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# What's Law Got To Do With It? Confronting Judicial Nullification Of Domestic Violence Remedies

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# WHAT’S LAW GOT TO DO WITH IT? CONFRONTING JUDICIAL NULLIFICATION OF DOMESTIC VIOLENCE REMEDIES

*Debra Pogrund Stark\**

INTRODUCTION.....	131
I. ORDERS OF PROTECTION AND THE ILLINOIS DOMESTIC VIOLENCE ACT .....	134
<i>A. Types of Conduct Meriting an Order of Protection</i> .....	135
<i>B. Relationship to the Abusive Party Necessary for an Order of C. Protection</i> .....	138
<i>D. Available Remedies with an Order of Protection</i> .....	140
DATA COLLECTED AND FINDINGS .....	148
<i>A. Method of Collecting the Case File Data</i> .....	148
<i>B. Summary of the Key Findings from the Case File Review and Problem Areas</i> .....	151
II. ANALYSIS OF FINDINGS AND RECOMMENDATIONS .....	153

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*A. Failure or Refusal to Grant the Remedy of Payment of Support: Sought in only three cases and not granted in any of the ninety-three cases.* .....153

*B. Failure or Refusal to Grant the Remedy of Payment of Losses: Sought in only two cases and not granted in any of the ninety-three cases*.....157

*C. Failure or Refusal to Grant the Remedy of Relinquishment of Firearms: Sought in eleven cases and not granted in any of the ninety-three cases* .....160

*D. Failure or Refusal to Grant the Remedy of Counseling: Sought in nineteen cases and granted in only two of the ninety-three cases* .....163

*E. Failure to Fill in Paragraph 18 as required in the Act*.....166

*F. Pro Se Petitioners Failing to Seek Potentially Beneficial Remedies* .....175

II. IMPLICATIONS OF THE RESULTS OF THE EMPIRICAL STUDY FOR OTHER JURISDICTIONS .....180

CONCLUSION .....183

APPENDIX.....185

INTRODUCTION

Imagine a state where the legislature created and passed a comprehensive system of protection laws for survivors of domestic violence. Now imagine that a county within that state implemented a specialized courthouse where the judges are trained to focus solely on civil orders of protection and misdemeanor domestic violence-related crimes. Finally, imagine that the courthouse has a play area and child care for children, to enable survivors who do not have available child care; a special elevator and waiting area just for the petitioners, so they can safely wait for their cases away from their abusers; and domestic violence advocates, pro bono attorneys, a lawyer-staffed

clinic, and prosecutors with the state attorney's office all operating to assist survivors seeking orders of protection or criminal prosecution of domestic violence-related crimes. The confluence of these circumstances creates the hope, indeed the reasonable expectation, that survivors of domestic violence will receive the justice they deserve. While a system this complete and equitable may seem politically impossible, it exists in Illinois.

In 1982, the Illinois legislature passed the Illinois Domestic Violence Act (the Act) and most recently passed an updated version in 2012.<sup>1</sup> The courthouse described opened in Chicago, Illinois on

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<sup>1</sup> See *Domestic Violence Law in Illinois*, ILL. COALITION AGAINST DOMESTIC VIOLENCE, [http://www.ilcadv.org/dv\\_law\\_in\\_il/default.html](http://www.ilcadv.org/dv_law_in_il/default.html) (last visited Jan. 8, 2015). The Illinois legislature passed an updated version of the Act in 2012. See *infra* Part I for a description of the broad class of relationships covered, the broad types of abuse covered, and the expansive set of remedies a state legislature such as this created in Illinois. The following are some additional special protections for survivors covered by the Illinois Domestic Violence Act (the Act): no filing fees, 750 ILL. COMP. STAT. 60/202(b) (2012); "simplified forms and clerical assistance" for pro se petitions, *id.* at 60/202(d); omission of the petitioner's address on all court filings for safety reasons, *id.* at 60/203(b); domestic abuse advocates' assistance in preparing petitions, attending and sitting at counsel table, and conferring with the victim, *id.* at 60/205(b)(1)-(3); granting privilege to victims' communications with advocates, *see id.* at 60/227. In addition, the Act limits the rights of the accused abuser in multiple ways. For example, the Act: only requires preponderance of the evidence as the burden of proof, *id.* at 60/205(a), does not require "physical manifestations of abuse on the person of the victim" to obtain an order of protection, *id.* at 60/214(a); does not grant the alleged abuser the right to a jury trial for an order of protection, *id.* at 60/206; does not allow for mutual orders of protection (only successive orders of protection), *id.* at 60/215; allows for a law enforcement official to serve a short form notification of the order of protection, *id.* at 60/222.10(a); allows ex parte emergency orders of protection to last for up to twenty-one days, *id.* at 60/220(a)(1); , and an order of protection following a hearing, a plenary order, can be up to a period of two years, *id.* at 60/220(b), or potentially longer when the order is issued in the context of another matter. *id.* Further, Article III of the Act details law enforcement responsibilities when responding to alleged domestic violence incidents, including filing police reports for every bona fide allegation and enumerating several forms of victim assistance for safety, medical needs, and preventing further abuse. *See id.* at 60/304. Article III also requires law enforcement to collect data in a format accessible to police [Needs a citation; does not match 305] and others assisting survivors and provides for law

October 11, 2005.<sup>2</sup> This Article examines how the specialized domestic violence courthouse in Chicago implements these laws.<sup>3</sup> Where the courthouse falls short, this Article will explore why, what can be done, and consider implications for other jurisdictions seeking to implement similar resources for survivors of domestic violence.

The results from this empirical study are mixed. On the positive side, the data reflect that judges are properly applying many important aspects of the new order of protection laws<sup>4</sup> and granting a high percentage of emergency orders of protection.<sup>5</sup> The data also reflect that judges fail to grant certain important remedies, even when survivors seek the remedies and appear to meet the statutory requirements to receive them.<sup>6</sup> Judges also fail to specify reasons for their denial of certain remedies when issuing an order of protection, notwithstanding that the Act requires that an order of protection include an explanation for a denial of any sought remedies.<sup>7</sup> This Article argues that these failures are a form of judicial nullification,<sup>8</sup>

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enforcement liability for willful or wanton misconduct in rendering emergency assistance or otherwise enforcing. *Id.* at 60/305. Article IV requires certain health care professionals to offer suspected abuse victims information about available services. *Id.* at 60/401.

<sup>2</sup> This courthouse exists at 555 W. Harrison, Chicago, Illinois, [and opened October 11, 2005 – this is already in the text, probably doesn't need to be repeated]. According to the court administrator, new judges are trained by the presiding judge, provided a manual, required to observe and shadow the courts, and required to attend regular annual statewide trainings. In 2011, all judges received two days of training on domestic violence through the National Council of Family Court Judges. Telephone Interview by Crystal Stewart with Court Administrator, Ill. Domestic Violence Division, in Chicago, Ill. (June 26, 2013).

<sup>3</sup> See *supra* note 1 for a description of the Act.

<sup>4</sup> See *infra* Part II.B and note 76. The determination that the petitioner appeared to be entitled to a remedy was based on a review of the facts contained in the affidavit or petition.

<sup>5</sup> See *infra* Table 1.

<sup>6</sup> See *infra* Table 2 and Part III (containing the analysis of Table 2).

<sup>7</sup> See 750 ILL. COMP. STAT. 60/221(a)(2) (2012) (requiring judges to specify in orders of protection reasons for denials of sought remedies); see also *infra* Part II.

<sup>8</sup> A review of affidavits and petitions found that petitioners often failed to seek remedies from which they could have benefitted. See *infra* Parts II and III. As discussed in Part III, there are many reasons why petitioners might not seek

judicial refusal to fairly interpret the law. Counter-intuitively, this problem may be exacerbated by the specialized nature of this domestic violence-focused court. A second important finding is that the vast majority of petitioners are pro se, and they often fail to seek some of the remedies under the protective legislation implicated by their factual situation.

Part I of this article explains, through a review of the Act, what remedies are available under an order of protection and what types of abuse and relationships can trigger this protection. Part II and the Appendix report on the methods and types of data collected in the empirical study. Part III discusses the remedies that judges rarely or never grant; explores the philosophical, practical, and psychological underpinnings for the judicial nullification phenomenon; and contemplates how to address nullification. Part III also explores why pro se petitioners leave potentially beneficial remedies unsought and proposes an empowerment model of assistance to guide future petitioners. Part IV considers how the results and policy implications from this study may apply to other jurisdictions.

## I. ORDERS OF PROTECTION AND THE ILLINOIS DOMESTIC VIOLENCE ACT

The Illinois Domestic Violence Act establishes laws surrounding orders of protection, which provides strong protections to survivors of domestic violence.<sup>9</sup> The Act was first passed in 1982 and most recently updated in 2012. This Part explains three essential aspects of orders of protection, in general, and under the Act: (i) the types of conduct that constitute “abuse” sufficient for an order of protection, (ii) the categories of individuals who are eligible to seek an order of protection, and (iii) the kinds of remedies available with an order of protection.<sup>10</sup>

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remedies from which they could benefit, including not being aware of or understanding them, and the perception that judges will not grant those remedies.

<sup>9</sup> See 750 ILL. COMP. STAT. 60 (2012).

<sup>10</sup> While “stay away” (protection) and “stop the abuse” (prohibition of abuse) orders are common in many states, the Act includes far more comprehensive

### A. *Types of Conduct Meriting an Order of Protection*

The Act defines the types of conduct that merit an order of protection under the definition of “Abuse” and include the following: (i) “Physical abuse,” (ii) “Harassment,” (iii) “Intimidation of a Dependent,” (iv) “Interference with Personal Liberty,” or (v) “Willful Deprivation.”<sup>11</sup>

“Physical abuse” includes sexual abuse and any of the following: “(i) knowing or reckless use of physical force, confinement or restraint; (ii) knowing repeated and unnecessary sleep deprivation; or (iii) knowing or reckless conduct which creates an immediate risk of physical harm.”<sup>12</sup> For example, shoving or throwing an object at an intimate partner, even if the person is not harmed, but could have been, is Physical Abuse under the Act.

The concept of “Harassment” is even broader. Harassment is defined as “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner.”<sup>13</sup> This category of abuse captures emotional abuse and acts designed to exercise power and control over the victim. By including this category, the Act addresses how abuse can escalate over time and provides protections before the conduct escalates to serious physical harm. The Act presents six examples of “Harassment” (rebuttable by a preponderance of the evidence): (i) creating a disturbance at petitioner’s place of employment or school; (ii) repeatedly telephoning petitioner’s place of employment, home, or residence; (iii) repeatedly following petitioner about in a public place or places; (iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her<sup>14</sup> home, school, place of

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remedies designed to better empower survivors to become safe and whole again.  
*See id.* at 60/214-219.

<sup>11</sup> *See id.* at 60/103.

<sup>12</sup> *Id.* at 60/103(14)(i)-(iii).

<sup>13</sup> *Id.* at 60/103(7).

<sup>14</sup> Due to the much higher percentage of male rather than female abusers and female rather than male survivors, female pronouns are used for survivors and petitioners, and male pronouns are used for abusers and respondents. Nevertheless,

employment, vehicle, or other place occupied by petitioner or by peering in petitioner's windows; (v) various forms of concealing or threatening to conceal a minor child from petitioner (unless respondent was fleeing an incident or pattern of domestic violence); or (vi) threatening physical force, confinement, or restraint on one or more occasions.<sup>15</sup> The Act is clear that these examples of Harassment are illustrative rather than exclusive.

“Intimidation of a dependent” is defined as:

subjecting a person who is dependent because of age, health or disability to participation in or the witnessing of: physical force against another or physical confinement or restraint of another which constitutes physical abuse as defined in this Act, regardless of whether the abused person is a family or household member.<sup>16</sup>

This covers a person who commits physical abuse in front of a child or forces or encourages the child to participate in the physical abuse. Including this form of abuse is critical because children who are exposed to domestic violence can suffer severe consequences.<sup>17</sup>

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men are sometimes survivors and petitioners and women are sometimes abusers and respondents. In our sample of ninety-three cases, sixteen petitioners (17%) were male and seventy-seven petitioners (83%) were female; sixty-six (71%) respondents were male and twenty-seven (29%) were female. The author checked whether there were gender differences in obtaining emergency orders of protection or plenary orders of protection and found that eleven of sixteen male petitioners were granted emergency orders of protection (69%) and sixty-four of seventy-seven female petitioners were granted emergency orders of protection (83%). This difference did not reach statistical significance using a chi-square analysis. The gender difference in obtaining plenary orders of protection also failed to reach statistical significance, with six of sixteen male petitioners (38%) obtaining it and thirty-six of seventy-seven (47%) female petitioners obtaining it.

<sup>15</sup> 750 ILL. COMP. STAT. 60/103(7).

<sup>16</sup> *Id.* 60/103(10).

<sup>17</sup> See, e.g., Gayla Margolin, *Effects of Domestic Violence on Children, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY* 57, 57-101 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998).



“Interference with personal liberty” is defined as “committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage.”<sup>18</sup> The power and control over partners, central to many domestic violence situations, makes this inclusion critical. In extreme form, this type of abuse could include preventing an abused intimate partner from leaving the house or talking with family, friends, or neighbors.

Finally, “Willful deprivation” is defined as “willfully denying a person who because of age, health or disability requires medication, medical care, shelter, accessible shelter or services, food, therapeutic device, or other physical assistance, and thereby exposing that person to the risk of physical, mental or emotional harm. . . .”<sup>19</sup> This definition includes situations such as an adult child or caretaker who fails to provide proper care of an elderly person’s medical or other basic needs, but the definition creates an exception where dependents express intent to forgo medical care or treatment,<sup>20</sup> and does not create new affirmative duties to support dependent persons.<sup>21</sup> This definition also protects “high risk adults with disabilities,”<sup>22</sup> or those whose physical or mental disability impairs their ability to seek an order of protection, from abuse, including “Neglect”<sup>23</sup> and “Exploitation.”<sup>24</sup>

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<sup>18</sup> 750 ILL. COMP. STAT. 60/103(9).

<sup>19</sup> *Id.* at 60/103(15).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 60/102(2).

<sup>23</sup> *Id.* at 60/103(11).

<sup>24</sup> *Id.* at 60/103(5).

