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*Battered Immigrants and Civil Protection Orders*¹²

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Introduction³

Civil protection orders are available in all fifty states, Puerto Rico, the District of Columbia, and all U.S. territories⁴ and are designed to protect battered individuals from their abusers.⁵ The civil protection order

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ This chapter strives to be useful both to attorneys and advocates who work in the area of domestic violence who will learn about particular issues that arise in protection order cases of battered immigrants. At the same time, this chapter will include some basic information on protection orders that will be useful to volunteer attorneys and immigrant rights advocates and attorneys who may not be previously familiar with civil protection order cases. For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

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aims to offer the victim protection from future abuse and can be crafted to uniquely address and counter abuse, power, and control in each particular relationship. When civil protection orders are appropriately drafted and consistently enforced, they can provide effective protection for victims of domestic violence.⁶ Most importantly, civil protection orders provide a victim-initiated and controlled justice response to domestic violence that does not require criminal justice system involvement. Civil protection orders are initiated by the victim, thus a victim can choose to pursue this justice-system remedy without reliance on the criminal courts. For example, a victim of domestic violence can obtain a civil protection order even if her abuser is not being criminally prosecuted for the abuse. Victims of domestic violence can obtain civil protection orders whether or not there is also a criminal prosecution of their abuser. Criminal prosecution of abusers is designed to hold abusers accountable for their behavior. Victim needs may or may not be addressed as part of the criminal case; thus, it is recommended that victims whose abusers were criminally prosecuted also obtain civil protection orders.

Civil protection orders may be one of the most effective means to protect victims from further abuse, particularly when the orders are drafted to fit the specific needs of the victim. The most effective protection orders are obtained when a victim is represented by counsel or a trained domestic violence advocate.⁷ This allows the court to address the victim's particular needs, while generic protection orders may exclude specific provisions necessary to ensuring the victim's safety. Advocates or attorneys assisting battered immigrants need to understand how protection orders can positively affect the victim's ability to attain legal immigration status. They must listen to and respond to the fears and concerns of the victim and understand the manner in which abusers may be exerting power and control over immigrant victims.⁸

Protection orders can effectively reduce domestic violence and offer protection and assistance to battered immigrant women, particularly because non-citizen abusers can be deported for a protection order violation. It is important to note, however, that in 20 to 30% of domestic violence cases, a protection order may have little effect in ending abuse. These particular cases have a high level of lethality and are extremely dangerous for the victims and their families. In such situations, advocates and attorneys can play a key role in helping battered immigrants survive abuse as well as helping obtain protection orders, through a criminal prosecution and possible deportation of the abuser.

What is a protection order?

In most jurisdictions, protection orders offer a wide array of relief that can provide vital protection against repeated violence for victims, even those who are not ready to separate from their abusers. A civil protection order can be an effective tool to shift the balance of power between an abuser and a victim. Studies have demonstrated that in 70% of domestic violence cases, the issuance of a civil protection order decreased physical violence and made petitioners feel more secure.⁹ Adding forms of relief beyond violence prevention provisions to a civil protection order can increase the effectiveness of violence prevention. It is important to note that protection orders do not guarantee an end to violence, and may not always deter an abuser. Advocates and attorneys should explain to their clients that a civil protection order is not for every victim. Safety must be the first and foremost consideration. Often a civil protection order is a crucial component of the victim's safety plan; in some situations, because violence escalates upon separation or immediately after separation from the abuser, a civil protection order may exacerbate the abuse.

Since victims have more control over the protection-order process, they can choose when, whether, and how to enforce protection orders, taking into account the potential for the abuser's deportation and whether that deportation might enhance danger to the victim and her family members. Protection orders can also provide

⁴ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

⁵ *Id.* at 811.

⁶ *Id.* at 813.

⁷ PETER FINN & SARAH COLSON, U.S. DEPARTMENT OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT X (1990).

⁸ See Chapter 1 of the manual for an overview of power and control used against immigrant victims.

⁹ See Finn & Colson.

