

## Domestic Violence Ten Years Later

by

Edward S. Snyder\*

and Laura W. Morgan\*\*

### I. Introduction

Ten years ago, *Remedies for Domestic Violence: A Continuing Challenge* appeared in these pages.<sup>1</sup> At that time, its author, Edward S. Snyder, outlined the significant progress made in the field of domestic violence<sup>2</sup> from the 1960s through the 1980s, as feminism brought the scourge of domestic violence to the nation's attention. The article focused on how matrimonial practitioners should approach the issue of domestic violence in their practices.<sup>3</sup>

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\* Edward S. Snyder is a principal partner in the firm of Weinstein Snyder Lindemann in Roseland, New Jersey.

\*\* Laura W. Morgan is the owner and operator of Family Law Consulting in Charlottesville, Virginia, providing legal writing in the form of memoranda, trial briefs, appellate briefs, and expert opinions to family law attorneys nationwide.

<sup>1</sup> Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. AM. ACAD. MATRIM. LAW. 335 (1994).

<sup>2</sup> "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. Roberta Valente, *Domestic Violence and the Law*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 3 (American Bar Association Commission on Domestic Violence, 1996). See also DEFINITIONS OF DOMESTIC VIOLENCE (National Clearinghouse on Abuse and Neglect Information, United States Department of Health and Human Services, Administration for Children and Families, 2002). <<http://nccanch.acf.hhs.gov/general/legal/statutes/stats02/domviol.cfm>>

A simpler definition is "the physical, sexual, and emotional maltreatment of one family member by another." VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 3 (1996).

<sup>3</sup> See also THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK, *supra* note 2; John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207 (2003); Roberta Valente, *Addressing Domestic Violence: The Role of the Family Practitioner*, 29 FAM. L.Q. 187 (1995).

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Since that article, practitioners, scholars, and the government have continued to document the impact of domestic violence on batterers,<sup>4</sup> the battered,<sup>5</sup> and children.<sup>6</sup> The raw statistics, however, continue to frighten, shock, and astonish:

- In 1996, among all female murder victims in the U.S., 30% were slain by their husbands or boyfriends;<sup>7</sup>
- In 2000, 1,247 women and 440 men were killed by an intimate partner;<sup>8</sup>
- In 2001, there were 691,710 nonfatal violent victimizations committed by current or former spouses, boyfriends or girlfriends;
- In 2001, intimate partner violence made up 20% of all non-fatal crime experienced by women;

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<sup>4</sup> DONALD G. DUTTON, *THE BATTERER* (1995).

<sup>5</sup> *E.g.*, JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM* (1999); Ann Shalleck, *Feminist Inquiry and Action: Introduction to a Symposium on Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL'Y & L. 237 (2003).

<sup>6</sup> *E.g.*, PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, *CHILD CUSTODY AND DOMESTIC VIOLENCE, A CALL FOR SAFETY AND ACCOUNTABILITY* (2003).

In recognition of the profound effect that witnessing domestic violence has on a child, some states use child endangerment statutes to permit prosecution of batterers who commit abusive behaviors in the presence of a child. Further, approximately 19 states now specifically identify children who witness acts of domestic violence as a class of persons in need of legal protection. *CHILD WITNESSES TO DOMESTIC VIOLENCE* (National Clearinghouse on Child Abuse and Neglect Information, United States Department of Health and Human Services, Administration for Families and Children, 2002). <<http://nccanch.acf.hhs.gov/general/legal/statutes/stats02/childwit.cfm>> *See also* ANNELIES HAGEMEISTER, *OVERLAP OF DOMESTIC VIOLENCE AND CHILD MALTREATMENT IN U.S.A. STATE CIVIL AND CRIMINAL STATUTES* (Minnesota Center Against Violence and Abuse, 2000). <<http://www.mincava.umn.edu/link/documents/statutes/statutes.doc>>

<sup>7</sup> Federal Bureau of Investigation, U.S. Dep't of Justice, *UNIFORM CRIME REPORTS OF THE U.S. 1996* (1996).

<sup>8</sup> Office of Violence Against Women, U.S. Dep't of Justice, *INTIMATE PARTNER VIOLENCE, 1993-2001* (2002). <<http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>>

- Each year, up to 4 million women are physically abused by their husbands or live-in partners.<sup>9</sup>

This article will not revisit the historical overview of domestic violence or the psychology of domestic violence. Rather, this article will focus on changes in federal and state law that have been wrought in response to the continuing social ill of domestic violence over the last ten years. The article will then consider how the matrimonial lawyer can confront and deal with domestic violence in practice.

## II. Federal Law

### A. Statutes

#### 1. *The Violence Against Women Act*

Historically, the federal government lacked jurisdiction over crimes of domestic violence. Victims of domestic violence had to rely on state criminal statutes and protective orders for relief. In 1994, however, as part of the Violence Crime Control and Law Enforcement Act of 1994, Congress enacted the Violence Against Women Act of 1994 (“VAWA”).<sup>10</sup> This Act recognized that violence against women is a crime with far-reaching consequences for families, children and society.<sup>11</sup> In 1996, Congress reaffirmed its commitment to VAWA by the enactment of additional federal domestic violence crimes in VAWA, and again in 2000 by the passage of amendments to the VAWA statutes.<sup>12</sup>

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<sup>9</sup> Lawrence a. Greenfield, et al., U.S. Dep’t of Justice, *VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS* (1998).

Of course, the precise incidence of domestic violence is difficult to determine: it often goes unreported; there is no nationwide organization that gathers information from local police departments about the number of substantiated reports and calls. C.J. Newton, *Domestic Violence: An Overview*, Feb. 2001 *MENTAL HEALTH JOURNAL*. <<http://www.therapistfinder.net/Domestic-Violence/Domestic-Violence-Statistics.html>>

<sup>10</sup> 42 U.S.C. § 13981 (2000).

<sup>11</sup> Congress stated its goal was to treat violence against women as a major law enforcement priority, take aim at the attitudes that nurture violence against women, and provide the help that survivors need. The Violence Against Women Act of 1991, S. Rep. No. 102-197, at 34-35 (1991).

<sup>12</sup> See discussion *infra*.