*B. Relationship to the Abusive Party Necessary for an Order of Protection*

In addition to broadly defining Abuse, the Act inclusively defines those who can receive protection.<sup>25</sup> The Act covers “Family or household members” broadly defined to include:

spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers. . . .<sup>26</sup>

It thereby covers not only current or former spouses, and those in a dating or engagement relationship, but also those who cohabitate, family members, and individuals who are responsible for providing care. The Act attempts to clarify what is meant by a “dating relationship” by stating, “neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.”<sup>27</sup> Based on this clarification in the statute, a “date” could include any get-together that is not part of a casual acquaintanceship or ordinary fraternization, such as dinner with a kiss good night. However, one Illinois appellate court has nevertheless defined it more narrowly<sup>28</sup>

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<sup>25</sup> *See id.* at 60/103(6).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> In *Alison C. v. Westcott*, the court ruled that attending the same school, speaking on the telephone, and going on one lunch date in a brief, non-exclusive relationship is not a “dating relationship or engagement relationship” under the Act, stating that the Act focused on preventing abuse in intimate relationships. 798 N.E. 2d 813, 815-16 (Ill. App. Ct. 2003). Consequently, the court interpreted “dating relationship” to mean a “serious courtship.” *Id.* at 817. Given the statutory mandate

and another circuit court judge refused to grant an order of protection because the petitioner had only been dating the respondent a few weeks.<sup>29</sup>

Fortunately, even if judges decide that there is no dating relationship due to lack of serious courtship, a petitioner might still qualify for an order of protection if he or she had a child or cohabited with the respondent.<sup>30</sup> Even platonic roommates are covered under the

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that “[t]his Act shall be liberally construed and applied to promote its underlying purposes,” including the goal to “[s]upport the efforts of victims of domestic violence to avoid further abuse,” see 750 ILL. COMP. STAT. 60/102 (2012), the court should not have interpreted dating relationship as serious courtship. The Act does not require a serious courtship or engagement or similar serious dating relationship. *Id.* at 60/103(6). Arguably, any dating-based relationship should qualify given the language and purposes of the Act. *Id.* Some states’ statutes attempt to better define “dating relationship.” For example, Rhode Island requires a “significant and personal/intimate relationship,” R.I. GEN. LAWS § 15-15-1(5) (2012), and Vermont requires a “social relationship of a romantic nature,” VT. STAT. ANN. tit. 15, § 1101(2) (2010), and their statutes list the following for courts to consider: the nature and length of the relationship and frequency of interaction between the parties. The facts in *Alison C.* would probably not satisfy the statutory requirements in these states, but the Illinois statute does not use either of these definitions and simply distinguishes it from a casual or social acquaintance.

<sup>29</sup> This example was reported by a student observer of court proceedings during the period of the empirical study reported on in this Article.

<sup>30</sup> The Illinois Civil No Contact Order Act provides for protection in those seeking remedies but in non-relationship situations but to qualify for a Civil No Contact Order non-consensual sexual conduct or non-consensual sexual penetration by the respondent must have occurred. [I don’t understand that sentence at all. Maybe: The Illinois Civil No Contact Order Act provides protection for those seeking remedies in non-relationship situations. But to qualify for a Civil No Contact Order, there must be non-consensual sexual conduct or non-consensual sexual penetration by the respondent.]. See 740 ILL. COMP. STAT. 22/201(a) and (b) (2012). Stalking that is not covered under the Act can qualify for a stalking no contact order under the Stalking No Contact Act. See 740 ILL. COMP. STAT. 21 (2012) (providing fewer remedies than the Act but prohibiting stalking or threatening to stalk, and providing a no contact type remedy, a stay away type remedy, a prohibition of possessing a FOID card or firearm, and “other injunctive relief”).

and household member relationship, allowing an order of protection, if required.<sup>31</sup>

### *C. Available Remedies with an Order of Protection*

Many states, including Illinois, empower survivors to become safe and whole again by providing for remedies beyond simply prohibiting abuse or ordering the respondent to stay away. The Act includes a comprehensive set of remedies when orders of protection are obtained; up to nineteen remedies are available. Part II and Table 2 present data on the extent to which these nineteen remedies have been sought by petitioners and granted by the judges.<sup>32</sup> This subpart presents a brief overview of the nineteen remedies, identifying which remedies judges systematically refused to grant based on our data.

From the data sample, most often petitioners sought and judges granted the following remedies: “Prohibition of abuse, neglect or exploitation,”<sup>33</sup> “Grant of exclusive possession of residence,”<sup>34</sup> “Stay away order and additional prohibitions,”<sup>35</sup> and “Protection of property”<sup>36</sup> (See Table 2 for the numbers sought and granted on each of these in our data sample). These four remedies cover the essence of what is typically sought in an order of protection: the abuse to stop; the respondent to stay away from the petitioner; protection of the petitioner’s property (e.g. car and cell phone); and, if the parties share a residence, for the petitioner to have exclusive right to that residence. Further, an “Order for injunctive relief”<sup>37</sup> was also frequently sought and granted, empowering the court to order any other injunctive relief necessary or appropriate to prevent further abuse or effectuate one of the granted remedies. These orders are typically used to elaborate on

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<sup>31</sup> See 750 ILL. COMP. STAT. 60/103(6).

<sup>32</sup> See *infra* Table 2 for an enumeration of all nineteen remedies and numbers of each remedy sought and granted.

<sup>33</sup> See 750 ILL. COMP. STAT. 60/214(b)(1) (2012).

<sup>34</sup> See *id.* at 60/214(b)(2).

<sup>35</sup> See *id.* at 60/214(b)(3).

<sup>36</sup> See *id.* at 60/214(b)(11).

<sup>37</sup> See *id.* at 60/214(b)(17).

the types of contact that are prohibited. They can expand upon the “stay away” order by warning respondents about specific prohibited conduct or modify the stay away remedy by permitting some contact. When children become protected parties to an order of protection with a stay away remedy, this prohibits all contact with the children. When the respondent is the parent of this child, the order for injunctive relief can clarify what types of contact would be permitted, for example, through supervised visitation.

Petitioners also frequently sought and judges frequently granted certain remedies relating to children in common. These include “Physical care and possession of the minor child,”<sup>38</sup> “Visitation,”<sup>39</sup> “Removal or concealment of minor child,”<sup>40</sup> and “Prohibition of access to records.”<sup>41</sup> These are important remedies because survivors of domestic violence are often afraid that abusive co-parents may take children away when the petitioner attempts to leave or keep children away for unwarranted periods of time. Indeed, abusers frequently threaten, often in an attempt to retain power and control. The petitioner may also fear that the respondent will abuse the children or use them as a means to continue the abuse. The order to prevent access to children’s school records may be particularly critical if the petitioner is in hiding from the abuser.<sup>42</sup> Petitioners can use the “Visitation” order remedy to address their fear that the respondent will use visitation as a means to further abuse the petitioner, abuse the children, or act in a manner that is not in the children’s best interests. Petitioners can seek supervised visitation when there is concern that the child will be abused while under respondent’s care, or petitioners can request that third parties facilitate the exchange of the children to reduce contact between the parents. Although the Act permits

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<sup>38</sup> *Id.* at 60/214(b)(5). This remedy also includes the remedy of ordering respondent to return a minor child to, or not remove a minor child from, the physical care of a parent or person *in loco parentis*.

<sup>39</sup> *Id.* at 60/214(b)(7).

<sup>40</sup> *Id.* at 60/214(b)(8). Violation of this remedy can lead to a criminal charge of child abduction. *Id.*

<sup>41</sup> *Id.* at 60/214(b)(15).

<sup>42</sup> *See id.*

visitation provisions to be addressed at the emergency order of protection stage *ex parte*, they are typically addressed at the plenary order of protection stage after the respondent has been served, so the respondent's views can be heard and the parties can come to agreement.

The "Order to appear"<sup>43</sup> remedy was infrequently sought and never granted in the data sample, perhaps because *pro se* petitioners did not understand it as used in the statute. An order to appear is not an order for the respondent to appear in court to respond in general to allegations of abuse, but rather relates to appearing in court to return the child or inform the court as to where the child is in order to prevent abuse, removal, or concealment of children.

This remedy is typically sought when petitioners know where the respondent is located but not where their children are located. Since this remedy is more limited in scope than what laypersons may think, it does not appear that judges inappropriately denied this remedy in the ninety-three cases. Yet, better educating petitioners about this remedy would be beneficial so that when this situation arises, petitioners will know of this solution as a possible means to recover their children.

"Temporary legal custody"<sup>44</sup> was less frequently requested in our data sample (requested in fifteen cases) than "Physical care and possession of the child"<sup>45</sup> (requested in twenty-five cases). Further, courts appear to regularly grant temporary legal custody, granting it in five of the fifteen cases observed.<sup>46</sup> Obtaining temporary legal custody is distinguishable from physical care and possession: the former focuses on decision-making and the latter on with whom the child primarily lives.

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<sup>43</sup> *Id.* at 60/214(b)(9).

<sup>44</sup> *Id.* at 60/214(b)(6).

<sup>45</sup> *Id.* at 60/214(b)(5).

<sup>46</sup> Table 1. 750 ILL. COMP. STAT. 60/212(b) (permitting courts that do not ordinarily handle matters of child custody or family support to "decline to decide contested issues of physical care, custody, visitation, or family support unless a decision on one or more of those contested issues is necessary to avoid the risk of abuse").

A respondent may seek to retaliate against a petitioner for attempting to leave the respondent by changing aspects of how children are raised (e.g. taking children to church against the petitioner's wishes and prior family practices). This remedy addresses such retaliation, and other forms of improper use of parental decision-making by empowering petitioners to make major decisions regarding their children without first obtaining agreement from the respondent. Pro se petitioners should be better educated both on the benefits of this remedy and how to exercise it. For example, they must check this as a desired remedy in their petition for an emergency order of protection even though it is not an available remedy at the emergency order of protection stage, and then must raise it with the judge again at the plenary order of protection stage.

In the Purposes section of the Act, the Illinois legislature specifically noted the importance of resolving “related issues of child custody and economic support, so that victims are not trapped in abusive situations by fear of retaliation, [or] loss of a child. . . .”<sup>47</sup> Consequently, it is worthwhile to take steps to improve petitioners' abilities to seek this remedy and for judges to grant it when appropriate.

Others, including children, can be added to the order of protection as a “protected person” if the person lives in the petitioner's household, is a minor child or dependent adult in the petitioner's care, is employed at the petitioner's residence, or is an employee of a domestic violence program where a protected person resides.<sup>48</sup> A child may qualify as a protected person even though she has not yet suffered abuse.<sup>49</sup> This provision recognizes how an abuser may attempt to use or harm children in common with the survivor as a means to continue to harm the survivor. Respondents are required to comply with the order of protection as applied to the petitioner and

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<sup>47</sup> *Id.* at 60/102(4).

<sup>48</sup> *Id.* at 60/201(a)(i)-(iv).

<sup>49</sup> See *In re Marriage of McCoy*, 625 N.E. 2d 883, 886 (Ill. App. Ct. 1993) (“Once one member of a household is abused, the court has maximum discretionary power to fashion the scope of an order of protection to include other household members or relatives who may be at risk of retaliatory acts by the abuser.”).

protected persons. When parents are respondents and their children are listed as protected persons, the court can create exceptions to stay away orders so that the respondent can retain the right to spend specific authorized time with his or her children—indeed one can provide for this in an order for injunctive relief.

There are also several specialty remedies that can be useful in certain narrow situations. “Prohibition of entry” bars the respondent from entering the residence when intoxicated and “constitutes a threat to the safety and well-being of the petitioner or petitioner’s children.”<sup>50</sup> This remedy is used when the petitioner does not want a general stay away, but only when the respondent is intoxicated. Our data sample demonstrates that judges are willing to grant this remedy; it was sought once and granted three times.

Another specialty remedy, an “Order for payment of shelter services,” requires respondents to reimburse shelters that provide victims accommodations and counseling services.<sup>51</sup> While it makes sense for respondents who have caused the need for these services to pay for them, it was sought in our data sample just once and not granted. This remedy presents practical problems because petitioners typically do not want respondents to know where they are, making petitioners unlikely to ask for this remedy when filing for an emergency order of protection. In addition, if recovered, it reduces the respondent’s resources to pay for support or losses to the petitioner, two other remedies available under the Act.

A third specialty protection is for pet owners. Abusers sometimes threaten to harm or actually do harm survivors’ pets when she leaves. Survivors will stay with abusers out of concern for their pets. Thus, “Protection of animals”<sup>52</sup> is an important remedy, but one which survivors of domestic violence may be unaware. No petitioners in our sample checked this box, but the court nonetheless granted this remedy in five cases.

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<sup>50</sup> 750 ILL. COMP. STAT. 60/214(b)(14).

<sup>51</sup> *Id.* at 60/214(b)(16).

<sup>52</sup> *Id.* at 60/214(b)(11.5).



While there is no evidence of judicial unwillingness to grant this remedy from our sample, the author learned from conversations with domestic violence advocates that some judges have declined to grant this remedy when the respondent, rather than the petitioner, is the one who purchased the pet. This practice is an incorrect application of the Act since this remedy does not require that the petitioner owns the pet, rather the remedy can be sought for pets “owned, possessed, leased, kept, or held by *either* the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. . . .”<sup>53</sup>

Another less frequently sought remedy is “Possession of personal property,” which grants a petitioner exclusive possession of enumerated personal property—e.g. a petitioner’s automobile or cell phone—and, if the respondent has possession or control, this order directs him to promptly transfer the property to the petitioner.<sup>54</sup> Obtaining this remedy at the emergency order of protection stage requires a petitioner to show either immediate, pressing need for the property, or that the respondent might improperly dispose of the property if notified that the petitioner is seeking this remedy.<sup>55</sup> This remedy was sought in fourteen cases in our sample and granted in six.

The four important remedies that judges systemically failed to grant even when properly sought (based on a review of affidavits and petitions, but not court transcripts) include: “Order of payment of losses,”<sup>56</sup> “Order of payment of support,”<sup>57</sup> “Counseling,”<sup>58</sup> and “Prohibition of firearm possession.”<sup>59</sup> Part III, *infra*, explains these

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<sup>53</sup> *Id.* (emphasis added). It could be that some trial judges are confusing the requirements for protection of animals with the requirements for protection of property, *see id.* at 60/214(11), or possession of personal property, *see id.* at 60/214(10), which do require that the petitioner, not the respondent, own the property or, if they both own the property, requires a balance of hardship before granting the remedy.

<sup>54</sup> *Id.* at 60/214(b)(10).

<sup>55</sup> *Id.* at 60/217(a)(3)(iii).

<sup>56</sup> *Id.* at 60/214(b)(13).

<sup>57</sup> *Id.* at 60/214(b)(12).

<sup>58</sup> *Id.* at 60/214(b)(4).

<sup>59</sup> *Id.* at 60/214(b)(14.5).

critical remedies and analyzes possible reasons why judges fail to grant them.

Before concluding this discussion of orders of protection, it is important to address what happens if the order is violated and partially address how a protective order, in some respects, is just a piece of paper. Fortunately, there are numerous consequences when an order is violated. Remedies can be enforced through civil contempt to coerce respondents to comply with orders, through criminal contempt to punish respondents for violations, or both.<sup>60</sup> In addition, violations of certain remedies in Illinois can result in a criminal charge of a “Violation of an order of protection”<sup>61</sup> and is a Class A Misdemeanor.<sup>62</sup> To protect survivors from respondents charged with Violation of Order of Protection, the State can ask courts to assess risks of future violations and escalation of violence.<sup>63</sup> Courts can use these risk assessments to justify ordering electronic surveillance of

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<sup>60</sup> *See id.* at 60/223.

