

NEW DEVELOPMENTS IN DOMESTIC VIOLENCE LAW: HOUSE BILL 1738¹

On May 26, 2009, the Governor signed HB 1739 (Peters/Anderson) into law. This bill was a result of 2002 death reviews of domestic violence homicides in Oklahoma by the Domestic Violence Fatality Review Board, a legislatively created multi-disciplinary professional group, which found that of the 75 death cases, 59% of the murdered victims and perpetrators with children in common had joint custody and 50% of the homicides occurred during a child exchange.² That finding resulted in a system recommendation for the establishment of a legal presumption against joint legal custody in cases involving domestic violence. In 2006, headway was made with the passage of 43 O.S. Section 109.3 which did create a rebuttable presumption that it "is not in the best interests of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic

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²For more information on the 2002 deaths reviewed and statistics thereon as well as other annual reports of the Domestic Violence Fatality Review Board, please go to the website of the Office of the Attorney General, www.oag.ok.gov. The Board has recently been transferred from the Criminal Justice Resource Center to the Office of the Attorney General and the site may be still under construction for the DV Board.

abuse, stalking or harassing behavior has been established" by a preponderance of the evidence. However, many other issues remained to be addressed based on empirical studies of domestic violence, including the negative effects that an abusive parent has on children of the marriage or relationship. In the past, it was assumed that violence against one parent by another parent did not necessarily translate to harm to the children. However, that myth- while still believed by the uninformed- has been debunked by numerous studies, which includes one endorsed by the Oklahoma Institute for Child Advocacy know as the ACE study.³ Specifically, there is a co-occurrence of child abuse and neglect where domestic violence exists: child abuse and neglect is 15 times more likely to occur in homes where domestic violence takes place; boys from homes where domestic violence is present are 25 times more likely to commit rape as an adult and 6 times more likely to commit suicide.⁴ The development of the brain of children is negatively impacted as well as their ability to function in school and socially. The effects on children vary according to the child's age and exposure, but there is no

³This report is available on the Oklahoma Institute for Child Advocacy, www.oica.org under "Facts and Publications."

⁴ACE issue brief 3: domestic violence. Findings of the Adverse Childhood Experience (ACE) Study Oklahoma KIDS COUNT Factbook, 2006-2007, p.4.

doubt that children are affected and the violence or the power and controlling behavior of the abuser negatively impact not just the parent being abused, but the entire family. The family bar legal community has to recognize this immense impact on children, not only to their safety and that of the protective parent, but to the long term development of children and future generations.

Domestic violence is LEARNED behavior so to ignore its presence is encouraging the behavior. Domestic violence is a crime, not the act of a good parent.

THE PURPOSES OF HB1739

While Oklahoma does not recognize a source for legislative history, the authors of this bill were focused on the safety of children and protective parents in matters of family law. The "talking points" for this bill included the following:

1. Protect children and non-abusive parents from violence, thus saving lives and providing children with a safe and stable environment in which to grow;
2. Provide for a standardized approach in the Oklahoma Judicial system in cases involving domestic abuse, (which includes domestic violence, stalking & harassment), custody and visitation;

3. Raise the awareness of the dangers of failing to consider factors which protect children and parents of domestic violence through education and information of best practices;

4. Provide access to legal services which is the number one factor in removing children from violent households.

SUMMARY OF HB1739⁵

Section 1 (Amends 43 O.S. Section 109):

New law providing for a standard, common sense approach by courts and lawyers to the issue of domestic violence which raises public awareness on parent/child safety issues in connection with child custody and visitation cases in family court:

*creates a rebuttable presumption that it is in the best interest of a minor child to be placed with the non-abusive parent upon a finding by the judge that there is domestic violence, stalking or harassment in a custody proceeding.⁶

⁵A copy of the signed bill is included with the paper.

⁶EFFECTS OF BATTERING ON CHILDREN

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*Each year, an estimated 3.3 million children are exposed to violence against their mothers or female caretakers by family members.

*In homes where domestic violence occurs, fear, instability, and confusion replace the love, comfort, and nurturing that children need. These children live in constant fear of physical harm from the person who is suppose to care for and protect them. They may feel guilt at loving the abuser or blame themselves for causing the violence.

This recognizes the adverse effect violence in a household has on children, regardless of whether the child is physically harmed.

*redefines “stalking” to include behavior subject to criminal prosecution in title 22, section 1173 and includes modern means of stalking, like computer and electronic means;

*Establishes legislative policy that **safety of the child(ren) and victim of domestic violence** is of primary importance in cases involving stalking, harassment and domestic violence in matters relating to custody or visitation;

*expands the definition of domestic violence from threat or actual physical injury to the comprehensive behavior of batterers for purposes of determining child custody;

*prohibits using a parent's relocation due to safety reasons as a factor

*Boys who witness family violence are more likely to batter their female partners as adults than are boys raised in non-violent homes.

*Girls who witness their mother's abuse have a higher rate of being battered as adults.

