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THE PENNSYLVANIA PROTECTION FROM ABUSE ACT: 1988 AMENDMENTS PROVIDE GREATER PROTECTION TO VICTIMS OF DOMESTIC VIOLENCE

I. INTRODUCTION

A wife is beaten every eighteen seconds in the United States.[1] Increased recognition of the widespread and devastating problem of domestic violence provided the Pennsylvania legislature with the initiative to reexamine the protection afforded to victims in this Commonwealth.[2] As a result, the Pennsylvania General Assembly overwhelmingly passed amendments to the Pennsylvania Protection From Abuse Act ("Act")[3] which are designed to more effectively combat the problems associated with domestic violence.

The dynamics of domestic abuse are complex. However, the clearest risk factor associated with becoming a victim of abuse is having witnessed domestic violence as a child.[4] Conversely, it has been estimated that as many as fifty percent of those who grow up in violent homes will become batterers as adults.[5] The most obvious solution to domestic abuse, therefore, would be to prevent children from being exposed to violence in the home. Unfortunately, victims are reluctant to leave abu-

1. Machlowitz, *Lawyer on the Aisle: PBS Explores the Hell of Family Violence*, A.B.A. J. 120, 120 (June 1985) (wife beating accounts for 20% of all police calls and 40% of all serious emergency room treatments).

2. Rubin, *Abuse Victims Fight Back*, Main Line Sunday, Oct. 23, 1988, at 1. Statistics reported by the Domestic Abuse Project of Delaware County indicate that an estimated three million to six million women are beaten each year by husbands and boyfriends. *Id.* at 3, col. 3. The single major form of injury to women is battering, which occurs more frequently than rapes and muggings combined. *Id.*

3. PA. STAT. ANN. tit. 35, §§ 10182-10190.2 (Purdon 1977 & Supp. 1989). Upon its third consideration in the House the vote was 190 in favor of the amendments, 0 against the amendments, 2 members did not vote and 11 members were excused. 1987 PA. HOUSE LEGIS. J. 2148 (Dec. 15, 1987).

4. M. Kaufman, Representing Battered Women 5 (May 1988) (unpublished manuscript) (prepared for students of Villanova University School of Law for use with Delaware County Legal Assistance Assoc., Inc.) (citing Hotaling & Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101 (1986)). Studies also indicate that victims are frequently under 30 years old and may hold traditional gender role expectations. *Id.*

5. *See* Comment, *Ex-Parte Protection Orders: Is Due Process Locked Out?*, 58 TEMP. L.Q. 843, 844 & n.4 (1985). For a child, the trauma of seeing a parent battered has lasting psychological effects. *Id.*; *see also* Note, *Pennsylvania's Protection From Abuse Act: A Decade in Existence Generates Judicial Interpretation and New Changes by House Bill 2026*, 91 DICK. L. REV. 805, 807 (1987). Childrens' attitudes are colored by the violence they see at home, which may result in violent behavior later in life. *Id.*

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sive situations,[6] and over seventy percent of victims who do leave abusive relationships return to them.[7] Over time, domestic violence within the home escalates, increasing in frequency and intensity.[8] Thus, it is the recurrence of violence that must be prevented. To combat domestic violence, civil protection statutes, such as the Pennsylvania Protection from Abuse Act,[9] appropriately provide protection from the long-term cyclical realities of abuse and supply crisis intervention relief.

Further necessitating an effective legislative response to domestic violence is the criminal justice system's inability to provide an adequate response to the problem.[10] The criminal justice system has failed for a number of interrelated reasons. First, police response to domestic abuse is inadequate as a result of several factors: a failure to take domestic violence seriously;[11] the belief that police intervention is not appropriate in domestic disturbances;[12] and an awareness of the inherent danger in responding to family disturbances.[13] Second, prosecutors often fail to bring charges against abusers, and if they do, the charges rarely reflect the seriousness of the attacks.[14] A third factor encompasses the inadequacy of the entire system, including the social stigma attached, the long delay involved and the victim's fear of further attacks after the abuser is released on bail.[15] As a result, the immediate relief and protection available to the victim under civil protection statutes clearly provide a more effective alternative than the criminal justice system.[16]

II. HISTORY OF THE PENNSYLVANIA ACT

For many years, the Pennsylvania legislature has sought to provide

6. *See* Note, *supra* note 5, at 807-08. Some of the reasons why victims fail to leave abusive homes include such practical considerations as lack of job skills, experience and money, as well as psychological factors encompassing the feelings of failure and fear of reprisal. *Id.*

7. *See* M. Kaufman, *supra* note 4, at 9 (citing Turner & Shapiro, *Battered Women: Mourning the Death of a Relationship*, 1986 SOCIAL WORK 372).

