

THE CHASE PAPER

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VISITATION IN THE DOMESTIC VIOLENCE CONTEXT: PROBLEMS AND RECOMMENDATIONS

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INTRODUCTION

In 1980, Vermont passed the Abuse Prevention Act (Act),¹ joining many states that have similar protection for victims of domestic violence. This article examines Vermont's efforts to provide services for battered women and, more narrowly, explores visitation issues that arise within the battering context.

The first section of this article presents an overview of the battering phenomenon. Three basic areas are explored: battering as a social problem, reasons why women stay in the abusive relationship, and finally, reasons why men batter women. There is a wealth of literature, books as well as law review articles, devoted to the subject of battering and battered women. Consequently, this section is not intended to provide an in-depth analysis of these issues, but rather to provide the reader with the basic knowledge to understand the dynamics of a battering relationship. This overview is essential because the legal system bases many of its responses to battered women on this same type of information.

Section two begins with a summary and explanation of Ver-

* See *Dedication*, 13 VT. L. REV. 1 (1988) for a biographical sketch of Dean Chase.

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1. VT. STAT. ANN. tit. 15, §§ 1101-1109 (Supp. 1988).

mont's Abuse Prevention Act. Included in this section are comments and criticisms of the Act based on the report of the Domestic Violence Task Force of the Governor's Commission on Women (Task Force Report).² The third section presents the services that are available to battered women in Vermont.

The fourth section focuses on issues that arise regarding visitation in the battering context. This section contains a detailed explanation of the statutory visitation rights in the battering context and compares these rights with the statutory visitation rights in the divorce context. A comparison of the two statutes raises a number of questions on the appropriateness of deciding visitation issues during an abuse prevention hearing. Various procedural and substantive concerns are identified and explored as a way of examining whether visitation should be decided in this forum. The problems raised are highlighted in section five by several women's experiences with court-ordered visitation in the battering context.

Leaving behind the emphasis on Vermont's problems in this area, the sixth section examines several domestic violence and divorce cases from a number of jurisdictions that have allowed or denied visitation. It becomes readily apparent that visitation is infrequently denied in either context.

The seventh and final section discusses recommendations for improving the Abuse Prevention Act. It starts with a summary of the visitation problem, followed by suggestions for possible alternatives to the present situation. All of the suggestions represent an attempt to balance the battered woman's need for immediate and effective relief from abuse, her children's right to safety, and the defendant's right to visitation.

I. BATTERING—AN OVERVIEW

Violence against women is an old problem. For centuries it was entirely legal for a man to discipline "his wife with a stick 'no thicker than his thumb.'"³ This long-standing tradition of allowing violence against women can be summarized by the simple phrase "the rule of thumb." Although in the last few decades states have

2. DOMESTIC VIOLENCE TASK FORCE, GOVERNOR'S COMMISSION ON WOMEN, DOMESTIC VIOLENCE IN VERMONT AND THE CRIMINAL JUSTICE PROCESS (November, 1986) [hereinafter TASK FORCE REPORT].

3. L. WALKER, THE BATTERED WOMAN 12 (1979).

enacted laws making it a crime for a man to beat his wife or significant other, incidents of violence against women remain shockingly high.⁴ Exact numbers are almost impossible to find because this violent crime often goes unreported.⁵ One study, however, estimates that approximately six million women are battered during a given year in the United States.⁶ This number represents about one tenth to one fifth of all women.⁷ Other studies state that perhaps as many as fifty percent of all women will be victims of battering at some point in their lives.⁸

A battered woman, for purposes of this paper, is defined as a "woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."⁹ Although both men and women may be battered, this paper discusses the issues of battering by viewing the woman as the victim and the man as the batterer.¹⁰ At the outset, it is important to realize that battering occurs at all socio-economic levels and among all races and creeds.¹¹ It is prevalent throughout society.¹²

To better understand battered women, it is critical to know why these women stay in abusive relationships. Dr. Lenore Walker has listed and analyzed characteristics of battered women that contribute to their staying in these relationships.¹³ According to Dr. Walker, battered women typically have low self-esteem, believe the myths about battering, are traditionalists regarding sex-role

4. Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 273 (1985).

5. *Id.* at 275. Reasons contributing to the tremendous underreporting of battering include the shame of the victim, denial of the problem, belief that what happens within the family is a private matter, and the taboo of the subject matter itself. *Id.*

6. *Id.* at 273.

7. *Id.*

8. L. WALKER, *supra* note 3, at 19.

9. *Id.* at xv. Other definitions have also been used. See, for example, Lisa G. Lerman's broader definition of battered women in Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 71-75 (1984).

10. In most cases, women are the victims of domestic violence. There is little support for the contention that men suffer from "battered men's syndrome." Post, *Childhood Exposure to Violence*, 6 VICTIMOLOGY: INT'L J. 156, 164 (1981).

11. L. WALKER, *supra* note 3, at 21-23.

12. It is possible that more incidents of battering of poor women than of middle or upper class women come to the attention of government officials for research or study purposes. This, however, is probably due to the fact that middle- and upper-class women escape detection by receiving treatment from their private physicians instead of the local hospital emergency room. Waits, *supra* note 4, at 276 n.35.