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crucial evidence of reoccurring abuse and therefore can help battered immigrants who file for immigration benefits, including battered spouse waivers, self-petitions, or cancellation of removal applications under the Violence Against Women Act and the crime visas (U and T-Visas).

There are two types of protection orders available to victims of abuse, an emergency or temporary protective order and a full protection order. A majority of states authorize the issuance of an emergency or temporary protection order after a hearing demonstrating the victim's immediate danger.¹⁰ Generally these hearings are held ex parte, without the opposing party (abuser) being present. Such orders are short-term (typically last 14-30 days) and are temporary remedies until the court can schedule a full hearing.¹¹ A full protection order is of longer duration and is granted after a full hearing. Full protection orders typically last one to three years, however orders may be extended upon demonstrated need.¹² In the vast majority of states, victims can choose whether to obtain a temporary protection order or whether to initiate protection order proceedings by filing directly for a full protection order. Obtaining a temporary protection order first is usually the appropriate procedure when the victim and the abuser reside together at the time the victim seeks a protection order. This helps against immediate retaliation when the abuser is served with notice of the protection order proceedings. Temporary protection orders are also particularly useful as a means to remove the abuser from the family home, helping deter efforts to make extra copies of house keys and to take or destroy papers in the home.

Psychological Barriers to Accessing Civil Protection Orders

A civil protection order can help deter physical and psychological abuse and can help battered immigrants regain a sense of well-being. It is one of the most effective tools for ending domestic violence and works best when the protection order is tailored to fit the particular needs of each victim, taking into account the victim's and abuser's immigration status. Yet, the psychological trauma of domestic violence and the power and control exerted by the abuser can often keep victims from obtaining a protection order and from reporting violations to the police.

The psychological impact of physical, psychological, and sexual abuse can also interfere with a battered woman's ability to participate in a protection order hearing.¹³ The victim may appear angry and hostile, socially withdrawn and passive, highly anxious and disorganized, or numb and detached.¹⁴ While these are normal reactions to trauma, not all battered women will appear the same and many may exhibit a combination of these emotions. A battered woman's demeanor and oral testimony at a protection hearing may be strongly affected if she is encountering the batterer for the first time after being separated.¹⁵ However, a victim with support from family and friends may appear assertive, confident, and strong. Advocates should be aware of the many factors that impact a battered woman's psychological response to violence.¹⁶

Battered immigrant women face distinct psychological barriers regarding civil protection orders. Many immigrant women fear the legal system. Even women with legal immigration status often believe that

¹⁰ *Id.* at 1035.

¹¹ David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST.L.J. 1153, 1191-92 (1995).

¹² *Id.* at 1192; Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1859 (2002).

¹³ Cf. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993) (stating that expert witnesses must understand the numerous ways that domestic violence victims will respond to violence); Hughes, M.J. and L. Jones (2000). "Women, Domestic Violence, and Posttraumatic Stress Disorder (PTSD)." *Family Therapy* 27(3): 125-139; Kessler, R.C., A. Sonnega, et al. (1995). "Posttraumatic Stress Disorder in the National Comorbidity Survey." *Arch Gen Psychiatry* 52(12): 1048-60.

¹⁴ Hughes, M.J. and L. Jones (2000). "Women, Domestic Violence, and Posttraumatic Stress Disorder (PTSD)." *Family Therapy* 27(3): 125-139; Kessler, R.C., A. Sonnega, et al. (1995). "Posttraumatic Stress Disorder in the National Comorbidity Survey." *Arch Gen Psychiatry* 52(12): 1048-60.

Id.

