

CHAPTER 3
DOMESTIC VIOLENCE
PRACTICE IN LOUISIANA

Becki Truscott Kondkar & Mark Moreau

About The Authors

Becki Truscott Kondkar is a Professor of the Practice and Deputy Director of Tulane Law School's Domestic Violence Clinic. She earned her J.D. from the University of North Carolina School of Law in 1999, and has devoted her legal career to representing victims of domestic violence and protecting parents of abused children in family court litigation.

Mark Moreau, Co-Director, Southeast Louisiana Legal Services, New York University School of Law, LL.M. in Taxation, 1982, Buffalo Law School, J.D., 1975, Brown University, A.B., 1971. Mr. Moreau has worked as a legal aid attorney for 35 years, and was a prior Director of the New Orleans Legal Assistance's family violence project. He started Louisiana's first Low Income Taxpayer Clinic in 2000 and serves as the Clinic's Director at Southeast Louisiana Legal Services.

Mr. Moreau is a member of the Louisiana and New York bars. He has been the 1992-93 Chairman of the Louisiana State Bar Association Consumer Protection, Lender Liability and Bankruptcy Section and has served on the Advisory Subcommittee on Lease for the Louisiana State Law Institute. Mr. Moreau is the recipient of the Louisiana State Bar Association's Career Public Interest Award, the New Orleans CityBusiness Leadership in Law Award, the National Taxpayer Advocate's Award and the Louisiana Coalition Against Domestic Violence's Into Action Award. He was the original author of *Domestic Violence Practice in Louisiana* in the 2001 and 2005 editions of the Louisiana Legal Services and Pro Bono Desk Manual.

1. INTRODUCTION

Domestic violence is the leading cause of female poverty and homelessness in America.¹ The overwhelming majority of homeless families in the United States are made up of single mothers with children, and domestic violence is a direct cause of homelessness for many, if not most of them.² Although it is true that domestic violence exists at all levels of our society, poor women are more likely to experience more violence across their life spans at the hands of more perpetrators than women who are not poor.³ And at the same time that poverty increases a woman's risk of repeat victimization, the victimization women experience often keeps them trapped in poverty.⁴ For all of these reasons and more, domestic violence perpetrators perpetuate a cycle of violence and poverty that plagues our society.⁵

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.⁶

2. LAWYERING IN DOMESTIC VIOLENCE CASES

2.1 ETHICAL LAWYERING IN DOMESTIC VIOLENCE CASES

Lawyer competence in domestic violence cases requires not only that attorneys understand the substantive law related to a client's legal claims, but also that he or she possess basic competence in understanding the dynamics of domestic violence and its effects on victims and their children.⁷ A lawyer who possesses basic competence about domestic violence is more likely to adequately address client safety concerns when crafting legal strategy and resolutions, to identify or discover important evidence, and to develop a case strategy that minimizes potential case weaknesses by helping the trier of fact understand victim behavior that seems counter-intuitive or self-destructive when not properly contextualized.

2.2 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.⁸ Lawyers make a difference in victims' lives.

¹ See generally, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), available at <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

² *Some Facts on Homelessness, Housing, and Violence Against Women*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, nllcp.org (Sept. 2006) (follow "Domestic Violence" link; then follow "Publication" link).

³ Claire Renzetti, *Intimate Partner Violence and Economic Disadvantage*, in 1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 73 (Evan Stark & Eve Buzawa. eds., 2009).

⁴ *Id.*

⁵ See generally, Alison Cares, *The Transmission of Intimate Partner Violence Across Generations*, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS *supra* note 3, at 23.

⁶ See Andrew Klein, *Offenders in the Criminal Justice System*, in 3 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS *supra* note 3 at 115, 117. A majority of abusers have been arrested before, but not necessarily for domestic violence. *Id.*; see also TK LOGAN ET AL., THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES & COSTS 6 (2009). Note also the significant co-occurrence of domestic violence and child sexual abuse. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. Child Custody 287, 291. (2009).

⁷ See generally, AM. BAR ASS'N, COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING IN CIVIL PROTECTION ORDER CASES (2007).

⁸ Amy Farmer & Jill Tielenthal, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158 (2003).

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

1. Protective Orders

Protective orders do not guarantee safety. But a recent comprehensive study examining the effectiveness of protective orders concluded that victims experienced a significant reduction in abuse, violence, and fear during the six months following issuance of a protective order.⁹ Protective orders criminalize conduct that 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, and landlords.

2. Divorce

Divorce can help end the violence. Some abusers no longer view their spouses as property after divorce. Divorce can also 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 victims.¹⁰ 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.¹¹ But even when domestic violence and physical abuse of the child do not co-occur, well regarded empirical studies show that many children who witness domestic violence suffer social, cognitive, and psychological consequences virtually identical to those suffered by children who are themselves physically abused.¹² Good lawyering in domestic violence cases can help victims obtain custody orders that protect themselves and their children from future harm.

4. Spousal and Child Support

Many women need support to remain independent from their abusers. Abusers are much less likely than non-abusers to pay child support.¹³ They often stop paying support to force the victim to return to them or to punish them for leaving. The traumatic and often disabling effects of abuse can also make it difficult for victims to get or maintain employment or achieve financial independence.

5. Community Property

The right to a home, car or pension may be essential to avoiding homelessness, keeping a job, or securing economic independence. While these assets may be essential for financial stability, victims of abuse routinely negotiate away financial support and assets to which they are entitled in exchange for securing safe custody arrangements for their children.¹⁴

⁹ See TK LOGAN ET AL. *supra* note 6, at 6-7. The study also shows reduced efficacy when stalking behavior preceded the protective order, and differences in effectiveness for urban and rural victims. Rural women experienced more violations of protective orders than urban women in the study. *Id.*

¹⁰ PETER JAFFE, CLAIRE CROOKS & NICK BALA, DEP'T OF JUSTICE CANADA, MAKING APPROPRIATE PARENTING ARRANGEMENTS IN FAMILY VIOLENCE CASES: APPLYING THE LITERATURE TO IDENTIFY PROMISING PRACTICES 16 (2005); Joan Zorza & Leora Rosen, *Guest Editor's Introduction*, 11 VIOLENCE AGAINST WOMEN 983, 985-86 (2005).

¹¹ PETER JAFFE, CLAIRE CROOKS & NICK BALA, *supra* note 10.

¹² Evan Stark, *The Battered Mother's Dilemma*, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS *supra* note 2, at 95, 112; NAT'L COUNCIL JUVENILE & FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES (2008), *citing* UNICEF CHILD PROTECTION SECTION, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (2006), *available at* <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>.

¹³ JAY SILVERMAN & LUNDY BANCROFT, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 156 (2002).

¹⁴ Evan Stark, *supra* note 12, at 4.

6. Housing

Up to 50% of all homeless women and children are fleeing domestic violence.¹⁵ Even if not “homeless,” victims of domestic violence and their children often live in chronically unstable housing circumstances that contribute to significant negative health and social outcomes.¹⁶ Service providers for victims report that it costs a victim about \$5,000 for each housing relocation necessitated by domestic violence.¹⁷ In Louisiana, finding a new apartment and moving can easily cost \$1,500, without counting all the personal property the abuser may destroy or the victim has to abandon. And even when a victim is not fleeing from domestic violence, abusers sometimes force housing emergencies by failing to pay the mortgage or rent, or causing the victim to be evicted because of his conduct. Eviction for a lease violation can cause a subsidized tenant to lose her rent subsidies for several years. For this reason, victims in subsidized housing need special help to protect their housing rights.

7. Employment

Abusers often harass their victims at work or take other action to get them fired.¹⁸ 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 Family Independence Temporary Assistance (FITAP) welfare.

9. Taxes

A battered woman should not file joint returns with her abuser because she could incur unexpected tax liabilities. Abusers often keep their spouses in the dark about financial information. Significant 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.¹⁹

11. Immigration

An immigrant battered spouse who leaves her abuser may face deportation. Abusers often fail to file ICE documents on spouses as a means of coercion. She may, however, self-petition (file a petition in her own name) the ICE for legal resident status or suspension of deportation. Legal Services Corporation (LSC) attorneys may represent immigrant domestic violence victims in domestic violence matters.²⁰

¹⁵ Chiquita Rollins et al., *Housing Instability is as Strong a Predictor of Poor Health Outcomes as Level of Danger in an Abusive Relationship*, 27 J. INTERPERSONAL VIOLENCE 623, 625 (2012).

¹⁶ *Id.* at 635.

¹⁷ Barbara Hart & Erika Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, Victim Advocate (Spring 2004), available at http://www.bwjv.org/files/bwjv/articles/CivilTorts_EconomicJustice.pdf.

¹⁸ BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF CRIMES (1991). Abusers harass 74% of employed battered women at work either in person or by phone. *Id.*

¹⁹ NAT'L CONSUMER LAW CTR., CONSUMER RIGHTS FOR DOMESTIC VIOLENCE SURVIVORS (2006). The National Consumer Law Center has a free Consumer Rights Screening Tool for Domestic Violence Advocates and Lawyers at its website nclc.org.

²⁰ *Immigration for Legal Aid Lawyers*, § 1.3, *infra*.

12. Victim Compensation Funds

Victims may be eligible for reparations under the Louisiana Crime Victims Reparations Act.²¹ Among other things, victim compensation can be awarded for medical bills, lost wages, and therapy necessitated by the crime. Lawyers can help determine victim eligibility for victim compensation, assist with necessary paperwork, and advocate for victims as they navigate the process of requesting compensation.

2.3 SAFE LAWYERING IN DOMESTIC VIOLENCE CASES²²

1. Office Protocol

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. See www.ncdsv.org for a copy of this tool to assess the overall patterns of abusive and violent behaviors in a case). Simply asking someone whether he or she is a “victim of domestic violence” is *not* an effective screening tool because victims often do not readily identify themselves as victims in response to that question. Additionally, be on alert for other issues that may necessitate further screening (e.g., if the man accompanies your client to the office and insists on participating in the interview, listens to your phone conversations, or is excessively litigious. These can be signs that domestic violence is involved).
- Assess the level of risk to your client and make sure she has a safety plan. See discussion in 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.²³
- Practice safe communications with your client. This means first establishing safe contact information and carefully documenting client files with this information. Your client file should clearly and prominently indicate whether and when it is safe to call a victim of abuse, whether it is safe to leave messages, and whether it is safe to mail documents to her at home.
- When you do initiate contact by telephone, always speak only to your client. Do not tell a family member that you are a lawyer. If possible, block caller id when you call. At the beginning of the conversations, ask her if it is safe to talk. Do not leave messages on answering machines

²¹ LA. REV. STAT. ANN. § 46: 1801(2011).

²² For a comprehensive resource on screening and handling domestic violence cases, and for safe lawyering see AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, A LAWYER’S HANDBOOK* (Margaret B. Drew et al. eds., 2d ed. 2004).

²³ In Louisiana, only protective orders under Louisiana Revised Statute 46: 2135-36 expressly allow the victim’s address to remain confidential.

and never leave detailed messages at all. In high risk cases, have a code word or expression that you and your client both understand is a signal that your client is in danger.

- Let your client know ahead of time about case developments so that she may take extra safety precautions. Always keep your client informed about the filing and service of pleadings on batterers so that they can do appropriate safety planning.
- For lawyer safety, avoid using your own cell phone to contact victims. Many perpetrators routinely monitor victim communications and will not hesitate to “return” your call.
- Victims should not be kept in a public waiting room in your office when safety is an issue. Consider the use of telephone or shelter intake when needed.

2. Court Protocol

Court hearings pose special risks to victims. On the day of court, an abuser knows exactly when and where to find his victim.

- Arrive early to court so that your client is not alone with the abuser.
- Meet your client inside the courthouse, on the inside of the security checkpoint. Do not stand outside of the courthouse or outside of the security checkpoint with your client either before or after court.
- Your client should be escorted to the courthouse by someone if possible and should be kept away from the abuser.
- In some cases, you may want to 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 or sit near a deputy. 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 present a risk to your client.
- Hold depositions in safe settings, e.g., a courthouse with a metal detector. Follow the safety rules for court appearances. If necessary, try to quash depositions that seek your client’s personal attendance in the presence of the abuser.
- Abusers’ attorneys are often inexperienced in domestic violence or family law and may create more safety risks. Be explicit with opposing counsel regarding your expectations relating to safety protocols, e.g., whether his or her client can be present for depositions, settlement negotiations, etc.

3. 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 for assessing risk is to determine whether your client is afraid she will be killed or hurt. A victim’s perception that she is in danger is a reliable indicator that she is.²⁴

²⁴ Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide* 24 J. INTERPERSONAL VIOLENCE 653, 657, 669-670 (2008). In this study, the authors conclude that a victim’s perceived risk of being killed or harmed was a strong indicator of actual risk. At the same time, the victim’s perception cannot be the only measure of risk because many victims also minimize their risk as a coping mechanism. *Id.*

Separation from the abuser is the most dangerous time for victims.²⁵ For this reason, attorneys often will be assisting victims during a time when she is most at risk and must take special precautions for her safety. Also keep in mind that abusers who violate protective orders, commit violence in public, stalk or escalate the violence are particularly dangerous.²⁶

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

- Threats of homicide or suicide
- Fantasies of homicide or suicide
- Stalking
- History of victim strangulation or choking
- Depression or other mental health issues
- Access to or use of weapons
- Obsession about partner or family
- Centrality of battered woman to abuser's life
- Substance abuse
- Rage or separation violence
- Frequency of violence
- Escalation of violence
- Violation of protective order
- Prior criminal history or protective orders
- Hostage taking
- Abuse of pets

The more of these factors present, the greater the risk of severe harm to your client.²⁷

4. Safety Planning

Making sure that your client has a safety plan, either by helping her create one or by referring her to someone who will, is a fundamental obligation in domestic violence cases. Ideally, your client will have developed a safety plan with a battered women's counselor. But do not assume that she has one – always inquire to ensure that she has a safety plan. If she does not have a safety plan, discuss the need for one with her and refer her to a counselor who can help her develop one.

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 her protective order at home and at work. If she has a cell phone, she may also want to store a photo or copy of the protective order on her cell phone. A photo of the abuser stored on the cell phone may also help law enforcement or security personnel.²⁸

²⁵ Evan Stark, *supra* note 12, at 104. In this article, Stark points out that the majority of abuse victims are not living with their perpetrator, and that physical separation is rarely an "antidote" for abuse. *Id.*

²⁶ Jacquelyn C. Campbell et al., *supra* note 24, at 655; THE AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE *supra* note 21 at 40-45.

²⁷ THE AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE *supra* note 21 at 40-45. Most of these factors may also be found in Jacquelyn C. Campbell et al., *supra* note 23, at 655.

²⁸ Louisiana law requires the clerk of court to file protective orders with the state's protective order registry. This enables the police in any parish to check the state registry. LA. REV. STAT. ANN. § 46:2135 (H)(2011).

- Visit her local police station. Meet the officers and ask them to place her 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.²⁹
- 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 her addresses and telephone numbers confidential.
- Screen incoming calls and keep a diary.
- If affordable, get a cell phone to call the police at 911. Most cell phones even when not activated can be charged and programmed to call 911.
- Give protective orders to school authorities to prevent the abuser from picking up the children.
- Refrain from using Facebook and other social media—these can be used to track down your client.

Be specific. When discussing safety issues with your client, prompt the discussion with questions like:

- Where will he know to look for you?
- Does he know he can find you at the children's bus stop?
- Does he know what church service you attend every week?
- Do you need to change the locks on your home?
- Do your children know what to do if he comes to your house?
- Do you have any friends or family who cannot be trusted to keep your address confidential?

Note on address confidentiality: The Louisiana Secretary of State maintains an address confidentiality program for victims of domestic violence, sexual abuse, and stalking. The program is designed to prevent abusers from locating victims using public records, and provides a victim with a substitute address in place of their actual address. If you are working with a victim who is relocating, this system works best if she contacts the program *before* the actual relocation so that no records are made of the new address. To learn more about the program, visit www.sos.louisiana.gov/acp.

2.4 INTERVIEW TIPS FOR DOMESTIC VIOLENCE CASES

1. Shame, fear, or pride may prevent a victim from talking about abuse. She may feel that she will be judged, or she may have concerns about privacy and confidentiality. Confidentiality issues are important to address early on

²⁹ Photographs may be helpful. The client should consider notifying her supervisor. Apartment complex security should be notified.

because of some victims' tendency to believe that batterers are omnipotent – in other words, they often believe that the batterer has the ability to know where the victim is and what she is doing at all times, and that the batterer is connected to “important” people in the community.

2. The Power and Control Wheel and the Woman Abuse Scale are good interviewing tools to help a victim 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 abuse, or the effects of the violence on their children, as a means of coping. One common way that victims minimize abuse is to describe it in terms that suggest mutual violence (“we were fighting”). Make sure to clarify these issues with follow up questions.
4. Do not confuse futile retaliatory violence by a victim with “mutual conflict.” If a victim perceives that you will not believe she is a victim if she tells you the truth about her own conduct, you may miss important information. Most victims do get angry and do fight back. Be realistic about the fact that not all victim resistance to an abuser is self-defense.
5. If you feel your client is minimizing the danger she is in, tell her that you are concerned for her safety and the safety of her children.
6. Never blame the victim. Respond to her in a non-judgmental way. She is a crime victim and you should treat her as such.
7. Do not ask what she did to cause him to beat her. There is nothing about her or her actions that could prevent or justify the crimes committed against her.
8. Do not ask why she did not leave sooner or why she went back.
9. Do not refer to the abuser by his relationship (e.g., husband, boyfriend). Refer to him by his first name.
10. 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.
11. Do not interview a victim with a third party present. Although a victim may want to have a supportive friend in the room, she will lose confidentiality if you do so. Also, clients may not make frank disclosures of negative information with other family or friends present. The presence of new dating partners presents even more problematic issues that should be avoided.

2.5 UNDERSTANDING MYTHS ABOUT DOMESTIC VIOLENCE VICTIMS AND BATTERERS – AND HOW IT CAN AFFECT YOUR CASE

There are many myths about domestic violence. Some impair effective counseling of and advocacy for a victim. Those include the following:

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

Fact: While some of these factors can make someone more vulnerable to abuse, domestic violence happens to women in all socioeconomic, ethnic, and age, groups, and to women of all education level and psychological dispositions.

- Myth:** Real victims are helpless and are too afraid to fight back.
- Fact:** Anger is the prevailing emotional response to abuse. Many victims are strong, willful, and resilient. Most victims engage in a variety of forms of resistance to abusive and controlling behavior, including retaliatory violence that is not self-defense. Many minimize their victimization by describing it in terms that suggest the violence is more mutual than it is.
- Myth:** Abusers are poor and uneducated, and have problems with anger management.
- Fact:** Abusers can be well-spoken, well-educated, socially adept, and charismatic. Abusers rarely appear “abnormal” in psychological testing, and abusers are no more likely to suffer from mental illness than others in the general population.³⁰ Most expertly manage their anger by directing it primarily to a specific intended target - the intimate partner.
- Myth:** Victims have a psychological make-up that causes them to stay in violent relationships.
- Fact:** Victims of domestic violence 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. The complexities of the decision-making process victims face is rarely obvious to an outside observer.
- Myth:** The victim’s behavior caused the battering.
- Fact:** The victim does not cause and cannot control the abuser’s behavior. The perpetrator chooses to abuse his partner regardless of her behavior.
- Myth:** Domestic violence perpetrators can still be good parents, so long as you separate them from the victim.
- Fact:** Perpetrators of abuse are unlikely to change unhealthy parenting habits at separation.³¹ To the contrary, after separation, children are at increased risk of physical and emotional abuse themselves.³²

3. STRATEGIC USE OF LOUISIANA’S DOMESTIC VIOLENCE LAWS

Louisiana has several civil statutes that create legal remedies designed specifically for victims of domestic violence. The most commonly used statutes include the Protection from Family Violence Act, Part II, Domestic Abuse Assistance,³³ which provides for emergency protective orders, and the Post-Separation Family Violence Relief Act,³⁴ which applies to child custody determinations where there is a “history of family violence.”³⁵ For simplicity, in this chapter, we will generally refer to the protective order laws in the Protection from Family Violence Act, La. Rev. Stat. 46: 2131-43, as the Domestic Abuse Assistance Act or DAAA.

³⁰ Andrew Klein, *supra* note 6 at 120.

³¹ LUNDY BANCROFT & JAY G. SILVERMAN, *supra* note 13.

³² LUNDY BANCROFT & JAY G. SILVERMAN, ASSESSING RISK TO CHILDREN FROM BATTERERS (2002), available at http://new.vawnet.org/Assoc_Files_VAWnet/RisktoChildren.pdf.

³³ LA. REV. STAT. ANN. §§ 46:2131-2143; see also the Protection from Dating Violence Act, LA. REV. STAT. ANN. § 46:2151 which extends protective order laws to victims of dating partners.

³⁴ LA. REV. STAT. ANN. §§ 9:361-369.

³⁵ *Id.* § 9:364(A).

Before initiating litigation for a victim of domestic violence, the lawyer should understand how these statutes may interact and/or affect strategy in any particular case. Attorneys should consider using a combination of these statutes to address both short and long-term client needs. For example, when a victim requests temporary child custody in a protective order proceeding, the lawyer should be thoughtful about the potential effect of any resulting temporary child custody arrangements on the permanent custody case.

When considering case strategy, lawyers should also avoid a “one size fits all” approach to domestic violence litigation. Domestic violence litigation requires careful consultation with clients about issues such as (1) whether legal action will positively or negatively impact victim safety (i.e., will it be a deterrent, or a trigger for this particular batterer), (2) whether non-legal alternatives exist for accomplishing the victim’s goals, and (3) whether litigation is likely to result in an abuser having increased access to shared children (i.e., will the abuser initiate custody litigation or begin exercising visitation he did not previously exercise).

By examining these issues, lawyers help clients consider the risks and benefits of any particular course of action and make informed decisions about court processes. For example, a client may believe strongly that he or she needs a custody order, even though an abuser has not sought visitation for a period of years. It is the lawyer’s job to make sure the client understands that, in this context, initiating litigation could result in increased abuser contact with a child. The client may nonetheless decide that the benefits outweigh the risks. Discuss these decisions fully and frankly with your clients. Clients who are more engaged in weighing the risks and benefits of any particular course of action are more likely to be safe and more likely to feel satisfied with outcomes from litigation.

4. PROTECTIVE ORDERS AND LOUISIANA FAMILY VIOLENCE STATUTES

4.1 OVERVIEW

1. *What types of protective orders are available in civil court?*

Louisiana has seven civil statutes under which a person may seek relief from domestic abuse by petitioning a court for a protective order or injunction:

- Protection from Family Violence Act, Part II, Domestic Abuse Assistance,³⁶ and the Dating Violence Prevention Act,³⁷ which applies the remedies of the Domestic Abuse Assistance Act to certain dating relationships and will be discussed together in this section.
- Post-Separation Family Violence Relief Act.³⁸
- Injunction against Abuse Ancillary to Divorce.³⁹
- Preliminary Injunction and Temporary Restraining Order.⁴⁰
- Children’s Code.⁴¹
- Civil Code Ancillaries, Part V.⁴²

³⁶ *Id.* §§ 46:2131-2143.

³⁷ *Id.* § 46:2151.

³⁸ *Id.* §§ 9:361-369.

³⁹ *Id.* §§ 9:372-372.1.

⁴⁰ LA. CODE CIV. PROC. ANN. art. 3601-3612 (2012).

⁴¹ LA. CHILD. CODE ANN. art. 1564-1575.

⁴² LA. REV. STAT. ANN. § 9:575 (protects adult parents or grandparents from abuse by adult children or grandchildren).

Most petitioners seeking a protective order in Louisiana do so under the Domestic Abuse Assistance Act. The Domestic Abuse Assistance Act authorizes broad relief to petitioners in need of protection from abuse, including temporary restraining orders and protective orders that award, among other things, temporary custody, temporary housing, and temporary support to victims. Permanent or indefinite injunctions against abuse and harassment (not including the ancillary relief described above) are available under the Domestic Abuse Assistance Act, the Post-Separation Family Violence Relief Act⁴³ or by request for an Injunction Ancillary to Divorce.⁴⁴

2. *What is the difference between a protective order issued by a criminal court and a protective order issued by a civil court?*

Criminal courts also issue restraining orders in the form of “stay away” orders pursuant to peace bonds, bail restrictions, conditions of release, or conditions of probation and sentencing orders.⁴⁵ These criminal stay away orders expire when the prosecution is dismissed or the probation is completed. As a practical matter, victims often receive conflicting information about when these orders expire, and many victims do not even know whether an order is in place. In 2012, the legislature amended La. Rev. Stat. 14:40.2 to allow criminal courts to issue protective orders to protect stalking victims either indefinitely or for a fixed period up to 18 months upon sentencing of the defendant for stalking.⁴⁶

The expiration of a criminal stay away order may trigger the need for a civil protective order. But even a victim who has a valid criminal stay away order in place may also need a civil protective order. Because criminal courts do not have subject matter jurisdiction over issues such as child custody, child and spousal support, and possession of a jointly used or owned residence, a criminal stay away order cannot include important relief that is available to victims who request a civil protective order.

Protective orders issued in both civil and criminal courts are enforceable by law enforcement the same way, and it is a crime to violate either of them.⁴⁷

3. *What is the Protective Order Registry?*

The Louisiana Protective Order Registry is a statewide database for all court orders that prohibit abuse against a current or former spouse, dating partner, family, or household member. *All* temporary restraining orders or protective orders prohibiting a person from harming a family member, household member, or dating partner, including orders entered under Louisiana’s general civil injunction statute,⁴⁸ must be entered on a Uniform Abuse Prevention Order Registry form, and the clerk of court must file the order with the Louisiana Protective Order Registry immediately.⁴⁹ This requirement is a key safety and enforcement feature for victims of domestic violence. Orders that are not prepared on the uniform order form and that are not entered into

⁴³ LA. REV. STAT. ANN. §§ 9:361-369.

⁴⁴ *Id.* § 372.

⁴⁵ LA. CODE CRIM. PROC. ANN. art. 26, 327.1, 335.1, 895, 871.1.

⁴⁶ Act 197 of 2012 (authorizes protective orders to prohibit abusing, harassing, or interfering with the stalking victim or being near her).

⁴⁷ LA. REV. STAT. ANN. § 14:79.

⁴⁸ LA. CODE CIV. PROC. ANN. art. 3601.

⁴⁹ *Id.* art. 3607.1.

the Protective Order Registry are more difficult for victims to enforce because law enforcement may have difficulty verifying the order's validity, and are sometimes less responsive to non-registry orders. Also, it is easier for abusers to purchase guns in violation of federal law if a protective order is not in the registry. Protective Order Registry forms are available on the Louisiana Supreme Court's website page at www.lasc.org.

4.2 THE DOMESTIC ABUSE ASSISTANCE ACT, LA. REV. STAT. ANN. §§ 46:2131-2143, AND THE DATING VIOLENCE PREVENTION ACT, LA. REV. STAT. ANN. § 46:2151.