13. L. WALKER, *supra* note 3, at 31.

stereotyping, accept responsibility for the batterer's actions, try to "keep the peace at home" thinking this will stop the abuse, and have severe stress reactions.¹⁴ Battered women also suffer from "learned helplessness."¹⁵ This helplessness is the *result* of the battering relationship, not its cause, and thereby reinforces the woman's inability to leave the battering relationship.¹⁶

While there is a great deal of information about battered women, very little is known about the personality of batterers. What is known about batterers is gleaned primarily from interviews with battered women about their abusers.¹⁷ These interviews indicate that, in many respects, the batterer is very similar to his victim. The batterer frequently suffers from low self-esteem, has traditionalist views about the family, and is often very dependent on his wife or significant other.¹⁸ This dependency leads the abuser to try to isolate the victim and drives him to extreme jealousy when the victim has contact with anyone outside the house.¹⁹ The batterer is also described as being very childish: impulsive and easily frustrated.²⁰ An additional and quite significant trait common to many batterers is that they themselves were battered or abused as children. Thus, battering is frequently a learned response.²¹ Battering, according to Dr. Walker, is cyclical and has three phases.²² First, there is the tension building phase. This is followed by the acute battering phase. Finally, the cycle is complete with the contrite, loving behavior phase.²³ During this third phase the batterer is kind, affectionate, and apologetic for what he has just done. The woman, desperately wanting to believe that this battering is an isolated incident, forgives the batterer and truly believes that now everything will be fine.²⁴ This forgiveness completes the cycle, and

14. *Id.* at 31-35. It is important to realize that not all women suffer from all of these characteristics. Also, this list is by no means exhaustive.

15. *Id.* at 31. The term "learned helplessness" was created by experimental psychologist Martin Seligman. *Id.*

16. *Id.* at 42-54. All of chapter two deals with the theory of learned helplessness and explains how this psychosocial theory applies to battered women.

17. See L. WALKER, *supra* note 3, at 36; Waits *supra* note 4, at 286 n.95.

18. See L. WALKER, *supra* note 3, at 36; Waits, *supra* note 4, at 286-89.

19. See L. WALKER, *supra* note 3, at 37-38; Waits, *supra* note 4, at 286-87.

20. See Waits, *supra* note 4, at 287.

21. Both Walker and Waits discuss the idea that battering is a learned response. For additional authority on this, see Panel 4, *Domestic Violence and Custody—“To Ensure Domestic Tranquility,”* 14 GOLDEN GATE U.L. REV. 623, 633 (1984) [hereinafter Panel].

22. L. WALKER, *supra* note 3, at 55-70.

23. *Id.*

24. *Id.* at 65-70. The importance of this final stage of the battering cycle cannot be

before long the tension building phase begins again.

Although there are variations to this general theme, the triphasic cycle provides understanding and insight into the battering relationship. An understanding of the cycle theory is important because the legal system uses this theory as a framework to develop rules and responses to protect battered women and aid battering men.

II. VERMONT AND BATTERED WOMEN

The occurrence of domestic violence in Vermont parallels that in other states. Approximately 27,000 Vermont women are abused in some manner during a given year.²⁵ This figure includes physical, emotional, and sexual abuse.²⁶ As in other states, incidents of abuse in Vermont continue, despite protective legislation. Vermont's first legislative response to domestic violence was the Abuse Prevention Act of 1980 (Act).²⁷ The original Act was amended several times, most recently in 1985.²⁸ The Act covers family or household members, including "former spouses, persons of the opposite sex living as spouses now or in the past, or persons sixty years of age or older living in the same household and related by blood or marriage."²⁹ From this definition, it is evident that Vermont's statute fails to protect a significant number of people. For example, people of the same sex who are living together are not protected under the statute. Similarly, the Act does not protect a person who is battered by someone who is not living with him or her, such as a significant other.

The Act provides for *ex parte* and regular court orders of protection.³⁰ Under the *ex parte* provisions, a victim may obtain an

underestimated. It is during this phase that the abuser is, in fact, truly sorry for his violence and often believes that it will not be repeated. Because this phase of the cycle brings back good memories for the woman, of how things used to be, she is all too willing to try again and to stay in the relationship.

25. GOVERNOR'S COMMISSION ON WOMEN & VERMONT NETWORK AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, PAMPHLET ON DOMESTIC VIOLENCE IN VERMONT (1988). Copies of this pamphlet are available from either the Governor's Commission on Women, 126 State Street, Montpelier, Vt. 05602, (802) 828-2851 or the Vermont Network Against Domestic Violence and Sexual Assault, P.O. Box 405, Montpelier, Vt. 05602, (802) 223-1302.

26. *Id.*

27. VT. STAT. ANN. tit. 15, §§ 1101-1109 (Supp. 1988).

28. *Id.*

29. *Id.* § 1101(2).

30. *Id.* §§ 1103-1104.

order without notice to the defendant which prohibits further abuse by the batterer, gives the victim temporary possession of the residence, and awards the victim temporary custody of any minor children.³¹ Within ten days after the order is issued, a second hearing must be held in order to extend any of the temporary provisions for up to one year.³² This second hearing allows a judge to grant visitation rights if he or she makes an order relating to child custody.³³ At the end of one year, the victim must go back to court to extend the order of protection by showing that he or she needs continued protection from abuse.³⁴

In addition to the Abuse Prevention Act, Rule 3 of the Vermont Rules of Criminal Procedure protects victims of domestic violence.³⁵ A recent addition to Rule 3 has broadened the police protection available to battered people.³⁶ Generally, under Rule 3 police officers may arrest a person if they have "probable cause to believe [that the] person has committed or is committing a felony."³⁷ In addition, the Rule allows a police officer to arrest without a warrant "when the officer has probable cause to believe a person has committed a misdemeanor which involves a violation of an order issued pursuant to [the Abuse Prevention Act], or which involves an assault against a family or household member, as defined in the same [Act]."³⁸ The newest addition to this Rule, enacted in 1988, allows an officer to arrest a person if "the officer has probable cause to believe that the person has committed a misdemeanor and, if not immediately arrested, will cause personal injury or damage to property."³⁹ The Reporter's Notes to the 1988 amendment explicitly state that several of these changes cover cases of domestic violence, "an area in which the legislature had made patent its preference for prompt arrest regardless of the presence of the officer to witness the crime."⁴⁰ Rule 3 provides protection for persons who do not have orders of protection.⁴¹ This

31. *Id.* § 1104.

