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## Enforcement in Domestic Violence Cases

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# Essays

## Enforcement in Domestic Violence Cases

*Hon. Hollis L. Webster\**

### I. INTRODUCTION

Across this country, victims<sup>1</sup> of family violence have not received appropriate protection and assistance, while their abusers have been able to escape prosecution and financial liability.<sup>2</sup> Responding to this problem, the State of Illinois (the "State") has made significant progress in recognizing domestic violence as a pressing social and legal concern by enacting the Illinois Domestic Violence Act of 1986<sup>3</sup> (the "Domestic Violence Act" or the "Act"). Intending to recognize domestic violence as a serious crime, and acknowledging that the legal system has ineffectively dealt with the issue,<sup>4</sup> the Act provides a statutory framework for courts to issue protective orders and to impose criminal penalties for violations of these orders.<sup>5</sup>

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1. Though technically incorrect, for the purpose of this Essay the term "victims" will refer mainly to battered wives and their children. The author acknowledges the existence of battered husbands in this country, noting nevertheless that they are substantially smaller in number than their female counterparts.

2. See Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES 95, 101 (Michael Steinman ed., 1991); Raymond I. Parnas, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585, 598-99 (1970); Ellen Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLINE L. REV. 247, 247-49 (1983); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 162 (1990).

3. Pub. Act No. 84-1305, 1986 Ill. Laws 1602 (codified as amended at ILL. COMP. STAT. ANN. ch. 750, §§ 60/101 to 60/401 (West 1993 & Supp. 1995)).

4. ILL. COMP. STAT. ANN. ch. 750, § 60/102 (West Supp. 1995).

5. See, e.g., *id.* § 60/214 (describing the issuance of orders as well as available remedies). In August 1993, the State General Assembly further addressed the problem of family violence by making court supervision unavailable to those found guilty of domestic battery. *Id.* ch. 730, § 5/5-6-1(c).

This Essay addresses the various tools Illinois courts may use to enforce protective orders and criminal judgments effectively. First, this Essay reviews the remedies available to a petitioner obtaining a protective order.<sup>6</sup> Next, it examines the vital role "victim court advocates"<sup>7</sup> play in assisting victims.<sup>8</sup> This Essay then discusses various means available to enforce protective orders,<sup>9</sup> and some common administrative problems in the entry of such orders.<sup>10</sup> It next examines the process of enforcing criminal charges, from arresting batterers through imposing court-mandated treatment programs.<sup>11</sup> Finally, this Essay concludes that, as the public becomes better-educated about domestic violence, the criminal justice system will respond more effectively.<sup>12</sup>

## II. ORDERS OF PROTECTION—AVAILABLE REMEDIES

Civil orders of protection, designed to separate the parties and prevent unlawful conduct, offer a wide range of remedies. Accordingly, the primary purpose of such orders is not to punish past conduct, but to prevent future harm. The Domestic Violence Act sets forth seventeen remedies available to petitioners, some of which a court may not grant at the *ex parte* stage.<sup>13</sup> If a court finds past abuse and likely future irreparable injury, it may issue an order of protection and grant the following remedies to petitioners:

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Illinois has not been alone in addressing this problem. Various other jurisdictions have developed domestic violence protocols which coordinate efforts to charge, prosecute, and sentence batterers. These protocols include mandatory arrest policies, vigorous prosecutions, support services for victims, and court-mandated treatment programs for defendants. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-38b (West Supp. 1994); D.C. CODE ANN. § 16-1031 (Supp. 1994); FLA. STAT. ANN. § 741.30(9)(b) (West Supp. 1995); KAN. STAT. ANN. § 22-2307 (Supp. 1994); MINN. STAT. ANN. § 629.72(1) (West Supp. 1995). *See also Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1506-20 (1993) [hereinafter *Legal Responses to Domestic Violence*] (discussing tools utilized by various jurisdictions to combat domestic violence); Diane F. Medley, Comment, *Separating the Victim from the Abuser: Chapter 94-135 and the Florida Legislature's Most Recent Attempts to Control Domestic Violence*, 7 ST. THOMAS L. REV. 169 (1994) (discussing Florida's response to domestic violence). *See also infra* notes 75-76 and accompanying text for a description of the protocol in DuPage County, Illinois.

6. *See infra* part II.

7. *See infra* part III.

8. *See infra* part III.

9. *See infra* part IV.

10. *See infra* part V.

11. *See infra* parts VI-X.

12. *See infra* part XI.

13. ILL. COMP. STAT. ANN. ch. 750, § 60/214 (West Supp. 1995).

1. A court may prohibit abuse, neglect, or exploitation by the respondent.<sup>14</sup> This remedy includes a prohibition of "harassment, interference with personal liberty, intimidation of a dependent, physical abuse, willful deprivation, neglect, exploitation, . . . or stalking."<sup>15</sup> Courts universally grant this remedy upon issuing a protective order.<sup>16</sup>

2. A court may grant exclusive possession of the petitioner's residence, without affecting title to the property.<sup>17</sup> Courts may grant this remedy on an emergency basis.<sup>18</sup>

3. A court may issue a "stay away" order against the respondent, including orders to stay away from the petitioner's school, work, or other specified places at times when the petitioner is present.<sup>19</sup>

4. A court may order counseling for the respondent, including psychological, psychiatric, or alcohol and substance abuse counseling.<sup>20</sup> This remedy is available only if the respondent has been personally served, has answered, or has made a general appearance.<sup>21</sup>

5. A court may award physical care and possession of a minor child to the petitioner.<sup>22</sup> This remedy is available on an emergency basis.<sup>23</sup>

6. A court may award temporary legal custody of a minor child to the petitioner.<sup>24</sup>

7. A court may determine the respondent's visitation rights.<sup>25</sup> The order must specify dates and times of visitation, and any other specific conditions, such as supervised visitation.<sup>26</sup>

8. A court may prohibit the respondent from removing a minor from the state or concealing a minor child within the state.<sup>27</sup>

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14. *Id.* § 60/214(b)(1).