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VAWA comprises numerous federal statutes to prosecute domestic violence offenders in the federal courts.<sup>13</sup> VAWA also created a civil rights remedy for gender motivated violence, but this part of VAWA was ruled unconstitutional.<sup>14</sup>

a. *Interstate Travel to Commit Domestic Violence*

It is a federal crime for a person to cross state lines or enter or leave Indian<sup>15</sup> country with the specific intent to kill, injure, harass or intimidate that person's intimate partner, if in the course of or as a result of such travel the suspect commits or attempts to commit a violent crime.<sup>16</sup> The term "intimate partner" includes a spouse, a former spouse, a past or present cohabitant (as long as the parties cohabitated as spouses), parents of a child in common, and any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides. "Intimate partner" does not include a girlfriend or boyfriend with whom the defendant has not resided, unless protected by state law. This section does not require either a completed commission of a crime of violence or bodily injury.<sup>17</sup>

It is also a federal crime to cause an intimate partner to cross state lines or enter or leave Indian country by force, coercion, duress or fraud, and during, as a result of, or to facilitate such conduct or travel, commit or attempt to commit a crime of violence.<sup>18</sup> The law does not require a showing of specific intent to cause the spouse or intimate partner to cross state or reservation

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<sup>13</sup> VAWA contains seven subtitles that address domestic violence: Subtitle A, Safe Streets for Women; Subtitle B, Safe Homes for Women; Subtitle C, Civil Rights for Women; Subtitle D, Equal Justice for Women in Courts; Subtitle E, Violence Against Women Act Improvements; Subtitle F, National Stalker and Domestic Violence Reduction; Subtitle G, Protection for Battered Immigrant Women and Children.

<sup>14</sup> See discussion II(B) *infra*.

<sup>15</sup> See Sandra J. Schmieder, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*, 74 U. COLO. L. REV. 765 (2003); Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001-2002).

<sup>16</sup> 18 U.S.C. § 2261(a)(1).

<sup>17</sup> *Id.*

<sup>18</sup> 18 U.S.C. § 2261(a)(2).

lines, but it does require proof that the interstate travel resulted from force, coercion, duress or fraud.<sup>19</sup>

b. *Interstate Stalking*

It is a federal crime to cross a state line with the specific intent to kill, injure, harass or intimidate another person, if in the course of, or as a result of such travel, the defendant places such person in reasonable fear of death to, or serious bodily injury to, that person or that person's immediate family.<sup>20</sup> The term "immediate family" includes a spouse, parent, sibling, child or any other person living in the same household and related by blood or marriage.<sup>21</sup> This section also applies within the special territorial or maritime jurisdiction of the United States.<sup>22</sup>

Under the 2000 amendments, it is a federal crime to use the mail or any facility of interstate or foreign commerce (including the Internet)<sup>23</sup> with the intent to kill, or injure, or place in reasonable fear of death or serious bodily injury, a person in another State or within the special maritime or territorial jurisdiction of the United States, or to engage in a course of conduct that places such person in reasonable fear of death, or serious bodily injury to themselves, their intimate partners, or a member of their immediate family.<sup>24</sup> This provision requires a "pattern of conduct composed of two or more acts, evidencing a continuity of purpose."<sup>25</sup>

c. *Interstate Travel to Violate an Order of Protection*

It is a crime to travel, or travel into or out of Indian country, with the specific intent to violate the portion of a valid protection order that prohibits or provides protection against violence, threats, repeated harassment, contact, communication with, or

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<sup>19</sup> Id.

<sup>20</sup> 18 U.S.C. § 2261A(1).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> See 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (United States Department of Justice, Report from the Attorney General to the Vice President, August 1999).  
<<http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>>

<sup>24</sup> 18 U.S.C. 2261A(1).

<sup>25</sup> Id.

physical proximity to another person.<sup>26</sup> It does not require an intimate partner relationship (although such a relationship may be required by the state or other governmental body issuing the protection order), and it does not require bodily injury. It does, however, require an actual violation of the protection order.<sup>27</sup>

It is also a crime to cause a person to cross state lines, or enter or leave Indian country, by force, coercion, duress or fraud, and during, as a result of, or to facilitate such conduct or travel, engage in conduct that violates the portion of an order of protection.<sup>28</sup> This law does not require a showing of specific intent to cause another person to cross state or reservation lines, but does require proof that the travel resulted from force, coercion, duress or fraud, and proof that the person violated the relevant portion of the protection order during the course of, as a result of, or to facilitate the forced or coerced conduct or travel.<sup>29</sup>

#### d. *Penalties*

Penalties for violations of VAWA sections 2261, 2261A, and 2262 depend on the extent of the bodily injury to the victim and whether a weapon is used. Terms of imprisonment are incremental, and range from a maximum of five years when there is no injury to the victim, ten years if there is serious bodily injury or if a dangerous weapon is used, twenty years if there is permanent disfigurement or life threatening bodily injury, up to life imprisonment if the crime of violence results in the victim's death.<sup>30</sup>

### 2. *The Gun Control Act*<sup>31</sup>

#### a. *Possession of a Firearm While Subject to an Order of Protection*

It is a crime for a person to possess a firearm while subject to a court order restraining such person from harassing, stalking, or threatening an intimate partner or the child of an intimate part-

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<sup>26</sup> 18 U.S.C. § 2262(a)(1).

<sup>27</sup> *Id.*

<sup>28</sup> 18 U.S.C. § 2262(a)(2).

<sup>29</sup> *Id.*

<sup>30</sup> 18 U.S.C. § 2621(b); 18 U.S.C. § 2262(b).

<sup>31</sup> Possession of a firearm is strongly associated with homicide at the hands of a family member or intimate. A strong association between a history of domestic violence and homicides committed in the home with a firearm has

ner. The protection order must have been issued following a hearing for which the defendant had notice and an opportunity to appear, and includes a specific finding that the defendant represents a credible threat to the physical safety of the victim or an explicit prohibition against the use of force that would reasonably be expected to cause injury.<sup>32</sup>

b. *Transfer of a Firearm to a Person Subject to an Order of Protection*

It is a crime to knowingly transfer a firearm to a person subject to a court order that restrains that person from harassing, stalking, or threatening an intimate partner or the child of an intimate partner.<sup>33</sup>

c. *Possession of a Firearm After Conviction of a Misdemeanor Crime of Domestic Violence*

An amendment to VAWA, effective September 30, 1996, makes it a crime to possess a firearm after conviction of a misdemeanor crime of domestic violence, even if the conviction occurred before the law's effective date.<sup>34</sup>

d. *Transfer of a Firearm to a Person Convicted of a Misdemeanor Crime of Domestic Violence*

It is a crime to illegally and knowingly transfer a firearm to a person who has been convicted of a misdemeanor crime of domestic violence.<sup>35</sup> An amendment to the Brady statement requires purchasers of firearms to state that they have not been convicted of a misdemeanor crime of domestic violence.<sup>36</sup>

e. *Penalties*

The maximum term of imprisonment for a violation of sections 922(d)(8), 922(g)(8), 922(d)(9), or 922(g)(9), is ten years. If, however, the defendant has three or more convictions for a vio-

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been shown. Arthur L. Kellerman, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1087 (1993).

