

Exploring the Impact Of Domestic Violence On Domestic Relations

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Divorce is one of the most difficult life events, but it becomes even more complicated when it involves an abusive relationship.

Statistics are staggering. In the United States, on average, nearly 20 people per minute are physically abused by their intimate partners¹. On an annual basis, the total number of affected individuals is more than 10 million individuals². One in three women and one in four men have been in situations in which an intimate partner has become physically violent³. One in five women and one in seven men have been the victim of severe physical violence inflicted upon them by an intimate partner⁴. Physical abuse perpetuated by an intimate partner constitutes 15 percent of all violent crimes⁵.

This article will address a variety of ways that domestic violence may impact a matrimonial matter, including: (1) orders of protection; (2) occupancy of the marital residence; (3) confidentiality; (4) custody and supervised visitation; (5) property division; (6) spousal support; (7) alternate dispute resolution methods; and (8) judicial forum.

Orders of Protection

Safety is paramount. From the outset, it is critical for spouses in abusive relationships to protect themselves.

An order of protection can be a crucial safeguard. A party can seek an order of protection against his/her spouse in the Family Court or Supreme Court. A spouse also can seek an order of protection on behalf of the parties' children. Orders of protection in the Family Court and Supreme Court are issued as part of a civil proceeding, as opposed to orders of protection in the Criminal Court that can be issued only against someone who has been charged with a crime.

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¹ National Center for Injury Prevention and Control, Division of Violence Prevention, National Intimate Partner and Sexual Violence Survey: 2010 Summer Report (2010), available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; National Coalition Against Domestic Violence: Statistics, National Statistics, available at <http://www.ncadv.org/learn/statistics>.

² Id.

³ Id.

⁴ Id.

⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Nonfatal Domestic Violence: Special Report (2003-2012), available at <http://www.bjs.gov/content/pub/pdf/ndv0312.pdf>.

When seeking an order of protection in Family Court, the moving party must submit a sworn family offense petition. The standard for obtaining an order of protection is set forth in §812 of the Family Court Act. The party moving for an order of protection must demonstrate that the other party committed at least one family offense set forth in the statute. Family offenses include assault, harassment, sexual abuse, strangulation, disorderly conduct, and stalking⁶. In contrast to a criminal proceeding, in which each element of the crime must be proven beyond a reasonable doubt, in Family Court, the standard of proof is a preponderance of the evidence.

A litigant in the Supreme Court requesting a protective order must submit a motion or Order to Show Cause. A protective order may be issued in the Supreme Court upon "good cause shown."⁷ However, the applicable law does not specifically define "good cause shown." Therefore, in determining an application for an order of protection, the Supreme Court generally applies the substantive provisions of Article⁸ of the Family Court Act.

An order of protection places restrictions on the conduct of an individual who harms or threatens to harm another person. A protective order may direct a party not to harm, threaten, or harass his/her spouse and/or children. It can require a party to stay away from his/her spouse, children, the spouse's home, the spouse's place of business, and the children's school. It may also mandate that a party cannot have any contact with his/her spouse by telephone, mail, email, text message, or otherwise, including indirect contact through a third party.

Usually, when seeking ex parte relief from the Supreme Court, a party must give advance notice in a manner that allows the other party an opportunity to appear in order to oppose the requested relief. An exception exists, however, if providing notice would cause significant prejudice. Therefore, where an order of protection is being sought as a result of domestic violence, advance notice of the ex parte application is typically not required because of safety concerns and the threat of violence.

Individuals sometimes question the effectiveness of an order of protection as "it's just a piece of paper." Although certainly not foolproof, an order of protection clearly provides more security to a party than if he/she did not have it, as well as remedies to help stop the violence. Violation of a temporary or permanent order of protection is a crime. If there is a violation, the spouse who has been granted the order of protection may call the police and the other spouse may be arrested. Physical violence does not need to occur in order to constitute a violation. For example, if an order of protection provides that a party must stay away from his/her spouse's place of employment and he/she shows up at the place of employment, then the police can be called and the individual may be arrested for violating the order of protection.

⁶ McKinney's Consolidated Laws of New York, Family Ct. Act §812(1) (2010 & Supp. 2015).

⁷ McKinney's Consolidated Laws of New York, Dom. Rel. §240(3)(e) (2010).

⁸ 22 N.Y. Comp. Codes R. & Regs, Judiciary 202.7(f) (2014).

Exclusive Occupancy of Residence

During the pendency of a divorce, it is frequently problematic when spouses live in the same residence. If the parties are in an abusive relationship, cohabitation during a divorce can be dangerous and even life threatening.