32. *Id.*

33. *Id.* § 1103(d).

34. *Id.* § 1103(b).

35. VT. R. CRIM. P. 3.

36. *Id.* R. 3(a)(4).

37. *Id.* R. 3(a)(1).

38. *Id.* R. 3(a)(2).

39. *Id.* R. 3(a)(4).

40. *Id.* R. 3 reporter's notes on 1988 amendments.

41. See J. Martinez, New and Important Information on Enforcement of APO's 4 (Sept. 16, 1988) (unpublished Vermont Legal Aid memorandum).

means that even if someone falls outside the Abuse Prevention Act protections, he or she may still have some measure of protection under Rule 3.⁴²

Although the Abuse Prevention Act and Rule 3 seem to resolve the concerns of battered women, many problems remain and new ones have been created.⁴³ Law enforcement officials have come to view Rule 3 as a controversial provision.⁴⁴ Moreover, there is general confusion surrounding this Rule and its inconsistent application.⁴⁵

The Governor's Task Force Report on domestic violence mentions several problems that have hampered the overall ability of the legal system to respond to the needs of battered women.⁴⁶ One problem is that, despite the six year existence of the Abuse Prevention Act, "there remains a lack of basic knowledge and understanding about domestic violence issues."⁴⁷ In addition, the various branches⁴⁸ of the legal system are hampered from providing effective assistance to battered women by the failure of "each part of the system to recognize its dependence on the others."⁴⁹ Put more simply, each branch of the system has failed to realize its interconnectedness with the other branches. These connections are vital for the effective delivery of services to battered women. The absence of these connections has led to "an inability of each part of the system to maximize common ground and minimize, if not eliminate, differences."⁵⁰

An additional problem is the continued lack of training in domestic violence issues for people who work with the Act on a regular basis. The Task Force Report stated that of 133 law enforcement officers interviewed, only fifty-nine percent had received training. Further, only thirty-one percent of the State's attorneys

42. *Id.* Vermont Rule of Criminal Procedure 3(a)(2) has two parts: the first provides coverage for misdemeanors involving a violation of an order of protection and the second "involves an assault against a family or household member." VT. R. CRIM. P. 3(a)(2). It is this second section that provides protection for individuals without orders of protection.

43. TASK FORCE REPORT, *supra* note 2, at 13-16.

44. *Id.*

45. *Id.*

46. *Id.* at 56-61.

47. *Id.* at 56.

48. The affected branches of the legal system are law enforcement, state's attorneys, judges, and victim's advocates. *Id.* at 6-7.

49. *Id.* at 57.

50. *Id.*

and only fifty-eight percent of the judges interviewed were trained.⁵¹

The Task Force Report, however, is not entirely critical. There are geographical areas in Vermont where agencies, working together, have established an interagency protocol⁵² for responding to domestic violence.⁵³ Areas that have developed such protocols find that better overall communication between the agencies leads to more effective and coordinated delivery of services to victims of domestic violence.⁵⁴

Vermont's Abuse Prevention Act represents a major step in the right direction. The Task Force Report embodies a collective realization that, even with the Act, problems remain in providing services to victims of domestic violence. The Report goes further by highlighting those areas that need the most improvement. The recommendations of the Task Force Report for continued education and training in domestic violence for all branches of the legal system, coupled with the use of protocols in all counties, will probably have the greatest effect in providing consistent and effective protection for victims of domestic violence.

III. SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE IN VERMONT

A variety of services are available to the battered or abused woman. Locally organized battered women's networks throughout the state provide the primary assistance. Some of the networks have shelters for women and their children; others provide a "safe home" where a woman and her family can stay temporarily.⁵⁵ Most of the networks provide a twenty-four hour telephone hotline for women to get help or information. Several provide either peer counseling or support groups for women who need the opportunity to talk and share experiences of battering with other women. These networks can also assist women in a number of very practi-

51. *Id.*

52. Protocol is defined as "a document which provides step-by-step guidance to all parts of the system in handling domestic violence cases." *Id.* at 58.

53. *Id.*

54. *Id.*

55. A shelter generally houses several women and their children. A safe home, in contrast, is a privately owned house in a community where the owner will allow a battered woman to stay in that home to be protected from the abuser. Another difference is that a safe home will not advertise itself as such; this way, the abusers have no way of knowing which homes are "safe homes" in a community.

cal ways such as helping to obtain get food stamps, housing, and Relief from Abuse Orders.⁵⁶

Most of the networks in Vermont are only countywide. Although the Vermont Network is a statewide organization of battered women's and rape crisis groups, there is no single comprehensive network established in Vermont.