<sup>61</sup> In practice, sentences imposed for violations of orders of protection depend upon prior convictions on other criminal matters and the assessment of risk of substantial harm in the individual case. If assessment suggests low risk, defendants may simply receive supervision (which can be expunged), conditional discharge, or probation (during which defendants can be monitored for compliance with conditions such as attendance in intervention or substance abuse programs or electronic surveillance). Telephone Interview with Kelly Navarro, former Cook County Assistant State’s Attorney, (Aug. 20, 2013). Under the statute, when the following remedies have been violated, this violation can trigger criminal charges: Prohibition of abuse, neglect, or exploitation, 750 ILL. COMP. STAT. 60/214(b)(1); Grant of exclusive possession of residence, *id.* at 60/214(b)(2); Stay away order and additional prohibitions, *id.* at 60/214(b)(3); Prohibition of entry (under the influence of drugs or alcohol), *id.* at 60/214(b)(14); Prohibition of firearm possession, *id.* at 60/214(b)(14.5); or any other remedy when the action constitutes a crime against the protected party, 720 ILL. COMP. STAT. 5/12-30(a)(1)(i) (2012). If respondents intentionally conceal, detain, or remove children from the state in violation of remedies granting petitioners physical care or possession, or both of the child or in violation of remedies of temporary legal custody (or intentionally concealing or removing children in violation of remedies prohibiting such conduct) this is a Class 4 felony, carrying a penalty of up to one to three years. 730 ILL. COMP. STAT. 5/5-4.5-45.

<sup>62</sup> 720 ILL. COMP. STAT. 5/12-3.4.

<sup>63</sup> 725 ILL. COMP. STAT. 5/110-5 (2012).

defendants as a condition of bond<sup>64</sup> or courts can do so after conviction in certain scenarios.<sup>65</sup> Originally, laws that provide for electronic surveillance of those charged or convicted of Violation of Order of Protection mandated risk assessments, and electronic surveillance could be required depending on the outcome of that risk assessment. Later modifications have now made the assessments discretionary due to costs and feasibility of implementation.<sup>66</sup>

After focusing on the many ways that orders of protection and the Act are geared towards helping protect survivors of domestic violence, it should be noted that the Act also contains provisions focused on addressing the interests of those accused of abuse. These include provisions that attempt to reduce false accusations, provide a swift opportunity to appear in court to contest the allegations of abuse, and to, at times, balance the petitioner's needs with the respondent's.<sup>67</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> After conviction, defendants can be placed under electronic surveillance: as a condition of probation or conditional discharge, 730 ILL. COMP. STAT. 5/5-6-3(b)(10)(iii) (2012), or as a mandatory condition of early release from prison when the inmate has received good conduct credit, *id.* at 5/3-6-3(f).

<sup>66</sup> See Bryan Thompson, *Changes in the Cindy Bischof Law*, 24 J. DUPAGE COUNTY B. ASS'N, Oct. 2011 at 40, available at <http://www.dcbabrief.org/vol241011art4.html>.

<sup>67</sup> The Act includes provisions that address fairness issues for respondents accused of committing abuse under the Act, including: requiring that evidence of immediate danger of further abuse to the petitioner outweighs the hardship to the respondent before imposing the remedy of exclusive possession of the home at an ex parte emergency order of protection, see 750 ILL. COMP. STAT. 60/217(a)(3)(i); allowing a respondent subject to an ex parte emergency order of protection or interim order of protection to appear and petition the court to rehear the original or amended petition two days, or a shorter period as the court may prescribe, after giving notice to the petitioner (in addition, if contesting a grant of exclusive possession of the home to the petitioner, the court must set a court date for a hearing within fourteen days), see *id.* at 60/224; if a party makes allegations without reasonable cause that are found to be untrue, this will subject the party pleading them to the payment of reasonable expenses actually incurred by the other party plus reasonable attorney's fee on motion made within thirty days of the judgment or dismissal and potential prosecution for perjury, *id.* at 60/226. In addition, as discussed in Part III, *infra*, in order to obtain an ex parte emergency order of

## II. DATA COLLECTION AND FINDINGS

This Part analyzes data collected from a court-monitoring project followed by case file review for cases that took place at the specialized domestic violence law court at 555 West Harrison Street in Chicago, Illinois. The goal of the study was to determine how well the court protects survivors of domestic violence. The study focused mainly on how well the judges apply the Act in order of protection cases they hear,<sup>68</sup> and in particular, whether judges grant the full range of remedies petitioners seek, when appropriate.

### A. *Method of Collecting the Case File Data*

Researchers collected data from court cases in three phases. In Phase I, four researchers observed the civil court call for orders of protection from approximately October through December of 2011, and recorded basic information about each case (e.g. who was present and whether an emergency order of protection or a plenary order of protection was issued).<sup>69</sup> The researchers attended a total of 217 cases during the afternoon court sessions, when petitions for ex parte emergency order of protection<sup>70</sup> are typically heard, and during the

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protection that awards certain remedies such as “prohibition of abuse,” the statute in Section 60/217(a)(3)(i) requires that the court determine that “the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner’s efforts to obtain judicial relief.” This standard was referred to in *Sanders v. Shephard* as “exigent circumstances.” 541 N.E. 2d 1150, 1155 (Ill. App. Ct. 1989).

<sup>68</sup> The author also wanted to see if the presence of an attorney for petitioner or respondent affected the outcome in the case (i.e. whether it led to more or fewer order of protections being granted), but so few petitioners and respondents were represented in the data sample, that the author was unable to find a statistically significant result from this factor.

<sup>69</sup> Researchers observing the civil court call used a Court Monitoring Form to record their observations, on file with the author.

<sup>70</sup> An emergency order of protection under the Act is an order that can be granted at an ex parte hearing that can result in an order of protection that can last up to twenty-one days (the return date for the hearing for a plenary order of protection) to provide time to serve the respondent. 750 ILL. COMP. STAT. 60/220(a)

morning court call, when plenary order of protection<sup>71</sup> hearings tended to take place. There are two courtrooms where judges hear these cases and the researchers observed one of the two courtrooms randomly each time. More information about these cases was collected in Phase II, approximately three months later,<sup>72</sup> because very limited kinds of information could be obtained through court observations.<sup>73</sup>

In Phase II, researchers reviewed the court files from the monitored cases. For a variety of reasons, the files from some of the monitored cases could not be located,<sup>74</sup> leaving ninety-three cases for analysis.

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(2012). The emergency order of protection can be continued at each hearing date as necessary to obtain service of the respondent. *Id.* at 60/213(b).

<sup>71</sup> A plenary order of protection under the Act is an order that can be granted at a hearing after the respondent has been served with the emergency order of protection (through personal service or service by publication; if service is by publication and the respondent has no actual knowledge of the plenary order of protection then if they violate the plenary order of protection they cannot be criminally liable for the crime of violating the plenary order of protection). *Id.* at 60/223(a)(1). The plenary order of protection can run for a period up to two years. *Id.* at 60/220(b).

<sup>72</sup> In some cases observed, the case was at a status stage and even when an emergency or plenary order hearing was taking place, the researchers had difficulty at times hearing what the parties and judge were saying. It is a common practice of the judges to read through very quickly their finding of abuse and what remedies they are granting.

<sup>73</sup> The cases observed happened quickly. It was often difficult to hear what the judges, parties, and any witnesses or attorneys were saying. In addition, one gets only a “snap-shot” of the case through a random court-monitoring project. For example, the case being observed might only be on a “return date” after an emergency order of protection has been issued, to see if the respondent has been served or not. Thus, to gain a better sense of what has been alleged in the case, and what remedies the petitioners sought, it was necessary to review the case file containing the petitioner’s petition for an emergency order of protection and affidavit. Because it can take several attempts to serve the respondent and the case may be continued for other reasons, it is also useful to review the case file more than once to see what has developed in the case.

<sup>74</sup> Some of these were due to lack of sufficient information in the court monitoring forms. Cases that involved civil no contact orders or stalking no contact orders (cases where there was not the “family or household member relationship” required for an order of protection) were also excluded. This reduced the number of

The researchers recorded which remedies were sought and granted, whether judges correctly applied the law, and updates to the status of these ninety-three cases. In particular, researchers reviewed the petition and affidavit for an order of protection and the actual order of protection itself (when granted) in the court file, supplemented the court monitoring forms with certain additional information,<sup>75</sup> and made any corrections or updates.<sup>76</sup>

Finally, in Phase III, between August 2012 and January 2013, approximately one year after the cases were first observed, an additional researcher reviewed the ninety-three case files to ensure the accuracy of the information collected, further update the status of the cases, and analyze how well the judges were applying the Act in the cases before them.

The researcher analyzed how the judge acted by examining the total number of remedies sought, granted, and denied against the fact patterns suggesting the applicability of certain remedies in certain fact patterns,<sup>77</sup> inspecting whether the judges filled in Paragraph 18 of the form specifying reasons for the denial of remedies when the judge had granted an order of protection but denied one or more of the sought remedies (filling in Paragraph 18 under this circumstance is a requirement under the Act, but many judges failed to comply), and identifying the time frame in each of the cases, specifically examining the time from the last abusive incident to when the petitioner sought the emergency order of protection. The results of this review are detailed in Table 1 and Table 2 of the Appendix and summarized below.

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cases to ninety-three. All ninety-three remaining case files were reviewed by at least two researchers for accuracy. The results are presented in Table 1.

<sup>75</sup> Researchers reviewing the case files also collected data on the correlation between petitioners dropping their cases and the number of continuances in the dropped case due to failure to serve the respondent.

<sup>76</sup> The Court Monitoring Form and the form used to update the Court Monitoring Form are on file with the author.

<sup>77</sup> One example of a fact pattern identified was the remedy of relinquishment of firearms when the facts in the affidavit noted the possession of firearms by a respondent and the respondent's threat to use them against the petitioner.

### *B. Summary of the Key Findings from the Case File Review*

Generally, the judges in the specialized court effectively implemented the Act's goals. Perhaps the best objective indicator of this proposition is that 81% of petitioners who sought an emergency order of protection received one, even though 80% of the petitioners acted pro se. Although 53% of the ninety-three cases did not result in a plenary order of protection, only 26% of those case denials were based upon judicial denial of a plenary order of protection after a hearing.<sup>78</sup> In addition, researchers' evaluations of the judges were quite positive.<sup>79</sup> The judges were typically very patient and helpful towards the pro se litigants,<sup>80</sup> generally able to extract from the pro se petitioner the proper pleaded facts for an order of protection, and appeared to properly apply the Act in the vast majority of observed cases.

Notwithstanding these positives, the review of the ninety-three cases found evidence of three very serious problems with judicial

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<sup>78</sup> See *infra* Table 1.

<sup>79</sup> Judges and court administrators were aware of the court-monitoring project and the presence of the researchers and so their handling of the cases may have been affected by their presence.

<sup>80</sup> Researchers noted statements and helpful legal explanations made by the judges intended to aid pro se parties: (i) explaining the burden of proof, the need to state facts not conclusions, providing information on return dates and the need to come to court prepared for the hearing, (ii) explaining certain legal phrases and concepts when the parties appeared not to understand them, such as what is "abuse" under the Act (reading out loud relevant portions of the definition), what it means to establish paternity and what is hearsay, and (iii) directing the petitioner to let the judge know if she feared for her safety while in court, warning the parties not to speak with each other and instructing the respondent not to sit next to the petitioner. While the judges under observation typically exhibited excellent patience, kindness, and helpfulness towards the pro se parties, researchers also observed, at times, judges who failed to exhibit respect towards a party. Negative comments included: (i) judges read through the order too quickly and (ii) some judges immediately dismissed cases if the petitioner was not present the very moment the case was announced, even when they had stepped outside of the courtroom in order to attend to a child needing their attention in the hallway. Judges could instead re-call at the end of the court call those cases where the petitioner had stepped out momentarily when the case was called.

implementation of the Act and a fourth problem relating to the large percentage of pro se petitioners. First, judges completely failed to comply with the Act's requirement to specify in writing the reasons for denying a remedy, even though the form order of protection (Paragraph 18) called for this information. Second, judges refused to grant the remedies of payment of child and spousal support, payment of losses, relinquishment of firearms, and counseling, even when sought and when the facts in the affidavit and petition supported such relief under the terms of the Act.<sup>81</sup> Third, judges' denial rates were nearly double for emergency order of protection when the last incident of abuse occurred more than seven days before the petitioner appeared in court seeking the emergency order of protection (23% versus 12%), suggesting that judges apply a major burden on petitioners to explain a delay in seeking an emergency order of protection even though there is no such temporal requirement in the Act for an emergency order of protection.<sup>82</sup> Finally, a very large percentage of petitioners (80%) and respondents (97%) acted pro se in these cases<sup>83</sup> and many petitioners failed to seek remedies that they appeared to be entitled to and from which they could have benefitted.<sup>84</sup>

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<sup>81</sup> See *infra* Table 3.

<sup>82</sup> The author sent a survey in March 2013, to twenty-seven organizations located in Chicago, Illinois, and a nearby suburb, who represent or otherwise assist survivors of domestic violence (the "Service Organization Survey"). Question 3 of the Service Organization Survey asked if they ever observed a judge state that he or she would not grant an emergency order of protection because the last incident of abuse took place "too long ago" in the court's judgment, and if yes, how many times they observed this happen. Eight of the nine organizations that turned in completed surveys reported observing this. Of the eight that observed this, one reported "countless" times, one reported that he "[did] not know the number of times," one reported four times over the past month, one reported twenty-four times [over the last month], and three reported between three and five times [over the last month]. Service Organization Survey (March 2013) (on file with author).

<sup>83</sup> See *infra* Table 1.

<sup>84</sup> See *infra* Table 3. In a few of the observed cases, the petitioner was seriously disadvantaged in obtaining any type of order of protection because an attorney did not represent her. In one case, for example, the order of protection was denied because the petitioner had not been able to meet, to the judge's satisfaction, the



Finally, a non-judicial problem with the implementation of the Act, reflected in the data collected, is that petitioners in 55% of the cases dropped their case after receiving an emergency order of protection. In 38% of these cases, the petitioner dropped the case *after* it had previously been continued for failure to serve the respondent. This indicates a connection among failure to obtain service, a need to continue the case as a consequence, and a substantial percentage of petitioners dropping their cases after one or more such continuances.

### III. ANALYSIS OF FINDINGS AND RECOMMENDATIONS

This Part focuses on the problem areas with the judicial application of the Act described in Part II. It explores how judicial practice diverges from the Act's requirements, possible reasons for this divergence, and steps that can be taken to address it. Finally, Part III considers the special challenges to full implementation of the Act given that 81% of petitioners and 97% of respondents are pro se, and many such petitioners fail to seek potentially beneficial remedies to which they are entitled.