Most victims seeking a protective order request one under these two statutes. The Dating Violence Prevention Act differs from the first only in that it extends the relief available under the Domestic Abuse Assistance Act to two categories of relationships not covered by the Domestic Abuse Assistance Act: (1) current and former dating partners who have not co-habited or who do not have children in common, and (2) same-sex partners.

1. *Who can get a protective order under these statutes?*

The Domestic Abuse Assistance Act, LA. REV. STAT. ANN. §§ 46:2131-2143:

- **Family members:** spouses, ex-spouses, parents, stepparents, foster parents, children, stepchildren, foster children, grandparents,⁵⁰ and possibly grandchildren.⁵¹
- **Household members:** person of opposite sex presently or formerly living with defendant as spouse, whether married or not.⁵²

The Dating Violence Prevention Act, LA. REV. STAT. ANN. § 46:2151:

- **Dating partners:** person who is or has been in a social relationship of a romantic or intimate nature, including same-sex relationships.⁵³

Most unwed heterosexual couples will proceed under the Domestic Abuse Assistance Act and most unwed homosexual couples will proceed under the Dating Violence Prevention Act.

2. *What can these orders do for a victim of domestic abuse?*

Relief includes *ex parte* temporary restraining orders and protective orders. 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, and upon a showing of good cause.⁵⁴ A showing of "immediate and present danger of abuse" constitutes good cause.⁵⁵

⁵⁰ LA. REV. STAT. ANN. § 46:2132(4).

⁵¹ See *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389. In *McCann*, the Court affirmed a protective order that protected the petitioner's grandchildren against their step-grandfather on grounds that the statute gives broad discretion to enter any order "likely to lead to a cessation of abuse." *Id.* Although the Domestic Abuse Assistance Act does not define "family member" to include grandparents and grandchildren, it does explicitly state that the Act's provisions apply to grandparent/grandchild relationships when the grandparent is the victim of an adult child. LA. REV. STAT. ANN. § 46:2132(4). This language suggests that minors who are victims of an abusive grandparent do not fall within the category of eligible petitioners. *Id.* But the Louisiana Court of Appeal for the Third Circuit concluded in *McCann* that the Act can protect grandchildren against a grandparent. *McCann*, 33 So. 3d 389.

⁵² LA. REV. STAT. ANN. § 46:2132(4).

⁵³ *Id.* § 2151.

⁵⁴ *Id.* § 2135.

⁵⁵ *Id.* § 2135(A).

Courts have significant discretion in fashioning relief for victims of abuse. The Domestic Abuse Assistance statute and the Protection From Dating Violence Act both authorize courts to enter *any* protective order that that will “bring about a cessation of abuse.”⁵⁶ This provision gives courts significant latitude in fashioning relief for victims of domestic abuse, and Louisiana’s courts of appeal have consistently affirmed orders that expand relief beyond that specifically enumerated in the statute.⁵⁷

Available relief under the statutes includes, but is not limited to, the following:

Temporary Restraining Order, LA. REV. STAT. ANN § 46:2135.

- Prohibit abuse, harassment, contact or interference of the petitioner.
- Prohibit an abuser from going near the residence and place of employment of petitioner and minor children.
- Award possession and use of jointly owned or leased property such as an automobile.
- Award possession and use of the residence or household to petitioner and evict defendant, unless the residence is (1) solely owned by defendant, or (2) solely leased by the defendant **and** the defendant has no duty of support to the protected person or party.
- Prohibit either party from transferring, encumbering or disposing of property mutually owned or leased by the parties, except when in the ordinary course of business or as necessary for the support of the party or the minor children.
- Award temporary custody of minor children or persons alleged to be incompetent.
- Award or restore to the petitioner possession of all separate property and all personal property and restrain the defendant from transferring, encumbering, concealing, or disposing of personal property of the petitioner.
- Allow a party to return once to the residence, escorted by law enforcement, to retrieve personal clothing and necessities.
- Grant the petitioner exclusive care, possession, or control of any pets that belong to or are under the care of the petitioner and the minor children who live in the household of either party and prohibit the defendant from harassing, interfering with, abusing, or injuring a pet held by either party or a minor child.

Protective Order, LA. REV. STAT. ANN. § 46:2136

- Grant the same relief as provided for in the temporary restraining order section 2135.
- Award temporary support or the provision of suitable housing or

⁵⁶ *Id.* § 2136(A).

⁵⁷ See *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (affirming order expanding eligibility for protection to step-grandchildren against step-grandfather); *Francois v. Francois*, 06-712 (La. App. 3 Cir. 11/2/06); 941 So. 2d 722, 726 (affirming order expanding distance requirements for the stay away provision); *Beard v. Beard*, 05-CA-302 (La. App. 5 Cir. 11/29/05); 917 So. 2d 1160, 1163 (affirming order to evict abuser from his separately owned property even though the eviction order was not incident to an award of child custody for petitioner).

- Grant the petitioner possession of the residence to the exclusion of the defendant.
 - Defendant may be evicted from a residence solely owned by the defendant and possession given to the petitioner, if the petitioner has been awarded temporary custody of minor children born to the parties.⁵⁸
- Award temporary custody or establish temporary visitation.
- Order a medical evaluation for the defendant or abused person or both.
 - If a medical evaluation is ordered for both parties two separate evaluators will be appointed.
 - After the medical evaluation, a court may order counseling or other medical treatment.
- Order the defendant to pay all court costs, attorney fees, costs of enforcement and modification proceedings, costs of appeals, evaluation fees, and expert witness fees.⁵⁹
- Order defendant to pay all costs of medical and psychological care for abused adult and children necessitated by domestic violence under section 2136.1.

3. **What is “abuse” under the statute?**

a. **Definition.**

Domestic abuse “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.”⁶⁰ As a practical matter, courts generally limit protective orders to physical abuse, sexual abuse, or an offense against a person that constitute violations of the criminal code.⁶¹ See discussion *infra* “Standard for awarding a protective order.”

b. **Standard for issuing an Ex Parte Temporary Restraining Order.**

A temporary restraining order under section 2135 of the Domestic Abuse Assistance Act requires “good cause” which is defined by section 2135(A) as “immediate and present danger of abuse.” Article 3603.1 of the Louisiana Code of Civil Procedure further provides that notwithstanding the Domestic Abuse Assistance Act, the Post-Separation Family Violence Relief Act, Injunction against Abuse Ancillary to Divorce, the Children’s Code Domestic Abuse Assistance laws, or the provisions on injunctions in the Louisiana Code of Civil Procedure, 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.”

⁵⁸ *But see Beard*, 917 So. 2d at 1163. In *Beard*, the Court affirmed an order granting the wife possession of her husband’s separately owned residence, even though she had not been awarded custody of any minor children. *Id.* The Court concluded that the statute provided broad discretion to make awards beyond the enumerated relief and to tailor the relief to the circumstances of the case. *Id.*

⁵⁹ LA. REV. STAT. ANN. § 46:2136.1 (A), as amended by Act 411 of 2008.

⁶⁰ LA. REV. STAT. ANN. § 46: 2132(3).

⁶¹ *Harper v. Harper*, 537 So. 2d 282 (La. App. 4 Cir. 1988).

Different judges use different standards to determine whether an interlocutory injunction should issue.⁶² For example, some judges will not issue an interlocutory injunction unless the abuse occurred within a certain number of weeks. Lawyers should know the personal practices of each judge.

c. Standard for awarding a protective order.

The standard for issuance of a protective order under section 2136 of the Domestic Abuse Assistance Act (as distinguished from a temporary restraining order) is that the court “may issue any protective order . . . to bring about a cessation of abuse of a party, any minor children, or any person alleged to be incompetent.”⁶³ Louisiana Courts of Appeal apply an “abuse of discretion” standard when reviewing the issuance or denial of protective orders.⁶⁴

Although the statute’s definition of domestic abuse can be interpreted broadly because of the “including but not limited to” provision, most Louisiana Courts of Appeal have concluded that, in the absence of physical violence, threats, assault, or an offense against the person, general harassment is not covered by the domestic abuse statutes. “Family arguments that do not rise to the threshold of physical or sexual abuse [or] violations of the criminal code are not in the ambit of the Domestic Abuse Assistance Act.”⁶⁵ Most courts, then, have declined to apply the statute’s protections in cases that involve contentious family relationships but no apparent risk of physical harm.⁶⁶

Even in the absence of physical violence or threats, general harassment – occurring in a context and fashion that would cause a reasonable person to fear for his or her safety – could be factually distinguishable from other cases where courts have refused to apply the statute for lack of physical violence. Harassment that would cause a reasonable person to fear for his or her safety should fall within the scope and purpose of the statute. In particular, harassment that rises to the level of stalking should entitle a petitioner to protection. Louisiana Criminal Code Revised Statute § 14:40.2 defines stalking as “the intentional and repeated following and harassing of a person that would cause a reasonable person to feel alarmed or suffer emotional distress.” A petitioner who proves those elements, then, has proved a violation of the Louisiana Criminal Code and need not rely on the “includes but is not limited to” provision of the protective order statute.

⁶² A particular court’s local rules relative to protective orders will be found at Rule 32. See Court Rules at the Louisiana Supreme Court’s webpage, lasc.org.

⁶³ LA. REV. STAT. ANN. § 46:2136. Note, however, that Louisiana Protective Order Registry Form 3, a protective order pursuant to title 46 section 2131, 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.

⁶⁴ *Mitchell v. Marshall*, 2000-1259 (La. App. 3 Cir. 5/1/02); 819 So. 2d 359, 361.

⁶⁵ *Culp v. Culp*, 42,239-CA (La. App. 2 Cir. 6/20/07); 960 So. 2d 1279, 1283 (holding that parents’ bickering, child manipulation and general harassment are beyond the scope of the statute).

⁶⁶ *Id.*; see also *Coy v. Coy*, 46,655-CA (La. App. 2 Cir. 7/13/11); 69 So. 3d 1270 (finding that general harassment in the form of excessive phone calls was insufficient to support award of protective order); *Fontenot v. Newcomer*, 10-1530, 10-1531 (La. App. 3 Cir. 5/4/11); 63 So. 3d 1149 (finding parents following an adult child around town without physical violence is insufficient general harassment); *Harper*, 537 So. 2d 282.

On the other hand, a party in need of protection should not have to wait until actual harm or a crime is committed before being eligible for protection. A protective order can be issued to prevent the possibility of abuse. In *Newton v. Berry*, the court held that a stepfather's act of disrobing, getting into bed with minor child, and tickling the child's stomach, constitutes "grooming" behavior that meets the definition of "domestic abuse," whether or not those acts rise to the level of a crime.⁶⁷ The *Newton* court concluded that there was "nothing in the law [that] would require the courts to ignore such behavior and leave a child at the mercy of the perpetrator until more harm is done."⁶⁸

Similarly, where there is a history of physical violence, a perpetrator's impending release from incarceration can be grounds for issuance of a protective order.⁶⁹ In *Wise v. Wise*, the court affirmed a protective order in favor of a petitioner who testified about past abuse and the defendant's threat to retaliate against her upon release from a six-month incarceration that resulted from the Defendant's failure to pay child support.⁷⁰

In general, Louisiana Courts of Appeal have supported awards of protective orders to victims. A battery does not need to be injurious to constitute domestic violence within the meaning of the statute.⁷¹ Likewise, threats and intimidation, without physical violence, can be grounds for issuance of an order.⁷² In *Cory v. Cory*, the court affirmed issuance of a protective order to a wife even though the husband had never hit her; he had threatened to "whip her ass," walked toward her in an intimidating manner, and revved his truck engine while she was standing in the driveway.⁷³ And a party seeking protection from abuse need not prove a *pattern* of violence or abuse.⁷⁴

4. *How long can an order last?*

a. **Temporary Restraining Order (TRO).**

Two conflicting provisions address the duration of temporary restraining orders under the Domestic Abuse Assistance Act, as amended in 2009, and the Protection from Dating Violence Act. Louisiana Revised Statute 46: 2135(B) provides that the temporary restraining order may last for up to 21 days from the judge's signature and that it can be reissued as deemed necessary by the court if the hearing is continued. A continuance must be set within 15 days unless there is good cause for further continuance.⁷⁵

⁶⁷ *Newton v. Berry*, 44,383-JAC (La. App. 2 Cir. 5/20/09); 15 So. 3d 262, 276. In *Newton* the Court did conclude, however, that the behavior described constituted an offense under the criminal code. *Id.*

⁶⁸ *Newton*, 15 So. 3d at 267.

⁶⁹ See *Wise v. Wise*, 02-CA-574 (La. App. 5 Cir. 11/13/02); 833 So. 2d 393.

⁷⁰ *Id.*

⁷¹ *Michelli v. Michelli*, 93 CA 2128 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342.

⁷² See *Cory v. Cory*, 43,447-JAC (La. App. 2 Cir. 8/13/08); 989 So. 2d 855; *Harper v. Harper*, 537 So. 2d 282 (La. App. 4 Cir. 1988).

⁷³ *Cory*, 989 So. 2d 855.

⁷⁴ See *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (affirming award of protective order where petitioner proved one incident where husband struck her on the arm and hand with keys).

⁷⁵ LA. REV. STAT. ANN. § 2135(B) (2011).

On the other hand, article 3604 (C) of the Louisiana Code of Civil Procedure allows temporary restraining orders to last longer, including those granted under the Domestic Abuse Assistance Act and the Protection from Dating Violence Act. That article provides that (1) a temporary restraining order remains in effect *until the hearing or 30 days*, whichever occurs first, (2) a court may extend the order for a period not to exceed 30 days (if done before the expiration of the temporary restraining order), and (3) 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.⁷⁶

b. Protective Order.

After 2012 legislative amendments to the Domestic Abuse Assistance Act, different time limits may apply to different portions of a final protective order. Section 2136(F)(1) provides that a protective order issued under either the Domestic Abuse Assistance Act or the Protection from Dating Violence Act must be for a fixed period of time not to exceed 18 months, but those orders may be extended after a contradictory hearing. In 2012, the legislature amended the Domestic Abuse Assistance Act by adding section 2136(F)(2). That section allows the portion of the protective order directing a defendant to refrain from abusing, harassing, or interfering with the victim to last indefinitely. The amendment is significant because, prior to the change, most victims could obtain permanent injunctions against abuse only if they qualified for and requested either an injunction ancillary to divorce or an injunction under the Post-Separation Family Violence Relief Act.

c. Ancillary relief in the Protective Order.

Generally, child custody, support, and other ancillary relief provisions expire with the expiration of the Domestic Abuse Assistance Act protective order. Under section 2136(F)(1), the portions of the protective order that award ancillary relief can last up to eighteen months and, presumably, for any additional fixed period of time that the order is extended by the court. But even if the order's provisions prohibiting abuse, harassment and interference last indefinitely, the ancillary relief cannot.⁷⁷

On the other hand, if a petition states other bases for relief, the child custody order may last longer.⁷⁸ Claims under the Domestic Abuse Assistance Act may be asserted in a divorce or custody action. A pleading under the Domestic Abuse Assistance statute that specifically requests relief under the Post-Separation Family Violence Relief Act could also result in a custody determination that lasts longer than the protective order.

⁷⁶ LA. CODE CIV. PROC. ANN. art. 3604(C) (2012).

⁷⁷ *Id.* § 46:2136(F)(2)(a).

⁷⁸ See *Anders v. Anders*, 618 So. 2d 452 (La. App. 4 Cir. 1993). In *Anders*, the trial court had authority to address child support, temporary alimony, and community debts in the protective order hearing where the protective order petition was dismissed but included a petition for divorce in the same pleading. *Id.*

The duration of spousal support awards in protective orders are not limited by the rules governing other types of temporary spousal support. A spousal support order in a section 2131 protective order may (1) last longer than an interim spousal support order in a divorce action and (2) survive a reconciliation defense.⁷⁹

5. *Can a protective order be extended?*

Yes. Under section 2136(F), an order entered under either of these Acts may be extended beyond 18 months, after a hearing, if the petitioner applies for an extension prior to the order's expiration.⁸⁰ Presumably, the entire protective order may be extended for another 18 months, and the portion prohibiting harassment, abuse and interference with person or employment may be extended indefinitely. In determining whether to extend an order under the Domestic Abuse Assistance Act, the trial court enjoys "vast" discretion.⁸¹ Although nothing in the law requires a showing that the defendant violated the prior protective order, past failure to abide by a protective order is a proper basis for extending an order of protection.⁸² Once a protective order expires without having been extended, a petitioner probably cannot get another protective order in the absence of new allegations or evidence.⁸³

Some judges may be willing to extend a protective order, but unwilling to also extend some of the ancillary relief granted in the original order, such as temporary child custody and spousal support. For this reason, a petitioner who requests an extension may need to file other actions to resolve those issues (if the protective order claims were not already raised in a divorce or custody action).

6. *Can a protective order be changed or modified?*

Yes. Either party may move the court to modify a prior protective order's substance or duration. But the court may modify an order only after notice to the other party and after a contradictory hearing.

Substance. A substantive modification may only do two things: (1) exclude any item included in the prior order, or (2) include any item that could have been included in the prior order.⁸⁴ These limitations preclude an abuser from using the modification process to seek relief he could not have been awarded as a defendant in the original action – e.g., making requests for child custody or a mutual injunction.

Duration. The court may modify the indefinite effective period of an order after notice and a hearing.⁸⁵ A defendant's motion to modify the effective period of an order is subject to strict notice requirements set forth in section 2136(F)(2)(c).

⁷⁹ See *McInnis v. McInnis*, 38,748- CA (La. App. 2 Cir. 8/18/04); 880 So. 2d 240.

⁸⁰ See also *Coie v. Coie*, 42,077 (La. App. 2 Cir. 2/21/07); 948 So. 2d 1276, 1279 (holding the trial court erred by extending terms of expired protective order); *Keneker v. Keneker*, 579 So. 2d 1083 (La. App. 5 Cir. 1991) (extending protective orders under the Domestic Abuse Assistance Act must be made prior to expiration of last order).

⁸¹ *Francois v. Francois*, 06-712 (La. App. 3 Cir. 11/2/06); 941 So. 2d 722, 726.

⁸² *Id.*

⁸³ See *Clayton v. Abbitt*, 44,427-CA (La. App. 2 Cir. 7/1/09); 16 So. 3d 512, 513 (reversing second issuance of protective order where it was not supported by new allegations after expiration of the first order).

⁸⁴ LA. REV. STAT. ANN. § 46:2136(D) (2012).

⁸⁵ *Id.* §46:2136(D)(2) and (F)(C).

7. What are the penalties for violating a protective order?

Violation of a temporary restraining order or a protective order under the Domestic Abuse Assistance Act may be punished through either contempt proceedings in civil court, or criminal prosecution. In civil court contempt proceedings, the penalties include jail for up to six months and/or a fine up to \$500.⁸⁶ A fine, if imposed, may be forwarded to the petitioner or dependants as support.⁸⁷ Lawyers pursuing contempt actions against defendants should specifically request that fines be allocated as support to the petitioner.

Also, under the Louisiana Criminal Code it is a crime to violate a protective order.⁸⁸ A defendant who violates a temporary restraining order (TRO) after it is served, or a protective order after it is issued (regardless of service), may be arrested and criminally prosecuted for violation of the order.⁸⁹ Thus, where a TRO has not been served, law enforcement can enforce the terms of the order, but cannot arrest for a violation. *See* discussion *infra* for how double jeopardy applies to these two enforcement mechanisms.

a. Petitioner's burden of proof in contempt proceedings.

Any contempt proceeding that punishes past behavior, rather than compels future behavior, is criminal in nature.⁹⁰ Accordingly, even if tried in civil court, criminal contempt must be proved beyond a reasonable doubt.⁹¹ Civil contempt requires proof by a preponderance of evidence.

b. Note on victims who contact their abusers.

A petitioner's actions do not excuse a violation of the court's order. Nor can a petitioner "violate" an order by contacting an abuser, unless the order is mutual and the provision prohibiting contact is directed to *both* parties. This should rarely be the case.

8. How does a related criminal proceeding affect protective order or contempt proceedings in civil court?

a. Continuances.

Some judges improperly refuse to conduct hearings on protective order petitions because a related criminal proceeding against the abuser is pending. The existence of a pending criminal case does not constitute "good grounds" for a continuance.⁹² A petitioner's constitutional right to a civil remedy prevails when weighed against a criminal defendant's Fifth Amendment rights.⁹³

b. Fifth Amendment.

In a civil case, the court may draw an adverse inference against a party who asserts his Fifth Amendment privileges.⁹⁴

⁸⁶ LA. REV. STAT. ANN. § 46:2137.

⁸⁷ LA. REV. STAT. ANN. § 46:2137(A).

⁸⁸ LA. REV. STAT. ANN. § 14:79.

⁸⁹ *Id.*

⁹⁰ State v. Hope, 449 So. 2d 633 (La. App. 1 Cir. 1984); *see also* Clark v. G.G. Cooley Serv., 35,675-CA (La. App. 2 Cir. 4/5/02); 813 So. 2d 1273.

⁹¹ Feiock v. Feiock, 485 U.S. 632 (1988).

⁹² Malmay v. Sentry Ins. Co., 550 So. 2d 366 (La. App. 3 Cir. 1989).

⁹³ Green v. Champion Ins. Co., 577 So. 2d 249, 262 (La. App. 1 Cir. 1991); Malmay v. Sentry Ins. Co., 550 So. 2d 366 (La. App. 3 Cir. 1989); Barbee v. Pigott, 398 So. 2d 137 (La. App. 3 Cir. 1981); Bank of Commerce v. Prejean, 262 So. 2d (La. App. 2 Cir. 1972).

⁹⁴ McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (citing Miles v. La. Landscape, 97-CA-118 (La. App. 5 Cir. 6/30/97); 697 So. 2d 348 (applying adverse inference in Domestic Abuse Assistance Act case)); *see also* Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).

c. Double Jeopardy and the Protective Order Case.

Double jeopardy does not bar criminal prosecution for the same act for which a civil protective order is issued. Nor does it bar criminal prosecution where a civil court has dismissed a petition for a protective order following an evidentiary hearing on the same facts and evidence.⁹⁵

d. Double Jeopardy and the Contempt Case.

Double jeopardy can bar enforcement of a protective order through both a contempt proceeding and criminal prosecution, if the contempt proceeding is also criminal in nature. When the primary purpose of a contempt proceeding in civil court is to punish past behavior rather than compel future behavior, the proceeding is criminal in nature.⁹⁶ In other words, when the punishment for contempt does not allow a party the opportunity to avoid the sentence or fine by satisfying certain obligations, it is criminal.⁹⁷ Because section 2137 of the Domestic Abuse Assistance Act explicitly states its punishment purpose, double jeopardy would presumably bar punishing the same violation through both contempt proceedings under Revised Statute 46:2137 and criminal prosecution under the Criminal Code, Revised Statute 14: 79.

On the other hand, if a contempt proceeding is *civil* in nature because its primary purpose is to compel compliance with an order (i.e., the defendant can do something to avoid jail), double jeopardy should not attach. And double jeopardy does not prevent a battered spouse from enforcing a civil protection order through criminal contempt while the state proceeds with criminal prosecution for crimes committed against the victim at the time the abuser violated the civil protective order.⁹⁸

9. Is the petitioner always entitled to a hearing?

Yes. A petitioner who is denied a temporary restraining order upon filing a Petition for Protection from Abuse is entitled to a hearing within ten days of the date of service of the petition under Revised Statute 46: 2135(D). Whether or not a TRO is granted, the court may not dismiss a petition for a protective order prior to a hearing on the merits.⁹⁹

10. Can the court proceed with a hearing if the defendant is in jail?

Yes. Many courts erroneously place the burden on the petitioner to file a writ of *habeas corpus ad testificandum* to ensure the presence of an incarcerated defendant. But in Louisiana, a prisoner's right to access state and federal courts does not include the right to be physically present at the trial of a civil suit.¹⁰⁰ At least one Louisiana Court of Appeal has specifically applied this rule in a child custody case.¹⁰¹ Moreover, in a protective order case, the court bears the burden of advancing any costs for a *habeas corpus ad testificandum*.¹⁰²

⁹⁵ State v. Carter, 2011 KW 2401 (La. App. 1 Cir. 4/3/12).

⁹⁶ State v. Hope, 449 So. 2d 633 (La. App. 1 Cir. 1984).

⁹⁷ Clark v. G.G. Cooley Serv., 35,675-CA (La. App. 2 Cir. 4/5/02); 813 So. 2d 1273.

⁹⁸ See U.S. v. Dixon, 509 U.S. 688 (1993).

⁹⁹ Vallius v. Vallius, 2010-CA-0807 (La. App. 4 Cir. 12/8/10); 53 So. 3d 655, 658, but see Young v. Young, 08-0865 (La. App. 3 Cir. 12/10/08), 999 So.2d 351, 355 (holding court may deny motion to modify protective order without hearing if Title 46 petition makes no allegations of domestic abuse).

¹⁰⁰ Falcon v. Falcon, 07-CA-491 (La. App. 5 Cir. 12/27/07); 975 So. 2d 40; Ardoin v. Bourgeois, 2004-1663 (La. App. 3 Cir. 11/2/05); 916 So. 2d 329; Proctor v. Calahan, 95-210 (La. App. 3 Cir. 8/30/95); 663 So. 2d 110.

¹⁰¹ Leeper v. Leeper, 44,777-CA (La. App. 2 Cir. 9/23/09); 21 So. 3d. 1006.

¹⁰² LA. REV. STAT. ANN. § 46:2134 (F).

A prisoner who wishes to secure his presence at a civil trial bears the burden of filing a writ of *habeas corpus ad testificandum*.¹⁰³ Even when he does so, the trial court has the discretion to deny it.¹⁰⁴ In *Taylor v. Broom*, the court affirmed the denial of a prisoner's request to be present at a civil hearing because of transportation costs and security risks.¹⁰⁵

11. Can the court order mutual protective orders?

Not unless both parties have filed a petition. A protective order may not be granted to a party who has not requested such relief by written petition because due process requires reasonable notice to a party that an order may be issued against them.¹⁰⁶

In general, mutual injunctions should be opposed because they (1) discourage victims from enforcing orders against abusers by making them fearful of arrest, (2) become a tool for abusers to harass victims, and (3) make it difficult for law enforcement to enforce orders. In addition to the serious enforcement and safety concerns presented by mutual orders, they also disadvantage victims of abuse in future litigation. Because mutual orders imply equally abusive behavior by the parties, they can (1) make it difficult for victims to defend against fault allegations that bar final spousal support awards and, (2) cause victims to lose custodial presumptions in favor of an abused parent under the Post-Separation Family Violence Relief Act.

Some attorneys will propose to resolve a protective order case by “dismissing” the Petition for Protection from Abuse and entering a mutual injunction against abuse and harassment that does not go into the Protective Order Registry. But the Louisiana Code of Civil Procedure requires that even those orders be immediately reduced to a Louisiana Protective Order Registry form and submitted to the registry by the clerk of court.¹⁰⁷

12. What if an abuser files a protective order petition to harass the victim?

An abuser who files a baseless petition can be cast with costs, if the court determines the petition was frivolous.¹⁰⁸ A party who files a petition for an improper purpose may also be sanctioned under article 863 of the Louisiana Code of Civil Procedure.¹⁰⁹ In *Woods v. Woods*, the court affirmed sanctions against a petitioner-husband who used his education and experience as an attorney to wage war on his wife by filing a baseless petition against abuse.¹¹⁰

13. How does the court allocate costs and attorney's fees?

a. Filing Fees.