The various groups provide vital services to battered women. But, as the Task Force Report suggests, much more needs to be done to increase the availability and effectiveness of these services to women. The basic framework for service is already in place. Therefore, the networks should now focus on working with the other branches in the legal system so that efforts and services are not duplicated. This, in turn, will make the whole system more effective in meeting the needs of battered women.

IV. VISITATION AND VERMONT'S ABUSE PREVENTION ACT

Vermont's Abuse Prevention Act⁵⁷ provides a means for obtaining orders of protection through ex parte or full notice hearings.⁵⁸ During an ex parte hearing, a judge can award temporary child custody to the victim "upon a finding that there is immediate danger of physical or emotional harm" to the minor child.⁵⁹ Emergency relief granted within the context of the ex parte hearing is only effective for a maximum period of ten days.⁶⁰ Consequently, the Act does not provide for visitation rights. This provision for custody is identical to provisions in other states.⁶¹ The constitutionality of these custody orders has been upheld by the courts on the grounds that they are only granted in an emergency situation and are of very limited duration.⁶² After ex parte relief has been

56. Interview with Maryann Zavez, Counselor for Safeline, in Chelsea, Vt. (Oct. 21, 1988); Interview with Jeri Martinez, Training Director at Vermont Legal Aid, in Montpelier, Vt. (Nov. 1, 1988).

57. VT. STAT. ANN. tit. 15, §§ 1101-1109 (Supp. 1988).

58. *Id.* §§ 1103, 1104.

59. *Id.* § 1104(a)(3).

60. *Id.* § 1104(b).

61. See Comment, *Ex Parte Protection Orders: Is Due Process Locked Out?*, 58 TEMP. L.Q. 843, 848 n.37 (1985) (listing 37 states that at the time of the printing of the Comment had domestic violence statutes providing ex parte relief).

62. Decisions in other jurisdictions upholding the constitutionality of the ex parte order of protection include: *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982); *Marquette v. Marquette*, 686 P.2d 990 (Okla. Ct. App. 1984); *Boyle v. Boyle*, 12 Pa. D. & C.3d 767 (C.P. Alleg. 1979).

granted, the Act provides that a second hearing must be held within ten days at which time the defendant has the opportunity to appear in court and to contest the court's order for relief.⁶³ At this second hearing, a court "may, if requested, include visitation rights, unless the court finds that visitation will result in abuse."⁶⁴

Several issues become apparent in reading the language of the Act. First, the Act does not indicate what may or may not be taken into account by a judge in determining custody and visitation rights; no guidelines or suggestions for what is meant to be the basis of this decision are enumerated. Second, the Act does not explicitly state that there are situations where visitation should be denied to the defendant.

The language of this section regarding visitation stands in contrast to the language of the divorce and custody provisions regarding visitation. The custody statutes relating to divorce set forth a presumption that it is in a child's best interest to have contact with both parents, unless there is a potential of direct harm to a child or parent.⁶⁵ Yet, in the context of domestic violence, where there is even more reason for concern about safety, the legislature has not made any effort to increase the safeguards for women and their children.

Moreover, the legislature has set out eight factors which a judge "shall" consider in making custody and visitation determinations in a divorce.⁶⁶ This directly contrasts with the complete ab-

63. VT. STAT. ANN. tit. 15, § 1104(b).

64. *Id.* § 1103(d).

65. VT. STAT. ANN. tit. 15, § 650 (Supp. 1988).

66. *Id.* § 665. The eight factors are:

(1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;

(2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;

(3) the ability and disposition of each parent to meet the child's present and future developmental needs;

(4) the quality of the child's adjustment to the child's present housing, school and community and the potential effect of any change;

(5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

(6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

sence of factors for guiding a judge in the order of protection context. Given the importance of visitation rights,⁶⁷ this absence is shocking.

Visitation in the context of abuse prevention hearings raises a number of procedural and substantive issues.⁶⁸ In considering some of the procedural issues, it is necessary to focus on the goals of the abuse prevention hearings. One purpose of Vermont's Abuse Prevention Act is to give battered women a chance to go into court alone and obtain fast, effective relief from abuse.⁶⁹ Another purpose of the Act is to provide brief and uncomplicated hearings so that a woman can proceed without a lawyer. Although laudable, these goals create additional problems. For example, unlike the divorce context, the Act is not designed to have, nor does it provide for, full evidentiary presentations where all the relevant facts can be brought to light. Furthermore, in the full hearing for orders of protection, lack of advance pleading leaves the woman completely unprepared, not knowing whether visitation or custody will be requested by the defendant. As a result of these problems, the area of visitation is now "more muddled" than ever before.⁷⁰

[B]atterers are now being granted unsupervised visitation rights with children in inappropriate situations. These are the result of hastily scheduled, poorly prepared hearings at which victims are often unrepresented by counsel. Of ultimate concern to victims is the safety of their children. *Yet even where the children themselves have been abused in addition to the women, unsupervised visitation is reportedly still being awarded.* In other situations batterers use the threat of harm to the children as a means to coerce and manipulate their intended victim.⁷¹

(7) the relationship of the child with any other person who may significantly affect the child;

(8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided.

Id.

67. See, e.g., *Barron v. Barron*, 184 N.J. Super. 297, 445 A.2d 1182 (N.J. Super. Ct. Ch. Div. 1982) (importance of visitation rights).

68. Procedural issues for purposes of this article focus on problems with the actual process of obtaining an order of protection. Substantive issues, in contrast, examine issues relating to continuing harm to the woman and her children after receiving an order of protection.