<sup>32</sup> 18 U.S.C. § 922(g)(8).

<sup>33</sup> 18 U.S.C. § 922(d)(8).

<sup>34</sup> 18 U.S.C. § 922(g)(9).

<sup>35</sup> 18 U.S.C. § 922(d)(9).

<sup>36</sup> 18 U.S.C. § 924.

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lent felony or a serious drug offense, or both, committed on occasions different from one another, the defendant must be imprisoned for not less than fifteen years, and the court may not suspend the sentence or grant probation.<sup>37</sup>

3. *Full Faith and Credit to Orders of Protection*

Pursuant to federal law, a qualifying civil or criminal domestic protection order issued by a court in one state or Indian tribe shall be accorded full faith and credit by the courts of other states or tribes, and enforced as would their own orders.<sup>38</sup> Qualifying protection orders may be permanent, temporary or ex parte, but they must be issued by a court that has jurisdiction over the parties, and provide the defendant with reasonable notice and an opportunity to be heard, consistent with due process. Mutual protection orders do not qualify if (a) the original respondent did not file a cross or counter petition seeking a protective order or (b) if such a cross or counter petition was filed, but the court did not make specific findings that each party was entitled to such an order.<sup>39</sup>

4. *Victims' Rights*

All victims of federal crimes, including victims of domestic violence have the following rights:<sup>40</sup>

- The right to be treated with fairness and with respect for the victim's dignity and privacy
- The right to be reasonably protected from the accused offender
- The right to be notified of court proceedings
- The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial
- The right to confer with attorney for the Government in the case

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<sup>37</sup> 18 U.S.C. § 924(e)(1).

<sup>38</sup> 18 U.S.C. § 2265.

<sup>39</sup> Id.

<sup>40</sup> 42 U.S.C. § 10606(b).



- The right to restitution<sup>41</sup>
- The right to information about the conviction, sentencing, imprisonment, and release

5. *42 U.S.C. § 1983*

Section 1983 provides a general federal cause of action against government officials whose actions deprive individuals of a constitutionally protected right.<sup>42</sup> *DeShaney v. Winnebago County Department of Social Services*,<sup>43</sup> however, severely restricted the ability of plaintiffs to sue police and municipal officers for their failure to protect women who were victims of domestic violence. In *DeShaney*, the plaintiff was a young boy whose father routinely abused him. State social workers were aware of the abuse, and while they took action, they did not remove the boy from his father's custody. A few months later, the boy's father beat him so severely that he was rendered permanently retarded and institutionalized. The boy's mother filed a lawsuit on his behalf alleging a due process violation. In affirming the trial court's grant of summary judgment to the defendant, the Court explained that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>44</sup> Since states have no affirmative duty to provide

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<sup>41</sup> In a VAWA case, the court must order restitution after conviction to reimburse the victim for the full amount of losses. These losses can include costs for medical or psychological care, physical therapy, transportation, temporary housing, child care, lost income, attorney's fees, costs incurred in obtaining a civil protection order, and any other losses suffered by the victim as a proximate result of the offense. In a conviction under the Gun Control Act, the Court may order restitution. 18 U.S.C. § 2264.

<sup>42</sup> Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>43</sup> 489 U.S. 189 (1976).

<sup>44</sup> 489 U.S. 189 (1976).

<sup>44</sup> 489 U.S. at 196.

such services, they cannot be held liable for injuries that would have been averted had they chosen to provide them.

Consequently, most cases that have asserted a violation of due process for the failure to protect against domestic violence have not been successful.<sup>45</sup> *DeShaney*, however, created two exceptions: when the victim is in the state's custody, and when the state has itself created the danger, such as by actively discouraging intercession and arrest in domestic violence cases. Under these exceptions, plaintiffs have garnered some successes.<sup>46</sup> Therefore, this possibility should not be overlooked.

### B. Case Law

Many viewed the civil enforcement provisions<sup>47</sup> of VAWA as a victory for the victims of domestic violence.<sup>48</sup> These sections established a civil rights remedy for violent acts based on discriminatory intent, by a person acting under color of state law or by a private individual. Congress stated that gender based violence had a negative impact on interstate commerce, and denied victims of gender motivated crimes equal protection of the laws, life, liberty, and property without due process of law.

In May 2000, the United States Supreme Court, in *United State v. Morrison*,<sup>49</sup> struck down this powerful civil rights provi-

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<sup>45</sup> E.g., *May v. Franklin County Bd. of Comm'rs*, 59 Fed. Appx. 786, 2003 WL 1134499 (6th Cir. Mar. 12, 2003); *Gonzales v. City of Castle Rock*, 307 F.3d 1258 (10th Cir. 2002); *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002); *O'Brien v. Maui County*, 37 Fed. Appx. 269, 2002 WL 1192768 (9th Cir. June 4, 2002); *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001).

<sup>46</sup> E.g., *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

<sup>47</sup> 42 U.S.C. § 13981.

<sup>48</sup> See Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999); Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIM. L. 173 (1999).

<sup>49</sup> 529 U.S. 598 (2000). See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002); Sally F. Goldfarb, *No Civilized System of Justice: The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499 (2000); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000); Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence after the*

sion.<sup>50</sup> In a sharply divided 5-4 opinion, the Rehnquist court held that modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate: the use of the channels of interstate commerce; the instrumentalities of interstate commerce and people or things in interstate commerce, even though the threat comes from intrastate activities; and economic activities that substantially affect interstate commerce.<sup>51</sup> Gender-motivated violence, the majority held, is not economic activity. The majority also stated that Congressional regulation of that activity could not be upheld based on its aggregate affect on interstate commerce: “The Constitution requires a distinction between what is truly national and what is truly local. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”<sup>52</sup> What the court deemed to be the non-economic, criminal nature of the conduct at issue was central to its decision.

In reaching its decision that intrastate violence is local in character, the Court held that it was up to the *Court*, not Congress, to ultimately decide whether an activity has a “substantial affect” on interstate commerce so that Congressional action is permissible. Thus, the four years of hearings, the mountains of findings in the Congressional Record concerning the impact of domestic violence on job opportunities and lost wages, and its effect on transportation, meant nothing. The Supreme Court could strike down a law if it simply disagreed with a Congressional assessment of the interstate impact on the activity it regulated.

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*Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919 (2001); Jennifer R. Johnson, *Privileged Justice Under Law: Reinforcement of Male Privilege by the Federal Judiciary Through the Lens of the Violence Against Women Act and U.S. v. Morrison*, 43 SANTA CLARA L. REV. 1399 (2003); Alberto B. Lopez, *Forty Yeas and Five Nays—The Nays Have It: Morrison’s Blurred Political Accountability and the Defeat of the Civil Rights Provision of the Violence Against Women Act*, 69 GEO. WASH. L. REV. 251 (2001); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 3 THE YALE LAW JOURNAL 619 (2001);

<sup>50</sup> 28 U.S.C. § 13981.

