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## Spouse Abuse: Proposal For a New Rule of Thumb

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## SPOUSE ABUSE: PROPOSAL FOR A NEW RULE OF THUMB\*

English common law rule of thumb - The husband has the right to inflict moderate personal chastisement on his wife, provided he use a switch no larger than his thumb.

3 Va. Law Reg. 241 (1917)

### I. INTRODUCTION

Since the mid-1970's, the nation has been giving increased attention to the problem of spouse abuse.<sup>1</sup> This increased attention arose a decade after the nation became acutely aware that child abuse was a problem in this country.<sup>2</sup> Heightened awareness of the fact that violence occurs between family members was accompanied by recognition that available legal remedies were inadequate.<sup>3</sup> The remedies available to the abused spouse in most states other than Virginia include not only prosecution through the criminal justice system but also civil protective orders which may be obtained by victims either as an alternative to or in conjunction with criminal prosecution. To insure that such orders accomplish the purpose of preventing further abuse, courts can decree that the abuser be denied use and possession of a shared residence for a specified period of time. This type of protection raises due process issues, in light of the fact that these orders may be obtained in an ex parte proceeding. Such protective orders, however, have thus far withstood constitutional attack.

The purpose of this comment is to discuss the incidence of spouse abuse in the United States and in Virginia; to review Virginia's response to the problem of spouse abuse; to review the legal remedies currently available in Virginia; and to present a justification and proposal for legislation, based on the experiences of other states, which will enable abuse victims to obtain civil protective orders.

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\* Grateful acknowledgement goes to Linda Sawyers, Executive Assistant, Virginia Department of Serial Services, who was the catalyst for this research and provided much of the background material on domestic violence in Virginia.

1. M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 10 (1980) [hereinafter cited as *BEHIND CLOSED DOORS*].

2. *Id.* at 8-9.

3. See generally Boylan & Taub, *Inadequacy of Legal Remedies, in ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES*, Part II, 34 (1981) reprinted in Taub, *Equitable Relief in Cases of Adult Domestic Violence*, 6 *WOMEN'S RTS. L. REP.* 241, 252 (1981); Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 *HASTINGS L.J.* 895, 905 (1981); D. MARTIN, *BATTERED WIVES* 87 (1981); Comment, *Wife Abuse: Failure of Legal Remedies*, 11 *J. MAR. J. PRAC. & PROC.* 549 (1978).

## II. DOMESTIC VIOLENCE - AN OVERVIEW<sup>4</sup>

### A. National Data

It is almost impossible to identify an incidence rate of spouse abuse in a particular community, in a particular state or across the nation as a whole. There is virtually no uniform means of data collection which reflects the extent of intrafamily violence. Law enforcement agencies generally do not keep records which distinguish assault between family members from that which occurs between strangers. One researcher estimates that police answer more calls concerning family conflicts than all calls for criminal incidents combined.<sup>5</sup> Even so, the commentators agree that those victims who identify themselves to law enforcement are only the tip of the iceberg.<sup>6</sup> One Kentucky study revealed that battered women called police in less than ten percent of the cases.<sup>7</sup>

The Federal Bureau of Investigation compiles data on the incidence of intrafamily homicide. In 1981, fifty-five percent of the 20,053 murders reported were committed by relatives or persons known to the victims. Seventeen percent of the murders were committed by family members; one-half of those murders were committed by a spouse. Approximately 3.8% of the murder victims were husbands, and 4.8% were wives.<sup>8</sup>

An alarming statistic compiled by the FBI is that during 1981, of the ninety-one law enforcement officers killed, nineteen were killed while responding to domestic disturbance calls.<sup>9</sup> The FBI maintains no data on the high incidence of assaults against police while responding to such calls.<sup>10</sup>

One group of researchers suggest that at a minimum, husband-wife violence occurs in at least one-fourth of American families.<sup>11</sup> After conducting research which involved 2143 families across the nation, they concluded that in sixteen percent of American couples, at least one violent

4. It is beyond the scope of this comment to deal adequately with the sociological and psychological aspects of the causes and treatment of domestic violence. For information on those topics, see BEHIND CLOSED DOORS, *supra* note 1; D. MARTIN, *supra* note 3; M.D. PAGELOW, WOMAN-BATTERING (1981); M. ROY, BATTERED WOMEN (1977); M. ROY, THE ABUSIVE PARTNER (1982); S. SCHECHTER, WOMEN AND MALE VIOLENCE (1982).

For a general discussion of special issues concerning intra-family violence, see *Symposium: Family Violence in America*, 6-7 Vt. L. REV., Parts I-II (1982).

5. BEHIND CLOSED DOORS, *supra* note 1, at 16 (citing Parnas, *The Police Response to the Domestic Disturbance*, 1967 Wis. L. REV. 914).

6. BEHIND CLOSED DOORS, *supra* note 1, at 6.

7. M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 3 (1979).

8. FBI, UNIFORM CRIME REPORTS 10-11 (1981).

9. *Id.* at 310. Disturbance calls include family quarrels and man with a gun.

10. The Virginia State Police report that approximately 20% of officer assaults occur in response to disturbance calls. Va. State Police, *Crime in Virginia - 1982* (to be published June 1983).

11. BEHIND CLOSED DOORS, *supra* note 1, at 18.

act is committed each year against a partner. Twenty-eight percent of the couples had experienced violence at some time during the course of their marriage.<sup>12</sup> These researchers also suggest that these statistics underestimate the actual incidence of spousal violence.<sup>13</sup>

Although spouse abuse often is equated with "wife-beating," the study revealed that husbands are assaulted even more often than wives. The rates for assaults (those attacks which could cause serious injury) on wives was 3.8%, or 1.8 million wives, per year; 4.6%, or over two million husbands, were assaulted yearly by their wives.<sup>14</sup>

Research also indicates that violence between spouses, once initiated, becomes a recurrent event: "Forty-seven percent of the husbands who beat their wives did so three or more times during the year, and 53 percent of the husband-beaters did so 3 or more times."<sup>15</sup> A study of domestic homicides in Kansas City revealed that in eighty-five percent of the cases police previously had been called to the residence, and in fifty percent of the cases, the police had responded to disturbance calls five or more times before the death.<sup>16</sup>

## B. Virginia

There is little statistical information on spouse abuse available in Virginia, since state law does not require law enforcement agencies to compile statistics on crimes between family members. However, some agencies do so on their own initiative. For instance, in 1974, police in Fairfax County received 4073 family disturbance calls. As a result, an estimated thirty assault warrants were sought by wives each week.<sup>17</sup>

The Virginia State Police report that of the 404 murders in 1982, 9.9%, or forty victims, were murdered by their current spouse, a decrease from the fifty-four spousal murders in 1981.<sup>18</sup> Unfortunately, no similar records are kept on other intra-family assaults.

The Virginia Department of Social Services collects data from twenty-five specialized projects across the state that offer services to abused

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12. *Id.* at 32.

13. *Id.* at 33.

14. *Id.* at 40-41. These findings do not mean that wives as victims should not remain the focus of social policy since women are typically in the weaker, more vulnerable position. *Id.* at 43-44. See also U.S. COMMISSION ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 469-70 (1978) (indicating that wife-beating is more underreported than husband-beating and that wives are at greater risk of and actually receive more serious injuries than men).

15. BEHIND CLOSED DOORS, *supra* note 1, at 41.

16. N. LOVING, RESPONDING TO SPOUSE ABUSE & WIFE BEATING - A GUIDE FOR POLICE 38 (1980).

17. D. MARTIN, *supra* note 3, at 19 (quoting Washington Post, Nov. 2, 1974, at 18).

18. Va. State Police, Crime in Virginia - 1982 (to be published June 1983).

spouses. For the six-month period of January to June, 1982, 4941 abused women requested services from these programs.<sup>19</sup> This figure again represents only the "tip of the iceberg" since the Kentucky study revealed that victims of abuse only rarely seek aid outside the family.<sup>20</sup>

### III. VIRGINIA'S RESPONSE TO DOMESTIC VIOLENCE

#### A. *Traditional Criminal Response*

Virginia has traditionally treated spousal abuse no differently than assault between strangers. The victim may pursue traditional criminal remedies by having the abusing spouse prosecuted for a misdemeanor or felony, depending on the seriousness of the injury.<sup>21</sup> A law enforcement officer summoned to the scene of a domestic disturbance may arrest an abusing spouse without a warrant if the officer has probable cause to believe that a felony has been committed.<sup>22</sup> Generally, an officer can arrest one who has committed a misdemeanor only if the offense took place in the officer's presence. However, a 1982 amendment enables an officer to make a warrantless arrest for an assault and battery not committed in his presence but based "on probable cause upon reasonable complaint of the person who observed the alleged offense."<sup>23</sup>

Law enforcement agencies, however, have been accused of treating victims of spousal assault differently and with less enthusiasm than victims of non-domestic assault. The belief that police have responded to domestic calls with a policy of minimum intervention and avoidance of arrest was tested in a research study involving 596 police investigations in three metropolitan areas: Rochester, New York, Tampa-St. Petersburg, Florida, and St. Louis, Missouri.<sup>24</sup> The findings point to a lack of law enforcement in the area of domestic disputes. The dispatchers did not accurately report the severity of the assault, and the police were slower in their initial

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19. VA. DEPT. OF SOCIAL SERVICES, STATISTICAL SUMMARY OF SPOUSE ABUSE SERVICES, JAN. 1982-JUNE 1982, at 2.

20. M. SCHULMAN, *supra* note 7, at 55. Counseling was received in seven percent of the incidents, shelter and legal aid in only three percent, and child care in only two percent, although a larger number of the women surveyed indicated a desire to receive such services.

Forty-three percent of the women turned to no one for help. *Id.* at 48.

21. Compare VA. CODE ANN. § 18.2-57 (Repl. Vol. 1982) (assault or assault and battery is a Class 1 misdemeanor) with *id.* § 18.2-51 (malicious shooting, stabbing, cutting or wounding or other act with intent to maim, disfigure, disable or kill is a Class 3 felony or Class 6 felony in the absence of malice). The Fairfax County Circuit Court recently held that under VA. CODE ANN. § 18.2-61 (Repl. Vol. 1982), a man can be prosecuted for raping his wife subsequent to their separation. *Commonwealth v. Weishaupt*, 9 FAM. L. REP. (BNA) 2248 (Cir. Ct. of Fairfax Co., Va. 1983).