Filing fees may not be charged for civil protective order petitions or the issuance of a protective order.¹¹¹ These rules obviate the need to seek *in forma pauperis* status for protective order petitioners. The peti-

¹⁰³ *Id.*; *Falcon*, 975 So. 2d. 40.

¹⁰⁴ *Leeper*, 21 So. 3d at 1010-11; *Taylor v. Broom*, 526 So. 2d 1367, 1368-69 (La. App. 1 Cir. 1988).

¹⁰⁵ *Taylor*, 526 So. 2d at 1368-69.

¹⁰⁶ *Bays v. Bays*, 2000-C-1727 (La. 2/21/01); 779 So. 2d 754; see *Lee v. Smith*, 08-CA-455 (La. App. 5 Cir. 12/16/08); 4 So.3d 100; *Branstetter v. Purohit*, 2006-CA-1435 (La. App. 4 Cir. 5/2/07); 958 So. 2d 740.

¹⁰⁷ LA. CODE CIV. PROC. ANN. art. 3607.1 (2012).

¹⁰⁸ LA. REV. STAT. ANN. § 46:2136.1(B) (2011).

¹⁰⁹ *Woods v. Woods*, 43,182-CA (La. App. 2 Cir. 6/11/08); 987 So. 2d 339.

¹¹⁰ *Id.*

¹¹¹ LA. REV. STAT. ANN. § 46:2134 (F); LA. CODE CIV. PROC. ANN. art. 3603.1.

tion, orders, and process are free for protective order petitioners. A court may not refuse to allow the filing of a protective order suit because of “unpaid” costs from a prior proceeding.¹¹²

b. Court Costs.

All court costs and attorney fees must be paid by the abuser, and a court may **not** cast a petitioner with court costs unless it determines that the petition was frivolous.¹¹³ Applying this standard, even where the petition is dismissed and the protective order is denied, a court may not cast costs to the petitioner in the absence of evidence showing that the petition was frivolous.¹¹⁴ Upon an explicit finding that a petition is frivolous, the petitioner *may* be cast with both costs and reasonable attorney fees.¹¹⁵ But a plain reading of the statute makes it clear that even a petitioner who files a frivolous action need not *necessarily* be cast with costs.

c. Attorney’s Fees and Other Costs.

Under the Domestic Abuse Assistance Act abusers *shall* be made to pay all court costs, attorney’s fees, and other costs related to the litigation, including, but not limited to, costs for evaluations, expert witnesses, enforcement or modification proceedings, and costs for medical or psychological care of an abused party or child of the abused party, if the care is necessitated by the abuse.¹¹⁶ An abuser may even be required to pay costs and attorney fees if the victim is the nonprevailing party on some aspects of the litigation.¹¹⁷

14. What other filing and procedural issues should I know about?

a. Jurisdiction and Venue.

Jurisdiction is proper in any court empowered to hear family or juvenile matters.¹¹⁸ But where both District Court and Family Court operate concurrently, the Family Court has exclusive subject-matter jurisdiction over all actions brought under either the Domestic Abuse Assistance Act or the Protection from Dating Violence Act.¹¹⁹

Venue is proper 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).

¹¹² *Cf.*, *Hawkins v. Jennings*, 1997-1291 (La. App. 3 Cir. 3/6/98), 709 So. 2d 292; *Rochon v. Roemer*, 1993-CP-2444 (La. 1/7/94), 630 So. 2d 247.

¹¹³ Tit. 46 § 2136.1(A-B).

¹¹⁴ *Vallius v. Vallius*, 2010-CA-0807 (La. App. 4 Cir. 12/8/10); 53 So. 3d 655; *see also Jimenez v. Jimenez*, 05-CA-645 (La. App. 5 Cir. 1/31/06); 922 So. 2d 672, 674 (reversing trial court order that cast costs to petitioner decided before frivolous provision).

¹¹⁵ LA. REV. STAT. ANN. § 46:2136.1(B).

¹¹⁶ *Id.*; LA. REV. STAT. ANN. § 46:2136.1(A).

¹¹⁷ *Cf.*, *Jarrell v. Jarrell*, 35,837 (La. App. 2 Cir. 2/27/02), 811 So. 2d 207 (interpreting a similar provision of the Post-Separation Family Violence Relief Act).

¹¹⁸ *Id.*; LA. REV. STAT. ANN. § 46:2133(A).

¹¹⁹ *Wellborn v. 19th Judicial Dist. Court*, 07-1087 (La. 1/16/08); 974 So. 2d 1.

b. Forms.

The Protective Order Registry provides form Petitions for requesting protective orders under the Domestic Abuse Assistance Act.¹²⁰ Do not be tied to space limits on the forms. If necessary, add a page so that the Petition will include a sufficiently comprehensive narrative of the abuse you intend to elicit testimony about. Although the forms include a “checklist” to elicit information about types of abuse, e.g., slapping, kicking, etc., lawyers should not rely on that checklist to plead specific acts of abuse. See discussion *infra* for drafting tips. Some plaintiffs will be eligible for protective orders under both the Domestic Abuse Assistance Act, and the Post-Separation Family Violence Relief Act. Both statutes may be pleaded together.¹²¹

Once an order is granted, the protective order itself *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.

c. Filing.

If a divorce is pending, a protective order application under the Domestic Abuse Assistance Act should be filed in the divorce action.¹²²

d. Service.

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 three to four 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. Clerks of courts must immediately file, process and issue temporary restraining or protective orders without any charge for court costs.¹²³ Furthermore, the law does not allow the court to withhold judgments or certified copies thereof from *in forma pauperis* litigants.¹²⁴

15. What special issues need to be considered when requesting temporary child custody in a protective order case?

a. How long can the temporary custody determination last?

It depends. Sections 2135 and 2136 of the Domestic Abuse Assistance Act authorize the court to award “temporary” custody at the protective order hearing. The “temporary” custody award in a section 2136 protective order may only last for the duration of the protective order or until modified (whichever occurs first). However, if the petition stated other bases for relief, the child custody order may last longer.¹²⁵

¹²⁰Note on Statutory Construction: Louisiana Protective Order Registry (LPOR) forms are developed by the Judicial Administrator’s Office, and the construction given by that agency constitutes persuasive interpretive authority. See *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389 (citing *Roberts v. Baton Rouge*, 108 So. 2d 111 (La. 1958)). In *McCann*, the Louisiana Court of Appeal for the Third Circuit found that inclusion of the category “other” and “grandparent or grandchild” on the LPOR form neither of which is explicitly named in the statute, supports including step-grandchild within scope of statute’s protection. *Id.*

¹²¹LA. REV. STAT. ANN. § 9:368; Louisiana Protective Order Registry, Louisiana Uniform Abuse Prevention Order Form, form 19.

¹²²See LA. REV. STAT. ANN. § 46:2134(E).

¹²³LA. REV. STAT. ANN. § 46:2134 (F); LA CODE CIV. PROC. ANN. art. 3603.1(C) (2012).

¹²⁴*Savoy v. Doe*, 315 So. 2d 875 (La. App. 3 Cir. 1975); *Carline v. Carline*, 93 CA 1505 (La. App. 1 Cir. 10/7/94); 644 So. 2d 835.

¹²⁵See *Anders v. Anders*, 618 So. 2d 452 (La. App. 4 Cir. 1993) (holding that when denying a protective order the court still had authority to grant relief under the divorce statutes also pled in same pleading).

Arguably, a protective order pleading that requests relief under the Post-Separation Family Violence Relief Act would not be limited to a “temporary” custody award, and could result in a custody order that lasts longer than the protective order. Ultimately, custody must be resolved through settlement or litigation under a statute other than the protective order statute.

b. Should a protective order petitioner invoke the Post-Separation Family Violence Relief Act (PSFVRA)?

Sometimes. The PSFVRA provides a variety of protections to victims and their children that are not routinely awarded in a protective order case. For example, if a petitioner meets her burden under the PSFVRA, the court may award a perpetrator of abuse only supervised visitation, and that visitation is conditioned upon the perpetrator’s successful completion of a batterer treatment program.¹²⁶

On the other hand, a petitioner who invokes the PSFVRA in a protective order proceeding has an additional burden – she must prove not just that a protective order is necessary to end abuse, but also that the defendant has a “history of family violence” as defined under that Act. So while one act of family violence could be sufficient for issuance of a protective order, it may be insufficient to prove a “history of family violence” under the PSFVRA for *sole* custody rights. One act of domestic abuse constitutes a “history of family violence” under that Act only if it results in serious bodily injury.¹²⁷

Because a finding on whether the defendant has a “history of perpetrating family violence” may be binding on a permanent custody determination, lawyers should carefully consider whether they can litigate that issue fully within the short time frames demanded by the protective order statute. For discussion on the issue of whether those findings are binding, see part *infra* “What is the effect of fact finding in a protective order case on permanent custody determinations.”

c. Do the same rules about ex parte custody determinations apply to custody requests under this act?

Louisiana Code of Civil Procedure article 3945 provisions on *ex parte* temporary custody orders do not apply to verified petitions alleging applicability of a family violence statute.¹²⁸

d. What is the effect of fact finding in a protective order case on permanent custody determinations?

Findings and rulings made in Domestic Abuse Assistance Act protective orders are not *res judicata* in any subsequent proceeding.¹²⁹ This means that the family violence has to be re-litigated in *subsequent* proceedings, most notably a subsequent custody suit seeking sole custody under PSFVRA. Therefore, you should be prepared to prove incidents of family violence again. On the other hand, if the protective order find-

¹²⁶ LA. REV. STAT. ANN. § 9 :364(A).

¹²⁷ *Id.* § 364.

¹²⁸ LA. CODE CIV. PROC. ANN. art. 3945(G).

¹²⁹ LA. REV. STAT. ANN. § 46:2134(E).

ing included a finding of a “history of family violence” under the Post-Separation Family Violence Relief Act, that finding is made under a different statute and could be binding in that suit and future litigation. See discussion *supra* “How long can a temporary custody determination last?”

Despite the fact that most findings in a “stand alone” Title 46 protective order proceeding are not binding in future litigation, as a practical matter, judges are unlikely to make subsequent rulings significantly inconsistent with their own prior factual determinations. Lawyers should carefully consider the impact of a protective order hearing on future custody litigation, and should be prepared to litigate the hearing as if it were determinative on the permanent custody litigation. This also means that lawyers should consider the impact of consent judgments on temporary custody on future custody litigation. For example, a judge may be reluctant to impose Post-Separation Family Violence Relief Act visitation restrictions in a case where a petitioner has previously consented to less restrictive visitation in protective order proceedings. For more discussion on child custody and *res judicata*, see *supra*.

16. *How can I be sure to address my client’s financial and housing needs?*

Many victims of domestic violence cannot meaningfully benefit from a protective order if the litigation does not address her immediate financial and housing needs. For this reason, attorneys should always plan to address child support, spousal support, and housing at the hearing on a protective order. In doing so, consider the following:

a. **Safety concerns:**

Support. Although financial security is a key to victim stability, it is also true that for some victims, pursuing claims for support can increase their danger. Be sure to discuss these issues with the client, both so she can do additional safety planning, and so that she can consider the risks associated with financial litigation. As a general rule, lawyers should aggressively pursue support claims, but should not take for granted that the client feels safe doing so. In rare cases, clients will decline to pursue child support because of safety concerns. In other cases, victims may determine that an abuser is more likely to leave her alone if he is not tied to her through support obligations. Some clients decline to pursue spousal support because they want to avoid continued dependence on an abuser.

Housing. Similarly, a victim’s housing stability can be critical to keep her safe and stable while gaining independence from an abusive partner. Housing stability can also be important for future custody litigation. At the same time, even if the court is willing to evict an abuser as part of the protective order relief, some victims do not feel safe returning to live in a previously shared residence. Lawyers should help clients consider safety issues associated with returning to a residence where the abuser can easily find her, and where an abuser may find it easier to break in or monitor her activities. When clients do not want to

return to a previously shared residence, the pleadings should instead request that the perpetrator pay for alternative housing. When possible, be specific – rent, deposits, moving costs, and costs associated with the transfer of utilities can all be requested in the petition.

b. Litigating support obligations.

Once a petitioner has requested child or spousal support in her petition for protection from abuse, she must be prepared to prove those claims, in addition to proving the abuse.

1. For both child and spousal support claims, the petitioner should be prepared to prove both her income, and the defendant's income.

- **Proving the petitioner's income.** Plan for your client to testify about her income and employment, and to introduce evidence of that income in the form of wage statements, tax returns, etc. **Note on victim's unemployment.** If your client is unemployed, be prepared to argue why income should not be imputed to her. For example, if she lost her job or suffered employment instability because of the abuser's harassment or abuse, he should be estopped from benefiting from his own bad acts. Similarly, if the abuser did not allow the victim to work when they were together, income should not be imputed to her. And by statute, if she is disabled or the primary caregiver of a child under the age of five, income should not be imputed.¹³⁰
- **Proving the defendant's income.** The first TRO issued by the court should include an order that requires the defendant to bring proof of his income to the hearing.¹³¹ But lawyers should prepare to prove the abuser's income without the proof that he has been ordered to produce. Some clients will have access to old tax returns or wage statements that can prove the defendant's income. Where you suspect that the defendant is concealing or underreporting income, Revised Statute 9:315.1.1 provides guidance on the types of evidence that can be used to establish his actual income. *See also*, S. Raman, *Louisiana Family Law Practice*, § 8, *infra*.
- **Self-employment.** In some cases, the defendant's income is elusive and difficult to prove, particularly for those who are self-employed. Some abusers will conceal income by "banking" with relatives. In those cases, plan to introduce evidence of the parties' expenses and standard of living, and the income those expenses would require.¹³² In some cases, abusers report expenses on their income and expense worksheets that exceed the earnings they claim, creating impeachment opportunities for trial.

¹³⁰ LA. REV. STAT. ANN. § 9: 315.11(A).

¹³¹ See Louisiana Protective Order Registry form 1 n. 15.

¹³² LA. REV. STAT. ANN. § 9: 315.1.1(A) (3).

- **Underemployment.** Similarly, it is not unusual for abusive partners to punish their victims and avoid support obligations by becoming voluntarily under-employed after separation. For purposes of calculating support, the issue of whether a party is voluntarily under-employed is a question of the obligor party's good faith.¹³³ The underemployment must result from no fault or neglect of the party.¹³⁴
2. **For spousal support claims, the petitioner must also show need and ability to pay.**
- **Need.** An award of interim spousal support requires that the requesting spouse demonstrate need. Need can be shown by proving that the petitioner lacks sufficient income to maintain the standard of living that she enjoyed while residing with her spouse.¹³⁵ To support a spousal support claim, then, the client must prove her need through evidence of her income, her expenses, and her previous standard of living. "Standard of living" evidence can include testimony about the number of bedrooms in the marital home or the frequency with which the parties dined out, as well as other information about the parties' lifestyle. But if an abuser intentionally deprived a dependent spouse of basic needs or a comfortable standard of living during the marriage, he cannot avoid a spousal support obligation by arguing that she must continue living similarly.¹³⁶ In most jurisdictions, the parties must prepare and submit an income and expense form to assist the determination on the petitioner's need.
 - **Ability to pay.** The only limit on a claimant spouse's needs is the obligor party's ability to pay.¹³⁷ An obligor spouse has the ability to pay when his income exceeds his expenses and child support obligations.¹³⁸ When a spouse does not have the ability to pay an award equal to the other spouse's needs, "interim spousal support should be fixed at a sum that will as nearly as possible be just and fair to all parties involved."¹³⁹
 - **Spousal support claims against poor abusers.** Do not decline to request spousal support from an abuser simply because he is poor - if your client is poorer, she may still be entitled to support. The law governing temporary spousal support aims to put both parties as close as possible to the stan-

¹³³ *Romans v. Romans*, 01-587 (La. App. 3 Cir. 10/31/01); 799 So. 2d 810, 812.

¹³⁴ LA. REV. STAT. ANN. § 9: 315(C)(5)(b).

¹³⁵ *Carmouche v. Carmouche*, 03-CA-1106 (La. App. 5 Cir. 2/23/04); 869 So. 2d 224, 227 (upholding interim spousal support where claimant's expenses exceeded her income even on "nominal, bare subsistence living expenses").

¹³⁶ *Brown v. Brown*, 44-989-CA (La. App. 2 Cir. 1/27/10); 31 So. 3d 532, 538 (awarding support after finding that living conditions during the marriage were deplorable but that those living conditions alone are not indicative of the standard of living during the marriage).

¹³⁷ *Hitchens v. Hitchens*, 38,339-CA (La. App. 2 Cir. 5/12/04); 873 So. 2d 882, 884.

¹³⁸ *Lambert v. Lambert*, 2006 2399 (La.App. 1 Cir. 3/23/07); 960 So. 2d 921, 930.

¹³⁹ *Derouen v. Derouen*, 04-1137 (La. App. 3 Cir. 02/02/05); 893 So. 2d 981, 985.

dard of living they enjoyed before the separation. In cases where neither party has substantial income or assets, it is useful to examine the parties' *relative* financial positions. Do this by comparing their respective incomes to the federal poverty level, and then calculate how far above or below the poverty level each person's income puts them. The court can make an award that is just and fair between two poor parties by awarding spousal support in an amount that puts the parties at equal footing above or below the poverty level. This analysis can be particularly compelling in cases where the claimant spouse is a custodial parent whose standard of living will affect the child.

- **Fault.** Fault is not a defense to temporary spousal support. Abusers will sometimes claim infidelity as "fault" grounds to avoid paying support. But because a protective order includes only a temporary spousal support award, the law governing temporary spousal support applies. Petitioners must show they are free from fault only in claims for final support.¹⁴⁰
- **Reconciliation.** Reconciliation applies only to actions brought in divorce. It has no effect on support claims brought between two people who have never been married or who have not filed for divorce.¹⁴¹ Thus, in a protective order case where support is awarded, a subsequent reconciliation has no bearing on whether support is owed for the period of reconciliation.

c. Litigating the request for temporary housing.

When making a request for temporary housing, make sure you are clear about homeownership issues and how they affect your request for relief. The Domestic Abuse Assistance Act specifies the relief available to victims when the abuser is a sole homeowner. If the abuser is the sole owner, he can be evicted and possession can be awarded to the petitioner, but only if she is the custodian of shared children.¹⁴² On the other hand, at least one appellate court has affirmed an award of possession to a petitioner when the abuser was the sole owner, and the parties did not have children in common.¹⁴³

17. Should I negotiate with the abuser or opposing counsel?

In most cases, it makes sense to make a quick initial determination about whether the abuser will contest a protective order. In some cases, abusers will agree to the order that you have requested. This scenario is less likely in cases that involve ancillary claims for support and/or child custody. In order to negotiate effectively, you should consult with your client before

¹⁴⁰LA. CIV. CODE ANN. art 113 (2012).

¹⁴¹Stanley v. Nicosia, 09-191 (La. App. 5 Cir. 9/29/09); 19 So. 3d 56, 58 (citing McInnis v. McInnis, 38, 748 (La. App. 2 Cir. 8/18/04); 880 So. 2d 240 (holding that in protective order case between two unmarried parties subsequent reconciliation had "no bearing" on whether support was owed for a period of subsequent reconciliation)).

¹⁴²LA. REV. STAT. ANN. §§ 46:2135(A), 2136(A)(2).

¹⁴³Beard v. Beard, 05-CA-302 (La. App. 5 Cir. 11/29/05); 917 So. 2d 1160.

court about the possibility of settlement and determine what, if any, issues are subject to negotiation. For example, you should know in advance what type of supervised visitation arrangements your client wants so that any negotiated order can include all necessary specifics. In general, follow these rules when negotiating with the other side:

- Do not negotiate in front of your client.
- Do not agree to a mutual injunction.
- Do not agree to an “injunction” that does not go into the LPOR. Do not assume that the order can be converted to a registry order in the future should it become necessary.¹⁴⁴
- Do not agree to custodial arrangements or visitation without assessing the effects on future custody litigation under the Post-Separation Family Violence Relief Act.
- Do not give a *pro se* defendant legal advice. This means you should not answer questions like: “If I agree to this, does it mean I am admitting to the abuse?”
- Be cautious about offers to “pay” for the client’s cell phone. If the phone remains in the abuser’s name, he may be able to activate GPS tracking services.

Consent agreements should be court approved so that the abuser may be held in contempt if he violates the agreement.¹⁴⁵ Be sure to read the consent agreement on the record since abusers often refuse to sign the consent agreement.¹⁴⁶

18. What other issues should I consider when drafting pleadings and orders?

a. The Petition.

1. Amending a pro se petition.

If a client has come to you after filing a *pro se* petition, review it to determine whether it should be amended and re-filed. If amending is necessary, a new court date will be probably be set and the defendant will have to be re-served.

2. Drafting an original petition.

When drafting a protective order petition, the LPOR forms will prompt you to write about the most recent incident of violence and the history of violence. In general, petitions should specifically plead the most recent violence and the two worst incidents of violence, but should also include descriptions that establish the general nature, frequency, and severity of the violence. Also include information about injuries, threats of harm, stalking behavior, and the use of weapons.

¹⁴⁴ See generally, *Branstetter v. Purohit*, 2006-1435 (La. App. 4 Cir. 5/2/07); 958 So. 2d 740, 743-44 (holding that trial court erred when it converted a non-registry injunction entered by consent into a registry injunction without notice in a subsequent contempt proceeding).

¹⁴⁵ See LA. REV. STAT. ANN. § 46:2136.

¹⁴⁶ See *McInnis v. McInnis*, 38,748-CA (La. App. 2 Cir. 8/14/04); 880 So. 2d 240 (finding consent judgment read into record becomes legal judgment even if not reduced to writing); *Alogdon v. Guertin*, 97-CA-0235 (La. App. 4 Cir. 10/1/97); 701 So. 2d 480.

3. Special child custody considerations.

A protective order petitioner may invoke the Post-Separation Family Violence Relief Act by asking that it be applied to the child custody determination.¹⁴⁷ Here, the petitioner will need to show a “history of family violence” to secure sole custody.

A petitioner requesting temporary child custody in a protective order proceeding may also want to make sure the petition includes information about whether the child has been present during the violence, whether the child has intervened to protect the abused parent, or whether the child has also been abused.

b. The Order.

1. Forms.

The protective order must be reduced to a Uniform Abuse Prevention Order form.¹⁴⁸ The judge will expect you to complete this form. All necessary relief should be checked.

2. Petitioner’s Address.

The Louisiana Protective Order Registry (LPOR) Forms provide a space for the petitioner’s protected residential address. If the protective order includes a specific home address that the defendant must stay away from, the order may not sufficiently protect a petitioner who moves to a new address. Since petitioners often move, the better practice may be to omit a specific address and instead include a provision prohibiting the defendant from going “anywhere the petitioner may reside.” The same logic applies to stay-away provisions regarding employment. If the current residential address and place of employment is already known to the defendant, the stay-away provision could be drafted to include those specific addresses AND anywhere else the petitioner may reside or be employed.

3. Child Custody.

Visitation and custody provisions should be drafted to minimize the risk to the petitioner and her children. Avoid using joint custody “reasonable visitation” clauses. “Reasonable visitation” is never appropriate in domestic violence cases. Provisions for custody and visitation should be specific, easy to understand, and enforceable. For example, protective orders should explicitly state where and when visitation exchanges can occur (with safety considerations in mind), and create explicit but limited exceptions for contact with children. Use a supervised visitation center or police station for safe exchanges whenever possible.

4. Mutual Orders.

Mutual protective orders should almost never be agreed to. Mutual protective orders, if not factually justified, re-victimize the victim, provide an abuser with another vehicle to harass the victim, and can impair future legal rights for victims. Lawyers often have

¹⁴⁷ LA. REV. STAT. ANN. § 9:368.

¹⁴⁸ LA. CODE CIV. PROC. ANN. art. 3607.1 (2012).

unrealistic expectations about victims' normal reactions to abuse. The fact that a victim has engaged in physical resistance or even retaliatory violence against a predominant aggressor is rarely an appropriate justification for a mutual protective order if the victim poses no future risk of harm to an abuser. For further discussion, see part *supra*, "Can the court order mutual protective orders?"

4.3 OTHER OPTIONS FOR PERMAMENT PROTECTIVE ORDERS AND OTHER TYPES OF INJUNCTIONS

The requirements and features of the other primary civil protective and restraining orders are set forth below.

4.3.1 Post-Separation Family Violence Relief Act Injunction, LA. REV. STAT. ANN. § 9:362

a. Overview.

Petitioners can seek protective orders under this statute if (1) the parties have a child in common, and (2) the petitioner proves family violence. The statute requires that in all "family violence cases," all court orders include an injunction in favor of the abused party or child.¹⁴⁹ This Act allows victims to request **permanent** injunctions against abuse. The terms of those injunctions are set out by Revised Statute section 9:362(4), and include more restrictive provisions on contact than many injunctions entered under either the Protection from Family Violence Act statutes (title 46) or Injunctions Ancillary to Divorce. For this reason, many victims seek a permanent injunction under this Act as part of their divorce or custody judgment.

b. Available Relief.

An injunction under this statute includes the following relief, as defined by Rev. Stat. § 9:362(4):

- Prohibit contact with abused parent or children except for contact expressly allowed for specific and limited purposes relating to the welfare of the children.
- Bar abuser from going within 50 yards of home, school, employment or person of abused parent and children.
- Bar abuser from going within 50 feet of automobile of abused parent and children.

The Post Separation Family Violence Relief Act includes many additional and important protections to victims and their children. See discussion *infra*.

c. Duration of Injunctions.

The rules for civil injunctions in the Louisiana Code of Civil Procedure govern.¹⁵⁰ Normally, a temporary restraining order lasts for two to ten days and may, at any time before its expiration, be extended for good cause for up

¹⁴⁹ LA. REV. STAT. ANN. § 9:366.

¹⁵⁰ A plaintiff eligible for relief under LA. REV. STAT. ANN. §§ 9: 361-369 should also be eligible for relief under title 46: 2131-2143. See LA. REV. STAT. ANN. § 46:2139.

to ten days. However, article 3604(B) of the Code of Civil Procedure 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, in a divorce suit, shall remain in force until the hearing on the preliminary injunction.¹⁵¹

In many cases, petitioners do not request a preliminary injunction in PSFVRA cases, but instead finalize a permanent injunction at divorce. This is true because if emergency circumstances require an immediate order, most petitioners seek a TRO under the Domestic Abuse Assistance Act. Where a preliminary injunction is requested, the hearing must be set for two to ten days after service of the notice.¹⁵² The preliminary injunction remains in effect until the hearing on the permanent injunction or until dissolved. The PSFVRA does not expressly waive the bond requirement for interlocutory injunctions. However, Code of Civil Procedure art. 3610 expressly waives bond for all TROS, preliminary or permanent injunctions seeking protection from domestic abuse, dating violence, stalking or sexual assault. Also, the PSFVRA may be used in conjunction with a Domestic Abuse Assistance Act proceeding and section 2135 of that Act does waive the bond requirement for temporary restraining orders.¹⁵³

A permanent injunction does not expire. However, a pre-divorce injunction may be extinguished if it is not specifically mentioned in the divorce judgment.¹⁵⁴

d. Penalties for Violation.

