

## Looking Out for the Children of Domestic Violence

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A DECADE AGO discussion of domestic violence gave people the jitters. Today people are paying close attention. Driven by sudden tragedy, which is nearly always followed by a correction, the study of domestic violence has exposed great deficiencies in our system, some so egregious that they may have caused loss of life. The debate has already begun as to the proper corrective measures.<sup>1</sup> The bond between judiciary and legislature has begun to fray. Countless differing opinions will, undoubtedly, rally. Not all are equally persuasive, but all come from heartfelt concern. To regain credibility and establish a workable solution, however, will take much more than good intentions. For starters it is necessary to take a long, hard look at what went wrong.

The impact of domestic violence on a child was first analyzed in *Sheridan v. Sheridan*,<sup>2</sup> by the Third Department. For the most part, the court based its determination on consideration of the child's best interests. *Sheridan* was a pre-*Tropea*<sup>3</sup> relocation case. The mother contended that the father abused alcohol and marijuana, that she was the victim of continued domestic violence and that she had entered a domestic violence shelter on one occasion. Family Court found exceptional circumstances to justify her relocation to Puerto Rico. As a consequence, the court granted her sole custody of the parties' child.

Finding that the relocation of the mother and child to Puerto Rico would deprive the father of regular and meaningful visitation, the Appellate Division held that the exceptional circumstances included "domestic violence and economic necessity evidenced by the availability of employment and financial support from respondent's family" who were in Puerto Rico. It noted that the mother had been the child's primary caretaker and, with the assistance of her family in Puerto Rico, she could "... ensure a stable home environment which is free from domestic violence, as compared to the uncertain and volatile living arrangements in place before the parties' separation."

### Weighty Consideration

Apart from this decision and several non-parent-versus-parent custody or neglect cases,<sup>4</sup> the impact of domestic violence on the child has in the past been overlooked in most New York parental custody contests.

Declaring that there has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases and acknowledging that at least 38 states and the District of Columbia have laws making domestic violence a relevant factor in custody decisions by the courts,<sup>5</sup> the Legislature enacted Chapter 85 of the Laws of 1996, which became law on May 21. Domestic violence is now a significant factor in New York custody cases.

The legislative policy is explained in detail in § 240(1) of the act, which states:

Rather than imposing a presumption, the legislature hereby establishes domestic violence as a factor for the court to consider in child custody and visitation proceedings, regardless of whether the child has witnessed or has been a direct victim of the violence.

The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, somatic symptoms, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse. A study of children in shelters for victims of domestic violence shows higher rates of child abuse in homes where a spouse has been battered.

A home environment of constant fear where physical or psychological violence is the means of control and the norm for the resolution of disputes must be contrary to the best interests of a child. It is well documented that family violence is cyclical and self-perpetuating. Children who live in a climate of domestic violence learn to use physical violence as an outlet for anger and are more likely to use violence to solve problems while children and later as adults.

Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore, at the time the court must make judgments regarding the custody and visitation of children, great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family upon dissolution and into the foreseeable future.

The act amends Domestic Relations Law (DRL) § 240(1),<sup>6</sup> which applies to custody and visitation determinations in any action or proceeding brought (1) to annul a marriage or to

declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage.

### **A Factor to Be Considered**

The act now provides, among other things:

Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in Article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section.

Family Court Act (FCA) §447 (a),<sup>7</sup> 467(c),<sup>8</sup> 549 (a),<sup>9</sup> 651(a) and (b)<sup>10</sup> and 652(c)<sup>11</sup>, which apply to custody/visitation determinations in support, paternity, habeas corpus, custody and visitation proceedings in Family court were also amended to add to each the words: "... in accordance with subdivision one of section two hundred forty of the domestic relations law ..." The effect of each addition is to incorporate into each of the sections, by reference, the provisions of amended §240(1). The act applies to all actions or proceedings concerning custody of or a right to visitation with a child whether the action or proceeding was commenced pursuant to DRL §240 or any other provision of law.<sup>12</sup>

DRL §240(1) requires the court to consider acts of domestic violence against "a family or household member of either party" and refers to FCA Article 8 for its definition. "Members of the same family or household" are defined in FCA §812 as persons related by consanguinity or affinity; persons legally married to one another; persons formerly married to one another; and persons who have a child in common regardless whether such persons have been married or have lived together at any time. Thus, the court is required to consider acts of domestic violence against spouses, their children, parents and step-children.

### **Form of Allegation**

The statute requires that the allegation that the other party has committed an act of domestic violence be in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading to be considered by the court. This pointed provision serves the useful purpose of providing the allegedly offending spouse with notice of the specific claims of domestic violence against him/her, thereby avoiding, among other things, a claim of lack of Due Process.