69. Interview with Jeri Martinez, *supra* note 56.

70. TASK FORCE REPORT, *supra* note 2, at 59.

71. *Id.* at 59-60 (emphasis in original).

In considering these procedural issues, it is apparent that the operative mechanisms of the Abuse Prevention Act are at odds with the reality of what is happening with visitation. With the creation of a statute that does not provide for counsel or a full evidentiary hearing, visitation is treated as a given, with little or no concern for its ramifications.⁷²

The lack of procedural safeguards⁷³ for women and their children leads to substantive problems. These arise when the victim is subject to continuing abuse and when the physical and emotional safety of the children involved is threatened by the grant of visitation rights.⁷⁴

The Abuse Prevention Act may fail to stop continuing abuse when a judge arbitrarily awards visitation rights to the abuser. Visitation is frequently used by batterers as a way of harassing, annoying, and abusing the victim.⁷⁵ To avoid some of these problems, judges have the discretion under the Act to require conditions for visitation,⁷⁶ such as the requirement of supervised visits or third-party pick-ups for visits. The effect of these conditions is to limit, or completely to prevent, contact between the victim and the batterer. All too often, however, men still use visitation to continue harassing the victim despite these conditions. This is done over the telephone when the man calls to reschedule visits or when, in some cases, men threaten harm to the children as a way of intimidating the woman.⁷⁷ Women faced with this situation often respond by not answering the telephone or by moving frequently to evade the abuser.⁷⁸ These attempts to escape continued harassment and violence are sometimes labeled as acts of "instability" by courts, and are often used to remove custody of the children from their mother.⁷⁹

72. Interview with Maryann Zavez, *supra* note 56.

73. Procedural safeguards such as use of counsel, full evidentiary hearings, and advance pleadings are safeguards for women and their children in the sense that they ensure a more reasoned decision. Reference to procedural safeguards throughout the rest of this article is meant to imply these types of proceedings and requirements.

74. For more information about the possibilities of continued abuse to the victim and her children see, Panel *supra* note 21, at 637; Woods, Been & Schulman, *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130, 1134 (1983).

75. Crites & Coker, *What Therapists May See that Judges Miss*, 27 JUDGES J. 9, 42-43 (Spring 1988).

76. VT. STAT. ANN. tit. 15, § 1103(d) (Supp. 1988).

77. See Crites & Coker, *supra* note 75, at 42.

78. See Woods, Been & Schulman, *supra* note 74, at 1134.

79. *Id.*

Harm to children is another substantive problem with visitation in the battering context. A vast amount of research suggests that children learn from the adults around them. This is particularly true for children who grow up in violent families.⁸⁰ Even those children who are not physically harmed are aware of the violence between their parents and are often emotionally scarred as a result.⁸¹

The effects of family violence on children cannot be trivialized. Dr. Lenore Walker found that over fifty percent of men who beat their wives also abuse their children and that eighty-seven percent of batterers threaten to abuse their children.⁸² Some of the short-term, more immediate results of family violence include low self-esteem, depression, stress disorders, isolation, fearfulness, self-blame, and a limited tolerance for frustration.⁸³ Also, these children "may use violence as a solution to problems both as children and as adults."⁸⁴ The long-range effects of family violence are equally frightening. Researchers have found that children who grow up in violent families are prone to become violent, or victims of violence, as adults.⁸⁵ Specifically, boys tend to become batterers and girls tend to be battered.⁸⁶ The bottom line of the research is that keeping children in a violent situation only perpetuates the cycle of violence.

As in the case of abuse to women, abuse to children does not automatically cease when the children are separated from the batterer.⁸⁷ "Men who are violent toward one family member frequently become violent toward others."⁸⁸ Consequently, a child is placed in an acutely dangerous position when, after the woman has left the abuser, visitation occurs between the child and the abuser. First, if the batterer no longer has the woman on whom he can vent his anger and abuse, the child may become the next victim of abuse. Second, the batterer's level of violence escalates when the woman asserts her independence, leading the child into a situation

80. See, e.g., Crites & Coker, *supra* note 75, at 11-12; Panel, *supra* note 21, at 637-38; Post, *supra* note 10, at 165.

81. See, e.g., Crites & Coker, *supra* note 75, at 11; Post, *supra* note 10, at 162-65.

82. Panel, *supra* note 21, at 633.

83. *Id.*

84. *Id.*

85. Post, *supra* note 10, at 162-65.

86. *Id.* at 164.

87. See *supra* note 74.

88. Lerman, *supra* note 9, at 110.

where extreme violence may occur.⁸⁹ The batterer often responds at this point by kidnapping the child as a way of threatening the woman.⁹⁰

Although these situations may seem far-fetched, the lack of procedural safeguards in the Abuse Prevention Act has given rise to a situation for women in Vermont where these substantive problems occur all too often. A few concrete examples illustrate the problems of visitation in the domestic violence context more clearly than abstract statistics.

V. EXAMPLES REGARDING VISITATION

This section provides three examples of women's "real life" experiences with visitation in the battering context in Vermont.