Violation of a PSFVRA injunction can be punished through contempt actions in civil court or criminal prosecution. Contempt is punishable by up to six months in jail and a fine of up to \$500.¹⁵⁵ The defendant may be arrested and criminally prosecuted for violation of the TRO after service or violation of the preliminary or permanent injunction after issuance.¹⁵⁶ See discussion *supra* for contempt and double jeopardy.

In addition to the above penalties, the Post-Separation Family Violence Relief Act requires that any violation of an injunction “shall result in a termination of all court ordered child visitation.”¹⁵⁷ This strong enforcement provision is available to petitioners exclusively under this Act.

e. Orders.

These injunctions, if granted at divorce, should be included in the divorce judgment and must *also* be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR.

¹⁵¹ LA. CODE CIV. PROC. ANN. art. 3604(B) (2012). Act 582 of 2012 amended Article 3604(B) to maintain TROs in effect until the preliminary injunction hearing in divorce cases only. In other cases, the duration of the TRO will be limited to either 21 or 30 days as applicable.

¹⁵² LA. CODE CIV. PROC. ANN. art. 3602.

¹⁵³ LA. REV. STAT. ANN. §§ 46:2131-2143.

¹⁵⁴ *Steele v. Steele*, 591 So. 2d 810 (La. App. 3 Cir. 1991). This argument should not apply to PSFVRA cases, but attorneys should be cautious and request an injunction in the divorce if possible.

¹⁵⁵ LA. REV. STAT. ANN. §13:4611(b).

¹⁵⁶ LA. REV. STAT. ANN. §14:79.

¹⁵⁷ LA. REV. STAT. ANN. §9:366(B). However, many trial judges will refuse to apply this law to terminate visitation.

4.3.2 Injunction against Abuse Ancillary to Divorce, LA. REV. STAT. ANN. § 9:372.

a. Overview.

These injunctions are available to victims of abuse who are married to their abusers and are seeking divorce. The injunctions available under this provision are more generic and less specific than those available through other statutes, and prohibit a “spouse from physically or sexually abusing the other spouse or a child of either of the parties.” The text of the statute includes no language about stay away provisions or restricting other forms of conduct that is not already illegal.

b. Duration of Injunction.

These orders can be permanent, but must be issued prior to the divorce; additionally, if an injunction is not included in the divorce, prior injunctions issued under this statute may expire upon divorce.¹⁵⁸ These injunctions, if granted at divorce, should be included in the divorce judgment and must *also* be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR.

c. Penalties for Violation.

These injunctions, like all injunctions prohibiting abuse, are entered into the Louisiana Protective Order Registry and are a crime to violate.¹⁵⁹ So although these orders appear to only prohibit behavior that is already criminal, they do create additional criminal penalties for enforcement. In other words, a defendant who violates one of these injunctions could potentially be charged both with the violation of the order, and the underlying crime that was committed during the violation.

4.3.3 General Civil Injunction, LA. CODE CIV. PROC. ANN. art. 3601-3612.

a. Overview.

Injunctions under this Article are available to any party seeking protection from abuse. Article 3601 is the only relief available to adult victims who are ineligible for relief under the Domestic Abuse Assistance Act,¹⁶⁰ the Protection from Dating Violence Act,¹⁶¹ the Post-Separation Family Violence Relief Act and Louisiana Revised Statute 9: 575.¹⁶² For example, a party who is being stalked or harassed by someone with whom they were never romantically involved may seek relief under article 3601. The plaintiff must show a likelihood of irreparable injury and bond is waived for any injunction seeking protection from stalking, domestic abuse, dating violence or sexual assault.¹⁶³

¹⁵⁸ *Lawrence v. Lawrence*, 02-1066 (La. App. 3 Cir. 3/5/03); 839 So. 2d 1201 (finding that an injunction may not be issued three years after divorce); *Steele*, 591 So. 2d 810 (finding that a pre-divorce injunction under predecessor statute expired upon divorce when not expressly continued in divorce judgment).

¹⁵⁹ LA. REV. STAT. ANN. §14:79.

¹⁶⁰ LA. REV. STAT. ANN. §46:2131-2143.

¹⁶¹ LA. REV. STAT. ANN. §46:2151.

¹⁶² LA. REV. STAT. ANN. §9:361-369.

¹⁶³ LA. CODE CIV. PROC. ANN. art. 3603(A) (1), 3610 (2012).

b. Duration of Injunction.

A temporary restraining order, if issued against a party other than a spouse, can last for no longer than ten days, but may be extended in ten-day intervals.¹⁶⁴ The temporary restraining order, if issued against a spouse in a divorce suit to prohibit harm, lasts until the preliminary injunction hearing.¹⁶⁵ 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.

c. Penalties for Violation.

Penalties for violation of an article 3601 injunction include contempt. Contempt is punishable by up to six months in jail and a fine up to \$1,000.¹⁶⁶ The defendant may be arrested and criminally prosecuted under Louisiana Revised Statute 14:79 for violation of the TRO after served or violation of the preliminary or permanent injunction after issued.

4.4 CONTEMPT MOTIONS

1. *How do I bring a contempt motion for violation of a protective order or injunction?*

Draft a contempt motion or rule to show cause that clearly states the notice that the abuser had of the injunction, the injunction and the terms violated, and all the facts or conduct alleged to constitute contempt.¹⁶⁷ A person is bound by an injunction from time that he has notice regardless of whether he has been served with the injunction.¹⁶⁸ A certified copy of the contempt motion and rule to show cause must be served on the abuser at least 48 hours before the hearing in the same manner as a subpoena.¹⁶⁹ Generally, this means personal or domiciliary service on the abuser.¹⁷⁰ Be prepared to prove the contempt without testimony from the abuser since he may invoke the 5th Amendment.

2. *May the court refuse to hear a contempt motion for violation of a protective order or injunction?*

No. The court must rule on a domestic violence victim's motion for contempt for violation of a protective order or injunction. It can't refuse to schedule the motion or decide the motion without a hearing.¹⁷¹

4.5 FOREIGN PROTECTIVE ORDERS AND INTERSTATE VIOLATIONS

1. Registry and Enforcement of Foreign Orders.

a. The Violence against Women Act requires that states give full faith and credit to orders of protection entered in other states.¹⁷²

The police may enforce foreign protective orders which have not been

¹⁶⁴ LA. CODE CIV. PROC. ANN. art. 3604(A).

¹⁶⁵ LA. CODE CIV. PROC. ANN. art. 3604(B).

¹⁶⁶ LA. REV. STAT. ANN. §13:4611(b).

¹⁶⁷ LA. CODE CIV. PROC. ANN. art. 225.

¹⁶⁸ *Dauphine v. Carencro High School, 2002-2005* (La. 4/21/03), 843 So. 2d 1096, 1104, n.6.

¹⁶⁹ LA. CODE CIV. PROC. ANN. art. 225.

¹⁷⁰ LA. CODE CIV. PROC. ANN. art. 1355.

¹⁷¹ In *Crowley v. Crowley, 96-CC-2413* (La. 10/11/96), 680 So.2d 661, the Supreme Court ordered the district judge to hear and rule on a domestic violence victim's contempt motion.

¹⁷² 18 U.S.C. § 2265. A child custody provision within a protective order must 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 is entitled to full faith and credit under the Violence against Women Act.

made executory in Louisiana, and can arrest for violation of a foreign protective order.¹⁷³ La. R. S. 13:4248 provides that a foreign protective order may be made executory in Louisiana by filing an *ex parte* petition.¹⁷⁴ The petitioner's address may remain confidential with the court.¹⁷⁵

b. Safety considerations should guide the decision about whether to register a foreign order.

The petitioner can keep her address confidential.¹⁷⁶ However, the abuser will be sent notice of the filing of the petition. The petitioner can file the *ex parte* petition by mail or through counsel. There is no need for the petitioner to travel to Louisiana to file the *ex parte* petition. She should not be charged any filing fees for the petition since it involves a protective order. The advantages to an executory Louisiana order are that police will be 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.¹⁷⁷ In addition, once the order becomes executory in Louisiana, a defendant is subject to contempt proceedings in a Louisiana civil court. The victim's refuge state should have jurisdiction to enter a prohibitory injunction even if personal jurisdiction over the defendant does not exist in the refuge state.¹⁷⁸ A Louisiana court should have personal jurisdiction over a non-resident abuser for any type of injunction, affirmative or prohibitory, if the non-resident has minimum contacts with Louisiana, e.g., making threatening phone calls or sending letters to victim in Louisiana.¹⁷⁹

c. Interstate violations are a crime.

It is a federal crime to cross a state line to commit domestic violence or to violate a protective order.¹⁸⁰ The Federal Bureau of Investigation and United States Attorneys' Office should be contacted if an interstate violation of a protective order occurs.

4.6 PROHIBITIONS ON GUN OWNERSHIP OR POSSESSION

1. Federal prohibitions apply to anyone who is subject to a Protective Order. Title 18 section 922(g) of the United States Code 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;

¹⁷³ LA. REV. STAT. ANN. §14:79(A)(2).

¹⁷⁴ See Louisiana Protective Order Registry Form E.

¹⁷⁵ LA. REV. STAT. ANN. §13:4248(A).

¹⁷⁶ *Id.*

¹⁷⁷ LA. REV. STAT. ANN. §14:79(A)(1)(a). To arrest for a violation, a party must have been served with a TRO. But a protective order, if issued after a hearing for which the defendant had notice, need not be served. *Id.* For this reason, law enforcement will have to examine a foreign order for indications that either a TRO was served, or that the defendant had notice of the protective order hearing.

¹⁷⁸ See e.g., *Spencer v. Spencer*, 191 S.W. 3d 14 (Ky. App. 2006); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Ia. 2001).

¹⁷⁹ *Brown v. Bumb*, 2003-1563 (La. App. 4 Cir. 3/21/04), 871 So. 2d 1201.

¹⁸⁰ 18 U.S.C. §§ 2261-2262.

- (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
- (4) 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.

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 invokes federal law prohibiting the abuser's possession of a gun. The LPOR forms include the warning that federal law prohibits purchase or possession of firearms.

If the abuser has a gun, ask the court to expressly order him to turn his guns over to law enforcement officials and to produce proof of said surrender to the court. Violation of 18 U.S.C. § 922 may be prosecuted by federal authorities. Some abusers may be willing to consent to a protective order on the theory that section 922(g) would not apply to them since "no hearing occurred."

2. Gun prohibitions apply to those convicted of a domestic violence crime.

In addition, 18 U.S.C. §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.

5. DIVORCE

5.1 TIMING FOR DIVORCE

1. *How does domestic violence affect divorce?*

Domestic violence can affect the timing of a divorce. The requisite separation period for divorce may be shorter in domestic violence cases than in other cases. Under Louisiana Code of Civil Procedure article 103.1, the requisite separation period for divorce when there are minor children is 365 days, *unless there is domestic violence*.¹⁸¹ In domestic violence cases, the requisite separation period – even when the parties have minor children – is 180 days. Only the victim of abuse may invoke the shorter time delay.¹⁸²

2. *How does a court determine whether the 180-day separation period applies?*

Where there is a protective order in place, the 180-day time delay applies.¹⁸³ Where no protective order is in place, the Petitioner must request a Rule to Show Cause for why the 365 day time period should not apply, and must prove the domestic violence. For this reason, attorneys representing victims should plan to present evidence of domestic violence sufficient to support both (1) the reduced time delay, and (2) a permanent injunction under one of the two statutes discussed below.

¹⁸¹ LA. CODE CIV. PROC. ANN. art. 103.1 (2012).

¹⁸² LA. CIV. CODE ANN. art. 103.1(B) (requiring a showing of abuse by *other* spouse).

¹⁸³ *Id.* art. 103.1(1)(C).

5.2 INJUNCTIONS WITH DIVORCE

1. *What types of injunctions are available at divorce?*

a. **Injunction under Post-Separation Family Violence Relief Act, LA. REV. STAT. ANN. § 9:366(A).**

The Post-Separation Family Violence Relief Act cases where there is family violence, the court *must* include an injunction against abuse in the judgment for divorce.¹⁸⁴ The terms of the injunction include restrictive no contact and stay away provisions in addition to typical prohibitions against physical abuse and harassment.¹⁸⁵ The statute does not put a time limit on these injunctions, and they are typically issued as permanent injunctions. These injunctions, like all injunctions prohibiting abuse, should be reduced to an LPOR form, are entered into the Louisiana Protective Order Registry and are a crime to violate.¹⁸⁶

b. **Injunction against Abuse Ancillary to Divorce, LA. REV. STAT. ANN. § 9:372.**

These injunctions are also available to victims of abuse who are married to their perpetrators and are seeking divorce. The injunctions available under this provision are more generic and less specific than those available through other statutes, and prohibit “a spouse from physically or sexually abusing the other spouse or a child of either of the parties.” But like all injunctions prohibiting abuse, these injunctions are entered into the Louisiana Protective Order Registry and are a crime to violate.¹⁸⁷

These orders can be permanent, but must be issued prior to or in the divorce. Also, if an injunction is not included in the divorce, prior injunctions issued under this statute may expire upon divorce.¹⁸⁸ These injunctions, if granted at divorce, should be included in the divorce judgment and must *also* be reduced to a Uniform Abuse Prevention Order form for submission to the LPOR. A subsequent divorce judgment may supersede a protective order if it fails to restate the injunctions against abuse.¹⁸⁹

c. **Injunctions against Harassment, REV. STAT. ANN. § 9:372.1.**

These injunctions are frequently issued as mutual injunctions in divorce cases, but should rarely be used in domestic violence cases. In domestic violence cases, both judges and opposing counsel often propose these injunctions to promote settlement. But injunctions against harassment are a poor substitute for injunctions against abuse for several reasons. First, any mutual injunction should be considered potentially dangerous to victims for reasons described *supra*. But even if these orders are not mutual, they provide little protection to victims. Injunc-

¹⁸⁴ LA. REV. STAT. ANN. § 9:366(A).

¹⁸⁵ LA. REV. STAT. ANN. § 9:363.

¹⁸⁶ LA. REV. STAT. ANN. §14:79.

¹⁸⁷ *Id.*

¹⁸⁸ *Lawrence v. Lawrence*, 02-1066 (La. App. 3 Cir. 3/5/03); 839 So. 2d 1201 (holding that an injunction may not be issued three years after divorce); *Steele v. Steele*, 591 So. 2d 810 (La. App. 3 Cir. 1991).

¹⁸⁹ See *Steele*, 591 So. 2d 810 (holding that a pre-divorce injunction under predecessor statute expires upon divorce if not expressly continued in divorce judgment).

tions against harassment, unlike injunctions prohibiting abuse, are not reduced to a Louisiana Protective Order Registry form and are not entered into the protective order registry. They are enforceable through contempt proceedings rather than arrest under the Criminal Code's protective order violation statute, making enforcement both more difficult and less likely to address immediate safety issues.¹⁹⁰ Also, these orders do not exempt an abused party from the custodial relocation notice requirements that protect victims with children who relocate,¹⁹¹ and they do not invoke federal firearm prohibitions.¹⁹²

2. *How do I choose which injunction to request at divorce?*

When assessing which injunction best meets your clients' needs consider the following:

a. Differences in relief.

In general, these orders are similarly enforceable, but provide different relief. The Post-Separation Family Violence Relief Act explicitly defines injunctions to include restrictive stay away and no contact provisions.¹⁹³ For example, the distance prohibitions against contact are more restrictive under this statute than under the Domestic Abuse Assistance Act. On the other hand, Rev. Stat. § 9:372 injunctions against abuse ancillary to divorce tend to be generic prohibitions against conduct that is already illegal (physical and sexual abuse). Revised Statute § 9:372 includes no explicit language regarding stay away provisions, prohibitions on contact, or restrictions on conduct that is not already illegal.¹⁹⁴ But even though an Injunction Ancillary to Divorce appears to prohibit only behavior that is already criminal, most courts will include additional remedies, like stay away provisions, if they are specifically pled. In fact, the Louisiana Protective Order Registry Form for § 372 injunctions includes remedies not specifically enumerated in the statute, and those forms create persuasive authority in favor of expanded relief.¹⁹⁵

b. Enforceability.

In any case, even a very limited Injunction against Abuse Ancillary to Divorce creates an important remedy for victims because it creates additional criminal enforcement mechanisms. These orders, like all injunctions prohibiting abuse, are entered into the Louisiana Protective Order Registry and are a crime to violate.¹⁹⁶ So an abuser who violates either type of injunction could potentially be charged both with violation of the order, and also any underlying crime committed during the violation. For discussion on double jeopardy issues, see part *supra*.

¹⁹⁰ LA. REV. STAT. ANN. § 14:79.

¹⁹¹ LA. REV. STAT. ANN. § 9:355.2(C)(2) as amended by Act 627 of 2012.

¹⁹² 18 U.S.C. § 922 (g).

¹⁹³ LA. REV. STAT. ANN. § 9:361.

¹⁹⁴ But see Louisiana Protective Order Forms, which include no contact provisions for injunctions issued under LA. REV. STAT. ANN. § 9:372.

¹⁹⁵ *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389, 396.

¹⁹⁶ LA. REV. STAT. ANN. § 14:79.

c. Additional consequences for violation in custody cases.

Finally, one important difference between the options for injunctions at divorce includes the effect of protective order violations on custody determinations. If a Petitioner is awarded an injunction under Rev. Stat. § 9:366, any violation of that injunction *requires* that the abusive parent's visitation be terminated.¹⁹⁷ This law can function both as a strong deterrent for batterers, and an important tool to protect victims and their children.

d. Making a decision.

Given these differences, lawyers should consider how the protections available under each statute fit a client's specific circumstances, whether the visitation termination provision of the PSFVRA is likely to be invoked against an abuser who violates an injunction, and whether the evidence satisfies the requisite burdens. A petitioner who desires the flexibility of more substantial contact because of shared children may find a no contact provision impractical and instead opt for a less restrictive order in an Injunction Ancillary to Divorce under section 372. On the other hand, a petitioner who has been stalked and harassed, or who feels the risk of future harm is imminent or likely, may want a more restrictive order under the PSFVRA in order to prevent her abuser from using shared children as an excuse to facilitate unwanted or dangerous contact. These issues should be discussed in detail with clients so that lawyers can request and draft orders that are tailored to meet each client's specific needs, and also so that ultimate decisions affecting client safety are the client's, not the lawyer's.¹⁹⁸ If the client elects not to seek a permanent injunction under the PSFVRA, you should document this decision in writing to the client, after a full discussion of the advantages and disadvantages of the injunction.

3. *If my client still has a valid protective order under the Domestic Abuse Assistance Act, why would she also need an injunction at divorce?*

Duration. These orders can last longer than any other orders available under the protective order statutes, and can be permanent. For reasons described *supra*, a client who fails to request a permanent injunction at divorce may miss her opportunity for a permanent order.

Relocation. Also, once a Domestic Abuse Assistance Act order expires, the relocation statute may apply to victims who do not obtain more permanent orders, because victims of domestic violence are exempt from the notice requirements of relocation only if a protective order is "in effect."¹⁹⁹ Note that Act 197 of 2012 amended R.S. 46: 2136 to allow a party to modify a DAAA protective order to be for an indefinite period, but only as to the portion that prohibits the defendant from abusing, harassing or interfering with the person as provided in R.S. 46:2135(A)(1).

¹⁹⁷ LA. REV. STAT. ANN. § 9:366(B).

¹⁹⁸ While lawyers should defer to client decisions on issues regarding safety, some clients minimize the risk of future harm and, initially, can be unrealistic about the possibility of safe contact with abusers. See Jacquelyn C. Campbell et al., *supra* note 24. In this situation, the lawyer might ask the client to consider whether her expectations of an abuser's future conduct are supported by the abuser's past conduct. An unrealistic order that anticipates cooperation by an abuser can be unsafe for victims and can also increase the likelihood of future litigation, which can be quite expensive.

¹⁹⁹ LA. REV. STAT. ANN. § 9:355.2(C)(2).

4. Can I still obtain a default judgment without a hearing if my client requests an injunction?

Maybe. Different judges will have different practices for default divorces. But where a petitioner has requested a permanent injunction at divorce, lawyers should plan to introduce testimony and evidence about the violence to support an award of a permanent injunction.

5.3 NAME CHANGE WITH DIVORCE

A married woman's maiden name is her legal surname.²⁰⁰ Marriage does not change her legal surname.²⁰¹ The divorce petition and judgment should be drafted to confirm your client's maiden name if she wishes to resume use of that name.

5.4 SPOUSAL SUPPORT AT DIVORCE

1. Overview.

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.

2. Special Issues in Domestic Violence Cases.

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.²⁰² Proof of freedom from fault is not required for interim spousal support. In domestic violence cases, the fault standard presents some challenges.

a. Fault.

Sometimes abusers seek to benefit from the collateral consequences of their abuse by characterizing victim behavior resulting from the abuse as fault grounds to avoid support. Fault that bars spousal support must be serious and an independent contributory or proximate cause of the break up.²⁰³

- **Abandonment.** Abandonment without lawful cause is a common ground for finding "fault" that bars final spousal support. It is not uncommon for an abuser to allege abandonment when the abused house leaves because of the violence. In order to defend against fault, the victim must prove the abuse if she has not already done so. Even threats of violence constitute lawful cause for abandonment and thus justify abandonment.²⁰⁴
- **Self-defense.** If the victim of abuse has committed violence against the other that is a "reasonable and justifiable response" to the abuser, she is not "at fault" in the break up of the marriage.²⁰⁵

²⁰⁰ LA. CODE CIV. PROC. art. 3947(B) (2012).

²⁰¹ *Id.*

²⁰² *Bowes v. Bowes*, 2000-CA-1062 (La. App. 4 Cir. 8/15/01); 798 So. 2d 996. Physical abuse or threats of violence may prevent a finding of fault. See *Almon v. Almon*, 97 CA 2004 (La. App. 1 Cir. 9/25/98); 718 So. 2d 1073; *Richards v. Richards*, 525 So. 2d 163 (La. App. 3 Cir. 1988); *Firstley v. Firstley*, 427 So. 2d 76 (La. App. 4 Cir. 1983).

²⁰³ *Smith v. Smith*, 08-575, 15 (La. App. 5 Cir. 1/12/10); 31 So. 3d 453, 462 (citing *Pearce v. Pearce*, 348 So. 2d 75 (La. 1977)).

²⁰⁴ *Caldwell v. Caldwell*, 95-CA-963 (La. App. 5 Cir. 3/13/96); 672 So. 2d 944.

²⁰⁵ *Smith*, 31 So. 3d at 464. In *Smith*, the wife arrested for simple battery after throwing scalding water on her husband was not at fault in the break-up of the marriage where evidence showed a history of abuse and that she acted in self-defense. *Id.*

- **Reconciliation.** Reconciliation often occurs in violent relationships prior to the final separation. Reconciliation that follows “fault” nullifies the prior fault.²⁰⁶ Thus, the critical question is the alleged misconduct that occurred between the last reconciliation and the filing of the divorce action. But in some cases, reconciliation can be challenged as not mutual – if a perpetrator moves back into a shared home without the victim’s consent, or the victim returns to a shared home for fear of her safety, her intent to reconcile may be at issue. The motives and intent of the parties will determine reconciliation.²⁰⁷ In general, however, if domestic violence, financial abuse, fear or coercion contributed to the circumstances that the abuser claims constitute reconciliation, the requisite intent and forgiveness may be lacking and application of the nullification principle is both wrong and inequitable.
- **Mental health and substance abuse.** Many victims suffer from mental illness or alcoholism because of physical abuse.²⁰⁸ “Misconduct” caused by mental illness is excused and will not bar final support.²⁰⁹ 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.²¹⁰

Further, a victim’s habitual intemperance may be excused by mental illness.²¹¹ One study found that 67% of abusers frequently abuse alcohol.²¹² The abuser’s intemperance may preclude a finding of fault against the victim. A course of conduct, such as drinking, when approved and consented to by both spouses, cannot constitute mutual fault.²¹³

b. Costs of Medical and Psychological Care.

Spousal support claims should be supplemented by requests that abusers pay for psychological and medical care that victims and children need because of the abuse. Victims and their children often need several years of psychological therapy to overcome the effects of family violence. The PSFVRA requires the abuser to pay the costs of the medical and psychological care necessitated by family violence.²¹⁴ 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.

²⁰⁶Doane v. Benenate, 95-CA-0953 (La. App. 4 Cir. 2/15/96); 671 So. 2d 523.

²⁰⁷Woods v. Woods, 27199-CA (La. App. 2 Cir. 8/23/95); 660 So. 2d 134.

²⁰⁸Richard Irons & Jennifer Schneider, *When is Domestic Violence a Hidden Face of Addiction*, 29 J. Psychoactive Drugs 337 (1997). This study reports that battered women comprise 64% of female patients admitted to inpatient psychiatric service. *Id.*

²⁰⁹Doane, 671 So.2d 523; Eppling v. Eppling, 537 So. 2d 814 (La. App. 5 Cir. 1989).

²¹⁰See Scarengos v. Scarengos, 606 So. 2d 9 (La. App. 5 Cir. 1992). *But see* Dolese v. Dolese, 517 So. 2d 1279 (La. App. 4 Cir. 1987).

²¹¹Anderson v. Anderson, 379 So. 2d 795 (La. App. 4 Cir. 1975).

²¹²Richard Irons & Jennifer Schneider, *supra* note 207.

²¹³Jenkins v. Jenkins, 38,873-CA (La. App. 2 Cir. 8/22/04); 882 So. 2d 705.

²¹⁴The 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.

5.5 USE AND OCCUPANCY OF FAMILY HOME IN DIVORCE SUITS

Housing is one of the most important needs of a domestic violence victim and her children. Abusers often punish victims by: (1) denying them financial support necessary to make rent payments, (2) causing them to be evicted, (3) failing to pay the home mortgage, or (4) damaging the house to make it uninhabitable.

Two statutory procedures are available to a spouse or parent who needs to obtain use and occupancy of the family home or apartment: Section 2135-6 of the Domestic Abuse Assistance Act and Injunctions and Incidental Orders under La. Rev. Stat. § 9:374. A petitioner who is not seeking a protective order under the domestic abuse statutes will have to address her housing needs under section 9:374, a general use and occupancy statute that applies to shared residences of divorcing couples.