22. VA. CODE ANN. § 19.2-81 (Cum. Supp. 1982).

23. *Id.*

24. Oppenlander, *Coping or Copping Out - Police Service Delivery in Domestic Disputes*, 20 CRIMINOLOGY 449, 451 (1982).

response. Conditions more conducive to arrest were inordinately higher than the actual arrest rate. Officers tended to mediate these situations, although most had no training in mediation or crisis intervention so that they necessarily relied on their own life experiences in prescribing solutions.<sup>25</sup> These findings, along with statistics on spousal abuse, suggest that stronger enforcement of the law rather than crisis counseling in the initial stages of this recurring type of family problem could prevent spousal murder in some cases.<sup>26</sup>

The Executive Deputy Chief of the Detroit Police Department has noted the nonresponsiveness of the legal system. In 1972, 4900 assaults survived the screening process, and a warrant was issued. However, "[t]hrough the process of conciliation, complainant harassment and prosecutor discretion fewer than 300 of the cases were ultimately tried by a court of law."<sup>27</sup>

Frustrated by law enforcement agencies' failure to respond, battered women brought class action suits against police departments in New York City<sup>28</sup> and Oakland, California.<sup>29</sup> The New York City case ended by a consent decree in which the department agreed to make arrests where there is reasonable cause to believe a felony has been committed, to send one or more officers to respond to every call in which assault or threatened assault was alleged, to inform an abuse victim of the available criminal and civil remedies, to protect or assist a victim in need of medical care and to help locate the abusing spouse when he has left the scene.<sup>30</sup> The Oakland case was settled out of court; the department agreed to treat domestic violence as criminal conduct and make arrests where appropriate, to develop training materials and to develop a brochure of resources available to abused spouses.<sup>31</sup>

Although skeptics have predicted a low conviction rate in spouse abuse cases, a prosecutor from New York recently reported that where enforcement of the law in spouse abuse cases is given a high priority, the conviction rate is over ninety-four percent. Also, contrary to the popular notion that abuse victims fail to follow through with criminal charges, this prosecutor reported that eighty-two percent of the victims in his jurisdiction

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25. *Id.* at 462.

26. *Id.* at 463.

27. James Bannon, *Law Enforcement Problems with Intra-family Violence 5* (presentation to the American Bar Association Convention, August 12, 1975).

28. *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (1977), *rev'd on other grounds*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

29. *Scott v. Hart*, No. 6-76-2395 (N.D. Cal. filed Oct. 28, 1976).

30. N. LOVING, *supra* note 16, at 36-37. See Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39 (1981) (a summary of subsequent litigation to improve the legal response to spousal abuse).

31. N. LOVING, *supra* note 16, at 37.

did follow through.<sup>32</sup>

### B. *Traditional Quasi-Criminal Relief*

Under section 19.2-19 of the Virginia Code, a court must require one who threatens to kill, injure, or commit violence against the person or property of another to give a recognizance to keep the peace.<sup>33</sup> An act of violence need not have occurred as long as there is good cause to fear that a person intends to commit an offense.<sup>34</sup> In such cases, the respondent posts a peace bond with the court and upon his good behavior in keeping the peace for a period of time not to exceed one year, the money is reimbursed.<sup>35</sup> However, since peace bonds impose a "conditional fine" where an offense has not yet been committed, the constitutionality of such bonds is suspect on double jeopardy and due process grounds.<sup>36</sup> Peace bonds are also generally criticized for their ineffectiveness in intrafamily violence.<sup>37</sup>

### C. *Traditional Civil Remedies - Tort Suits*

Traditionally, tort suits between spouses have been barred by the doctrine of intraspousal tort immunity in Virginia.<sup>38</sup> However, such immunity has been expressly abrogated by statute.<sup>39</sup> While this statute opens the door for a battered spouse to be compensated for injuries received at the hands of an abusing partner, a tort suit does little to offer protection and immediate relief in the midst of a violent episode.

32. Pirro, *Domestic Violence: The Criminal Court Response*, 54 N.Y. St. B.J. 352, 356 (1982).

For further discussion on the role of law enforcement, see U.S. DEPT. OF JUSTICE, PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES (1980).

33. VA. CODE ANN. § 19.2-19 (Cum. Supp. 1982):

If any person threatens to kill or injure another or to commit violence or injury against his person or property, or to unlawfully trespass upon his property, he shall be required to give a recognizance to keep the peace for such period not to exceed one year as the court hearing the complaint may determine.

34. See Op. Att'y Gen. 138 (1961); Op. Att'y Gen. 135 (1961).

35. Healy v. Commonwealth, 213 Va. 325, 191 S.E.2d 736 (1972).

36. See Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 266 (1971); Note, *Peace-Bond — A Questionable Procedure for a Legitimate State Interest*, 74 W. VA. L. REV. 326 (1972); Note, *Peace and Behavior Bonds — Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966).

37. See generally, Truninger, *supra* note 36, at 266-67; Bannon, *supra* note 27, at 5-6; U.S. COMMISSION ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 54, 60 (1978) (presentation by Judge Golden Johnson).

38. See, e.g., Counts v. Counts, 221 Va. 151, 266 S.E.2d 895 (1980) (interspousal immunity barred recovery for intentional tort); Korman v. Carpenter, 216 Va. 86, 216 S.E.2d 195 (1975) (created exception in wrongful death suits); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971) (created exception to doctrine for automobile accidents).

39. VA. CODE ANN. § 8.01-220.1 (Cum. Supp. 1982).

*D. Recent Efforts to Respond Specifically to Domestic Violence in Virginia*

The Virginia General Assembly first turned its attention to the problem of domestic violence between spouses in 1977.<sup>40</sup> Although Senate Joint Resolution No. 89, which called for the study of physical abuse between spouses, failed to pass out of the House Courts of Justice Committee, the House Committee on Health, Welfare and Institutions voluntarily agreed to study the problem as a result of the concern that had been generated.<sup>41</sup> A series of public hearings was held, and a report with seven recommendations was submitted to the full committee for the 1978 General Assembly.<sup>42</sup> The recommendations are summarized as follows:

- 1) Establishment of shelters for battered spouses.
- 2) Provision for uniform statewide reporting system so that statistics on the incidence of domestic violence could be reported to the 1979 General Assembly.
- 3) Consideration of legislation for warrantless arrest where a battery has been committed on one's spouse.
- 4) Empowering juvenile and domestic relations district courts to order counseling and treatment for spouses in addition to criminal penalties for offenses committed against spouses.
- 5) Promotion of public education on resources available to battered spouses.
- 6) Consideration of legislation to abrogate spousal tort immunity for assault and battery.
- 7) Training for law enforcement officers in the management and resolution of domestic quarrels.<sup>43</sup>

While the House Subcommittee was aware of the availability of civil protection orders in other states,<sup>44</sup> it chose not to make any recommendations to consider this type of legislation.

The 1978 General Assembly did enact three of the House Subcommittee's recommendations. House Joint Resolution No. 31 recognized a concern about domestic violence and encouraged localities to establish shelters for battered spouses and their children through federal grants and Title XX funding.<sup>45</sup> House Joint Resolution No. 27 requested the Criminal Justice Services Commission to emphasize training of law enforce-

40. The 1975 Virginia General Assembly had enacted comprehensive legislation for the protection of abused and neglected children. See VA. CODE ANN. § 63.1-248.1 to -248.17 (Repl. Vol. 1980).

41. REPORT OF THE SUBCOMMITTEE TO STUDY BATTERED SPOUSES TO THE HOUSE COMMITTEE ON HEALTH, WELFARE AND INSTITUTIONS 2 (December 6, 1977) [hereinafter cited as SUBCOMMITTEE REPORT].

42. *Id.*

43. *Id.* at 11-13.

44. *Id.* at 7. The Subcommittee included a copy of the Pennsylvania Protection from Abuse Act as Exhibit B in its Report.

45. 1978 Va. Acts at 1922. Title XX refers to part of the National Social Security Act. *Id.*



ment officers in handling domestic violence.<sup>46</sup> House Bill No. 1120 amended the Code to allow the juvenile and domestic relations court to "impose conditions and limitations in an effort to effect the reconciliation and rehabilitation of the parties, including, but not limited to, treatment and counseling for either or both spouses and payment by the defendant spouse for crisis shelter care for the complaining spouse" in cases involving offenses between spouses.<sup>47</sup>

House Bill No. 683, which would have provided for a two-year pilot program of emergency shelters for battered spouses, was carried over until 1979;<sup>48</sup> however, it subsequently failed to pass. But in 1980, Chapter 18, Services for Abused Spouses, was added to the public welfare laws.<sup>49</sup> That act provided a state policy statement to "support the efforts of public and private community groups seeking to provide assistance to and treatment for the victims of spouse abuse and to provide recognition to the need to combat all phases of spouse abuse in this Commonwealth."<sup>50</sup> The statute designates the Department of Social Services to coordinate state efforts to carry out this policy statement.<sup>51</sup> The department's responsibilities include providing an information clearinghouse; encouraging use of information and referral agencies to provide information on spouse abuse; maintaining a list of available resources for the victims of spouse abuse; promoting interagency cooperation for technical assistance, data collection and services delivery; administering any state funds for development of community programs; and providing technical assistance for the development of resources for victims, such as shelters and self-help groups.<sup>52</sup>

Although these provisions enabled the department to set up shelters and other community services, the legislature did not appropriate funds to carry out that purpose. Thus, the 1980 legislation provided nothing concrete in the way of funds, services or legal remedies for battered spouses.

During the 1982 General Assembly, Senate Bill No. 279 was enacted to raise the marriage license fees from three dollars to ten dollars.<sup>53</sup> The purpose of the original bill was to set up a Family Trust Fund to be appropriated to the Department of Social Services to expend for child abuse

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46. 1978 Va. Acts at 1920.

47. 1978 Va. Acts, ch. 756, at 1273 (as codified in VA. CODE ANN. § 16.1-279(L) (Repl. Vol. 1982)).

48. H.B. 683, 1978 Va. Gen. Assem.

49. VA. CODE ANN. § 63.1-315 to -319 (Repl. Vol. 1980).

50. *Id.*

51. *Id.* § 63.1-317.

52. *Id.* § 63.1-319.

53. *Id.* § 20-15 (Cum. Supp. 1982).

prevention and services for abused spouses.<sup>54</sup> This method of raising funds followed a trend nationwide to raise funds to deal with the problems of domestic violence.<sup>55</sup> However, the bill which was signed into law only raised the marriage fee and did not specify its use.<sup>56</sup> The 1982 Appropriations Bill<sup>57</sup> provided that an additional \$400,000 for each year of the biennium was appropriated for the purposes stated in sections 63.1-248.7(C)<sup>58</sup> and 63.1-319.<sup>59</sup> The result of this change from the original bill enables the General Assembly to appropriate the funds raised from the increase in the marriage license tax for another purpose in 1984, if it chooses to do so.

During this same period of time, a number of bills have been introduced to secure more legal rights for victims of spouse abuse. In 1981, Senate Bill No. 742 was introduced to create a new section, 16.1-253.1, which would have enabled the juvenile and domestic relations court to provide temporary protective orders to prevent abuse of a spouse or child by another spouse.<sup>60</sup> The bill went beyond the scope of the orders already available to protect children<sup>61</sup> in that it proposed to allow an order to exclude the abusing spouse from the home. As a result of the focus on the constitutional questions related to deprivation of a property right, the bill failed to pass.<sup>62</sup>

In 1982, Senator Colgan, the patron of Senate Bill No. 742, attacked

54. See S.B. 279, 1982 Va. Gen. Assem.

55. See, e.g., MICH. COMP. LAWS § 551.332 (1982); NEV. REV. STAT. § 122.060 (1979); OR. REV. STAT. §§ 106.045, 660 (1981); W. VA. CODE 48-1-24 (Cum. Supp. 1982).