15. *Id.*

16. Courts grant this remedy because it essentially prohibits the respondent from criminal conduct or the type of abuse that supported the entry of the order.

17. ILL. COMP. STAT. ANN. ch. 750, § 60/214(b)(2).

18. *Id.* The statute does not specifically prohibit courts from granting this remedy on an emergency basis.

19. ILL. COMP. STAT. ANN. ch. 750, § 60/214(b)(3).

20. *Id.* § 60/214(b)(4).

21. *Id.* § 60/210(d).

22. *Id.* § 60/214(b)(5).

23. *Id.* The statute does not specifically prohibit courts from granting this remedy on an emergency basis.

24. ILL. COMP. STAT. ANN. ch. 750, § 60/214(b)(6).

25. *Id.* § 60/214(b)(7).

26. *Id.*

27. *Id.* § 60/214(b)(8).

9. A court may order the respondent to appear in court, with or without any minor children.<sup>28</sup>

10. A court may grant possession, though not title, of personal property to the petitioner, provided the order specifically identifies such property.<sup>29</sup>

11. A court may order the protection of certain items of specified personal property.<sup>30</sup>

12. A court may award temporary support of the petitioner or any minor children.<sup>31</sup> This remedy is available only if the respondent has been personally served, has answered, or has made a general appearance.<sup>32</sup>

13. A court may order the payment of any losses suffered by the petitioner.<sup>33</sup> This remedy is available only if the respondent has been personally served, has answered, or has made a general appearance.<sup>34</sup>

14. A court may prohibit entry to the petitioner's residence while the respondent is under the influence of alcohol or drugs and constitutes a threat to the safety of the petitioner or minor children.<sup>35</sup>

15. A court may prohibit the respondent's access to records, including school or other records of a minor child in the care of the petitioner.<sup>36</sup> This remedy is available only when a court has prohibited the respondent from having contact with the minor child,<sup>37</sup> if the petitioner's address is omitted from records filed with the court,<sup>38</sup> or if necessary to prevent the abuse, concealment, or removal of a minor child.<sup>39</sup>

16. A court may order the payment of shelter services by the respondent.<sup>40</sup> This remedy is available only if the respondent has been personally served, has answered, or has made a general appearance.<sup>41</sup>

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28. *Id.* § 60/214(b)(9).

29. *Id.* § 60/214(b)(10). If the order does not specifically identify the property, courts may not enforce the remedy.

30. ILL. COMP. STAT. ANN. ch. 750, § 60/214(b)(11).

31. *Id.* § 60/214(b)(12).

32. *Id.* § 60/210(d).

33. *Id.* § 60/214(b)(13).

34. *Id.* § 60/210(d).

35. *Id.* § 60/214(b)(14).

36. *Id.* § 60/214(b)(15).

37. *Id.*

38. *Id.* For further explanation of removing the petitioner's address, see *id.* § 60/203(b).

39. *Id.* § 60/214(b)(15).

40. *Id.* § 60/214(b)(16).

41. *Id.* § 60/210(d).

17. A court may order injunctive relief.<sup>42</sup> Courts often use this remedy as a "no contact" order or to limit contact for a specified purpose, such as supervised visitation.<sup>43</sup>

### III. VICTIM COURT ADVOCATES

Battered women's shelters and other social agencies may offer victims of domestic violence a variety of support services, including providing victim court advocates to assist in court proceedings. The contribution of these advocates in achieving the stated goals of the Domestic Violence Act is invaluable.<sup>44</sup> These advocates are often the victim's first source of information about obtaining protective orders.

Moreover, these advocates provide vital guidance in shepherding the pro se victim through the legal process. Oftentimes, the victim suffers from emotional and physical trauma and is ill-equipped to complete the process without an advocate's support. Advocates also assist in the enforcement process by encouraging victims to testify, as well as by providing support throughout the trial and sentencing hearings. Although prosecutors are charged with the duty of preparing and trying the criminal charges, victim advocates can give witnesses the emotional support necessary to follow through and cooperate with the prosecutors' efforts.

While the judge's role is to be an impartial arbiter of the facts and the law, the court must also understand the dynamics of domestic violence. The reluctance of victims to testify, coupled with the potential for further and increased violence, justifies the court's marshaling of all available resources to administer justice effectively. Since victim advocates are often more successful than prosecutors in encouraging victims to follow through on criminal charges, courts may refer pro se litigants to local victim advocacy agencies. For example, when issuing emergency protective orders or when dismissing criminal charges because victims recant, judges may not only refer victims to local domestic violence shelters,<sup>45</sup> but also under appropriate circumstances refer victims directly to advocates in the courtroom.<sup>46</sup>

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42. *Id.* § 60/214(b)(17).