* Forty to sixty percent (40-60%) of men who abuse women also abuse children.

*Children in homes where domestic violence occurs are physically abused or seriously neglected t a rate of 1, 500% higher than the national average in the general population.

*Sixty-two (62%) of young men between the ages of 11 and 20 serving time for homicide, killed their mother's batterer.

Source: These statistics and information are gleaned from a publication of the National District Attorney Association/National Prosecutors Research Institute, Volume 16, Number 1. “Domestic Violence Basics for Child Abuse Professionals” and from a fact sheet prepared by the New Hampshire Coalition Against Domestic and Sexual Violence.

in determining custody or visitation;

*requires the court to consider the history of the offending parent causing the domestic violence, stalking, harassment, threatening conduct regarding issues of visitation and custody.

COMMENT: It is widely known that domestic violence/abuse is an issue of power and coercive control and that physical violence is only one element of the behavior, usually occurring in conjunction with other means of financial, emotional, mental and/or spiritual abuse. The statute makes specific reference to the intentional infliction of emotional distress which has been defined by Oklahoma case law as "extreme and outrageous conduct coupled with severe emotional distress".⁷ It does not extend to "mere insults, indignities, threats or annoyances, petty oppressions, or other trivialities" but must so totally and completely exceed the bounds of acceptable social interaction that the law must provide redress.⁸ The understanding that domestic violence is more than physical harm or threat of physical harm is critical to understanding the dynamics of this family law matter and, thus, the harm caused to children and protective parents.

⁷See, Miller v. Miller, 1998 OK 24 for an in-depth discussion.

⁸Miller v. Miller, *supra* at paragraph 33.

Section 2 (Amends 43 O.S. Section 110.1-Shared Parenting):

*Amends shared parenting policy in temporary orders to exempt situations of domestic violence, stalking or harassing behavior or when the parents are unable to cooperate, recognizing a common sense approach to situations of divorce (parties are unable to get along) and emphasizing the safety of the family.

*provides that shared parenting is now a permissive ("may") option for temporary orders rather than mandatory.

Section 3 (Amends 43 O.S. 111.1) Safe Visitation Provisions:

*Sets forth the policy of the state to provide for the safety of children during divorce and visitation and suggests *options* for the court to consider.⁹ This statute mandates a court to provide for the safety of the non-abusive family members (children and parent) and also provides for standards to terminate visitation.¹⁰

*Upon request, a court shall not order a victim to be present during child

⁹Those options include supervised visitation, child exchange in a protected setting, facilitation of child exchange by a third party, lethality assessments, prohibition of consumption of alcohol within 24 hours of visitation, attendance to batterer's intervention program.

¹⁰Termination of visitation is subject to penalties under existing statutes and this clearly gives attorneys and judges guidance regarding cases when the child is in distress and the court's orders are not followed, alleviating the necessity of returning to court for contempt or an order of modification (should cut down on court dockets)

visitation exchange or provide the child's and victim's address to the offender.

*Court may order the victim to participate in the address confidentiality program.

*Court may restrict access to medical and educational records of the child if those records could be used to determine location.

Section 4 (New: 43 O.S. Section 111.4-Protective Parent Provision):

*New provision of the law that permits a parent who, in good faith and with a reasonable belief supported by fact that a child is a victim of abuse or neglect or suffers from the effects of domestic violence may take necessary action to protect that child, including suspending visitation. This is a form of a protective parent statute, recognizing that a parent has a right to take necessary action to protect their child, depending on the facts and circumstances.

Section 5 (New law: 43 O.S. Section 112.4- Attorney fees):

* Provides for attorney fees to be paid to the party being stalked or the victim of domestic abuse after application to a judge at the commencement of a divorce, separation or custody proceeding. This provision for attorney fees is at the commencement of the proceeding to facilitate access to legal services by victims.

Section 6: Effective date: 11/1/09

SUMMARY

These new laws complement existing laws and strongly set forth the legislative policy that domestic violence is a serious issue affecting children and protective parents and that we must be pro-active in addressing it.¹¹

Oklahoma consistently ranks in the **TOP 10** in the nation for intimate partner homicides—making the issue of safety for children and victims of violence a continuing crisis in this state as well as in our courts. It is not a private matter or one that should not be presented in court because it is difficult or "ugly." It is a matter of the future of the children and victims upon which this crime is inflicted. These laws support going forward with this issue and recognize that the behavior will not be tolerated and that an abusive parent is not entitled to the same rights as one who is non-abusive—for good reason.

¹¹An Appendix of Oklahoma civil laws and select Federal laws applicable to domestic violence situations is attached here for your reference.

