temporary custody of children
• Allow a party to return once to residence but only with law enforcement escort to retrieve personal clothing and necessities

Protective Order
• Same relief as provided for temporary restraining orders
• Where there is a duty to support, order temporary support or provision of suitable housing
• Award temporary custody or establish temporary visitation
• Order counseling or medical treatment for defendant or abused person or both
• Order perpetrator to pay court costs, attorney fees, expert witness fees, medical and psychological care for abused adult and children necessitated by domestic violence.

e. Duration of Order
The temporary restraining order may last for up to 20 days from the judge’s signature. It can be reissued for 10 days if the hearing is continued. No bond is required for the restraining order. Ch. C. art. 1569 A

The protective order may be for up to 6 months. It may be extended beyond 6 months if the petitioner, after a hearing, applies for an extension prior to the order’s expiration. The law is silent as to how long the protective order may be extended. Presumably, it may be extended for another 6 months.

If the protected person is a sexually molested child, the protective order can last until the child reaches 18 years old.

f. Penalties for Violation
Violations of a Children’s Code art. 1569 or 1570 order may be punished as civil contempt. The penalties include jail for up to 6 months and/or fine up to $500. The defendant may be arrested and criminally prosecuted under R.S. 14:79 for violation of the TRO after served or violation of the protective order after issued.