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**ATTORNEY FEES AS NECESSARIES OF LIFE:
EXPANDING A DOMESTIC VIOLENCE VICTIM'S
ACCESS TO SAFETY AND JUSTICE**

Angela Zielinski

Roger follows Anne to and from work. He makes harassing and threatening phone calls to her during her shift. When Anne arrives home in the evening, Roger tells Anne that she is worthless and stupid. While Anne prepares their dinner, Roger reminds her that she is lucky to have a husband like him to take care of her because no one else would. Roger becomes more and more angry as Anne remains silent. He jumps up from his chair and enters the kitchen. He viciously hits and kicks Anne until she repeats how stupid she is and how lucky she is to be with him. Once again, Anne ends up in the local emergency room. Now she has a splint on her wrist.

Anne imagines what her life would be like without Roger.

Roger threatens to kill her if she leaves. Despite his threats, Anne spent two nights in a local shelter, but she returned home when Roger convinced her that he loved her. He said he would try hard to change.

Yet, the violence continues, and Anne now thinks about getting a temporary restraining order, even a divorce. She made an appointment with an attorney to discuss her options, but the attorney wanted a retainer. Roger would be furious when he found out that Anne paid the attorney, and she could never deliver the money without Roger noticing. He keeps track of money just like he keeps track of Anne. The attorney suggested that Anne contact the local Legal Services office. Anne phoned Legal Services and was informed that even though Anne's income from her retail sales position put her well within the requisite income guidelines for assistance, Roger's considerable salary as an engineer would mean that their incomes would likely be calculated together, and she would be ineligible for legal assistance. Anne was also told that in certain circumstances, Legal Services could take cases like hers if her access to the family's income was restricted or there existed an emergency situation. But even if she met the income guidelines

or the circumstantial exceptions, the backlog of domestic violence cases was very long. Anne was added to their waiting list.

She is afraid to wait much longer. Anne is more and more terrified of Roger. Yet, she has no money to seek the advice of a private attorney.

Anne is trapped in her violent life.

I. INTRODUCTION

The Montana Supreme Court faces the opportunity to provide victims of domestic violence¹ increased access to justice in the Montana courts. In *Missoula YWCA v. Bard*,² the court will determine whether attorney services are a “‘necessary article’ when they are provided to a wife to obtain orders of protection from an abusive spouse, thereby obligating the abuser

1. In the United States, 96% of all domestic violence victims are women. Telephone Interview with Kathy Sewell, Services Coordinator of the Montana Coalition Against Domestic and Sexual Violence, in Helena, Mont. (February 3, 1999). In Montana, the latest statistics show that over 10,000 women received assistance for domestic violence, and 170 men were served. *Id.* As the number of women victimized by domestic assaults is greater than the number of men or those in gay or lesbian relationships who report such incidents, the author will refer to domestic violence victims as women and batterers as men. This Comment does not intend to minimize the pain and injury men suffer when subjected to domestic violence, and the author recognizes the injustice of domestic violence whether the victim is male or female.

2. See No. 98-256 (Mont. filed July 8, 1998). This case is scheduled for oral argument before the Montana Supreme Court on April 12, 1999 at the University of Montana School of Law. Mr. Jon Ellingson, a Missoula attorney, assisted Ms. Julia Marquis in dissolution proceedings and in obtaining two orders of protection against her abusive husband, Allen Bard. Appellant’s Brief at 3-6, *Bard* (No. 98-256). Ms. Marquis alleged that her husband threatened to kill her if she became involved with another man. Appellant’s Brief at 4, *Bard* (No. 98-256). Using anger and intimidation, he went to her workplace and begged her to believe that he would change. Appellant’s Brief at 4, *Bard* (No. 98-256). Finally, he said he would leave her alone if she would have sex with him. Appellant’s Brief at 4, *Bard* (No. 98-256). Julia Marquis died (from causes unrelated to the abuse), and on November 3, 1997, Mr. Ellingson filed a complaint alleging that his client’s abusive husband, Allen Bard, was liable for his wife’s attorney fees as necessities of life. Appellant’s Brief at 2, *Bard* (No. 98-256). The Third District Court of Powell County dismissed the case after concluding that there was no set of facts on which Mr. Ellingson could prevail. Opinion and Order at 2, *Ellingson v. Bard*, No. DV 97-93 (Dist. Ct. Third Jud. Dist. March 5, 1998). Mr. Ellingson appealed, and donated all interest in the proceeds of the case to the Missoula YWCA. Appellant’s Brief at 2, *Bard* (No. 98-256). Montana Legal Services and the Missoula Family Violence Council filed amicus briefs. Bard argues that he is not liable for his wife’s attorney fees because they were not necessities of life under Montana law, citing primarily *In re Marriage of White*, 218 Mont. 343, 708 P.2d 267 (1985). Respondent’s Brief at 2, *Bard* (No. 98-256). In addition, Bard concludes that Mr. Ellingson has other means at his disposal to obtain payment. Respondent’s Brief at 8, *Bard* (No. 98-256).

for payment of the attorney fees so incurred.”³ Put another way, the court must decide whether someone in Anne’s situation can offer a private attorney the ability to recoup the value of her legal assistance as a “necessary article” for which a violent husband like Roger is liable.

Necessaries of life may be defined as “things indispensable, or things proper and useful, for the sustenance of human life.”⁴ Black’s Law Dictionary expands upon this general statement:

Necessaries consist of food, drink, clothing, medical attention, and a suitable place of residence . . . However, liability for necessaries is not limited to articles required to sustain life; it extends to articles which would ordinarily be necessary and suitable, in view of the rank, position, fortune, earning capacity, and mode of living of the individual involved.⁵

The “doctrine of necessities”⁶ dictates that in a marital relationship, each spouse must provide the other with these necessary items.⁷ For example, one spouse must pay the other spouse’s medical bills.⁸ If the spouses are living apart due to the husband’s fault or by consent, the husband remains liable for his wife’s medical and dental expenses.⁹

3. Appellant’s Brief at 1, *Bard* (No. 98-256). While the issue in *Bard* involves orders of protection, this Comment argues that a violent spouse should be responsible for his victim’s attorney fees whether incurred to obtain an order of protection or a dissolution of marriage.

4. BLACK’S LAW DICTIONARY 1029 (6th ed. 1990).

5. *Id.* See also 41 C.J.S. *Husband and Wife* § 52 (1991) (the concept of necessaries is “elastic.”). Necessaries are not limited to food, drink, clothing, washing, education, shelter, and medical attention. Spousal liability for necessaries has been “expanded to include those things needed and suitable to the rank and condition of the spouses and the style of life they have adopted.” See 41 AM. JUR. 2D *Husband and Wife* § 200 (1995). What constitutes necessaries should be decided on a case by case basis by considering the “means, ability, social position, and circumstances of both husband and wife.” *Id.* But see *Yeiser v. Lowe*, 69 N.W. 847, 848 (Neb. 1897) (typical of early case law which limited necessaries to “food, drink . . . instruction, and a competent place of residence.”).

6. See *Cole v. Adams*, 289 S.E.2d 918, 919-20 (N.C. Ct. App. 1982) (Necessaries “are those things which are essential to [a wife’s] health and comfort according to the rank and fortune of the husband.”).

7. Traditionally, the husband was primarily liable for providing his wife the necessities of life. See *McQuay v. McQuay*, 86 Mont. 535, 538, 284 P. 532, 533 (1930). See also BLACK’S LAW DICTIONARY 1029 (6th ed. 1990) (“one who sells goods to a wife or child may charge the husband or father if the goods are required for their sustenance or support.”). But equal protection challenges have imposed liability on husbands and wives jointly. See generally *St. Francis Reg’l Med. Ctr. v. Bowles*, 836 P.2d 1123, 1128 (Kan. 1992); see also Jay M. Zitter, Annotation, *Modern Status of Rule That Husband is Primarily or Solely Liable for Necessaries Furnished Wife*, 20 A.L.R. 4TH 196 (1981).

8. See *McQuay*, 86 Mont. at 538, 284 P. at 533.

9. See *Kerner v. Eastern Dispensary & Cas. Hosp.*, 123 A.2d 333, 379-80 (Md.

Similarly, Montana law mandates spousal responsibility for necessities of life.¹⁰ Both spouses are equally liable for necessary expenses.¹¹ The statute provides that “expenses for necessities of the family and of the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.”¹² Montana law broadly defines necessary articles for which a spouse is liable. Necessaries include:

All such goods and services as are reasonably required to provide for the health, welfare, comfort, and education of the married person, his spouse, and minor children, taking into consideration the earnings, resources, and general standard of living of such person.¹³

Applying Montana’s statutes and the dictionary definition to Anne’s circumstances, it may be logically concluded that Anne’s personal safety is vital to her health, welfare, and comfort. Her safety is imperative to a “suitable” place of residence and surely an article which is necessary in any mode of living. In order to ensure her safety, Anne must remove herself from her violent husband. Consequently, an attorney’s services should be deemed necessities of life when they are reasonably required to provide for a domestic violence victim’s¹⁴ health, welfare, and comfort by way of an order of protection or a marital dissolution. Because these are necessities of life for which her spouse, Roger, is responsible under § 40-2-106 of the Montana Code, he should be responsible for payment of the attorney fees incurred to provide Anne with these necessary items.

Part II of this comment provides a historical overview of domestic violence and the resulting problems within the

1956).

10. See MONT. CODE ANN. § 40-2-106 (1997).

11. See *id.* MONT. CODE ANN. § 40-2-210, which defines necessities for the purpose of MONT. CODE ANN. § 40-2-106, was enacted in 1975. See 1975 Mont. Laws ch. 293 § 11. The statute was intended to hold both spouses responsible for providing necessities of life, which were delineated as goods and services reasonably required for a spouse’s health, welfare, comfort, and education. See *id.*

12. Mont. Code Ann. § 40-2-106 (1997).

13. MONT. CODE ANN. § 40-2-210 (1997).

14. For the sake of variety, the author uses the terms “domestic violence,” “spousal assault,” and “battered” interchangeably to describe victims, and, likewise, “violent husband” and “batterer” are used interchangeably to describe the violent actor. Note that spousal assault includes causing apprehension of bodily injury as well as purposeful or negligent bodily injury. See MONT. CODE ANN. § 40-5-206 (1997).

national and Montana judicial systems. Part III addresses the inadequacy of Montana's statutory provision for attorney fees in domestic violence cases. Part IV presents the preferable and viable option of awarding attorney fees as necessities of life in domestic violence cases where a violent husband threatens his wife's health, welfare, and comfort. Part V emphasizes the need for *pro bono* representation in domestic violence cases, and argues that designating legal services as necessities of life will expand the recruitment and retention of *pro bono* attorneys for these cases. The discussion concludes that Montana law clearly supports the designation of legal fees as necessities of life in certain domestic matters, and the Montana Supreme Court should recognize this designation to increase a domestic violence victim's access to safety and justice.

II. LEGAL ASSISTANCE AND DOMESTIC VIOLENCE

A. *Domestic Violence: The Lingering Problem*

Domestic violence in the United States is responsible for over two million injuries to women per year.¹⁵ This figure may be as high as six million.¹⁶ In fact, domestic violence is the "single greatest cause of injury to women."¹⁷ Muggings, car accidents, and rapes combined do not victimize the number of women seen in emergency rooms due to domestic violence injuries.¹⁸

The history of domestic violence must be addressed to understand domestic violence today.¹⁹ Current domestic violence problems stem from lingering attitudes toward women. While the history of domestic violence is far beyond the scope of

15. See Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983 (1989).

16. See Katherine M. Schelong, *Domestic Violence and the State: Responses To and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 80 (1994).

17. Sewell, *supra* note 15, at 983 (citing P.A. LANGAN & C.A. INNES, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 3 (1986)).