A spouse may seek temporary exclusive use and occupancy of the marital residence during a divorce proceeding. In order to obtain temporary exclusive occupancy, a moving party must demonstrate either: (1) that a spouse voluntarily moved out and his/her return would cause domestic strife; or (2) there exists a threat to physical safety or property⁹. Upon obtaining an award of exclusive use and occupancy, a party may change the locks to help keep the other party away.

Confidentiality

In other circumstances, a spouse who has been abused may need to flee from the marital residence or move away to an undisclosed location. Address information normally is set forth in court documents, such as a Summons with Notice for Divorce and Verified Complaint. In instances of domestic violence, a spouse may opt to keep her/his whereabouts confidential for safety purposes. A party in a divorce, regardless of whether there is an order of protection, may make an application to the court seeking to have her/his address kept confidential.

In situations where the court determines that disclosure of the address would pose "an unreasonable risk to the health or safety of a party or the child," the address will be not be required to be disclosed¹⁰. While a determination is pending, the address information is kept confidential and sealed¹¹. Furthermore, if a spouse or his/her child has resided or resides in a facility for victims of domestic violence, his/her present address and the address of the facility will not be disclosed¹².

Custody and Supervised Visits

The standard for determining child custody is the best interests of the children. In determining what constitutes the best interests of the children, courts look at the totality of the circumstances. Factors that courts examine in determining the best interests of the children include the primary caretaker during the marriage, the quality of the home environment, the ability of each parent to provide for the child's emotional and intellectual development, the ability of each parent to provide for the child, the relative fitness of each parent and the effect an award of custody would have on the child's relationship with the other parent¹³.

During a custody or visitation proceeding, if a party alleges in a sworn affidavit or pleading that the other party committed acts of domestic violence and the allegations are demonstrated by a

⁹ McKinney's Consolidated Laws of New York, Dom. Rel. §234 (2010); Taub v. Taub, 33 A.D.3d 612 (App. Div. 2d Dept. 2006); Mitzner v. Mitzner, 228 A.D.2d 483 (App. Div. 2d Dept. 1996).

¹⁰ McKinney's Consolidated Laws of New York, Dom. Rel. §254(1) (2010).

¹¹ Id.

¹² McKinney's Consolidated Laws of New York, Dom. Rel. §254(2) (2010).

¹³ Eschbach v. Eschbach, 56 N.Y.2d 167 (Ct. of Appeals 1982); Bressler v. Bressler, 122 A.D.3d 659 (App. Div. 2d Dept. 2014).

preponderance of the evidence, the court must consider the effect of the domestic violence on the best interests of the children¹⁴. Although domestic violence is a factor considered together with others that the court finds relevant in a custody and visitation case, it is not determinative¹⁵.

In situations of domestic violence, it is advantageous to minimize ties between parents after a divorce. Sole custody is typically preferable in families where there has been a history of domestic violence. Joint legal custody obligates parents to make decisions jointly and to consult with each other. This creates a continued dialogue between the parents and one can intimidate the other parent to obtain control. It may be advantageous to prescribe that pick-ups and drop-offs of the children will occur in public places, such as at school or camp.

Supervised visitation is a potential remedy. Supervised visitation may be awarded where the court determines that un-supervised visitation will be contrary to the children's best interests. For example, in the case of *In re Luis F. v. Dayhana D.*, the Appellate Division, First Department, upheld the Family Court's determination that an award to the father of unsupervised visitation was not in the child's best interests¹⁶. In reaching that determination, the court considered that the father had been convicted of assaulting the child's mother and the father was directed to participate in a domestic violence program¹⁷.

Property Division

In New York, equitable distribution of marital assets does not necessarily mean equal distribution. Domestic Relations Law §236 sets forth factors to consider in rendering an equitable distribution. This includes a catchall criterion that gives the court discretion to consider any other factor that it considers "just and proper." A history of domestic violence may be considered under this catchall factor in rendering an equitable distribution¹⁸.

However, in cases involving domestic violence, the person who has been abused only may be awarded a greater portion of the marital assets upon a showing of egregious marital fault. Except for egregious cases that "shock the con-science" of the court, misconduct is not a factor in rendering an equitable distribution¹⁹. Verbal and emotional abuse is insufficient to meet this standard.

Courts require such a high standard for marital fault because they believe that marriage is an economic partnership and upon divorce both parties are entitled to a fair share of the marital assets.

¹⁴ McKinney's Consolidated Laws of New York, Dom. Rel. §240(1)(a) (2010).