1. One woman's experience involves a specific problem cited by the Task Force Report. A child in this woman's family told her mother that she had been sexually abused by her father. The mother went to court to obtain an order of protection for her child. The judge gave the woman custody of the child, possession of the home, and gave her an order of protection for the child. However, although the judge had just heard the woman's reasons for seeking the order of protection, he nevertheless ordered that visitation take place between father and child.⁹¹

2. A woman who had been battered for two years by her significant other got into a fight with him on a Sunday afternoon. During the fight she struck back at him. They made amends later that day. The following morning, however, the man, who had been habitually abusing the woman, went to court to get an order of protection against her. During the *ex parte* hearing, he was not only granted the order of protection, but also custody of a seven month old nursing infant. The sheriff, accompanied by the father, came to the couple's home and took the infant from the woman. Subsequently, the woman requested an expedited hearing (one held sooner than the ten day maximum allowed by statute), at which time she regained custody of her child.⁹²

3. A final example focuses on how women are subject to con-

89. *Id.* at 109. See also *supra* notes 74-75 and accompanying text.

90. Lerman, *supra* note 9, at 109.

91. Interview with Jeri Martinez, *supra* note 56.

92. *Id.*

tinued harassment although they may have an order of protection. One woman, after she had been awarded custody of two young children, allowed the batterer to come to her house to pick up the children for visitation. The abuser came to the house on several occasions on his motorcycle and tried to put both children on it to take them for the visit. Because the details regarding visitation were not specified in the order of protection, the woman did not know whether she was required to allow her abuser to take the children even under these hazardous circumstances. The woman was forced to call several lawyers to determine what she could and could not do without violating the order of protection.⁹³

Each of these examples demonstrates in a very real way the problems that women face in terms of trying to obtain orders of protection that will provide not only protection for them, but for their children as well. Unfortunately, as these cases illustrate, the issue of visitation appears to be given only a very limited amount of thought by the respective judges involved.

VI. CASES ON VISITATION

Research on visitation rights in the domestic violence context, as well as in divorce, indicates that only in the rarest of situations is visitation denied. This section examines several cases where visitation rights are at issue. A Pennsylvania case, *Hughes v. Hughes*,⁹⁴ provides one example of outright denial of visitation rights to a father.

In *Hughes*, the husband and wife had been married, but were divorced at the time the husband was seeking visitation rights. The Pennsylvania Superior Court found that although visitation rights were seldom denied, they may be refused if a moral deficiency threatens the welfare of the child.⁹⁵ The court found that the father had manifested such reckless and abusive behaviour toward both the mother and child that it was appropriate to deny him visitation. The Pennsylvania court labeled his acts of shooting the mother while she was holding the child evidence of a "severe mental or moral deficiency."⁹⁶ The court added that the father's other abusive conduct toward the mother was additional proof of

93. Interview with Maryann Zavez, *supra* note 56.

94. 316 Pa. Super. 505, 463 A.2d 478 (1983).

95. *Id.* at 508, 463 A.2d at 479.

96. *Id.*

this moral deficiency.⁹⁷ Consequently, the court held that there was no error in denying visitation to this father.⁹⁸ Another Pennsylvania court grappling with the issues of parental violence and visitation stated that "whether or not to grant visitation under circumstances where the parent's relationship has been violent always presents a question of the degree and type of violence and its effect on the child."⁹⁹

Several other courts have also dealt with the effect of visitation in domestic abuse cases.¹⁰⁰ In all of these cases, the courts have highlighted the importance of the parent-child relationship, qualified by concern for the welfare of the child. "The right of visitation is an important and legal right, although it is not an absolute right but is one which must yield to the good of the child."¹⁰¹ This statement succinctly describes the posture of most of these cases. The Vermont Supreme Court took the same approach, stating that "a visitation privilege of some sort is the right of a parent unless good cause exists to deny visitation."¹⁰²

A New Jersey court discussed thoroughly the importance of visitation rights.¹⁰³ Custody had been awarded to the mother during the couple's divorce proceedings. For five years after the divorce, the father made "minimal efforts" to see his children.¹⁰⁴ Finally, after five years he sought visitation.¹⁰⁵ The mother vehemently opposed the visits on the grounds that, because he had not tried to see his children for the past five years, the father had abandoned them and that he should consequently be "forever denied visitation."¹⁰⁶ The mother added that because of the psychological and emotional harm to the children that would result from visits, the visits should be denied.¹⁰⁷ The court observed that "parental rights have always occupied an exalted position in our soci-

97. *Id.*

98. *Id.* at 509, 473 A.2d at 480.

99. *Dena Lynn F. v. Harvey F.*, 278 Pa. Super. 95, 101, 419 A.2d 1374, 1377, (1980).

100. *See, e.g., Capri M.P. v. Ronald O.*, 480 A.2d 669 (Del. Fam. Ct. 1984); *In re Constance W.*, 351 Pa. Super. 393, 506 A.2d 405 (1986); *Cleverly v. Cleverly*, 147 Vt. 154, 513 A.2d 612 (1986).

101. *Capri M.P.*, 480 A.2d at 673.

102. *Cleverly*, 147 Vt. at 157, 513 A.2d at 614.

103. *Barron v. Barron*, 184 N.J. Super. 297, 445 A.2d 1182 (N.J. Super. Ct. Ch. Div. 1982).

104. *Id.* at 298, 445 A.2d at 1183.

105. *Id.* at 299, 445 A.2d at 1183.