5.5.1 Domestic Abuse Assistance Act, LA. REV. STAT. ANN. § 46: 2135-6

Under the Domestic Abuse Assistance statute, a domestic abuse protective order or TRO may grant possession of the residence or household to the exclusion of the defendant, by evicting him or restoring possession to the petitioner where:

- The residence is jointly owned in equal proportion or leased by the defendant and the petitioner or the person on whose behalf the petition is brought;
- The residence is solely owned by the petitioner 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.²¹⁵

This relief can be obtained in a temporary restraining order without a contradictory hearing, and can be continued by protective order for up to eighteen months. In addition, a protective order issued under section 2136 may grant two additional forms of housing relief in the form of 1) granting the petitioner possession of, and evicting a defendant from, a residence is solely owned by the defendant, where the petitioner has been awarded temporary custody of the parties' minor children, or 2) ordering the provision of suitable alternative housing.²¹⁶ See discussion *supra* "Domestic Abuse Assistance Act."

5.5.2 Injunctions and Incidental Orders, LA. REV. STAT. ANN. § 9:374

Section 374 addresses use and occupancy of a shared residence in divorce. Under this statute, the court can award use and occupancy only after the filing of a divorce (or a separation of property in the case of community property) and a contradictory hearing.

- a. **Community Property.** Where the family residence is community property, either spouse may petition for use and occupancy. The court may award use and occupancy pending partition of the community property or further orders, whichever occurs first.²¹⁷

²¹⁵ LA. REV. STAT. ANN. § 46: 2135(A); 2136(A)(1-2).

²¹⁶ LA. REV. STAT. ANN. § 46: 2136(A)(2) (2011).

²¹⁷ LA. REV. STAT. ANN. § 9: 374 (B).

²¹⁸ LA. REV. STAT. ANN. § 9: 374 (A).

- b. **Separately Owned Property.** 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.²¹⁸
- c. **Standard for awarding use and occupancy.** Courts should award use and occupancy based upon the best interest of the family, and, in doing so, must consider the relative economic status of the parties and the needs of the children.²¹⁹ Ordinarily, occupancy by the spouse who has custody of children is in the best interest of the family.²²⁰ In cases involving a “history of family violence,” victims should have a strong case for occupancy of the marital residence because Louisiana custody laws require, in general, that they be awarded sole custody.²²¹
- d. **Rent reimbursement claims.** Use of section 374 raises issues regarding rent. Be prepared to address this issue if requesting use and occupancy under that statute.²²²

6. CUSTODY AND VISITATION IN DOMESTIC VIOLENCE CASES

6.1 OVERVIEW

The presence of domestic violence presents special issues in child custody determinations. Domestic violence triggers different laws and different litigation practices than those used in other child custody cases. A family law attorney who fails to distinguish between cases that involve domestic violence and those that do not risks both malpractice, and also harm to victims and their children. This section addresses custody laws and litigation issues unique to domestic violence cases. It will touch only peripherally on general laws for custody and visitation. Discussion of general custody law can be found in the family law chapter, *infra*.

Domestic violence and children²²³

Domestic violence has devastating effects on children. An increasingly robust body of research suggests that children living in homes where a parent is abused suffer emotional, psychological, and long-term life consequences practically identical to those of children who are themselves physically abused.²²⁴ Children living in these homes are at risk of developing profound psychological, behavioral, cog-

²¹⁹ *Id.*

²²⁰ *Burrell v. Burrell*, 437 So. 2d 354 (La. App. 4 Cir. 1983).

²²¹ LA. REV. STAT. ANN. § 9: 364.

²²² Prior to 2004, rent for use of family home could not be retroactively assessed unless the parties agreed or the court ordered. *McCarroll v. McCarroll*, 96-C-2700 (La. 10/21/97); 701 So. 2d 1280. Under the pre-2004 law, a rent order could only be rendered at the time of the award of the family home. *Chance v. Chance*, 29591-CA (La. App. 2 Cir. 5/7/97); 694 So. 2d 613, 616. Now section 374(C) requires 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. Section 374(C) 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.

²²³ See generally Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 J. GENDER SOC. POL'Y & L. 657 (2003).

²²⁴ BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 12; Evan Stark, *supra* note 6, at 292.

nitive, social and educational problems – problems that often manifest in impaired functioning as adults.²²⁵ Even more, children whose mothers are abused are at significantly increased risk of also being abused.²²⁶ And after separation, children who have never been previously physically abused by a domestic violence perpetrator are at increased risk of being physically abused themselves.²²⁷ But despite overwhelming empirical data to the contrary, many family court judges and court-appointed evaluators persist in the erroneous belief that domestic violence has a limited impact on children and parenting – that once two parents separate, the effects of domestic violence on children will dissipate.

For all of the reasons described above and more, one of the most important services a lawyer can provide to a victim of abuse is to help her address her legal needs for child custody. This is no small task. When victims leave abusive partners, abusers routinely seek to punish and harass their victims through aggressive custody and visitation litigation.²²⁸ Visitation periods and visitation exchanges can expose both victims and their children to continuing injury. After separation, child contact is the most common context in which victims will be re-assaulted.²²⁹ When insufficient visitation protections are in place for children, or when abusers are awarded sole or joint custody, some victims reconcile as a last resort to help keep their children safe.

Nationally, abusers have been very effective at making good on their promises to punish victims by taking their children away. Batterers are more likely to seek custody of their children than are non-violent fathers.²³⁰ A variety of government and institution sponsored gender bias studies conducted in state courts across the nation have shown that, contrary to the commonly held believe that women are favored by courts in contested custody litigation, women face serious disadvantages in family law courts.²³¹ Moreover, some studies suggest that mothers who are victims of abuse may be more likely to lose custody of their children than women who are not.²³² And despite good domestic violence custody laws, domestic violence perpetrators are frequently awarded sole or joint custody of children.²³³ Innumerable issues contribute to this problem, including a lack of education about domestic violence and its effects. In many cases, abusers exploit easy opportunities to characterize the lingering psychological effects of the abuse as parenting deficits in the victim. In other cases, perpetrators benefit from misconceptions about abusers – expectations that abusers will present as angry or impulsive, or with mental health issues that can be detected by psychological testing or evaluation.

²²⁵ Evan Stark, *supra* note 6, at 292. While children in these homes are at much greater risk of these harms, not all children suffer these harms – many children show significant coping skills and resilience in the face of abuse. *Id.*; THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON CHILDREN 2 (Robert Geffner, Robyn Spurling Igelman & Jennifer Zellner eds., 2003).

²²⁶ Evan Stark, *supra* note 6, at 292 (describing “robust link” between domestic violence and child physical and sexual abuse); THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON CHILDREN *supra* note 224.

²²⁷ BANCROFT & SILVERMAN, *supra* note 26.

²²⁸ Evan Stark, *The Battered Mother’s Dilemma, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS supra* note 12, at 96.

²²⁹ Evan Stark, *supra* note 6, at 291.

²³⁰ Joan Zorza & Leora Rosen *supra* note 10, at 986.

²³¹ *Id.* at 314; see also STEPHANIE DALLAM, ARE “GOOD ENOUGH” PARENTS LOSING CUSTODY TO ABUSIVE EX-PARTNERS (updated 2008), available at <http://leadershipcouncil.org/1/pas/dv.html> (citing and summarizing state-sponsored gender bias studies).

²³² Evan Stark, *supra*, note 6, at 314; Joan S. Meier, *supra* note 222; Peter Jaffe *supra* note 10, at 16.

²³³ Joan S. Meier, *supra* note 222, at 662; Evan Stark, *supra* note 6.

The Post-Separation Family Violence Relief Act (PSFVRA), Louisiana Revised Statute 9:361-369, addresses these problems.²³⁴ That Act creates important legal remedies to protect abused parents and their children, and also abused children. In part, it protects victims and children by reducing judicial discretion in family violence cases, creating custodial presumptions that favor sole custody for the non-abusive parent, and imposing restrictions on the abusive parent's access to children. Because the PSFVRA should govern most custody determinations in family violence cases, this section focuses on that Act.

6.2 THE POST-SEPARATION FAMILY VIOLENCE RELIEF ACT (PSFVRA): APPLICABILITY AND REMEDIES

1. *Who can invoke the Post-Separation Family Violence Relief Act?*

The PSFVRA applies to custody and visitation disputes that involve a history of family violence, whether the parents are unwed, married or divorced.²³⁵

2. *What relief is available to a victim of domestic violence under the Post-Separation Family Violence Relief Act?*

The PSFVRA imposes mandatory standards for determining custody and visitation disputes where there is a "history of family violence." The PSFVRA includes a variety of important remedies for victims of abuse that include the following:

a. **The PSFVRA creates a custodial presumption in favor of the abused parent. LA. REV. STAT. ANN. § 9:364(A).**

The PSFVRA prohibits the award of sole or joint custody to an abusive parent.²³⁶ The presumption in favor of the abused parent can be overcome only if the abusive parent proves that he has completed a treatment program (typically six months in duration), that he is 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.²³⁷

This means that even after proving completion of a treatment program and freedom from substance abuse, the abuser must still prove that the child's best interest requires his participation as a custodial parent because the other parent has abandoned the child, suffers from mental illness, substance abuse or "such other circumstances" which affect the child's best interest. The phrase, "such other circumstances" refers to the preceding statutory terms in Rev. Stat. § 9:364(C), which all involve circumstances that rise to a level of parental unfitness. Thus,

²³⁴ See *D.O.H. v. T.L.H.*, 01-174 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714, 721-32 (Woodard, J., dissenting) (discussing the intent of the PSFVRA and how domestic violence affects children).

²³⁵ See *Evans v. Terrell*, 27615-CA (La. App. 2 Cir. 12/6/95); 665 So.2d 648. The PSFVRA applies to family violence cases without regard to the parents' marital status. See LA. REV. STAT. ANN. §§ 9: 362 (1)-(4), 363-364 (2011); see also LA. CIV. CODE ANN. art. 245 (2012) (establishing that custody rules applicable to married or divorced parents are applicable to unwed parents).

²³⁶ The 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. The statutory presumption denies discretion to judges who may be uneducated or biased on the issue of domestic violence.

²³⁷ LA. REV. STAT. ANN. § 9:364.

under the rule of *ejusdem generis*, “such other circumstances” must be things similar to the preceding terms, which includes only factors suggesting parental unfitness.²³⁸ In other words, mere “best interest” circumstances that do not rise to a level of parental unfitness are not sufficient. Additionally, if one interprets the statute to require only a showing of “best interest” circumstances, the statute’s specific reference to an “abused parent’s absence, mental illness, substance abuse” is rendered superfluous and meaningless. This interpretation violates rules of construction requiring that a statute be read to give effect to all of its words and parts.²³⁹

b. The PSFVRA prohibits courts from denying victim custody because of problems attributable to the abuse. LA. REV. STAT. ANN. § 9:364(A).

The fact that an abused parent suffers from the effects of the abuse cannot be grounds to deny her custody.²⁴⁰ This provision provides an important advocacy tool for victims, because many victims have problems attributable to the abuse that abusers frame as parenting deficits during custody disputes. These problems can include mental health issues such as depression and anxiety, as well as financial, employment, and housing instability.

c. The PSFVRA imposes restrictions on an abusive parent’s visitation. LA. REV. STAT. ANN. § 9:364(C).

The PSFVRA prohibits the abusive parent from exercising even supervised visitation until he proves that he has completed a treatment program.²⁴¹ After that, he may have supervised visitation.²⁴² Upon a showing that the perpetrator is not abusing alcohol or drugs, poses no danger to the child, and that unsupervised visitation is in the child’s best interest, he may eventually be awarded unsupervised visitation.²⁴³ For discussion on an opposing view asserting that supervised visitation can take place *during* the treatment rather than *after completion* of treatment, see *infra*, “Can the court order visitation prior to the completion of a treatment program?”

Additionally, visitation should never occur outside the sight or hearing of the supervisor, cannot be overnight or in the abuser’s home, and must be paid for by the abuser.²⁴⁴

²³⁸ Under the statutory construction rule of *ejusdem generis*, general words are restricted to a sense analogous to the less general words. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06); 925 So.2d 1202, 1211.

²³⁹ *Ritchie v. Louisiana Dept. of Public Safety and Corrections*, 595 So.2d 1158, 1160 (La. App. 1 Cir. 1991).

²⁴⁰ LA. REV. STAT. ANN. § 9:364 (A).

²⁴¹ LA. REV. STAT. ANN. § 9:364 (C). Several courts have specifically affirmed that supervised visitation cannot begin until the abuser has *completed* a treatment program. See *Duhon v. Duhon*, 01-0731 (La. App. 3 Cir. 12/12/01); 801 So. 2d 1263, 1265; *Morrison v. Morrison*, 97 CA 0295 (La. App. 1 Cir. 9/19/97); 699 So. 2d 1124, 1127; *cf.* *Folse v. Folse*, 98-C-1976 (La. 6/29/99); 738 So. 2d 1040; *Crowley v. Crowley*, 96-CC-2413 (La. 10/11/96); 680 So. 2d 661 (staying visitation where family violence found). *But see* *Lewis v. Lewis*, 34,031-CA (La. App. 2 Cir. 11/3/00); 771 So.2d 856 (allowing supervised visitation before completion of the treatment program in a case where that issue was not raised or addressed). In light of *Lewis*, some opponents argue that supervised visits can take place *during* treatment. For further discussion of these issues see “Can the court order visitation before the completion of a treatment program?”

²⁴² LA. REV. STAT. ANN. § 9:364(C).

²⁴³ *Id.*

²⁴⁴ LA. REV. STAT. ANN. § 9:362(6).

d. The PSFVRA prohibits courts from using a batterer’s friends or family as visitation supervisors. LA. REV. STAT. ANN. § 9:362(6).

The PSFVRA specifically excludes an abuser’s friends, relatives, therapist, or associates as visitation supervisors.²⁴⁵ The requirement that an abuser’s visitation be “supervised” is easily undermined by the appointment of supervisors who are unlikely to meaningfully supervise the visitation. The court may appoint a *victim’s* friends or family to supervise visitation, *but only if the victim consents.*²⁴⁶

e. The PSFVRA prohibits courts from ordering mediation in domestic violence cases. LA. REV. STAT. ANN. § 9:363.

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.²⁴⁷ This rule applies for any family violence case and does not require proof of a “history of family violence.”²⁴⁸

f. The PSFVRA mandates protective orders for victims. LA. REV. STAT. ANN. § 9:366.

Under the PSFVRA, all orders entered in family violence cases shall include an injunction against abuse. The Act defines “Injunction” to include specifically enumerated provisions for protection.²⁴⁹ In general, the injunctions are permanent.

g. The PSFVRA requires that an abuser’s visitation be terminated if he violates an injunction against abuse. LA. REV. STAT. ANN. § 9:366.

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

- He violates an injunction (protective order) as defined in Rev. Stat. § 9:362.²⁵⁰ This termination appears to be permanent.²⁵¹
- It is proven by clear and convincing evidence that he sexually abused his child.²⁵² The visitation termination continues until 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.²⁵³ Even after this is proved, only supervised visitation can be allowed.

²⁴⁵ LA. REV. STAT. ANN. § 9:362(6); Hollingsworth v. Semerad, 35,264-CA (La. App. 2 Cir. 10/31/01); 799 So. 2d 658 (amending trial court judgment to require “unbiased” supervisor even where PSFVRA was held inapplicable).

²⁴⁶ LA. REV. STAT. ANN. § 9:362(6).

²⁴⁷ LA. REV. STAT. ANN. § 9:363.

²⁴⁸ The PSFVRA’s custodial presumption requires that petitioner show a “history” of family violence that includes either more than one incident of family violence, or one incident resulting in serious bodily injury. LA. REV. STAT. ANN. § 9:364(A).

²⁴⁹ LA. REV. STAT. ANN. § 9:362(4).

²⁵⁰ LA. REV. STAT. ANN. § 9:366.

²⁵¹ The legislative history of the Post-Separation Family Violence Relief Act makes it clear that the legislature intended to eliminate the courts’ power to allow visitation for violators of injunctions. Compare Act 1091 of 1992 with Act 888 of 1995 and Act 750 of 2003. A brief on this issue is available at www.probono.net/la.

²⁵² LA. REV. STAT. ANN. § 9:364 (D).

²⁵³ Buchanan v. Langston, 36,520-CA (La. App. 2 Cir. 9/18/02); 827 So. 2d 1186. If sex abuse is proven, however, Louisiana Children’s Code article 1570(F) may be invoked instead to suspend visitation until the child is eighteen years old.

- He physically abuses his child.²⁵⁴ Visitation is terminated until the 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 the child.²⁵⁵

h. The PSFVRA creates strict standards for the appointment of mental health professionals in domestic violence cases. LA. REV. STAT. ANN. § 9:365.

Section 365 mandates that any mental health professionals appointed to conduct a custody evaluation in a case where family violence is an issue must have current and demonstrable training and experience working with perpetrators and victims of family violence.²⁵⁶ An untrained mental health professional could botch the evaluation and endanger the parties.²⁵⁷ When appropriate, contest an evaluator’s qualifications under section 365.²⁵⁸ Failure to object to an unqualified court appointed evaluator at the time of appointment could waive the objection.²⁵⁹ Attorneys representing victims should not only object to an evaluator’s qualifications where appropriate, but should also seriously consider opposing the appointment of a custody evaluator entirely.²⁶⁰ See discussion *infra* “Should the Court appoint a custody evaluator?”

i. The Post-Separation Family Violence Relief Act exempts abused parents from Louisiana’s relocation notification statute. LA. REV. STAT. ANN. § 9:368.

Fortunately, Louisiana’s relocation notification statute does not apply when an “order” issued pursuant to the Domestic Abuse Assistance Act, the Protection from Dating Violence Act, the Post-Separation Family Violence Relief Act, Children’s Code article 1564, or any other restraining order, preliminary injunction, permanent injunction, or any protective order prohibiting a person from harming or going near the other person **is in effect**, other than a section 9: 372.1 injunction.²⁶¹ See discussion *infra*, “*What should I do if my client wants to relocate?*”

j. The Post-Separation Family Violence Relief Act shifts costs and attorney fees to the abuser. LA. REV. STAT. ANN. § 9:367.

The Post-Separation Family Violence Relief Act discourages vindictive litigation by abusers by mandating that all attorney fees and costs be paid by the perpetrator of family violence. Many abusers continue their harassment of the victim through protracted custody and visitation litigation. Revised Statute 9:367 provides a powerful deterrent to such lit-

²⁵⁴ LA. REV. STAT. ANN. § 9:366.

²⁵⁵ LA. REV. STAT. ANN. § 9:364 (C).

²⁵⁶ Many mental health professionals do not have this training since it is not a required course in professional schools. A minimum of forty hours of specialized domestic violence training should be expected for court appointed evaluators.

²⁵⁷ Evan Stark, *supra* note 6; Robert Geffner, Lisa Conradi, Kari Geis & Brenda Aranda, *Conducting Child Custody Evaluations in the Context of Family Violence Allegations: Practical Techniques and Suggestions for Ethical Practice*, 6 J. Child Custody 189 (2009); NAT’L COUNCIL JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY AND VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE (2006), available at http://ncjfcj.org/sites/default/files/judicial%20guide_0.pdf.

²⁵⁸ See *e.g.*, Ledet v. Ledet, 03-CA-537 (La. App. 5 Cir. 10/8/03); 865 So. 2d 762, 765.

²⁵⁹ See Evans v. Terrell, 27615-CA (La. App. 2 Cir. 12/6/95); 665 So. 2d 648.

²⁶⁰ See NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES *supra* note 256.

²⁶¹ LA. REV. STAT. ANN. § 9: 355.2(D)(2) (2012). Note that an injunction against abuse ancillary to divorce under La. Rev. Stat. 9:371 qualifies for exemption, but an injunction against harassment under R.S.9:372.1 is not exempt.

igation. Once “family violence” has been found, the abuser must pay all of the victim’s attorney fees incurred in furtherance of the Act. The perpetrator of abuse may be made to pay the victim’s reasonable attorney fees, even if he is the prevailing party in subsequent litigation.²⁶²

6.3 LITIGATING POST-SEPARATION FAMILY VIOLENCE RELIEF ACT CASES

1. *What is the legal standard for applying the custody and visitation provisions of the Post-Separation Family Violence Relief Act?*

a. **The petitioner must prove a “history of family violence.”**

The custody and visitation provisions of the Post-Separation Family Violence Relief Act are triggered by finding that there is a “history of family violence.” The Act defines a “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.²⁶³ In other words, if a petitioner proves one of these two alternative bases for showing a “history” of family violence, the Act applies.²⁶⁴

b. **“Family violence” is defined broadly.**

Under the act, “family violence” includes, *but is not limited to* 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.²⁶⁵ 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.²⁶⁶

This definition of family violence tracks the definition of “domestic abuse” in the Domestic Abuse Assistance Act. The two definitions differ only in that the PSFVRA limits acts of “family violence” to acts perpetrated by one parent upon the other parent (as opposed to the various relationships between parties that can invoke application of the DAAA). Accordingly, case law decided under the DAAA addressing the issue of what constitutes “domestic abuse” is instructive for purposes of examining what constitutes “family violence” under the PSFVRA. See “Standard for awarding a protective order” *supra*.

²⁶² Jarrell v. Jarrell, 35,837-CA (La. App. 2 Cir. 2/27/02); 811 So. 2d 207 (affirming award of almost \$10,000 in attorney fees to victim who unsuccessfully opposed increased visitation time with abuser).

²⁶³ LA. REV. STAT. ANN. § 9:364(A). Note that this definition resulted from a statutory amendment that occurred in response to a bad decision in *Simmons v. Simmons*, in which the court refused to apply the PSFVRA 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 his wife’s adultery. 26,414-CA (La. App. 2 Cir. 1/25/95); 649 So. 2d 799. The *Simmons* definition of history of family violence has been legislatively overruled. As noted by *Hicks v. Hicks*, the outdated *Simmons* test for history of family violence is wrong. 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261. Generally, cases on “history of family violence” decided before the 1995 amendment are likely to be wrong.

²⁶⁴ LA. REV. STAT. ANN. § 9:364. This section should preclude any attempt by an abuser to invoke the jurisprudential reformulation rule, i.e., that abatement of prior misconduct makes evidence of the prior misconduct irrelevant for determining fitness for custody. See *Crownson v. Crownson*, 32,314-CA (La. App. 2 Cir. 9/22/99); 742 So. 2d 107.

²⁶⁵ LA. REV. STAT. ANN. § 9: 362 (3); G.N.S. v. S.B.S., 35,348-CA (La. App. 2 Cir. 9/28/01); 796 So.2d 739 (granting sole custody based on violence to child); *Hollingsworth v. Semerad*, 35,264-CA (La. App. 2 Cir. 10/31/01); 799 So. 2d 658; *Duhon v. Duhon*, 01-0731 (La. App. 3 Cir. 12/12/01); 801 So. 2d 1263 (unjustified corporal punishment of child constituted “family violence”). Note that a father’s abuse of the stepmother does not allow the mother to invoke the PSFVRA to restrict custody and visitation.

²⁶⁶ LA. REV. STAT. ANN. § 9:362(3).

In general, “family violence” includes battery, even if merely offensive and not injurious, threats to injure without touching, and forced sex.²⁶⁷ The violence does not have to be frequent or continuous.²⁶⁸ The statute’s definition is subject to broad interpretation because of the “including but not limited to” language, but as in Domestic Abuse Assistance Act cases, courts are unlikely to apply the statute in cases that do not involve physical violence, threats, assault, or an offense against the person that constitutes a violation of the criminal code.²⁶⁹ Because stalking is an offense against the person that violates the criminal code, the Post-Separation Family Violence Relief Act should apply in serious stalking cases, even in absence of direct threats or physical violence.

Despite the likelihood that, as a general rule, courts will not apply the PSFVRA in cases with no threats of harm or physical violence, lawyers should consider whether some cases still warrant the Act’s application. There is a legitimate argument that, from the standpoint of effecting the Act’s protective purpose, abuse in the form of extreme control, coercion and intimidation - even in absence of physical abuse - should sometimes be included within the meaning of the statute. Recent research on lethality in abuse cases suggests that factors relating to control and coercion better predict lethality risk and other negative outcomes for victims than does the frequency or severity of past physical abuse.²⁷⁰ So, for example, a victim who has not been physically abused but who is not allowed to leave her home without her husband’s permission, who has been “punished” by abuse of a family pet, or who is routinely stalked and monitored, could be more at risk of being killed by her abuser when she leaves him than a victim who has been hit or slapped with relative frequency in the past.

The PSFVRA’s broad definition of family violence allows a good faith argument for applying the Act’s protections in cases with non-physical abuse that nonetheless suggests high risk of lethality. But these cases can present challenges for litigation that require expertise in abuse cases - attorneys and their clients should carefully weigh the victim’s lethality risk against the risk that the victim will lose credibility with a Judge who may perceive that she is exaggerating the seriousness of her situation.

c. The court should proceed logically in determining whether the act applies.

Once a party pleads the Post-Separation Family Violence Relief Act, the court should use a logical procedure for determining whether it applies. In doing so, the court should first examine each alleged inci-

²⁶⁷ See *Hicks v. Hicks*, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261; *Michelli v. Michelli*, 93 CA 2128 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342; *Harper v. Harper*, 537 So. 2d 282 (La. App. 4 Cir. 1988).

²⁶⁸ *Michelli*, 655 So. 2d 1142.

²⁶⁹ *Smith v. Smith*, 44-663 (La. App. 2 Cir. 8/19/09) 16 So. 3d 643, 651 (holding the trial court did not err in refusing to apply the PSFVRA where evidence showed that each party provoked verbal and physical altercations and no serious bodily injury had occurred).

²⁷⁰ *Evan Stark supra* note 6, at 293; Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089 (2003) This study found that three factors (1) separation, (2) the presence of a weapon, and (3) the existence of control increased lethality risk nine-fold. The frequency and severity of past violence was a less accurate predictor of dangerousness. *Id.*

dent of family violence to determine (1) whether it was proved and (2) for each that was proved, determine whether it meets the statutory definition of “family violence.” Next, the court should consider whether the proven incidents, taken together or alone, constitute a “history of family violence.” In other words, determine whether any one incident proved by the petitioner resulted in serious bodily injury, or whether the petitioner proved more than one incident. If the petitioner has shown one of these two alternatives, the Act must be applied in making the custody determination.²⁷¹

2. *Can a court refuse to apply the PSFVRA or make custody orders before determining whether the PSFVRA applies?*

No. If the petitioner proves a history of family violence, the court must apply the protections of the Post-Separation Family Violence Relief Act.²⁷² Louisiana’s Courts of Appeal have consistently admonished trial courts on the Act’s mandatory application.²⁷³ Even more, the trial court may not avoid application of the Act’s protections by refusing to make a determination on the question of whether there is a “history of family violence.”²⁷⁴ Once the Act has been pled, all custody determinations must be predicated on a finding about family violence - the court may not issue even an interim or temporary custody order without first determining that issue.²⁷⁵ Even where the PSFVRA has not been pled, it is improper to make a custody determination before resolving outstanding pleadings alleging domestic violence - related Domestic Abuse Assistance Act proceedings could determine whether the PSFVRA applies.²⁷⁶

3. *Can the court refuse to make a finding of “family violence” if the evidence is uncontroverted?*

In most cases, no. Even though the trial court’s determination of “family violence” is entitled to great weight and will not be disturbed on appeal absent clear abuse of discretion,²⁷⁷ the trial court must apply the Act as written and may not impose a higher burden on the petitioner than that demanded by the Act.²⁷⁸ Thus, where the victim offers unrefuted testimony about specific acts of family violence, she does not also have to produce corroborating

²⁷¹ See *Hicks*, 733 So.2d 1261.