<sup>51</sup> 529 U.S. at 608-09.

<sup>52</sup> 529 U.S. at 617-18.

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Of further interest is the majority opinion's reiteration that Congress cannot regulate "family law":

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded §13981 from being used in the family law context. See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.<sup>53</sup>

At the same time, the minority, per Justice Breyer, stressed that child support could be regulated under the Commerce Clause; it is not, therefore, merely a matter of what is "family law" and what is not; the question is what has an effect on commerce and what does not.<sup>54</sup>

In contrast to the civil provisions of VAWA, the criminal provisions have been upheld by every court that has considered the issue.<sup>55</sup>

### III. State Law

For the matrimonial lawyer, the greatest impact of domestic violence on state law has been in the areas of child custody/visitation, property division in divorce, and divorce mediation. These topics will be dealt with in section IV below. Before reaching that section, two uniform laws, as well as state VAWA-type acts, should also be considered in domestic violence cases.

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<sup>53</sup> 529 U.S. at 615-16.

<sup>54</sup> 529 U.S. at 660 (Breyer, J., dissenting).

<sup>55</sup> *United States v. Lankford*, 196 F.3d 563 (5th Cir. 1999); *United States v. Page*, 167 F.3d 325 (6th Cir. 1999); *United States v. Von. Foelkel*, 136 F.3d 339 (2nd Cir. 1998); *United States v. Wright*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 523 U.S. 1053 (1998); *United States v. Casciano*, 124 F.3d 106 (2nd Cir.) *cert. denied*, 522 U.S. 1034 (1997); *United States v. Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, 522 U.S. 896 (1997); *United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997), *aff'd* 154 F.3d 49 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1020 (1999); *United States v. Frank*, 8 F. Supp.2d 253 (S.D.N.Y. 1998).

A. *The Uniform Child Custody Jurisdiction and Enforcement Act*

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),<sup>56</sup> proposed by the National Conference of Commissioners of Uniform State Laws and approved by the American Bar Association in December 1997, includes many new provisions helpful in meeting the needs of victims of domestic violence forced to take their children and seek refuge in a another state.<sup>57</sup>

First, the definition of “custody proceeding” in the UCCJA was ambiguous. State court decisions, as well as the Commissioners themselves, did not agree on whether the UCCJA applied to protection from domestic violence proceedings. The UCCJEA, by contrast, includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a “custody determination.”<sup>58</sup> Second, notice under the Act may be given in a manner consistent with notice in a domestic violence proceeding.<sup>59</sup> Third, the UCCJEA recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child’s parent or sibling has been subjected to or threatened with mistreatment or abuse.<sup>60</sup> Fourth, the Act allows for the defense of forum non conveniens based on the likelihood of domestic violence in a forum.<sup>61</sup> Fifth, a court can refuse jurisdiction by reason of an abuser’s conduct.<sup>62</sup> Sixth, the court may

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<sup>56</sup> 9, Part 1A, U.L.A. 649 (1999). The UCCJEA is intended to replace the outdated Uniform Child Custody Jurisdiction Act (UCCJA) and is currently in effect in most jurisdictions.

<sup>57</sup> 27 Joan Zorza, *The UCCJEA: What Is it and How Does it Affect Battered Women in Child- Custody Disputes*, 2000 *FORDHAM URB. L.J.* 909 (2000).

<sup>58</sup> UCCJEA § 102(4).

<sup>59</sup> *Id.* at § 108.

<sup>60</sup> *Id.* at § 204.

<sup>61</sup> *Id.* at § 207(b)(1).

<sup>62</sup> *Id.* at § 208.

According to the Reporter’s Notes, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed

enter orders providing for the safety of the child and the person ordered to appear with the child. This alternative might be important when safety concerns arise regarding victims of domestic violence or child abuse traveling to the jurisdiction where the abuser resides.<sup>63</sup>

#### B. *The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act*

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act<sup>64</sup> was approved in 2000.<sup>65</sup> This Act establishes uniform procedures that enable courts to recognize and enforce valid domestic protection orders issued in other jurisdictions. This uniformity will enable courts to treat such cases consistently, thereby better serving the needs of victims of domestic violence. This Act supplements VAWA's full faith and credit provisions.<sup>66</sup>

#### C. *State VAWAs*

The Supreme Court suggested in *United States v. Morrison* that states can regulate the type of conduct prohibited by VAWA, and can, under state law, provide civil causes of action and remedies similar to VAWA.<sup>67</sup> In 2000, New York City was the first

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under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

<sup>63</sup> UCCJEA § 210(c).

<sup>64</sup> 9, Part 1B U.L.A. 28 (Supp. 2004). See Andrew C. Spiropoulos, *Prefatory Note and Comments to Uniform Interstate Enforcement of Domestic Violence Protection Orders Act*, 35 FAM. L.Q. 205 (2001).

<sup>65</sup> As of August 15, 2004, UIEDVPOA had been adopted in Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Texas and West Virginia. Bills were introduced in Kansas, Oklahoma, and the U.S. Virgin Islands for its passage.

<[http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-uedvpoa.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uedvpoa.asp)>

<sup>66</sup> 18 U.S.C. § 2265. See discussion *supra* II(A).

<sup>67</sup> 529 U.S. at 616. See Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. REV. 1081 (2001).

jurisdiction to adopt a local version of VAWA, giving persons injured by domestic violence the right to sue their abusers for civil damages.<sup>68</sup> California followed suit in 2002, and Illinois in 2004.<sup>69</sup>

## IV. Practice: Representing Victims of Domestic Violence

### A. Screening for Domestic Violence

Clients should be screened to determine if they are victims of domestic violence.<sup>70</sup> If the attorney determines that domestic violence is present, the first goal is to stop the violence and help

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<sup>68</sup> N.Y. CITY ADMIN. CODE §§ 8-901 to 8-907 (2001) (providing a civil cause of action for any person committing a “crime of violence motivated by gender” and authorizing compensatory and punitive damages, injunctions, and fees).

<sup>69</sup> CAL. CIV. CODE § 52.4 (2002); ILL. PUBLIC LAW 94-0416 (effective Jan. 1, 2004).