43. *See id.* Such an order is injunctive relief pursuant to statute. Courts enter it to prevent further abuse, neglect, or exploitation, or to effectuate one of the other remedies. *Id.*

44. For a description of these goals, see *id.* § 60/102.

45. Under such circumstances, the author will often distribute shelter service cards to the victims from the bench.

46. In this situation, the author has physically directed victims to advocates present in her courtroom.

Victim advocates play a vital role in helping the legal system protect victims of domestic violence. The earlier a victim reaches an advocate, the more beneficial the advocate's involvement can be. Victim advocates, who are often located at shelters, police stations, and in courtrooms, assist domestic abuse victims in obtaining safe shelter, in receiving orders of protection, and in referring the victims to agencies for legal, medical, psychological, or economic assistance. Some domestic violence protocols require arresting officers to advise the shelter shortly after every domestic battery arrest.<sup>47</sup> Because Illinois law provides that defendants out on bail must avoid contact with victim family members for seventy-two hours,<sup>48</sup> if arresting officers advise shelters of the arrest during this time period, victims can receive help in obtaining a protective order before the time period expires. This enables victims to remain in their homes under the shield of an emergency protective order.<sup>49</sup>

#### IV. ENFORCING PROTECTIVE ORDERS

Without a viable means of enforcement, a protective order provides no more protection than the thin sheet of paper on which it is written. In fact, without viable enforcement, such an order may increase a victim's danger by creating a false sense of security. Courts may enforce a protective order only if the respondent intentionally violates the order after knowing of its contents.<sup>50</sup> Nevertheless, even if offen-

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47. See *supra* note 5. The DuPage County, Illinois, Domestic Violence Protocol requires an arresting officer to contact the shelter in the county where the arrest occurred as soon as possible. If necessary, the arresting officer may then assist the victim to the shelter. DUPAGE COUNTY STATE'S ATTORNEY TASK FORCE ON DOMESTIC VIOLENCE, THE DUPAGE COUNTY DOMESTIC VIOLENCE MANUAL 1-6 (rev. 1993) [hereinafter DOMESTIC VIOLENCE MANUAL]. Specifically § 8 of this manual provides that an arresting officer should "[i]mmediately contact[] the victim advocacy service (Family Shelter) for victim assistance following a domestic violence related incident if the victim advocacy services are needed on site. Otherwise, the victim advocacy service should be called within the officer's tour of duty." *Id.*

48. ILL. COMP. STAT. ANN. ch. 725, § 5/110-10(d)(1). For further discussion of this provision, see *infra* part VII.

49. By forcing the alleged abuser to leave the residence, if he lives there, or to stay away from the victim's residence, if he does not live there, the victim can feel secure in her own home and need not immediately go to the local shelter.

50. ILL. COMP. STAT. ANN. ch. 750, § 60/223(d). The Act continues:

[T]he respondent has actual knowledge of [the] contents [of an order of protection if] as shown through one of the following means:

- (1) By service, delivery, or notice under [ILL. COMP. STAT. ANN. ch. 750, § 60/210 (describing service of orders of protection)].
- (2) By notice under [ILL. COMP. STAT. ANN. ch. 750, § 60/210.1 or 211 (describing service in conjunction with a pending civil case or hearings)].
- (3) By service of an order of protection under [ILL. COMP. STAT. ANN. ch.

ders know of these orders and their contents, if they do not perceive any meaningful risk of being arrested, they may violate orders routinely. For such an order to have any "teeth," the court system must monitor compliance and victims must report violations. Most importantly, police, prosecutors, and judges must respond sternly to reported violations.

Courts may enforce violations through either civil or criminal contempt proceedings.<sup>51</sup> Civil contempt proceedings may be appropriate to achieve compliance with certain remedies, such as the payment of support, losses, or shelter services, but such proceedings are generally discouraged for violations alleging further abuse or harassment.<sup>52</sup> A finding of civil contempt is not intended to punish, but rather to secure compliance with the court's directive.<sup>53</sup> In fact, law enforcement officers have no immediate powers to arrest for civil contempt because the defendant must be given an opportunity to "undo" his behavior.<sup>54</sup> Therefore, in cases where a violation does not otherwise qualify as an arrestable offense, civil contempt proceedings provide ineffective immediate protection to a victim.<sup>55</sup>

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750, § 60/222 (describing service by the sheriff)].

(4) By other means demonstrating actual knowledge of the contents of the order.

*Id.*

51. See *id.* § 60/223(b).

52. See generally PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 49-63 (National Institute of Justice Issues and Practices, 1990) (discussing enforcement of civil protection orders); *Legal Responses to Domestic Violence*, *supra* note 5 (discussing effective remedies to combat domestic violence).

53. See *In re Marriage of Logston*, 469 N.E.2d 167, 177 (Ill. 1984); *People ex rel. Chicago Bar Ass'n v. Barasch*, 173 N.E.2d 417, 418 (Ill. 1961); *In re Marriage of Betts*, 558 N.E.2d 404, 415-16 (Ill. App. 4th Dist. 1990), *appeal denied*, 567 N.E.2d 328 (Ill. 1991).

54. See *Logston*, 469 N.E.2d at 177 (stating that a civil contemnor must have an opportunity to purge himself of the contempt finding by complying with the pertinent court order).