18. See Schelong, *supra* note 16, at 80 (citing Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990)).

19. See Schelong, *supra* note 16, at 83-84 (citing R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 23 (1979); Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title II of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2206-07 (1992)).

this article, some background is illustrative. In early Greek and Roman times, women were classified as property, and a man could beat, divorce, or murder his wife if she threatened his honor or property rights.²⁰ Early Christian attitudes supported death by mutilation or stoning for a woman lacking docility, chastity, and passivity.²¹ Later, the Catholic Rules of Marriage stated a husband could sharply scold, bully and terrify his wife when she committed an offense against him.²² Feudal England forbade women from property ownership and thus denied her status and political power.²³ Additionally, the doctrine of coverture dictated that a husband could beat a misbehaving wife.²⁴ In nineteenth-century America, women gained property rights, and a few courts punished domestic violence.²⁵ However, legal recourse was limited to women of means and the ability to withstand the resulting humiliation and social retribution.²⁶

From 1900 to 1980, domestic violence laws were widely ignored by the courts and police.²⁷ As late as 1974, the notion of "family privacy" prevented the legal system from treating domestic violence as a serious crime.²⁸ In effect, this inaction reinforced men's societal and familial domination over women and as a result women were widely blamed for provoking their

20. See Schelong, *supra* note 16, at 84 (citing DOBASH & DOBASH, *supra* note 19, at 34-37.)

21. See Schelong, *supra* note 16, at 85 (citing Sewell, *supra* note 15, at 986; Deuteronomy 25:11-12 (recommending mutilation as punishment for a wife who touched a man not her husband); Deuteronomy 22:13-21 (relating incident wherein an unmarried woman not a virgin was stoned to death); ANSON SHUPE ET AL., *VIOLENT MEN, VIOLENT COUPLES* 87-89 (1987)).

22. See Schelong, *supra* note 16, at 85 (1994) (citing Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 *YALE J.L. & FEMINISM* 207, 232 n. 144 (1992)).

23. See Schelong, *supra* note 16, at 86 (citing Salina Szechtman, *Wife Abuse: Women's Duties - Men's Rights*, 10 *VICTIMOLOGY: INT'L J.* 253, 254 (1985)).

24. See Schelong, *supra* note 16, at 86-87 (citing 1 *WILLIAM BLACKSTONE, COMMENTARIES* *444).

25. See Schelong, *supra* note 16, at 91-92 (citing LEO KANOWITZ, *WOMAN AND THE LAW: THE UNFINISHED REVOLUTION* 40-41 (1969); Fulgham v. State, 46 Ala. 143 (1871); Commonwealth v. McAfee, 108 Mass. 458 (1871)).

26. See Schelong, *supra* note 16, at 92-93 (citing Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*; 14 *SETON HALL L. REV.* 74, 80 (1983)).

27. See Schelong, *supra* note 16, at 94-95 (citing DOBASH & DOBASH, *supra* note 19, at 64).

28. Lori Heise & Jane Roberts Chapman, *Reflections on a Movement: The U.S. Battle Against Women Abuse*, in *FREEDOM FROM VIOLENCE* 257 (Margaret Schuler ed. 1992) [hereinafter *FREEDOM FROM VIOLENCE*].

husbands' abuse.²⁹

Even today, judicial attitudes toward domestic violence tend to be unsympathetic, misguided, and misinformed.³⁰ For example, judges may believe that domestic violence problems are better dealt with by a social service agency.³¹ However, unlike social service agencies, judges have the exclusive authority to issue binding protective orders and compel law enforcement agents to protect domestic violence victims.³² Or, a judge may be overtly hostile to defensive measures, such as orders of protection, and refuse to issue or enforce them.³³ Such hostility may stem from a perceived need to preserve privacy rights within the home.³⁴ Additionally, some judges actively advocate marital reconciliation over intervention in domestic affairs.³⁵ Such prejudices likely stem from a lack of judicial training about battered women and the complications of domestic violence cases.³⁶

These judicial views are dangerous to a battered woman. Domestic violence victims experience decreased self-esteem, emotional reliance upon the dominant male, and a kind of "learned helplessness"³⁷ resulting from inability to predict or control their batterer's violent actions.³⁸ The relationship between the batterer and victim has three phases.³⁹ First, there

29. See *id.*

30. See Sewell, *supra* note 15, at 1011 (citing U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 55, 57 (1982)).

31. See Sewell, *supra* note 15, at 1011.

32. See REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 29 (1982).

33. See Sewell, *supra* note 15, at 1011-12.

34. See Schelong, *supra* note 16, at 113-14 (citing Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 985 (1991)).

35. See Schelong, *supra* note 16, at 115 (citing Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exception*, 24 J. MARSHALL L. REV. 393, 405 (1991); Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985)).

36. See FREEDOM FROM VIOLENCE, *supra* note 28, at 270-71.

37. See Lenore E. Walker, *THE BATTERED WOMAN* 42-54 (2d ed. 1980).

38. See Cynthia Lynn Barnes, Annotation, *Admissibility of Expert Testimony Concerning Domestic Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior*, 57 A.L.R. 5TH 315, 329 (1998).

39. See Walker, *supra* note 37, at 56-57. There has been some controversy regarding these phases and the corresponding battered woman's syndrome and learned helplessness. One view challenges the scientific validity of Walker's study. See David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997). In addition, some argue that the "syndrome" characterization of battered women is laden with a stereotypical view of women as passive, powerless, victimized, and even crazy, thus hindering explanations for severe actions women may

exists a tension building stage where minor abusive incidents cause a victim to accept blame for the batterer's violent actions.⁴⁰ A second phase includes an acute battering incident where the batterer's uncontrollable rage often results in severe beatings after which the domestic violence victim suffers denial of injuries and isolation.⁴¹ Completing the cycle is a loving phase where the violent husband apologizes and showers his victim with gifts and attention.⁴² A victim may choose to believe that the man in phase three is the loving and dependable man she loves, and this phase often results in reconciliation.⁴³

The psychological ramifications of violence and financial dependence on the batterer make leaving the violent situation extremely difficult.⁴⁴ Often, women must choose whether to be beaten or to expose themselves and their children to poverty.⁴⁵ Furthermore, victims often see no way out of their situation because the violence may increase when women attempt to leave.⁴⁶ A batterer may threaten to harm or ruthlessly track her or others.⁴⁷ A victim may perceive that in the end the batterer will kill her regardless of her decision to remain in or escape the violent relationship.⁴⁸

If a spousal assault victim makes the difficult, and

take against their batterers. See Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213, 232-34 (1992); Sue E. McClure, Note, *The Battered Woman Syndrome and the Kentucky Criminal Justice System: Abuse Excuse or Legitimate Mitigation?*, 85 KY. L.J. 169, 171-72, 176-77 (1997) (citing Michael Dowd, *Dispelling the Myths About the "Battered Women's Defense": Towards a New Understanding*, FORDHAM URB. L. J. 567, 577 (1992); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence*, 21 HOFSTRA L. REV. 1193-94 (1993)). Regardless of the controversy surrounding battered woman's syndrome and its definition, all of these authors agreed that a battered woman possesses certain characteristics that are integral to a court's understanding of her actions. The argument that a violent husband is responsible for providing the victimized spouse with necessities of life, such as health, welfare, and comfort, does not depend on how these characteristics are defined or presented.

40. See Walker, *supra* note 37, at 56-57.

41. See *id.* at 59-64.

42. See *id.* at 65-66.

43. See *id.* at 68-69.

44. See *id.* at 33-34, 47-48.

45. See FREEDOM FROM VIOLENCE, *supra* note 28, at 288-89.

46. See Schelong, *supra* note 16, at 101 (citing Lynn Hecht Schafran, *Carol Stuart and the War on Women: What is the Legal Community's Response?*, 75 MASS. L. REV. 51 (1990)).

47. See Schelong, *supra* note 16, at 101 (citing Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 283 (1985)).

48. See Walker, *supra* note 37, at 75.

sometimes dangerous, decision to seek protection from her spouse, competent legal representation is vital.⁴⁹ Competent legal counsel can increase the victim's awareness of her rights and help her through the legal red tape in the face of her husband's threats to take her children, home, and financial support.⁵⁰ In recognition of the importance of legal services to domestic violence victims, some states have mandated in their domestic violence statutes that offenders must, if financially able, provide for the victim's attorney fees and court costs.⁵¹ Permitting award of attorney fees encourages low-income battered women to seek an attorney's services for protection and may deter the batterer by providing a form of financial punishment.⁵²

B. Montana's Problem

In 1986, Montana created the crime of partner and family member assault.⁵³ A person commits the offense of partner or family member assault if the person purposely or knowingly causes bodily injury to a partner or family member, negligently causes bodily injury to a partner or family member using a weapon, or purposely or knowingly causes reasonable apprehension of bodily injury.⁵⁴ The Partner and Family Member Assault Act clarifies arrest powers and promotes arrest as the preferred response to incidences of domestic violence.⁵⁵

49. See *id.* at 258.

50. See *id.*

51. See MISS. CODE ANN. § 93-21-15(f) (1998); N.H. REV. STAT. ANN. § 173-B:10.II(h) (1997); N.Y. FAM. CT. ACT. § 812 (McKinney 1998); 23 PA. CONS. STAT. § 6108(a)(8)(1998); and WASH. REV. CODE ANN. § 26.50.060(f) (1998).

52. See *Krassnoski v. Rosey*, 684 A.2d 635, 638 (Pa. 1996) (awarding fees to *pro bono* counsel both encourages victims to take advantage of Pennsylvania's Protection from Abuse Act and acts as a financial disincentive to deter batterers from violent conduct). While providing legal assistance as part of a domestic violence statute may encourage victims to seek the legal advice they require, it seems unlikely that the threat of fee payment will deter the batterer from his behavior, especially considering the characteristics of a typical batterer. See Walker, *supra* note 37, at 24, 35-41. Requiring a batterer to pay his spouse's legal fees under the doctrine of necessities would accomplish the goal of affording legal assistance to the victim and abandon an unrealistic deterrent argument.

53. See MONT. CODE ANN. § 45-5-206 (1997). See also Women's Law Caucus, University of Montana, *Montana's New Domestic Abuse Statutes: A New Response to an Old Problem*, 47 MONT. L. REV. 403, 408 (1986).

54. See MONT. CODE ANN. § 45-5-206(1)(a)-(c) (1997).

55. See MONT. CODE ANN. § 46-6-311(2)(a) (1997). See also Women's Law Caucus, *supra* note 53, at 409.

Additionally, police officers must provide the assault victim, at minimum, information about local shelters and the right to file for an order of protection.⁵⁶ Finally, police officers must file a written report when no arrest occurs.⁵⁷ In essence, Montana's response to domestic violence "acknowledges the unacceptability of violence in the home and promotes a system designed to interrupt and end the cycle of violence."⁵⁸

While Montana's legislative and law enforcement responses to domestic violence have improved, problems still exist in some Montana courts. Domestic violence victims often are simply not believed if there are no visible cuts and bruises or police records to substantiate the violence.⁵⁹ If physical signs of violence are obvious, the victim may be criticized for not escaping the violent relationship sooner.⁶⁰ Courts of limited jurisdiction handle the majority of domestic violence cases in Montana, and efforts at judicial education regarding domestic violence are sometimes not well accepted.⁶¹ Instead of focusing on the offender and the offense, some courts focus on the victim's behavior and options.⁶² When the victim's behavior is scrutinized rather than the offender's criminal conduct, these courts continue to discount the criminal aspect of domestic violence. Consequently, judicial perceptions about domestic violence remain a serious problem in some Montana courts.⁶³

Judicial attitudes in Montana reflect the need not only for more education but also for adequate legal representation for the domestic violence victim. Unlike other states which provide payment for legal services required by domestic violence victims, Montana does not.⁶⁴ An offender convicted of partner and family member assault, if able, must pay the victim's "reasonable

56. See MONT. CODE ANN. § 46-6-602 (1997). See also Women's Law Caucus, *supra* note 53, at 410.

57. See MONT. CODE ANN. § 46-6-601 (1997). See also Women's Law Caucus, *supra* note 53, at 410.

58. Women's Law Caucus, *supra* note 53, at 419.

59. Klaus Sitte, Remarks at the Panel Discussion on Domestic Violence and the Law sponsored by the University of Montana Women's Law Caucus (Nov. 19, 1998).