If an allegation of domestic violence is neither admitted nor denied, it is deemed admitted [13](#) and the court must consider it as a formal judicial admission. A formal judicial admission dispenses with the production of evidence by conceding for the purposes of the litigation, the truth of a fact alleged by the adversary. It takes the place of evidence. [14](#) Having said that, the court must still struggle with thorny issues. The most glaring challenge is basic. What is domestic violence? May the court ignore an admission of domestic violence? How does the court dispose of uncontroverted allegations of domestic violence in an uncontested divorce action based on cruel and inhuman treatment? Can the parties waive this provision?

DRL &szlig;240(1) does not define domestic violence. It would seem fairly elementary that domestic violence is the commission of an act enumerated in FCA &szlig;812, which enumerates the family offenses over which the family court and the criminal courts have concurrent jurisdiction. Thus, these would be any acts that would constitute disorderly conduct, harassment in the first or second degree, aggravated harassment in the second degree, menacing in the second or third degree, reckless endangerment, assault in the second or third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household.

"Disorderly conduct" includes disorderly conduct not in a public place. [15](#) Drawing this conclusion is inescapable and validated by FCA &szlig;812(5), which requires every police officer, peace officer or district attorney investigating a family offense under Article 8 to give the victim a written notice that refers specifically to domestic violence. The notice must include the following:

If you are the victim of *domestic violence*, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a *domestic violence* program, a family member's or a friend's residence, or a similar place of safety. \*\*\* The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to *domestic violence*, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local *domestic violence* hotline telephone numbers).

## **Orders of Protection**

Moreover, the recent Court of Appeals decision in *Walker v. Walker* [16](#), an Article 8 proceeding, specifically refers to such proceedings as proceedings to protect victims of *domestic violence*. There, the Court held that the Family Court is not generally precluded from imposing, in the exercise of appropriate discretion, a maximum six-month jail

commitment for each separate and distinct violation of an order of protection, to be served consecutively.

With historical wisdom, the Court of Appeals noted that FCA §841 and 842 authorize the inclusion of orders of protection as part of dispositional orders in family offense proceedings and that FCA §846-a, which prescribes the procedure and penalty for failure to obey such an order, provides that if "... a respondent is brought before the court for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey any such order, the court may \* \* \* commit the respondent to jail for a term not to exceed six months."

The Court rejected the appellants' claim that the statute allowed a maximum of six months' incarceration only, regardless of the number of willful acts of disobedience against the same order. It found no such limitation in the statute or its purpose and held that to disallow consecutive penalties under these circumstances would also elevate form over substance and frustrate the core purpose of FCA Article 8, which is designed to provide reasonable means and methods of protection and enforcement for victims of *domestic violence*.

DRL §240(1) applies several basic principles to cases. It *requires* the court to consider the effect of domestic violence on the best interests of the child, where the allegations of domestic violence are proven by a preponderance of the evidence. A formal judicial admission is conclusive of the facts admitted in the action.<sup>17</sup> Where such allegations are neither admitted nor denied they will be, by virtue of being formal judicial admissions, proven by a *preponderance of the evidence* and must be considered by the court.

Our earlier failure to respond was symptomatic of a more fundamental problem. Without a solution for an overburdened system, weaknesses in the system were ignored. As a consequence, often those most culpable got off with barely a nick, while the children, the silent sufferers, took the hit. We must be vigilant in keeping the children in sight at all times, possibly saving lives in the process.

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## Notes

(1) In a letter to the editor of the *Law Journal*, Aug. 2, 1996, the president of the New York Chapter of the American Academy of Matrimonial Lawyers took the position that "a finding of domestic violence based upon an acknowledgement does not qualify as a proper consideration in a custody or access dispute."

(2) 204 AD2d 771, 611 NYS2d 688 (3d Dept, 1994).

(3) *Tropea v. Tropea*, 87 NY2d 727 (1996) rejected the rule that a relocation with the child to a distant domicile, which had the effect of depriving the non-custodial parent of regular and frequent visitation with the child, required the custodial parent to demonstrate exceptional circumstances.

(4) See *Matter of Antoinette M v. Paul Seth G.*, 202 AD2d 429 (2d Dept., 1994).

(5) Laws of 1996, Chapter 85, §1, effective May 1, 1996.

(6) *Id.* §2.

(7) *Id.* §3.

(8) *Id.* §4.

(9) *Id.* §5.

(10) *Id.* §6.

(11) *Id.* §7.

- (12) Id. &szlig8.
  - (13) CPLR &szlig3018(a).
  - (14) Farrel, *Prince, Richardson on Evidence* (11th Edition), &szlig8-215, p.533; *Human Development Svcs v. Zoning Bd.*, 67 NY2d 702.
  - (15) FCA 812.
  - (16) 86 NY2d 624 [1995].
  - (17) *Coffin v. President etc., Grand Rapids Hydraulic*, 136 NY 655.
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