8. Simmons, *Protection From Abuse Act Expanded by Superior Court*, 10 Pa. L.J. Rptr., July 13, 1987, at 3, 4. One study determined that in 85% of spousal homicides the police had been called to the residence five or more times prior to the homicide. *Id.* One-eighth of all homicides occur between spouses. *Id.*

9. Act of Oct. 7, 1976, Pub. L. 1090, No. 218 (codified as amended at PA. STAT. ANN. tit. 35, §§ 10181-10190.2 (Purdon 1977 & Supp. 1989).

10. *See* Note, *supra* note 5, at 808-11.

11. *See* Simmons, *supra* note 8, at 4.

12. *See* Note, *supra* note 5, at 808-09 & nn.21-22. Police policy of nonintervention has been documented and proven in some cases. *Id.*

13. *See* Comment, *supra* note 5, at 845 & n.11. FBI statistics indicate that 20% of police officers killed each year are those responding to domestic disturbance calls. *Id.*

14. *See* Note, *supra* note 5, at 810 & nn.25-26.

15. *See id.* at 810-11.

16. *See id.* at 811.

an effective civil response to domestic abuse. When originally enacted in 1976,[17] the Act was hailed as a forward-looking vanguard measure to combat domestic violence,[18] and a number of states patterned their civil protection statutes on the comprehensive Pennsylvania Act.[19] After two years, however, the Act required substantial amendments to resolve unforeseen problems. The 1978 amendments to the Act provided for emergency relief, clarified the contempt provision and made other minor changes.[20]

For a decade, the Act provided "an efficient, simple and rapid vehicle for the resolution of family disputes."[21] Moreover, the Superior Court of Pennsylvania consistently read the terms of the Act expansively to aid in accomplishing this legislative goal.[22] Yet, despite the comprehensive provisions of the Act and the courts' expansive construction, domestic violence continued to persist.[23] In 1988, the Act was again amended to address the continuing problem of domestic abuse.[24] By further broadening the coverage of the Act and providing victim-oriented provisions, the 1988 amendments reflect an attempt to coordinate the combined efforts of domestic violence programs and local law enforcement in the battle against domestic abuse.[25]

III. RECENT AMENDMENTS TO THE ACT

The amendments to the Act became effective on June 20, 1988, and to date, there have been no judicial interpretations of the amendments. Therefore, this article will attempt to interpret the recent and widespread changes to the Act and attempt to predict the legal issues which may result from these changes.[26] Furthermore, this article will outline

17. PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon 1977).

18. *See* Yankoskie v. Lenker, 363 Pa. Super. 448, 454, 526 A.2d 429, 432-33 (1987) ("[T]his court has repeatedly characterized the Act as a 'vangard measure dealing with the problems of wife and child abuse.' "); Cipolla v. Cipolla, 264 Pa. Super. 53, 53 n.1, 398 A.2d 1053, 1054 n.1 (1979).

19. *See* Comment, *supra* note 5, at 846 & n.16.

20. 1978 Pa. Laws 513-15. The 1978 amendments broadened the definition of abuse by including parties who formerly resided together and who continue to maintain legal access to the residence. *Id.* at 513. The 1978 amendments also provided for the waiver of court costs. *Id.* Further, the 1978 amendments added support as a form of relief. *Id.* at 514.

21. Mahorsky v. Mahorsky, 22 Pa. D. & C.3d 210, 213 (1982).

22. *See* Simmons, *supra* note 8, at 3; *see also* Yankoskie v. Lenker, 363 Pa. Super. 448, 526 A.2d 429 (1987) (court guided by general principle that provisions of statute shall be liberally construed).

23. *See* Rubin, *supra* note 2, at 3, col. 1. In Delaware County 35 protection orders are issued each week, and 11 homicides relating to domestic violence were reported last year. *Id.* at 3, col. 3.