56. VA. CODE ANN. § 20-15 (Cum. Supp. 1982).

57. 1982 Va. Acts, ch. 684, Item 504, at 1446.

58. VA. CODE ANN. § 63.1-248.7(C) (Repl. Vol. 1980): "To assist in developing programs aimed at discovering and preventing the many factors causing child abuse and neglect."

59. *Id.* § 63.1-319.

In dispersing funds through grants to local agencies to provide service programs for the victims of spouse abuse, the Department of Welfare may fund both administrative functions and the delivery of direct services, including a portion of: the operational costs of offices and shelters including staff, rent, utilities, travel and supplies; twenty-four hour crisis intervention hotlines; counseling; information and referral; self-help groups; transportation; emergency shelter; and follow-up services.

60. S.B. 742, 1981 Va. Gen. Assem.

61. Protective orders currently are available pursuant to § 16.1-253 of the Virginia Code where necessary to protect a child's life, health or normal development pending a final adjudication of a petition. This statute could be used to protect a battered spouse where the child's safety is also in issue and a petition has been filed pursuant to the present jurisdictional authority found in VA. CODE ANN. § 16.1-241 (Repl. Vol. 1982). This statute, however, fails to provide assistance to the battered spouse who either has no children or where the children have already reached majority.

This statute also does not include a provision to bar an abusing parent from the home for a temporary period of time, as suggested by the legislative proposal in this comment. See *infra* notes 107-121 and accompanying text.

62. Telephone conversation with Senator Charles J. Colgan, patron of S.B. 742 (Aug., 1982).

the problem in another way. In this session of the General Assembly, he introduced Senate Bill No. 232 to amend section 19.2-45 and enable magistrates to prohibit an abusing spouse from reentering his home until a judge had the opportunity to act on the motion.<sup>63</sup> This bill also failed. However, the following April, the Attorney General released an official opinion which states that

[a] magistrate or other judicial officer has [the] authority to forbid [a] person accused of spouse abuse from returning to his/her own home as [a] condition of release pursuant to § 19.2-123(a)(4) when said official believes there is a danger that physical abuse may recur and that [the] restriction is necessary to assure [the] accused's good behavior pending trial.<sup>64</sup>

Despite this 1982 Attorney General opinion, Senator Colgan introduced Senate Bill No. 100 at the 1983 General Assembly session. The bill would have amended section 19.2-123 to provide expressly that where offenses are committed by family members, "restrictions may be placed on contacts with family members and visitation of the residence of any family member" in order to assure the accused's good behavior pending trial or hearing or to assure his appearance at trial or a hearing.<sup>65</sup> This bill also failed to pass.

Only one piece of legislation has passed the Virginia General Assembly to broaden legal protections available to abused spouses. This protection, however, is only made available where a suit for divorce or annulment is pending. Under section 20-103 of the Virginia Code, the court may exclude a spouse from the jointly owned or jointly rented residence upon a showing of "reasonable apprehension of physical harm [to the other spouse]."<sup>66</sup> Such relief can be obtained for up to fifteen days through an ex parte hearing.<sup>67</sup> The order may be extended "for such longer period as the court deems appropriate" after notice and a full hearing is conducted.<sup>68</sup>

While this statute provides protection for abuse victims in the context of a divorce or annulment proceeding, it clearly overlooks the plight of an abused spouse who needs protection from a violent partner, but is unwilling or unable to file a bill of complaint for a divorce. Depending on the history of abuse in the family, an abuse victim may very likely wish to continue the marriage if somehow the abuse could be stopped. Civil protective orders, such as those available in most states,<sup>69</sup> would enable abuse victims to obtain immediate relief by separating the parties, pro-

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63. S.B. 232, 1982 Va. Gen. Assem.

64. Op. Att'y Gen. 238 (1982).

65. S.B. 100, 1983 Va. Gen. Assem.

66. VA. CODE ANN. § 20-103 (Cum. Supp. 1982).

67. *Id.*

68. *Id.*

69. *See, e.g.*, Appendix, §§ E, F.

viding a "cooling off" period, preventing serious injury during the interim and giving the couple time to determine whether the marriage can be salvaged.

#### IV. PROTECTIVE ORDER LEGISLATION

##### A. *How Can Such Legislation be Justified?*

Although abused spouses in Virginia generally have a remedy available to them through the criminal justice system,<sup>70</sup> these victims of spouse abuse do not have any realistic civil remedy to protect them against future attacks and to facilitate resolution of domestic disputes without ending the marriage. Neither divorce<sup>71</sup> nor the imposition of criminal punishment or tort liability for past injuries received<sup>72</sup> serve to promote the welfare of the family<sup>73</sup> by preventing future attacks or to foster resolution of the problems between the parties themselves.

Much of the prior legislation has been concerned with the community's role in protecting abused spouses through the funding of shelters and other support services.<sup>74</sup> The growth of shelters is in response to the need for a safe place where the victim and children can go, while the abusing spouse retains full use of the family residence and personal property. A civil protective order would enable the victim(s) to remain in the residence and force the abusing party to seek other accommodations until a court is convinced that the threat of injury in the home is removed. As a result of this purely private remedy, less demand would be placed on public funds to shelter abuse victims.

The traditional remedy of criminal prosecution places the responsibility of securing a remedy for an abuse victim on the prosecutor. Prosecutorial reluctance in such cases has been well documented.<sup>75</sup> The primary responsibility for obtaining a civil protective order, however, is on the party who has the greatest interest in the result—the victim. Although the abuse victim is often described as having feelings of dependency, powerlessness and low self-esteem,<sup>76</sup> it is possible that the ability to use self-help and to have the opportunity to take control of the situation with the help of the legal system would serve to facilitate resolution

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70. See *supra* notes 21-37 and accompanying text.

71. See VA. CODE ANN. § 20-91(6), (9) (Cum.-Supp. 1982). Under both these grounds the parties must be separated for one year before a divorce can be obtained.

72. See *supra* notes 38-39 and accompanying text.

73. See VA. CODE ANN. § 16.1-227 (Repl. Vol. 1982): "It is the intention of this law that in all proceedings the welfare of the child and the family is the paramount concern of the State. . . ."

74. See *supra* notes 40-59 and accompanying text.

75. See *supra* notes 24-32 and accompanying text.

76. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, FAMILY VIOLENCE: INTERVENTION STRATEGIES 12-13 (1980) [hereinafter cited as INTERVENTION STRATEGIES].

of the violent patterns within the family by altering the balance of power.

An analogy for the success of civil remedies over criminal remedies can be found in the implementation of the Child Abuse and Neglect Act.<sup>77</sup> In 1975, identification of child abuse and neglect situations was transferred out of the criminal justice system and into the human resources area.<sup>78</sup> As a direct result of this change from a punitive to a rehabilitative approach to a family problem, over 20,000 children each year since 1975 have been identified as suspected cases.<sup>79</sup> The General Assembly recognized, however, that the criminal justice system should step in where a serious injury or offense is involved. As a result, an overlap with the criminal justice system has been expressly provided for in certain cases.<sup>80</sup>

Similarly, in spousal abuse situations, the pattern of abuse is one that affects all members of the family.<sup>81</sup> Where rehabilitation and voluntary resolution of the problem can be achieved, the civil, rather than the criminal, alternatives are less disruptive to the family.<sup>82</sup> However, there may be situations where protection can realistically be obtained only through the criminal side of the court. Still, a civil protective order is an alternative that could be made available in *both* situations since its purpose is to prohibit certain behavior and prescribe certain conditions to be followed to provide protection to an abuse victim.<sup>83</sup>

77. See VA. CODE ANN. § 63.1-248.1 to -248.17 (Repl. Vol. 1980).

78. Compare *Id.* § 63.1-248.1 with former VA. CODE ANN. §§ 16.1-217.1 to -217.4 (Cum. Supp. 1968).

79. Conversation with staff, Bureau of Child Protective Services, Va. Dept. of Social Services (Mar., 1983). Prior to the 1975 legislation, only 426 children had been identified as possibly abused or neglected. *Id.*

80. VA. CODE ANN. § 63.1-248.6(D)(5) (Repl. Vol. 1980).

When abuse or neglect is suspected in any cases involving death of a child or injury to the child in which a felony is also suspected for which the penalty prescribed by law is not less than five years imprisonment or where there is sexual abuse or suspected sexual abuse of a child involving the use of display of the child in sexually explicit visual material, as defined in § 18.2-374.1, report immediately to the Commonwealth's attorney and make available to the Commonwealth's attorney the records of the local department upon which such report is founded. . . .

81. See INTERVENTION STRATEGIES, *supra* note 76, at 29-31; Rosenbaum & O'Leary, *Children: The Unintended Victims of Marital Violence*, 51(4) AMER. J. ORTHOPSYCHIATRY 692 (1981).

82. Temporary eviction from the home of the abusing partner still enables the parties to participate in treatment toward resolution of the problems; incarceration would not.

83. VA. CODE ANN. § 63.1-316 (Repl. Vol. 1982). Many states provide that protection orders are also available to any household or family member and/or unmarriages who are living together as man and wife. See ALA. CODE § 30-5-2(4) (Cum. Supp. 1982); ALASKA STAT., § 09.55.640 (Cum. Supp. 1980); CAL. CIV. PROC. CODE § 542(c) (West Supp. 1982); COLO. REV. STAT. § 14-4-101(2) (Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 46b-38(2)(a) (West Supp. 1982); D.C. CODE ANN. § 16-1001(1) (1981); GA. CODE ANN. § 53-701 (1982); HAWAII REV. STAT. § 585-1 (Supp. 1982); ILL. ANN. STAT. ch. 40, ¶ 2301-3, § 103(2) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.2(2) (Supp. 1982); KAN. CIV. PROC. CODE ANN. § 60-3102(c) (Vernon Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 762(4) (1981); MD. CTS. & JUD. PROC.

## B. *Components of a Protective Order Statute*

To date, thirty-eight states and the District of Columbia have enacted special statutory provisions to enable victims of domestic violence to obtain a civil protective order without the necessity of filing criminal charges or a suit for divorce.<sup>84</sup> The purpose of this section is to outline the amendments to Virginia's Juvenile and Domestic Relations District Court Law<sup>85</sup> which would be necessary to create such a remedy for victims in Virginia. The proposed amendments are compiled in the Appendix and reference is made to each provision in the following text.