APPENDIX: LAWS AFFECTING CLIENTS OF VIOLENCE¹²

A. PROTECTIVE ORDERS¹³

A civil protective order does not guarantee a victim's safety, but it does get a quicker response from law enforcement authorities and provides a paper trail, documenting the domestic abuse. The decision to seek a protective order is dependent on the client's knowledge of the abuser--know that some clients will feel that the abuser will get more enraged and that she will be at more risk of harm. She may decline to seek one on this basis. It is your responsibility to respect her position, but you must educate her on the benefits of a protective order:

- *access by victim to the residence may be permitted under the PO;
- *there will be a record of the abuser's unlawful behavior;
- *he is prohibited from carrying a firearm under federal law;
- *if the order is violated, there are potentially criminal penalties applicable;
- *if the offender is prosecuted and convicted of a felony, a rebuttable

¹²Copyrighted and Prepared by G. Gail Stricklin, 10-01-09, for Legal Aid Seminar on 10-7-09. Special thanks to Donna Mathews, Associate Director of DVIS in Tulsa for her contributions.

Note that the ABA has issued Standard of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases, available at www.abanet.org/domviol/

presumption against the offender as custodial parent applies;

*a rebuttable presumption exists under family law that it is not in the best interests of the child to have unsupervised visitation or be placed in custody with a parent where domestic violence, stalking or harassing behavior has been proven by a preponderance of the evidence.

Encourage clients to pursue any lawful criminal charge against offenders as this is the primary way to hold them accountable for their behavior.

Preparing and Filing a Protective Order (PO). Assist the client in preparing the Petition for Protective Order, emphasizing dates and specific facts. If you are unable to assist, refer the client to a victim's advocate usually associated with a domestic violence agency, law enforcement or the courthouse. If possible, get the PO heard before filing the divorce action as the two actions may be consolidated¹⁴ which may cause complications, including compromising the safety of the client. For example, the PO will be used as a negotiating point by the batterer's counsel in the decree of dissolution of marriage and, even worse, it may be included as a paragraph in

¹⁴22 O.S. 60.2(A)(1) The law currently provides for mandatory consolidation of FD and PO cases in a county. Effective, November 1, 2008, the law will provide for permissive consolidation of the Protective Order (PO) and Divorce actions (FD docket) under certain situations. See, 22 O.S. 60.2(A)(1)(b). However, as a practical matter, the cases will probably be heard together by the family law judge if there is a pending FD matter when the PO is filed or if the FD matter is filed before the PO is heard.

the Decree which prevents enforcement thereof. However, this issue has been addressed, effective 11-1-08, in 22 O.S. Section 60.2 which specifically provides that the protective order shall remain a "separate action and a separate order shall be entered in the protective order action." See, 22 O.S. Section 60.2(A)(1)(b).

In addition, 22 O.S. Section 60.2(A)(1)(b) in the Protection from Domestic Abuse Act, attempts to address the issue of bargaining away the Protective Order in a divorce/separation action by requiring a hearing prior to dismissal of the PO. This part of the section specifically provides "[p]rotective orders may be dismissed in favor of restraining orders in the divorce or separate maintenance action if the court specifically finds, upon hearing, that such dismissal is in the best interest of the parties and does not compromise the safety of any petitioner." However, please note the provision in 22 O.S. Section 60.4(B)(4) provides that "[a] petitioner may move to dismiss the petition and emergency or final order at any time, however, a protective order must be dismissed by court order" which has been interpreted by some courts to give the Petitioner the right to dismiss the PO at any time.

In any event, MAKE SURE the ORDER OF PROTECTION is docketed under the "PO" docket, separate and distinct from the Decree of Dissolution

of Marriage. A PROTECTIVE ORDER or a RESTRAINING ORDER in a Decree of Dissolution of Marriage will not be registered with the law enforcement authorities and the district attorney's office will not prosecute for violations unless under a PO docket. The only enforcement mechanism in this instance is a Contempt of Court action.

Service of a PO: Since past amendments to the Protection Against Domestic Abuse Act provide only for service "in the same manner as a bench warrant" (which means a peace officer), ask the judge to authorize service by a private process server at the walk-through of the emergency if necessary. Write on the face of the Emergency PO and the Application something to the effect: "Service by Private Process server is authorized" or "PPS authorized" and draw a line for the Judge to sign his name. Some judges prefer a minute order, but the hand-written authorization is acceptable to others. Some judges will not authorize a private process server unless the sheriff's office has been unsuccessful in serving the defendant and, pursuant to the statute, the sheriff's office is to arrange for that mode of service. Quite often, service by the Sheriff's office is hard to achieve and a private process server will be able to act quickly when the location of the batterer is known¹⁵.

¹⁵When VINE PO is brought on line, private process servers will need to notify county sheriff dispatchers within fifteen (15) minutes of service so that the victim

Military Protective Orders. The military now provides for protective orders, enforceable by the Department of Defense. In Oklahoma City, contact the Tinker Family Advocacy Office at (405)734-4390 and make an appointment for a personal interview with a family advocacy treatment manager who should be a licensed clinical social worker. There is a Family Advocacy Office at each military base.