60. *Id.*

61. Judy Wang, Remarks at the Panel Discussion on Domestic Violence and the Law sponsored by the University of Montana Women's Law Caucus (Nov. 19, 1998).

62. *Id.*

63. *Id.*

64. See MONT. CODE ANN. § 45-5-206(5) (1997). *But see* MISS. CODE ANN. § 93-21-15(f) (1998); N.H. REV. STAT. ANN. § 173-B:10.II(h) (1997); N.Y. FAM. CT. ACT. § 812 (McKinney 1998); 23 PA. CONS. STAT. § 6108(a)(8) (1998); and WASH. REV. CODE. ANN. § 26.50.060(f) (1998).

actual medical, housing, wage loss, and counseling costs.”⁶⁵ Legal costs are absent from the list.

While amending Montana’s statute to include the offender’s responsibility for legal fees may seem like an appropriate solution, it is not an adequate answer. The legal fees covered by such an amendment would only cover the costs of orders of protection. If an attorney’s assistance is not required, there are usually no costs for these.⁶⁶ The amendment would not cover the legal costs of marital dissolution, which can be the ultimate solution to the problem of family violence.

Rather than amending the Partner and Family Member Assault Act, all legal protection expenses should be designated as necessities of life in domestic violence cases. Then, the violent husband would be liable under Montana law for all legal fees associated with the domestic violence victim’s access to health, welfare, and comfort.⁶⁷

III. INADEQUACY OF MONTANA’S STATUTORY PROVISION FOR ATTORNEY FEES IN DOMESTIC VIOLENCE CASES

Currently, Montana law does not mandate spousal liability for attorney fees in dissolution proceedings.⁶⁸ Section 40-4-110(1) states:

The court from time to time after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under chapters 1 and 4 and for professional fees, including sums for legal and professional services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the professional, who may enforce the order in the professional’s name.

The purpose of the statute is to “ensure that both parties have timely and equitable access” to the courts for dissolution and other marital proceedings.⁶⁹

The statute is inadequate for victims of domestic violence in

65. MONT. CODE ANN. § 45-5-206(5) (1997).

66. See MONT. CODE ANN. § 40-15-204(8) (1997). See also Women’s Law Caucus, *supra* note 53, at 416-18. For a discussion of when an attorney’s services are necessary to obtain an order of protection, see *infra* notes 100-101 and accompanying text.

67. See MONT. CODE ANN. §§ 40-2-106, -205, -210 (1997).

68. See MONT. CODE ANN. § 40-4-110 (1997).

69. MONT. CODE ANN. § 40-4-110(2) (1997).

three respects. First, the requisite procedure for obtaining attorney fees in a dissolution proceeding may deter a victim from seeking fees because she may have to testify regarding the violence at a hearing where the batterer is likely to be present. Second, the discretionary award of fees may impede an attorney's ability to recoup fees. Third, the statute fails to cover attorney fees incurred for orders of protection. These three drawbacks are obstacles to the victim's recruitment and retention of a *pro bono* attorney and her access to safety.

A. Procedure

A spouse may be ordered to pay the other spouse's attorney fees before, during, or after dissolution proceedings.⁷⁰ The standard for an award of attorney fees is as follows:

The petitioning party must make a showing of necessity The award must be reasonable, and must be based on competent evidence Reasonableness is shown by means of a hearing allowing for oral testimony, the introduction of exhibits, and the opportunity to cross-examine.⁷¹

In short, the award must be 1) based on necessity, 2) reasonable, and 3) supported by competent evidence.⁷² The district court must conduct a separate hearing following dissolution proceedings to determine whether the award of fees is reasonable.⁷³ The district court's determination will be disturbed only upon an abuse of discretion,⁷⁴ that is, if the award of fees is not supported by substantial evidence.⁷⁵ For example, an award of attorney fees will be reversed if the district court declines to hear evidence relating to the necessity and reasonableness of the award.⁷⁶ This determination is properly made only when a spouse is afforded the opportunity to

70. See MONT. CODE ANN. § 40-4-110(1) (1997).

71. *In re Marriage of Laster*, 197 Mont. 470, 479, 643 P.2d 597, 602 (1982) (citation omitted) (holding that testimony and an uncontested affidavit showing the wife's costs met the necessity requirement).

72. See *Pfeifer v. Pfeifer*, 282 Mont. 461, 466, 938 P.2d 684, 687 (1997) (citation omitted) (reversing award of attorney fees for failure to provide substantial evidence of necessity).

73. See *id.* at 466, 938 P.2d at 687-88.

74. See *In re Marriage of Lee*, 282 Mont. 410, 423, 938 P.2d 650, 658 (1997) (holding husband not liable for attorney fees because both parties lacked financial resources).

75. See *Pfeifer*, 282 Mont. at 465-66, 938 P.2d at 687.

76. See *In re Marriage of Cox*, 266 Mont. 67, 74, 878 P.2d 903, 908 (1994).

present evidence and refute the other spouse's claim for an award of fees.⁷⁷ In determining the necessity of an award, the district court must consider more than the parties' respective financial resources.⁷⁸ The court does not elaborate on what exactly meets these requirements, but it does mandate evidence above and beyond their financial situation.⁷⁹ Under *Pfeifer v. Pfeifer*, the parties are required to produce evidence which would clarify how their financial situation leads to and supports an award of attorney fees.⁸⁰

A woman seeking a divorce from a violent husband is taking a great step towards safety and a better life. For victims of domestic violence, dissolution proceedings should not be made more difficult than necessary. Yet, § 40-4-110 does exactly this. The statute requires a victim, after obtaining her divorce and finally ending a violent relationship, to go through a separate hearing to show substantial evidence as to the reasonableness and necessity of her request for attorney fees.⁸¹

To meet the *Pfeifer* standard, a spousal assault victim may have to reveal the household violence to show the substantial evidence necessary to meet these necessity and reasonableness requirements. Evidence of domestic violence can show the emotional and financial problems that would clarify her financial situation⁸² and support an award of fees.

But the victim would be forced to discuss the violence in front of strangers with her violent husband not only present, but *afforded the opportunity to cross-examine her and refute her claim*.⁸³ This procedure postpones the parting, giving the violent husband more time to physically or mentally harm his spouse by venting his anger or begging for forgiveness and reconciliation. In effect, this could afford the desperate violent husband another opportunity to humiliate, manipulate, harass, and even attack his wife.⁸⁴ This experience would emotionally drain the victims, many of whom have been threatened with

77. See *id.* at 74, 878 P.2d at 907.

78. See *Pfeifer v. Pfeifer*, 282 Mont. 461, 466-67, 938 P.2d 684, 688 (1997) ("The court's statement that it considered the parties' financial resources, without more, is an insufficient basis upon which to determine that an attorney fee award is necessary.").

79. See *id.* at 466-67, 938 P.2d at 688.

80. See *id.* at 467, 938 P.2d at 688.

81. See *id.* at 466, 938 P.2d at 687-88.

82. See *supra* notes 44-45 and accompanying text.

83. See *In re Marriage of Cox*, 266 Mont. 67, 74, 878 P.2d 903, 907 (1994).

84. See *supra* notes 46-48 and accompanying text.

greater harm if they leave their husbands and many of whom remain fearful of the consequences of their decision.⁸⁵

As a result, domestic violence victims, with good reason, would be deterred from seeking an award of fees. Because a victim would not likely seek fees under such a procedure, a private attorney might be less likely to take her case. The procedural aspects of § 40-4-110 end up depriving the victim of adequate legal representation.⁸⁶

B. The Court's Discretion

The award of attorney fees is largely discretionary with the district court,⁸⁷ not mandatory.⁸⁸ In addition to showing that the award is necessary, reasonable, and supported by competent evidence,⁸⁹ an attorney seeking fees must also show that she represented the prevailing party.⁹⁰

A prevailing party is not necessarily the party who is awarded a money judgment, and often there may be no prevailing party.⁹¹ For instance, where the wife prevails on the payment of medical and travel expenses, and her husband prevails on child support and washer and dryer issues, no party prevails.⁹²

The discretionary nature of attorney fee awards makes it difficult for an attorney to determine whether to take a domestic relations case on a *pro bono* basis. If the spousal assault victim is unable to clarify her financial situation because she does not wish to discuss the household violence, it is within the court's discretion to withhold a fee award for lack of substantial evidence of necessity and reasonableness. Alternatively, if the spousal assault victim is not the prevailing party in the dissolution, the court not only may, but probably must, deny an

85. See *supra* notes 46-48 and accompanying text.

86. The recruitment and retention of *pro bono* attorneys for abuse victims is increasingly important. See *infra* notes 220-228 and accompanying text.

87. See *In re Marriage of Lee*, 282 Mont. 410, 423, 938 P.2d 650, 658 (1997).

88. See *In re Marriage of Carlson*, 214 Mont. 209, 218-19, 693 P.2d 496, 501 (1984); *In re Support of Rockman*, 217 Mont. 498, 502, 705 P.2d 590, 592 (1985).

89. See *supra* notes 71-72 and accompanying text.

90. See *In re Marriage of Jensen*, 223 Mont. 434, 441, 727 P.2d 512, 517 (1986) (declining to award fees).

91. See *In re Marriage of Herbert*, 255 Mont. 69, 71-2, 840 P.2d 584, 586 (1992) ("There is no prevailing party where both parties gain a victory but also suffer a loss.").

92. See *id.* at 71-72, 840 P.2d at 586.

award of attorney fees.⁹³ This would probably be the case since policies of equitable settlement in dissolution proceedings make it difficult for one spouse to “prevail” over the other.

A wife who obtains primary parenting responsibilities, child support, and maintenance may not be a prevailing party and will not receive an attorney fee award should her husband prevail on other issues such as division of household goods and property. This uncertainty of payment could deter an attorney from taking a difficult domestic violence and dissolution of marriage case at no charge to the client, thus denying the low-income victim access to competent representation and safety.

C. Orders of Protection

Orders of protection represent an effort by the Montana legislature to provide for “the safety and protection of all victims of partner and family member assault, victims of sexual assault and victims of stalking.”⁹⁴ In 1997, 2,612 partner violence victims received an order of protection in Montana.⁹⁵ These orders prevent the violent individual from contact with the victim at home or at work.⁹⁶ It is a criminal offense for the batterer to disobey the court’s restrictions.⁹⁷ As a result, a victim of domestic violence “is more likely to be safe from further threats and crimes committed by the offender.”⁹⁸

There is currently no provision in Montana law for financial assistance to those domestic violence victims who require an attorney’s assistance in obtaining an order of protection.⁹⁹ Section 40-4-110 provides for the award of attorney fees only in the case of marital dissolution and related proceedings.

Many domestic violence victims with limited or restricted economic resources may request an order of protection *pro se*, but others need the advice of counsel.¹⁰⁰ When a spousal assault

93. See *Jensen*, 223 Mont. at 441, 727 P.2d at 517.

94. MONT. CODE ANN. § 40-15-101 (1997). See also Brief Amicus Curiae of the Missoula Family Violence Council at 2-4, *Missoula YWCA v. Bard*, No. 98-256 (Mont. filed July 8, 1998) (providing a summary of current status of orders of protection).