24. PA. STAT. ANN. tit. 35, §§ 10182-10190.2 (Purdon Supp. 1989).

25. *Id.*

26. For a discussion of the substantive changes of the 1988 amendments, see *infra* notes 28-46 & 72-104 and accompanying text.

the procedure which must be followed in order to guide a victim through the judicial system in accordance with the Act.[27]

A. *Victims Afforded Protection*

The Act affords protection to victims based on their relationship with their abuser. As a result of the 1988 amendments, the scope of the Act encompasses abuse between "family or household members, sexual or intimate partners or persons who share biological parenthood."[28] The 1988 amendments further define "family or household members" as "spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood."[29] Although many of these terms are not self-explanatory, this section of the Act is clearly intended to include many different and varied relationships between victims and abusers[30] which were not previously covered by the 1978 version of the Act.[31]

The 1978 version of the Act required that the parties reside together—or at least maintain access to a shared residence.[32] Current language of the Act eliminates the residency requirement which previously posed a problem to victims who no longer shared conventional living arrangements with their abusers.[33] Furthermore, courts no longer need to determine whether the parties had "legal access" to the residence as previously required by the 1978 amendments to the Act.[34]

Therefore, the legislature has drafted the amendments to include as broad a range of victims as possible. Moreover, the amendments expressly recognize the need to provide relief in the areas of child abuse as well as elderly abuse.[35] Practitioners should be aware that the current

27. For a discussion of the procedure which must be followed under the Act, see *infra* notes 47-71 and accompanying text.

28. PA. STAT. ANN. tit. 35, § 10182 (Purdon Supp. 1989).

29. *Id.*

30. *See* M. Kaufman, *supra* note 4, at 12-13.

31. 1978 Pa. Laws 513.

32. *Id.*

33. PA. STAT. ANN. tit. 35, § 10182 (Purdon Supp. 1989). The current language of the Act which includes current and former spouses and current and former sexual or intimate partners eliminates any residency requirement. *Id.*

34. *See* Yankoskie v. Lenker, 363 Pa. Super. 448, 526 A.2d 429 (1987). The superior court, applying the 1978 amendments, noted that a plaintiff must provide that the defendant engaged in abuse, that the parties were family or household members and that the defendant satisfied the Act's residency requirement. *Id.* at 452, 526 A.2d at 431. The court concluded that when considering "legal access," a full range of circumstances must be taken into account so that the defendant cannot place himself outside the reach of the Act by maintaining a separate residence. *Id.* at 452, 526 A.2d at 432.

35. PA. STAT. ANN. tit. 35, § 10184(a) (Purdon Supp. 1989). Section 10184(a) provides that an adult may seek relief on behalf of minor children and

language of the amendments which includes "current or former sexual or intimate partners" expands the Act's coverage to include victims who were previously without relief.[36] For instance, the protection of the Act may now be available for "non-conventional" relationships, such as homosexuals and for "non-conventional" forms of abuse, such as date-rape. Practitioners should be advised that, if the courts of Pennsylvania continue to construe the provisions of the Act broadly, protection from abuse will be available under the Act to all persons who are not strangers at the time of the abuse.[37]

B. *Statutory Definitions of Abuse*

Under the 1988 amendments, "abuse" is defined as the occurrence of one or more of the following acts:

> (i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, spousal sexual assault or involuntary deviate sexual intercourse with or without a deadly weapon.
>
> (ii) Placing by physical menace another in fear of imminent serious bodily injury.
>
> (iii) The infliction of false imprisonment . . . .
>
> (iv) Physically or sexually abusing minor children . . . .[38]

The recent amendments have greatly expanded the definition of abuse under the Act. One notable change includes the addition of rape, spousal sexual assault and involuntary deviate sexual intercourse as forms of abuse.[39] These inclusions indicate a recognition on the part of the legislature that domestic abuse can be sexual as well as physical. Furthermore, the addition of sexual abuse under the Act may help to eradicate the ancient belief that a woman is the property of a man and thus cannot be sexually abused by a spouse or partner.[40] Practitioners should therefore be aware that a partner making unilateral decisions on

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that a guardian may seek relief on behalf of an adult who has been declared incompetent. *Id.*

36. *See* M. Kaufman, *supra* note 4, at 12-13. Standard dictionary definitions of these terms encompass many relationships with the potential for abuse.

37. For the relevant language of the 1988 amendments which leads to this conclusion, see *supra* notes 28-29 and accompanying text.

38. PA. STAT. ANN. tit. 35, § 10182 (Purdon Supp. 1989). The Act refers to the criminal code to define terms not defined in the Act. *Id.* (making reference to Pennsylvania Crimes Code, 18 PA. CONS. STAT. ANN. §§ 1-9183 (Purdon 1983 & Supp. 1989)).

39. *Compare* PA. STAT. ANN. tit. 35, § 10182(i) (Purdon Supp. 1989) *with* 1978 Pa. Laws 513.