Similar legislation has been proposed in other municipalities, as well as in the states of Arizona, Arkansas, and New York. *E.g.*, “Violence Motivated by Gender,” S.B. 1550, 45th Leg., 1st Reg. Sess. (Ariz. 2001) (providing damage actions when acts of violence are “motivated by gender,” as established by a “preponderance of the evidence,” but not if “random”); “Arkansas Violence Against Women Act of 2001,” H.B. 1691, 83d Gen. Assem., Reg. Sess. (Ark. 2001) (providing for protection of the “civil rights of victims of gender motivated violence and . . . promoting the public safety, health, and activities by establishing a state civil rights cause of action”); “An Act To Amend the Civil Rights Law, in Relation to Providing a Civil Remedy for Victims of Bias-Related Violence or Intimidation,” S.B. 2776, 224th Leg., Reg. Sess. (N.Y. 2001) (providing remedies for injuries based on gender and sexual orientation and authorizing civil suits to be brought by both the attorney general and individuals).

<sup>70</sup> Lois Shwaeber, *Representing Victims of Domestic Violence* in 1999 WILEY FAMILY LAW UPDATE 166 (1999), from a composite of questions suggested in AMERICAN MEDICAL ASSOCIATION DIAGNOSTIC AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 4, n. 18 at 8 (1992), recommends the following screening questions:

1. Are you in a relationship where you are being physically hurt? Threatened? Treated Badly?
2. Has your partner ever destroyed things? Your property? Pets?
3. Has your partner ever threatened or hurt the children?
4. Has your partner ever forced you to have sex? Forced you to engage in sexual acts you were uncomfortable with?
5. Has your partner prevented you from leaving the house? From seeing your friends?

the client be safe. The most valuable tool in keeping a client safe is the civil protection order.<sup>71</sup> Every state has a mechanism for such an order,<sup>72</sup> and obtaining an order not only prevents further abuse but may grant valuable remedies, such as temporary custody, child support, and use of the marital home. Every state also has a domestic violence arrest law,<sup>73</sup> and criminal prosecution should not be overlooked.

In recent years, many states have also adopted laws allowing employers to apply for restraining orders to prevent violence, harassment, or stalking of their employees.<sup>74</sup> Therefore, requesting the employer to obtain such an order should be considered by the practitioner as well. If the domestic violence is serious, the employee can, in some states, request leave to address the domestic violence.<sup>75</sup>

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6. Does your partner make you account for your every minute? Does your partner check up on you constantly? Check your mileage?
  7. Does your partner control the family finances? Dole out small amounts of money for you to spend?
  8. Does your partner accuse you of having an affair? Does your partner behave in an overprotective manner?
  9. Has your partner ever threatened you with a gun or dangerous instrument?
  10. Are you afraid?
  11. What do you need to be safe?

See also Susan Schechter, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 13, n. 24 (1987); NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE 8, n. 76 (1999); David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON BAR J. 25 (July/Aug. 1989).

<sup>71</sup> The civil protection order is also known as a temporary restraining order, temporary injunction, stay away order, or no-contact order.

<sup>72</sup> See FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE Appendix 4A (Supp. 2003).

<sup>73</sup> See *id.* § 6:1.

<sup>74</sup> ARIZ. REV. STAT. ANN. § 12-1810 (West 2003); ARK. CODE ANN. § 11-5-115 (Michie 2002); CAL. CIV. PROC. CODE § 527.8 (West Supp. 2004); COLO. REV. STAT. ANN. § 13-14-102(4)(B) (West 2003); GA. CODE ANN. § 34-1-7 (2004); IND. CODE ANN. § 34-26-6 (Michie Supp. 2004); NEV. REV. STAT. ANN. § 33.200-.360 (Michie 2004); R.I. GEN. LAWS § 28-52-2 (2003); TENN. CODE ANN. §§ 20-14-101 to -109 (Supp. 2003).

<sup>75</sup> In recent years, several states have enacted laws that provide domestic violence victims time off from work to address the violence in their lives. ALASKA STAT. § 12.61.017 (Michie 2002); ARIZ. REV. STAT. ANN. § 13-4439 (West Supp. 2003); CAL. LAB. CODE §§ 230 through 230.2 (West 2003 and Supp.



Even the threat of a civil protection order can have benefits. Attorneys guilty of committing domestic violence face disciplinary measures from their state bar, including, but not limited to, public censure or reprimand,<sup>76</sup> suspension,<sup>77</sup> or disbarment.<sup>78</sup> Courts justify imposing discipline on attorneys for nonprofessional misconduct as appropriate to protect the public, preserve the reputation and integrity of the legal profession, and enhance public confidence in attorneys.<sup>79</sup> Police officers guilty of domestic violence may find themselves dismissed for conduct unbecoming an officer.<sup>80</sup> Although there may be economic ramifications in filing for a protective order, an attorney must realize that a

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2004); COLO. REV. STAT. ANN. § 24-34-402.7 (West 2003); CONN. GEN. STAT. ANN. § 54-85b (West Supp. 2004); HAW. REV. STAT. ANN. § 378-72 (Michie 2004); 820 ILL. COMP. STAT. ANN. § 180/1-45 (West Supp. 2004); ME. REV. STAT. ANN. tit. 26, § 850 (West Supp. 2003); MO. ANN. STAT. § 595.209(1)(14) (West 2003); N.Y. PENAL LAW § 215.14 (McKinney 1998).

Moreover, almost half the states have enacted laws that explicitly provide unemployment insurance to domestic violence victims in certain circumstances. CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256 (West Supp. 2004); COLO. REV. STAT. ANN. § 8-73-108(4)(r) (West 2003); CONN. GEN. STAT. ANN. § 31-236(a)(2)(A) (West 2003); DEL. CODE ANN. tit. 19, § 3315(1) (Supp. 2002); 820 ILL. COMP. STAT. ANN. 405/601 (West Supp. 2004); IND. CODE ANN. § 22-4-15-1(1)(C)(8) (Michie Supp. 2003); KAN. STAT. ANN. § 44-706(A)(12) (Supp. 2004); ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (West Supp. 2003); MASS. GEN. L. ANN. ch. 151A, §§ 1, 14, 25, 30 (West 2004); MINN. STAT. ANN. § 268.095(1)(8) (West Supp. 2004); MONT. CODE ANN. § 39-51-2111 (2003); NEB. REV. STAT. ANN. § 48-628(1)(a) (Michie Supp. 2003); N.H. REV. STAT. ANN. tit. 23, § 282-A:32(I)(a)(3) (Supp. 2003); N.J. REV. STAT. § 43:21-5(j) (Supp. 2004); N.M. STAT. ANN. § 51-1-7 (A) (Michie 2004); N.Y. LAB. LAW § 593(1)(a) (McKinney Supp. 2004); N.C. GEN. STAT. § 96-14(1f) (Supp. 2003); OKLA. STAT. ANN. tit. 40, §§ 2-405(5), 3-106(G)(8) (West Supp. 2004); OR. REV. STAT. § 657.176(12) (Supp. 2004); R.I. GEN. LAWS § 28-44-17.1 (2003); S.D. CODIFIED LAWS § 61-6-13.1 (Supp. 2003); WASH. REV. CODE ANN. §§ 50.20.050, 50.20.100, 50.20.240, and 50.29.020 (2002 & Supp. 2004); WIS. STAT. ANN. § 108.04(7)(s) (2002); Wyo. Stat. Ann. § 27-3-311 (Michie 2003).