95. See Brief Amicus Curiae of the Missoula Family Violence Council at 3, *Bard* (No. 98-256).

96. MONT. CODE ANN. § 40-15-103, -201 (1997).

97. MONT. CODE ANN. § 45-5-220 (1997).

98. See Brief Amicus Curiae of the Missoula Family Violence Council at 2, *Bard* (No. 98-256).

99. See *supra* notes 64-65 and accompanying text.

100. See Brief Amicus Curiae of the Missoula Family Violence Council at 3, *Bard* (No. 98-256). See also Appellant’s Brief at 2, *Bard* (No. 98-256) (domestic abuse victim

victim knows that her husband is represented by an attorney, she may be too frightened or intimidated to appear in court without legal assistance, and she is likely to require an attorney's help in obtaining an order of protection.¹⁰¹

A low-income victim could better afford access to safety and justice if legal services were designated as necessities of life for the victims of domestic violence. Under Montana's statutory scheme, the attorney who helps a domestic violence victim obtain an order of protection, and thus provides for the victim's health, welfare, and comfort,¹⁰² could be assured payment of reasonable fees and costs from the violent spouse. The attorney's services would be necessities of life for which the spouse is liable.¹⁰³

IV. A BETTER ALTERNATIVE: LEGAL SERVICES AS NECESSARIES OF LIFE UNDER § 40-2-106

The obstacles posed by § 40-4-110 can be easily avoided. Designating legal services as necessities of life offers an alternative, and preferable, theory on which a *pro bono* attorney who represents a domestic violence victim may recover her fees. If an attorney is able to show that she represented a domestic violence victim, providing for her health, welfare, and comfort,¹⁰⁴ then the court must hold the violent spouse liable for the attorney's reasonable costs pursuant to spousal and contractual obligations underlying §§ 40-2-106 and 40-2-205.¹⁰⁵

required assistance of counsel in obtaining two orders of protection.)

In Missoula, a combined effort of the Missoula Family Violence Council and the Crime Victims Advocates located in the City Attorney's Office resulted in a Pro Bono Program which provides volunteer attorneys to represent indigent victims of domestic violence at hearings to obtain orders of protection. (These attorneys do not provide assistance for dissolutions or custody actions.) However, these programs do not serve other Montana communities, and many spousal assault victims with limited means or without access to family finances are left without adequate legal assistance to obtain an order of protection. Telephone Interview with Klaus Sitte, Deputy Director of Montana Legal Services, in Missoula, Mont. (January 20, 1998); Telephone Interview with Judy Wang, Chairperson of Missoula Family Violence Council, in Missoula, Mont. (January 24, 1998).

101. Telephone Interview with Klaus Sitte, Deputy Director of Montana Legal Services, in Missoula, Mont. (January 20, 1998); Telephone Interview with Judy Wang, Chairperson of Missoula Family Violence Council, in Missoula, Mont. (January 24, 1998).

102. See MONT. CODE ANN. § 40-2-210 (1997).

103. See MONT. CODE ANN. §§ 40-2-106, -205 (1997). See also *infra* notes 154-158, 163-170 and accompanying text.

104. See MONT. CODE ANN. § 40-2-210 (1997).

105. See MONT. CODE ANN. §§ 40-2-106, -205 (1997).

Designating legal services as necessities of life is a viable option supported by United States and Montana law. With this option, more attorneys will take these difficult cases, thereby expanding the domestic violence victim's access to safety and justice.

A. *Cross-Section of Legal Services as Necessaries of Life in the United States*

National precedent exists for deeming legal services as necessities of life in certain circumstances. However, some states have a history of denying such fees in dissolution actions and others deny fees in such actions today. Following is an overview of pertinent law throughout the United States.

1. *Criminal Actions*

Generally, a husband is liable for legal services necessary for his wife's protection.¹⁰⁶ A husband has been held liable for attorney fees incurred in defending his wife in a criminal action.¹⁰⁷ For example, the New York Court of Appeals held that legal services rendered to defend a wife against charges of libel, assault, and grand larceny were chargeable to her husband.¹⁰⁸ The court reasoned that "when a wife living with her husband . . . is arrested on a criminal charge or prosecuted in a civil action which may result in her incarceration, the necessity for a lawyer may be as urgent and important as the necessity for a doctor when she is sick."¹⁰⁹ In addition, the court stated that the husband could not avoid the responsibility to furnish legal services for his wife's protection by "merely providing a house and eatables."¹¹⁰

Twenty-five years later, the Supreme Court of Colorado relied on the *Elder* rationale when holding a husband liable for legal expenses rendered in defending his wife against murder charges.¹¹¹ The court labeled the attorney's services as necessities and went on to emphasize that the "suffering and

106. See generally 41 AM. JUR. 2D *Husband and Wife* § 201 (1995).

107. See *Read v. Read*, 202 P.2d 953, 957 (Colo. 1949); *Fenters v. Fenters*, 231 S.E.2d 741, 743 (Ga. 1977); *DuBois v. DeLarm*, 578 A.2d 1250, 1256-57 (N.J. 1990); *Elder v. Rosenwasser*, 144 N.E. 669, 670 (N.Y Ct. App. 1924).

108. See *Elder*, 144 N.E. at 669-70.

109. *Id.* at 670.

110. *Id.* at 671.

111. See *Read*, 202 P.2d at 958.

anguish” that may result from a conviction could be as devastating as “bodily ailments.”¹¹²

2. *Divorce Actions*

While there is general agreement that legal services are necessities of life while the marital relation exists, early case law reflected the negative response of courts faced with the question of whether a husband was liable for attorney fees incurred by the wife in a divorce action. Courts were especially reluctant when the wife’s attorney brought a separate action against the husband to collect his fees.¹¹³ Courts declined to award fees in divorce actions primarily because divorce was not seen as necessary for the wife’s protection. According to the New Hampshire Supreme Court, “it is never necessary for the safety of the wife, as such, to obtain a divorce from her husband or resist his obtaining one from her.”¹¹⁴ The Arkansas Supreme Court agreed with this rationale, stating that it could not understand “how a suit for divorce could be necessary, or actually afford protection to the wife against personal abuse on the part of the husband.”¹¹⁵ Finally, the Wisconsin Supreme Court stated that a husband is required to supply necessities to his wife “to sustain her as his wife, and not to provide for her future condition as a single woman or perhaps as the wife of another man.”¹¹⁶

However, recognizing divorcing wives’ need for access to the courts and husbands’ fair notice that divorce might occur, two early decisions supported a husband’s liability for his wife’s attorney fees incurred in a divorce action.¹¹⁷ In Texas, an attorney sued his client’s husband for his services rendered prior to the reconciliation of his client and her husband.¹¹⁸ The Texas Court of Civil Appeals acknowledged that the majority of

112. *See id.* at 957.

113. *See Kincheloe v. Merriman*, 16 S.W. 578, 579 (Ark. 1891); *Sumner v. Mohn*, 190 P. 368, 369-70 (Cal. Dist. Ct. App. 1920); *Yeiser v. Lowe*, 69 N.W. 847, 848 (Neb. 1897); *Morrison v. Holt*, 42 N.H. 478, 482 (N.H. 1861); *Clark v. Burke*, 27 N.W. 22, 23-24 (Wis. 1886). In *Bard*, the attorney brought a separate action against his client’s husband to collect his fees. *See supra* note 2.

114. *Morrison*, 42 N.H. at 480.

115. *See Kincheloe*, 16 S.W. at 579.

116. *See Clark*, 27 N.W. at 24.

117. *See Ceccato v. Deutschman*, 47 S.W. 739, 739-40 (Tex. App. 1898); *Gibson v. Gibson*, 122 P. 15, 16 (Wash. 1912).

118. *Ceccato*, 47 S.W. at 739.

American jurisdictions did not hold husbands liable for legal fees associated with divorce proceedings.¹¹⁹ Yet, the court held the husband responsible for the attorney fees reasoning that a wife's right to sue for divorce "would be shorn of all efficacy if she was denied the means of getting into the court, as would be the effect in most instances if the husband could not be held liable for the expenses of the suit."¹²⁰ Similarly, the Washington Supreme Court stated that the husband's liability for attorney fees was "an assumed risk which the husband takes with him from the marriage altar, and which follows him until death or divorce squares the debt."¹²¹

If the attorney fees were necessary for the wife's protection, still other courts permitted a husband's liability for payment.¹²² For instance, the Iowa Supreme Court reasoned that the husband's liability rested solely on the appearance that a wife's prosecution or defense, in civil as well as criminal matters, was necessary for her protection.¹²³

In later decisions, some courts did designate legal services in divorce actions as necessaries of life. The California Fifth District Court of Appeals allowed a wife's attorneys to enforce a writ of execution against her husband's earnings (despite the couple's reconciliation), stating that providing legal services and advancing costs plainly qualified as "common necessaries of life" for the low-income spouse.¹²⁴ The California court cited precedent declaring that "money awarded to a wife to pay her attorney fee in a divorce case is as much for her support as

119. *Id.*

120. *Id.* In a similar case, where a husband and wife reconciled and the wife's attorney commenced an action against her husband, the court held that the marital relationship imposed an implied liability on the husband and the attorney must be paid if he acted in good faith and there was no evidence of collusion or purpose of oppression or vindication of a right. *Preston v. Johnson*, 21 N.W. 606, 607 (Iowa 1884). Four years later, in another unsuccessful divorce suit, the Iowa Supreme Court upheld *Preston* when deciding that the wife's attorney could recover his attorney fees from her husband because the legal services were necessary. See *Clyde v. Peavy*, 36 N.W. 883, 884 (Iowa 1888).

121. *Gibson*, 122 P. at 16.

122. See *Thorn v. Kelley*, 134 N.W. 2d 545, 549 (Iowa 1965) (holding husband not liable for wife's attorney fees because she failed to prove husband had been guilty of "inhuman treatment" and divorce was not granted.) See also *Wald v. Wald*, 99 N.W. 720, 721 (Iowa 1904); *Wick v. Beck*, 153 N.W. 836, 843 (Iowa 1915) (reversing husband's liability for wife's attorney fees as wife failed to show that her attorney's services in a divorce action were necessary for her protection).

123. See *Wick*, 153 N.W. at 843.

124. See *In re Marriage of Pallesi*, 140 Cal Rptr. 842, 844 (Cal. Ct. App. 1977).

money for a doctor's fee or a grocery bill."¹²⁵ Likewise, the New Jersey Supreme Court reasoned that if the wife instituted the divorce action in good faith and was unable to afford attorney fees, and if the husband could afford the fees, then the counsel fees were included as necessities for which the husband was responsible.¹²⁶

Other decisions, while not mentioning necessities specifically, have found spousal liability for legal services in divorce actions based on the husband's common law obligation to provide for his wife.¹²⁷

In contrast, the Utah Supreme Court refused to consider attorney fees associated with a divorce action as necessities or "expenses of the family."¹²⁸ The Utah court established that items and services were necessities of the family if they "promoted the family."¹²⁹ Because divorce disrupts the family unit, attorney fees could not be necessary family expenses.¹³⁰

B. Advantage of the Necessaries of Life Designation

The advantage of the necessities of life designation is that third party creditors, such as *pro bono* attorneys, are more likely to be paid. The necessities rule "benefits the providers of goods and services by assuring them greater certainty of payment when they extend credit to families."¹³¹ Courts may enforce these liabilities as necessities for which each spouse is responsible on the theory of an agency relationship between husband and wife or a theory of implied contract.¹³² The court

125. *Id.* (citing *Henry v. Henry*, 6 Cal. Rptr. 418, 422 (Cal. Ct. App. 1960)). *See also* *McIntosh v. McIntosh*, 26 Cal. Rptr. 28 (Cal. Ct. App. 1962).

126. *See* *Williams v. Williams*, 281 A.2d 273, 275 (N.J. 1971). *See also* *Romeo v. Romeo*, 16 B.R. 531, 536 (Bankr. D.N.J. 1981); *Weiner v. Weiner*, 290 A.2d 307, 309 (N.J. 1972); *Pelusio v. Pelusio*, 328 A.2d 10 (N.J. Super. Ct. App. Div. 1974).