²⁷² See LA REV. STAT. ANN § 9:364 (2011). Although the trial court has discretion in its factual determination on “family violence,” once the finding has been made, the court is bound to apply the Act.

²⁷³ *Ledet v. Ledet*, 03-CA-537 (La. App. 5 Cir. 10/8/03); 865 So. 2d 762 (reversing and remanding for a determination on family violence); *Lewis v. Lewis*, 34,031-CA (La. App. 2 Cir. 11/3/00); 771 So. 2d 856; *Hicks*, 733 So.2d 1261 (reversing custody award to father where uncontroverted evidence proved at least on act of family violence resulting in serious bodily injury, but trial court failed to apply the act); see also *Crowley v. Crowley*, 96-CC-2413 (La. 10/11/96); 680 So. 2d 661 (reversing trial court that made finding that there was a history of family violence but did not apply the act’s requirement that the victim be awarded sole custody).

²⁷⁴ *Ledet*, 865 So. 2d 762. In *Ledet*, the trial court refused to hold an evidentiary hearing on the abuse allegations and suspended ruling on the abuse allegations for sixty days. The appellate court ordered the trial court to (1) hold and complete a hearing on the “family violence” allegations within fifteen days, (2) make findings on the “family violence” allegations, and (3) set custody in accordance with those findings and the PSFVRA. *Id.*

²⁷⁵ *Id.*, 865 So. 2d 762; *Ford v. Ford*, 01-387 (La. App. 3 Cir. 10/17/01); 798 So. 2d 316; *McFall v. Armstrong*, 10-1041 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 40.

²⁷⁶ *McFall*, 75 So. 3d at 40 (reversing custody determination made before Domestic Abuse Assistance Act (DAAA) petition was resolved and holding that the DAAA proceeding will determine whether the court is mandated to apply the Post-Separation Family Violence Relief Act).

²⁷⁷ *Buchanan v. Langston*, 36-520-CA (La. App. 2 Cir. 9/18/02); 827 So. 2d 1186.

²⁷⁸ *Hicks*, 733 So. 2d at 1266.

evidence.²⁷⁹ The uncontradicted evidence must be taken as true in the absence of circumstances in the record casting suspicion on its reliability.²⁸⁰ As a practical matter, however, lawyers should plan to introduce all corroborating evidence available.

4. *Can the court grant an injunction if the victim's testimony is disputed by the abuser?*

Yes. Often, a victim is the only witness to her abuse. The burden of proof for family violence is on the victim. However, this burden can be met by the victim's testimony if the court finds her credible.²⁸¹ Of course, corroborating evidence is very helpful in the "she said/he said" cases.

5. *Can the court apply the Act in a case where the petitioner failed to plead it?*

Yes, but it may not have to. The PSFVRA cannot be pled for the first time on appeal,²⁸² but the Act need not be formally pled for the court to apply it.²⁸³ In other words, if a petitioner fails to plead the act, she cannot complain on appeal that the court should have applied it. But even when it has not been formally pled, the court may make a finding of family violence that triggers the Act's provisions.²⁸⁴

6. *What satisfies the treatment program requirements under the PSFVRA?*

The PSFVRA requires that a parent with a history of perpetrating domestic violence **successfully** complete a "treatment program" before exercising supervised visitation. "Treatment program" is defined as one "designed specifically for perpetrators of domestic violence." Lawyers representing domestic violence victims should be fully prepared to litigate both (1) whether the treatment program satisfies this definition, and (2) whether it was successful. In most cases, lawyers should aggressively challenge any attempt to substitute batterer intervention courses with "anger management." The two are substantively different in important ways, and should not be conflated for the reasons described below.

a. *What type of "treatment program" satisfies the requirement?*

To date, this issue has not been directly addressed by a Louisiana appellate court. In *DOH v. TLH*, the Louisiana Court of Appeal for the Third Circuit upheld a trial court order finding that "anger management" satisfied the requirement, but did not actually opine upon whether anger management satisfied the statutory mandate.²⁸⁵ Instead, the court held that because the petitioner had presented no evidence or experts to refute the testimony regarding the perpetrator's "anger management" the trial court did not err as a matter of law.²⁸⁶

²⁷⁹ *Id.* at 1264.

²⁸⁰ *Id.*; Donahoe v. Jefferson Council on Aging, 04-CA-178 (La. App. 5 Cir. 10/26/04); 887 So. 2d 549, 552.

²⁸¹ See e.g., Porter Parson v. Parsons, 2010 WL 2342759, 2009-2120 (La. App. 1 Cir. 6/11/10), writ denied 2010-1472 (La. 10/1/10), 45 So.3d 1100 (protective order affirmed despite fact that husband and two of his friends denied the abuse); see also McCann v. McCann, 09-1341 (La. App. 3 Cir. 3/10/10), 33 So.3d 389, 395.

²⁸² Nguyen v. Lee, 07-CA-81 (La. App. 5 Cir. 5/15/07); 960 So. 2d 261, 265.

²⁸³ Dufresne v. Dufresne, 08-CA-215, 08-CA-216 (La. App. 5 Cir. 9/16/08); 992 So. 2d 579.

²⁸⁴ *Id.* (granting mother sole custody and father supervised visitation under PSFVRA, although mother requested only joint custody).

²⁸⁵ D.O.H. v. T.L.H., 2001-174 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714.

²⁸⁶ *Id.* at 718.

In fact, anger management does not satisfy the PSFVRA requirements. The dissenting opinion in *DOH v. TLH* correctly asserts that, with respect to both substance and procedure, anger management courses fall short of providing meaningful rehabilitation for batterers.²⁸⁷ Anger management is not a course of therapy specifically designed for perpetrators of domestic violence, and it is not recognized as such by experts in domestic violence. If a therapist conflates the two types of therapies, that fact alone suggests that he or she is untrained in domestic violence. Moreover, many experts believe that anger management programs increase danger to victims. The United States Department of Justice Office on Violence Against Women, which funds domestic violence programs nationwide, asserts that the practice of substituting anger management for batterer intervention compromises victim safety and allows perpetrators to escape responsibility.²⁸⁸ The remedial purposes of the statute – to provide protection for victims and their children by imposing meaningful rehabilitative requirements on batterers – are not met by the substitution of batterer intervention programs with either “anger management” or individual therapy.

Lawyers representing victims should aggressively litigate this issue, using expert testimony when possible. As a general rule, a program designed specifically for perpetrators of domestic violence should be at least twenty-six weeks long.

b. What is “successful” completion?

Ineffective treatment may be challenged in a hearing on a request for either supervised or unsupervised visitation.²⁸⁹ The fact that a party presents a “certificate of completion” for batterer intervention or anger management should not be equated with “successful completion” as a matter of fact or law. Any statutory interpretation of “successful” that imposes only the formal requirements of *attendance* belies the clear legislative purpose of the Act. Ostensibly, “successful completion” would require that a party not only meet the formal requirements of attendance and cooperation, but also that he has learned to accept responsibility for his battering behavior and its impact on children and parenting. So, for example, where a batterer “completes” a course, but remains unwilling to acknowledge the gravity of abusive behavior on family dynamics, or continues to engage in victim-blaming, the “success” of his therapy should be at issue in the litigation. The continuing denial of abuse is evidence that treatment has not been successful. When possible, present expert testimony about the types of behavior that would suggest meaningful reform.

Additionally, it is often important that lawyers help clients understand that even a highly-regarded batterer intervention program is unlikely to produce meaningful reform for a significant portion of batterers. Clients are often overly optimistic about the prospects of an

²⁸⁷ *Id.* at 722-32.

²⁸⁸ This language can be found in Office on Violence Against Women grant solicitations under the topic heading “Activities that Compromise Victim Safety and Recovery” found at: <http://www.ovw.usdoj.gov/docs/fy2012arrest-solicitation.pdf>.

²⁸⁹ See L.A. REV. STAT. ANN. § 9:362(7), 364 (2011); Jarrell v. Jarrell, 35,837-CA (La. App. 2 Cir. 2/27/02); 811 So. 2d 207; D.O.H., 799 So. 2d 714. Michael Rempel, *Batterer Programs and Beyond*, in 3 VIOLENCE AGAINST WOMEN *supra* note 2, at 179.

abuser's participation in batterer intervention. Research on the effectiveness of batterer intervention programs is controversial. But increasingly, it suggests that burgeoning court reliance on these programs is problematic because batterer intervention programs largely fail to prevent or even reduce future violence.²⁹⁰

7. *Can the Court award visitation prior to the completion of an abuser treatment program?*

No. A parent with a history of family violence is allowed only supervised visitation, and that visitation is “*conditioned* upon that parent’s participation in and completion of” a treatment program for abusers.²⁹¹ In other words, the treatment must be first completed. The requirement of “completion” supplements the requirement of participation, and clarifies that mere participation is insufficient to support a supervised visitation award.

This plain reading of the statute is consistent with the PSFVRA’s remedial purposes, and is supported by Louisiana’s rules on statutory construction. Under Louisiana Civil Code article 9, “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”²⁹² Despite the statute’s clarity about pre-conditions for visitation, attorneys representing abusers often conjure artificial ambiguity by arguing that section 9:364(C) should be interpreted to allow supervised visitation *during* participation in a batterer intervention program, rather than *after* completion of the program. This argument belies the statute’s plain language and attempts to create ambiguity where none exists. It contradicts the clear meaning of the phrase “conditioned upon,” and requires that the phrase “and completion of” be given no effect.²⁹³

In cases where abusers raise this issue, attorneys representing victims can look to a variety of Louisiana’s rules on statutory construction to support the statute’s plain meaning. In general, Louisiana rules do not support interpretations that favor ambiguity over clarity. For example, Louisiana Revised Statute 1:4 states, “when the wording of a section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.” Here, the word “and” is unambiguous and should not be construed contrary to its common usage in order to void its effect.²⁹⁴ Additionally, Louisiana Revised Statute 1:9 makes it clear that, for purposes of statutory interpretation, the disjunctive “or” is not interchangeable with “and.” Simply put, “and” means “and.”

²⁹⁰ Michael Rempel, *Batterer Programs and Beyond*, in 1 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 180 (Evan Stark & Eve Buzawa, eds., 2009). Given the discouraging evidence on program efficacy, some experts suggest that batterer intervention programs should be used to promote a more achievable goal of accountability, rather than rehabilitation. *Id.* at 188.

²⁹¹ LA. REV. STAT. ANN. § 9: 364(C).

²⁹² See also LA. REV. STAT. ANN. § 1: 4.

²⁹³ Applying this logic, an abuser’s visitation would be preserved indefinitely with a showing of participation alone. Some proponents of this position propose that the statute be read so that the completion requirement is not a pre-requisite, but is instead grounds for *terminating* visitation later if not fulfilled. This interpretation requires circuitous reasoning and conflicts with the fact that the legislature created explicit termination provisions in other parts of the statute. In other words, if the legislature had intended that it be a termination provision rather than a condition precedent, they would have said so.

²⁹⁴ Under Louisiana Revised Statute 1:3, words and phrases must be construed using their common usage.

No Louisiana Court of Appeal has directly interpreted section 9:364(C), but several have upheld orders suspending visitation until treatment completion.²⁹⁵ Two appellate courts appear to have overlooked the completion requirement when remanding to a trial court.²⁹⁶ Given no contrary treatment, the plain and best reading of the statute requires that courts deny supervised visitation until the treatment program is successfully completed.

8. *Should the court appoint a custody evaluator?*

a. **No, it is probably procedurally premature, and unlikely to help in a family violence case.**

The appointment of a custody evaluator is usually premature, and also unhelpful, in PSFVRA cases. 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 at least until the court has ruled on the allegations of “family violence.” Thereafter, if a history of family violence is proven, section 364 prohibits the court from awarding sole or joint custody to the abuser and a custody evaluation is unnecessary. 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.²⁹⁷ If the court’s custody determination is mandated by section 364, the child’s best interest does not become and may never become an issue. Thus, the appointment of a custody evaluator is premature before the court has ruled on the “family violence” allegations.²⁹⁸

A contradictory hearing to determine good cause should take place before a custody evaluator is appointed.²⁹⁹ A request for mental health evaluations is governed by La. Rev. Stat. 9: 331 and article 1464 of the Louisiana Code of Civil Procedure.³⁰⁰ These statutes require that evaluations be ordered only for good cause shown and upon notice to the other party.³⁰¹ The existence of an abuse claim does not constitute “good cause” for an evaluation.³⁰² *The presentation of testimony and evidence*

²⁹⁵ See *Duhon v. Duhon*, 01-0731 (La. App. 3 Cir. 12/12/01); 801 So. 2d 1263, 1265 (upholding trial court judgment that ordered supervised visitation to begin only after father complied with the provisions of the PSFVRA); *Ford v. Ford*, 01-387 (La. App. 3 Cir. 10/17/01); 798 So. 2d 316, 318 (reversing unsupervised visitation award to father and holding that if mother prevails on PSFVRA claim father may have supervised visitation only after completing treatment); *Morrison v. Morrison*, 97 CA 0295 (La. App. 1 Cir. 9/19/97); 699 So. 2d 1124; see also *Folse v. Folse*, 738 So. 2d 1040 (La. 1999) (suspending all visitation in a sex abuse case until completion of treatment program).

²⁹⁶ *Hicks v. Hicks*, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261; *Lewis v. Lewis*, 34,031-CA (La. App. 2 Cir. 11/3/00); 771 So. 2d 856. In both *Hicks* and *Lewis*, the appellate court reversed a trial court for improperly awarding joint or primary domiciliary custody to an abuser and failing to apply the PSFVRA. The remand orders impose supervised visitation until the perpetrator can show that he has met PSFVRA’s requirements, and in doing so, appear to allow co-occurring visitation. Nonetheless, neither *Hicks* nor *Lewis* supports an argument in favor of co-occurring visitation because the specific issue of whether treatment must be completed, not merely commenced, was not raised or examined, and neither petitioner-victim appears to have ever requested that visitation be prohibited before completion. For example, in *Lewis*, the victim-petitioner explicitly acquiesced to co-occurring visitation, arguing on appeal only that the trial court should have ordered “supervised visitation for Mr. Lewis until such time that he completed a treatment program for family violence perpetrators.” *Lewis*, 771 So. 2d at 860-1. *Id.*

²⁹⁷ See e.g., *Scott v. Scott*, 95 CA 0816 (La. App. 1 Cir. 12/15/95); 665 So. 2d 760; *Clark v. Clark*, 539 So. 2d 913, 917 (La. App. 2 Cir. 1989).

²⁹⁸ Cf., *McFall v. Armstrong*, 10-1041 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 40.

²⁹⁹ Tit. 9 § 331. A mental health evaluation may only be ordered for good cause shown. *Id.*

³⁰⁰ Arguably, this statute is the only authority under Louisiana law that could conceivably authorize the appointment of custody evaluations.

³⁰¹ LA. CODE CIV. PROC. ANN. art. 1464.

³⁰² Cf., *Bourque v. Bourque*, 03-1254 (La. App. 5 Cir. 3/30/04), 870 So. 2d 1088 (psychological evaluation denied where no psychological issues involved in case).

is the best way to determine whether abuse has occurred. For the reasons described above, once the abuse has been proved, the PSFRVA's mandatory custody provisions are triggered and the mental conditions of the parties should not be at issue.

Lawyers should contest the issue of "good cause" in most domestic violence cases. Procedurally, evaluations, parenting assessments, and best interest assessments should not occur before an abuser has completed a batterer's treatment program and proved that he is free from alcohol and substance abuse. Unless the abuser alleges that the child's best interest requires the abuser's participation as a custodial parent because of the other parent's absence, mental illness, substance abuse or such other circumstances affecting the child's best interest, the motion should be denied.³⁰³

If the court orders an evaluation over your objection in a domestic violence case, request an opportunity to examine evaluator qualifications in advance of the appointment of a specific evaluator. The fact that the court has routinely relied on an evaluator in the past is not evidence that the evaluator meets the PSFVRA standards for appointment of a mental health professional. If an evaluation is ordered, it must be paid for by the abuser, and not split by the parties.³⁰⁴

b. Apart from the procedural issues raised above, the appointment of a custody evaluator is rarely appropriate in domestic violence cases.

For reasons that are beyond the scope of this chapter, a growing body of studies suggests that the appointment of a custody evaluator makes it less likely that family courts will respond appropriately to reports of abuse in custody cases.³⁰⁵ Some experts have concluded that the increasingly frequent appointment of custody evaluators and guardians *ad litem* are a principal reason that abusers routinely win custody.³⁰⁶ Many, if not most, custody evaluators lack meaningful training and expertise in even basic dynamics of domestic violence; they are unfamiliar with reputable professional literature in the field, and do not believe that domestic violence is an important factor to consider in making custody recommendations.³⁰⁷ In fact, a great deal of evidence suggests that evaluators are biased against believing reports of abuse because they are unaware of the fact that contested custody cases have a much higher rate of domestic violence than uncontested cases.³⁰⁸ The National Council of Juvenile and Family Court Judges cautions against

³⁰³ LA. REV. STAT. ANN. § 9: 364. Under Title 9 section 364, the abuser cannot have unsupervised visitation or move for custodial rights until he has successfully completed a treatment program designed for perpetrators of abuse, which usually takes six 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. And 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.

³⁰⁴ *Id.* § 367.

³⁰⁵ Evan Stark, *supra* note 6, at 299.

³⁰⁶ *Id.* Joan S. Meier, *supra*, note 222.

³⁰⁷ Stark, *supra* note 6, at 298-99; Joan S. Meier *supra* note 222, at 708.

³⁰⁸ Joan S. Meier *supra* note 222, at 708. Ironically, many evaluators express skepticism about abuse allegations in "high conflict" cases, but fail to recognize that highly contested custody cases do in fact involve higher rates of abuse because batterers are more likely to engage in protracted custody litigation to punish their victims. *Id.*

using custody evaluations in abuse cases and has published a guide for judges that explains the reasons.³⁰⁹ That guide is an excellent resource for attorneys opposing the appointment of an evaluator in domestic violence cases.

The same logic that applies to custody evaluations, also applies to general mental health evaluations and psychological testing in domestic violence cases. Many custody evaluations and mental health evaluations include psychological testing. Psychological testing tends to normalize abusers and pathologize victims.³¹⁰ Domestic violence is not a mental health problem, and abusers typically appear normal in response to psychological testing and evaluation.³¹¹ Victims, on the other hand, can present poorly in response to mental health evaluations that do not properly account for their experiences of abuse. A poorly conducted mental health evaluation of a victim suffering from the effects of abuse will usually pathologize her normal responses to abuse.³¹² It is not uncommon for some psychological testing to result in victims being labeled anxious, paranoid, histrionic, borderline personality disordered, or even schizophrenic.³¹³ And once an evaluator improperly labels a victim with a personality disorder, both the evaluator and the court sometimes conclude that the “conflict” between the parties is attributable to her condition, not the abuse.³¹⁴ Nonetheless, courts often give disproportionate weight to reports on psychological testing because they wrongly assume that the testing is probative for determining whether someone is a perpetrator or victim of abuse, and for determining parenting capacity. Even more, poorly trained judges and mental health professionals are unlikely connect a victim’s psychological presentation to the effects of abuse, or to recognize symptoms of Post Traumatic Stress Disorder that can make victims seem less credible during the evaluation process and while testifying.³¹⁵ Typically, this happens when victims appear to over-react to “trivial” issues, lack emotional affect when describing violence, or giggle inappropriately.³¹⁶ Untrained mental health professionals will fail to properly contextualize these reactions, and often reinforce the court’s tendency to attribute these behaviors to a lack of credibility.

For all of these reasons, attorneys representing victims may need to oppose evaluations, and if an evaluation is nonetheless ordered, oppose an evaluation that includes psychological testing. There are strong arguments to exclude evidence of psychological testing because the tests most commonly used by evaluators lack scientific validity for use in the context of custody disputes or abuse.³¹⁷

³⁰⁹ NAT’L COUNCIL JUVENILE & FAMILY COURT JUDGES *supra* note 262.

³¹⁰ Joan S. Meier *supra* note 222, at 712-13.

³¹¹ Evan Stark *supra* note 6, at 296.

³¹² Joan S. Meier *supra* note 222, at 712-13.

³¹³ Nancy Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What does Psychological Research Tell Us?*, 39 FAM. L. Q. 87, 89 (2005).

³¹⁴ *Id.*

³¹⁵ Joan S. Meier *supra* note 222, at 691.

³¹⁶ Joan S. Meier *supra* note 222, at 691-92.

³¹⁷ Joan S. Meier *supra* note 222, at 712-14.

c. Note on Parental Alienation:

The use of custody evaluations in abuse cases also makes it much more likely that an abuser will benefit from inadmissible and discredited “parental alienation” theories. “Parental alienation” theory is a legal defense abusers use in custody cases to refute legitimate reports of abuse.³¹⁸ Using this theory, a child’s report of abuse, her alignment with a non-abusive parent, or her rejection of an abusive parent, is attributed – not to the child’s experiences of abuse – but to a vindictive mother who has “poisoned” her child against the other parent.³¹⁹ Under this theory, any evidence that the victim presents to prove the abuse or to refute alienation claims can be used, instead, as evidence of alienation.³²⁰

The parental alienation defense is delivered primarily through testimony from custody evaluators who lack expertise in domestic violence and label victims “unfriendly parents” or “alienators” when they seek appropriate restrictions on an abusive parent. In general, testimony about parental alienation syndrome (or related parental alienation theories named differently) should be excluded under evidentiary standards for admissibility because it is not supported by empirical science and has been rejected by researchers.³²¹ Attorneys should aggressively contest the admissibility of testimony and reports that rely on alienation theories. Realistically, however, attorneys should expect resistance from family courts. Many courts rely heavily on custody evaluations that promote alienation theories, and too few attorneys insist on evidentiary gatekeeping in custody cases.

At the same time attorneys should contest “parental alienation” as a scientific theory, it is also important to recognize that abusers do indeed engage in a range of harmful behaviors that are designed to undermine the relationship between victims and their children.³²² Lawyers representing victims should present evidence and testimony that proves the ways that an abuser undermines the victim’s parenting and denigrates her to the children. This evidence generally does not require psychological testimony, and can be proved without invoking problematic “alienation” theories.

9. What role does the “best-interest” standard play in a Post-Separation Family Violence Relief Act case?

None – in the initial stages of litigation. The Louisiana Civil Code factors relating to the “best interests” of the child do not apply once a finding of fam-

³¹⁸ Joan S. Meier, *The Misuse of Parental Alienation Syndrome in Custody Suits*, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 147 (Evan Stark & Eve Buzawa, eds., 2009). At most, parental alienation is a legal hypothesis to explain a problem in a parent-child relationship. *Id.* at 150. The theory is not supported by empirical evidence and has been broadly discredited as a scientific theory. *Id.*

³¹⁹ *Id.* at 148.

³²⁰ *Id.* at 149-50. Meier gives many examples of this phenomenon: if the child continues to report abuse during visits, those reports are framed as extreme brainwashing of the child; if the child’s therapist opines that the child is abused, the therapist is characterized as contributing to the alienation; if the mother seeks to corroborate the reports of abuse with other evidence, that behavior is attributed to her extreme need to alienate the child. *Id.*

³²¹ See NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, NAVIGATING CUSTODY AND VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE (2006).

³²² This defense, as used routinely in family court, differs from legitimate psychological concepts of alignment, estrangement, and alienation. Some parents, especially batterers, do indeed engage in behavior that denigrates the other parent and damages the relationship between the child and the other parent. But evidence of that conduct can be presented in court without the need for psychological testimony that presupposes the conduct exists because there has been a report of abuse.

ily violence triggers application of the PSFVRA.³²³ The “best interest” standard is not operative in a family violence case until the litigation reaches the stage where an abuser has satisfied the requirements to request unsupervised visitation.

Unsupervised visitation may be allowed only upon proof that (1) the abuser has completed a treatment program, (2) is not abusing alcohol and drugs, (3) poses no danger to the child, and (4) unsupervised visitation is in the child’s best interest.³²⁴ The issues of whether the visitation is in the child’s best interest and the risk of danger to the child will usually be contested in an abuser’s motion for unsupervised visitation.

Treatment programs largely fail to cure an abuser.³²⁵ 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 who witness violence against the abused parent are traumatized by it. Continued contact with an abuser causes confusion and fear, especially in cases where the abuser refuses to acknowledge his behavior and wants to ignore that it ever happened.³²⁶ Whether the child was the subject of abuse, or witnessed it against a parent, it can take a long time (and a lot of therapy) before unsupervised visitation is in a child’s best interest.

10. *What should I do if my client wants to relocate?*

Remember that the exemption to the relocation statute applies only in cases where protective orders are currently in effect. 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.

Although the Post-Separation Family Violence Relief Act requires that all orders subsequent to a finding of family violence include an injunction, sometimes sole custody decrees or divorce judgments are entered without a protective order. 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.

Even if compliance with the relocation statute is not required, there may be a need to seek modification of visitation if the abuser has a court order for visitation. Failure to seek modification may expose the victim to a contempt motion even if the relocation statute authorized her to move without notice and court approval. This is especially true if it is unlikely that a victim cannot comply with a visitation order from her new location.

If your client is not exempt from the relocation statute, she must notify the other parent of her intent to relocate.³²⁷ Absent consent, court authorization is required to relocate a child before a final decision on the proposed relocation.³²⁸ Relocation is not a change of circumstance warranting a change of custody.³²⁹ Under La. Rev. Stat. 9: 355.11, moving without prior notice or

³²³ Hicks v. Hicks, 98-1527 (La. App. 3 Cir. 5/19/99); 733 So. 2d 1261, 1266.

³²⁴ LA. REV. STAT. ANN. § 9:362 (2011).

³²⁵ See generally Michael Rempel, *Batterer Programs and Beyond*, in 3 VIOLENCE AGAINST WOMEN *supra* note 2, at 179.

³²⁶ LENORE WALKER, *ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST* (1994).

³²⁷ LA. REV. STAT. ANN. § 9:355.3 - 355.4.

³²⁸ *Id.* § 355.5.

³²⁹ LA. REV. STAT. ANN. § 9: 355.11 (2012).

moving in violation of a court order may be considered in a motion to modify custody. However, Rev. Stat. 9: 355.11 does not create an exception to the *Bergeron* standard for modification of custody decrees.³³⁰ The factors for determination of a contested relocation are listed at Rev. Stat. 9: 355.12-13. The relocating parent must show that the relocation is in good faith and the child's best interest.³³¹ The relocation statute mandates that the court consider family violence and substance abuse when considering opposition to relocation.³³² The existence of domestic violence and stalking behavior, even when the behavior has abated, should strongly favor relocation of the abused parent.³³³

11. *What if the court finds that the violence is mutual?*

In some cases, the court may find that both your client and her abuser have a history of perpetrating abuse. The Post-Separation Family Violence Relief Act addresses this scenario. Where a court finds that **both** parents have a history of perpetrating abuse, it must award sole custody to the parent who is less likely to continue the family violence.³³⁴ Lawyers should be prepared to present evidence, testimony, and argument on this issue should it become necessary during the litigation.