#### *A. Failure or Refusal to Grant the Remedy of Payment of Support: Sought in only three cases and not granted in any of the ninety- three cases*

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“relationship” requirement. The judge in that observed case noted that one month of dating is not “dating” for purposes of the Act, even though there is no such time length requirement in the Act. If represented, the attorney could have raised this point. In some instances, the petitioner clearly alleged the statutorily required “abuse,” testifying that the respondent struck the petitioner, causing scratches and bruising, meeting the definition of “physical abuse” under the Act. The petitioner also alleged that the respondent held a gun to the petitioner’s head and then shot a bullet from the gun into a wall of the petitioner’s home which went through her daughter’s room, meeting the definition of “harassment” and “intimidation of a dependent” under the Act. Yet the judge ruled there was “insufficient evidence of physical abuse” and denied an order of protection. It is possible that the judge ruled this way because the judge did not believe the petitioner’s testimony or additional testimony or evidence offered through the petitioner’s pleadings.

The “Order for payment of support” is an order that requires the respondent to pay temporary support for the petitioner or any child in the petitioner’s care or custody when the respondent has a legal obligation to support that person under the Illinois Marriage and Dissolution of Marriage Act. The Marriage and Dissolution of Marriage Act governs the amount of such support and the means by which the support is effectuated.<sup>85</sup> This order “may be granted only if the respondent has been personally served with process, has answered or has made a general appearance.”<sup>86</sup> The order cannot be granted on an emergency order of protection.<sup>87</sup>

The order for payment of support appears, at first blush, to be primarily financial in nature—the payment of money in certain circumstances—rather than focused on safety. Some judges may believe that only matters of safety should be handled in a court that handles orders of protection, and thusly, do not readily grant this remedy.

In reality, financial remedies are necessary for a survivor’s ability to safely leave an abuser. Thus, financial remedies can be as much a safety issue as a stay away order.<sup>88</sup> Indeed, the Illinois legislature recognized the importance of payment of support by stating, among the purposes of the Act, “more appropriately protecting and assisting victims” and preventing further abuse by addressing “related issues of child custody and economic support, so

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<sup>85</sup> 750 ILL. COMP. STAT. 60/214(b)(12) (2012).

<sup>86</sup> *Id.* at 60/210(d).

<sup>87</sup> *Id.* at 60/217(a)(3)(iii).

<sup>88</sup> *See, e.g., Economic Justice and Domestic Violence*, FAM. VIOLENCE PREVENTION FUND (Oct. 17, 2007), <http://web.archive.org/web/20071017202435/http://endabuse.org/programs/display.php3?DocID=304> (showing a lack of income is a common reason cited by survivors of domestic violence for staying in abusive relationships). Indeed, the abuse itself is a major cause of creating financial dependence on the abuser. *See generally* Angela M. Moe & Myrtle P. Bell, *Abject Economics: The Effects of Battering on Women's Work and Employability*, 10 VIOLENCE AGAINST WOMEN 29 (2004), available at [http://works.bepress.com/angela\\_moe/10](http://works.bepress.com/angela_moe/10).

that victims are not trapped in abusive situations . . . by . . . financial dependence. . . .”<sup>89</sup>

Yet, some judges have expressed reluctance to grant the payment of support remedy because they do not want petitioners to be able to “misuse” the court as a means for a “cheap divorce.”<sup>90</sup> Even when the respondent previously agreed to pay support, some judges are still reluctant to order support because a violation of the order can result in a possible contempt sanction.<sup>91</sup> Petitioners only sought payment of support in three of the ninety-three cases, and judges never granted it.

Some attorneys and advocates who work with survivors of domestic violence are generally concerned that if they push for more remedies, including remedies like financial support, they might jeopardize the granting of an emergency order of protection. This is a troubling concern and may explain why only three petitioners sought this remedy. The fact that this remedy cannot be granted at the emergency order of protection stage may also explain why some pro se petitioners failed to seek it. Court clerks may be informing petitioners that this remedy is not available at the emergency order of protection stage but may not be explaining that to seek this remedy at the plenary order of protection stage, they need to include the remedy in their initial petition.

In addition, in order to recover temporary child support, the petitioner needs to know how to present evidence of the respondent’s net income under the Marriage and Dissolution of Marriage Act.<sup>92</sup> The petitioner also may need to provide evidence of the respondent’s parental status towards the child under Illinois law.<sup>93</sup> Although the law relating to child support in Illinois is relatively straightforward, presenting evidence on net income and parental status of the petitioner may be difficult for pro se petitioners without assistance.

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<sup>89</sup> 750 ILL. COMP. STAT. 60/102(4).

<sup>90</sup> Interview with confidential party, in Chi., Ill. (2014).

<sup>91</sup> *Id.*

<sup>92</sup> 750 ILL. COMP. STAT. 5/505.

<sup>93</sup> *Id.*

Conversely, temporary support for the petitioner is less clear under the Marriage and Dissolution of Marriage Act. The pro se petitioner would need even more assistance in seeking this remedy because it is more difficult to qualify for and obtain spousal support. Although spousal support is generally less likely to be pursued, it should be pursued when the petitioner requires this assistance to become financially independent but does not desire to file a divorce action right away.

Due to the clear intent of the Illinois legislature to provide survivors with this financial remedy as a part of the plenary order of protection, it is important that survivors of domestic violence are empowered to seek financial remedies. Petitioners should not be intimidated into disregarding it due to confusion over presenting appropriate evidence, nor due to a fear of backlash from the judge in obtaining an emergency order of protection if the financial remedy is checked off in her petition.

Forms should be created that inform petitioners about the types of evidence necessary to obtain these remedies. Further, judges should be trained to grant payment of support when petitioners provide proper evidence.<sup>94</sup>

Section 60/212(b) of the Act provides that judges should not decline hearing child support or temporary spousal support in the context of a plenary order of protection, even if the judge does not ordinarily hear this type of matter, if the remedy is necessary to avoid further abuse.<sup>95</sup> If the court determines the remedy is not necessary to avoid further abuse and declines to grant the remedy, then the court must transfer all undecided issues to the appropriate court or division and cannot delay or decline from ruling on the other issues. This section may partially explain why so few petitioners in the data

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<sup>94</sup> Educational and training materials on how to lay a foundation for the remedies of payment of support, payment of losses, temporary legal custody, and relinquishment of possession of firearms are located at *Domestic Violence Clinic*, J. MARSHALL L. SCH., [www.jmls.edu/clinics/domestic-violence/public.php](http://www.jmls.edu/clinics/domestic-violence/public.php) (last visited Jan. 19, 2015).

<sup>95</sup> 750 ILL. COMP. STAT. 60/212(b).

sample sought payment of support, and even when they did, why so few judges granted the remedy of support.

Child support and spousal support ordinarily take place in the context of a divorce or parentage case. However, many petitioners have sought and been granted the “Physical Care and Possession of the minor child” remedy, which is also covered by section 60/212(b). This dichotomy raises the following question: why do judges seem much more receptive to handling the care of children remedy than the payment of support remedy?

Perhaps judges are better able to see the connection to safety matters for the former over the latter. In exacerbation of the problem, it appears that after observing repeated denial of payment of support remedies, lawyers and advocates now do not seek the remedy of payment of support, even when their clients could benefit from this remedy.<sup>96</sup>

*B. Failure or Refusal to Grant the Remedy of Payment of Losses:  
Sought in only two cases and not granted in any of the ninety-  
three cases*

The “Order for payment of losses” provides for three categories of losses that survivors face. First, it allows compensation for losses they may have suffered due to the abuse, including medical expenses, lost earnings, repair or replacement of damaged or stolen property, reasonable attorney’s fees, court costs, and moving or other travel expenses, including reasonable costs of temporary shelter and restaurant meals.<sup>97</sup> Second, it allows compensation for appropriate

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<sup>96</sup> In confidential conversations by the author with lawyers and domestic advocates, several reasons were raised for not seeking the payment of support remedy when obtaining an order of protection: at the time, it was not being granted by the judges, fear of backlash from a judge who might view the petitioner as less credible about the abuse when the petitioner was seeking monetary remedies too, fear of backlash from the respondent who might become more violent when this remedy is pursued, and goal of the petitioner to have no further contact with the respondent including through implementing this remedy.

<sup>97</sup> 750 ILL. COMP. STAT. 60/214(b)(13).

temporary relief, which would, consequently, address some of the family needs to break away from financial dependence on abusers.<sup>98</sup> Third, it allows for the reimbursement of the costs of recovering children if they have been removed or concealed.<sup>99</sup> Without these remedies, survivors may be unable to safely and successfully separate from their abusers. Similar to the order for payment of support, the order for payment of losses can only be granted if the respondent has been personally served with process, and has answered or has made a general appearance.<sup>100</sup> Additionally, the order for payment of losses is not available on an emergency order of protection<sup>101</sup> and is enforceable through civil or criminal contempt.

Considering how important and useful this remedy can be, it is disappointing to see that only two of the ninety-three petitioners sought it. Similar to the remedy of payment of support, some petitioners may mistakenly fail to check this off as a desired remedy in their petition for an emergency order of protection, a precondition to then being able to seek the remedy after service of the respondent at the hearing for a plenary order of protection. Petitioners may also consciously decide not to do so due to fear of enraging respondents or because respondents may lack the resources to pay these losses. Alternatively, petitioners may fear that in seeking this remedy judges will perceive the petitioners as prioritizing financial assistance compared to the petitioner's safety concerns, and consequently deny the orders of protection. Attorneys of survivors raised this as a concern.<sup>102</sup>

While some judges tell petitioners to seek this remedy in a small claims court rather than in the order of protection proceeding, this is incorrect under the Act. Only remedies relating to child custody and family support are matters that judges can decline hearing, and then only when these remedies are not linked to preventing future abuse.<sup>103</sup>

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<sup>98</sup> *Id.* at 60/214(b)(13)(i).

<sup>99</sup> *Id.* at 60/214(b)(13)(ii).

<sup>100</sup> *Id.* at 60/210(d).

<sup>101</sup> *See id.*

<sup>102</sup> *See supra* note 96.

<sup>103</sup> 750 ILL. COMP. STAT. 60/212(b).

Pursuant to Section 212(b) of the Act, judges are supposed to then transfer that issue to another court.<sup>104</sup>

Judges should be trained to grant payment of losses when the petitioner seeks it and provides evidence of losses recoverable under section 214(b)(13) of the Act.<sup>105</sup> Attorneys should appeal cases where judges incorrectly deny this remedy. Furthermore, if judges deny orders of protection as a negative reaction to petitioners also seeking this remedy, an attorney on behalf of the petitioner should move for reconsideration, and if not granted, should appeal the decision. When appealing denials, petitioners can cite to the Illinois Appellate Court in *Best v. Best*: “[T]he central inquiry [for an order of protection] is whether the petitioner has been abused. Indeed, under section 214(a) of the Domestic Violence Act, once the trial court finds that the petitioner has been abused, ‘an order of protection. . . shall issue.’”<sup>106</sup>

Although having no order of protection during the appeals process can leave some survivors in dangerous situations, which explains why some advocates and attorneys fear to seek the payment of losses remedy, other safety measures can and should be taken. Due to the time-sensitive nature of the relief sought and the possibility of delays in obtaining an order of protection, denials can be deadly.

Therefore, the Illinois legislature should amend the Act—and other state legislatures amend their comparable legislation—to provide for an expedited appeals process for denials of emergency orders of protection. If denials occur at the plenary order of protection stage, petitioners can move for stays of the denial pending appeal, so that the prior emergency order of protection remains in place. Finally, if after training on this remedy, judges continue to rule inappropriately, the presiding judge should consider using her authority under Supreme Court Rule 21(g) to address judges’ failures to perform their duties.<sup>107</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 60/214(b)(13).

<sup>106</sup> 860 N.E. 2d 240, 244 (Ill. 2006) (quoting 750 ILL. COMP. STAT. 60/214(a)) (emphasis in original).

<sup>107</sup> See *infra* Part III.E.

*C. Failure or Refusal to Grant the Remedy of Relinquishment of Firearms: Sought in eleven cases and not granted in any of the ninety-three cases*

The final remedy that the judges failed to grant is “Prohibition of firearm possession.” This remedy is critical because abuse is much more likely to become lethal when abusers possess firearms.<sup>108</sup> The Act is clear that when certain standards are met, judges must order respondents to relinquish firearms and Firearm Owner Identification (FOID) cards.<sup>109</sup>

Notwithstanding the mandatory language in the Act, judges in the study systemically refused to grant this remedy. Perhaps this is because the statute is unclear as to who should seize the firearms, whether sheriffs or police could search respondents’ persons or homes for the firearms, and the process and timing by which respondents should turn over firearms and FOID cards. The comparable statute in California includes many more details on how relinquishment should take place. The California statute imposes duties on respondents to

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<sup>108</sup> See, e.g., Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003); see also Benjamin Thomas Greer & Jeffrey G. Purvis, *Judges Going Rogue: Constitutional Implications When Mandatory Firearm Restrictions Are Removed From Domestic Violence Restraining Orders*, 26 WIS. J.L. GENDER & SOC’Y 275, 281 (2011) (proper application of firearm restrictions produced an 8% decrease in the rate of intimate partner violence homicide) (citing Daniel W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN’S HEALTH 93, 93 (2010)). Also recognizing the connection between possession of a firearm and heightened risk for lethality, under the Illinois Firearm Owner’s Identification Act, 430 ILL. COMP. STAT. 65/2(a)(1) (2012), in order to lawfully possess a firearm, a person (except for police in their official duties) must have a valid FOID card issued by the Illinois State Police. Further, officials must deny an application for a FOID card by anyone subject to an order of protection, and officials must revoke and seize a previously issued FOID card by anyone subject to an order of protection *Id.* at 65/8.2 (2012).

<sup>109</sup> 750 ILL. COMP. STAT. 60/214(b)(14.5) (2013). At the time the empirical study was conducted, 60/214(b)(14.5) used the phrase “shall” repeatedly. Since then, Section 60/214(b)(14.5) has been amended. See P.A. 97-1150 signed into law on Jan. 25, 2013, and codified at 750 Ill. Comp. Stat. 60/214.



file with the court a receipt showing that firearms should be either surrendered to local law enforcement or sold to licensed gun dealers within forty-eight hours after being served.<sup>110</sup> Failure to do so constitutes a violation of the order of protection.<sup>111</sup>

As amended in January 2013, the relinquishment of firearms remedy is no longer available at the emergency order of protection stage.<sup>112</sup> The standard for issuing the remedy also changed.<sup>113</sup> It now mirrors the language in federal laws relating to orders of protection barring possession of firearms and is confined to situations where the petitioner is an intimate partner of the respondent or the child of such an intimate partner.<sup>114</sup> However, the mandatory language requiring a court to order the seizure of any firearm in the possession of the respondent is retained,<sup>115</sup> as is the mandatory language for the court to

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<sup>110</sup> CAL. FAM. CODE § 6389(c)(2) (West 2013).