<sup>76</sup> See *Matter of Principato*, 655 A.2d 920, 922-23 (N.J. 1995).

<sup>77</sup> See *In re Knight*, 883 P.2d 1055, 1056 (Colo. 1994).

<sup>78</sup> See *Attorney Grievance Commission of Maryland v. Painter*, 739 A.2d 24, 24 (Md. 1994).

<sup>79</sup> Ignacio G. Camarema, II, Comment, *Domestically Violent Attorneys: Resuscitating and Transforming a Dusty Old Punitive Approach to Attorney Discipline into a Viable Prescription for Rehabilitation*, 31 GOLDEN GATE U.L. REV. 155, 167 (2001).

<sup>80</sup> See *Oaks v. City of Philadelphia*, 59 Fed. Appx. 502 (3rd Cir. 2003).

victim could be swayed by the consequences to the abuser. The attorney must encourage the victim to focus upon thwarting further abuse.

Once a civil protection order has been obtained, the attorney must then devise specific strategies for custody and property division that take into account the domestic violence. Mediation must be avoided, since a power imbalance exists in violent relationships. Finally, the attorney should consider tort remedies.

### B. *Custody*

Men who batter their partners are likely to physically abuse their children.<sup>81</sup> Moreover, children in homes where domestic violence is present suffer the same emotional and psychological impact as children who are themselves targets of abuse.<sup>82</sup>

The psychopathology of the batterer often leads him to demand custody of the children as a means of maintaining control. Men who have battered their partners continue to attempt to maintain their control over the abused party and her children.<sup>83</sup>

Today, in stark contrast to ten years ago, 48 states<sup>84</sup> have child custody statutes that consider domestic violence in the

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<sup>81</sup> Susan Schechter, Jon Conte, Loretta Fredrick, *Domestic Violence and Children: What Should the Courts Consider?* in *COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY* (NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES FAMILY VIOLENCE PROJECT, 1993).

<sup>82</sup> Maria V.B. Frankel, *The Aftermath of Child Witnessing: Some Rays of Hope*, 3 SYNERGY: THE NEWSLETTER OF THE RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY No. 1, at 2-3 (1998). See also 3 DAVID PELKOVITZ & SANDRA J. KAPLAN, *CHILD WITNESSES OF VIOLENCE BETWEEN PARENTS* 745-46 (1994); Marjory D. Fields, *The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221, 222-234 (1994); Lynne R. Kurtz, Comment, *Protecting New York's Children; An Argument for Creating a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345 (1997); Mildred D. Pagelow, *The Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION J. 348 (1990); *Custody of Vaughn*, 664 N.E.2d 434 (Mass. 1996) (child who witnesses or experiences domestic violence suffers profound and deep harms).

<sup>83</sup> Evan Stark, *Framing and Reframing Battered Women*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* 287 (Eve S. Buzawa & Carl G. Buzawa, eds., 1992).

<sup>84</sup> LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 4:01 at 172 (Supp. 2003).

awarding of custody.<sup>85</sup> The statutes provide either that (a) a rebuttable presumption exists against the perpetrator of domestic violence being awarded custody,<sup>86</sup> or (b) domestic violence is a factor to be considered by the court when determining the best interests of the child.<sup>87</sup> Moreover, Model Code § 401 of the National Council of Juvenile and Family Court Judges provides for a

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<sup>85</sup> See generally Nancy K.D. Lemon and Peter Jaffe, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY DISPUTES 2 (1995); Annotation, *Construction and Effect of Statutes Mandating Consideration Of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R.5TH 241 (1999); Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211 (2002); Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 DIVORCE LITIG. 141, 145 (1998).

<sup>86</sup> E.g., ALA. CODE § 30-3-131 (1999); ARIZ. REV. STAT. ANN. § 25-403(B) (West 2000); ARK. CODE ANN. § 9-13-101 (Michie Supp. 2003) (presumption may be overcome by a finding that there is no risk of future violence); COLO. REV. STAT. ANN. § 14-10-124(1.5)(m) (West 2003); DEL. CODE ANN. tit. 13, § 705A (Supp. 2002) (presumption may be overcome by a finding that there is no risk of future violence); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 2004); HAW. REV. STAT. ANN. § 571-46(9) (Michie Supp. 2003); IOWA CODE ANN. § 598.41 (2001); LA. REV. STAT. ANN. § 9:364 (West 2000) (presumption against giving custody to an abuser but the statutory presumption may be overcome by “clear and convincing” evidence or by a preponderance of the evidence that the abuser has completed a treatment program successfully); MASS. GEN. L. ANN. ch. 209A, § 1 (West 1998); MO. ANN. STAT. § 452.375.11 (West 2003); N.H. REV. STAT. ANN. § 458:17 (Supp. 2003); N.D. CENT. CODE § 14-09-06.2 (2003); OHIO REV. CODE ANN. § 3109.04(F)(1)(h) (West 2003); OKLA. STAT. ANN. tit. 43 § 112.2 (West Supp. 2004) (requires that domestic violence be proved by clear and convincing evidence before the presumption operates); TEX. FAM. CODE ANN. § 153.004 (West Supp. 2004); WASH. REV. CODE ANN. § 26.09.191 (2) & (3) (West 1997); WYO. STAT. ANN. § 20-2-113(a) (Michie 2003).

Just six years ago, in 1998, only 11 states had a rebuttable presumption that the perpetrator of domestic violence should not be awarded custody. Opinion of the Justices to the Senate, 691 N.E.2d 911 (Mass. 1998). See also Fields, *supra* note 82.

House Concurrent Resolution 172 declared the sense of Congress that evidence of one parent’s physical abuse of the other should create a statutory presumption that it is detrimental to the child to be placed in the custody of the spouse-abusing parent. 136 CONG. REC. H11777 (1990).