127. *See* *Paxton v. Porter Superior Court*, 467 N.E. 2d 1205, 1207 (Ind. 1984) (holding husband liable for wife's attorney fees despite the fact that she died before the divorce was final).

128. *See* *Morrison v. Federico*, 232 P.2d 374, 377 (Utah 1951).

129. *See id.*

130. *See id.*

131. *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 328 (Wis. 1982).

132. *See generally* 41 AM. JUR. 2D *Husband and Wife* § 184 (1995). *See also* *Allen v. Keating*, 517 N.W.2d 830, 831 (Mich. 1994) (agency relationship); *McQuay v. McQuay*, 86 Mont. 535, 538, 284 P. 532, 533 (1930) (agency relationship); *Battle & Sons Funeral Home v. Chambers*, 631 N.E.2d 203, 204 (Ohio 1993) (implied contract). A husband and wife cannot have a true agency relationship. Instead, the power of a wife to obtain necessities and bind her husband for payment stems from restitutional power and the desirability of having a spouse or parent perform family duties. *See* RESTATEMENT

may also impose spousal liability when there exists a statute which implicitly or expressly requires payment for necessities.¹³³

C. Montana's Constitution, Statutory Scheme and Case Law Support Legal Services as Necessaries of Life in Domestic Violence Matters

Fees for legal services rendered in domestic violence matters must be designated as necessaries of life to avoid the unnecessary and difficult aspects of § 40-4-110 and to encourage the recruitment and retention of *pro bono* counsel to represent persons of limited or restricted economic means. Montana law supports legal services as necessaries of life for domestic violence victims.

1. Constitution

The Montana Constitution states that all individuals are born free and have specific inalienable rights.¹³⁴ These rights include “a clean and healthful environment and the rights of pursuing life’s basic necessities . . . and seeking their safety, health, and happiness in all lawful ways.”¹³⁵ Surely, freedom from violence is essential to safety, health, and happiness.

2. Statutes

Generally, spouses are not liable for each other’s debts.¹³⁶ However, § 40-2-106 provides that “the expenses for necessaries of the family and of the education of the children are chargeable upon the property of both husband and wife, or either or them, and in relation thereto they may be sued jointly and separately.”¹³⁷ A companion statute specifies the need for a spouse to provide the other spouse with necessaries of life:

The earnings and accumulations of a married person are not liable

(SECOND) OF AGENCY § 14(I) cmt. b (1958). However, many courts still refer to the marital relationship as an agency relationship. See RESTATEMENT (SECOND) OF AGENCY § 14(I) cmt. a (1958).

133. See generally 41 AM. JUR. 2D *Husband and Wife* § 184 (1995). See also *Citizens & S. Nat'l Bank v. Parker*, 245 S.E.2d 48, 49 (Ga. Ct. App. 1978) (implied by statute); *Holliday v. Holliday*, 358 So.2d 618, 620 (La. 1978) (expressly provided by statute).

134. MONT. CONST. art. II, § 3.

135. *Id.*

136. MONT. CODE ANN. § 40-2-106 (1997) (“Neither husband nor wife, as such, is answerable for the acts of the other or liable for the debts contracted by the other . . .”).

137. MONT. CODE ANN. § 40-2-106 (1997).

for the debts of that person's spouse except for debts incurred for necessary articles procured for the use and benefit of the married person, his spouse, and minor children, taking into consideration the earnings, resources, and general standard of living of such persons.¹³⁸

These two statutes clearly show that spouses must provide necessities of life to each other and to their family.

Montana defines necessities of life broadly. The pertinent statute defines necessities as:

all such goods and services as are reasonably required to provide for the health, welfare, comfort, and education of the married person, his spouse, and minor children, taking into consideration the earnings, resources, and general standard of living of such persons.¹³⁹

The Montana legislature defined necessities of life, but the terms employed—health, welfare, and comfort—leave much room for interpretation by the Montana Supreme Court. Yet, the terms of this definition have never been interpreted by the court. The court could apply Montana's statute to a domestic violence situation, and the court could reasonably conclude that the services rendered by an attorney to a victim of domestic violence are necessary to provide for her health, welfare, and comfort.

a. Health

A woman's health clearly depends upon freedom from violence. In Montana, women are treated every day for physical injuries inflicted by their spouses. While no Montana case specifically defines health for purposes of the statute, Black's Law Dictionary defines health as the "state of being hale, sound, or whole in body, mind, or soul, well-being. Freedom from pain or sickness."¹⁴⁰

Certainly, freedom from violence is essential to being whole in body, mind, and soul. Freedom from violence *is* freedom from pain or sickness.

One way to provide for health is to ensure proper medical services to the domestic violence victim. The Montana legislature has no qualms about holding a batterer liable for his

138. MONT. CODE ANN. § 40-2-205 (1997).

139. MONT. CODE ANN. § 40-2-210 (1997).

140. BLACK'S LAW DICTIONARY 721 (6th ed. 1990).

victim's medical care.¹⁴¹ If the offender is able to pay, he must pay the partner or family member's "reasonable actual medical costs" and "counseling costs."¹⁴² Also, under § 40-2-106 and prior case law, medical care is a necessary of life for which each spouse is responsible.¹⁴³

A second way to provide for health is to ensure adequate legal services for the domestic violence victim. Unlike a physician, who is limited to treating the wounds inflicted, an attorney can attempt to end the infliction of wounds altogether. An attorney may provide for the victim an order of protection which can effectively stop the violence. An attorney can aid the victim in dissolution proceedings which will in effect remove her from her violent household. In this way, legal services play a greater role than medical services in ensuring long-term health and freedom from pain and sickness. Competent counsel provides for the mental and physical well-being of the client.

It would be quite ironic if Montana law required a violent spouse to pay for the medical services required by his spouse as a result of the violence, but placed no liability on the batterer for the legal services his spouse required to escape the violent relationship. If this were the case, Montana law would actively perpetuate the cycle of violence in Montana homes.

Fortunately, Montana's necessities of life statute is capable of providing a cure rather than a band-aid for the problem of domestic violence. The statute is broad enough to encompass spousal responsibility for attorney fees when one spouse's health is threatened by the other spouse's violent acts. A spouse is liable for "all such goods and services as are reasonably required to provide for the health . . . of the married person . . ." ¹⁴⁴ An attorney's services, in the case of domestic violence, are reasonably required to provide for the health of a married person. As such, these legal services should be considered necessities of life.

b. Welfare

Again, no Montana case defines welfare for purposes of the

141. See MONT. CODE ANN. § 45-5-206(5) (1997).

142. *Id.*

143. See MONT. CODE ANN. § 40-2-106 (1997); *McQuay v. McQuay*, 86 Mont. 535, 538-39, 284 P. 532, 533 (1930) (stating wife's medical and funeral expenses were necessities of life for which husband was liable).

144. MONT. CODE ANN. § 40-2-210 (1997).

statute. But an analysis of the necessity for an attorney's services to provide for the welfare of a spousal assault victim is essentially the same as an analysis of an attorney's provision for the spouse's health.

Welfare may be defined as "well-doing or well-being in any respect; the enjoyment of health and common blessings of life; exemption from any evil or calamity; prosperity; happiness."¹⁴⁵ As previously argued, freedom from violence is a component of health. Surely, freedom from violence also ensures "well-being," "exemption from evil or calamity," and "happiness." An attorney's services foster her client's welfare by promoting freedom from violence, in the form of an order of protection and/or a marital dissolution. As such, these legal services should be considered necessities of life.

c. Comfort

Finally, comfort may be described as "benefit, consolation, contentment, ease, enjoyment, happiness, pleasure, or satisfaction."¹⁴⁶ As with health and welfare, the Montana Supreme Court has provided no interpretation for this term. Surely, freedom from violence is crucial to an individual's comfort. In a violent relationship, a spouse is effectively deprived of ease, contentment, consolation, and other elements of comfort. When an attorney provides the legal services necessary for a domestic violence victim to achieve a sense of comfort, Montana law suggests that the services are necessities of life for which the violent spouse is liable.

d. Shelter

In the case currently pending before the Montana Supreme Court,¹⁴⁷ the Missoula Family Violence Council argued that shelter is a necessary of life in Montana and "a fundamental requirement of shelter is that it be safe."¹⁴⁸

Safety may be ensured to the victim of spousal assault through the issuance of an order of protection, or ultimately, a marital dissolution. In the case of orders of protection, the

145. BLACK'S LAW DICTIONARY 1594 (6th ed. 1990).

146. *Id.* at 267.

147. See *Missoula YWCA v. Bard*, No. 98-256 (Mont. filed July 8, 1998).

148. See Brief Amicus Curiae of the Missoula Family Violence Council at 1, *Bard* (No. 98-256).

legislative intent was “to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and stalking.”¹⁴⁹

In order to advance the safety and protection of a domestic violence victim through orders of protection or marital dissolution, the services of an attorney are vital. The attorney, in essence, provides the victim the legal tools to obtain shelter without violence—shelter which is safe. As such, these legal services are necessary articles for which a violent spouse must be liable.

e. Procedure

Whereas § 40-4-110 impedes an award of attorney fees by placing an undue burden on the domestic violence victim, designating legal services as necessities of life under § 40-2-106 allows an attorney to collect fees without excess hardship.

For instance, in *McAlear v. Unemployment Compensation Commission*, the court designated the attorney’s services as necessities of life after the attorney petitioned the court for a fee award on that theory.¹⁵⁰ His clients were not required to attend a separate hearing, thus the clients were not as personally involved in the procedure. The necessity and reasonableness of McAlear’s fee request were for the court and the attorney to address.

The spousal assault victim’s attorney could separately petition for a fee award under § 40-2-106. The attorney then must show that she provided services reasonably required for her client’s health, welfare, and comfort.¹⁵¹ The attorney could provide an affidavit from her client stating the circumstances of violence. Police reports, hospital reports, and previous orders of protection, if available, could also substantiate the incidence of violence. The husband would be permitted the chance to

149. See MONT. CODE ANN. § 40-15-101 (1997). See also Brief Amicus Curiae of the Missoula Family Violence Council at 3-4, *Bard* (No. 98-256).

150. See 145 Mont. 458, 463, 405 P.2d 219, 221-22 (1965). McAlear defended three out-of-work loggers accused of fraud by the Montana Unemployment Commission. After all three loggers were cleared of the fraud charges and received benefits, McAlear petitioned the court for his fees. *Id.* at 462-63, 405 P.2d at 221-22. While *McAlear* was not decided under MONT. CODE ANN. § 40-2-106, the procedural aspects of *McAlear* are relevant to a discussion of awarding attorney fees pursuant to the statute. For an analysis of the case facts and the court’s holding, see *infra* notes 185-190 and accompanying text.

151. See MONT. CODE ANN. § 40-2-210 (1997). See also *supra* notes 136-146 and accompanying text.

challenge the allegations of domestic violence. However, he would face an emotionally impartial attorney rather than his fearful and intimidated wife.

The court would consider the facts of the case to determine whether the attorney fees are necessities of life.¹⁵² The question of domestic violence and the necessity and reasonableness of counsel's assistance would be for the attorney and the court to determine. If the services were deemed necessities within the meanings of §§ 40-2-106, and 40-2-210, the attorney could be compensated without exposing the victim to unnecessary and excess hardship and without infringing on due process protections.

3. Case Law

a. General Necessities: Edgerton and McQuay

Two Montana cases discuss spousal responsibility for necessities of life.¹⁵³ Analysis of these decisions shows that each case supports the notion that legal services could be designated as necessities of life when rendered to provide for the health, welfare, and comfort of a spouse. Consequently, the court should be amenable to the award of attorney fees as necessities of life in certain domestic matters.