<sup>111</sup> *Id.* Sections (3) and (4) contain other useful aspects of implementing the relinquishment of firearms relating to specifying the known location and types of firearms and providing courts with the discretion to grant a use immunity for relinquishing firearms if the respondent asserts the right against self-incrimination when declining to relinquish possession. *See id.* § 6389(c)(3)-(4).

<sup>112</sup> 750 ILL. COMP. STAT. 60/214(b)(14.5)(a)(1) (2012) (“Prohibit a respondent against whom an order of protection was issued from possessing any firearms during the duration of the order if the order: (1) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate”).

<sup>113</sup> 750 ILL. COMP. STAT. 60/214(b)(14.5)(a)(2) (2012). To obtain this remedy against a respondent, it is necessary that the order of protection restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (3)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* “The court *shall* issue a warrant for seizure of any firearm in the possession of the respondent, to be kept by the local law enforcement agency for safekeeping, except as provided in subsection (b). *Id.* (emphasis added). If the respondent is a police officer, subsection (b) provides that the weapon is

order forfeiture of any FOID.<sup>116</sup> Violating this remedy constitutes the crime of violating an order of protection, making the respondent subject to arrest.<sup>117</sup>

The process for informing the court and petitioner when and whether the firearms were turned over or seized is not uniform. Further, petitioners could contact law enforcement to inquire, but currently there is no requirement in place to communicate this information to the petitioner or even to the court. Illinois law should be amended to require that this information be provided to the court by law enforcement or the sheriff's office that seized the weapons under the order. This information should also be made available in the case file for petitioners to review within forty-eight hours of any such seizure or relinquishment so that the petitioner knows whether this safety measure has taken place. Section 14.5 should be amended to require respondents to relinquish their firearms within forty-eight hours of service of their order and provide evidence of relinquishment to the court, as required in California. Courts could then determine whether respondents have complied—with a rebuttable presumption of non-compliance if evidence is not received within forty-eight hours—thereby aiding petitioners' safety.

Some judges may refuse to grant this remedy due to the difficulty of monitoring and enforcing compliance even when they recognize the risks to the survivor's safety. Others may see this as a Second Amendment issue, even though federal case law does not support a constitutional challenge.<sup>118</sup> Because this remedy is so

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surrendered to the chief law enforcement executive of the agency in which the respondent is employed, who retains it for safekeeping for the duration of the order of protection. *Id.* at 214(b)(14.5)(b).

<sup>116</sup> "Any Firearm Owner's Identification Card in the possession of the respondent, except as provided in subsection (b), *shall* be ordered by the court to be turned over to the local law enforcement agency." *Id.* (emphasis added).

<sup>117</sup> 720 ILL. COMP. STAT. 5/12-3.4.

<sup>118</sup> See *Moore v. Madigan*, 702 F.3d 933, 939-40 (7th Cir. 2012) (citing *United States v. Skoien*, 614 F.3d 638, 643-44 (7th Cir. 2010) (ruling certain Illinois firearm laws, not including the Act, to be unconstitutional, but distinguishing the situation where a person is convicted of the misdemeanor crime of domestic battery as the basis for prohibiting possession of a firearm)).

critical to protecting some survivors of domestic violence, judges should be instructed to grant the remedy when the statutory conditions for relinquishment of firearms have been met.

*D. Failure or Refusal to Grant the Remedy of Counseling: Sought in nineteen cases and granted in only two of the ninety-three cases*

Because some petitioners desire to remain with their intimate partners, but in safer, healthier relationships,<sup>119</sup> the Illinois legislature provided not only for a stop the abuse remedy but also an order for the respondent to attend counseling. One form of counseling available under this remedy is “an Illinois Department of Human Services protocol approved partner abuse intervention program” where the respondent would go “for an assessment and to follow all recommended treatment.”<sup>120</sup> Other potential forms of counseling available under this remedy include alcohol or substance abuse counseling, as well as other guidance services as the court deems appropriate.<sup>121</sup> While data on the success of various counseling and partner abuse intervention programs is mixed, some abusive partners benefit from various forms of counseling and partner abuse

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<sup>119</sup> Comments of Representative Greiman, 82d Gen. Assembly, Reg. Sess., at 90-91 (Ill. May 6, 1981), *available at* <http://www.ilga.gov/house/transcripts/htrans82/HT050681.pdf> (“[I]n the end this Bill gives people an opportunity to stay together, to not get a divorce. . . most of these remedies, many of them could be handled in a divorce setting. This gives them an opportunity to try and stay in their situation without getting a divorce.” This appears to explain why at least some legislators wanted the remedy of counseling included in the original bill passed back in 1981.).

<sup>120</sup> 750 ILL. COMP. STAT. 60/214(b)(4).

<sup>121</sup> *Id.* The counseling under Section (b)(4) should not be the typical form of “couple’s counseling” that takes place when a couple is experiencing normal difficulties and where there will be no acts of intimidation and retaliation when both spouses discuss the problems in the relationship, but instead needs to be tailored to the power and control dynamics of intimate partner abuse, which under current thinking, is performed with partner abuse intervention programs. Mike Feinerman, Co-Ex. Dir., Certified Partner Abuse Intervention Partners, Address at the John Marshall Sch. of Law: Working with People Who Batter: Parenting After Domestic Violence (Mar. 26, 2013) (presentation material on file with author).

intervention programs.<sup>122</sup> Thus, this is an important remedy not only for petitioners who seek to safely remain in a relationship, but also for society as a whole, since successful intervention can reduce future abuse with other partners.

This is also a critical remedy for children common to the petitioner and respondent. Due to the severe emotional harm children may experience from observing domestic violence, it is beneficial for the order of protection to include the remedy of counseling. If the respondent has a child in common with the petitioner, there will be continuing contact between the co-parents and further abuse could occur in front of the child. This remedy seeks to prevent further abuse through proactive counseling.

Like orders for payment of support and payment of losses, counseling is not allowed on an emergency order of protection.<sup>123</sup> It can only be granted when the respondent has been served and the respondent answered or made a general appearance.<sup>124</sup> The remedy is

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<sup>122</sup> The organization that created the Duluth model (which is the most widely-adopted approach for court-mandated batterer intervention programs), reported that in a study of men who pass through their program and the criminal justice system, 68% have not reappeared in the criminal justice system over a course of eight years. *Why the Duluth Model Works*, HOME OF THE DULUTH MODEL, <http://www.theduluthmodel.org/about/why-works.html> (last visited Feb. 17, 2015). *But see* Julia C. Babcock, Charles E. Green, & Chet Robie, *Does Batterers' Treatment Work? A Meta-analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004) (discussing how current interventions, including the Duluth Model, have a minimal impact on reducing recidivism beyond the effect of being arrested). According to the Center for Advancing Domestic Peace—an organization located in Chicago, Illinois—when the person who is attending a partner abuse intervention program has more to lose if arrested for a domestic violence-related crime (for example, the person has a good job), the person is more likely to benefit from the program and less likely to re-abuse, even if the person initially does not want to be in the program. LARRY BENNETT ET AL., PROGRAM COMPLETION, BEHAVIORAL CHANGE, AND RE-ARREST FOR THE BATTERER INTERVENTION SYSTEM OF COOK COUNTY ILLINOIS 4 (Feb. 14, 2005), *available at* <http://www.icjia.state.il.us/public/pdf/ResearchReports/CookCountyDVInt.pdf>.

<sup>123</sup> 750 ILL. COMP. STAT. 60/217(a)(3) (2012).

<sup>124</sup> *Id.* at 60/210(d).

enforced through civil or criminal contempt.<sup>125</sup> While this remedy is not available at the emergency order of protection stage, a petitioner still must check this remedy off in their petition for an emergency order of protection in order to be able to obtain it at the plenary order of protection stage. Unfortunately, some pro se petitioners may fail to check off that they are seeking this remedy in their initial petition at the emergency order of protection stage if they are informed that they cannot get this remedy at that stage, not realizing that they still need to check off this remedy on the initial petition in order to argue for it at the plenary order of protection stage.

Judges may be reluctant to grant this remedy due to the difficulties of enforcement in civil orders of protection, as contrasted with criminal cases where there is already probationary monitoring of the defendant. Other judges might not view counseling as effective in stopping abuse. However, judges' views on the general efficacy of counseling, the desirability of obtaining the respondent's agreement to the counseling, or concerns with the difficulties of monitoring compliance are not valid grounds for denial.

Nevertheless, practical issues with the enforcement of this remedy need to be addressed. Perhaps if new funding is made available—for example, from entities like the National Football League,<sup>126</sup>—the implementation and monitoring of this remedy could be achieved in a fashion similar to how it functions in criminal cases where attending partner abuse intervention programs is required as

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<sup>125</sup> *Id.* at 60/223(b).

<sup>126</sup> National Football League (NFL) Commissioner Goodell sent a memo to the Chief Executives of and Club Presidents in the NFL, dated September 26, 2014, where he noted two initiatives the NFL is already engaged in to help prevent domestic violence and sexual assault: a partnership with the National Domestic Violence Hotline and the National Sexual Violence Resource Center that includes financial support from the NFL to both of those groups and running PSAs produced by NO MORE, a national campaign addressing domestic violence and sexual assault. See Ken Belson, *Roger Goodell Cites N.F.L.'s Efforts to Fight Abuse*, N.Y. TIMES, (Sept. 26, 2014), [http://www.nytimes.com/2014/09/27/sports/football/nfl-roundup.html?\\_r=0](http://www.nytimes.com/2014/09/27/sports/football/nfl-roundup.html?_r=0). In light of the NFL's desire to help prevent domestic violence and sexual assault, the organization may be receptive to funding preventative measures such as court-mandated partner abuse intervention programs.

one of the conditions for probation. Although violation does not constitute a criminal offense, it can result in a rule to show cause for civil contempt to obtain compliance or criminal contempt to punish the failure to comply.

In addition, the Act could be amended to require evidence of compliance within a specified period, such as a statement from the counseling agency that the respondent has initiated the counseling program with periodic reports on whether the respondent is in good standing with the program or completed the program. Changes to the Act would have to take into account privacy concerns and legal requirements relating to the disclosure of health care information, but limiting reports to cover only attendance, standing, and completion information may reduce this concern.<sup>127</sup> Without this change, petitioners can follow up with counseling agencies to confirm compliance and notify courts if respondents fail to initiate counseling or remain in good standing in a program prior to its completion. Creating better training for petitioners and judges, along with creating a special court call for enforcement, may encourage judges to more widely grant this remedy with more successful outcomes.

#### *E. Failure to Fill in Paragraph 18 as Required in the Act*

As previously noted, none of the judges in the ninety-three case files reviewed complied with Section 60/221(a) of the Act which states: “Any order of protection shall describe the following . . . (2) The reason for denial of petitioner’s request for any remedy listed in Section 214.” This requirement is critical. First, requiring judges to articulate why they refuse to grant remedies assists petitioners when appealing a ruling by producing a record of the court’s reasoning. Second, this requirement might make judges less likely to deny remedies for reasons that are inconsistent with the Act.

Because some judges never grant certain remedies for philosophical and practical reasons, further discussed below,

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<sup>127</sup> For example, North Dakota allows a court to “request a report from the designated agency.” See N.D. CENT. CODE § 14-07.1-02(4)(d) (2014).

compliance with Section 221(a)(2) is essential. Requiring judges to articulate reasons for denying remedies should cause judges to make more deliberate decisions, especially relating to the remedies of payment of support, payment of losses, counseling, and firearm relinquishment. It is hoped this requirement will lead judges to focus on the language in the Act governing the conditions for these remedies.

Understanding why judges do not comply with Section 221(a)(2) may help obtain compliance. One possible explanation is that judges may be unaware of it. However, Paragraph 18 of the form order of protection lists this requirement, indicating that judges should be aware of it. But, if judges noticed the statement and inquired about the requirement when receiving training for this court call, they may have been told that it is not necessary to fill in a response in this paragraph. Further, the judges may have missed the requirement when reading the statute because of its length and complexity.<sup>128</sup>

Another possibility is that the judges noticed Paragraph 18 but mistakenly thought that since hearings are recorded and parties can obtain transcripts of the hearing, that anything they say in denying a sought remedy would be adequate. Judges may have confused the presence of Paragraph 18 with Section 214(c)(3) of the Act, which creates the requirement that the court:

shall make its findings in an *official record or in writing*, and shall at a minimum set forth the following: (i) That the court has considered the applicable relevant factors described in paragraphs (1) and (2) of this subsection. (ii) Whether the conduct or

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<sup>128</sup> “I doubt seriously, outside . . . perhaps Representative Greiman and myself, that there is anybody in this chamber who’s read over 10% of the Bill. If you have, I congratulate you, and I think that’s terrific, but I defy anybody to be able to begin to describe what’s in this Bill here, because you can’t do it. I can’t do it and I spent days looking at the Bill.” Comments of Representative Johnson, 84th Gen. Assembly, Reg. Sess., at 88 (Ill. May 23, 1986), *available at* <http://www.ilga.gov/house/transcripts/htrans84/HT052386.pdf> (speaking on House Bill 2409, after noting that the Bill and the amendment to it they received the same day it was enacted was about 150 pages long).

actions of respondent, unless prohibited, will likely cause irreparable harm or continued abuse. (iii) Whether it is necessary to grant the requested relief in order to protect petitioner or other alleged abused persons.<sup>129</sup>

It is important to note that, unlike Section 221(a)(2), Section 214(c)(3) does not require that the findings must be in the form of the order of protection; rather it requires “official record or in writing.” Second, Section 214(c) applies when courts have decided to grant orders of protection and are required to make certain “findings of fact” for this ruling.<sup>130</sup> Section 214(c) does not apply when an emergency or plenary order of protection is granted, but one or more remedies have been denied. That situation is covered in Section 221(a)(2). While Section 221(a)(2) specifically states that the reason for denial must be included in the form of the order of protection, courts of appeal have ruled that the statutory enumerated minimum findings of fact set forth in 214(c) can be made in an official record of the hearing—in the transcript of the hearing.<sup>131</sup> So, if judges fail to fill

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<sup>129</sup> 750 Ill. Comp. Stat. 60/214(c)(3) (2012) (emphasis added).

<sup>130</sup> See, e.g., *People ex rel. Minter v. Kozin*, 697 N.E. 2d 891, 894-95 (Ill. App. Ct. 1998). The court noted that the “trial court failed to meet its statutory obligation to make specific findings prior to entering an order of protection under the Act.” *Id.* at 894. (emphasis added).

<sup>131</sup> See, e.g., *In re Marriage of McCoy*, 625 N.E. 2d 883, 887 (Ill. App. Ct. 1993).