<sup>87</sup> IDAHO CODE § 32-717 (Supp. 2004); 750 ILL. COMP. STAT. ANN. 5/602(a)(7) (West 1999); MICH. COMP. LAWS ANN. § 722.23 (West 2002); MINN. STAT. ANN. § 518.17(2)(d) (West Supp. 2004); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 2004); R.I. GEN. LAWS § 15-5-16 (2003); VA. CODE ANN. § 20-

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rebuttable presumption that it is detrimental to the children for perpetrators of domestic violence to be given any custodial role and Model Code § 402 provides that domestic violence must be considered in any custody or visitation proceeding.<sup>88</sup>

Some states also have statutes that encourage or create a presumption in favor of joint custody.<sup>89</sup> Obviously, joint custody is incompatible with domestic violence.<sup>90</sup> Consequently, many custody statutes contain presumptions against the award of joint custody where domestic violence exists.<sup>91</sup>

Most states now also require that judges must consider the presence of domestic violence when granting the non-custodial parent visitation.<sup>92</sup>

### C. Property Division

At one end of the spectrum, some states specifically consider domestic violence in property division. Of these states, some specifically list domestic violence as a factor in property division,

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124.3 (Michie Supp. 2004); WIS. STAT. ANN. § 767.24(2)(b)(2)(c) (West Supp. 2003). See Dale Patrick D. v. Victoria Diane D., 508 S.E.2d 375 (W. Va. 1998).

<sup>88</sup> 2 SYNERGY: THE NEWSLETTER OF THE RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY No. 3 (Fall 1997).

<sup>89</sup> 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 6-1 (2d ed. 2000). Atkinson states there are eleven jurisdictions with general presumptions in favor of joint custody: District of Columbia, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, New Hampshire, New Mexico and Texas. Further, there are ten states with a presumption in favor of joint custody if both parents agree: Alabama, California, Connecticut, Maine, Michigan, Mississippi, Nevada, Tennessee, Vermont, and Washington.

<sup>90</sup> Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (1999).

A study of failed joint custody arrangements found that 57% of such arrangements had incidents of domestic violence. Susan B. Steinman et al, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreements and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554 (1985).

<sup>91</sup> E.g., ALASKA STAT. § 25.20.090(8) (Michie 2002); COLO. REV. STAT. ANN. § 14-10-124(1.5)(m), (4) (West 2003); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 2004); KAN. STAT. ANN. § 60-110(a)(3)(B) (Supp. 2004); TEX. FAM. CODE 153.131 (West Supp. 2004).

<sup>92</sup> E.g., DEL. CODE ANN. tit. 13, § 701A (Supp. 2002); IND. CODE ANN. § 31-17-2-8.3 (Michie Supp. 2003); IOWA CODE ANN. § 598.41 (West 2001); MO. ANN. STAT. § 452.375.13 (West 2003); N.D. CENT. CODE § 14-05-22 (2003).

while in others, “marital fault” is a factor in property division. In those states where “marital fault” is a consideration in the division of property, a definite trend exists towards giving weight to acts of domestic violence during the marriage when distributing marital or community property.<sup>93</sup> Spousal abuse is a relevant factor in and of itself without specifically requiring particularly egregious abuse, and without expressly demanding a connection between the abuse and some other factor.<sup>94</sup>

In the center of the spectrum, some states do not allow the courts to consider “marital fault,” but do allow the courts to consider “economic fault.” In these states, courts are more than willing to find that spousal abuse constitutes economic fault because of the economic impact that spousal abuse may have, such as increased medical bills or a decreased ability to work.<sup>95</sup>

At the other end of the spectrum, some states have taken the view that domestic violence is relevant in property distribution only if the abuse was egregious. In New York, for example, spousal abuse must be “egregious” to be factored into a property

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<sup>93</sup> Brett R. Turner, *The Role of Marital Misconduct in Dividing Property Upon Divorce*, 15 *DIVORCE LITIG.* 117, 129-139 (July 2003).

<sup>94</sup> *E.g.*, *Crowe v. Crowe*, 602 So. 2d 441 (Ala. Civ. App. 1992) (record clearly reflected husband’s physical abuse of wife; award of majority of marital property to wife not error); *Bleuer v. Bleuer*, 755 A.2d 946 (Conn. Ct. App. 2000) (husband abused wife and children; wife awarded 80%); *Crews v. Crews*, 949 S.W.2d 659 (Mo. Ct. App. 1997) (wife awarded 88% of marital property); *McMann v. McMann*, 845 S.W.2d 159 (Mo. Ct. App. 1993) (wife testified to ongoing spousal abuse of husband; wife awarded 63% of marital assets); *Reiser v. Reiser*, 621 N.W.2d 348 (N.D. 2000) (dividing estate in favor of wife despite short term marriage where husband abused wife); *Weigel v. Weigel*, 604 N.W.2d 462 (N.D. 2000) (dividing home equally although husband made down payment); *Viti v. Viti*, 773 A.2d 893 (R.I. 2000) (60% to wife where husband abused wife); *Thompson v. Thompson*, 642 A.2d 1160 (R.I. 1994) (husband admitted to three incidents of physical abuse and trial court found that husband abused wife both physically and emotionally; wife awarded 65% of marital assets); *West v. West*, 431 S.E.2d 603 (S.C. Ct. App. 1993) (wife left husband as result of his extreme physical and mental abuse and sought equitable distribution of property; wife awarded 40% of equity in marital home); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. Ct. App. 1995) (awarding husband only 27.1% of assets where he had abused wife during marriage).

<sup>95</sup> *E.g.*, *Jones v. Jones*, 942 P.2d 1133 (Alaska 1997); *Mosley v. Mosley*, 601 A.2d 599 (D.C. 1992); *In re Marriage of Coomer*, 622 N.E.2d 1315 (Ind. Ct. App. 1993) (wife awarded 60% of marital assets in part because her health was impaired as a consequence of the husband’s physical abuse).

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distribution.<sup>96</sup> Some other courts have also suggested that domestic violence is relevant only if it was the precipitating cause for the divorce.<sup>97</sup>

When domestic violence is weighed into the determination of an appropriate property distribution upon divorce, the most common result is that the wife (the spouse who is typically abused) is given a larger portion of the marital estate than she might have received otherwise.<sup>98</sup>

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<sup>96</sup> See *Orofino v. Orofino*, 627 N.Y.S.2d 460 (N.Y. App. Div. 1995); *Kellerman v. Kellerman*, 590 N.Y.S.2d 570 (N.Y. App. Div. 1992). In both cases, the courts found that the spousal abuse was not so egregious as to be considered in determining equitable distribution. In *Kellerman*, the husband's abuse consisted of verbal harassment, threats and several acts of minor domestic violence. In *Orofino*, the husband consumed extraordinary amounts of alcohol; was verbally abusive to plaintiff on a biweekly basis; was physically abusive and threw an ashtray at plaintiff causing a laceration to her scalp; threatened to commit arson; and placed the muzzle of a rifle to plaintiff's head and threatened to kill her. Cf. *Wenzel v. Wenzel*, 472 N.Y.S.2d 830 (N.Y. Fam. Ct. 1984), where the husband had attacked the wife with a knife, inflicting numerous serious wounds, and then left the wife for dead. There, the court found the conduct "egregious" enough to consider in property distribution. See generally Cheryl J. Lee, *Escaping the Lion's Den and Going Back for Your Hat - Why Domestic Violence Should be Considered in the Distribution of Marital Property Upon the Dissolution of Marriage*, 23 Pace L. Rev. 273 (2002) (surveying New York law).