Including children on Protective orders: Include requests for protection of the children when the facts support the need. Be aware that most courts do not "like" to include children and do not understand the effects of domestic violence on children, so be prepared with third party testimony, if available, to support your request. At the very least, insist upon supervised visitation. Remember--when your client is separating from the offender and after she has left and gotten a divorce, she and the children are at most risk of harm. Some judges will require the entry of an emergency temporary custody order (within a family law case) before the hearing on the protective order, or the children will be removed from the protective order.

B. SEPARATION vs. DIVORCE

registered with VINE will be promptly notified. More Information is available on the Office of Attorney General website: www.oag.ok.gov

Realize that there are times when the choice of a petition for separation rather than dissolution of marriage is a safer choice for a client and may be all she feels comfortably with at that time. The client knows the offender better than anyone and while the safety factor can be discounted by the client, the attorney needs to explain the basic difference between the two actions: one does not dissolve the marital status. This may be appropriate for the client depending on the client's religious preference and the level of danger that her abuser presents.

Quite often, the batterer will offer to get counseling to lure his prey back into the lair and she will want to give him "one more chance." Please advise your client that it would not be wise to do any "couples counseling" and that if he is serious, he will enroll in an approved batterer's treatment program during which time the parties should not co-habitat. Oklahoma statutes provide for a 52 week Batterers Intervention Program¹⁶ which stresses consequences, education, confrontation and accountability.¹⁷ **DO NOT** recommend "anger

¹⁶ Current list of Certified Batterers Intervention Programs:
www.oag.state.ok.us/oagweb.nsf/v-cert.html

¹⁷See, 22 O. S. section 60.6 D (2)(a): "The court shall require the defendant to participate in counseling or undergo treatment to bring about the cessation of domestic abuse as specified in paragraph 2 of this subsection (conviction of a second or subsequent violation of a protective order) by an individual licensed practitioner or a domestic abuse counseling program approved by the court or a domestic abuse treatment program certified by the Attorney General." Note in section 60.6D(2)(b) the

management." These types of programs are not designed to deal with the complexities of an offender and usually by the time a batterer is ordered to a program or volunteers, he is a "serial offender."

C. TO MEDIATE OR NOT TO MEDIATE

Oklahoma statutes recognize that mediation in cases of domestic violence should occur only if: "(1) the professional mediator has substantial training concerning the effects of domestic violence or child abuse on victims; (2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering an imbalance of power as a result of the alleged domestic violence (rarely happens!!) and (3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between parties resulting from the alleged domestic violence or child abuse or (4) or in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence."¹⁸ The Early Settlement Mediation programs in Oklahoma

statute sets forth the policy of the state that "[a] program for anger management, couples counseling, or family and marital counseling shall not solely qualify for the counseling or treatment requirement for domestic abuse pursuant to this subsection."

¹⁸43 O.S. Section 107.3 B (1) (a)(b).

County have historically refused to mediate cases involving domestic violence--that in and of itself is extremely instructive. It has been opined that the only feasible situation where mediation involving domestic violence should occur is where there are two (2) separate mediators, one for the victim and one for the offender. The other train of thought is that the option to mediate should be presented to the client of violence so as not to remove her control of the situation, provided, of course, that certain safety precautions are in place, including no face to face meeting with the offender and an attorney who understands the dynamics of domestic violence.

D. CHILD CUSTODY

It is generally accepted and statutorily addressed in Oklahoma that it is detrimental to a child and not in a child's best interests to be placed in the custody of a perpetrator of family violence.¹⁹ Effective November 1, 2009, there is a rebuttable presumption that "sole custody, joint legal or physical custody or any shared parenting plan with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not in the best interest of the child...."²⁰ The emotional harm and risk of physical harm is well

¹⁹ See, Oklahoma Statute: 43 O.S. Section 109.3(2006) and HB 1739, Section 1, to be codified at 43 O.S. Section 109A I (1)(2)(3)(4)(5)

²⁰HB 1739, Section 1, to be codified at 43 O.S. Section 109 I ((1).

documented in the many studies on the effects of domestic violence on children and the characteristics of batterers and the Oklahoma legislature has recognized this in passing H.B. 1739. Many courts express the position that they prefer joint custody, or equal access to the children in a divorce so it is the responsibility of the attorney to educate and inform the court of the perils of joint custody in matters involving domestic violence, particularly in light of H.B. 1739.²¹

It is imperative, in representing a victim of domestic violence, that the attorney understand the true facts in custody and domestic violence matters.

For further information, see the publication by the American Bar Association on the 10 Myths about Custody and Domestic Violence and How to Counter Them.²²

²¹Note that Oklahoma courts consider “joint child custody a viable alternative for courts to consider when favorable circumstances are present so that it probably will work.” *Hornbeck v. Hornbeck*, 1985 OK 48, paragraph 9. In *Hornbeck*, the trial court imposed a joint custody agreement over the objection of a parent, but the facts did not disclose that family violence was present. In *Dunham v. Dunham*, 1989 OK CIV APP 44, the Court of Appeals indicated that “[j]oint custody should only be considered where certain circumstances are present. These circumstances include: the likelihood of parental cooperation in matters affecting the child; a capacity to provide equally beneficial home environments; and that the situation will not be unduly disruptive of other important aspects of the children’s life.” This Court wisely commented that “[t]o force joint custody on an unwilling parent should always give a trial court pause.” *Supra* at paragraph 4. Other factors to determine if joint custody is appropriate can be found in footnote 9 in *Rice v. Rice*, 1979 OK 161.