55. Most civil contempt orders do not provide for immediate incarceration, but rather delay incarceration so as to afford contemnors the opportunity to comply with the court order. For example, in *Logston*, a civil contempt order sentenced Eugene Logston to not more than six months in jail. *Id.* The order allowed him to purge himself of contempt and avoid serving any of the sentence, however, by complying with the court's order within 30 days. *Id.*

Indirect criminal contempt<sup>56</sup> may also be a ground to enforce protective orders,<sup>57</sup> though it may also prove to be ineffective in situations where the victim needs immediate action. A finding of indirect criminal contempt generally must conform to the same constitutionally mandated due process requirements that are available to all criminal defendants.<sup>58</sup> Thus, because a court cannot summarily find and punish an individual through an indirect finding of criminal contempt, such a finding fails to provide an effective, immediate scheme of enforcement.

Nevertheless, Illinois has adopted the preferred scheme of enforcement—criminal prosecution—and has authorized police officers to make warrantless arrests of those violating protective orders.<sup>59</sup> This scheme grants police officers clear authority to detain not only those whom they witness violating an order, but also those whom they have probable cause to believe committed a violation, even if not in the presence of the officers.<sup>60</sup> Furthermore, Illinois prescribes that those who knowingly violate “restraining” orders of protection<sup>61</sup> are guilty of Class A misdemeanors,<sup>62</sup> and those intentionally abducting chil-

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56. Illinois law divides contempt into direct and indirect contempt. *People v. Jashunsky*, 282 N.E.2d 1, 3 (Ill.), *cert. denied*, 409 U.S. 989 (1972). Direct criminal contempt is contemptuous conduct occurring within the presence of the judge so that all elements of the offense are within the judge’s personal knowledge. *People v. L.A.S.*, 490 N.E.2d 1271, 1273 (Ill. 1986). In contrast, indirect contempt is contemptuous conduct occurring outside of the presence of the court so that the court must depend upon evidence of which the judge has no judicial notice. *Id.*; *People v. Harrison*, 86 N.E.2d 208, 210 (Ill. 1949); *see also* James A. Francque, Note, *People v. Simac: How Much is too Much Advocacy?*, 26 LOY. U. CHI. L.J. 793, 795-800 (1995) (discussing the differences between direct and indirect contempt).

57. *See* ILL. COMP. STAT. ANN. ch. 750, § 60/223(b).

58. *In re Betts*, 558 N.E.2d at 425. In *Bloom v. Illinois*, 391 U.S. 194 (1968), the United States Supreme Court stated that a defendant is entitled to a jury trial under the Fifth and Fourteenth Amendments when the punishment for contempt indicates that it is a serious offense. *Id.* at 198. Moreover, the Court specifically stated that this is a right that does not apply to petty offenses. *Id.* at 209; *cf.* *People v. Carter*, 267 N.E.2d 362, 364 (Ill. App. 2d Dist. 1971) (holding that a contemnor sentenced to six months for indirect criminal contempt was not deprived of the constitutional right to a trial by jury).

59. ILL. COMP. STAT. ANN. ch. 750, § 60/301(a).

60. *Id.*

61. For the purpose of this Essay, “restraining” orders of protection are those which prohibit abuse, neglect, or exploitation; grant exclusive possession of the petitioner’s residence; order the respondent to stay away; or prohibit the respondent from entering the residence while under the influence of alcohol or drugs. For a description of these remedies, *see id.* § 60/214(b)(1), (2), (3), (14); *supra* notes 14, 17, 19, 35, and accompanying text.

62. ILL. COMP. STAT. ANN. ch. 720, § 5/12-30(d). While the first violation of an order of protection is generally a Class A misdemeanor, a second or subsequent violation is a Class 4 felony. *Id.*

dren<sup>63</sup> are guilty of a Class 4 felony.<sup>64</sup>

The Domestic Violence Act "encourages" a judge to impose a minimum of twenty-four hours imprisonment for respondent's first misdemeanor violation and a minimum of forty-eight hours imprisonment for a second or subsequent violation.<sup>65</sup> Although sentence length is at the discretion of the sentencing court, the statute suggests that these minimums be imposed "unless the court explicitly finds that an increased penalty or that period of imprisonment would be manifestly unjust."<sup>66</sup> This language seems to require that the court state on the record at the sentencing hearing why imprisonment was not imposed. Additionally, a sentencing court may consider evidence of any violations of a protective order to increase, modify, or revoke bail on an underlying criminal charge, or to modify the order itself.<sup>67</sup> Certainly, a court may also revoke or modify any prior court supervision or conditional discharge on this basis.

## V. ADMINISTRATIVE ISSUES

Any court having jurisdiction can enter orders of protection.<sup>68</sup> Nevertheless, judges usually enter these orders in a domestic relations court, criminal court, after-hours court, or bond court duty judge setting. The Domestic Violence Act is clearly intended to make the court system "user friendly" to victims of abuse, encouraging the entry of protective orders to avoid future harm.<sup>69</sup>

Unfortunately, in practice, obtaining a protective order often becomes a race to the courthouse between the parties involved in a domestic dispute. Moreover, litigants may misuse the process as a sword in a hotly contested divorce proceeding, rather than as a shield. As a result, different courts may issue conflicting orders, leaving the police to decide which orders to enforce and how to deal with any

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63. Child abductors may also violate orders of protection which govern the physical care and possession of the child, grant temporary legal custody of the child, or prohibiting the removal or concealment of the child. *See id.* ch. 750, § 60/214(b)(5), (6), (8); *supra* notes 22, 24, 27, and accompanying text.