<sup>97</sup> See *Shirley v. Shirley*, 600 So. 2d 284 (Ala. Civ. App. 1992); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App. 1995).

<sup>98</sup> E.g., *Crowe v. Crowe*, 602 So. 2d 441 (Ala. Civ. App. 1992) (wife awarded exclusive possession of majority of marital property, both real and personal, in part because of husband's physical abuse); *In re Marriage of Coomer*, 622 N.E.2d 1315 (Ind. Ct. App. 1993) (wife awarded 60% of marital assets in part because her health was impaired as a consequence of the husband's physical abuse); *Dodson v. Dodson*, 904 S.W.2d 3 (Mo. Ct. App. 1995) (testimony that husband dragged wife across floor by her hair on one occasion, put a loaded pistol in her mouth and threatened to kill her on two occasions, and locked her in a dog house on one occasion; court awarded wife the marital home); *McMann v. McMann*, 845 S.W.2d 159, 161 (Mo. Ct. App. 1993) (wife awarded 63% of marital assets; appellate court ruled that "[e]ven if Wife's contribution was much lower than that of Husband, the trial court's division of the marital assets could be supported by Wife's testimony concerning ongoing spousal abuse of Husband"); *Thompson v. Thompson*, 642 A.2d 1160 (R.I. 1994) (wife awarded 65% of marital assets in part because of husband's physical and emotional abuse of wife); *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex. App. 1995) (72% of community property awarded to wife in large part

#### D. Mediation

Mediation is a widely accepted method of resolving custodial and financial issues in divorce.<sup>99</sup> Commentators generally agree that mediation should be avoided in cases where there has been a pattern of domestic violence.<sup>100</sup> Violence, and the resulting fear, taints all aspects of the negotiation process, and mediation may be wildly inappropriate in such cases.<sup>101</sup> Consequently, many states have statutes that specifically exempt domestic violence cases from mediation.<sup>102</sup>

#### E. Tort Law

##### 1. Causes of Action

With the abolition of interspousal tort immunity, domestic torts have become an increasingly effective way to compensate the victim of domestic violence. Common legal theories that have been used in domestic violence cases include: negligence, negligent infliction of emotional distress,<sup>103</sup> negligence per se, defamation, deceit and fraudulent misrepresentation, false imprisonment, intentional infliction of emotional distress, wrong-

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because of husband's "abusive and violent nature, which ultimately contributed to the divorce").

<sup>99</sup> Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. L. 447 (1997).

<sup>100</sup> Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 21 MISS. C. L. REV. 145 (2002); Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235 (2002); Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559 (2002); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95 (2001); Alexandra Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediation and Mediation Program Administration*, 2001 J. DISP. RESOL. 253; Jennifer P. Maxwell, *Mandatory Mediation of custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335 (1999).

<sup>101</sup> Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731 (1999).

<sup>102</sup> Joyce, *supra* note 99 at 459-465.

<sup>103</sup> E.g., *Feltmeier v. Feltmeier*, 798 N.E.2d 75 (Ill. 2003).

ful death, assault and battery, and an implied cause of action for violation of a criminal statute.<sup>104</sup>

## 2. Joinder of Tort Action with Divorce Action

In some states, courts have held that tort and contract claims that arise during the marriage should be litigated and decided in the divorce case. In these states, the effect of requiring that tort and contract claims be joined with the dissolution action is the application of res judicata to any tort or contract claims that were not brought.<sup>105</sup> In some other states, joinder of a tort claim with a divorce action is permitted but not required.<sup>106</sup>

In most states, however, the courts have held that interspousal tort or contract claims should not be joined with pending divorce actions. For example, in *Simmons v. Simmons*,<sup>107</sup> the Colorado court stated that joinder was inappropriate, because of the entirely distinct natures of divorce and tort proceedings.<sup>108</sup>

## V. Conclusion

The last ten years have seen an amazing development in both statutory and case law recognizing the impact of domestic violence on marriages and children. With the Supreme Court's decision in *Morrison*, however, an important piece of legislation

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<sup>104</sup> Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 M.D. L. Rev. 1268 (1996). See generally LEONARD KARP & CHERYL L. KARP, PH.D., DOMESTIC TORTS (1989).

<sup>105</sup> E.g., *Coleman v. Coleman*, 566 So. 2d 482 (Ala. 1990); *Brown v. Brown*, 506 A.2d 29, 32 (N.J. Super. App. Div. 1986).

<sup>106</sup> E.g., *Maharam v. Maharam*, 575 N.Y.S.2d 846 (N.Y. App. Div. 1991); *Hakkila v. Hakkila*, 812 P.2d 1329 (N.M. Ct. App. 1991); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

<sup>107</sup> 773 P.2d 602 (Colo. Ct. App. 1988).

<sup>108</sup> *Accord* *Windauer v. O'Connor*, 485 P.2d 1157 (Ariz. 1977); *Nash v. Overholser*, 757 P.2d 1180 (Idaho 1988); *Vance (Chandler) v. Chandler*, 597 N.E.2d 233 (Ill Ct. App. 1992); *Henrikson v. Cameron*, 622 A.2d 1135 (Me. 1993); *Heacock v. Heacock*, 520 N.E.2d 151 (Mass. 1988); *Aubert v. Aubert*, 529 A.2d 909 (N.H. 1987); *Koepke v. Koepke*, 556 N.E.2d 1198 (Ohio Ct. App. 1989); *Walther v. Walther*, 709 P.2d 307 (Utah 1985); *Ward v. Ward*, 583 A.2d 577 (Vt. 1990); *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988). See generally LEONARD KARP, CHERYL L. KARP, & CATHERINE PALO, DOMESTIC TORTS §§ 1.36, 1.42 (Supp. 2003); Steven J. Gaynor, Annotation, *Joinder of Tort Actions Between Spouses with Proceeding for Dissolution of Marriage*, 4 A.L.R.5th 972 (1993 & Supp. 2003).



remains undone: state civil remedies similar to that in VAWA. The Congressional findings of the extraordinary physical, psychological, and economic impact of domestic violence make the need for such legislation clear. This is therefore a call to state legislatures to take up the invitation issued in *Morrison* and create appropriate civil remedies for victims of domestic violence.