All case planning in domestic violence cases should anticipate that abusers will allege that the victim is either the primary aggressor, or mutually violent. Although anger is the prevailing emotional response to abuse, judges often believe that anger is inconsistent with "real victims." They sometimes expect victims to present as fearful and passive, and to behave consistently with notions of "learned helplessness." When victims instead present as angry or resistant to their abusers, they are readily cast as mutually violent perpetrators, or "high conflict" litigants. This tendency to cast victims as mutually violent sometimes varies with racial and socio-economic demographics, and can be more challenging for some clients than for others. Carefully consider how these issues will play out in your case and plan accordingly.

12. *What options are appropriate for supervised visitation?*

This issue can present practical challenges for litigants and attorneys. The PSFVRA does not allow supervision by people associated with the batterer, and it is generally not safe or appropriate for a victim's friends or family to supervise either. For supervised visitation, the best option is usually a supervised visitation center. In communities that lack supervised visitation centers, lawyers and clients must carefully weigh their options. Petitioners may specifically request that the court appoint a police officer or competent professional as the supervisor.³³⁵ Supervisors can be police officers with some sensitivity to juvenile or domestic issues. These officers may be 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. It is a good idea to have a specific list of potential supervisors and their contact information

³³⁰ Gray v. Gray, 2011-548 (La. 7/1/11), 65 So.3d 1247, 1260.

³³¹ *Id.* § 355.13.

³³² LA. REV. STAT. ANN. § 9: 355.12 (11).

³³³ H.S.C. v. C.E.C., 2005-1490 (La. App. 4 Cir. 11/8/06); 944 So. 2d 738, 750 (reversing order denying relocation request).

³³⁴ LA. REV. STAT. ANN. § 9: 364(B).

³³⁵ *Id.*

available at the hearing on custody. Otherwise, the court may appoint a supervisor with whom you are unfamiliar, and who may be ill-suited to supervise in a family violence case.³³⁶

Note on using supervisors as witnesses. As a practical matter, lawyers should be cautious about eliciting professional opinions from even trained visitation supervisors, and should seek to exclude the testimony if offered by an abuser. It is usually not relevant. Generally speaking, the fact that an abuser does not abuse in a supervised visitation setting, or that a child enjoys a parent's company during supervised visits, is in no way probative on the issues of (1) whether there is a history of past abuse, (2) whether there is a likelihood of future abuse, or (3) whether unsupervised visitation is in a child's best interest. Abusers can be very effective at co-opting mental health and social work professionals. Most mental health professionals have little, if any training in domestic violence and even those that do rarely have enough to meaningfully understand basic dynamics of abuse.³³⁷ Abusers are likely to be on their best behavior in settings where they know they must be. And children are often delighted to see even an abusive parent in a setting where they are safe, and where "good daddy" shows up to see them. Courts often give far too much weight to testimony about parent-child observations; information from these visits rarely leads to relevant or probative evidence in abuse cases.

13. *Can the victim introduce evidence of family violence that occurred prior to a stipulated or considered decree?*

Sometimes. In custody cases, it is not uncommon for victims to have previously litigated or negotiated a custody case without raising issues of domestic violence. Many family law attorneys do not adequately advise victims about domestic violence in custody litigation, resulting in stipulated or considered decrees that fail to address domestic violence or victim and children safety.

In a case for custody modification, the court will determine whether to admit evidence of abuse that pre-dates a prior custody decree on a case-by-case basis.³³⁸ The evidence should not be automatically excluded or admitted.³³⁹ Instead, the evidence should be admitted if it is (1) relevant and material, and (2) involves an issue that the parties did not have a "full and fair opportunity to litigate" in the prior proceeding.³⁴⁰ For custody cases, this means the issue must have been "actually adjudicated."³⁴¹ Where there is doubt concerning whether *res judicata* applies, the doubt must be resolved against its application.³⁴²

³³⁶ Batters are often very manipulative and can be extremely effective at co-opting court appointed professionals who are untrained in domestic violence.

³³⁷ Joan S. Meier *supra* note 222, at 708.

³³⁸ *Raney v. Wren*, 98 CA 0869 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 58.

³³⁹ *Id.* at 58.

³⁴⁰ *Id.* at 57 (citing *Smith v. Smith*, 615 So. 2d at 931). 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. *Id.* The court found that the trial court erred because the parties did not have previous opportunity to litigate the issue. *Id.*

³⁴¹ LA. REV. STAT. ANN. § 13: 4232 (3).

³⁴² *Redman v. Bridgefield Casualty Insurance Co.*, 11 CA 651 (La. App. 5 Cir. 2/28/2012); 88 So.3d 1087, 1092.

In general, however, the doctrine of *res judicata* does not apply to child custody cases.³⁴³ To the contrary, the court is bound to consider all matters relevant to the best interests of the child, including parental conduct that occurred prior to the last custody decree.³⁴⁴ But even if *res judicata* applied to custody cases, it would not apply where the interests of justice are not served by its use. Louisiana's *res judicata* statute explicitly contemplates equitable application of the doctrine. Section 4232 (1) creates an exception for "exceptional circumstances," and the official comments to the statute explain, "this discretion is necessary to allow the court to balance the principle of *res judicata* with the interests of justice."³⁴⁵ Where issues of abuse have never been meaningfully considered, the interests of justice and the best interest of the child would require their consideration. This logic rings particularly true in cases where, because the abused parent was awarded primary custody in a consent decree, it was not necessary that she litigate the issues of abuse. If, thereafter, the perpetrator seeks increased custodial access, equitable principles and the best interest of the children require examination of the abuse.

14. *What if my client doesn't want PSFVRA restrictions on the abuser's visitation?*

Victims often minimize the effects of domestic violence on their children. Not only can it be painful for victims to acknowledge the true effects of violence on their children, but victims also sometimes receive conflicting messages from family, friends, and religious institutions that prioritize the value of two-parent households over freedom from abuse. Ultimately, it is the client's decision whether to plead the PSFVRA, and whether to seek restrictions on an abuser's access to children. But responsible lawyering requires that lawyers help clients make informed choices about these issues by encouraging them to examine (1) whether the client is being realistic about the abuser's capacity for shared parenting or safe visitation (i.e. does his past behavior support this conclusion?), (2) whether the client is well-informed about the impact of domestic violence on children and parenting, and (3) whether the client understands the legal ramifications of failing to plead the PSFVRA or failing to seek important visitation restrictions in the initial stages of custody litigation.

15. *Is the Post-Separation Family Violence Relief Act the only way to get supervised visitation and sole custody in a domestic violence case?*

No – but it is usually the best. Even when the Post-Separation Family Violence Relief Act does not apply, a court may impose supervised visitation as safety or best interests require.³⁴⁶ Louisiana appellate courts have

³⁴³ LA. REV. STAT. ANN. 13 § 4232. The Official Comments to section 4232 explain that "the general principle of *res judicata* is subject to the exceptions set forth in R.S. 13:4232 and to any other exceptions that may be provided for in the substantive law as, for example, in cases of family matters." See also Tit. 13 § 4232(3) (excepting matters incidental to divorce from doctrine of *res judicata* except as to matters actually adjudicated); *Hulshoff v. Hulshoff*, 11-1055 (La. App. 3 Cir. 12/7/11); 81 So. 3d 57; *Granger v. Granger*, 11-77 (La. App. 3 Cir. 6/15/11); 69 So.3d 666; *Kleiser v. Kleiser*, 619 So. 2d 178 (La. App. 3 Cir. 1993); *Hansel v. Hansel*, 2000-CA-1914 (La. App. 4 Cir. 11/21/01); 802 So.2d 875.

³⁴⁴ *Touchet v. Touchet*, 36,881-CA (La. App. 2 Cir. 1/29/03); 836 So.2d 1149; *G.N.S. v. S.B.S.*, 35-348-CA (La. App. 2 Cir. 9/28/01); 796 So. 2d 739 (citing *Hargrove v. Hargrove*, 29590-CA (La. App. 2 Cir. 5/9/97); 694 So.2d 645).

³⁴⁵ LA. REV. STAT. ANN. 13 § 4232 A (1).

³⁴⁶ *Dufresne v. Dufresne*, 08-CA-215, 08-CA-216 (La. App. 5 Cir. 9/16/08); 992 So. 2d 579, 586 (citing *Harper v. Harper*, 33 452 (La. App. 2 Cir. 2/61/00), 764 So. 2d 1186).

affirmed even termination of visitation in a variety of circumstances under both Civil Code article 136 (award of visitation rights) and Civil Code article 134 (factors in determining best interests).³⁴⁷ Although it is *possible* to obtain meaningful protection and visitation restrictions under these general custody statutes, those statutes do not *require* that courts impose appropriate restrictions in domestic violence cases. Simply put, under general custody statutes, the judge has more discretion to enter custody orders that ignore the risks to victims and their children, and victims are not entitled to all of the important relief enumerated in the PSFVRA, including sole custody. For this reason, petitioners who can prove a history of family violence and plead under the PSFVRA have much stronger appellate remedies if a court fails to put appropriate protections in place for custody and visitation.³⁴⁸

6.4 JURISDICTION AND INTERSTATE CHILD CUSTODY ISSUES

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. 13: 1801-1842, applies to all “child custody proceedings” in which legal custody, physical custody, or visitation with respect to a child is at issue. A “child custody proceeding includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from family violence, in which the custody or visitation issue may appear.” In domestic violence cases, interstate jurisdiction issues typically arise when a victim moves out of state to get away from an abuser. If a victim relocates to a new state but is made to litigate contentious custody issues in the first state, her safety and stability may be compromised. In these cases, lawyers may be called upon to represent victims who need help asking Louisiana courts to either accept or decline jurisdiction under the UCCJEA’s domestic violence provisions. The UCCJEA includes important protections for domestic violence victims and their children that can help lawyers advocate for victims.

The UCCJEA’s inconvenient forum and emergency jurisdiction rules have changed so that it is easier to protect victims who flee the child’s “home state” to escape violence.³⁴⁹ Under the UCCJEA, a child’s “home state” has jurisdiction to decide custody. Home state is defined in § 1813 as “the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.” In some domestic violence cases, Louisiana will be the “home state” and the victim may need to establish or protect its status as such. In other cases, Louisiana may be the home state but the victim instead needs help asking Louisiana to decline

³⁴⁷ *Teague v. Teague*, 44-005-CA, 44-006-CA (La. App. 2 Cir. 11/25/08); 999 So. 2d 86, 98 (affirming visitation termination due to habitual drug use); *Willis v. Duck*, 98-1898 (La. App. 3 Cir. 5/5/99); 733 So. 2d 707, 714, 716 (affirming visitation termination due to mother’s history of drugs, neglect, theft, and unemployment).

³⁴⁸ One possible exception to this rule is in child sex abuse cases. In those cases, the PSFVRA’s heightened burden of proof requiring “clear and convincing” evidence might create more challenges for proving the abuse and restricting visitation than would otherwise be required. If proven, however, the PSFVRA mandates stringent and comprehensive protection for sexually abused children.

³⁴⁹ *Stoneman v. Drollinger*, 64 P.3d 997, 1001-02 (Mont. 2003); *Kovach v. McKenna*, 2011-C-0228 (La. App. 4 Cir. 4/1/11). In *Kovach*, the appellate court reversed a trial court’s denial of a motion to decline its home state jurisdiction in favor of the family violence victim’s refuge state. In its opinion, the *Kovach* Court found that the “domestic violence and residence of the child in another state for more than six months predominates over all other considerations in La. Rev. Stat. Ann. §13:1819.”

jurisdiction in favor of a refuge state. Alternatively, Louisiana may be the refuge state, not the home state, and a victim needs help establishing temporary emergency jurisdiction for protection here.

Home state jurisdiction and inconvenient forum. When a victim flees domestic violence, litigation of custody in the refuge state can greatly enhance a victim's safety and economic welfare. Under title 13:1819, a Louisiana court with UCCJEA jurisdiction may decline home state jurisdiction in favor of a domestic violence victim's refuge state by conducting an "inconvenient forum" analysis. Although the inconvenient forum analysis includes a list of factors for consideration, factors (1) domestic violence and (2) the length of time that the child has resided outside of Louisiana, are often determinative on the issue of whether a Louisiana court should decline its jurisdiction. When representing a victim who has left Louisiana for a refuge state, lawyers should consider whether to file a title 13: 1819 motion requesting that Louisiana decline jurisdiction. These motions may be filed at any time in the litigation.³⁵⁰

The leading case on applying the domestic violence factor in an inconvenient forum analysis is *Stoneman v. Drollinger*.³⁵¹ Additionally, in an unpublished Louisiana case, *Kovach v. McKenna*, a Louisiana appellate court ordered declination of Louisiana's home state jurisdiction under section 13: 1819 and dismissal of the abuser's Louisiana custody suit. In doing so, the *Kovach* Court concluded that "domestic violence and residence of the child in another state for more than six months predominated over all other considerations in La. Rev. Stat. 13:1819."³⁵² As in *Kovach*, many trial courts may find an absence from the state of 6 months or more (even if it occurs after the initial filing) weighs heavily in favor of declining jurisdiction under a section 1819 "inconvenient forum" analysis. UCCJEA decisions from other states have upheld declination as inconvenient forum when the child has been absent for a lengthy time.³⁵³ The ruling on a motion to decline as inconvenient forum is reviewable for abuse of discretion by supervisory writs.³⁵⁴

Temporary emergency jurisdiction. The new §13: 1816 of the UCCJEA is also helpful to protect victims. Section 13:1816 addresses a Louisiana court's authority to issue temporary emergency orders to protect family violence victims who have fled to Louisiana. Revised Statute §13: 1816(A) expressly allows temporary emergency jurisdiction to protect a child, if the child or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. The prior UCCJL provision had allowed emergency jurisdiction to protect the child only if the child was subject to the threats or abuse.

It is important to note, however, that section 13:1816 emergency orders provide only temporary relief. Ultimately, the custody case must be resolved in the state that has proper jurisdiction under § 1813-15, unless that state declines jurisdiction under the inconvenient forum test. If no prior custody order exists and no suit has been commenced in a state with § 1813 subject matter jurisdiction, a tem-

³⁵⁰ LA. REV. STAT. ANN. § 13:1819 (A).

³⁵¹ 64 P.3d 997 (Mont. 2003); see also, *Rainbow v. Rainbow*, 990 A.2d 535 (Me. 2010) (declination of home state jurisdiction in favor of refuge state was appropriate where there was domestic violence).

³⁵² *Kovach v. McKenna*, 2011-C-0228 (La. App. 4 Cir. 4/1/11). This unpublished opinion is available at www.probono.net/la.

³⁵³ See e.g., *Fox v. Mina*, 2011 WL 255557 (Ky. App. 2011) (3 years); *Fickinger v. Fickinger*, 182 P.3d 763 (Mont. 2008) (3 ½ years); *Dillon v. Dillon*, 37 Conn L. Rptr. 291 (Conn. Super. 2004) (2 years, 8 months)

³⁵⁴ *Kovach v. McKenna*, 2011-C-0228 (La. App. 4 Cir. 4/1/11); see also, *Addington v. McGehee*, 29729-CA (La. App. 2 Cir. 1997); 698 So. 2d 702, 704.

porary emergency order will remain in effect until an order is obtained from the home state or a state that has proper § 1813 jurisdiction.³⁵⁵ If a prior custody order exists, the judge must confer with the other state's judge.³⁵⁶ Then, the court with temporary emergency jurisdiction must specify a reasonable time limit for the petitioner to obtain an order from the state with proper § 1813-15 jurisdiction, or to seek declination from that court.³⁵⁷ The temporary emergency order will remain in effect until an order is obtained from the other state or the time limit expires.³⁵⁸

6.5. REPRESENTING VULNERABLE POPULATIONS IN DOMESTIC VIOLENCE CASES

1. Representing Immigrant Victims

a. Communication.

Representing battered immigrants presents special issues for lawyers. First and foremost, lawyers should do their best to make sure that, if English is not the victim's first language, they establish a reasonable way to communicate with their clients by using professional interpreters and establishing a protocol for contact and communication that reduces stress on the victim. In general, lawyers should avoid using the victim's friends and family as interpreters for client meetings for a variety of reasons, including the risk of waiving attorney-client privilege. And for court, the abuser should be made to pay the cost of a professional interpreter.³⁵⁹ Prepare your client for testimony through interpreters. *See* Luz Molina *et al.*, *Language Access*, §§ 6-7 in this Manual. It is a good idea to have a non-witness friend, relative, or other person who speaks the same language as your client listen to testimony to tell you if the professional interpreter is interpreting accurately.

b. Referral.

Next, find an immigration expert. Lawyers should be extremely cautious about inadvertently creating immigration problems for their clients, and should seek to protect clients from immigration abuse.

c. Deportation.

Battered immigrant spouses who leave their abusers may face deportation. They may, however, self-petition 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. 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. *See* Laila Hlass, *Immigration for Legal Aid Lawyers*, Chapter 8 *infra*.

³⁵⁵ *See* LA. REV. STAT. ANN. § 13: 1816 (B) (2011).

³⁵⁶ LA. REV. STAT. ANN. § 13:1816(D).

³⁵⁷ LA. REV. STAT. ANN. § 13:1816(C).

³⁵⁸ *Id.*

³⁵⁹ LA. REV. STAT. ANN. § 46: 2136.1; LA. REV. STAT. ANN. § 9:367.

d. Generally.

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.
- Obtain details about immigration related abuse. (Threats to deport, withholding assistance, or preventing them from being able to legally work.
- A client should always speak to an immigration law expert before speaking with the ICE. ICE may arrest them and deport them before they have a chance to speak to a lawyer.
- Clients should not sign ICE 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, or contacting immigration, any government agency, or law enforcement to interfere with her status in any way. The evidence needed for an application for permanent residence is lower than that required for a self-petition under the VAWA.
- Plan to respond and object if the abuser raises immigration issues in court. Alternatively, immigration abuse can be a part of your abuse case.
- If the abuser has sponsored the victim, obtain copies of the Affidavit of Support he signed. This can help with support hearings.
- NEVER AGREE TO A MUTUAL PROTECTIVE ORDER.

For more information, see Laila Hlass, *Immigration for Legal Aid Lawyers*, §§ 4.1.1-3, *infra*.

2. Representing Victims in Same-Sex Domestic Violence Cases³⁶⁰

Louisiana’s Dating Violence Act allows victims to obtain orders of protection against same-sex partners. But these cases present unique challenges, especially when mutual violence is alleged. Law enforcement may be less likely to adequately assess predominate aggressor in response to calls for service, and more likely to make dual arrests. This phenomenon, in turn, makes it even more important that service providers themselves assess cases

³⁶⁰For support and resources in representing LGBTQ victims of domestic violence, the American Bar Association’s Commission on Domestic Violence has published a resource guide. NAT’L LGBT BAR ASS’N, TOOL FOR ATTORNEYS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) SURVIVORS OF DOMESTIC VIOLENCE (2011) available at http://www.americanbar.org/content/dam/aba/multimedia/domestic_violence/publications/LGBT_update/ABA_LGBT_tools_Final.authcheckdam.pdf.

diligently to make sure they are representing the victim. Some issues unique to working with LGBT clients include distrust of traditional service providers, service provider homophobia or ignorance, and unique vulnerabilities to abuse in the form of threats to “out” the victim, threats to take away children that the victim may have limited (or no) legal rights to seek access to, and the inability to avoid an abuser in a socially insular community.³⁶¹ Also, there is significant evidence that transgendered persons constitute one of the most vulnerable populations for partner abuse, but are among the least likely to access services.³⁶²

7. TRYING THE CASE: PRACTICE TIPS FOR PROTECTIVE ORDER AND CHILD CUSTODY LITIGATION

7.1 ASSESSING THE CASE

1. Assessing the client’s need for legal assistance.

When domestic violence victims are turned away by legal services providers, they often have no place else to turn. This fact places enormous pressure on attorneys to diligently assess cases and to err on the side of providing desperately needed advocacy. In doing so, legal services attorneys must balance considerations of clients’ needs, the capacity of the firm, and the likelihood of accomplishing meaningful client outcomes. While a victim lying in the hospital with a broken leg may present an opportunity to handle a compelling domestic violence case, a victim whose injuries are more difficult to prove and whose abuser has never been arrested may actually have an even more pressing need for attorney advocacy. And even the most compelling case can involve a victim who is unlikeable or who presents as angry and aggressive. It can be a real challenge to assess cases without making judgments about clients who are unlikeable, angry or ungrateful. Further, the most compelling cases are not necessarily the clients who first present with the most compelling narrative, or even those who seem the most fearful. Anger – not fear – is the prevailing emotional response to abuse, and many victims minimize their experiences of abuse by using language that inaccurately suggests mutuality of violence between the parties. To complicate matters even more, some victims who truly need legal help sabotage their own cases by not being honest with their attorneys about important bad facts that need to be prepared for in litigation. Over time, a skilled interviewer will begin to catch these nuances and learn to investigate further so that victims in need of help are not turned away. Here are some tips for assessing a case for representation:

a. How serious is the abuse?

- Is the violence escalating?
- Is there a pattern of stalking, controlling and monitoring that suggests high lethality risk even in the absence of physical abuse?
- Has the violence ever involved choking, strangulation, or use of weapons?
- Have there been threats to kill?

³⁶¹ *Id.*

³⁶² *Id.*

b. Is the client particularly vulnerable in the court system for any of the following reasons?

- She has limited capacity to express herself or articulate her situation because of mental health issues or impaired mental capacity
- She has limited English proficiency
- The abuser has an attorney
- The abuser has significantly more financial assets for litigation than she does
- The abuser has initiated litigation against her
- Her case involves complicated issues that require expert testimony, or testimony from medical professionals
- The client has a criminal record that she will be unable to adequately address if she represents herself

c. Can meaningful legal outcomes be realized for the client?

- If you do prevail, will the outcome significantly improve safety and stability for the victim or her children?

On the other hand, when assessing a case for representation, try **not** to decline representation based *solely* on reasons like these:

- There is no evidence to corroborate her reports of abuse. It is not at all unusual for victims to have never called the police and never sought medical attention.
- There are no visible physical injuries.
- The client is unlikeable.
- The client is angry.
- The client has resisted her abuser by engaging in either self-defense or futile retaliatory violence.
- The client has a criminal record.
- The client has substance abuse or mental health issues resulting from the abuse.
- The client withholds negative facts in early interviewing processes for fear that you won't take her case.
- The client has initiated contact with an abuser after separation or after obtaining a protective order.

2. Assessing whether to file emergency pleadings.

Not all domestic violence cases should be addressed through emergency proceedings. Once you've determined that you will assist a victim in addressing her legal needs, it is important to be realistic with clients about what can be accomplished in the court system. In some cases, the complexity of the facts or evidence in a case make it impossible to competently litigate cases in the time frame demanded by a protective order statute. For example, cases that require expert testimony to address issues relating to victim behavior, children who align with an abuser, or child sex abuse, can be difficult to prepare for in the time frames required under protective order statutes. In those cases, lawyers should speak frankly with their clients

about immediate safety considerations, long-term litigation goals, and options for different types of proceedings. Rushing to court for a protective order can do more harm than good if the case cannot be litigated properly and results in findings and orders that pre-dispose the court to rule against your client on important issues in the future. For discussion on developing a thoughtful, comprehensive case strategy, section 3, “Strategic Use of Louisiana’s Domestic Violence Laws,” *supra*.

7.2 PRE-TRIAL PRACTICE AND CASE PLANNING

Domestic violence protective cases can present unique challenges in pre-trial practice. The emergency nature of protective order proceedings means that in many cases, formal pre-trial discovery is unavailable. In some cases, lawyers must prepare for court despite a seriously limited capacity to conduct important investigative functions. For this reason, lawyering in these cases requires a style of pre-trial preparation that accounts for a variety of scenarios that cannot be determined in advance of the hearing. But good pre-trial practice, even in this setting, makes it possible to avoid a true “trial by surprise” scenario in the courtroom. Here are some tips for pre-trial practice:

1. Develop a compelling case theme

a. Make it logical, provable, and compelling.

Your theme must match your evidence and must not overstate your case.

b. Eliminate distractions.

Have a concise message that is not watered down by unnecessary information or facts.

c. Co-opt “bad facts.”

Lawyers often miss the opportunity to co-opt “bad facts” in the earliest stages of litigation. In many cases, a “bad fact” can be incorporated into a case theme such that actually bolsters the victim’s case. For example, if your client suffers from housing and unemployment instability, connect those problems to the defendant’s bad acts (harassment on the job, fleeing to shelter because of abuse), and incorporate that into your case theme (i.e. “this is a defendant who hopes the court will reward him for his own bad acts, instead of righting the wrongs against his family”).

d. Support your case AND respond to the other side.

Your client almost always knows what the batterer will say about her, and how he will present in court. Address it into your case theme when possible.

e. Thread your case theme throughout every element of your case.

If possible, begin with your pleading. Carry it throughout and drive it home in closing argument by “connecting the dots” with the evidence presented.

f. Communicate your theme to your client.

Sharing the case theme with the client helps you confirm that you “got it right” and that your testimony and evidence will support your theme. Your client should have a shared understanding about what information is most important to convey to the court so that she will stay focused when testifying.

2. Investigate and Conduct Discovery

Overview.

Given the shortened time frame of protective order proceedings, lawyers representing victims must not only conduct quick, focused investigations, they must quickly decide when to edit evidence and testimony that detracts from the clients “core story” and fails to meaningfully support the case theme.

Once you determine to proceed, you must quickly determine what, if any, witness testimony you will present in addition to your client’s testimony. Competent lawyering demands that, even within this shortened time frame, you prepare each witness for court by running through the direct, preparing for cross-examination, and explaining the process of objections.

In most jurisdictions, it is not common practice to conduct formal discovery in protective order proceedings, even though it may be possible within the time frames allowed. In others, there is insufficient time to conduct written discovery, but sufficient time to give reasonable notice of a deposition. Lawyers should exploit all opportunities to conduct formal discovery in advance of a protective order hearing. When a defendant fails to respond, it creates the opportunity for a continuance that includes maintaining the TRO in place while you compel the discovery process. Discovery is not only valuable to help you prepare for the defendant’s version of events, but also for ensuring that you can produce the best evidence of the abuser’s income and ability to pay support.

Once you examine your options within the time frame dictated by statute, make a case plan that establishes what you need to prove, and whether the sources of proof will require:

- Informal discovery (any investigation you can do on your own) or
- Formal discovery (interrogatories, requests for production, requests to admit, depositions, subpoena)

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.