40. *See generally* Comment, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 779-81 (1986). Many people do not recognize marital rape as a crime because they consider it to be a husband overcoming his wife's reluctance through nonviolent means. *Id.*

sexual behavior without the other partner's consent may be committing abuse as defined by the Act.

Additionally, the recent amendments include false imprisonment as a form of abuse.[41] False imprisonment is "knowingly restrain[ing] another unlawfully so as to interfere substantially with his liberty."[42] While it is not entirely clear what the legislature intended to include within this provision, if interpreted broadly, false imprisonment could encompass a great deal of psychological, though nonviolent, abuse. For instance, this provision may prevent a partner or spouse from unilaterally controlling social relationships, access to transportation, telephones, mail and the parties' economic resources, jointly owned or otherwise.[43] This intimidating conduct may not only force the victim to remain with the abuser, but may be as emotionally devastating as violent abuse.

The final revision to the definition of abuse was the inclusion of physical abuse of children.[44] By comparison, the earlier versions of the Act addressed only the sexual abuse of minor children.[45] This addition reflects the attempt to provide protection from all forms of domestic abuse in one proceeding.

In order for a victim to seek relief under the Act, two elements must be alleged: (1) the victim's relationship with the abuser comes within the definition of "family or household members," and (2) the victim experienced one or more of the forms of abuse as defined by the Act.[46] In light of the above discussion, far more victims will be entitled to protection under the 1988 amendments to the Act than were previously entitled to seek protection under the 1978 version of the Act.

C. *Procedure Under the Act*

A victim will ordinarily learn of the availability of a protection order[47] under the Act either on the advice of a domestic abuse program[48] or by a police officer who responds to a domestic disturbance

41. PA. STAT. ANN. tit. 35, § 10182(iii) (Purdon Supp. 1989).

42. *See* 18 PA. CONS. STAT. ANN. § 2903 (Purdon 1983). The Act defines false imprisonment by referring to the criminal false imprisonment statute. PA. STAT. ANN. tit. 35, § 10182(iii) (Purdon Supp. 1989).

43. *See* M. Kaufman, *supra* note 4, at 2. All of these actions impoverish a victim's ability to function apart from the abuser, but may not have come within the statutory definition of abuse under the 1978 version of the Act. *Id.*

44. PA. STAT. ANN. tit. 35, § 10182(iv) (Purdon Supp. 1989). The Act refers to The Child Protective Services Law to define abuse of minor children. *Id.* (citing PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon 1975 & Supp. 1989)).

45. PA. STAT. ANN. tit. 35, § 10182(iii) (Purdon 1977); 1978 Pa. Laws 513.

46. *See* M. Kaufman, *supra* note 4, at 11-14.

47. For a discussion of the relief a court may grant in a protection order, see *infra* notes 71-88 and accompanying text.

48. *See* M. Kaufman, *supra* note 4, at 15. For example, when police are

call.[49] The recent amendments to the Act incorporate a provision which requires all officers and employees of every Pennsylvania police department to receive instruction concerning the provisions of the Act to enable them to advise victims properly.[50]

Once informed of the available protection, a victim may chose from two alternative procedures in seeking the protection afforded by the Act. One method is to file a petition in the appropriate court of common pleas.[51] The petition must set forth information sufficient to establish that the petitioner and defendant are "family or household" members as defined by the Act and that the defendant abused the petitioner.[52] This requires the victim to document specific incidents which meet the statutory definition of abuse.[53] The 1988 amendments to the Act permit some victims to file without paying the costs, and provide simplified forms and clerical assistance in writing and filing of all necessary forms to aid unrepresented victims.[54]

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called to an incident in Delaware County, they are instructed to give the victim a Domestic Abuse Project Inc. (DAP) card. *Id.*

49. *See* 18 PA. CONS. STAT. ANN. § 2711(d) (Purdon Supp. 1989). Pursuant to this section, entitled Probable Cause Arrests in Domestic Violence Cases, the police officer upon responding to a domestic violence case shall notify the victim of the availability of shelters, including phone numbers. Further, the police must make the following statement:

> If you are a victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse pursuant to . . . the Protection From Abuse Act, which could include the following:
>
> (1) An order restraining the abuser from further acts of abuse.
>
> (2) An order directing the abuser to leave your household.
>
> (3) An order preventing the abuser from entering your residence, school, business or place of employment.
>
> (4) An order awarding you or the other parent temporary custody of or temporary visitation with your child or children.
>
> (5) An order directing the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so.

Id. (footnote omitted).