¹⁵ *Id.*

¹⁶ *Luis F. v. Dayhana D.*, 109 A.D. 3d 731 (App. Div. 1st Dept. 2013).

¹⁷ *Id.*

¹⁸ *Havell v. Islam*, 186 Misc.2d 726 (N.Y. Sup. Ct., N.Y. County 2000) (aff'd in *Havell v. Islam*, 301 A.D. 339 (1st Dept. 2002)).

¹⁹ *Kaur v. Singh*, 44 A.D.3d 622 (2d Dept. 2007); *Kellerman v. Kellerman*, 187 A.D.2d 906 (3d Dept. 1992); *Blickenstein v. Blickenstein*, 99 A.D.2d 287 (2d Dept. 1984).

Moreover, the courts generally feel that it is a complicated endeavor to ascribe fault and its determination may be time consuming and may sidetrack the proceedings²⁰.

Spousal Support

Victims of domestic violence perpetuated by their intimate partners lose a total of eight million days of paid work each year²¹. From 21 percent to 60 percent of domestic violence victims lose their jobs because of reasons related to the abuse²².

Economic abuse involves conduct directed at causing financial dependence, thus making it more difficult for a victim of domestic violence to leave the relationship. For example, a spouse engaging in economic abuse may maintain tight control over the finances, withhold access to money and attempt to prevent the other spouse from working. Between 94 and 99 percent of individuals affected by domestic violence are the victims of economic abuse. During a divorce proceeding, temporary maintenance can be helpful tool to help tide over the less wealthy spouse throughout the pendency of the case.

Upon divorce, post-divorce maintenance may be critical in facilitating an individual's ability to move on and become self-supporting. Among the factors that must be taken into account in determining the amount and duration of post-divorce maintenance include acts by a spouse that inhibited or continue to inhibit a party's earning capacity, including acts of domestic violence²³.

ADR Methods

Divorcing couples have various avenues for alternate dispute resolution, which include mediation and collaborative law. In mediation, the divorcing couple meets with a mediator, who tries to facilitate a settlement. In collaborative law, each party is represented by an attorney, although they sign a participation agreement at the outset of the process stating that new counsel will be obtained in the event that the matter becomes litigated.

Professionals are divided regarding whether mediation and collaborative law are appropriate for cases involving domestic violence. On the one hand, proponents believe that they are viable methods for resolving disputes. They feel that it is possible to utilize such methods to address issues such as custody, support, and property division without delving into the abuse and domestic violence. In addition, proponents believe that such methods encourage cooperation and empowerment, as opposed to litigation, which may further exacerbate the situation.

Other professionals believe that domestic violence is antithetical to alternative dispute resolution. They believe that the inherent imbalance of power will have a corrosive effect on the proceedings.

²⁰ Havell v. Islam, 186 Misc.2d 726 (N.Y. Sup. Ct., N.Y. County 2000).

²¹ How Employment Helps Female Victims of Intimate Partner Violence: A Qualitative Study, Rothman, Emily F.; Hathaway, Jeanne; Stidsen, Andrea; de Vries, Heather F., Journal of Occupational Health Psychology, Vol 12(2), April 2007, 136-43, available at <http://dx.doi.org/10.1037/1076-8998.12.2.136>.

²² Id.

²³ McKinney's Consolidated Laws of New York, Dom. Rel. §236(a)(7) (2010).

A spouse may be fearful of his/her abuser, which may lead to major concessions and unfair settlements.

IDV Courts

The Integrated Domestic Violence (IDV) courts are specialized courts that were established to improve the handling of cases involving domestic violence. The IDV courts adopt a "one familyone judge" approach. They bring together matrimonial, family, and criminal cases that involve domestic violence, so that the matters affecting one family can be presided over by one judge. In order to have a case in the IDV courts, the family must have a criminal domestic violence case, as well as a family court case and/or divorce case.

Prior to the IDV courts, multiple cases frequently could be pending for the same family. This would result in numerous judges, court appearances scheduled on different dates, and cases heard in different courthouses. This presents a daunting legal terrain, requiring a tremendous amount of time and money, for litigants already challenged with domestic violence.

Judges in IDV courts are specially trained in the area of domestic violence in order to be equipped to handle this complex and sensitive area of the law. The various cases do not merge, but rather they are handled separately according to the law that would have been applied in the case's originating court. Because multiple cases are heard before the same judge, the results are more consistent.

Conclusions

Numerous unique considerations exist in divorce cases that involve domestic violence. However difficult the path, divorce can help pave the way for a domestic violence victim to become a domestic violence survivor.

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