106. *Id.*

107. *Id.* at 299-300, 445 A.2d at 1183.

ety. And since visitation rights are a diminishment of parental rights previously enjoyed, they naturally take on special importance to the non-custodial parent."¹⁰⁸ The court went on to discuss the possibility of terminating visitation rights and concluded that such termination should only be "an extraordinary proscription."¹⁰⁹ The court stated that visitation rights would be terminated only if it could be shown by clear and convincing evidence that visitation would cause physical or emotional harm to the child or that the parent was unfit.¹¹⁰ The court concluded that a five year absence did not constitute grounds for termination.¹¹¹

These cases illustrate the difficulties courts have in reconciling a victim's and child's need for safety with the other parent's right to visitation. It seems evident from these few cases that only in the most serious situations will a court completely deny a parent visitation.

VII. RECOMMENDATIONS

The issue of visitation rights within the context of an order of protection hearing presents several problems. At the heart lies a basic conflict between the purposes of the abuse prevention hearing and the reality of its effect. As described above, the purpose of the Abuse Prevention Act is to provide women with a fast, uncomplicated, inexpensive proceeding where they can appear pro se.¹¹² Although in many cases the Act is effective and does stop the abuse, the reality is that in many other cases, especially those that involve visitation rights, women and their children face continued abuse and harassment. Obviously, there is a trade-off. In order to have a fast, uncomplicated proceeding, there are few procedural safeguards¹¹³ and protections for the woman with respect to visitation rights. The critical question is whether this trade-off must contrive, or whether there are viable alternatives that will increase the procedural safeguards for victims without losing the benefits of a fast, pro-se proceeding. There are many alternatives, and several which are present in Vermont's child custody provisions¹¹⁴ could

108. *Id.* at 300, 445 A.2d at 1184.

109. *Id.* at 303, 445 A.2d at 1185.

110. *Id.*

111. *Id.* at 303-04, 445 A.2d at 1185.

112. *See supra* text accompanying note 69.

113. *See supra* note 73.

114. VT. STAT. ANN. tit. 15, §§ 650-670 (Supp. 1988).

readily be adapted to the abuse prevention hearing.

A. Denial of Visitation

The first alternative is to deny visitation in cases where, according to the Act, there may be harm to the parent or child.¹¹⁵ Although courts are generally unwilling to deny a parent visitation, it is evident from research and case law that in many instances it would be in the best interest of both the woman and her child to have visitation with the defendant denied.

1. In the case of a married couple, if the father is denied visitation, he can use other procedural tools to contest the visitation order. A divorce proceeding, for example, is the appropriate forum in which to raise or to continue to litigate this issue. The Abuse Prevention Act as formulated does not provide safeguards that ensure a sound, reasoned, and well thought-out decision on visitation. Consequently, in a situation where there is the possibility of continuing harm to the victim because of visitation, a judge should simply deny visitation to the defendant. The defendant would then have the option of suing for divorce, raising custody and visitation as issues in that proceeding. "The temporary loss of access to children due to abuse isn't very burdensome since men can sue for divorce to get visitation."¹¹⁶

Taking the custody and visitation issue out of the abuse prevention context and placing it within the divorce context makes sense for two reasons. First, as stated above, procedural safeguards exist in the divorce context that will assure both parties that a decision will have a sound factual basis. Second, placing the burden on the defendant at this stage is appropriate. The victim has already sustained her burden by obtaining an order of protection. Should the defendant want custody or visitation, if custody or visitation has been denied him, then the burden should be on him to take the next step; that is, to sue for divorce.

2. There are couples for whom divorce is not a practical solution because of their religious beliefs. For them, a legal separation, as provided by title 15 of the Vermont Statutes Annotated, would

115. VT. STAT. ANN. tit. 15, § 1104 (Supp 1988).

116. Note from Professor Heather Wishik, Adjunct Professor, Vermont Law School to the author (Oct. 1988) (discussing draft one of this article). This idea was also supported by Jeri Martinez, *supra* note 56, during the author's discussion with her regarding solutions to the visitation problem.

be the appropriate proceeding.¹¹⁷ In a legal separation, a court must make the same evaluation regarding custody (parental rights and responsibilities) and visitation using the same factors as in a divorce proceeding.¹¹⁸ Using the legal separation proceeding thus provides all of the procedural safeguards absent in the abuse prevention hearing, without creating the conflict with a defendant's religious beliefs that a divorce proceeding might raise.

3. Another group of people for whom divorce would not present a workable solution are those couples who are not married but who are living together. The use of Parentage Proceedings would, however, provide relief similar to a divorce or separation.¹¹⁹ During such a proceeding, a court may determine parentage and also may make provisions regarding child support, visitation, and custody.¹²⁰ The purpose of these proceedings is to establish the rights and responsibilities of parents towards their children, regardless of whether the child is born in or out of wedlock.¹²¹

In conclusion, this first alternative, denying visitation where there may be harm to the victim or to the children, is an extremely viable solution. Although the defendant may have concerns about the resulting temporary loss of access to his children, there are a variety of other proceedings, such as divorce, separation, or parentage, through which the defendant could have visitation reinstated. Balancing the interests and safety of the victim and child against the defendant's right to access to his children, this temporary loss is not too great a burden for the defendant to bear.

B. Secondary "Visitation" Hearing

A second alternative would be to create an additional hearing for those cases where visitation is contested. This second hearing would supplement the regular order of protection hearing; however, its focus would be solely on visitation. Such a hearing would allow a judge more time to reflect and consider who should be awarded custody and whether visitation rights ought to be granted

117. VT. STAT. ANN. tit. 15, § 665(a) (Supp. 1988).

118. VT. STAT. ANN. tit. 15, § 655(a) (Supp. 1988) provides: "In an action under this chapter, the court shall make an order concerning parental rights and responsibilities of any minor child of the parties."