50. PA. STAT. ANN. tit. 35, § 10183.2 (Purdon Supp. 1989).

51. *Id.* § 10184(a). Any parent or household member may initiate the proceeding on behalf of minor children and a guardian is entitled to seek protection for an incompetent adult. *Id.*

52. *Id.*

53. *See* M. Kaufman, *supra* note 4, at 26 app. (provides example of petition for relief under Act).

54. PA. STAT. ANN. tit. 35, § 10184(f) (Purdon Supp. 1989). The 1988 amendments allow a victim who is unable to pay the costs of filing and service to simply file an affidavit stating that the victim does not have the funds available to pay. *Id.* § 10184(b). The court may decide at the hearing whether to waive costs or assign them to the defendant. *Id.* The recent amendments eliminated the need to establish indigency as previously required under the 1978 amendments. 1978 Pa. Laws 513. The Act previously provided that when a petition was filed without costs the court would determine whether the plaintiff was indigent and if the plaintiff was not considered indigent then the court could order the plaintiff to pay the court costs. *Id.*

The petition must be accompanied by an order which sets a hearing date. According to the Act, a hearing must be held within ten days of the filing.[55] The Act requires that the defendant receive service of the petition and the order.[56] At the hearing, the victim must prove the allegation of abuse by a preponderance of the evidence to get a protection order from the court.[57]

A victim using this procedural method may petition the court for a temporary protection order.[58] If the victim requests temporary protective relief, the court will conduct an ex-parte hearing, at which time the victim must allege "immediate and present danger of abuse to the plaintiff or minor children."[59] If a temporary protection order is entered and the hearing is continued beyond ten days, the victim then may obtain an extension to insure that there is no lapse of protection.[60]

The alternative method in which a victim may commence proceedings under the Act is by seeking emergency relief.[61] A district judge, bail commissioner or Philadelphia Municipal Court Judge may order emergency relief when the judges in the court of common pleas in the victim's county are unavailable.[62] Practitioners should note that the recent amendments provide for extended emergency relief so that a victim may utilize this provision when the court is unavailable during the day, at the close of business at the end of each day and on the weekends.[63] Previously, the Act provided for emergency relief only on the weekends.[64]

Under this alternative procedure the court also conducts an ex-

55. PA. STAT. ANN. tit. 35, § 10185(a) (Purdon Supp. 1989).

56. *Id.* § 10184(e). An adult victim may personally effect service on the defendant. However, due to the inherent danger involved, the Act provides that the police or another agency may effect service. *Id.* § 10184(c). There is also a provision to waive the fees for service of the petition and the order. *Id.* § 10184(d). Under the Act, orders must be served simultaneously on the local police departments. *Id.* § 10184(e). This is required in part because police departments must maintain a current registry of all orders which can be enforced within their jurisdiction. *Id.* § 10187. While service is mandatory, the Act provides that failure to serve will not affect a valid order. *Id.* § 10184(e).

57. *Id.* § 10185(a).

58. *Id.* § 10185(b).

59. *Id.* If the court finds immediate and present danger, the court may enter a "temporary order as it deems necessary." *Id.*

60. *Id.* § 10185(c).

61. *Id.* § 10188(a).

62. *Id.* This section provides for emergency relief in counties with less than four judges when the court is "unavailable during the business day by reason of duties outside the county, illness or vacation," and in counties with at least four judges when the court is "unavailable from the close of business at the end of each day to the resumption of business the next day or from the end of the business week to the beginning of the business week." *Id.*

63. For a discussion of the emergency relief provided by the 1988 amendments, see *infra* note 79 and accompanying text.

64. 1978 Pa. Laws 514-15.

parte proceeding to determine if the victim can establish "good cause" for the court to provide emergency relief.[65] Again, proof of "immediate and present danger" is sufficient to establish "good cause" under this provision.[66] The extent of emergency relief which can be granted is limited[67] and the relief is very short-lived, expiring at the beginning of the next business day of the court of common pleas.[68] At the resumption of business, the court of common pleas must review and extend the emergency relief until the hearing to avoid a lapse of protection.[69] Most importantly, all emergency orders are immediately certified to the court of common pleas which, in effect, commences a proceeding under the Act, thus streamlining the process.[70]

The recent amendments to the Act have attempted to simplify the procedures to be followed in obtaining relief under the Act. These changes have tailored the procedure to allow victims to obtain protection without the assistance of counsel. Certainly, police awareness of the protection afforded victims along with simplified forms and clerical assistance will help the victim wade through the process. Nevertheless, judicial proceedings are intimidating and the victims seeking protection are often scared and confused. The victim's plight highlights the need for legal assistance and domestic violence programs which are familiar with the procedures required by the Act and which can help guide the victim through those procedures, while at the same time providing the emotional support the victim requires.[71]

D. *Relief Available to Victims*

The Act sets forth eight specific forms of relief which the court may grant in a permanent protection order at a hearing with both parties present.[72] These include:

> (1) Directing the defendant to refrain from abusing the plaintiff or minor children.