Edgerton v. Edgerton supports the idea that a husband must provide for his wife's necessities of life.¹⁵⁴ In *Edgerton*, the Montana Supreme Court affirmed a lower court award of maintenance to the wife.¹⁵⁵ In a lengthy discussion on common law and equity court practices, the court explained that in situations where a husband abandoned or drove his wife away by his cruel treatment, an agency analysis¹⁵⁶ was inappropriate and courts instead should rely on the "obligation of the husband

152. See *McAlear*, 145 Mont. at 463, 405 P.2d at 222.

153. See *Edgerton v. Edgerton*, 12 Mont. 122, 130, 29 P. 966, 967 (1892); *McQuay v. McQuay*, 86 Mont. 535, 538-39, 284 P. 532, 533 (1930).

154. See *Edgerton*, 12 Mont. at 130-31, 29 P. at 972 (1892). This early case arose prior to Montana's adoption of the Uniform Marriage and Divorce Act and the right to a "no-fault" divorce. See *infra* note 180 and accompanying text. Additionally, the case was decided before the enactment of Mont. Code Ann. § 40-2-210, which broadly defines necessities of life. Yet, *Edgerton* remains instructive regarding the court's attitude towards the plight of a woman exposed to her husband's abuse and cruelty and her struggle to support herself. See Appellant's Brief at 9-10, *Bard* (No. 98-256).

155. See *id.* at 149, 29 P. at 974.

156. See *supra* note 132 and accompanying text.

to support his wife, even separate and apart from his habitation, where by his conduct he had justified her separation¹⁵⁷ The husband's obligation to his wife was undisputed.¹⁵⁸

In deciding that the district court could enforce a maintenance action against a "cruel" husband, the court sympathized with the wife's situation.¹⁵⁹ The court explained:

When a husband turns his wife out of doors, without any reasonable or just cause, or forces her to withdraw from him without any means for her support, the law implies that he has given her credit to supply herself with necessaries as are suitable and proper for her to have, namely clothing, boarding, and lodging, and the like.¹⁶⁰

The *Edgerton* rationale implies that legal services may be necessaries for which the violent husband is liable. While this 1892 decision enumerates as necessities clothing, boarding, and lodging, it also deems necessary those items which are suitable and proper. This language fits squarely with current statutory law expansively declaring health, welfare, and comfort as necessities of life.¹⁶¹ Health, welfare, and comfort in one's home are obviously suitable and proper. Freedom from violence in one's marriage is certainly suitable and proper.

A second instructive case also supports the premise that legal services may be necessaries of life for which each spouse is responsible.¹⁶² The Montana Supreme Court held that a deceased wife's assignees could attach her husband's funds for \$839.00 in medical and funeral expenses due to contractual obligations found within the marital relationship.¹⁶³ In its analysis, the court stated that when a husband "neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from the husband."¹⁶⁴ The court reasoned that a wife's contracts for necessaries of life are also the husband's contracts and thus his obligations.¹⁶⁵ The court stated that the wife's medical and

157. *Edgerton*, 12 Mont. at 131, 29 P. at 968.

158. *See Edgerton v. Edgerton*, 12 Mont. 122, 130, 29 P. 966, 967 (1892).

159. *See id.* at 149, 29 P. at 974.

160. *Id.* at 131, 29 P. at 972 (1892) (citations omitted).

161. *See* MONT. CODE ANN. § 40-2-210 (1997).

162. *See McQuay v. McQuay*, 86 Mont. 535, 538-39, 284 P. 532, 533 (1930).

163. *See id.* at 540, 284 P. at 534.

164. *Id.* at 538, 284 P. at 533.

165. *See id.*

funeral expenses were, without question, necessary articles for her support.¹⁶⁶

The basis of this spousal liability for necessities was the husband's failure or refusal to provide necessities.¹⁶⁷ Due to the marital relationship, the husband had a legal and moral duty to provide necessities, and failure to do so created an implied agency where the wife could bind the husband in order to obtain items necessary for her support.¹⁶⁸ The court stated that the agency was statutory, but the obligations to third parties arising under the statute were contractual.¹⁶⁹ The Montana Supreme Court upheld a spousal liability rule that "there is a contract for the direct payment of money, which is unconditional as to time, amount and the person by whom and to whom it is to be paid."¹⁷⁰

While *McQuay*, like *Edgerton*, was decided under a different statutory arrangement and before no-fault divorce, the general rule remains that a spouse is liable for the other spouse's necessary expenses.¹⁷¹ It stands to reason that when a spouse fails to provide for the other spouse's support, a third party may in good faith supply the necessary articles for that spouse. Whether the party providing the necessary articles is a physician or an attorney should be of no consequence.

The *Edgerton* and *McQuay* Courts faced an issue similar to that facing today's court. The *Edgerton* court decided that, in the case of abuse and neglect, a husband was required to provide maintenance for his wife so that she may obtain things suitable and proper for her existence. The *McQuay* court required a spouse to provide articles necessary for the other spouse's support.

A violent husband cannot be said to support his spouse with the necessary articles of health, welfare and comfort enumerated by the Montana legislature as necessities. As a result, an attorney should be able to supply the wife with tools to obtain these necessities, and "recover the reasonable value thereof from the husband."¹⁷²

166. *McQuay*, 86 Mont. at 538, 284 P. at 533.

167. See *McQuay v. McQuay*, 86 Mont. 535, 538, 284 P. 532, 533 (1930). At this time under Montana common law and statutory law, the husband was primarily responsible for providing necessary articles to the wife. See MONT. REV. CODE ANN. §§ 5784, 5800 (1921).

168. See *McQuay*, 86 Mont. at 539, 284 P. 532 at 533.

169. See *id.*

170. *Id.*

171. See MONT. CODE ANN. §§ 40-2-106, -205 (1997).

172. *McQuay*, 86 Mont. at 538, 284 P. at 533.

Today the Montana Supreme Court should mandate spousal obligation for necessary attorney fees just as the court required spousal responsibility for necessary expenses in *Edgerton* and *McQuay*. In the case of domestic violence, the violent husband should be required to provide for legal services rendered to his spouse so that she may obtain articles necessary for her health, welfare, and comfort. In this way, the legal services themselves become necessities of life without which the domestic violence victim may never leave her batterer and a cycle of violence.

b. Legal Services as Necessaries of Life

(i) Grimstad v. Johnson

The Montana Supreme Court has never designated legal services as necessities of life when rendered for dissolution proceedings or in obtaining an order of protection for a domestic violence victim. In fact, one early Montana decision refused to award attorney fees in a divorce suit as necessities.¹⁷³

In *Grimstad*, a wife's attorneys brought an action to recover fees incurred while representing the wife in dissolution proceedings before she reconciled with her husband.¹⁷⁴ The Montana Supreme Court held that attorney fees were not recoverable on the ground that the services were necessities of life.¹⁷⁵ If a husband neglected his wife, while the couple lived apart the wife, as her husband's agent, could obtain necessary articles from a third party who could then hold the husband liable,¹⁷⁶ only if his wife abandoned him due to his bad conduct.¹⁷⁷ However, the attorney fees could not be necessities

173. See *Grimstad v. Johnson*, 61 Mont. 18, 24, 201 P. 314, 315-16 (1921). Neither Appellant nor Respondent in *Bard* mentioned *Grimstad* in their briefs even though it is the only Montana case dealing with attorney fees and divorce. See *infra* note 184. The case was mentioned in Montana Legal Services' amicus brief. See Brief Amicus Curiae of Montana Legal Services at 14, *Bard* (No. 98-256).

174. See *Grimstad*, 61 Mont. at 19, 201 P. at 314.

175. See *id.* at 24, 201 P. at 315. The court also held that the attorney's fees were not recoverable because counsel fees were only permitted while a divorce action was pending, not after the fact. See *id.* at 23, 201 P. at 315. However, under MONT. CODE ANN. § 40-4-110, these professional fees may be recovered after entry of judgement.

176. See *Grimstad*, 61 Mont. at 23-24, 201 P. at 315. Again, the Montana Supreme Court referred to an agency relationship between the husband and wife. See *supra* notes 132, 156-157, 168-169 and accompanying text. However, the husband was only liable for necessities if he had neglected to provide them for his wife. See *Grimstad* at 23-24, 201 P. at 315.

177. See *Grimstad*, 61 Mont. at 23-24, 201 P. at 315.

because it was never necessary for the wife to obtain a divorce, “no matter upon what grounds she seeks it.”¹⁷⁸ Relying upon section 3724 of the Revised Codes, the court stated:

The necessities referred to in section 3724 are such as should be provided by the husband for the wife to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps, the wife of another man. The duty to support the wife grows out of the marital relation, and when the wife seeks to dissolve this relation and set it aside, her want of funds to carry on the litigation is in no sense of the term a “necessary” for her support as a wife.¹⁷⁹

Thus, under *Grimstad*, attorney fees in a divorce proceeding were never necessary because divorce was never necessary.

Grimstad is an obstacle to designating legal services as necessities of life in dissolution actions. However, the case should not control. Under the Uniform Marriage and Divorce Act,¹⁸⁰ today’s court could not reasonably conclude that a dissolution is never necessary, let alone unnecessary for a spousal assault victim to escape a violent marriage. By following *Grimstad*, a wife would be locked into a violent relationship with her husband by her inability to pay for the legal services essential to her escape. In every sense of the term, funds to carry on protection and dissolution proceedings are necessary for her support and safety. A *Grimstad* rule is unjust in the face of the serious problem that domestic violence poses to Montanans.¹⁸¹ Consequently, today’s court should overrule *Grimstad* insofar as it concludes that a dissolution of marriage and corresponding expenses are never necessary for a wife’s support.

178. *Id.* at 24, 201 P. at 315.

179. See *Grimstad v. Johnson*, 61 Mont. 18, 24, 201 P. 314, 315 (1921) (citing MONT. REV. CODE ANN. § 3724 (1921)). The court’s language was identical to that of the 1886 Wisconsin decision of *Clark v. Burke*, 27 N.W. 22 (Wis. 1886), although the Montana court cited no source. See *supra* note 116 and accompanying text.

180. The Uniform Marriage and Divorce Act, adopted in Montana, required no traditional grounds for a dissolution of marriage. See MONT. CODE ANN. tit. 40, chs. 1, 4; see also MONT. CODE ANN. § 40-4-107; *State ex. rel. Marlenee v. Dist. Court*, 181 Mont. 59, 592 P.2d 153 (1979).

181. Brief Amicus Curiae of Montana Legal Services Association at 14, *Bard* (No. 98-256).

(ii) *McAlear v. Unemployment Compensation Commission and In re Marriage of White*

Missoula YWCA v. Bard pits two prior Montana Supreme Court decisions, *McAlear v. Unemployment Compensation Commission*¹⁸² and *In re Marriage of White*¹⁸³ against each other. These cases addressed the issue of whether legal services were necessities of life.¹⁸⁴ While neither case addresses divorce or protection proceedings, each is imperative to a discussion of these causes of action. *McAlear* supports legal services as necessities and *White* does not preclude the designation.