²² This and other valuable information is available on the website of the ABA Commission on Domestic Violence, located at www.abanet.org/domviol/ .

The following question was put to the American Psychological Association Presidential Task Force on Violence and the Family:

"When parents separate after an abusive relationship, shouldn't fathers have as much right as mothers to be granted physical custody of and visitation rights with their children?"

Their answer: "Although most people believe that fathers should have equal access to their children after the termination of a relationship between the parents, the equal-access option is based on the assumption that fathers will act in their children's best interests. However, that is a naive assumption in situation where family violence has occurred.

Fathers who batter their children's mothers can be expected to use abusive power and control techniques to control the children, too. In many of these families, prior to separation, the men were not actively involved in the raising of their children. To gain control after the marital separation, the fathers fight for the right to be involved. Often children who have been exposed to violence in the family are frightened to confront their father's negative or abusive behavior, and mothers cannot protect them. Sometimes the father tries to alienate the child from the mother by using money and other enticements, negative comments, or restricted access to the telephone during visitation with him. Other times, fathers may threaten or actually kidnap the child to punish the mother for leaving, or to try to force her to return.

Most people, including the battered woman herself, believe that when a woman leaves a violent man, she will remain the primary caretaker of their children. Family courts, however, may not consider the history of woman abuse relevant in awarding custody. Recent studies suggest that an abusive man is more likely than a nonviolent father to seek sole physical custody of his children and may be just as likely (or even more likely) to be awarded custody as the mother. Often fathers win physical custody because men generally have greater financial resources and can continue the court battles with more legal assistance over a longer period of time.

Family courts frequently minimize the harmful impact of children's witnessing violence between their parents and sometimes are reluctant to

believe mothers. ***If the court ignores the history of violence as the context for the mother's behavior, in a custody evaluation, she may appear hostile, uncooperative, or mentally unstable. For example, she may refuse to disclose her address or may resist unsupervised visitation, especially if she thinks her child is in danger. Psychological evaluators who minimize the importance of violence against the mother, or pathologize her responses to it, may accuse her of alienating the children from the father and may recommend giving the father custody in spite of his history of violence.***" (Emphasis added)

Some professionals assume that accusations of physical or sexual abuse of children that arise during divorce or custody disputes are likely to be false, but the empirical research to date shows no such increase in false reporting at that time. In many instances, children are frightened about being alone with a father they have seen use violence towards their mother or a father who has abused them. Sometimes children make it clear to the court that they wish to remain with the mother because they are afraid of the father, but their wishes are ignored.

Research indicated that high levels of continued conflict between separated and divorced parents hinders children's normal development. Some practitioners now believe that it may be better for children's development to restrict the father's access to them and avoid continued danger to both mothers and the children."²³

In fact, the Oklahoma Domestic Violence Fatality Review Board, a multi-disciplinary legislatively established group, recommended in their 2002 executive report that a legal presumption against joint legal custody in cases involving domestic violence be established by law. This was a result of a finding that of the 75 death cases reviewed in 2002 by the Board, 59% of the

²³Issues and Dilemmas in Family Violence, Issue 5, American Psychological Association Online:www.apa.org.

victims and perpetrators with children in common had joint custody arrangements and 50% of homicides occurred during a child exchange.²⁴ This is a government publication and has been admitted into evidence to support the argument against joint custody under exceptions to hearsay rule, 12 O.S. Sections 2902(5) or 2803(8). Look at the information contained in the annual reports of the Domestic Violence Fatality Review Board, accessible at www.ocjrc.net (Click on the right "Domestic Violence Fatality Review Board") and consider introducing it as evidence at hearings. Note that the DV Fatality Review Board has moved to the Office of the Attorney General so the website may change.

Section 109.3 of Title 43 is a valuable tool which must be utilized to effectively represent clients of violence. The statute, which resulted from the death statistics in Oklahoma, is designed to protect clients of violence and their children:

"In every case involving the custody of, guardianship of or visitation with a child, the court shall consider the evidence of domestic abuse, stalking and/or harassing behavior properly brought before it. If the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence, there shall be a rebuttable presumption that it is not in the best interest of

²⁴For more information on the 2002 deaths reviewed and statistics thereon, please go to Office of the Attorney General website: www.oag.ok.gov for Domestic Violence Fatality Review Board.

the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established.” 43 O.S. Section 109.3

This section has now been expanded upon in H.B. 1739, Section 1, which recognizes that joint custody is not a viable option in a domestic violence cases-it is an invitation to murder a parent based upon the statistics from domestic violence deaths in Oklahoma.