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65. Pa. Stat. Ann. tit. 35, § 10188(a) (Purdon Supp. 1989).

66. *Id.*

67. For a discussion of the emergency relief a court may grant, see *infra* note 78 and accompanying text.

68. PA. STAT. ANN. tit. 35, § 10188(b) (Purdon Supp. 1989).

69. *Id.* § 10188(c) (Purdon Supp. 1989); *see* 1987 PA. HOUSE LEGIS. J. 2132-33 (Dec. 15, 1987) (remarks of Senator Lashinger). Senator Lashinger offered the amendment, adding that it would "provide additional protection and not allow for gaps in protection orders when they are granted on a temporary basis." *Id.*

70. PA. STAT. ANN. tit. 35, § 10188(c) (Purdon Supp. 1989).

71. *See* M. Kaufman, *supra* note 4, at 15. In Delaware County the proceeding is usually commenced pro se with the assistance of the Domestic Abuse Project Inc. (DAP). They provide counseling and assist the victim in completing the required forms. *Id.* They also accompany the victim to the courthouse and will often arrange service of the order upon the defendant for the victim. *Id.*

72. PA. STAT. ANN. tit. 35, § 10186(a) (Purdon Supp. 1989).

> (2) Granting possession to the plaintiff of the residence to the exclusion of the defendant by evicting the defendant . . . .[73]
>
> (3) . . . restoring possession of the residence to the plaintiff . . . when the defendant is the sole owner or lessor . . . or by consent agreement allowing the defendant to provide suitable, alternative housing.
>
> (4) Awarding temporary custody of and/or establishing temporary visitation rights with regard to minor children. . . .
>
> (5) . . . directing the defendant to pay financial support to such persons as defendant has a duty to support. . . .
>
> (6) Prohibiting the defendant from having contact with the plaintiff, including . . . restraining the defendant from entering the place of employment . . . or school of the plaintiff and from harassing the plaintiff . . . .
>
> (7) Ordering the defendant to temporarily relinquish . . . weapons which have been used or been threatened to be used . . . .
>
> (8) Directing the defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, including medical, dental, relocation and moving expenses; counseling; loss of earnings . . . and . . . reasonable attorney fees.[74]

Additionally, the court has the power to approve any consent agreement reached between the parties.[75] A consent agreement may include any of the above forms of relief, and/or any additional types of relief that the parties may agree to, such as counseling.[76] The court may not, however, grant any relief which would affect the title to real property.[77]

In a temporary order, the court may grant all of the above forms of relief with the exception of financial support.[78] By contrast, in a proceeding for emergency relief, the court is limited to directing the defendant to refrain from further abuse and to restore possession of the residence to the victim.[79]

Generally, the relief provision of the Act is victim oriented and intended to satisfy the victim's immediate needs for safety, shelter and fi-

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73. This provision has been held not to violate the defendant's constitutional rights. *See* Boyle v. Boyle, 12 Pa. D. & C.3d 767 (1979) (Act is not unconstitutional even though it permits spouse to be excluded from jointly owned property without opportunity to be heard); *see also* Comment, *supra* note 5, at 852-53.

74. PA. STAT. ANN. tit. 35, § 10186(a) (Purdon Supp. 1989).

75. *Id.*

76. *See* M. Kaufman, *supra* note 4, at 19. Kaufman concludes that portions of an agreement which concern counseling will not be enforceable in a contempt proceeding. *Id.*

77. PA. STAT. ANN. tit. 35, § 10186(c) (Purdon Supp. 1989).

78. *Id.* § 10186(a).