In *McAlear v. Unemployment Compensation Commission*, Allen McAlear, a Bozeman attorney, rendered services to three out-of-work loggers accused of fraud by the Montana Unemployment Commission.¹⁸⁵ All three claimants were cleared of the fraud allegations and received benefits.¹⁸⁶ The Unemployment Commission denied McAlear's request for fees, and McAlear appealed their decision to the Montana Supreme Court on the grounds that his legal services were necessities of life for which he should receive compensation.¹⁸⁷ The court held that McAlear, unfortunately, could not collect his fees because he failed to give notice to the Commission regarding his

182. See 145 Mont. 458, 405 P.2d 219 (1965).

183. See 218 Mont. 343, 708 P.2d 267 (1985).

184. In *Bard*, both Appellant Jon Ellingson and Respondent Allen Bard analyzed *McAlear* and *In re Marriage of White* at both the district as well as the appellate levels. For the arguments presented to the District Court, see Reply Brief in Support of Motion to Dismiss at 2, *Ellingson v. Bard*, No. DV 97-93 (Dist. Ct. Third Jud. Dist. filed Nov. 3, 1997); Supplemental Brief at 3:10-26, 4:1, *Ellingson* (No. DV 97-93); Supplemental Brief in Support of Motion to Dismiss at 1:20-25, 2:1-9, *Ellingson* (No. DV 97-93). For the arguments presented to the Supreme Court, see Appellant's Brief at 11-15, *Missoula YWCA v. Bard*, No. 98-256 (Mont. filed July 8, 1998); Respondent's Reply Brief at 2-6, *Bard* (No. 98-256); Appellant's Reply Brief at 2, 6, *Bard* (No. 98-256). Ellingson reasoned that under *McAlear*, his fees were necessities of life, while Bard argued that *In re Marriage of White* was determinative and the legal services were not necessary articles for which he was responsible. See *id.* The district court agreed with Bard and concluded that in a dissolution case *In re Marriage of White* controlled. Opinion and Order at 2, *Ellingson v. Bard*, No. DV 97-93 (Dist. Ct. Third Jud. Dist. March 5, 1998). The issue of whether the fees were necessities now stands before the Montana Supreme Court. See *supra* note 2.

185. See *McAlear*, 145 Mont. at 460, 405 P.2d at 220.

186. See *McAlear v. Unemployment Compensation Comm'n*, 145 Mont. 458, 460, 405 P.2d 219, 220 (1965).

187. *Id.* at 462-63, 405 P.2d 219, 221-22 (1965). Under Montana unemployment compensation law, a creditor might collect from a person's unemployment benefits only if the debts were "incurred for necessities furnished to such individual or his spouse, or dependents during the time when such individual was unemployed." See MONT. REV. CODE ANN. § 87-143 (Smith 1964).

representation of his clients on a contingent fee basis.¹⁸⁸ However, the court determined that under the *facts* of the case, the attorney's services should most certainly be considered as debts incurred for necessities.¹⁸⁹ The court finalized its discussion by stating:

What are necessities depends upon the facts of each case, and stated another way, whether legal services are to be considered 'necessaries' depends upon whether there was a necessity for such services.¹⁹⁰

In *White*, the Montana Supreme Court reasoned that legal services were not necessities of life.¹⁹¹ In this case, the husband argued, on the theory of necessities of life, that his wife should be liable for his attorney fees because they were incurred in defense against her allegations of child abuse.¹⁹² The husband relied on § 40-2-106, which provides that each spouse is liable for necessary family expenses.¹⁹³ Using limited and fact specific language, the court held that "attorney's fees incurred by one spouse to defend himself against child abuse charges are not necessities of life within the meaning of § 40-2-106, MCA."¹⁹⁴

Thus, the attorney services rendered by McAlear to three unemployed loggers were necessities of life, but the attorney services White required to defend himself against child abuse charges were not necessary. Why the different outcomes?

Montana's statute is decisive.¹⁹⁵ And in order to comply with the statute, the facts of each case must be scrutinized. That is where *McAlear* comes in.

McAlear, a 1965 decision, was decided before any statutory definition of necessities existed in Montana.¹⁹⁶ Absent statutory intent, the court relied on decisions from several other

188. See *McAlear*, 145 Mont. at 464-65, 405 P.2d 219, 223 (1965).

189. See *id.* at 463, 405 P.2d at 222.

190. *Id.* at 463, 405 P.2d at 222.

191. See *In re Marriage of White*, 218 Mont. 343, 346, 708 P.2d 267, 269 (1985).

192. See *id.*

193. See *id.*

194. *Id.* at 346, 708 P.2d at 269.

195. See MONT. CODE ANN. § 40-2-210 (1997). See also *supra* notes 136-146 and accompanying text.

196. MONT. CODE ANN. § 40-2-210 was enacted in 1975. See *supra* note 11. Presumably, *McAlear*, as an unemployment compensation case, would not have been governed by the spousal responsibility provision. However, in the absence of any other statute defining necessities of life, it may be reasonably argued that the *McAlear* court would have looked to the provision for some guidance when determining what constituted necessities.

jurisdictions to decide when legal services were necessary.¹⁹⁷ For instance, the Montana court's language that facts must drive the necessities determination was drawn from a Missouri appellate court decision which dealt with attorney services rendered to a minor.¹⁹⁸ Also, the court cited a California appellate case where an attorney's fees rendered in proceedings to restore a wife to competency over the husband's objections were necessities for which the husband was held liable.¹⁹⁹ Because *McAlear's* conclusion rested on varying fact situations and statutes, its determination that facts drive what are necessities is appropriate.

Although *McAlear* was decided before the enactment of § 40-2-210, and would not be governed by the family law provision,²⁰⁰ it is not inconsistent with the statute. In fact, compliance with Montana's statute mandates the implementation of *McAlear's* requirement that the facts of each case be considered. In effect, *McAlear's* conclusion sits squarely with the idea that necessary articles are those goods and services essential to health, welfare, and comfort. Put in the language of *McAlear*, whether legal services are to be considered necessities under §§ 40-2-106, and 40-2-210, depends upon whether an examination of the facts shows that there was a necessity for such services.

Unlike *McAlear*, *White* was decided after the enactment of § 40-2-210, was governed by the provision, and is inconsistent with the statute. Instead of relying on the applicable statute, the court relied on a very limited definition of necessities. Citing Black's Law Dictionary, the court stated that necessities were "things indispensable, or things proper and useful, for the sustenance of human life."²⁰¹ Then, relying on *Edgerton*, the

197. See *McAlear v. Unemployment Compensation Comm'n*, 145 Mont. 458, 463, 405 P.2d 219, 222 (1965) (citing *Caruso v. United States*, 236 F.Supp. 88 (D.N.J. 1964); *Leonard v. Alexander*, 122 P.2d 984 (Cal. Dist. Ct. App. 1942); *Stone v. Conkle*, 88 P.2d 197, 199 (Cal. Dist. Ct. App. 1939); *City Nat'l Bank & Trust v. Sewell*, 21 N.E. 810, 813 (Ill. 1889); *In re Schulte's Guardianship*, 1 N.W.2d 193 (Iowa 1941); *Fenn v. Hart Dairy Co.*, 83 S.W.2d 120, 124 (1935)).

198. See *Fenn* at 124 ("While it has been stated generally that attorney's services are not to be regarded as necessities, whether attorney's services are to be considered necessities or not depends on whether or not there is a necessity therefor.").

199. See *Stone*, 88 P.2d at 199 (stating that the rule that a husband is liable for necessities furnished by a third party to the wife, an incompetent, "is too well established to require authority, and this is true irrespective of the fact that the husband did not desire the services rendered or that he opposed the proceeding. The law imposes the obligation and enforces it by a contract remedy.").

200. See *supra* note 196 and accompanying text.

201. See *In re Marriage of White*, 218 Mont. 343, 346, 708 P.2d 267, 269 (1985)

court limited this definition to “food, drink, clothing, and a suitable place to live.”²⁰²

The court’s analysis misconstrued *Edgerton* and ignored *McQuay* and § 40-2-210. The *Edgerton* court defined necessities as those articles which were *suitable and proper* for the spouse to have, “namely clothing, boarding, lodging, and the like.”²⁰³ Except for the exclusion of medical care, *White’s* language is very similar to one portion of the current Black’s Law Dictionary definition,²⁰⁴ but it does not capture the broader notions of suitable and proper as espoused in *Edgerton*.²⁰⁵

Furthermore, by limiting necessities to items like food and drink, *White* ignores the *McQuay* decision which stated that medical services fell within the classification of articles necessary for the wife’s support.²⁰⁶ In light of *McQuay*, Montana case law fails to back *White’s* limited version of what constitutes necessities.

Finally, and most egregiously, *White* failed to mention § 40-2-210.²⁰⁷ Unlike the *White* court, the Montana legislature broadly defines as necessities goods *and services* which are reasonably required to provide for the health, welfare, comfort, and education of all family members.²⁰⁸ Unlike *White*, Montana law does not provide a limited laundry list of necessities for which a spouse is responsible, and § 40-2-210 does not support *White’s* analysis.

As Montana case law and statutes do not support *White*, it fails to uphold the proposition that legal services are never necessities of life. In fact, the dissent powerfully stated that the legal services incurred by *White* were necessities of life:

Appellant was charged and tried by a jury and acquitted of a most grievous offense. His whole reputation and his future was on the line and to not allow attorney’s fees here is, in my opinion, a denial

(citing BLACK’S LAW DICTIONARY 1181 (rev. 4th ed. 1968)).

202. See *White*, 218 Mont. at 346, 708 P.2d at 269 (citing *Edgerton v. Edgerton*, 12 Mont. 122, 131, 29 P. 966, 972 (1892)).

203. *Edgerton*, 12 Mont. at 131, 29 P. at 972. See *supra* notes 154-160 and accompanying text.

204. See *supra* note 5 and accompanying text.

205. See *supra* notes 160-161 and accompanying text.

206. See *McQuay v. McQuay*, 86 Mont. 535, 538, 284 P. 532, 533 (1930). See also *supra* notes 163-166 and accompanying text.

207. The court based its decision on MONT. CODE ANN. § 40-2-106 but ignored its interpretive companion, § 40-2-210. See *supra* notes 136-146 and accompanying text.

208. MONT. CODE ANN. § 40-2-210 (1997).

of fairness.²⁰⁹

Although the dissent does not cite § 40-2-210 or *McAlear*, its stance conforms more with Montana's expansive definition of necessities and *McAlear*'s adherence to an examination of the facts of each case.

If the majority of the *White* court would have considered *McAlear* and § 40-2-210, would *White*'s attorney fees have been considered necessities?

First, the facts must be considered. Necessaries of life depend on the facts of each case.²¹⁰ While *McAlear* is noticeably absent from the court's analysis, the *White* opinion is *McAlear* in action. In *McAlear* and *White*, the attorney's services were rendered to combat serious charges of fraud and child sexual abuse respectively.²¹¹ The facts of both cases may be examined to illustrate their importance to a determination of when legal services are necessities. For instance, the *McAlear* facts were damaging in that the denial of unemployment compensation put general economic livelihood at stake. Thus, the legal services were required to provide for vital financial interests. *White*'s reputation was at stake, not his livelihood. Here, the court decided that his legal services were not necessary.²¹² A fact-driven analysis pushed the Montana Supreme Court to its fact-based holding that *White*'s defense *against child abuse charges* leveled by his wife was not a necessary of life.²¹³

While considering the facts of each case was the last stop of the *McAlear* court's analysis, it cannot be for *White* or any other case involving spousal responsibilities. Instead, Montana law requires that the fact examination shows the goods and services provided to a spouse were reasonably required for a spouse's health, welfare, comfort, or education.²¹⁴ Using this standard, it may be argued that *White*'s attorney fees were not necessary. Admittedly, *White*'s reputation may have been scarred, but this may not have been the type of substantial credible evidence the

209. *In re Marriage of White*, 218 Mont. 343, 346, 708 P.2d 267, 269-70 (1985) (Harrison, J., concurring in part and dissenting in part).

210. *See McAlear v. Unemployment Compensation Comm'n*, 145 Mont. 458, 463, 405 P.2d 219, 222 (1965).

211. *See supra* notes 185-194 and accompanying text.

212. Although the *White* court did not mention public policy, it may be reasonably suggested that penalizing the reporting of child sexual abuse allegations by assigning responsibility for attorney fees may decrease the reporting of such incidents.

213. *White*, 218 Mont. at 346, 708 P.2d at 269-70.

214. *See* MONT. CODE ANN. §§ 40-2-106, -210 (1997).

court requires before awarding attorney fees.²¹⁵ Essentially, the *White* court came to the right conclusion using the wrong means.

This conclusion is not fatal to every claim for attorney fees as necessities of life. The court, when correctly analyzing Montana's expansive concept of necessities in conjunction with serious factual scrutiny, is likely to conclude that an attorney's services may be necessities for which a spouse is liable under current Montana law.