64. ILL. COMP. STAT. ANN. ch. 720, § 5/10-5(d) (West 1993). Violations of custody or support orders may also be enforced under the Illinois Marriage and Dissolution of Marriage Act. *See id.* ch. 750, § 5/611.

65. *Id.* § 60/223(g)(3) (West Supp. 1995); *cf. id.* ch. 720, § 5/12-30(d) (imposing 24 hours of imprisonment for a second offense under the criminal code).

66. *Id.* ch. 750, § 60/223(g)(3)(iii); *cf. id.* ch. 720, § 5/12-30(d) (containing similar language).

67. *Id.* ch. 750, § 60/223(g)(4).

68. *Id.* ch. 720, § 5/12-30(b); *id.* ch. 725, § 5/112A-9 (West 1993); *id.* ch. 750, § 60/223(b) (West Supp. 1995).

69. *See id.* ch. 750, § 60/102 (West Supp. 1995) (describing the purposes of the Act).

mutually exclusive remedies, such as exclusive possession of a residence granted to both parties.

The Act attempts to deal with this problem by prohibiting "mutual" orders of protection and discouraging "correlative separate" orders.<sup>70</sup> In light of the potential for entering a conflicting order, a judge considering a petition for an order of protection should always determine if there is any other action pending between the parties. If so, the judge presiding over that action should hear the petition. For example, if a criminal charge of domestic battery is pending and either the victim or the defendant wishes to obtain a protective order, both parties should present their petitions to the judge hearing the criminal case, so that there is less likelihood of different judges entering conflicting orders.

Nevertheless, consolidating petitions into pending divorce or criminal files will not always alleviate the potential for conflict. In some cases, a court will issue an emergency order of protection before any criminal charges are filed, resulting in two separate case files. For example, if a defendant obtains an order and later faces criminal charges, the victim may then seek an emergency order during the seventy-two hour bond "stay away" restriction.<sup>71</sup> This creates a potential for further conflict and violence if both parties attempt to enforce their own orders, particularly if the orders grant such remedies as exclusive possession or physical care of a minor child, or possession of certain personal property.

Understanding this administrative nightmare, however, does nothing more than provide a wake-up call to judges responsible for hearing these petitions. Conventional wisdom suggests that if petitioners provide credible bases for courts to grant protection, judges should enter orders liberally in order to protect potential victims. Illinois safeguards a respondent's due process rights by making a hearing available within two days of the entry of an emergency order.<sup>72</sup> The only true resolution of these conflicts, however, is to rely upon the judge's determination of whether abuse truly occurred in the past and the likelihood of irreparable injury if the respondent was given prior notice of the petition.<sup>73</sup>

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70. *Id.* § 60/215.

71. For a description of this provision, see *id.* ch. 725, § 5/110-10(d); text accompanying *supra* note 48; *infra* part VII.

72. ILL. COMP. STAT. ANN. ch. 750, § 60/224(d).

73. Due to the *ex parte* nature of an emergency hearing for an order of protection, many petitioners believe that prior notice to a respondent will trigger further abuse.

## VI. CRIMINAL ENFORCEMENT

The Domestic Violence Act mandates that all law enforcement agencies develop and implement written policies concerning arrest procedures for domestic violence incidents.<sup>74</sup> In response, several counties have developed domestic violence protocols to comply with the Act and further its purpose in recognizing domestic violence as a serious crime. For example, the DuPage County Domestic Violence Protocol (the "DuPage County Protocol") has a mandatory arrest protocol, calling for a police officer to make an arrest when probable cause exists in domestic violence cases involving one of five circumstances: (1) when the abuser commits a felony; (2) when the officer sees visible signs of injury, or when the abuser uses a weapon to inflict injury, intimidate, or threaten a victim; (3) when the abuser commits a misdemeanor and the officer is aware that the abuser has committed other acts of domestic violence in the past; (4) when the officer witnesses the offense; or (5) when the officer confirms that a valid order of protection is in effect, and that the abuser has violated a condition of the order.<sup>75</sup> The DuPage County Protocol also requires a police officer to: (1) offer the victims of abuse transportation to a medical facility for treatment if necessary; (2) provide information and assistance about petitioning for an emergency protective order; (3) advise that, even if the officer does not arrest the abuser, the victim still has a right to file a criminal complaint at a later date; (4) stress the importance of preserving evidence, such as photographing visible injuries; and (5) contact the victim advocacy service for assistance during the officer's shift, or immediately if the victim needs on-site advocacy services.<sup>76</sup>

Any law enforcement protocol is only as effective as the agency's officer education, training, and compliance. Unfortunately, old habits die hard. For example, in one case, the police told the advocate that the abuser was only affected by the hot weather and that "when it cools off, he will cool off."<sup>77</sup> The traditional "walk around the block" to "let things cool down" should be a police response of the past. It is clear, however, that both the police and the public will continue to grow more sensitive to this issue and comply with law enforcement protocols as awareness of this issue increases.

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74. ILL. COMP. STAT. ANN. ch 750, § 60/301.1.

75. DOMESTIC VIOLENCE MANUAL, *supra* note 47, at 1-8 to 1-9.

76. *Id.* at 1-5 to 1-6.