79. *Id.* § 10188(a).

nancial independence. However, there are a number of caveats which must be noted in connection with this provision. First, all of the relief available under the Act is temporary and is granted only for a fixed period of time, not to exceed one year.[80] Second, the grant of financial support under the Act is limited to two weeks,[81] and within that time the plaintiff must file a separate claim for support.[82] If the plaintiff does not file a separate claim for support within two weeks, that portion of the protection order dealing with support is void.[83]

It is also important to note that the provision for custody and visitation is not intended to establish permanent custody.[84] As a result, any grant of relief concerning minor children will be superseded by a separate proceeding on those matters.[85] Nevertheless, the Act gives a great deal of latitude to the court concerning immediate custody and visitation. The court may decline to grant custody or visitation to the defendant if at the hearing the court finds that the defendant abused the children or failed to abide by a custody order in the past two years.[86] Moreover, the court, in a temporary order, may override a court order or agreement of the parties concerning custody if the defendant is "likely to inflict abuse upon the children or to remove the children from the jurisdiction."[87]

The most controversial amendment to the relief provision is the court's power to order restitution to the victim for reasonable losses.[88] This allows a victim to consolidate a petition for protection with a request for damages. Opponents of this provision are concerned that it creates "a hearing within a hearing."[89] As a practical matter it is very difficult for a plaintiff to prove damages with reasonable certainty when the hearing takes place within such a short period of time. Thus, judges may decline to grant this form of relief.

E. *Enforcement of the Act: Contempt*

If a defendant violates a protection order or a consent agreement

80. *Id.* § 10186(b). This provision also allows a court to amend an order at any time. *But see* Keith v. Keith, 28 Pa. D. & C.3d 462 (1984) (order may not be extended beyond one year if there are no further occurrences of abuse as defined by Act).

81. PA. STAT. ANN. tit. 35, § 10186(a)(5) (Purdon Supp. 1989).

82. *Id.* (directing that separate claim for support be filed under 23 PA. CONS. STAT. ANN. §§ 4301-4352 (Purdon Supp. 1988)).

83. *Id.*

84. *See* Rosenberg v. Rosenberg, 350 Pa. Super. 268, 270 n.1, 504 A.2d 350, 351 n.1 (1986) (purpose of Act is to provide immediate protection from physical abuse, not to establish procedure for determining permanent custody).

85. PA. STAT. ANN. tit. 35, § 10186(a)(4) (Purdon Supp. 1989).

86. *Id.*

87. *Id.*

88. *Id.* § 10186(a)(8).

89. *See* Note, *supra* note 5, at 828 & n.146.

under the Act, the court may hold the defendant in direct criminal contempt.[90] Under the Act, the defendant may be arrested "without warrant upon probable cause whether or not the violation is committed in the presence of the police officer."[91] The arresting officer need only affirm the existence of a valid protection order.[92]

Once the defendant is arrested, the police officer is empowered to seize all weapons used or threatened to be used by the defendant.[93] Thereafter, the defendant is "afforded a preliminary arraignment without unnecessary delay."[94] At the preliminary arraignment, bail may be set and a hearing date is scheduled.[95] According to the Act, indirect criminal contempt may be punished by up to six months in jail and/or a fine not to exceed one thousand dollars.[96] At trial, the defendant is expressly entitled to counsel.[97] However, the defendant does not have a right to a jury trial on the charge of indirect criminal contempt under the Act.[98]

The 1978 amendments to the Act provided that any proceedings available under the Act are in addition to any civil or criminal remedies otherwise available.[99] The 1988 amendments add that "a hearing on a charge or allegation of indirect criminal contempt shall not preclude a hearing on other criminal charges underlying the contempt, nor shall a hearing on other criminal charges preclude a hearing on the charge of indirect criminal contempt."[100] Under the 1988 amendments compul-

90. PA. STAT. ANN. tit. 35, § 10190(a) (Purdon Supp. 1989); *see, e.g.*, Commonwealth v. Allen, 506 Pa. 500, 486 A.2d 363 (1984) (contempt is criminal in nature because it protects dignity and authority of court and contempt is indirect because it did not occur in presence of court or directly affect proceeding then in progress), *cert. denied*, 474 U.S. 842 (1985).

91. PA. STAT. ANN. tit. 35, § 10190(c) (Purdon Supp. 1989).

92. *Id.*; *see also* M. Kaufman, *supra* note 4, at 19-20. The victim simply fills out and signs a Protection From Abuse Contempt Statement. *Id.*

93. PA. STAT. ANN. tit. 35, § 10190(c.1) (Purdon Supp. 1989).

94. *Id.* § 10190(e). *See* Cipolla v. Cipolla, 264 Pa. Super. 53, 58-59, 398 A.2d 1035, 1055-56 (1979) (indirect criminal contempt constitutes crime in all fundamental respects, thus legislature has enshrouded proceeding with procedural safeguards).