For example, even if the attorney's services were not considered necessary in *White*, the court could reasonably conclude that they are necessary in a situation of domestic violence. In *White*, the husband's safety and protection from physical and mental assaults as proscribed by statute²¹⁶ were not at issue. Rather, his reputation was "on the line."²¹⁷ Contrast this with domestic violence situations where a husband physically beats, and emotionally harasses and threatens his wife, or cases such as *Bard* where a husband threatened to kill his wife, and tried to stop her escape through calculated begging and intimidation, often at her workplace.²¹⁸ Surely, a woman's violent husband does not support her with the necessities of health, welfare, and comfort. And, surely the legal services provided to ensure physical safety are necessities:

For if the Court concludes that legal services provided to protect one's personal physical safety are not a necessity of life, then what kind of legal services could ever be considered a necessity? . . . Sometimes legal services may not be considered necessities. The typical business law services would not be. But where the services of lawyer are provided to protect the physical health and safety of a person, those services take on a different character. These services must be considered necessities. And a spouse should be fully responsible for them.²¹⁹

Freedom from spousal assault is essential to achieve health, welfare, and comfort. The domestic violence victim may only escape the violence and achieve true freedom by removing herself from the attacks, distancing herself from her violent husband. In such an instance, it becomes clear that an attorney's services are reasonably required to provide the victim

215. See *supra* notes 136-146 and accompanying text. See also *supra* notes 151-152.

216. See MONT. CODE ANN. § 45-5-206 (1997). See also *supra* notes 53-58, 94-98 and accompanying text.

217. See *supra* note 209 and accompanying text.

218. See *supra* note 2.

219. Appellant's Reply Brief at 9, *Bard* (No. 98-256).

with the necessities she is entitled to under the obligations of the marriage contract and Montana law.

V. LEGAL SERVICES AS NECESSARIES OF LIFE AND THE
RECRUITMENT AND RETENTION OF *PRO BONO* ATTORNEYS FOR
DOMESTIC VIOLENCE VICTIMS

While the Montana Supreme Court supports a policy favoring attorney fee awards for *pro bono* attorneys,²²⁰ designating legal assistance in certain domestic matters as a necessary of life will better guarantee that attorneys taking these cases *will* be compensated. At a time when there is an increasing need for *pro bono* representation, awarding fees under § 40-2-106²²¹ will increase the recruitment and retention of *pro bono* attorneys.

Montana Legal Services Association (MLSA) is often the only resource available to a low-income victim of spousal assault. "The majority of MLSA's clients require assistance in family law matters, and they are often victims of domestic violence."²²² The Congressional intention behind providing legal services to low-income individuals is to increase their social and economic opportunities and better serve the ends of justice.²²³ However, decreased funding to MLSA has resulted in only 15 MLSA staff attorneys to serve approximately 180,000 eligible Montanans.²²⁴ Additionally, MLSA is no longer able to claim, collect, or retain attorney fees,²²⁵ thus exacerbating financial hardship for civil legal assistance programs. Congress instead requires MLSA to solicit private attorneys who will provide adequate representation to low-income individuals.²²⁶

As a result of substantial funding cuts at MLSA, the major legal resource for low-income Montanans, the services of *pro*

220. See *In re Marriage of Malquist*, 266 Mont. 447, 456-60, 880 P.2d 1357, 1362-65 (1994), *rev'd on other grounds*, 279 Mont. 491, 500, 928 P.2d 214, 220 (1994).

221. See generally Part IV. See also notes 150-152 and accompanying text.

222. Brief Amicus Curiae of Montana Legal Services Association at 10, *Bard* (No. 98-256).

223. See 42 U.S.C. § 2996 (1998). See also Brief Amicus Curiae of Montana Legal Services Association at 10-11, *Bard* (No. 98-256) (providing a summary of current status of national and Montana Legal Services Associations).

224. See Brief Amicus Curiae of Montana Legal Services Association at 10, *Bard* (No. 98-256).

225. See 45 C.F.R. § 1642 (1998). See also Brief Amicus Curiae of Montana Legal Services Association at 11, *Bard* (No. 98-256).

226. See 45 C.F.R. § 1609.1 (1998). See also Brief Amicus Curiae of Montana Legal Services Association at 10, *Bard* (No. 98-256).

bono counsel are increasingly important.²²⁷ Thus, the availability of attorney fee awards is also of utmost importance. These awards spur *pro bono* involvement. Congress acknowledged this, when recognizing Legal Services Corporation's (LSC) stance that disallowing attorney fee awards to private attorneys "would be a substantial impediment to the recruitment of *pro bono* lawyers."²²⁸

Similarly, Montana case law supports a policy of awarding attorney fees to *pro bono* counsel.²²⁹ In *Malquist*, the Montana Supreme Court held that the district court, pursuant to § 40-4-110, may award attorney fees to a *pro bono* attorney providing that the requesting party demonstrates necessity and reasonableness of the fee.²³⁰ In stressing the importance of the award of attorney fees in domestic relations cases, the court aptly stated:

We live in a society where, next to health care, competent legal service is likely the most essential, yet most costly, professional service that most people from time to time require. That is certainly no more evident than in domestic relations cases wherein the court's decision will likely involve important property questions and will forever alter the personal relationships and obligations of the litigants to each other. More importantly, however, at issue in many such cases are the relationships of children to their parents and the fundamental rights of those children to food, clothing, shelter, education, medical care, support, and to a safe and reasonably stable home life. The multiplicity of laws and often technical court rules and procedures governing domestic relations cases combined with the emotionally charged nature of such proceedings, present a mine field to the

227. See Brief Amicus Curiae of Montana Legal Services Association at 10, *Bard* (No. 98-256).

228. This statement was made in the final rule restricting Legal Services Corporation and private attorneys paid by Legal Services Corporation from seeking attorney fees in cases after April 26, 1996. See 45 C.F.R. § 1642.4 (1998). See also Brief Amicus Curiae of Montana Legal Services Association at 11, *Bard* (No. 98-256).

229. See *In re Marriage of Malquist*, 266 Mont. 447, 456-60, 880 P.2d 1357, 1362-65 (1994), *rev'd on other grounds*, 279 Mont. 491, 500, 928 P.2d 214, 220 (1994). In *Malquist*, a father was held responsible for a portion of his child's medical bills regardless of his child's receipt of his disability benefits and fundraiser money. See *id.* at 451-52, 880 P.2d at 1359-60. The court reversed the district court's award of fees to the mother's attorneys and remanded for an evidentiary hearing when she failed to show any evidence supporting the reasonableness of the fees to the district court. See *id.* at 454-55, 880 P.2d at 1362. The court concluded the case with a policy discussion of allowing fee awards for *pro bono* attorneys. See *id.* at 455-60, 880 P.2d at 1362-65.

230. See *id.* at 460, 880 P.2d at 1365. However, the current statute does have drawbacks for domestic assault victims. See *supra* notes 150-152 and accompanying text.

litigant who is too poor to hire competent counsel.²³¹

The Montana Supreme Court's solution to this crisis was to allow the award of attorney fees to *pro bono* attorneys. The court reasoned that with the prospect of compensation, *pro bono* attorneys would be "financially better able to provide more legal services to the increasing numbers of indigent litigants who need such services."²³² The court reiterated this policy consideration when requiring a landlord to pay the fees of the *pro bono* attorney who represented his tenant.²³³ The court emphasized that providing equal justice to all mandated that, when appropriate, attorney fees be awarded to individuals represented by *pro bono* attorneys.²³⁴

It may be hard to reconcile the notions of *pro bono* representation and the award of attorney fees. The conflict seemingly arises because an attorney who provides representation at no cost to the indigent client should receive compensation in the form of a good work done, not a court-ordered fee award. However, the reality is that for financial and time management reasons, the two concepts are inevitably intertwined. The Montana Supreme Court and several other jurisdictions²³⁵ have recognized this reality. These courts agree that the potential of an attorney fee award increases the likelihood that an attorney will take the case at no charge. A mandatory award of attorney fees in domestic violence situations will increase the chances of payment and the amount of *pro bono* representation will increase accordingly.

231. *Malquist*, 266 Mont. at 456-57, 880 P.2d at 1363.

232. *Id.* at 458, 880 P.2d at 1364.

233. *See Whalen v. Taylor*, 278 Mont. 293, 304, 925 P.2d 462, 468 (1996).

234. *See id.* at 304, 925 P.2d at 468.

235. Montana is not alone in its reasoning. California, Colorado, Connecticut, Indiana, Kentucky, Michigan, Missouri, and Pennsylvania, to name a few, recognize the importance of awarding attorney fees to *pro bono* counsel. *See Rodriguez v. Taylor*, 569 F.2d 1231, 1244-47 (3d Cir. 1977); *Ward v. Ward*, 4 Cal. Rptr. 2d 365 (Cal. Ct. App. 1992); *In re Marriage of Swink*, 807 P.2d 1245, 1248-49 (Col. Ct. App. 1991) (allowing reasonable fees to *pro bono* attorneys "encouraged greater lawyer participation."); *Benavides v. Benavides*, 526 A.2d 536, 537-39 (Conn. 1987); *Beeson v. Christian*, 594 N.E.2d 441, 442-43 (Ind. 1992); *Hale v. Hale*, 772 S.W.2d 628, 630 (Ky. 1989) (recognizing that private attorneys' financial considerations diminish time available for *pro bono* activities and reasoning that fee awards would "make it feasible for competent attorneys to represent, free of charge to their client, a needy or indigent person who otherwise would find it difficult, if not impossible, to obtain representation in legal matters."); *Stackhouse v. Stackhouse*, 484 N.W.2d 723, 445-46 (Mich. 1992); *In re Marriage of Gaddis*, 632 S.W.2d 326 (Mo. App. 1982); *Krassnoski v. Rosey*, 684 A.2d 635, 638 (Pa. 1996).

This is good news for spousal violence victims.²³⁶ If an attorney knows that a case will generate compensation, the attorney will more readily take the case at no charge to the victim. A victim seeking an order of protection and/or marital dissolution will be more likely to obtain the competent professional service they require to deal with the "mine field" of domestic relations law. Equal justice for indigent domestic violence victims mandates that attorney fees be awarded as necessities of life to *pro bono* attorneys.

VI. CONCLUSION

Return to the situation of Anne and Roger. Roger was required by law to pay the medical expenses resulting from Anne's trip to the emergency room. Medical expenses are a necessary of life for which Roger is liable, and the hospital is likely to receive payment. Yet, the legal services that Anne will require to stop the trips to the emergency room altogether are not explicitly provided for in Montana.

Under Montana law, the necessities of life for which each spouse is responsible are defined broadly. Each spouse must provide for the health, welfare, and comfort of the other spouse. The Montana Supreme Court has been sympathetic to the plight of the victim in the past and has reasonably determined that the facts of each case should determine when a necessity for legal services exists. The Montana Supreme Court should go one step further to ensure indigent victims of spousal assault the competent representation they direly need. The court should designate legal services rendered to a domestic violence victim as a necessary of life, the payment for which the violent husband is liable.

The designation of legal services as necessities of life will mean that Anne may seek the services of a private *pro bono* attorney to obtain either an order of protection or a dissolution of marriage. The attorney will likely take her case, knowing, as did the emergency room physician, that she will likely be compensated after demonstrating that she provided for Anne's health, welfare, and comfort pursuant to §§ 40-2-106 and 40-2-

236. For attorneys who are able to spare the time and expense of *pro bono* work, this may also be good news for organizations assisting battered women. It is noteworthy that in *Bard*, the petitioning attorney has allocated his interest in payment to the Missoula YWCA Battered Women's Shelter. See Appellant's Brief at 2, *Bard* (No. 98-256).

210. As a result, Anne, with the assistance of competent legal representation, is afforded an expanded opportunity to obtain safety and justice.