### 1. Definitions

The Virginia General Assembly has previously defined "spouse abuse"

CODE ANN. § 4-501(e) (Cum. Supp. 1981); MASS. ANN. LAWS ch. 209A, § 1 (Michie Cum. Supp. 1981); MINN. STAT. ANN. § 518B.01 § 2(b) (West Cum. Supp. 1983); MISS. CODE ANN. § 93-21-3(d) (Cum. Supp. 1982); MO. ANN. STAT. § 455.010(6) (Vernon Supp. 1983); NEB. REV. STAT. § 42-903(1) (1978); NEV. REV. STAT. § 33.020(1) (1979); N.H. REV. STAT. ANN. § 173-B:1(II) (Supp. 1981); N.J. STAT. ANN. § 2C:25-3(a) (1981); N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 1982); N.C. GEN. STAT. § 50B-1 (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-02(1) (1979); OHIO REV. CODE ANN. § 3113.31(A)(3) -(4) (Cum. Supp. 1982); OR. REV. STAT. § 107.705(2) (1981); PA. STAT. ANN. tit. 35, § 10182 (Purdon 1977); S.D. CODIFIED LAWS ANN. § 25-10-1(2) (Supp. 1981); TEX. FAM. CODE ANN. tit. 4, § 71.01(b) (Vernon Supp. 1982); UTAH CODE ANN. § 30-6-1(3) (Supp. 1981); W. VA. CODE § 48-2A-2(b) (Cum. Supp. 1982); WIS. STAT. ANN. § 813.025(2)(a) (West Supp. 1982); WYO. STAT. § 35-21-102(a)(iv) (Cum. Supp. 1982).

84. See ALA. CODE §§ 30-5-1 to -11 (Cum. Supp. 1982); ALASKA STAT. §§ 09.55.600 to .640 (Cum. Supp. 1980); ARIZ. REV. STAT. ANN. § 13-3602 (West Supp. 1982); CAL. CIV. PROC. CODE §§ 540-553 and CAL. CIV. CODE § 4359 (West Supp. 1982); COLO. REV. STAT. §§ 14-4-101 to -105 (Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 46b-38 (West Cum. Supp. 1982); D.C. CODE ANN. §§ 16-1001 to -1006 (1981); GA. CODE ANN. § 53-701 to -705 (Cum. Supp. 1982); HAWAII REV. STAT. §§ 586-1 to -11 (Supp. 1982); ILL. ANN. STAT. ch. 40, ¶ 2302-1 to -3, ¶ 2302-1 to -13 (West Supp. 1982); IOWA CODE ANN. § 236.1 to .11 (Supp. 1982); KAN. CIV. PROC. CODE ANN. §§ 60-3101 to -3111 (Vernon Supp. 1982); KY. REV. STAT. ANN. § 209.010 (1980); ME. REV. STAT. ANN. tit. 19, §§ 761-771 (1981); MD. CTS. & JUD. PROC. CODE ANN. § 4-501 to -506 (Cum. Supp. 1981); MASS. ANN. LAWS ch. 209A, §§ 1-6 (Michie Cum. Supp. 1981); MINN. STAT. ANN. § 518B.01 (West Cum. Supp. 1983); MISS. CODE ANN. §§ 93-21-1 to -29 (Cum. Supp. 1982); MO. ANN. STAT. §§ 455.010 to .085 (Vernon Cum. Supp. 1983); MONT. CODE ANN. §§ 27-19-201 to -204, -301 to -307, -401 to -406, 40-4-106 (1982); NEB. REV. STAT. §§ 42-924 to -927 (1978); NEV. REV. STAT. § 33.020 (1979); N.H. REV. STAT. ANN. § 173-B:1 to -B:11a (Supp. 1981); N.J. STAT. ANN. §§ 2C:25-1 to -16 (West 1982); N.Y. FAM. CT. ACT §§ 812-847 (McKinney Supp. 1982); N.C. GEN. STAT. §§ 50B-1 to -8 (Cum. Supp. 1981); N.D. CENT. CODE §§ 14-07.1-01 to -08 (Repl. Vol. 1981); OHIO REV. CODE ANN. §§ 3113.31 (Baldwin Cum. Supp. 1982); OR. REV. STAT. §§ 107.700 to .720 (1981); PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon 1977); R.I. GEN. LAWS § 15-5-19 (Cum. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 25-10-1 to -14 (Supp. 1982); TENN. CODE ANN. §§ 36-1201 to -1215 (Cum. Supp. 1982); TEX. FAM. CODE ANN. tit. 4, §§ 71.01 to .19 (West Supp. 1982); UTAH CODE ANN. §§ 30-6-1 to -9 (Supp. 1981); VT. STAT. ANN. tit. 15, §§ 1101-1108 (Cum. Supp. 1982); W. VA. CODE §§ 48-2A-1 to -10 (Cum. Supp. 1982); WIS. STAT. ANN. § 813.025 (West Supp. 1983); WYO. STAT. §§ 35-21-101 to -107 (Cum. Supp. 1982).

85. See VA. CODE ANN. §§ 16.1-226 to -330 (Repl. Vol. 1982).

as "any act of violence, including any forceful detention, which results in physical injury and which is committed by a person against another person to whom such person is married or has been married."<sup>86</sup> This definition covers only those acts which result in physical injury.<sup>87</sup> A protective order, however, should also be available in situations where the abusing partner's threats of physical abuse place the victim in fear of bodily injury.<sup>88</sup> In this way the protective order can more successfully accomplish its goal of *preventing* abuse by eliminating the necessity of a prior serious injury. In fact the Virginia General Assembly already has recognized the need for a remedy where the victim may have a "reasonable apprehension of physical harm" where a suit for divorce or annulment is pending.<sup>89</sup>

## 2. Jurisdiction

The juvenile and domestic relations court currently has jurisdiction over spouse abuse cases only where a criminal charge has been filed. The court hears all cases where an offense has been committed by one family member against another or where a criminal warrant has been taken out by one family member against another.<sup>90</sup> A new section 16.1-241(M) should be created in order to authorize the court to hear civil cases in which an abused spouse seeks a protective order against an abusing spouse.<sup>91</sup>

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86. *Id.* § 63.1-316 (Repl. Vol. 1980).

87. All statutes cited *supra* note 84 cover situations of actual physical contact with the other spouse.

88. See Appendix, § A. Twenty-nine states currently provide a remedy where threats of injury constitute the abuse: ALA. CODE § 30-5-2(1)(b) (Cum. Supp. 1982); CAL. CIV. PROC. CODE § 542(a) (West Cum. Supp. 1983); COLO. REV. STAT. § 14-4-101(2) (Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 46b-38(a) (West Cum. Supp. 1982); HAWAII REV. STAT. § 586-1(1) (Supp. 1982); ILL. ANN. STAT. ch. 40, ¶ 2301-3, § 103(1) (Smith-Hurd Cum. Supp. 1983); KAN. STAT. ANN. § 60-3102(a)(2) (Cum. Supp. 1982); KY. REV. STAT. ANN. § 403.710(1) (Baldwin Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 762(1)(B) (1981); MD. CTS. & JUD. PROC. CODE ANN. § 4-501(b)(2) (Cum. Supp. 1982); MASS. ANN. LAWS ch. 209A, § 1(b) (Michie Law. Co-op. Cum. Supp. 1983); MINN. STAT. ANN. § 518B.01(2)(a)(i) (West Cum. Supp. 1983); MISS. CODE ANN. § 93-21-3(a)(ii) (Cum. Supp. 1982); MO. ANN. STAT. § 455.010(1) (Vernon Cum. Supp. 1983); MONT. CODE ANN. § 27-19-201(5) (1981); NEB. REV. STAT. § 42-903(1)(b) (1978); NEV. REV. STAT. § 33.020(1)(b) (1979); N.H. REV. STAT. ANN. § 173-B:1(I)(b) (Supp. 1981); N.C. GEN. STAT. § 50B-1(2) (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-01 (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(A)(1)(b) (Baldwin Cum. Supp. 1983); OR. REV. STAT. § 107.705(1)(b) (1981); PA. STAT. ANN. tit. 35, § 10182(ii) (Purdon 1977); R.I. GEN. LAWS § 15-5-19 (Cum. Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-10-1(1) (Supp. 1982); UTAH CODE ANN. § 30-6-1(1)(b) (Supp. 1981); VT. STAT. ANN. tit. 15, § 1101(1)(B) (Cum. Supp. 1982); W. VA. CODE § 48-2A-2(a)(2) (Repl. Vol. 1980); WYO. STAT. § 35-21-102(a)(iii) (Cum. Supp. 1982).

89. VA. CODE ANN. § 20-103 (Cum. Supp. 1982).

90. *Id.* § 16.1-241(J) (Repl. Vol. 1982).

91. See Appendix, § B.

### 3. Procedures

Most civil actions in juvenile and domestic relations court are initiated by petitions filed with intake officers of the court services unit.<sup>92</sup> The Virginia Supreme Court is authorized by section 16.1-262 of the Virginia Code to prescribe the form of these petitions.<sup>93</sup> Therefore, section 16.1-262 of the Virginia Code should be amended so as to authorize the supreme court to prescribe the form and contents of the petition to be used by abused spouses who are seeking a protective order.<sup>94</sup> Sixteen states and the District of Columbia expressly require the court to provide the forms necessary to initiate proceedings concerning protective orders to facilitate the abuse victim's access to court.<sup>95</sup> Many states also expressly waive the filing fee together with any bonds that may be required for abuse victims who initiate such actions.<sup>96</sup> In Virginia, however, the petitioner can avoid such expenses only if he or she is indigent and allowed to proceed *in forma pauperis*.<sup>97</sup>

### 4. Ex Parte Orders of Protection

All states providing for protective orders except Rhode Island authorize the issuance of such order *ex parte*, the rationale being the necessity of providing prompt relief to those spouses in imminent danger of harm.<sup>98</sup> Most states require a showing of an immediate and present danger of abuse prior to the granting of an *ex parte* order.<sup>99</sup>

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92. VA. CODE ANN. § 16.1-260 (Repl. Vol. 1982).

93. *Id.* § 16.1-262.

94. See Appendix, § C. Such petition may require only amending the form in current use, Form DC-511 3/82.

95. ALASKA STAT. § 09.55.620 (Cum. Supp. 1980); ARIZ. REV. STAT. ANN. § 13-3602(B) (Cum. Supp. 1983); CAL. CIV. PROC. CODE § 543 (West Cum. Supp. 1983); D.C. CODE ANN. § 16-1003 (1981); HAWAII REV. STAT. § 586-3(c) (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 764(2) (1981); MINN. STAT. ANN. § 518B.01(4)(d) (West Cum. Supp. 1983); MO. ANN. STAT. § 455.025 (Vernon Cum Supp. 1983); N.H. REV. STAT. ANN. § 173-B:3(III) (Supp. 1981); N.J. STAT. ANN. § 2C:25-12(d) (West 1982); N.Y. FAM. CT. ACT § 812(4) (McKinney Cum. Supp. 1983); OR. REV. STAT. § 107.718(3) (1981); TENN. CODE ANN. § 36-1204 (Cum. Supp. 1982); UTAH CODE ANN. § 30-6-4 (Supp. 1981); VT. STAT. ANN. tit. 15, § 1104(C) (Cum. Supp. 1982); W. VA. CODE § 48-2A-4(2) (Repl. Vol. 1980); WYO. STAT. § 35-21-103(e) (Cum. Supp. 1982).