3. Select the evidence that best supports the client’s “core story”

Don’t try to prove everything and every incident. Plan to prove a limited number of incidents, and choose your best evidence. In general, your case plan should include proving:

- The two most recent incidents of abuse
- Two or three of the worst incidents of abuse
- The general nature and frequency of abuse
- Incidents resulting in serious bodily injury or medical attention
- Incidents involving the use of weapons
- Threats to kill
- Routine or escalating talking and monitoring behavior

In domestic violence cases, the most frequent sources of evidence to corroborate abuse include:

- Photographs of injuries or property damage³⁶³
- Phone records
- Voice mails or audiotapes
- Emails/text messages (take photographs when possible)
- Clothing
- Police reports
- 911 tapes
- Medical records

In addition to client testimony, witnesses often include:

- Children
- Police
- Neighbors
- Family
- Friends
- Co-workers

Note on child testimony: Few issues generate more controversy in family court than child witnesses. In domestic violence cases, children are often the only witnesses who can corroborate the victim's testimony about abuse in the home. Many judges believe strongly that children should not testify because of the risk that the experience of testifying will be traumatic. But in some cases, the child's testimony is a critical component to securing orders of protection that will prevent future harm. In many cases, the child's testimony makes it more likely that the child will be safer in the future. But children, like all people, are complicated. They can exhibit a wide range of responses to their experiences of abuse, all of which must be anticipated by the lawyer eliciting the testimony. Clients often accurately predict how children will respond to questioning, and this can help lawyers prepare.

Finally, consider the other types of evidence you will need:

- Evidence in the abuser's control or possession
- Evidence that supports ancillary claims such as child and spousal support, child custody, and housing needs
- Evidence necessary to rebut claims from the other side
- Evidence of positive parenting or previous caretaking history

7.3 DIRECT EXAMINATION

A compelling direct examination is the foundation of a successful trial. Although it is rarely given the attention that cross-examination receives in trial advocacy training, a weak direct examination will lose your case much more quickly than a weak cross-examination. In domestic violence cases, direct examination sometimes makes up your entire case-in-chief, and the importance of conducting it skillfully cannot be understated. The challenges associated with

³⁶³ Cell phones can be used to take immediate photos of injuries.

conducting a cohesive direct examination of a client who still suffers from the effects of abuse makes the task of preparing for direct even more arduous. Be aware that many victims, even those represented by attorneys, may clam up on direct examination and hurt their cases. Counsel clients on the need to tell their story to the judge.

In short, an effective direct examination will do all of the following:

- Support your case theme with facts and details
- Evoke vivid and compelling imagery of your client's experience
- Minimize the impact of stereotypes and strategies typically employed against victims in family court
- Establish the necessary factual basis for your legal claims.

7.4 STRUCTURING YOUR DIRECT EXAMINATION

a. Establish the identity of the parties and their relationship to one another.

Include any other foundational facts that you need to prove as a preliminary matter to entitle her to a protective order.

b. Humanize your client by asking introductory questions.

Does she work, is she a full-time parent, how long have they been married, is she in the military?

c. Ask preliminary questions that put the incident of abuse in context.

An effective direct examination will begin "painting a picture" for the trier of fact, and begin to trigger the imagination. The lawyer must direct the testimony so that it stays focused on the core story, but contextualizes it enough to make it vivid and compelling.

d. Follow up and clarify. Ask questions about anything your client "glossed over," and clarify any vague or confusing language.

e. Ask questions that wrap up the story of the abuse and moves the client out of trauma before she has to answer questions from opposing counsel.

Questions about entitlement to ancillary relief may help move the client out of the trauma of abuse—before she faces cross-examination by the abuser.

f. Address negative facts to take the sting out of her anticipated cross-examination. "Bury" this in the middle.

g. Ask questions that establish her entitlement to ancillary relief, such as custody, support, use and possession of a home or car, etc.

h. Finish strong.

7.5 PREPARING YOUR CLIENT FOR DIRECT

- Frankly discuss the emotions the hearing might trigger
- Don't discourage emotional expression during her testimony
- Encourage honesty in her emotional responses in the courtroom
- Explain why it is important that your client tell what happened to her
- Advise her about the importance of tone and body language for credibility

- Make sure your client understands that being “tough” to prove something to her batterer can backfire in court
- Reconcile all inconsistencies or seemingly illogical facts and behavior in advance of court
- Know bad facts: ask your client whether she is worried about any issues that might be brought up in court
- Make sure your client understands your case theme, and what facts and evidence in her case are most compelling and best support her claims. While a lawyer should never manufacture a client’s testimony, it is critical that the lawyer prepare the client to testify about what is important to the judge and to leave out what is unimportant.
- Encourage your client to use language and style that is natural to her (except when it is necessary to slow her down).
- Avoid discussing domestic violence terminology that, if repeated during client testimony, will sound disingenuous and coached (i.e., “he’s obsessed with power and control”)
- Identify a client’s tendency to be distracted by issues that don’t support her “core story,” (such as the batterer’s recent infidelity). Talk to her about what the focus should be on in court, and why.
- Identify and address a client’s tendency to “gloss over” details of painful events. Practice doing it differently.
- Identify and address client’s tendency to minimize, deny, or use language that characterizes abuse as mutual.
- Ask the client to make a timeline of abuse that can serve as a reference point for both of you.
- Make sure she understands the process of objections.
- Practice the direct, for both substance, pace and to ensure that the client can tell her full story.
- Prepare the client for a judge’s questioning style³⁶⁴

1. Tips for eliciting a strong narrative

- Start and end strong
- Paint a vivid picture of individual incidents
- Pace yourself and your client
- Draw upon the full range of your client’s experiences (the constraints of her life), but stay focused on violence
- Go back to elicit painful but compelling details that the witness avoided describing
- Take the sting out of bad facts
- Plan for the victim/racial/gender stereotypes that may be imposed on your client
- Where appropriate, incorporate positive parenting themes
- Demonstrate the logic of your client’s counter-intuitive behavior

³⁶⁴ Some judges use an inappropriate questioning style that may intimidate or traumatize a victim. You do not want your client to be adversely affected by an untrained judge’s questioning style.

2. Dealing with bad facts

a. Generally.

Domestic violence victims rarely conform to societal notions of “good” or “deserving victims.” Representing victims of domestic violence can be challenging not only because clients are imperfect, but also because society imposes stereotypes on victims that are unrealistic. For example, most people expect victims to appear afraid—in fact, the prevailing emotion experienced by most victims is anger. As a result, it is important that attorneys prepare to deal with allegation of victim aggression, or mutual violence.

In addition to stereotypes about victims, victims actual do behave in ways that present challenges to litigation. Some of the bad facts that lawyers are likely to need to confront include the following:

- A victim with substance abuse issues
- A victim with mental health issues
- A victim who is not the predominant aggressor, but who “hit first” or injured the abuser
- A victim who has an arrest history
- A victim who contacts her abuser, while also claiming to fear him
- A victim whose fear seems inconsistent with the abuse she is reporting

*For guidance on representing clients with mental health issues, an excellent resource guide is the National Center on Domestic Violence, Trauma & Mental Health’s “Representing Domestic Violence Survivors Who are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys” available at <http://www.csaj.org/documents/407.pdf>.

b. Victim Stereotypes.

Also, for every domestic violence case, victim and perpetrator stereotypes will come into play. Effective case planning includes preparation for a variety of predictable defenses that batterers use against their victims, most of which play upon gendered stereotypes that include some version of either (1) the lying/vindictive/scorned woman, (2) the hysterical, crazy, or exaggerating woman, (3) the provocateur, or (4) the cheating manipulator. Your client is likely to know which of these the batterer will use. Do not underestimate the effectiveness of these powerful cultural archetypes.

In addition to the gendered stereotypes that abusers frequently exploit, commonly held beliefs about “real victims” of domestic violence also present challenges in protective order cases. For example, judges often believe that anger is inconsistent with “real victims,” who they expect victims to present as fearful, passive, or helpless. When victims present as angry or resistant to their abusers, they are readily cast as mutually violent perpetrators, “high conflict” or “contentious” litigants.

c. Perpetrator Stereotypes.

Lawyers must also prepare for the role that stereotypes about abusers will play in their case. The relative economic privilege and professional status of abusers often dictates which stereotypes about victims and abusers are most effective. The commonly held belief that domestic violence is primarily committed by people of lower socio-economic status can make it harder for victims whose perpetrators have financial resources and professional credentials. Additionally, abusers benefit from the tendency to conflate domestic violence with “anger management” problems. Although most abusers tend to be experts at managing their anger by directing it to one safe target (your client), judges often expect abusers to present as volatile and angry. When they instead present as calm and in control, the abuser’s behavior is wrongly perceived as incongruous with the victim’s reports of abuse. Similarly, judges who wrongly assume that domestic violence is associated with mental illness often believe that normal psychological testing and the absence of an identifiable pathology is probative on the issue of domestic violence.

2. Avoid common mistakes in direct examination

- Be absolutely clear about your client’s timeline
- Make sure your client’s testimony paints a vivid picture of individual incidents, rather than sweeping or generic descriptions of abuse
- Don’t disregard compelling evidence about the emotional toll of being routinely stalked and monitored
- Carefully edit and assess testimony about power, control, and abusive behavior that is not physical
 - It must support, and not detract, from your client’s “core story” (in other words, avoid the perception that you are “grasping at straws” for evidence of abuse)
 - It should be connected to an element of your legal claim
 - Exception: Generally, evidence of stalking and monitoring behavior should be presented
- If it doesn’t make sense to you, it won’t make sense to the court
- Lay a foundation and authenticate your evidence
- Anticipate objections and plan your response.

7.6 CROSS-EXAMINATION OF ABUSERS

Contrary to popular belief, cross-examination skills are not a gift that some lawyers possess, and others do not. A good cross-examination can be conducted by any lawyer who prepares diligently. The key to a strong cross-examination in a domestic violence case is to work closely with your client to anticipate how the abuser will present and what he will focus on in his testimony. Often times, abusers inadvertently corroborate a victim’s testimony about things such as the abuser’s stalking behavior or his fixation on fidelity issues by discussing those matters on direct (i.e. “I checked her cell phone so I knew she had been calling him.”).

The number one mistake that many attorneys make during cross-examination is asking one question too many. That last question sometimes allows the abuser to explain something away, or, worse yet, allows him to deny a fact that he did not deny in his own direct examination. If he did not deny a specific incident in his direct, the worst thing you can do is raise it during cross.

Another common mistake by attorneys in these cases is over-reliance on questions that ask the abuser whether he actually committed specific incidents of abuse. These questions are rarely, if ever, fruitful.

As a general rule, cross-examination of the abuser should be tailored to both the lawyer's style and the abuser's presentation. An overly aggressive cross-examination of a *pro se* abuser can make it look like the attorney is picking a fight and trigger sympathy for the abuser. It is important to give these issues thoughtful consideration in advance of the hearing. Don't plan your cross by relying on the hope that a dramatic movie-style moment will transpire. Be realistic.

Finally, the cross-examiner should plan to make a few clear, concise points, and stop. Important points will lose their impact if lost amidst a rambling barrage of questions that make trivial points, if any. In assessing your cross-examination plan, consider these questions:

- Have I limited myself to only a few, discrete and important points?
- Is each question simple, direct, and clear?
- Have I asked only leading questions?
- Have I limited myself to only one fact per question?
- Have I avoided "why" questions?
- Does every question have a purpose?
- Have I examined each question to make sure it does not give the abuser an opportunity to explain himself?
- Can I control the answer to every question?
- Do I have a plan for every possible answer?
- Does the question require a yes/no answer?
- Am I clear about which question is "the one question too many?"
- Have I avoided being overly transparent such that the witness might catch on and do damage control?
- Did I save the important points to connect the dots in closing argument?
- Is my strategy consistent with the advice my client gave me about how he will behave and what he will say?
- Have I done my homework to discover all possible sources of impeachment material?
- Have I avoided trying to get evidence that I can get from a more predictable or more friendly source?
- Have I prepared myself to be flexible, and to follow my witness?
- Do I have a plan to move on when the going gets rough? Don't increase the impact of negative information by being befuddled and slowing down.

7.7 NOTE ON OPENING AND CLOSING ARGUMENTS

Judges will often discourage opening and closing argument in these cases. Do it anyway, but don't waste the court's time with a rote recitation of facts. Opening is your opportunity to frame the case and lay the groundwork for your theme. Closing is our chance to connect the dots, tie your evidence to the law, tell your client's story and why the court should believe it, and address any sticky issues that the court seems to be focusing on. These functions are essential to a successful trial, and even a truncated argument is better than none.

7.8 EVIDENTIARY ISSUES RELATED TO PROTECTIVE ORDERS AND FAMILY VIOLENCE CASES

7.8.1 Prior Bad Acts or Convictions, Louisiana Code of Evidence article 404.

Prior bad acts or crimes should be admissible in many protective order cases since a key custody issue under Louisiana Revised Statutes title 9 section 364 is whether there is a "history of family violence."³⁶⁵

Prior bad acts may also be admissible to prove a greater likelihood of abuse in the future and the need for protective measures.³⁶⁶

In the protective order context, prior bad acts may be relevant to prove intent, motive or absence of mistake.³⁶⁷ 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.

7.8.2 Police reports and arrest records

Louisiana law requires the police to write a report whenever they respond to a domestic violence call.³⁶⁸ In Louisiana, police reports are generally inadmissible.³⁶⁹ You may be able to introduce a police report if the defendant does not object. Police reports (or testimony about them) are admissible in child custody actions under the limited applicability rules of Louisiana Code of Evidence article 1101.³⁷⁰ 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 article 1101 and will make a victim's proof of domestic violence more difficult by excluding police reports.³⁷¹ By ordinance or policy, a police report may be free to domestic violence victims in your parish. Check local law. Arrest records are admissible in custody cases.³⁷² Many abusers are serial abusers and may have abused former intimate partners for which there may be arrest or conviction records.

³⁶⁵ See *Raney v. Wren*, 98 CA 0869 (La. App. 1 Cir. 11/6/98); 722 So. 2d 54, 58; *Michelli v. Michelli*, 93 CA 2128 (La. App. 1 Cir. 5/5/95); 655 So. 2d 1342. Even acts that occurred prior to a custody decree should be admissible. *Wren*, 722 So. 2d at 58.

³⁶⁶ See *Wise v. Wise*, 02-CA-574 (La. App. 5 Cir. 11/13/02); 833 So. 2d 393; *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991) (noting abuser's past conduct is perhaps the most important evidence of his future conduct).

³⁶⁷ LA. CODE EVID. ANN. art. 404(B), 402.

³⁶⁸ LA. REV. STAT. ANN. §§ 46:2131-2143 (2011).

³⁶⁹ LA. CODE EVID. ANN. art. 803 (8)(b); *State v. Sigur*, 578 So. 2d 143 (La. App. 1 Cir. 1990).

³⁷⁰ See *Gautreau v. Gautreau*, 96-1548 (La. App. 3 Cir. 6/18/97); 697 So. 2d 1339, writ denied 97-1939 (La. 11/7/97), 703 So. 2d 1272.

³⁷¹ Currently, Code of Evidence art. 1101 would not apply to a protective action that did not involve child custody issues.

³⁷² *Fernandez v. Pizzaloto*, 04-1676 (La. App. 4 Cir. 4/27/05), 902 So. 2d 1112; *L.E.P.S. v. R.G.P.*, 08-1349 (La. App. 3 Cir. 6/3/09), 11 So. 3d 633, 641.

7.8.3 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.³⁷³

7.8.4 Threats to harm

A threat by the abuser to harm the victim is not hearsay. It is an admission.³⁷⁴

7.8.5 Abuser's writings

Letters or e-mails by an abuser are his own statements and therefore are not inadmissible hearsay.³⁷⁵

7.8.6 Flight from crime scene

Evidence of an abuser's flight from crime scene (e.g., assault and battery of victim) is relevant and admissible as an indication of consciousness of guilt.³⁷⁶

7.8.7 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.³⁷⁷

7.8.8 Audiotapes

Audiotapes of the defendant's statements or threats, even secretly recorded telephone conversations, may be admissible.³⁷⁸ 911 tapes can be very compelling evidence. Defendants may leave threats on an answering machine.

7.8.9 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.³⁷⁹ Well-written police reports may contain excited utterances by the victim or children to which the police officer may testify.

7.8.10 Child's Hearsay Statements

A child's hearsay statements to a doctor, mental health professional or abuse expert may be admissible.³⁸⁰ The Louisiana Code of Evidence provides that the rules of evidence should serve only as guidelines in child custody proceedings.³⁸¹ In other words, the rules of evidence still apply in custody proceedings, but only "to the extent they promote the purposes of the proceeding."³⁸² The reason for relaxed evidentiary rules in child custody cases is that strict application of the rules does not serve the best interests of the child. The Louisiana Supreme Court, and several courts of appeal, have concluded that a child's hearsay statements should be admissible in child custody cases under the PSFVRA.³⁸³

³⁷³ LA. CODE EVID. ANN. art. 804(B)(3).

³⁷⁴ See e.g., *State v. Burmaster*, 97-517 (La. App. 3 Cir. 2/25/98), 710 So. 2d 274, 281.

³⁷⁵ *State v. Strickland*, 94-0025 (La. 11/1/96), 683 So. 2d 218, 229.

³⁷⁶ *State v. Mills*, 505 So.2d 933 (La. App. 2 Cir. 1987).

³⁷⁷ *Id.* art. 804 B (1); *State v. Adams*, 609 So. 2d 894 (La. App. 4 Cir. 1992).

³⁷⁸ *State v. Jeanlouis*, CR96-474 (La. App. 3 Cir. 11/6/96); 683 So. 2d 1355; *Briscoe v. Briscoe*, 25955- CA (La. App. 2 Cir. 8/17/94); 641 So. 2d 999.

³⁷⁹ LA. CODE EVID. ANN. art. 803 (2).

³⁸⁰ *G.N.S. v. S.B.S.*, 35,348-CA (La. App. 2 Cir. 9/28/01); 796 So. 2d 739, 750-51.

³⁸¹ LA. CODE EVID. ANN. art. 1101(B)(2).

³⁸² *Id.*

³⁸³ *Folse v. Folse*, 98-C-1976 (La. 6/29/99); 738 So. 2d 1040, 1046-47; *C.L.S. v. G.J.S.*, 2005-CA-1419 (La. App. 4 Cir. 3/7/07), 953 So. 2d 1025, 1040-41, writ denied 2007-710 (La. 4/27/07, 955 So. 2d 698); *G.N.S. v. SBS*, 35, 348-CA (La. App. 2 Cir. 2001) 796 So. 2d 739, 751.

7.8.11 Fifth 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.³⁸⁴ The existence of a criminal prosecution should not constitute grounds for continuance of a protective order hearing. La. Rev. Stat. 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.³⁸⁵ 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.

7.8.12 Relaxed evidentiary rules in child custody cases

Article 1101(B) (2) of the Code of Evidence 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." Article 1101 has been held to apply to child custody actions under the Post-Separation Family Violence Relief Act.³⁸⁶

In *Gautreau v. Gautreau*, a police officer's testimony about a police report was admitted under article 1101 of the Code of Evidence despite an objection by the opposing party.³⁸⁷ In practice, many judges do not follow article 1101 and will make a victim's proof of domestic violence more difficult by excluding police reports.

7.8.13 Medical records

Certified medical records may be admitted into evidence without a witness. Title 13 section 3714 (A) of the Louisiana Revised Statutes governs the admission of medical records in Louisiana. That statute provides that certified copies of medical records shall be received in evidence as "prima facie proof" of its contents, upon the condition that the opposing party has the opportunity to summon the author as witness for cross-examination.³⁸⁸ Because medical records are considered inherently reliable, then, certification is the only requirement to lay a foundation of authenticity.

In domestic violence cases, medical records can present three common evidence issues that lawyers should plan for in advance: (1) notice to the opposing party, (2) hearsay within the medical record, and (3) statements made by your client that conflict with her testimony because she lied about the cause of her injuries. First and foremost, the notice requirement of this statute premises admissibility on fair notice to the other side. In non-emergency cases, this means attor-

³⁸⁴ See *McCann v. McCann*, 09-1341 (La. App. 3 Cir. 3/10/10); 33 So. 3d 389; *Miles v. La. Landscape*, 97-CA-118 (La. App. 5 Cir. 6/30/97); 697 So. 2d 348.

³⁸⁵ LA. REV. STAT. ANN. 46 § 2134 (E).

³⁸⁶ LA. REV. STAT. ANN. § 9: 361; *Folse*, 738 So. 2d 1040; *D.O.H. v. T.L.H.*, 01-174 (La. App. 3 Cir. 10/31/01); 799 So. 2d 714, 717.

³⁸⁷ *Gautreau v. Gautreau*, 96-1548 (La. App. 3 Cir. 6/18/97); 697 So. 2d 1339, writ denied 97-1939 (La. 11/7/97), 703 So. 2d 1272.

³⁸⁸ LA. REV. STAT. ANN. § 13:3714 (A).

neys should provide copies to opposing counsel of the records they intend to use, far enough in advance of trial to allow for issuance of a subpoena. In emergency cases, notice is a trickier issue. Judges tend to admit certified medical records in emergency proceedings, but it is still a good idea to let opposing counsel know before the case begins that you will be introducing medical records. If opposing counsel nonetheless objects to the record's admission on notice grounds, there is a strong argument to be made in favor of admitting the records: In emergency cases where a TRO has been issued, it is the *defendant's* due process rights that require a quick hearing – to ensure that he is not subjected unfairly to an order that he had no notice of. If the defendant decides that he cannot fairly defend the case on such short notice, it is his right to request more time before being made to do so. If the defendant did not feel he could be prepared to meet the evidence, he could have requested more time to prepare. If he did not, even after being told that petitioner would introduce the records, that was his decision. (Then, if necessary, indicate the extent to which you made efforts to comply with the notice requirement as best as possible).

The two other issues you should plan to deal with relate to the contents of the records. If there is hearsay within the document that you intend to admit as substantive evidence to prove the truth of matter asserted, you may need to argue other hearsay exceptions. To be clear about the rule, the statute allows the contents of the record to be taken as “prima facie proof.” But if, for example, there is a hearsay statement within the report, the report is simply prima facie proof that the statement was made, not of the truth of the statement. In order for that hearsay to be admitted as substantive proof, it must fall within a hearsay exception. Those exceptions will usually include: statement in aid of medical treatment, excited utterance, and prior consistent statement. And in the event that medical records show your client attributing her injuries to a source other than abuse by her partner, if the records are good proof of the injuries, you should often seek to admit them anyway, and prepare your client to testify about why she did not report the abuse to her doctor. In some cases, it is because the batterer accompanied her to the hospital, or told her what to say. In other cases, it is attributable to shame or fear. Know why she told the doctor what she told him, and make sense of it to the Judge during her direct examination. Don't forget to prepare your client for tough questioning on this in cross.

7.8.14 Electronic Evidence.

Electronic evidence in the form of emails, text messages, face books page, etc., present both opportunities and challenges for domestic violence litigation. Some of the best evidence of stalking and threats can be found in these sources. The mechanics of having them admitted into evidence can be tricky and require advance planning. When possible, attorneys introducing text messages should have the cell phone with text messages available in court, but should also try to find better ways to present the evidence (i.e. a print out of the messages or even photographs of them). You should rely on your client, not the abuser, to lay the necessary foundation to authenticate them and to establish both the sender and the recipient of the communication.

7.8.15 Expert testimony on domestic violence.

The admissibility of expert testimony is governed by La. Code of Evidence art. 702. That article provides that “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”³⁸⁹ In one recent Louisiana case, the defendant raised a *Daubert* challenge to testimony from a clinical social worker with a specialty in domestic violence intervention and prevention, and the Louisiana Fifth Circuit Court of Appeal upheld the trial court’s admission of the testimony.³⁹⁰ And expert testimony about Post Traumatic Stress Disorder is admissible for explaining, in general terms, reactions to abuse that are used to attack the victim witness’s credibility.³⁹¹

7.8.16 Relevance issues in child custody cases.

Child custody cases under the PSFRVA present important relevance issues that must be raised by lawyers representing victims. Because the PSFVRA mandates specific outcomes once a determination of “family violence” is made, the “best interests” evidence normally considered in custody determinations is usually not relevant. The perpetrator may want to testify that he takes his kids to church every Sunday or coaches the soccer team, but that type of evidence has no bearing in a PSFVRA case. Lawyers should be diligent in objecting to that type of evidence so that it does not detract from the relevant abuse issues.

8. HELPING YOUR CLIENT ACHIEVE ECONOMIC INDEPENDENCE

8.1 INTRODUCTION

Your client’s economic welfare or independence is often critical to her recovery and escape from domestic abuse. She may need additional help with other poverty law problems, e.g., public assistance, tax, subsidized housing, evictions, foreclosures, consumer debt, employment, etc.

8.2 SUBSIDIZED HOUSING

Many domestic violence victims live in subsidized housing. Issues that may arise for your client include:

- Eviction or subsidy termination for alleged crimes by the abuser or victim’s temporary absence due to flight from abuser
- Need to ask housing authority to remove the abuser from the lease
- Portability of victim’s voucher to another apartment or city
- Transfer to another apartment for safety reasons
- Right to rent decrease or minimum rent because of loss of family income
- Early lease termination
- Admission preference due to domestic abuse

For more information, see Renae Davis *et al.*, *Federally Subsidized Housing*, Chapter 6 in this Manual.

³⁸⁹ LA. CODE EVID. ANN. ART. 702.

³⁹⁰ McFall v. McFall, 10, 14-1041 (La. App. 5 Cir. 9/13/11); 75 So. 3d 30, 38.

³⁹¹ State v. Chauvin, 2002-K-1188 (La. 5/20/03); 846 So. 2d 697.

8.3 TAX

Many married victims, often unknown to them, have substantial tax debt problems that could cripple them economically if not resolved. Fortunately, there are “innocent spouse” relief laws that can relieve many domestic violence victims of their federal tax debt. These laws are discussed in detail in *Tax Law for Legal Services and Pro Bono Attorneys*, § 14.9.5, 14.9.10, in this Manual. The innocent spouse relief laws are complex. We recommend that you refer your client to low-income tax specialists, such as the Low Income Taxpayer Clinic at Southeast Louisiana Legal Services (504-529-1000). You should counsel your client against signing any joint returns with her abuser.

8.4 PUBLIC ASSISTANCE

A client’s options for welfare should be explored. Food stamps may be applied for on an expedited basis. FITAP welfare (or TANF) takes longer to get. The 24 and 60 month limits on FITAP welfare may be waived for domestic violence victims.³⁹²

9. MISCELLANEOUS

9.1 MILITARY

The military does not tolerate domestic violence.³⁹³ The military services have Family Advocacy Programs which help reduce family violence. Commanding officers and military family advocates 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 victim and alleged offender 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 non-judicial punishment or courts-martial.

9.2 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 example, attorneys have been disciplined for abusing their spouses.³⁹⁴

³⁹² LA. REV. STAT. ANN. 46 § 460.9.

³⁹³ For a guide on the military’s response to domestic violence, see Judith Beals & Patricia Erwin, *Understanding the Military Response to Domestic Violence: Tools for Civilian Advocates* (Battered Women’s Justice Project 2007) available at www.bwjp.org. The Battered Women’s Justice Project has significant resources on the Military-Civilian Advocate Resource Network.

³⁹⁴ In re Magid, 655 A.2d 916 (N.J. 1995); In re Nevill, 704 P.2d 1332 (Cal. 1985).