119. See VT. STAT. ANN. tit. 15, §§ 301-306 (Supp. 1988).

120. *Id.* § 305.

121. *Id.* § 301.

at all. Ideally, this secondary hearing would be scheduled shortly after the order of protection hearing, perhaps within a week or two.¹²²

Setting this secondary visitation hearing apart from the order of protection hearing would allow a judge to treat the custody and visitation issues more seriously. It would also provide the victim (and the defendant) time to better prepare for a contested hearing. This is an option that is not available under the existing order of protection provision. Although there are positive aspects to this alternative, a few negative ones must also be considered. Another hearing extends the process of obtaining relief from abuse. This conflicts with the original idea of the Abuse Prevention Act, which was designed to provide a quick proceeding.¹²³ Moreover, this additional proceeding makes obtaining an order of protection more complicated.

C. *Factors for a Judicial Decision*

The third alternative, used in conjunction with the secondary visitation hearing, would require a judge to consider some of the factors listed in the divorce and custody statute.¹²⁴ Not all of these factors would have to be adopted for this visitation hearing. However, using at least some of them would be helpful in reaching a reasoned decision.¹²⁵ The problem of having both parties present evidence, as mandated in a divorce proceeding, could be avoided by requiring the judge to ask the parties about selected issues raised by the eight factors. Separating this hearing from the regular order of protection hearing provides the victim with time to prepare answers to such questions. At the earlier hearing the victim, as well as the defendant, would be informed about the issues which the judge will be raising during the secondary visitation hearing. The drawbacks of this alternative include the increased complexity of the proceeding due to the use of guidelines, the additional time required by the secondary hearing, and the increased costs to the parties from having to return to court on a separate

122. The second hearing should be held as soon after the first one as possible in order to maintain the goal of the Abuse Prevention Act of providing an expeditious method of obtaining relief from abuse. *See supra* text accompanying note 69.

123. *Id.*

124. *See supra* note 66.

125. *See id.* For example, factors 1, 2, 5 and 6 could be adopted. These factors focus on the quality of the relationship between parent and child, and on the ability of each parent to foster a positive relationship between the child and the other parent.

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D. *In Camera* Hearings

A final alternative to consider is the use of an *in camera* hearing during which the judge would receive testimony from the child or children involved.¹²⁶ The judge, under the present divorce statute, is already granted the discretion to hold such a hearing in a divorce proceeding.¹²⁷ This provision could readily be adapted to the Abuse Prevention Act.¹²⁸ A judge could decide who, besides the child or parent, should be present at the hearing. For example, if either or both of the parents had attorneys, these attorneys could be present during the *in camera* hearing whereas the parents might be excluded. Like the divorce provision for *in camera* hearings, the only stipulation would be that the court stenographer would record the proceeding.¹²⁹

Although this solution sounds workable, there are perhaps some stronger countervailing issues to consider here than in the previous alternatives. The greatest risk is the possible trauma to the child from being interviewed by a judge on such a sensitive issue.

A variation which would avoid this concern is the use of a guardian ad litem or an expert witness. Either or both of these persons could interview and evaluate the child. During the secondary visitation proceeding, or even at the regular order of protection hearing, such persons could then testify in court as to their recommendation about custody and visitation. Use of a guardian ad litem, as well as that of the expert witness, is already provided for in the divorce context.¹³⁰

Clearly there are available possibilities. Some of these, as set forth in this section, could be adapted from the existing divorce and custody statutes. In addition to these suggestions, the Governor's Task Force outlined a number of recommendations that could be incorporated into the actual order of protection hear-

126. VT. STAT. ANN. tit. 15, § 594(c) (Supp. 1988).

127. *Id.*

128. See VT. STAT. ANN. tit. 15, §§ 1101-1109 (Supp. 1988).

129. VT. STAT. ANN. tit. 15, § 594(c) (Supp. 1988).

130. See VT. STAT. ANN. tit. 15, §669 (Supp. 1988) (guardians ad litem); VT. STAT. ANN. tit. 15, §667(b) (Supp. 1988) (expert witnesses).

ing.¹³¹ All of these would make the abuse protection system in Vermont more effective.

CONCLUSION

Trying to resolve the issue of visitation in the context of an abuse prevention hearing has not yielded very satisfactory results. Although the Abuse Prevention Act is effective in providing a fast, simple proceeding for the protection of victims of domestic violence, the trade-off is the reduced effectiveness of the Act in preventing further abuse.

The vast amount of research on the effects of battering on women and children, and on the harm of exposing victims to continued abuse through court-ordered visitation, demands that changes be instituted in the present abuse prevention act. There are a variety of alternatives to the present system existing within the context of other proceedings. As previously discussed, examples of these alternatives include divorce proceedings, legal separations, parentage proceedings, adapting the factors used for custody and visitation decisions, and *in camera* hearings.¹³² Incorporating some or all of these alternatives into the Abuse Prevention Act would enhance the effectiveness of the Act in the areas where change is needed most. Although each alternative has both positive and negative aspects,¹³³ a victim's and her children's need for safety must be balanced with the defendant's right to visit his children. The defendant's temporary loss of access to his children is outweighed by two factors: first, each individual victim will benefit from the increased procedural safeguards; second, and perhaps most importantly, society as a whole will benefit if these alternative procedures help stop the cycle of violence.

131. TASK FORCE REPORT, *supra* note 2, at 62-75.

132. See *supra* text accompanying notes 115-131.

133. See *id.*