96. See, e.g., KAN. STAT. ANN. § 60-3104 (Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 764(3) (1981); MD. CTS. & JUD. PROC. CODE ANN. § 4-502(c) (Cum. Supp. 1982); MINN. STAT. ANN. § 518B.01(10)(b) (West Cum. Supp. 1983); S.D. CODIFIED LAWS ANN. § 25-10-3(4) (Supp. 1982).

97. VA. CODE ANN. § 14.1-183 (Repl. Vol. 1978).

98. See *infra* note 99.

99. ALA. CODE § 30-5-6(b) (Cum. Supp. 1982); COLO. REV. STAT. § 14-4-103(2) (Cum. Supp. 1982); CONN. GEN. STAT. ANN. § 46b-38(1)(b) & (2)(b) (West Cum. Supp. 1982); IOWA CODE ANN. § 236.4(2) (West Supp. 1982); KAN. CIV. PROC. CODE ANN. § 60-3106(b) (Vernon Supp. 1982); KY. REV. STAT. ANN. § 403.710(3)(a) (Baldwin Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 765(2) (1981); MINN. STAT. ANN. § 518B.01(7) (West Cum. Supp. 1983); MISS. CODE ANN. § 93-21-11(2) (Cum. Supp. 1982); MO. ANN. STAT. § 455.035 (Vernon Cum.



While most of the states have statutory provisions applicable to both ex parte orders and orders issued after a full hearing, some states have restricted the use of ex parte orders to forcing the respondent to refrain from any acts of abuse,<sup>100</sup> granting exclusive possession and use of a residence to the petitioner<sup>101</sup> or ordering temporary custody of the children.<sup>102</sup>

Some statutes limit the duration of ex parte orders to a specific number of days.<sup>103</sup> Others allow such order to continue in effect until a full hear-

Supp. 1983); N.H. REV. STAT. ANN. § 173-B:6 (Supp. 1981); N.C. GEN. STAT. § 50B-2(c) (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-03(1) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(D) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.718(e)(2) (1981); PA. STAT. ANN. tit. 35, § 1018(b) (Purdon 1977); TENN. CODE ANN. § 36-1205 (Cum. Supp. 1982); W. VA. CODE § 48-2A-5(1) (Supp. 1982).

Other states require different standards before an ex parte order will be issued: ALASKA STAT. § 09.55.610(b)(1) (Cum. Supp. 1980) (substantial likelihood of immediate danger); ARIZ. REV. STAT. ANN. § 13-3602(C) (Cum. Supp. 1982) (reasonable cause to believe an act of violence has been or may be committed); CAL. CIV. PROC. CODE § 545 (West Supp. 1982) (reasonable proof of past act of abuse); D.C. CODE ANN. § 16-1004(c) (1981) (welfare or safety is immediately endangered); GA. CODE ANN. § 53-703(b) (1982) (substantial likelihood of immediate danger); ILL. ANN. STAT. ch. 40, ¶ 2302-4, § 204(a)(2) (Smith-Hurd Cum. Supp. 1982) (irreparable injury likely to occur); MASS. ANN. LAWS ch. 209A, § 4 (Michie Cum. Supp. 1981) (substantial likelihood of immediate danger); MONT. CODE ANN. § 40-4-106(4) (1981) (irreparable injury will occur); NEB. REV. STAT. § 42-925 (1978) (irreparable harm, loss or damage); N.J. STAT. ANN. § 2C:25-13(c) (West 1981) (necessary to protect life, health and well-being); S.D. CODIFIED LAWS ANN. § 25-10-6 (Supp. 1982) (immediate and irreparable injury, loss or damage); TEX. FAM. CODE ANN. § 71.15(a) (Vernon Supp. 1982) (clear and present danger of violence); UTAH CODE ANN. § 30-6-5(2) (Supp. 1981) (occurrence of abuse or substantial likelihood of immediate danger); WYO. STAT. § 35-21-104(a)(i) (Cum. Supp. 1982) (real danger of further abuse).

100. COLO. REV. STAT. 14-4-103(3)(a) (Cum. Supp. 1982); KAN. CIV. PROC. CODE ANN. § 60-3106(b) (Vernon Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 765(4)(B) (1981); MINN. STAT. ANN. § 518B.01(7)(a) (West Cum. Supp. 1983); MO. ANN. STAT. § 455.045(1) (Vernon Supp. 1983); N.H. REV. STAT. ANN. § 173-B:6(I) (Supp. 1982); N.D. CENT. CODE § 14-07.1-03(2)(a) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(E)(1)(a) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.718(1)(c) (1981); S.D. CODIFIED LAWS ANN. § 25-10-6(1) (Supp. 1981); TENN. CODE ANN. § 36-1206(1) (Cum. Supp. 1982); VT. STAT. ANN. tit. 15, § 1104(a)(1)(A) & (B) (Cum. Supp. 1982).

101. COLO. REV. STAT. § 14-4-103(3)(b) (Cum. Supp. 1982); KAN. STAT. ANN. § 60-3107 (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 765(4)(C) (1981); MINN. STAT. ANN. § 518B.01(7)(b) (West Supp. 1983); MO. ANN. STAT. § 455.045(2) (Vernon Supp. 1983); N.H. REV. STAT. ANN. § 173-B:6(II) (Supp. 1981); N.D. CENT. CODE § 14-07.1-03(2)(b) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(D), (E)(1)(b) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.718(1)(b) (1981); S.D. CODIFIED LAWS ANN. § 25-10-6(2) (Supp. 1982); VT. STAT. ANN. tit. 15, § 1104(a)(2) (Cum. Supp. 1982).

102. COLO. REV. STAT. § 14-4-103(3)(c) (Cum. Supp. 1982); MO. ANN. STAT. § 455.045(3) (Vernon Cum. Supp. 1983); N.D. CENT. CODE § 14-07.1-03(2)(c) (Repl. Vol. 1981); OR. REV. STAT. § 107.718(1)(a) (1981); VT. STAT. ANN. tit. 15, § 1104(a)(3) (Cum. Supp. 1982).

103. Statutes which specify a specific number of days often allow extensions where the scheduled full hearing is continued or where the court deems necessary: ALASKA STAT. § 09.55.610(c) (Cum. Supp. 1980) (10 days); D.C. CODE ANN. § 16-1004(c) (1981) (10 days); ILL. ANN. STAT. ch. 40, ¶ 2302-11, § 211(b) (Smith-Hurd Supp. 1982) (10 days); MINN. STAT.

ing before the court.<sup>104</sup> Many states also provide that the full hearing must take place within a prescribed period following the date of the ex parte order.<sup>105</sup>

Because important rights are adjudicated at an ex parte hearing, Virginia should limit the purposes for granting an ex parte order to the following:

- 1) prohibiting further acts of abuse;
- 2) prohibiting such other contacts as the court deems necessary;
- 3) granting possession of a jointly owned or jointly rented residence to the petitioner to the exclusion of the abusing spouse; or
- 4) requiring the abusing spouse to provide suitable alternative housing for the petitioner and children.<sup>106</sup>

These provisions would provide protection to the abuse victim pending a full hearing without requiring the court to adjudicate other rights, such as support and child custody.

Perhaps the most controversial aspect of these provisions is the temporary deprivation of the use and possession of a shared residence from the respondent before having an opportunity to participate in a hearing. Although some judges have testified outside the courtroom that such a provision is constitutionally suspect,<sup>107</sup> a number of courts that have ad-

ANN. § 518B.01(7) (West Cum. Supp. 1983) (14 days); MISS. CODE ANN. § 93-21-11(2) (Cum. Supp. 1982) (10 days); NEV. REV. STAT. § 33.020(5) (1979) (15 days); N.D. CENT. CODE § 14-07.1-03(3) (Repl. Vol. 1981) (30 days); OR. REV. STAT. § 107.718 (1981) (one year); S.D. CODIFIED LAWS ANN. § 25-10-7 (Supp. 1981) (14 days); TEX. FAM. CODE ANN. § 71.15(b)-(c) (Vernon Supp. 1982) (20 days); WIS. STAT. ANN. § 813.025(2)(b) (West Cum. Supp. 1982) (5 days).

104. ALA. CODE § 30-5-6(b), (c) (Cum. Supp. 1982); IOWA CODE ANN. § 236.4(2)-(3) (West Cum. Supp. 1982); KAN. STAT. ANN. § 60-3106(b)-(c) (Cum. Supp. 1982); KY. REV. STAT. ANN. § 403.710(3)-(4) (Baldwin Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 765(2), (4), (6) (1981); MO. ANN. STAT. § 455.035 (Vernon Cum. Supp. 1983); N.J. STAT. ANN. § 2C:25-13(c), (e) (West 1982); PA. STAT. ANN. tit. 35, § 10185(b)-(c) (Purdon 1977); UTAH CODE ANN. § 30-6-5(2) (Cum. Supp. 1981); W. VA. CODE § 48-2A-5(1), (3) (Repl. Vol. 1980).

105. ALASKA STAT. § 09.55.610(d) (Cum. Supp. 1980) (earliest possible time after 10 days notice to respondent); ARIZ. REV. STAT. ANN. § 13-3602(E) (Cum. Supp. 1983) (10 days from written request by respondent); CAL. CIV. PROC. CODE § 546 (West Cum. Supp. 1982) (20 to 25 days); HAWAII REV. STAT. § 585-5 (Cum. Supp. 1982) (15 days); MD. CTS. & JUD. PROC. CODE ANN. § 4-503(a) (Cum. Supp. 1982) (5 days from service of order on respondent); MASS. ANN. LAWS ch. 209A, § 4 (Michie Cum. Supp. 1981) (5 days); MINN. STAT. ANN. § 518B.01(7) (West Cum. Supp. 1983) (7 days); N.H. REV. STAT. ANN. § 173-B:6 (Supp. 1981) (5 days from request by respondent); N.J. STAT. ANN. § 2C:25-13(c) (1982) (10 days); N.C. GEN. STAT. § 50B-2(b) (Cum. Supp. 1981) (10 days); N.D. CENT. CODE § 14-07.1-03(4) (Repl. Vol. 1981) (14 days); OHIO REV. CODE ANN. § 3113.31(D) (Baldwin Cum. Supp. 1982) (7 court days); TENN. CODE ANN. § 35-1205 (Cum. Supp. 1982) (10 days from service on respondent); VT. STAT. ANN. tit. 15, § 1104(b) (Cum. Supp. 1982) (10 days); W. VA. CODE § 48-2A-5 (Repl. Vol. 1980) (5 days); WYO. STAT. § 35-21-104(a)(iii) (Cum. Supp. 1982) (72 hours).