While the written order might have contained more express findings, [it stated the court had considered all the relevant statutory factors—satisfying Section 214(c)(3)(i)] the official record of the hearing held . . . indicates the court found the evidence established respondent as a violent person whom petitioner had reason to fear and given respondent’s attempts to circumvent the visitation orders entered in the dissolution case, it was proper to prevent him from contacting the children at school by prohibiting his presence at times they were in attendance.

*Id.* This satisfied the findings required under Section 214(c)(3)(ii) and (iii).



in Paragraph 18 because they mistakenly think that Section 214(c)(3) applies, then judges should receive training to correct this misunderstanding. Regardless of the reasoning for the omission, the requirement should be followed.

The presiding judge of the Domestic Violence Division should take steps to provide training to judges on Section 221(a)(2)'s requirements. To facilitate compliance with this requirement, a working group should draft a list of appropriate categories of reasons for denial of each of the remedies. These categories would be based upon the Act's conditions for remedies, with recommended wording for each category that judges might append to the order of protection (Paragraph 18 leaves little space to articulate reasons). These categories may allow judges to smoothly and efficiently comply with this statutory requirement.

If, however, judges continually fail to comply with Section 221(a)(2), the presiding judge should act under her authority and responsibility, under Illinois Supreme Court Rule 21(g),<sup>132</sup> to require judges to specify reasons for denial of remedies and provide guidance and suggestions on how to comply along with sample language judges can use. Rule 22(g) states:

the presiding judge of each district, and the chairman of the Executive Committee in the First District, shall have the authority to determine, among other things, . . . and to instruct the way in which a judge on the bench is expected to behave. In the exercise of this general administrative authority, the presiding judge of each judicial district and the chairman of the Executive Committee in the First District *shall* take or initiate

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<sup>132</sup> A similar grant of authority and responsibility is provided to the chief circuit judge under Illinois Supreme Court Rule 21(b); if the presiding judge fails to issue rules under 22(g), it is recommended that the chief circuit judge do so. *See* ILL. SUP. CT. R. 22(g).

appropriate measures to address the *persistent failure of any judge to perform his or her judicial duties*.<sup>133</sup>

Committee comments to Rule 22(g) clarify that a presiding judge's administrative role includes the "authority" and "responsibility" to address "persistent failure of any judge to perform his or her judicial duties."<sup>134</sup> Thus, the presiding judge of the Domestic Violence Division not only has the authority to require judges to specify reasons for denying remedies as required under Section 221(a)(2),<sup>135</sup> but also the responsibility to do so if persistent failures continue. Further, the presiding judge is authorized to commission a group to draft sample language that judges can use to comply with Section 221(a)(2). Creating sample language for judges to use should also allay the concern that judges who have philosophical or practical issues with granting some remedies will game the Section 221(a)(2) requirement, by using vague justifications like "did not satisfy the requirements for this remedy,"<sup>136</sup> or that the "petitioner was not credible."<sup>137</sup>

The Illinois legislature could not have intended such vague justifications when it enacted the requirement in Section 221(a)(2). The sponsoring member of the General Assembly emphasized how the special remedies under the Act were tailored to meet survivors'

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<sup>133</sup> *Id.* (emphasis added).

<sup>134</sup> *Id.*

<sup>135</sup> 750 ILL. COMP. STAT. 60/221(a)(2) (2012).

<sup>136</sup> This broad statement might only be appropriate when the petitioner has marked off every single remedy (which does sometimes occur when the petitioner is acting pro se) since some of the remedies do not work as intended if put together such as a "general stay away" and a "stay away while intoxicated." To mark off every single remedy is likely to mean that the petitioner has not given thought to which of the remedies applies to her situation.

<sup>137</sup> This would typically not be a valid reason since the judge in the 221(a)(2) situation has already likely found the petitioner credible because an order of protection with some remedies has been granted, but certain remedies sought have not been granted.

needs.<sup>138</sup> Denial of remedies should be based on facts from the petitioner's specific circumstances.

Meaningful specification for denial of remedies requires courts to articulate how statutory conditions for specific remedies have not been satisfied. Anything short of that fails to inform petitioners why they did not satisfy the requirements for the sought remedy.

Statutes need to be interpreted according to the legislative intent and with a presumption that words in statutes are not superfluous.<sup>139</sup> Vague justifications, such as "lack of credibility of the petitioner" or "failure to satisfy conditions for the remedy," arguably fail to comply with the Section 221(a)(2) requirement. Worse yet, permitting general justifications facilitates the filling in of pretexts, rather than true reasons for denials. But even if judges use vague reasons for denial, appeals are still possible when records reflect that petitioners did present evidence satisfying the conditions for the remedy, notwithstanding the trial court judge's assertions to the contrary or finding that the petitioner was not credible.<sup>140</sup> If trial judges write

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<sup>138</sup> Comments of Representative Greiman, 82d Gen. Assembly, Reg. Sess., at 96-97 (Ill. May 6, 1981), *available at* <http://www.ilga.gov/house/transcripts/htrans82/HT050681.pdf>;

[W]e must, I think, use our intelligence and our imagination to fashion remedies and to allow courts to fashion remedies to really take care of the needs of people in the real world. In the world of the street and in the world of violence, in the world of the battered family member.

*Id.*

<sup>139</sup> *See, e.g.,* *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The Government's reading [What government? What reading is she referring to? Is this a quote from the case?] is thus at odds with one of the most basic interpretive canons that states, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...." (quoting 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06 at 181-186 (rev. 6th ed. 2000)).

<sup>140</sup> The standard for appellate review is the less deferential "manifest weight of evidence" standard rather than the "abuse of discretion" standard because the trial court's findings are based on a preponderance of the evidence. *Best v. Best*, 860 N.E. 2d 240, 244-45 (Ill. 2006).

invalid reasons, such as “payment of losses should be sought in a separate tort action in a small claims court,” then those kinds of denials could easily be appealed.

If some judges continue to fail to comply with Section 221(a)(2), the next alternative is a writ of mandamus. A writ of mandamus allows courts to compel public officials to perform non-discretionary, ministerial duties: a writ is appropriate when public officials have clear duties to perform ministerial acts and have failed to do so; public officials have duties to comply with the terms of the writ; and petitioners have clear rights to the relief requested.<sup>141</sup> These three elements are met when judges fail to specify reasons for denial because judges are public officials subject to writs of mandamus,<sup>142</sup> Illinois judges have a clear duty to specify reasons for denial of remedies under Section 221(a)(2), and this duty is mandatory.<sup>143</sup>

Similar to judges who are required by statute to comply with sentencing laws, judges who deny a remedy in an order of protection are required to comply with Section 221(a)(2) by including a specific reason. This type of compliance is ministerial in nature. Ministerial

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<sup>141</sup> See, e.g., *Romero v. O’Sullivan*, 707 N.E.2d 986, 988 (Ill. App. Ct. 1999).

<sup>142</sup> There are numerous cases where judges are the recipients of writs of mandamus under Illinois law. See, e.g., *People ex rel. Daley v. Schreier*, 442 N.E.2d 185, 189 (Ill. 1982) (court awarded a writ of mandamus against a judge where the judge failed to follow a non-discretionary duty to follow sentencing mandates); *People ex rel. Madigan v. Kinzer*, 902 N.E.2d 667, 674 (Ill. 2009) (court granted mandamus against a judge when he entered a sentence that did not comply with the sentencing statute or Supreme Court Rule 18); *Owen v. Mann*, 475 N.E.2d 886, 892 (Ill. 1985) (private party’s petition for mandamus granted and required judge to vacate an order compelling discovery where the communications requested were confidential and not subject to discovery); *People ex rel. Courtney v. Thompson*, 192 N.E. 693, 697 (Ill. 1934) (court granted a writ of mandamus where the judge did not have the jurisdiction to hear the underlying habeas action and therefore did not have the ability to enter the order in question); *People ex rel. Ruel v. Weaver*, 162 N.E. 205, 208 (Ill. 1928) (court issued a writ of mandamus against a judge because the judge did not have the discretion to vacate a prior order).

<sup>143</sup> 750 ILL. COMP. STAT. 60/211(a)(2) (2012).

acts are non-discretionary acts that officials are required to perform as part of their official duties.<sup>144</sup> In *Chicago v. Seben*, the court stated,

[o]fficial duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law imposes it, prescribes and defines the time, mode and occasion of its performance with such certainty, that nothing remains for judgment or discretion.<sup>145</sup>

The duty to specify reasons for denying remedies is absolute, involving mere execution. The law imposing it sets the time, mode, and occasion for its performance (when judges have granted orders of protection but have denied another sought remedy).

To satisfy the requirements for obtaining a writ of mandamus, the writ would only be sought when judges have already failed to specify reasons for denial and the writ will only relate to the precise action required under Section 221(a)(2). The petitioner has a clear right to the action (i.e. right to specified reasons for denial) under Section 221(a)(2).<sup>146</sup> Petitioners under these facts should be able to successfully bring actions for writs of mandamus. The case law on writs of mandamus contains dicta that they are within a court's discretion to grant.<sup>147</sup> So even if the elements are met, a court may decline to issue a writ. However, based on an extensive review of Illinois writ of mandamus cases, it is rare for a court to exercise that discretion and deny a writ.<sup>148</sup>

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<sup>144</sup> The Supreme Court of the United States defined a ministerial act as one "to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866).

<sup>145</sup> 165 Ill. 371, 378 (1897).

<sup>146</sup> 750 ILL. COMP. STAT. 60/221(a)(2) (2012).

<sup>147</sup> See, e.g., *Gunning v. Sheahan*, 73 Ill. App. 118, 129 (Ill. App. Ct. 1898); *People ex rel. Dickinson v. Bd. of Trade*, 62 N.E. 196, 199-200 (Ill. 1901); *Orenic v. Ill. State Labor Relations Bd.*, 537 N.E.2d 784, 791-793 (Ill. 1989).

<sup>148</sup> Of 239 cases reviewed, in only nine cases did the court appear to deny a writ of mandamus for discretionary reasons (those reasons were that granting the writ

Because writs of mandamus cannot be used to direct the manner in which judges exercise matters within their discretion, some may argue that while writs of mandamus can order judges to specify reasons, they cannot be used to dictate which reasons are acceptable. But, some reasons are so invalid that judges who provide those reasons would be in non-compliance with Section 221(a)(2) and, therefore be subject to further writs of mandamus. Furthermore, as previously discussed, even if courts were to confine writs of mandamus to simply ordering judges to specify any reasons, specifying invalid reasons may still assist petitioners in appeals of their denials.

Another possibility is an ethics claim. The Illinois Constitution, in Article VI, Section 15(e), provides that the Illinois Courts Commission has the authority to remove judges from office, suspend them without pay, and censure or reprimand them for “persistent failure to perform his or her duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute. . . .”<sup>149</sup> When judges violate, rather than misinterpret, statutes, it may be willful misconduct, subjecting the judge to suspension from judicial duties.

In *People ex rel. Harrod v. Illinois Courts Commission*, a judge was charged with violating the sentencing mandates in the Illinois Supreme Court Rules and was suspended from judicial duties for one month without pay as a consequence.<sup>150</sup> Ultimately, the Supreme Court of Illinois expunged this ruling, stating that the Illinois Courts

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would: violate a contract or statute; cause public disorder, confusion, or inconvenience; not achieve the goal sought by the petitioner; be manifestly unjust because the petitioner was guilty of unclean hands; or interfere with another pending judicial proceeding). Memorandum from Lieyau Wong, Foley & Lardner, on Illinois Writs of Mandamus to Debra Stark, author (Sept. 26, 2013) (on file with author).

<sup>149</sup> ILL. CONST. art. VI, § 15, cl. c (1). The Illinois Judicial Inquiry Board has the authority to file a complaint with the Illinois Courts Commission for the “persistent failure of a judge to perform his duties.” *Id.* Illinois Supreme Court Rules 61 through 71 specify the duties of judges. Specifically Rule 63 states: “A Judge should be faithful to the law...” ILL. SUP. CT. R. 63(A)(1).

<sup>150</sup> 372 N.E. 2d 53, 53 (Ill. 1977).

Commission exceeded its authority in sanctioning the judge because the violation was a matter of judicial interpretation.<sup>151</sup> However, if judges in the Domestic Violence Division are not interpreting Section 221(a)(2), for which appeals would be appropriate, but are willfully continuing to violate it after training from the presiding judge, their actions should be subject to sanction by the Illinois Courts Commission. As the court noted in *Harrod*, “[t]he fact that a judge’s misconduct may be remedied by the appeal of an individual defendant does not prevent the same conduct from being the subject of a disciplinary action.”<sup>152</sup>

#### *F. Pro Se Petitioners Failing to Seek Potentially Beneficial Remedies*

The presence of a large number of pro se petitioners among the ninety-three cases reviewed, 80%, raises the concern that many petitioners might not be aware of and be able to exercise the full range of rights they have under the Act. This case file review investigated the extent to which the petitioners sought remedies that they would likely benefit from and to which they were entitled. The results are reflected in Table 2 and Table 3. Table 3 demonstrates that petitioners often failed to seek the following remedies even when the specific facts and circumstances in their petitions and affidavits reflected that they might benefit from the remedies:

1. Counseling (see Fact Pattern 3: sought “stop the abuse” but not “stay away” remedy);
2. Physical care of their children (See Fact Pattern 4b: petitioner and respondent have children in common);
3. Temporary legal custody (see Fact Pattern 4a: petitioner and respondent have children in common);
4. Payment of support (see Fact Pattern 4c: petitioner and respondent have children in common);

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<sup>151</sup> *Id.* at 66.

<sup>152</sup> *Id.* at 65-66.

5. Payment of losses (See Fact Patterns 5b: threat to remove/actual removal of child or costs to get child back facts and 10: medical expenses, lost earnings damage to property, temporary shelter);
6. Restricted visitation (see Fact Pattern 6: abuse of child, abuse of petitioner in front of child, conceal child or visitation to abuse); and
7. Prohibition of access to records (See Fact Patterns 5c: threat to remove/actual removal of child or costs to get child back facts and 7: child in common and petition does not identify location of petitioner or in petition sought no contact with child).

The underutilization of remedies by pro se petitioners is probably greater than reflected here. If pro se petitioners do not carefully review and understand the remedy boxes on the petition, then they are less likely to include facts relating to those remedies in their affidavits. Since the report is based on the facts contained in the affidavits, actual underutilization is likely greater than reported here.

One reason for this underutilization may be that petitioners are not aware of these remedies or do not understand the remedies or their benefits. Alternatively, judges might dissuade petitioners from seeking some remedies.<sup>153</sup> A third possibility is that petitioners may be aware that they are entitled to these remedies but decide not to pursue them for a variety of reasons, including fear of enraging the respondent further or the practical difficulty of enforcement.