77. Deborah Nelson & Rebecca Carr, *Cops Faulted in Domestic Cases*, CHI. SUN-TIMES, June 22, 1994, at 6.

Perhaps the easiest way to encourage police officers' compliance with law enforcement protocols is to publicize the potential for civil liability if an officer fails to properly respond to a domestic dispute. Notwithstanding this view, however, the Act specifically limits law enforcement liability. Under the Act, law enforcement officers acting in good faith to render emergency assistance or to otherwise enforce the Act shall be immune from civil liability unless their misconduct is willful or wanton.<sup>78</sup> Victims are now challenging this immunity in the courts.<sup>79</sup>

Several courts have ruled that police have an affirmative duty to protect against domestic violence.<sup>80</sup> For example, in *Thurman v. City of Torrington*,<sup>81</sup> a federal district court denied a motion to dismiss a complaint which alleged that a municipality and its police officers failed to perform their official duties to protect a victim of domestic violence.<sup>82</sup> The *Thurman* court opined that the police may not treat instances of domestic violence less seriously than other types of assault simply because of the relationship between the two persons involved,<sup>83</sup> and that a municipality must enforce laws against domestic violence just as it enforces those against any other kind of violence.<sup>84</sup>

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78. ILL. COMP. STAT. ANN. ch. 750, § 60/305 (West 1993). The Act also immunizes the officer's supervisor or employer. *Id.*

79. In June 1994, six women filed a federal class action suit charging the Chicago Police Department with failing to enforce the Act. *McDonald v. City of Chicago*, No. 94 C 3623 (N.D. Ill. filed June 13, 1994); *Finley v. City of Chicago*, No. 94 C 3624 (N.D. Ill. filed June 13, 1994).

80. *Cf. Cooper v. Molko*, 512 F. Supp. 563, 567-68 (N.D. Cal. 1981) (holding that the failure to take reasonable measures to protect the civil rights of those the police have reason to believe may be threatened is a denial of equal protection of the laws and is actionable under 42 U.S.C. § 1983 (1988)); *Huey v. Barloga*, 277 F. Supp. 864, 872-73 (N.D. Ill. 1967) (same).

81. 595 F. Supp. 1521 (D. Conn. 1984).

82. *Id.* at 1527-29. The complaint was brought under 42 U.S.C. § 1983 and the Equal Protection Clause of the Constitution. *Id.* at 1524. In *Thurman*, the plaintiff alleged that her estranged husband had repeatedly harassed, threatened, and assaulted her, violating his probation as well as a restraining order. *Id.* at 1524-26. During this time, the plaintiff alleged that the police had continually refused to accept her complaints or arrest her estranged husband. *Id.*

83. *Id.* at 1528.

84. *See id.* at 1527. Law enforcement has a particular duty to enforce civil protection orders. In *Baker v. City of New York*, 269 N.Y.S.2d 515 (N.Y. App. Div. 1966), a New York appellate court acknowledged that although "[a] municipality may not be held liable for [the] failure to provide general police protection . . . there may be liability if there exists on the part of the municipality 'some relationship \* \* \* creating a duty to use due care for the benefit of particular persons or classes of persons.'" *Id.* at 518 (citations omitted) (quoting *Motyka v. City of Amsterdam*, 204 N.E.2d 635, 637 (N.Y. 1965)). The *Baker* court went on to state that the plaintiff, holding an unenforced order of protection, was one to whom the city owed such a special duty, noting that she "was .

Therefore, although the Act grants partial immunity to Illinois law enforcement officers, police officers may not disregard their responsibilities to enforce protective orders or make arrests when they believe there is probable cause that a domestic battery has occurred.

## VII. BOND RESTRICTIONS

Just as protective orders may protect domestic violence victims from future harm, bond restrictions may also guarantee victims some form of protection. Under Illinois law, when a person is charged with a criminal offense and the victim is a family or household member, the court shall impose conditions at the time of the defendant's release on bond that will restrict the defendant's access to the victim.<sup>85</sup> Unless the court provides otherwise, these restrictions shall include requirements that the defendant (1) refrain from contact with the victim for at least seventy-two hours after being released; and (2) refrain from entering or remaining at the victim's residence for at least seventy-two hours after being released.<sup>86</sup>

This "stay away" provision is most helpful to victims. The provision gives the victim a window of opportunity to obtain an order of protection so that the no-contact order and any exclusive possession can be continued for a longer period of time. Furthermore, if such a defendant should knowingly violate a condition of his release, he may be charged with the criminal offense of violation of bail bond, a Class

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... singled out by [the] judicial process as a person in need of special protection." *Id.*

Later, in 1978, the New York City Police Department settled a suit brought by 12 battered women claiming that their pleas for help had been largely ignored. *Bruno v. Codd*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd*, 393 N.E.2d 976 (N.Y. 1979). Under the terms of the settlement, the police department signed a consent decree, agreeing:

[T]o respond swiftly to every request for protection and, as in an ordinary criminal case, to arrest the husband whenever there is reasonable cause to believe that a felony has been committed against the wife or that an order of protection or temporary order of protection has been violated. Moreover, [under the terms of the decree,] officers [agree] to remain at the scene of the alleged crime or violation in order to terminate or prevent the commission of further offenses and to provide the wife with other assistance. To assure that these undertakings are fulfilled, supervisory police officers [agree] to make all necessary revisions in their disciplinary and other regulations.

*Bruno*, 393 N.E.2d at 980.