106. See Appendix, § D.

107. U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB - BATTERED WOMEN

dressed this issue have found that *ex parte* orders under certain conditions do not violate the due process clause of the fourteenth amendment.<sup>108</sup> A Pennsylvania court has noted that a notice requirement would defeat the purpose of a protective order by increasing the risk of domestic violence.<sup>109</sup> What is needed is "immediate temporary relief in a volatile situation where there is imminent danger of recurring or further abuse to the plaintiff or children."<sup>110</sup>

In a recent decision by the Supreme Court of Missouri in *State ex rel. Williams v. Marsh*,<sup>111</sup> the court applied the balancing test of *Matthews v. Eldridge*<sup>112</sup> and found that the *ex parte* order provisions of the Missouri Adult Abuse Act "comply with due process requirements because they are a reasonable means to achieve the state's legitimate goal of preventing domestic violence, and afford adequate procedural safeguards, prior to and after any deprivation occurs."<sup>113</sup>

Applying the *Matthews v. Eldridge* test, the court in *Marsh* balanced the respondent's property interest in his home and his liberty interest in the custody of his children. Balanced against these interests was the government's interest in promoting the health, welfare and safety of its citizens.<sup>114</sup> To serve this state interest, states may use their police powers to adopt reasonable summary procedures.<sup>115</sup> The third part of the test is the "fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards."<sup>116</sup> In *Marsh*, the court was satisfied that the statute as written was narrowly drawn and thus constitutionally sound. In upholding the Missouri Adult Abuse Act, the court emphasized that only a court could issue an *ex parte* order upon a showing of "immediate and present danger of abuse."<sup>117</sup> The court noted that under the Missouri Act, a judge could issue such an order only after the petitioner had filed a verified petition satisfying this

AND THE ADMINISTRATION OF JUSTICE 50-52 (1982).

108. See *Geisinger v. Voss*, 352 F. Supp. 104 (E.D. Wis. 1972); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 228-32 (Mo. 1982); *People v. Derisi*, 110 Misc. 2d 718, 442 N.Y.S. 2d 908, 908-09 (1981); *People v. Faieta*, 109 Misc. 2d 841, 440 N.Y.S.2d 1007, 1010-11 (1981); *Boyle v. Boyle*, 5 Fam. L. Rep. (BNA) 2916 (Pa. C.P., Allegheny Co. 1979); *Ohio v. Heyl*, No. C 79 BR 120 (Hamilton Co., Ohio, Municipal Ct. 1979), summarized in Woods, *Challenges to Legislation Enacted on Behalf of Battered Women*, 14 CLEARINGHOUSE REV. 426, 427 (1980). See also *Pitsenberger v. Pitsenberger*, 286 Md. 20, 410 A.2d 1052, appeal dismissed, 449 U.S. 807, *reh'g denied*, 449 U.S. 1028 (1980) (divorce action).

109. *Boyle v. Boyle*, 5 Fam. L. Rep. (BNA) 2916, 2917 (Pa. C.P., Allegheny Co., 1979).

110. *Id.* at 2916.

111. 626 S.W.2d 223 (Mo. 1982) (en banc).

112. 424 U.S. 319 (1976).

113. 626 S.W.2d at 232.

114. *Id.* at 230.

115. *Id.* at 231 (citing *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)).

116. 626 S.W.2d at 231 (quoting *Matthews v. Eldridge*, 424 U.S. at 343).

117. 626 S.W.2d at 232.

statutory standard,<sup>118</sup> that ex parte orders were effective only up to fifteen days, after which time a hearing was to be conducted and that nothing in the Act prohibited the respondent from obtaining an earlier hearing.<sup>119</sup> Following other states, the court noted that the “[e]xisting remedies such as peace bonds, regular criminal process and tort law have proved to be less than adequate in aiding the victims of abuse and in preventing further abuse.”<sup>120</sup>

Commentators on the constitutionality of an ex parte order to temporarily deprive an abusing party of the use or possession of his residence generally approve of such orders based on (1) the Supreme Court’s sanctioning of summary procedures for deprivation of property in other contexts,<sup>121</sup> and (2) the flexible nature of due process as set forth in *Matthews v. Eldridge*.<sup>122</sup>

## 5. Dispositional Alternatives

### a. Order of Protection as Disposition in a Criminal Proceeding Currently

Where one spouse has committed a criminal offense against the other, Virginia authorizes a court to order treatment, counseling, payment of crisis shelter care and to make other provisions necessary to bring about the reconciliation and rehabilitation of the parties.<sup>123</sup> A civil protective order can be designed to effect the same result.<sup>124</sup> The same components available in a criminal proceeding against a spouse should also be available in a civil action against the spouse.<sup>125</sup> An amendment to section 16.1-279(L) of the Virginia Code would achieve this result.<sup>126</sup>

### b. Order of Protection as Disposition in a Civil Proceeding

Upon a showing of spouse abuse, the court should have a variety of alternatives available to prevent further abuse and to provide continued protection for a period of time. During this specified period, the parties can attempt to resolve the problems which gave rise to the violence and

118. *Id.*

119. *Id.* at 231.

120. *Id.* at 226.

121. See *The Constitutionality of Ex Parte Proceedings*, in BOYLAN & TAUB, *ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES*, Part II, 96 (Legal Services Corp. 1981); Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95 (1980); Note, *Domestic Relations - The Protection From Abuse Act*, 51 TEMPLE L.Q. 116, 121-24 (1978).

122. 424 U.S. 319 (1976).

123. VA. CODE ANN. § 16.1-279(L) (Repl. Vol. 1982).

124. See Appendix, § F.

125. See *id.*

126. See Appendix, § E.

can determine whether reconciliation, permanent separation, or divorce is the answer. The availability of a civil protective order would not preclude the involvement of the criminal justice system should the civil order prove to be ineffective in a particular case.<sup>127</sup>

A civil protective order does not currently exist in Virginia, making the enactment of a new subsection necessary to authorize courts to grant such an order as the final disposition of a civil action.<sup>128</sup> Such authorization should enable a judge to fashion adequate protection in a particular case by granting him the authority to issue such orders as those:

- 1) prohibiting acts of abuse;<sup>129</sup>
- 2) prohibiting other contacts between the parties as deemed necessary;<sup>130</sup>
- 3) excluding the abusing spouse from the jointly owned or rented residence;<sup>131</sup>

127. Only in New York may an abuse victim elect between proceeding either in family court or in criminal court. See N.Y. JUD. LAW § 847 (McKinney Supp. 1982).

128. See Appendix, § F.

129. All state provisions cited *supra* note 84 include a requirement that the abusing spouse refrain from further abusive acts.

130. ALASKA STAT. § 09.55.600(b)(3) (Cum. Supp. 1980); ARIZ. REV. STAT. ANN. § 13-3602(D)(3) (Cum. Supp. 1982); CAL. CIV. CODE § 4359(a)(2) (West Supp. 1982); D.C. CODE ANN. § 16-1005(c)(3) (1981); GA. CODE ANN. § 53-704(a)(9) (1982); HAWAII REV. STAT. § 586-5 (Supp. 1982); IOWA CODE ANN. § 236.5(2)(c) (West Supp. 1982); MONT. CODE ANN. § 40-4-106(2)(b) (1981); N.J. STAT. ANN. § 2C:25-13(b)(1) (West Supp. 1982); N.Y. JUD. LAW § 842(a) (McKinney Supp. 1982); OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Baldwin Cum. Supp. 1982); R.I. GEN. LAWS § 15-5-19 (Cum. Supp. 1982); TEX. FAM. CODE ANN. § 71.11(a)(1)(B), (C) (Vernon Cum. Supp. 1982); WIS. STAT. ANN. § 813.025(2)(a) (West Cum. Supp. 1982); WYO. STAT. § 35-21-105(a)(iii) (Cum. Supp. 1982).

131. Some states vary this provision depending on the ownership interest in the home. Other states allow the eviction of the respondent without regard to title ownership. See ALA. CODE § 30-5-7(a)(2), (a)(3) (Cum. Supp. 1982); ALASKA STAT. § 09.55.600(b)(2) (Cum. Supp. 1980); ARIZ. REV. STAT. ANN. § 13-3602(D)(2) (Supp. 1982); CAL. CIV. CODE § 4359(a)(3) (West Supp. 1982); CONN. GEN. STAT. ANN. § 46b-38(b)(3) (West Supp. 1982); GA. CODE ANN. § 53-704(a)(2), (a)(5) (1982); HAWAII REV. STAT. § 586-5 (Supp. 1982); ILL. ANN. STAT. ch. 40, § 2302-8, § 208(c)(2) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.5(2)(b) (West Supp. 1982); KAN. STAT. ANN. § 60-3107(a)(2) (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(B), (1)(C) (1981 & Cum. Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 4-503(b)(2) (Cum. Supp. 1982); MASS. ANN. LAWS ch. 209A, § 3(b) (Michie Law. Co-op. Cum. Supp. 1981); MISS. CODE ANN. § 93-21-15(1)(b) (Cum. Supp. 1982); MO. ANN. STAT. § 455-050(1)(2) (Vernon Supp. 1982); MONT. CODE ANN. § 40-4-106(2)(c) (1981); NEB. REV. STAT. § 42-924(3) (1978), § 33.020(4)(b) (1979); N.H. REV. STAT. ANN. § 173-B:4(I)(a)(2) (Supp. 1981); N.J. STAT. ANN. § 2C:25-13(b)(2)-(4) (West 1982); N.Y. JUD. LAW § 842(a) (McKinney Supp. 1982); N.C. GEN. STAT. § 50B-3(a)(2), (a)(5) (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-02(4)(b)-02(6) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(E)(1)(b), (c) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.716(2)(b) (1981); PA. STAT. ANN. tit. 35, § 10186(a)(2), (a)(3) (Purdon 1977); S.D. CODIFIED LAWS ANN. § 25-10-5(2) (Supp. 1982); TENN. CODE ANN. § 36-1206(2) (Cum. Supp. 1982); TEX. FAM. CODE ANN. § 71.11(a)(2) (Vernon 1982); UTAH CODE ANN. § 30-6-6(1) (Supp. 1981); VT. STAT. ANN. tit. 15, § 1103(a)(2) (Cum. Supp. 1982); W. VA. CODE § 48-2A-6(1)(b), (1)(c) (Repl. Vol. 1980); WIS.

- 4) requiring the abusing spouse to provide alternative housing for petitioner;<sup>132</sup>
- 5) awarding temporary custody, support, and/or visitation of minor children;<sup>133</sup>
- 6) awarding temporary support and maintenance to petitioner;<sup>134</sup>
- 7) requiring any of the parties to participate in counseling or treatment;<sup>135</sup> and

STAT. ANN. § 813.025(2)(a) (West Supp. 1982); WYO. STAT. § 35-21-105(a)(i) (Cum. Supp. 1982).