It is advisable for your client to limit physical/verbal contact with the abuser, using written (letter or e-mail) modalities except in the case of an emergency. The batterer will use the children to attempt to exercise power and control over the ex-wife just as he may use the court system to continue his pattern of control and harassment.

Another statutory tool available to practitioners is the use of an **expert witness pursuant to the provisions of 22 O.S. Section 40.7²⁵** which permits expert testimony concerning the effect of domestic abuse on the beliefs, behavior, and perception of the person being abused. Domestic Violence Service Providers have qualified experts as all advocates must be certified as such. Also, you may contact the Office of Attorney General or the Coalition

²⁵"In an action in a court of this state, if a party offers evidence of domestic abuse, testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior an perception of the person being abused shall be admissible as evidence." 22 O.S. Section 40.7-Expert testimony-Admissibility.

Against Domestic Violence and Sexual Assault for assistance. Most experts will be provided at little or no charge to the client.

Other statutes affecting custody of children and domestic violence are:

*10 O.S. Section 21.1 D (2) (d) -Renumbered as 43 O.S. 112.5 and 43 O. S. Section 112.2 B(4) both create a rebuttable presumption that it is not in the best interests of a child to have custody granted to “a person who has been convicted of domestic abuse within the past five (5) years.” This is valuable if charges are pressed and a conviction is obtained, not a deferred sentence.

*43 O.S. Section 112.2 A (4) instructs a court to consider in the determination of custody and visitation whether any person “[h]as been convicted of domestic abuse within the past five (5) years.”

*43 O.S. Section 112.2 C provides that “[c]ustody.... or visitation with a child shall not be granted to any person if it is established that the custody...or visitation will likely expose the child to a foreseeable risk of material harm.”

E. VISITATION ISSUES

Visitation exchange in family violence cases should be, first and foremost, a safety issue--that of the minor child and that of the survivor of domestic violence. To that end, the National Council of Juvenile and Family Court Judges has recommended for over a **decade** that visitation be ordered only after

adequate provisions for such safety are made and Oklahoma has adopted a policy of providing for safety first in H.B. 1739. The Advisory Guidelines for Visitation released by the Oklahoma Administrative Director of the Courts failed to specifically address safe visitation in cases of domestic violence but did note that "...when there are safety issues resulting from domestic violence.....the advisory guidelines and visitation schedules need to be modified." A state publication by the Health Department on suggested Guidelines for Visitation for Children birth-5 years is now available from Oklahoma Lawyers for Children (405) 232-CHILD and the Coalition Against Domestic Violence and Sexual Assault (405) 524-0700, and specifically includes guidelines for safe visitation and domestic violence.²⁶ A copy of the brochure is included with the materials herein. Finally, H.B. 1739, Section 3, specifically sets forth safety considerations that a court shall consider in addition to conditions which shall terminate visitation in cases of domestic violence, stalking or harassment, to be codified at 43 O.S. Section 111.1 A (3)(4 (5)(6).

Examples of options for safe visitation exchange to ask the Court to impose:

²⁶ Note that this is a governmental publication (public authority) and is self authenticated under 12 O.S. Section 2902 (5) or 2803(8). The DV Fatality Review and Child Death Review Board reports are likewise publications of public authorities and should be self-authenticating.

- a. Order the exchange of a child to be facilitated by a third party where the parents do not have any contact with each other;
- b. Order an exchange of a child to occur in a protected setting;
- c. Order visitation supervised by another person or agency;
- d. Order the abusive parent to pay a fee to help defray the costs of supervised visitation or other costs of child exchanges, including compensating third parties;
- e. Order the perpetrator of domestic violence to attend and complete, to the satisfaction of the Court, a program of intervention for perpetrators of domestic violence, certified by the Attorney General;
- f. Prohibit unsupervised or overnight visitation until the perpetrator of domestic violence has successfully completed a specialized program for abusers and where the batterer has neither threatened nor exhibited violence for a substantial period of time;
- g. Order the perpetrator of domestic violence to abstain from the possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding the visitation;
- h. Order visitation in a location physically separate from the abused party and impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic violence, or other household member.

i. Provide for conditions which shall result in termination of visitation:

(1) When there are repeated violations by the batterer/perpetrator of domestic violence of the terms and conditions of visitation;

(2) If the child becomes severely distressed in response to visitation, including the determination by a mental health professional or certified

domestic violence specialist that visitation with the abuser is causing the child severe distress;

(3) If there are clear indications that the violent parent has threatened to either harm or flee with the child.

J. Provide specific terms for other contact with the children and the parent- **DO NOT REQUIRE OR ENCOURAGE CONTACT BETWEEN THE PARTIES.**

(1) Specific times for contacting children by phone--instruct your client not to engage in conversation with the offender-hand the phone to the children or let the children answer the phone and do not talk to him when he tells the child to "hand the phone to your mother" (the client may say "I'll get back to you later; Finish your visit with Joey and e-mail me"). Even suggest the client leave the room and even the house (water the plants or something). The abuser will try to engage the survivor when he should be visiting with the children.