85. ILL. COMP. STAT. ANN. ch. 725, § 5/110-10 (West Supp. 1995).

86. *Id.* The 72 hour period is only a minimum; the judge who sets bond in a domestic case may require that the defendant have absolutely no contact with the victim until the case is resolved, effectively extending the stay away bond restriction provided under the statute. In addition, the statute requires that local law enforcement agencies develop standardized bond forms for use in cases involving family or household members. *Id.* § 5/110-10(e).

A misdemeanor.<sup>87</sup>

### VIII. DURATION OF PLENARY ORDERS OF PROTECTION IN CRIMINAL CASES

When plenary orders of protection are issued in conjunction with a pending criminal case, there is always an issue as to how long the order should remain in effect without further review. The Domestic Violence Act attempts to delineate these terms.<sup>88</sup> Nevertheless, the Act fails to advise whether plenary orders of protection should track the criminal charge until disposition or simply last for two years upon issuance. When making this key decision, a judge should consider the victim's inconvenience in returning to extend her order, especially when the criminal case is continued, either for the failure of the defendant to appear or upon the motion of either party. Notwithstanding this concern, however, a judge should also consider the defendant's rights. If the State ultimately dismisses the criminal case, or the court finds the defendant not guilty, a thoughtless two-year extension seems to abrogate the defendant's due process rights. This issue is most bothersome when the remedy at issue is the exclusive possession of a household, the temporary legal custody of a minor child, or the possession of certain personal property.

To avoid this potential abrogation of a defendant's due process rights, a judge should continue a plenary order of protection issued during a defendant's pre-trial release period up to the trial date. If the defendant is found guilty at trial, then the judge may extend the order

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87. *Id.* ch. 720, § 5/32-10(b).

88. The Act provides:

A plenary order of protection entered in conjunction with a criminal prosecution shall remain in effect as follows:

- (i) if entered during pre-trial release, until disposition, withdrawal, or dismissal of the underlying charge; if, however, the case is continued as an independent cause of action, the order's duration may be for a fixed period of time not to exceed 2 years;
- (ii) if in effect in conjunction with a bond forfeiture warrant, until final disposition or additional period of time not exceeding 2 years; no order of protection, however, shall be terminated by a dismissal that is accompanied by the issuance of a bond forfeiture warrant;
- (iii) until expiration of any supervision, conditional discharge, probation, periodic imprisonment, parole or mandatory supervised release and for an additional period of time thereafter not exceeding 2 years; or
- (iv) until the date set by the court for expiration of any sentence of imprisonment and subsequent parole or mandatory supervised release and for an additional period of time thereafter not exceeding 2 years.

*Id.* ch. 750, § 60/220(b)(2). The Act does not define what it means to have a criminal case continued as an "independent cause of action."

of protection for the period of the sentence. If the criminal charge is dismissed, or if the defendant is found not guilty, however, it is then incumbent upon the victim to establish by a preponderance of the evidence that the court should extend the order as an "independent cause of action."<sup>89</sup> The judge may then make an evidentiary determination of the victim's claims.

### IX. THE RELUCTANT VICTIM

One of the greatest problems in dealing with criminal charges of domestic violence is the victim's reluctance to cooperate with the prosecution's effort to convict the defendant. Due to the unique nature of the offense, and the defendant's access to the victim, the injured party may not wish to come forth to testify for a variety of reasons. The victim may feel intimidated or fear losing financial support, or the victim may reconcile with the defendant and not wish to jeopardize the current harmony between them. Finally, the victim may simply prefer to rely upon "the devil she knows" than upon a complicated and forbidding criminal justice system that she does not know. For whatever reason, the burden of pressing charges often seems too great for a domestic violence victim to bear.

In an effort to ease the burden on the victim, many prosecuting agencies have attempted to shift the burden of pressing charges to the State. If a victim wishes to drop charges, the standard response by both the prosecution and the court is that the State of Illinois *is* prosecuting the case and intends to proceed to trial. The prosecuting agencies will then consider dismissing the charges only when the credibility of the victim is in doubt or when the victim will testify substantially differently from her prior statements or police reports. Even so, however, the prosecutor generally needs supervisor approval for such a dismissal.

Under most domestic violence protocols, the State usually subpoenas the victim to testify at trial.<sup>90</sup> If the victim fails to comply with the subpoena, the prosecutor requests a rule to show cause why she should not be held in contempt.<sup>91</sup> If the victim still fails to appear in court, the State may request a writ of attachment.<sup>92</sup> The court must then decide whether the victim should be physically arrested and held

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89. See *id.* § 60/220(b)(2)(i); *supra* note 88 and accompanying text.

90. DOMESTIC VIOLENCE MANUAL, *supra* note 47, at 2a-5. In the author's experience, this is not only the policy in DuPage County, Illinois, but also in various other county protocols.