132. See ALA. CODE § 30-5-7(a)(3) (Cum. Supp. 1982); GA. CODE ANN. § 53-704(a)(3) (1982); ILL. ANN. STAT. ch. 40, ¶ 2302-8, § 208(c)(2) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.5(2)(b) (West Supp. 1982); KAN. CIV. PROC. CODE ANN. § 60-3107(a)(3) (Vernon Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(C)(2) (Cum. Supp. 1982); MISS. CODE ANN. § 93-21-15(1)(C) (Cum. Supp. 1982); N.J. STAT. ANN. § 2C:25-13(b)(3) (West 1982); N.C. GEN. STAT. § 50B-3(a)(3) (Cum. Supp. 1981); PA. STAT. ANN. tit. 35, § 10186(a)(3) (Purdon 1977); TENN. CODE ANN. § 36-1206(3) (Cum. Supp. 1982); W. VA. CODE § 48-2A-6(1)(c) (1980); WYO. STAT. § 35-21-105(a)(i) (Cum. Supp. 1982).

133. See ALA. CODE § 30-5-7(a)(4), (5) (Cum. Supp. 1982); ALASKA STAT. § 09.55.600(b)(4), (5) (Cum. Supp. 1980); CAL. CIV. PROC. CODE § 547(a), (b) (West Supp. 1982); GA. CODE ANN. § 53-704(a)(4), (6) (1982); ILL. ANN. STAT. ch. 40, ¶ 2302-8, § 208c(3)(4), (7) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.5(2)(d), (e) (West Supp. 1982); KAN. CIV. PROC. CODE ANN. § 60-3107(a)(4), (6) (Vernon Supp. 1982); KY. REV. STAT. ANN. § 403.710(3)(b), (c) (Baldwin Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(E), (G) (Cum. Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 4-503(b)(3) (Cum. Supp. 1982); MASS. ANN. LAWS ch. 209A, § 3(c), (d) (Michie Law. Co-op. Cum. Supp. 1981); MINN. STAT. ANN. § 518B.01(6)(c), (d) (West Supp. 1983); MISS. CODE ANN. § 93-21-15(1)(d), (e) (Cum. Supp. 1982); MO. ANN. STAT. § 455.050(2)(1), (2) (Vernon Supp. 1983); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(2) to (4) (Supp. 1981); N.J. STAT. ANN. § 2C:25-13(b)(5) (West 1981); N.Y. JUD. LAW § 842 (McKinney Supp. 1982); N.C. GEN. STAT. § 50B-3(a)(4), (6) (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-02(4)(c), (e) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(E)(1)(d) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.716(2)(a) (1981); PA. STAT. ANN. tit. 35, § 10186(a)(4) (Purdon 1977); R.I. GEN. LAWS § 15-5-19 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-10-5(3), (4) (Supp. 1982); TENN. CODE ANN. § 36-1206(4) (Cum. Supp. 1982); TEX. FAM. CODE ANN. § 71.11(a)(3), (4) (Vernon Supp. 1982); VT. STAT. ANN. tit. 15, § 1103(a)(3) (Cum. Supp. 1982); W. VA. CODE § 48-2A-6(1)(d) (Cum. Supp. 1982); WYO. STAT. § 35-21-105(a)(ii) (Cum. Supp. 1982).

134. See ALA. CODE § 30-5-7(a)(5) (Cum. Supp. 1982); ALASKA STAT. § 09.55.600(b)(4) (Cum. Supp. 1980); GA. CODE ANN. § 53-704(a)(7) (1982); ILL. ANN. STAT. ch. 40, ¶ 2302-8, § 208(c)(7) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.5(2)(e) (West Supp. 1982); KY. REV. STAT. ANN. § 403.710(3)(b) (Baldwin Cum. Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(G) (1981); MASS. ANN. LAWS ch. 209A, § 3(d) (Michie Law. Co-op. Cum. Supp. 1981); MINN. STAT. ANN. § 518B.01(6)(d) (West Supp. 1983); MISS. CODE ANN. § 93-21-15(1)(e) (Cum. Supp. 1982); MO. ANN. STAT. § 455.050(2), (3) (Vernon Supp. 1983); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(4) (Supp. 1981); N.C. GEN. STAT. § 50B-3(a)(7) (Cum. Supp. 1981); N.D. CENT. CODE § 14-07.1-02(4)(e) (1979); OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Baldwin Cum. Supp. 1982); R.I. GEN. LAWS § 15-5-19 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-10-5(4) (Supp. 1982); TENN. CODE ANN. § 36-1206(5) (Cum. Supp. 1982); TEX. FAM. CODE ANN. § 71.11(a)(4) (Vernon Supp. 1982); W. VA. CODE § 48-2A-1(e) (Cum. Supp. 1982); WYO. STAT. § 35-21-105(a)(ii) (Cum. Supp. 1982).

135. See ARIZ. REV. STAT. ANN. § 13-3602(J) (Supp. 1982); CAL. CIV. PROC. CODE § 547(d) (West Supp. 1983); D.C. CODE ANN. § 16-1005(c)(2) (1981); ILL. ANN. STAT. ch. 40, ¶ 2302-8, § 208(c)(5) (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 236.5(1) (West Supp. 1982); KAN.

8) any other relief deemed appropriate.

A realistic period for the parties to attempt to resolve the situation while continuing under the court's supervision would be three months. However, if, at the end of the three months, there is a showing of continuing abuse or likelihood of abuse, the court should have the ability to continue the order for another three-month period. The court should have the ability to renew the order for successive three-month periods up to a total period of one year.<sup>136</sup> After a year, the parties should have been able to reach decisions about their long-term plans for the family so that court intervention would no longer be necessary. Each component of the protective order should be a separate provision, and the court should

CIV. PROC. CODE ANN. § 60-3107(a)(9) (Vernon Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 766(1)(F) (1981); MD. CTS. & JUD. PROC. CODE ANN. § 4-503(b)(4) (Cum. Supp. 1982); MINN. STAT. ANN. § 518B.01(6)(e), (f) (West Supp. 1983); MISS. CODE ANN. § 93-21-15(1)(f) (Cum. Supp. 1982); N.H. REV. STAT. ANN. § 173-B:4(I)(b)(5) (Supp. 1981); N.J. STAT. ANN. § 2C:25-13(b)(7) (West 1982); N.Y. JUD. LAW § 842(g) (McKinney Supp. 1982); N.D. CENT. CODE § 14-07.1-02(4)(d) (Repl. Vol. 1981); OHIO REV. CODE ANN. § 3113.31(E)(1)(f) (Baldwin Cum. Supp. 1982); R.I. GEN. LAWS § 15-5-19 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-10-5(5) (Supp. 1982); TEX. FAM. CODE ANN. § 71.11(a)(5) (Vernon Supp. 1982); WYO. STAT. § 35-21-105(a)(vii) (Cum. Supp. 1982).

For a discussion on treatment programs for battering spouses, see A. GANLEY, COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS (Center for Women's Policy Studies 1981) and M. ROY, THE ABUSIVE PARTNER (1982).

136. The states differ in the maximum duration for protective orders: ALA. CODE § 30-5-7(b) (Cum. Supp. 1982) (one year); ALASKA STAT. § 09.55.600(c) (Cum. Supp. 1980) (45 days plus 45-day extension); ARIZ. REV. STAT. ANN. § 13-3602(6) (Supp. 1982) (six months); CAL. CIV. PROC. CODE § 548 (West Supp. 1983) (one year plus extensions); CONN. GEN. STAT. ANN. § 466-38(c), (d) (West Supp. 1982) (90 days plus extension); D.C. CODE ANN. § 16-1005(d) (1981) (one year plus extension); GA. CODE ANN. § 53-704(c) (Cum. Supp. 1982) (six months); HAWAII REV. STAT. § 586-5 (Supp. 1982) (30 days plus 30-day extensions); ILL. ANN. STAT. ch. 40, § 2302-11, § 211(a) (Smith-Hurd Supp. 1982) (one year); IOWA CODE ANN. § 236.5(2) (West Supp. 1982) (one year); KAN. STAT. ANN. § 60-3107(c) (Supp. 1982) (one year); KY. REV. STAT. ANN. § 403.710(4) (Baldwin Cum. Supp. 1982) (effective until further order by the court); ME. REV. STAT. ANN. tit. 19, § 766(2) (1981) (one year plus extension); MASS. ANN. LAWS ch. 209A, § 3 (Michie Law. Co-op. Cum. Supp. 1981) (one year plus extension); MINN. STAT. ANN. § 518B.01(6) (West Supp. 1983) (one year); MISS. CODE ANN. § 93-21-17(2) (Cum. Supp. 1982) (one year); MO. ANN. STAT. § 455.040(1) (Vernon Supp. 1983) (180 days plus 180-day extension); MONT. CODE ANN. § 40-4-106(3) (1981) (one year); NEV. REV. STAT. § 33.020(5) (1979) (30 days); N.H. REV. STAT. ANN. § 173-B:4(III) (Supp. 1981) (one year plus extension); N.Y. JUD. LAW § 842 (McKinney Supp. 1982) (one year); N.C. GEN. STAT. § 50B-3(b) (Cum. Supp. 1981) (one year plus extension); OHIO REV. CODE ANN. § 3113.31(E)(3) (Baldwin Cum. Supp. 1982) (one year); OR. REV. STAT. § 107.716(3) (Repl. Vol. 1981) (one year); PA. STAT. ANN. tit. 35, § 10186(b) (Purdon 1977) (one year); S.D. CODIFIED LAWS ANN. § 25-10-5 (Supp. 1982) (generally one year, except 30-day limit on exclusion from residence); TENN. CODE ANN. § 36-1210 (Cum. Supp. 1982) (one year); TEX. FAM. CODE ANN. § 71.13(a) (Vernon Supp. 1982) (one year); UTAH CODE ANN. § 30-6-5(4) (Supp. 1981) (60 days); VT. STAT. ANN. tit. 15, § 1103(b) (Cum. Supp. 1982) (one year plus extension); W. VA. CODE § 48-2A-6(2) (Repl. Vol. 1980) (30 days); WIS. STAT. ANN. § 813.025(2)(b) (West Supp. 1982) (2 years); WYO. STAT. § 35-21-106(b) (Cum. Supp. 1982) (3 months plus 3-month extension).

have discretion to include all or one of the above provisions in its order. Thus, a provision barring the respondent from the residence could be deleted from the order upon motion to the court, with continuing court supervision of the family's situation so as to monitor compliance with other provisions of the order such as the prohibition of abusive acts and court-ordered treatment.

The states vary in their treatment of a violation of the protective order. Some states make such a violation a criminal misdemeanor offense,<sup>137</sup> while others make it a contempt of court.<sup>138</sup> Still others treat it as being both a misdemeanor offense and a contempt of court.<sup>139</sup> In Virginia, courts may impose fines as well as a jail sentence in civil contempt proceedings.<sup>140</sup> However, due to the seriousness of the acts being proscribed under a protective order, the court should have the flexibility to treat any violation as a Class 1 misdemeanor.