The results from the data collected raise questions on how best to educate pro se petitioners on these remedies, specifically about the circumstances under which they apply, the benefits, and the ways to address the problems in obtaining them. Some of this education already takes place at the courthouse<sup>154</sup> and by judges,<sup>155</sup> but the

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<sup>153</sup> There is anecdotal evidence that court clerks, advocates, and even lawyers inform petitioners that judges do not grant certain remedies and thusly, it may not be a good idea to seek those remedies.

<sup>154</sup> For example, pro se petitioners at the 555 W. Harrison Courthouse receive an informational booklet that adequately explains who can obtain an order of



current information provided to pro se petitioners is clearly inadequate.

One strategy might have judges read from a uniform, prepared statement at the start of the court call. The statement should inform petitioners of the requirements to obtain an emergency order of protection, the key remedies available under it, preconditions for these remedies, as well as of the importance of keeping a copy of the emergency order of protection on their person to provide to police.<sup>156</sup>

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protection and what the judge will require for the petitioner to obtain an emergency order of protection; but, the booklet could be more detailed. The information on remedies in the booklet, however, is cursory in nature. The decision to not explain the remedies more fully in the information booklet was due to a concern expressed by some who work with petitioners that it would take too long for the petitioner to review a lengthy explanation of each of these remedies and then still be able to obtain, in the same day that the petitioner arrives at the courthouse, an emergency order of protection. Notes from Leslie Landis, Court Administrator, Illinois Domestic Violence Court, to Debra Stark, author (Aug. 27, 2013) (on file with author). It is also difficult, in general, to create a clear, easy-to-understand, and comprehensive booklet on the eighteen fairly complicated remedies without creating information-overload to a petitioner. To be most useful, for each of the remedies, the booklet should give an example of a situation where the remedy can be most helpful, the conditions for qualifying for the remedy, and what evidence or testimony would need to be presented to obtain the remedy. The author hopes that this booklet, when completed, could be used by those who assist survivors of domestic violence before the survivor appears in court, as well as once in court. Currently, pro se petitioners also may receive assistance from court clerks, advocates, and trained law students in filling out the paperwork.

<sup>155</sup> Student court monitors noted that judges would sometimes try to explain to a pro se party what “hearsay” was, what a “preponderance of the evidence” meant, and even quote from the statute on what is “abuse” when a party seemed to need this information. As Table 3 reflects, some judges granted the remedy of protection of pets even when the petitioner failed to seek this remedy in their petition.

<sup>156</sup> This opening statement can also be made available to judges who do not sit on the specialized domestic violence court call (orders of protection can be heard in many other courts) so that if and when they have an order of protection matter before them with pro se parties, they can then read from this statement at that time to educate the parties. It should be noted, however, that by the time of the start of the court call, the pleadings have already been filed and it would be difficult to modify them before the case is called. Perhaps a support area in or near the courtroom could be created to assist with any necessary changes to the pleadings

For pro se respondents, the standard statement should inform them of their responsibilities when a plenary order of protection is issued against them, including a warning that a stay away order is effective until its term ends or a judge vacates it. The statement should emphasize to respondents that petitioners cannot terminate the order of protection and that failure to stay away is an unconditional violation of the order subject to criminal prosecution. Whenever respondents voluntarily agree to plenary orders of protection and are not represented, judges should inform them that plenary orders of protection can potentially affect respondents' ability to get jobs or possess or carry firearms.

Some judges, however, may be reluctant to provide information that can be construed as advice and uncertain how to balance the information provided to each party, especially when departing from a standardized opening statement. The rules of ethics that apply to judges should be modified to provide more guidance on how judges should handle situations in which they provide information to pro se parties.

The presiding judge of the Illinois Domestic Violence Division should also convene a work group—comprised of representatives of attorneys and advocates who represent petitioners, attorneys who represent respondents, and interested judges—to tackle this problem. The work group could recommend language that would be beneficial to pro se parties as part of a standard opening statement and standard explanations of typical legal issues that arise that judges could use as needed. Since the opening statement should be brief to preserve time to adjudicate cases, pro se parties should receive further information on their rights, obligations, and options through a video or computer program at the courthouse, with petitioners and respondents observing the video seated at computer tables in separate areas of the courthouse. This type of information should also be offered in written form to supplement the current information booklet.

Another strategy might be to better utilize the Section

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with judges permitting the petitioner to move their case to the end of the court call so the petitioner can obtain assistance to modify their pleading.

214(b)(13) payment of losses remedy. Section 214(b)(13) states: “Order respondent to pay petitioner for losses suffered as a direct result of the abuse. . . . Such losses shall include, but not be limited to . . . reasonable attorney’s fees, [and] court costs.” In *Steward v. Schluter*, the Illinois Appellate Court ruled that this clause clearly applies to attorney’s fees for petitioners who hire attorneys to represent them seeking an order of protection, and would also apply to situations where courts appoint attorneys to represent petitioners seeking orders of protection.<sup>157</sup> If attorneys were routinely granted attorney’s fees for their time in obtaining orders of protection under Section 214(b)(13), more petitioners would likely be able to hire attorneys to represent them and explain to them the numerous options and rights provided to them under the Act. While some respondents lack the financial resources to pay petitioners’ attorney’s fees and some petitioners fear that seeking a financial remedy might further enrage respondents or make separation more difficult, in some situations, respondents have sufficient means and petitioners can safely seek this remedy.

Currently, petitioners are unlikely to even know that this remedy exists. They may see a box for “payment of losses” in the petition but are unlikely to know that this includes recovering their attorney’s fees for obtaining the order of protection. The educational materials to be developed, as described above, could provide this information and be disseminated not only at the courthouse but also in other useful locations, such as shelters.

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<sup>157</sup> *Steward ex rel. v. Schluter*, 819 N.E. 2d 1, 5-6 (Ill. App. Ct. 2004). The court ruled that the respondent was responsible to pay the attorney’s fees for an attorney appointed by the court and paid for by the county to represent the petitioner seeking an order of protection under Section 214(b)(13) and then further stated:

Had petitioner hired an attorney on her own, the court could clearly have ordered that the attorney fees be paid by the respondent. We see no reason why the court should be prevented from ordering respondent to pay for petitioner’s attorney in this case where the attorney was provided to petitioner by the court.

*Id.* at 6 (citation omitted).

In addition, in situations when adequate free legal assistance is not available, domestic violence advocates could suggest that attorneys, whose fees will be paid by respondents, represent survivors. An attorney who is specially trained in domestic violence, the Act, and related areas of divorce and paternity law could represent survivors seeking orders of protection when the petitioner is seeking complicated remedies or the respondent is represented by an attorney. This strategy could greatly improve petitioners' chances of obtaining complicated remedies such as payment of support, payment of losses, firearm relinquishment, counseling, and temporary legal custody. These attorneys would also be aware of the importance of creating records for appeal and would take steps to do so especially when representing petitioners seeking remedies that judges are more reluctant to grant.

#### IV. IMPLICATIONS OF THE RESULTS OF THE EMPIRICAL STUDY FOR OTHER JURISDICTIONS

While empirical studies similar to the one conducted here are beyond the scope of this Article, it is clear that other states have at least some of the same problems with domestic violence remedies. For instance, in both California and Wisconsin, judges have purposefully failed to comply with statutory requirements relating to firearm relinquishment.<sup>158</sup> Further, a number of other state

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<sup>158</sup> Greer & Purvis, *supra* note 108, at 276-82.

Too often, because of a personal disagreement with the political underpinnings and constitutional implications of these policies, trial court judges have attempted to obviate the mandatory firearm restriction language in the California statute and, in particular the state preprinted domestic violence form....

*Id.* at 276.

Overall, of the 76,787 active protective orders in 2004 [in California], 4,215 of them were defective. . . . Two months after the California Department of Justice sent law enforcement

jurisdictions include firearm removal as a remedy in their order of protection type statutes,<sup>159</sup> but it is unclear how often judges enforce these measures.

Other states also have statutes that grant financial remedies, such as payment of support<sup>160</sup> or payment of losses,<sup>161</sup> as part of an

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agencies a notifying letter containing a clear directive to properly record and enter protective orders into the Domestic Violence Restraining Order System . . . the overall defective rate dropped to 2.6 percent.

*Id.* at 282 (citations omitted).

<sup>159</sup> Based on a review of seventeen jurisdictions' laws relating to orders of protection, eleven of these jurisdictions provide for the remedy of relinquishment of firearms as a remedy. *See* N.D. CENT. CODE ANN. § 14-07.1-02(4)(g) (2014); OHIO REV. CODE ANN. § 3113.31(F)(2) (LexisNexis 2008); OR. REV. STAT. § 107.718(1)(h)(A) (2013) (which permits "other relief" and language in petitions call for this relief); 23 PA. STAT. ANN. § 6108(a)(7) (2012); R.I. GEN. LAWS § 15-15-3 (2014); TENN. CODE ANN. § 36-3-604(c)(1) (2014); TEX. FAM. CODE ANN. § 85.022(a)(1) (West 2014); UTAH CODE ANN. § 78B-7-106(2)(d) (LexisNexis 2014); WASH. REV. CODE § 26.50.060(1)(k) (2014); W. VA. CODE § 48-27-502(b)-(c) (2012); and WIS. STAT. § 813.12(4m)(a)(2) (2014).

<sup>160</sup> Based on a review of seventeen jurisdictions' laws relating to orders of protection, twelve of these jurisdictions provide for the remedy of payment of support: N.D. CENT. CODE § 14-07.1-02(4)(e); OHIO REV. CODE ANN. § 3113.31(E)(1)(e); 23 PA. STAT. ANN. § 6108(a)(5); R.I. GEN. LAWS § 15-15-3(a)(4) (for child support); S.C. CODE ANN. § 20-4-60(C)(2) (2014); S.D. CODIFIED LAWS § 25-10-5(4); TENN. CODE ANN. § 36-3-606(a)(7); TEX. FAM. CODE ANN. § 85.022(a)(1); UTAH CODE ANN. § 78B-7-106(2)(i); VT. STAT. ANN. tit. 15 § 1103(c)(2)(F) (2014) (for child support and capped at three months which can be extended if consolidated with an action for legal separation, divorce, or parentage); W. VA. CODE § 48-27-503(5); and WYO. STAT. ANN. § 35-21-105(b)(ii) (2014). One other jurisdiction, Oregon, provides for the remedy of "emergency monetary assistance" from the respondent to the petitioner. OR. REV. STAT. § 107.718(1)(h)(A).

<sup>161</sup> Based on a review of seventeen jurisdictions' laws relating to orders of protection, two of these jurisdictions provide for the general remedy of payment of losses similar to the Act remedy. *See* 23 PA. STAT. ANN. § 6108(a)(8); W. VA. CODE ANN. § 48-27-503(11). However, seven of the seventeen jurisdictions provide for the remedy of recovery of attorney's fees, including Pennsylvania and West Virginia, as noted above, and North Dakota, Oklahoma, South Carolina, Texas, and Washington. *See* N.D. CENT. CODE § 14-07.1-02(4)(e); OKLA. STAT. ANN. tit. 22, §

order of protection. It is unclear if and how often judges enforce these measures. Although counseling can be ordered in other jurisdictions,<sup>162</sup> it is unclear how often is it ordered. Overall, more research is necessary to fully determine how other states can improve their legal systems but that is beyond the scope of this article.

More importantly, other states can look to the Illinois model to explore both the successes and the limitations of a court that specializes in domestic violence. As noted earlier, one consequence of appearing before a specialized court is that both positive and problematic practices, such as not granting certain remedies, are more likely to become ingrained in the process through judicial memory rather than formal training. Consequently, petitioners might obtain a full range of remedies in general courts compared to courts that specialize.

Furthermore, when advocates and attorneys working in specialized courthouses see that judges will not grant certain remedies, even when properly sought, the advocates and attorneys may self-censor, as seen in Cook County.<sup>163</sup> Petitioners may stop seeking those remedies, thereby reinforcing the practice of judges not granting those remedies. Once this practice becomes entrenched,

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60.2(A)(2)(C)(1) (2014); S.C. CODE ANN. § 20-4-60(C)(6); TEX. FAM. CODE ANN. § 81.005(a); WASH. REV. CODE § 26.50.060(1)(g). Three of these jurisdictions provide for the remedy of recovery of medical costs, including Pennsylvania and West Virginia, as noted above, and Wyoming. *See* 23 PA. STAT. ANN. § 6108(a)(8); WYO. STAT. ANN. § 35-21-105(b)(iii).

<sup>162</sup> Based on a review of seventeen jurisdictions' laws relating to orders of protection, ten of these jurisdictions provide for the remedy of counseling. *See* N.D. CENT. CODE § 14-07.1-02(4)(d); OHIO REV. CODE ANN. § 3113.31(E)(1)(f); OKLA. STAT. ANN. tit. 22, § 60.4(C)(1); OR. REV. STAT. § 107.718(6)(c) (but more limited in nature by conditioning the remedy on what is necessary for the safety of the respondent's child); S.D. CODIFIED LAWS § 25-10-5(5); TENN. CODE ANN. § 36-3-606(a)(8); TEX. FAM. CODE ANN. § 85.022(a)(1); WASH. REV. CODE § 26.50.060(1)(e); W. VA. CODE § 48-27-503(8); WYO. STAT. ANN. § 35-21-105(a)(vii).

<sup>163</sup> *See supra* note 96.

advocates and attorneys may fear that seeking these remedies for their clients could backfire.<sup>164</sup>

But, creating courthouses that specialize in domestic violence is not a mistake. The answer to the problem of judicial nullification is not to do away with generally well-functioning courthouses, but instead to better train and educate judges, reform problematic practices, modify laws as necessary so that they are better able to be implemented, and when necessary, take aggressive steps to appeal judicial decisions when they are inconsistent with the legislative protections that have been enacted.<sup>165</sup> Once this groundwork is laid, attorneys and advocates who assist survivors in obtaining orders of protection should no longer fear judicial reprisal when they seek the full range of remedies to which their clients are entitled.

## CONCLUSION

The results from this empirical study are mixed. On the positive side, the data collected reflects that judges are properly applying many important aspects of the order of protection law, and granting a high percentage of emergency orders of protection. On the negative side, the data also reflected the problem of judicial nullification and petitioners failing to seek certain remedies from which they could benefit.

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<sup>164</sup> This information comes from conversations the author had with attorneys and advocates who assist petitioners seeking orders of protection in Cook County, Illinois.

<sup>165</sup> Indeed, the presiding judge for the courthouse, one of the focuses of this empirical study, created a “Remedies Work Group” focusing on these problems. The presiding judge expressed a commitment to providing training for judges and advocates, and further educational information for the many pro se petitioners as a means to encourage and facilitate the seeking and granting of the full range of remedies that petitioners are entitled to under the Act. As discussed in the Article, another key problem that contributes to remedies not being sought and granted is the large percentage of pro se petitioners who simply may not be aware of all of the remedies they can benefit from and how to go about seeking them properly. This must also be addressed.