(2) Advise your client that most communication should be in writing. E-mail is great. Put this in the order.

(3) Establish that phone calls to the parent should only be for emergencies. If the parent doesn't answer, leave a message--it is not appropriate to call back 10 times. If it is important ("I'm running late."), a message will suffice.

F.. MISCELLANEOUS STATUES/ISSUES FOR CLIENTS OF DV

*Non-disclosure of address. You may need to request an order maintaining the confidentiality of the address of the child and survivor as well as denying the non-custodial parent access to the child's medical and educational records if they might be used to determine the child's location. If your client is residing in Oklahoma, she can apply through a domestic violence

shelter to participate in the state's Address Confidentiality Program.²⁷ This address will be considered the legal address for service of process.

*VINE (Victim Information and Notification Everyday). OK VINE uses computer technology to provide Victim Information and Notification Everyday automatically to anyone who is interested in being notified about any Oklahoma offender's custody status. Custody status changes covered include offender transfer, escape, apprehension, release or death. Information can be accessed by calling a toll free number or logging onto www.vinelink.com any time of the day or night. Victims can inquire whether an offender is held in jail as well as the facility's location. For more information or to refer your client, contact Jennifer Taylor, Victims Services Unit, Office of the Attorney General at (405) 522-2294.

*Notice of Relocation. 43 O.S. Sections 112.3 E (1)(2) make provisions for maintaining confidentiality of address changes in dangerous situations by providing as follows:

“On a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child or change of residence of an adult, the court may order that:

a. The specific residence address and telephone number of the

²⁷ Address Confidentiality Program: (405) 522-2942 or 1-866-227-7784 (toll free); P.O. Box 60189, Oklahoma City, Oklahoma, 73146.

child or of the adult and other identifying information shall not be disclosed in the pleadings, other documents, filed in the proceeding, or the final order, except for an in camera disclosure,

b. The notice requirements provided by this article be waived to the extent necessary to protect confidentiality and the health, safety or liberty of a person or child, and

c. Any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child.

2. If appropriate, the court may conduct an ex parte hearing pursuant to this subsection.”

*Name Changes 12 O.S. Sections 1631-1637 set forth the requirements and procedure for changing one’s name. It is imperative that a request to have the records sealed and publication waived is appropriate when representing a client who is in imminent danger of harm. Local Rule 12, Seventh Judicial Administrative District (Oklahoma/Canadian counties) requires that the non-custodial parent or father be given notice if you are making application for a child unless excused by the judge hearing the application.

Prior to filing the Petition for name change, make a motion to seal records and waive publication and a brief in support thereof with an attached affidavit of your client to the Chief Judge or Presiding Judge with a pauper's affidavit, if needed prior to filing the case. Then take the Order to the Court Clerk , prior to filing to determine how they want it handled, and the time the action will be accessible on the computer will be minimal if at all. If you need more specific

information on this issue, please contact G. Gail Stricklin.

*Claims of Parental Alienation Syndrome (PAS): While most batterers will attempt to interfere with the parent/child relationship, the victim may be accused of Parental Alienation Syndrome (PAS) in a contested case. PAS was created by Dr. Richard Gardner, deceased as a result of his own suicide, who defined it as a “psychiatric disorder arising in the context of a child custody dispute. In this disorder, one parent “programs” or “brainwashes” a child into a campaign of denigration against the other parent, even though that other parent is generally good and loving.”²⁸

PAS is not recognized as a disorder by the American Psychiatric Association in the DSM-IV and has been discredited in the scientific community.²⁹ The National Council of Juvenile and Family Court Judges recommends that “[t]estimony that a party to a custody case suffers from the syndrome should therefore be ruled inadmissible both under the standard established in *Daubert* and the stricter *Frye* standard.”³⁰ Consider filing a

²⁸See, *In re Marriage of Norma Perez de Bates and R. Edward Bates*, 819 N.E. 714; 2004 Ill.LEXIS 1619.

²⁹ See, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judges Guide*, footnote 15, which cites the American Psychological Association in concluding that there are no data to support the “phenomenon” called PAS. This Handbook is available on the website of the Council at www.ncjfcj.org.

³⁰ *Id.* at page 19.

motion in limine prior to this becoming an issue at trial.

*Psychological/Custody Evaluations. Your client may not test well in an evaluation as the personality tests included do not account for the components of domestic violence-- the standard tests may indicate that the client is paranoid (well, he's stalking her or has) or some trauma (she probably has PTSD) as there is no single psychological test to determine abuse. The tests utilized are woefully void of providing any true insight into the psychological aspects of family violence. For more information, consult the Handbook regarding custody and visitation evaluations resource of the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

*Unemployment benefits are available to victims who must leave work as a part of a safety plan to escape domestic violence. Oklahoma law provides that the person may be able to collect unemployment benefits as "good cause" for voluntarily leaving work, which includes escaping domestic violence or abuse. See, 40 O.S. Sections 3-106(G)(8); and 2-405 (5).³¹

*Federal Domestic Violence Laws. It is a federal crime under VAWA to cross state lines or enter or leave Indian country and physically injure an

³¹Prior to 11-1-05, in order to qualify for unemployment benefits, the claimant must have an existing PO (filed and effective protective order) at the time of termination.