### C. Use and Effect of Protective Orders Where Available

Protective orders have been viewed favorably by battered women and prosecutors.<sup>141</sup> Statistics indicate that protective orders are used regularly where they are available.<sup>142</sup> In 1982, San Francisco county and city aided

137. CAL. CIV. PROC. CODE § 551 (West Supp. 1983); HAWAII REV. STAT. § 586-11 (Supp. 1982); MO. ANN. STAT. § 455.085(3) (Vernon Supp. 1983); NEV. REV. STAT. § 33.020(9) (1979); S.D. CODIFIED LAWS ANN. § 25-10-13 (Supp. 1982); UTAH CODE ANN. § 30-6-6(3) (Supp. 1981); VT. STAT. ANN. tit. 15, § 1104(d) (Cum. Supp. 1982); WIS. STAT. ANN. § 940.33 (West 1982).

138. ALA. CODE § 30-5-10(b) (Cum. Supp. 1982); ARIZ. REV. STAT. ANN. § 13-3602(F) (Cum. Supp. 1982); D.C. CODE ANN. § 16-1005(f) (1981); IOWA CODE ANN. § 236.8 (West Supp. 1982); KAN. STAT. ANN. § 60-3110 (Supp. 1982); MISS. CODE ANN. § 93-21-21 (Cum. Supp. 1982); N.H. REV. STAT. ANN. § 173B:8 (Supp. 1981); N.J. STAT. ANN. § 2C:25-15(b) (West 1982); N.C. GEN. STAT. § 50B-4 (Cum. Supp. 1981); OHIO REV. CODE ANN. § 3113.31(H) (Baldwin Cum. Supp. 1982); OR. REV. STAT. § 107.720(3) (1981); PA. STAT. ANN. tit. 35, § 10190 (Purdon Supp. 1982); TENN. CODE ANN. § 36-1212; W. VA. CODE § 48-2A-7 (Repl. Vol. 1980); WYO. STAT. § 35-21-106(c) (Cum. Supp. 1982).

139. ILL. ANN. STAT. ch. 40, ¶ 2302-12, § 212 (Smith-Hurd Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 769(1) (1981), tit. 17-A, § 4-A (2-A) (1983); MD. CTS. & JUD. PROC. CODE ANN. § 4-503(c), -505 (Cum. Supp. 1982); MINN. STAT. ANN. § 518B.01(14) (West Supp. 1983); N.D. CENT. CODE § 14-07.1-06 (Repl. Vol. 1981); TEX. FAM. CODE ANN. § 71.16 (Vernon Supp. 1982).

140. See *United Steelworkers v. Newport News Shipbuilding & Dry Dock Co.*, 220 Va. 547, 260 S.E.2d 222 (1979) (contempt for violation of injunction imposed during labor dispute).

141. Note, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F.L. REV. 703, 733 (1982) [hereinafter cited as *Restraining Order Legislation*]. This article cites a study conducted by the United States Department of Justice surveying 270 former clients of a family violence prevention program. Sixty-nine percent of the victims believed that restraining orders were "somewhat" to "very" effective in preventing abuse. *Id.* at 732-33 & nn. 160-63.

142. Pirro, *Domestic Violence: The Criminal Court Response*, 54 N.Y. ST. B.J. 352, 357 (1982).



365 women in filing petitions.<sup>143</sup> In the same year, 1169 petitions were filed in the City of Baltimore with 796 ex parte orders being granted and 283 orders being continued into an indefinite protective order after a full hearing.<sup>144</sup> In Philadelphia, 1470 petitions were filed during this same period.<sup>145</sup>

One research study has suggested that protective orders have limitations in preventing the recurrence of domestic violence. However, the study also indicates that the effectiveness of the orders can be increased if victims are aware of the availability of protective orders and if procedures are streamlined to facilitate the filing of petitions.<sup>146</sup> Effectiveness is also increased where the statutory provisions and the actual enforcement procedures make it clear that sanctions will be provided for all violations and where a civil protective order is available in conjunction with other criminal and civil remedies.<sup>147</sup>

## V. CONCLUSION

The Virginia legislature should enact additional options to secure protection for victims of intrafamily violence.<sup>148</sup> The documentation of the scope of the problem of spouse abuse around the country warrants a closer examination of the problem in this state.

In particular, civil protective orders which have been used most effectively in other states, should be available to aid abuse victims. This civil remedy can supplement and enhance the civil and criminal remedies already available. Such an approach constitutes

[a] constructive middle way short of either criminal[ly] prosecuting or ignoring the violation of law. . . . [which may] . . . be helpful to the family in the sense that the [abuser's] presence in the community under an order of protection and his continuance in his employment without a criminal re-

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143. Telephone interview with Administrative Coordinator, W.O.M.A.N. Inc., San Francisco, Cal. (March, 1983) (counselling and support services program for battered women).

144. Telephone interview with Clerk's Office, District Court - Civil Division, City of Baltimore (March, 1983).

The Maryland Commission for Women has also compiled statistics for a two-year period which indicate that 2843 petitions were filed statewide. Almost half of these resulted in the issuance of protective orders. Maryland Commission for Women, *Information Regarding Petitions Filed in Maryland District Courts Under the Protection From Domestic Violence Act, July 1, 1980-June 30, 1982* (July, 1982) (unpublished report).

145. Telephone interview with Appointment's Clerk, Family Division, Court of Common Pleas, City of Philadelphia (March, 1983).

146. J. Graw, J. Fagan and H. Wexler, *Restraining Orders for Battered Women: Issues of Access and Efficacy* 16-18 (January 31, 1983) (unpublished article available from the URSA Institute, Pier 1½ San Francisco, Cal.) [hereinafter cited as Graw]; see also Note, *Restraining Order Legislation*, *supra* note 141, at 132-33.

147. Graw, *supra* note 146.

148. See Wadlington, *Virginia Domestic Relations Law: Recent Developments*, 67 VA. L. REV. 351, 353 (1980).

cord might be important to his children.<sup>149</sup>

The Virginia General Assembly should seriously consider enacting this type of legislation to strengthen court intervention as a realistic alternative in responding to the growing problem of domestic violence.

*Cheryl A. Wilkerson*

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149. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657, 1684 (1981) (quoting *Montalvo v. Montalvo*, 55 Misc. 2d 699, 702-03, 286 N.Y.S.2d 605, 610 (Fam. Ct. 1968)).

## APPENDIX

## A. Add New Section:

§ 16.1-228(T) "Spouse abuse" means any act of violence, including any forceful detention, which results in physical injury or places one in reasonable apprehension of serious bodily injury and which is committed by a person against a spouse, notwithstanding that such persons may be separated and living apart.

## B. Add New Section:

§ 16.1-241(M) Petitions may be filed by a spouse for the purpose of obtaining an order of protection pursuant to § 16.1-253.1 or § 16.1-279(N) as a result of spouse abuse.

## C. Amend § 16.1-262 (last paragraph) (amendment is underlined):

In accordance with § 16.1-69.32 of the Code, the Supreme Court may formulate rules for the form and content of petitions in the juvenile court concerning matters related to the custody, visitation or support of a child and the *protection*, support or maintenance of an adult where the provisions of this section are not appropriate.

## D. Add New Section:

§ 16.1-253.1 Preliminary protective orders in cases of spouse abuse.

A. Upon the filing of a petition alleging that the petitioner is or has been subjected to spouse abuse, the court may issue a preliminary order of protection against an abusing spouse in order to protect the health and safety of the petitioner. Such order may be issued in an ex parte proceeding upon good cause shown where the petition is supported by an affidavit or sworn testimony before the judge or intake officer. Immediate and present danger of spouse abuse shall constitute good cause under this section. A preliminary order of protection may include, but is not limited to the following provisions to be imposed on the abusing spouse:

1. Prohibition of further acts of spouse abuse.
2. Prohibition of such other contacts between the parties as the court deems appropriate.
3. Granting possession of the jointly owned or the jointly leased residence to the petitioner to the exclusion of the abusing spouse; provided however, that no such grant of possession shall affect title to any real or personal property.
4. Requiring that the abusing spouse provide suitable alternative housing for the petitioner and any children, where appropriate.

Such preliminary order of protection shall remain in ef-

fect until a full adversary hearing can be held by the court.

- B. A copy of an ex parte preliminary order of protection shall be served as soon as possible on the abusing spouse. Within ten days of the issuing of an ex parte preliminary order of protection, the court shall provide an adversary hearing on the petition. Notice of such hearing shall be served on the abusing spouse with the copy of the ex parte preliminary order of protection. When feasible, the abusing spouse may request a hearing in less than ten days.
  - C. The preliminary order is effective upon service on the abusing spouse. Any violation of the order shall constitute contempt of court. Such violation may also be punishable as a Class 1 misdemeanor.
  - D. At a full hearing on the petition, the petitioner must prove the allegation of spouse abuse by a preponderance of the evidence. Upon proof of such spouse abuse, the court may issue an order of protection pursuant to § 16.1-279(N).
- E. Amend § 16.1-279(L) (amendment is underlined):

In cases involving the violation of any law, regulation or ordinance for the education, protection or care of children or involving offenses committed by one spouse against another, the juvenile court or the circuit court may impose a penalty prescribed by applicable sections of the Code; provided, however, in cases involving offenses committed by one spouse against another, the court may impose conditions and limitations in any effort to effect the reconciliation and rehabilitation of the parties, including, but not limited to, *an order of protection as provided in § 16.1-279(N)*, treatment and counseling for either or both spouses and payment by the defendant spouse for crisis shelter care for the complaining spouse.

F. Add New Section:

§ 16.1-279(N)

- A. In cases of spouse abuse, the court may issue an order of protection to protect the health and safety of the petitioner, and to effect the rehabilitation and reconciliation by the parties where the court deems it appropriate. An order of protection issued under this section may include, but is not limited to, the following provisions:
  - 1. Prohibition of further acts of spouse abuse.
  - 2. Prohibition of such contacts between the parties as the court deems appropriate.
  - 3. Granting possession of the jointly owned or jointly rented residence to the petitioner to the exclusion of the abusing spouse; provided however, no such grant of possession

- shall affect title to any real or personal property.
4. Requiring that the abusing spouse provide suitable alternative housing for the petitioner, and, if appropriate, any children.
  5. Awarding temporary custody and support as well as visitation rights concerning the minor children, if appropriate.
  6. Ordering the abusing spouse to pay temporary support and maintenance to the petitioner.
  7. Ordering one or both parties to participate in treatment, counseling or other programs designed for the rehabilitation of the parties.
  8. Any other relief necessary for the protection of the petitioner and minor children.
- B. Such order of protection shall be issued for a specified period not to exceed three months. However, such order may be extended for other three month periods by the court upon motion of the petitioner and upon a showing that such continued protection is necessary, up to a total period of one year.
- C. Any violation of an order of protection issued under this section shall constitute contempt of court. Such violation may also be punishable as a Class 1 misdemeanor.
- D. The court may assess costs and/or attorneys fees against either party regardless of whether an order of protection has been issued as a result of a full hearing.