91. DOMESTIC VIOLENCE MANUAL, *supra* note 47, at 2a-5.

92. *Id.*

in jail on the contempt charge.<sup>93</sup>

If the victim-witness complies with the subpoena and comes to court, she may decide to assert the Fifth Amendment privilege against self-incrimination.<sup>94</sup> This privilege does not exist unless there are reasonable grounds to fear self-incrimination.<sup>95</sup> Once a witness asserts her Fifth Amendment privilege against self-incrimination, the court must determine if there is a real danger of incrimination.<sup>96</sup> If the State grants the victim immunity,<sup>97</sup> however, the court can compel the victim to testify, backed up with the threat of contempt of court charges.<sup>98</sup>

## X. BATTERERS' TREATMENT PROGRAMS

Research suggests that the key to any effective sentence for domestic violence is the requirement that the defendant complete a batterers' treatment or counseling program.<sup>99</sup> The Domestic Violence Advisory Council in Illinois has recently completed a draft proposal for an Illinois protocol for domestic abuse batterers' programs.<sup>100</sup> This protocol sets forth the necessary program goals, structure, content, standards, accountability, and fee structure, and deals with the necessity for specially trained counselors and support staff.<sup>101</sup>

In an effort to provide some basis for monitoring the counseling that defendants receive from sources of their own choosing, DuPage

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93. In her courtroom, the author has declined to go this far, believing that it further victimizes individuals who may have legitimate fears of coming to court. Moreover, the author believes that victim court advocates can provide invaluable assistance in determining the reason why a witness is choosing to disobey a court subpoena.

94. Generally, the incrimination would relate to either a potential charge for filing a false police report or to a complaint for domestic battery, with the defendant as a victim.

95. *In re Zisook*, 430 N.E.2d 1037, 1041 (Ill. 1981), *cert. denied*, 457 U.S. 1134 (1982). Neither an unreasonable fear of self-incrimination nor a mere reluctance to testify is a ground for claiming the privilege. *Id.*

96. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *People v. Redd*, 553 N.E.2d 316, 339 (Ill. 1990). The witness is not required to prove that the answer to a particular question would necessarily subject her to prosecution. *Hoffman*, 341 U.S. at 486-87. Otherwise, she would be compelled to surrender the very protection which the privilege is designed to guarantee. *Id.*

97. See ILL. COMP. STAT. ANN. ch. 725, §§ 5/106-1 to 5/106-2 (West 1993).

98. *Id.* § 5/106-3. When a witness is granted immunity, the witness is granted transactional immunity, under which the witness is fully immunized from prosecution for any offense to which the compelled testimony may relate. *Id.* § 5/106-2. If the State grants immunity under such statutory authority, the granting of immunity must strictly comply with the terms of the statute. *People v. Goodwin*, 499 N.E.2d 119, 121 (Ill. App. 4th Dist. 1986), *appeal denied*, 505 N.E.2d 357 (Ill. 1987).

99. See FINN & COLSON, *supra* note 52, at 44.

100. ILLINOIS DEPARTMENT OF PUBLIC AID, DOMESTIC VIOLENCE ADVISORY COUNCIL, ILLINOIS PROTOCOL FOR DOMESTIC ABUSE BATTERERS PROGRAMS (1994).

101. *Id.*

County has developed recommended standards for the treatment of perpetrators of domestic violence.<sup>102</sup> DuPage County has also developed a three-tier County Batterers' Program which begins with an evaluation to determine the appropriateness of treatment and to decide which treatment tract best suits the defendant's needs. The evaluation costs \$150. Following the evaluation, the defendant may take part in one of three different programs described in turn below:

1. A remedial program, consisting of six sessions, totaling nine hours. This program involves an anger management seminar designed to educate and alert clients to the necessity for managing their anger. The remedial program, including the evaluation, costs \$330.
2. The standard program, consisting of a twelve-week psycho-educational group, followed by five monthly monitoring groups. The standard program, including the evaluation, costs \$650.
3. The intensive program, consisting of a twelve-week psycho-educational group, followed by an eighteen-week process group. The intensive program, including the evaluation, costs \$1,130.<sup>103</sup>

If a court sentences a defendant to complete a domestic violence batterers' treatment program, and the court learns during the evaluation that alcohol or substance abuse problems need to be addressed, the court refers that defendant for substance abuse counseling before any violence counseling takes place.<sup>104</sup> Additionally, if an evaluator determines that the DuPage County program is inappropriate for the particular defendant, the evaluator will refer the defendant to the appropriate resource, either the Family Shelter Service or the Mental Health Department.<sup>105</sup>

## XI. CONCLUSION

Since the women's movement began in the late 1960s, the issue of domestic violence has significantly raised societal consciousness and

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102. See BILL MORGAN, DUPAGE COUNTY DOMESTIC VIOLENCE PROGRAM MANAGER, RECOMMENDED TREATMENT STANDARDS OF DUPAGE COUNTY FOR SERVICE PROVIDERS TO PERPETRATORS OF DOMESTIC VIOLENCE (1991).

103. DUPAGE COUNTY PSYCHOLOGICAL SERVICES, DOMESTIC VIOLENCE PERPETRATOR TREATMENT PROGRAM LEAFLET.

104. The author undertakes this practice because in her opinion courts cannot successfully address violence issues until substance abuse issues are resolved.

105. Usually these individuals are people with psychiatric problems or dual diagnoses issues.

has recently received national-media attention.<sup>106</sup> As a result, enforcement efforts can only improve. As the public becomes more educated about this problem, enforcement through the criminal justice system will become more effective. The statutory framework in Illinois provides a sound basis for attacking the problem of domestic abuse in this state. It is apparent that the attitudes of law enforcement officers, prosecutors, judges, and treatment counselors are evolving toward the belief that the court system must treat violence toward loved ones occurring behind closed doors in the same manner that it treats violence toward strangers occurring on the streets.

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106. *See generally* sources cited *supra* note 2.