This Article argued that these problems are exacerbated by the specialized domestic violence court call, where problematic judicial practices can become more entrenched. As those who assist petitioners observe certain remedies not being granted, they see a pattern and conform their conduct accordingly. Some attorneys decide not to seek potentially beneficial remedies because of the perceived futility in doing so. Some attorneys even fear that by seeking some of these remedies, especially the financial ones, petitioners may lose credibility and be denied any order of protection at all.

Survivors of domestic abuse in Illinois have a good system, but not all are receiving optimal benefit from it—the full range of remedies petitioners are entitled to under the Act are not being applied. As outlined by this Article, a number of key steps should be taken so that the full legislative promise of comprehensive protection to survivors of domestic violence can be realized.



## APPENDIX

**List of Tables**

1. General Results from Court Monitoring/Case File Review (93 Cases)
2. Total Number of Remedies Sought and Remedies Granted (93 Cases)
3. Breakdown of Remedies Sought and Granted Under Twelve Fact Patterns

**Table 1****General Results from Court Monitoring/Case File Review (93 Cases)**

1. Emergency Order of Protection:
  - a. Granted: 75 [81% of 93 cases]<sup>166</sup>

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<sup>166</sup> Due to some slight differences in results reported when different student researchers reviewed the case files at different times (due to a mistaken double counting of results in three cases, the status of cases changing, the contents of the file being out of chronological order, and, on one occasion, an emergency order of protection missing from the court file), we decided to base the number of emergency orders of protection and plenary orders of protection granted among our ninety-three case data sample from the computer records on these files at the courthouse. The computer-based results on emergency orders of protection and plenary orders of protection granted were a bit lower than the original results we found when reviewing the court files by hand (emergency orders of protection granted dropped from 88% to 81% and plenary orders of protection granted dropped from 49% to 47%), but due to the changing composition of documents located in some of the court files we decided to go with the computer records rather than the court files in reporting the number of emergency orders of protection and plenary orders of protection issued. Yet even the computer records could be difficult at times to parse through with a notation of an emergency order of protection being denied and then later a notation that the “ex parte order was continued” (we treated this as an emergency order of protection granted as this was consistent with our initial court file review of that case).

b. Denied: 18

2. Plenary Order of Protection:

a. Granted: 44 [47% of 93 cases]

b. Not Granted: 49

3. Situations Where a Plenary Order of Protection was Not Granted Due to Denial at a Hearing or Due to the Petitioner Dropping the Case:

a. Hearing held and plenary order of protection denied: 13 [26% of 49 cases where the plenary order of protection was not granted]

b. Petitioner appeared in court on return date and dropped the case: 3

i. Case continued at some point due to failure to serve the respondent: 0

ii. Case continued more than once to serve the respondent: 0

c. Petitioner failed to appear in court and the case was dismissed: 24

i. Case continued at some point due to failure to serve the respondent: 2

ii. Case continued more than once to serve the respondent: 7

d. Total number of dropped cases: 27 [55% of 49 cases]

where a plenary order of protection not issued]<sup>167</sup>

#### 4. Service Data:

a. Personal service achieved: 61

i. Sheriff: 20

ii. Open Court: 37

iii. Special Process Server: 0

iv. Short form notice: 4

b. Service by publication: 12

c. No service record in the file as of the review date:<sup>168</sup> 20

#### 5. Special Remedies Granted:

a. Support Payments: 0

b. Prohibition of Firearm Possession: 0

c. Counseling: 2

d. Payment of Losses: 0

#### 6. Specifying Reason for Denial of Remedies (required by the Act): 0

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<sup>167</sup> There is a discrepancy between the total number of cases where the plenary order of protection was not granted (forty-nine), against the combination of the total number of cases reported as dropped (twenty-seven), with the total number of cases where the court ruled that the plenary order of protection was denied at a hearing (thirteen). It appears that this discrepancy is based on the fact that when the initial review of cases was performed, the researchers focused only on cases where the emergency order of protection was granted and not where the emergency order of protection was denied. Later we included cases and collected data in the cases where an emergency order of protection was denied, since some petitioners still move forward after a denial of the emergency order of protection and proceed with a petition for a plenary order of protection with notice to the respondent. However, it appears that we did not incorporate those cases into the statistics on why a plenary order of protection was not granted.

<sup>168</sup> This category also includes cases where the emergency order of protection was denied and the petitioner did not seek to continue the case with notice to the respondent.

7. Total # of pro se litigants:a. Petitioner

i. Pro se: 74 [80% of 93 cases]

ii. Attorney: 19

b. Respondenti. Pro se (no appearance filed):<sup>169</sup> 90 [97% of 93 cases]

ii. Attorney (appearance filed): 3

8. Timeliness Data (timing between last incident and petition/affidavit):

a. 0-3 days: 48

b. 4-7 days: 14

c. 7-14 days: 4

d. 2-4 weeks: 9

e. 5-7 weeks: 0

f. 2-3 months: 3

g. &gt;3 months: 1

h. unknown: 14

In the seventeen cases where the last incident was greater than seven days from when the petitioner came to court to seek an emergency order of protection, thirteen emergency orders of protection were granted and four emergency orders of protection were denied (i.e. 23% were denied compared with only 19% of emergency orders of protection being denied from the general sample of ninety-three cases).

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<sup>169</sup> The percentage of pro se defendants here may be over-reported in that it was determined based on looking for appearances filed by an attorney for the respondent and if no appearance was filed, the respondent was classified as acting “pro se.” There is anecdotal evidence that sometimes attorneys for respondents come for a court date and enter into agreements or go to a hearing without ever actually filing an appearance in the case (perhaps to avoid costs for this filing).

Nine of the seventeen cases led to the granting of a plenary order of protection (two from cases where the emergency orders of protection were originally denied but the case proceeded anyhow) and eight of the seventeen cases did not result in a plenary order of protection.

**Table 2**

**Total Number of Remedies Sought and Remedies Granted (93 Cases)**

Table 2 reflects the total number of remedies sought and granted from the ninety-three case files reviewed, without filtering the results to exclude remedies that were sought without a basis as reflected in the affidavits or petitions.

<b>750 ILL. COMP. STAT. 60/214 subsection</b>	<b>Remedy</b>	<b>Sought by Petitioner ?</b>	<b>Issued at emergenc y order of protectio n stage?</b>	<b>Issued at plenary order of protectio n stage?</b>
(b)(1)	Prohibition of abuse, neglect or exploitation	91	73	42
(b)(2)	Grant of exclusive possession of residence	82	63	33
(b)(3)	Stay away order	83	69	35
(b)(4)	Counseling	19	No per the Act	2
(b)(5)	Physical care and possession of the minor child	25	21	12
(b)(6)	Temporary legal custody	15	No per the Act	5

(b)(7)	Visitation	26	19	14
(b)(8)	Removal or concealment of minor child	28	20	13
(b)(9)	Order to appear	6	0	0
(b)(10)	Possession of personal property	14	6	1
(b)(11)	Protection of property	76	45	27
(b)(11.5)	Protection of animals	0	5	2
(b)(12)	Payment of support	3	No per the Act	0
(b)(13)	Payment of losses	2	No per the Act	0
(b)(14)	Prohibition of entry while under influence	1	3	3
(b)(14.5)	Prohibition of firearm possession	11	0	0
(b)(15)	Prohibition of access to records	16	12	4
(b)(16)	Payment of shelter services	1	No per the Act	0
(b)(17)	Order for injunctive relief	42	21	25
¶ 18 on OP Form Required under 60/221(a)(2)	Explanation for denial/reservation of remedy	N/A	0	0

**Table 3<sup>170</sup>**

**Breakdown of Remedies Sought and Granted Under Twelve Fact Patterns**

To better ascertain whether petitioners were seeking appropriate remedies based on the facts in their affidavits and whether courts in such instances were granting the remedies sought, Table 3 contains twelve fact patterns as determined from a review of the affidavits and petitions that would suggest the seeking of certain remedies by the petitioners in those cases and the granting of those remedies by the judges.

**1.**

<b>Fact Pattern</b>	<b># cases present</b>	<b># cases remedy 14.5 (prohibition of firearm)</b>	<b># cases 14.5 granted at emergency order of</b>	<b># cases 14.5 granted at plenary order of</b>
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<sup>170</sup> Table 3 provides a Fact Pattern Overview. Column 1 describes the Specific Fact Pattern. Column 2 provides the Fact patterns determined in each based on a review of the affidavit and petition in the court file; it is possible that there were additional examples of the fact pattern among the cases in the data sample (for example some of these facts may have only been raised during a court hearing). Consequently, the number of cases identified as having this fact pattern may be under-inclusive. Column 3: Excludes instances where the petition inappropriately sought this remedy because the facts in the affidavit and petition did not support this remedy (for example, some petitioners marked off all eighteen remedies). Although further facts may have been revealed in court to support this remedy, since we do not know this was the case, we did not include in the category of remedies sought here anywhere the petition appeared to inappropriately seek this remedy. We thought it unfair to reflect that a judge failed to grant a sought remedy when it appeared that the petitioner who sought the remedy did not appear to qualify for the remedy. The purpose of Table 3 is to assess the degree to which judges granted or failed to grant various remedies when the facts in the affidavit and petition supported the remedy sought. Table 2, in contrast, includes all situations where a petitioner sought a remedy, whether it appeared appropriate or not.

		sought	protection stage	protection stage
Firearm	4	4	0	0

**2.**

<b>Fact Pattern</b>	# cases present	# cases remedy 2 (exclusive possession of residence) sought	# cases 2 granted at emergency order of protection stage	# cases 2 granted at plenary order of protection stage
Shared residence <sup>171</sup>	25	22	18	5

**3.**

<b>Fact Pattern</b>	# cases present	# cases remedy 4 (counseling) sought	# cases 4 granted at emergency order of protection stage	# cases 4 granted at plenary order of protection stage
Seek remedy 1 (prohibition of abuse) but not remedy 3 (stay away)	7	0	No per the Act	0

**4. (a)**

<b>Fact</b>	# cases	# cases	# cases 6	# cases 6
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<sup>171</sup> Cases were counted under the shared residence fact pattern if they specifically claimed a shared residence, identified a spousal relationship between the parties, or otherwise mentioned their shared home in the petition or affidavit.



<b>Pattern</b>	present	remedy 6 (temporary legal custody) sought	granted at emergency order of protection stage	granted at plenary order of protection stage
Common children <sup>172</sup>	39	15	No per the Act	5

**4. (b)**

<b>Fact Pattern</b>	# cases present	# cases remedy 5 (physical care and possession of minor children) sought	# cases 5 granted at emergency order of protection stage	# cases 5 granted at plenary order of protection stage
Common children	39	22	19	11

**4. (c)**

<b>Fact Pattern</b>	# cases present	# cases remedy 12 (payment of support) sought	# cases 12 granted at emergency order of protection stage	# cases 12 granted at plenary order of protection stage
Common	39	3	No per the	0

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<sup>172</sup> Although many petitioners sought protection for their children, cases were only counted under this “common children” fact pattern when it was clear from the petition and/or affidavit that the petitioner and respondent were together the legal parents of any children. Therefore, petitioners seeking protection for their children where the respondent was not the legal parent of the child were not included in this category.

children			Act	
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**5. (a)**

<b>Fact Pattern</b>	# cases present	# cases remedy 8 (removal or concealment of minor child ) sought	# cases 8 granted at emergency order of protection stage	# cases 8 granted at plenary order of protection stage
Threat to remove/actual removal of child or costs to get child back facts	4	4	3	2

**5. (b)**

<b>Fact Pattern</b>	# cases present	# cases remedy 13 (payment of losses) sought	# cases 13 granted at emergency order of protection stage	# cases 13 granted at plenary order of protection stage
Threat to remove/actual removal of child or costs to get child back facts	4	1	No per Act	0

**5. (c)**

<b>Fact Pattern</b>	# cases present	# cases remedy 15 (prohibition	# cases 15 granted at emergency	# cases 15 granted at plenary

		of access to records) sought	order of protection stage	order of protection stage
Threat to remove/actual removal of child or costs to get child back facts	4	2	2	2

6.

<b>Fact Pattern</b>	# cases present	# cases remedy 7 (restricted visitation) sought	# cases 7 granted at emergency order of protection stage	# cases 7 granted at plenary order of protection stage
Abuse of child, abuse of parent in front of child, conceal child, visitation to abuse	8	4	3	3

7.

<b>Fact Pattern</b>	# cases present	# cases where remedy 15 (prohibition of access to records) sought	# cases 15 granted at emergency order of protection stage	# cases 15 granted at plenary order of protection stage
Child in	12	5	6	2

common and petition does not identify location of petitioner or in petition sought no contact with child				
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**8.**

<b>Fact Pattern</b>	# cases present	# cases remedy 11 (protection of property) sought	# cases 11 granted at emergency order of protection stage	# cases 11 granted at plenary order of protection stage
Threats to take personal property <sup>173</sup>	0	0	0	0

**9.**

<b>Fact Pattern</b>	# cases present	# cases remedy 11.5 (protection of animals) sought	# cases 11.5 granted at emergency order of protection stage	# cases 11.5 granted at plenary order of protection stage
Threats to animals,	0	0	0	0

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<sup>173</sup> Despite the lack of specific mention of this fact pattern, this remedy (along with 1, 2, and 3) was among the most frequently granted. *See* Table 1.

animal abuse <sup>174</sup>				
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**10.**

<b>Fact Pattern</b>	<b># cases present</b>	<b># cases remedy 13 (payment of losses) sought</b>	<b># cases 13 granted at emergency order of protection stage</b>	<b># cases 13 granted at plenary order of protection stage</b>
Medical expenses, lost earnings, damage to property, temporary shelter <sup>175</sup>	2	0	0	0

**11.**

<b>Fact Pattern</b>	<b># cases present</b>	<b># cases remedy 14 (prohibition of entry while under the influence) sought</b>	<b># cases 14 granted at emergency order of protection stage</b>	<b># cases 14 granted at plenary order of protection stage</b>

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<sup>174</sup> Table 2 reveals that although this fact pattern was not raised from a review of the affidavit or petition, it was granted in several instances. It is likely that information was revealed in a court hearing that warranted the protection of animals.

<sup>175</sup> The two cases where this fact pattern was present involved damage to personal property.

Drug/alcohol use and did not seek remedy 3 <sup>176</sup>	1	1	1	0
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**12.**

<b>Fact Pattern</b>	# cases present	# cases remedy 16 (payment of shelter services) sought	# cases 16 granted at emergency order of protection stage	# cases 16 granted at plenary order of protection stage
Shelter facts <sup>177</sup>	0	0	0	0

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<sup>176</sup> Although only one case of drug or alcohol use did not seek the remedy 3 stay away remedy, facts involving respondent's use of drugs and/or alcohol were common in the cases reviewed.

<sup>177</sup> No shelter facts were present in the petition or affidavit of the cases reviewed. This is not surprising given the likelihood that a petitioner would not want this information revealed to the respondent.