“intimate partner” (18 U.S. C. Section 2261); to cross state lines to stalk, harass or to stalk or harass within the maritime or territorial lands of the U.S. including military bases and Indian country (18 U.S.C. Section 2261A); to cross state lines or enter or leave Indian country and violate a qualifying Protective Order (18 U.S. C. 2262); It is a federal crime under the Gun Control Act to possess a firearm and/or ammunition while subject to a qualifying Protective Order (18 U.S. C. Section 922(g)(8) or to possess a firearm and/or ammunition after conviction of a qualifying misdemeanor crime of domestic violence (18 U.S. C Section 922 (g)(9)). Contact the local U.S. Attorney’s Office or Bureau of Alcohol, Tobacco and Firearms (ATF) and it is helpful to have all the documentation (Protective Order, evidence of possession of a firearm). State law on the issue of Protective Orders and firearms is limited although the Oklahoma Self-Defense Act, 21 O.S. 1290.25 et. seq. does recognize that domestic violence and guns together present a hazard. Also, 22 O.S. Section 60.8 provides for seizure of firearms used to commit domestic violence. Note that 60%of domestic violence homicides in Oklahoma were committed with a firearm.³²

³²A Report of the Oklahoma Domestic Violence Fatality Review Board 2004. Soon to be accessible at the Office of the Attorney General's website: www.oag.ok.gov under Domestic Violence Fatality Review Board.

Social Security Benefits for marriage of ten (10) years. Do not seek an immediate dissolution of the marriage if the client is close to having been married for ten (10) years as she can draw on his benefits down the road if they are more advantageous than hers. Quite often, she has been prohibited from working or been unable to sustain long term employment because of the abuse so take advantage of this provision. This provision in the law does not reduce the husband's potential benefits at all.

RESOURCE ATTACHMENTS/EXHIBITS:

- A Danger Assessment Tool (Dr. Jacqueline Campbell):
www.dangerassessment.org
- B Safety Plan from 2006 DV Fatality Review Board Annual Report
www.ocjrc.net/pubFiles/DVFRB/2006AnnualReport.pdf
- C DV Personal Safety Plan (client friendly)
- D Certified Domestic Violence/Sexual Assault Programs www.ocadvsa.org
click just below "Do you need help?"
- E ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases. Free download: www.abanet.org/domviol/docs/StandardsCommentary.pdf.
- F 10 Myths about Custody and Domestic Violence and How to Counter Them
www.abanet.org/domviol/custody_myths.pdf
- G Divorce and Visitation Issues for Children Ages 0-5
- H Oklahoma Attorney General's Address Confidentiality Program Brochure - info online at: www.oag.state.ok.us/oagweb.nsf/v-acp.html
- I OK VINE (Victim Information and Notification Everyday) Brochure - info online at: www.vinelink.com/vinelink/siteInfoAction.do?siteId=37000
- J VINE Protective Order Brochure
- K 2007 DV Fatality Review Board Annual Report
- L H.B. 1739

MORE INTERNET RESOURCES:

- Tool for Attorneys to Screen for Domestic Violence, American Bar Association Commission on Domestic Violence (free download, or laminated for purchase): www.abanet.org/domviol/screeningtoolcdv.pdf.
- Representing Victims of Domestic Violence, American Bar Association Commission on Domestic Violence (free download): www.abanet.org/publiced/representingvictims.pdf.
- American Bar Association Commission on Domestic Violence (www.abanet.org/domviol)
 - The Impact of Domestic Violence on Your Legal Practice
 - Resources for Attorneys and Judges
- Greenbook, National Council of Juvenile and Family Court Judges (www.ncjfcj.org) (www.thegreenbook.info) (the intersection of domestic violence and child abuse and neglect)
- National Coalition Against Domestic Violence (www.ncadv.org)
- National Network to End Domestic Violence (www.nnedv.org) (technology abuse and internet safety specialists)
- Family Violence Prevention Fund (www.endabuse.org)
- Oklahoma Coalition Against Domestic Violence & Sexual Assault (www.ocadvsa.org)
- Women's Law (www.womenslaw.org)
- NOW Family Law ad hoc Committee Resources (www.nowfoundation.org/issues/family/index.html)
- The Stalking Resource Center (<http://www.ncvc.org/src/Main.aspx>)
- Battered Women's Justice Project (www.bwjp.org)
- National Clearinghouse for the Defense of Battered Women (www.ncdbw.org)
- National Center on Full Faith & Credit (www.fullfaithandcredit.org)