95. *See* M. Kaufman, *supra* note 4, at 20. When considering bail the judge should take into account the potential danger to the victim. *Id.* at 20-21. Further, the judge should tell the defendant not to go near the victim or he will be placed in jail. *Id.* at 21.

96. PA. STAT. ANN. tit. 35, § 10190(b) (Purdon Supp. 1989).

97. *Id.*

98. *Id.*; *see* Eichenlaub v. Eichenlaub, 340 Pa. Super. 552, 556, 490 A.2d 918, 920 (1985) (provision denying defendant right to jury trial enjoys presumption of constitutionality and does not deny defendant right to equal protection in light of emergency nature of proceedings).

99. 1978 Pa. Laws 515.

100. PA. STAT. ANN. tit. 35, § 10190(g) (Purdon Supp. 1989). This appears to be an express adoption of the holding of the Supreme Court of Pennsylvania in Commonwealth v. Allen, 506 Pa. 500, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985).

sory joinder of the contempt charge and the underlying criminal charges is not required under the Act.[101] Further, this provision insures that the underlying criminal charges constitute separate offenses, prosecution of which is not barred by the prohibition against double jeopardy.[102]

The provision for indirect criminal contempt under the Act is necessary as protection orders are worthless without a method to enforce them. Reliance on the slow-moving criminal justice system to enforce the orders would duplicate the initial problems encountered by domestic abuse victims which provided the impetus for legislative response in the first place.[103] Under the Act, the defendant will be faced with a fine or jail term within two weeks of his violation. This sanction may deter the abuser from violating the protection order more than once.[104]

IV. CONCLUSION

For many years, the Pennsylvania legislature has sought to provide adequate protection to victims of domestic violence. Yet domestic violence persists. The legislature has reacted to this widespread problem by enacting amendments which broaden the scope of protection, expand the definition of abuse and respond to realities of the problem by attempting to include the efforts of the police and domestic abuse programs. The Act is clearly comprehensive, yet it is reactive and crisis oriented. The protections under the Act certainly help victims and may reduce the recurrence of violence, but only education can reduce the occurrence of violence.

All practitioners, regardless of their area of expertise, should be aware of the protection afforded to victims under the Act as well as the procedure which must be followed. Considering the fact that one out of

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101. *Allen*, 506 Pa. at 509, 486 A.2d at 365. In *Allen*, the defendant was found in violation of a protection order and held in indirect criminal contempt. *Id.* at 504-06, 486 A.2d at 365. Thereafter, the defendant was prosecuted for simple assault, criminal trespass and rape. *Id.* The court held that compulsory joinder was not required because the contempt proceeding was privately triggered, thus judicial economy would not be served thereby and such joinder would do injustice to the purpose of the Act. *Id.* at 506-07, 486 A.2d at 366-67.

102. *Id.* at 509-16, 486 A.2d at 367-70. The court concluded that a contempt proceeding was criminal in nature, thus requiring a double jeopardy analysis. *Id.* at 511, 486 A.2d at 368. However, the court determined that the charges did not constitute the "same offense" and, therefore, prosecution for both the contempt and the underlying charges were not barred by the prohibition against double jeopardy. *Id.* at 512-14, 486 A.2d at 368-70.

103. For a discussion of the inadequacy of the criminal justice system in dealing with the problem of domestic abuse, see *supra* notes 10-16 and accompanying text.

104. *See* Rubin, *supra* note 2, at 3, col. 1 (quoting Donna Leichner, executive director of the Women's Center of Montgomery County: "The law is effective only with someone who has respect for it. It isn't magic, it's just a piece of paper.").

five women are abused by their male partners,[105] every practitioner may some day be confronted with a victim of abuse who needs help.[106] If domestic violence is to subside, it is every practitioner's responsibility to help victims take advantage of the protection afforded by the Act.

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105. *See* M. Kaufman, *supra* note 4, at 4 (citing Nissonoff & Bittman, *Spouse Abuse: Incidence and Relationship to Selected Demographic Variables*, 4 VICTIMOLOGY 131 (1979)). Kaufman indicated that others have reported rates closer to one out of every three women. *Id.* (citing M. Straus & R. Gelles, Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys (1985) (paper presented at the annual meeting of the American Society of Criminology)).

106. *See* Machlowitz, *supra* note 1, at 120. Additionally, Machlowitz suggested that some attorneys may have a more personal role in family violence since the pressure associated with the job of an attorney may make them prime candidates to abuse their wives, husbands or children. *Id.* An awareness of the problems associated with domestic violence may allow these attorneys to understand their need for help. *Id.*