¹⁵ American Psychiatric Association (2000). *Diagnostic and Statistical Manual DSM-IV-TR*. Washington, D.C. *Id.*

¹⁶ Thompson, M.P., N.J. Kaslow, et al. (2000). "Partner Violence, Social Support, and Distress Among Inner-City African American Women." *American Journal of Community Psychology* 28(1): 127-143. *Id.*

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reporting domestic violence will result in their deportation.¹⁷ Battered immigrants are also less likely to call the police or turn to the courts for help.¹⁸ Many were raised in countries where the judiciary was the arm of a repressive government, and where the persons who prevailed in court were the ones with the most influence, the strongest ties to the government, and the most economic resources.¹⁹ Additionally, in many such legal systems, a man's word is inherently more credible than a woman's.²⁰ Battered women who have learned not to expect justice from such legal systems find it difficult to believe that our system will function any differently, and thus feel isolated and alone.²¹ Because of these fears it is likely that a battered woman's testimony at a protection order hearing will be affected.

Protection orders can be particularly effective for battered immigrants when the abuser is an immigrant and/or naturalized citizen. For example, non-citizen abusers may be more afraid of the repercussions from protection order violations (i.e., deportation) and therefore, may be more willing to comply with the provisions of the order. If the abuser is a non-citizen and is found guilty of violating a protection order, the abuser can be deported. For battered immigrant women, the complexities arising from reporting a violent act can be compounded by the fact that the report may trigger the deportation of a non-citizen abuser.²² For some women, the deportation of their abusers can help them recover tremendously by allowing them to remove violence from their lives. For other women, the opposite is true. The abuser's deportation may create enhanced dangers related to economic survival, her ability to attain legal immigration status, and her safety and the safety of family members both here and abroad.²³ Advocates for battered immigrant women should ascertain whether criminal prosecution, following an arrest for violating a protection order, will enhance or undermine an individual victim's safety. Different women will have completely different needs that must be met if the abuser is deported.²⁴ By looking at the problem from different angles, advocates can help battered immigrant women make the best choices.

Advocates and attorneys should be aware of cultural restraints, which may inhibit the victim from leaving the abuser. Many victims choose not to separate themselves from their abusers. A battered immigrant may opt to live with her abuser, as long as the individual receives therapy and agrees to stop the abuse. Attorneys and advocates should view the victim's willingness to obtain a protection order, while she continues to reside with her abuser, as an important step towards building her self-esteem and taking action to protect herself and her children. A protection order without a stay-away provision should also be offered as an alternative if a victim suddenly wants to drop the protection order altogether. Many times, an abuser will promise to stop abusing the victim if she promises not to pursue the protection order. In this situation the protection order can serve as a deterrent to the abuser and shift the power balance to the victim.

Obtaining a Protection Order

Protection orders are important for battered immigrants seeking to leave an abusive citizen or lawful permanent resident or immigrant visa holder, because the order will legally document evidence of violence for her immigration case.²⁵ Most state statutes recognize the relevance of past abusive acts and violence to provide a context to evaluate present fear and danger.²⁶ Hence, in most jurisdictions, protection order laws

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, 19 (August 1994).

²¹ See Orloff Address.

²² ANN BENSON AND JOSEPH JUSTIN ROLLINS, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE, (Seattle: Washington Defender Association 2001).

²³ Leslye E. Orloff, et al., *Ensuring That Battered Immigrants Who Seek Help from the Justice System are not Reported to the INS*, in SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS, 279, 206 (1999).

²⁴ Edna Erez and Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE AND VICTIMS 251 (1998).

²⁵ See Leslye E. Orloff, et al., *With No Place to Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L. Q. 313 (1995).

²⁶ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 901 (1993).

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do not impose time limits within which a victim must file for a protection order following a violent incident.²⁷ Courts regularly consider the parties' history of violence as evidence of the need for a current protection order.²⁸ If the last incident or threat against a battered immigrant woman took place months before filing a protection order, the advocate or attorney should help gather evidence of the history of abuse. The attorney should present this evidence to the court and demonstrate that additional protection is needed. Moreover, explaining to the judge that the victim may need protection for when she files for immigration relief separate from her abuser, should underscore the need for the protection order.

Despite statutory authority allowing courts to issue protection orders without regard to the date of the most recent incident of physical violence or criminal behavior, a few courts may not grant an order if the most recent threat or incident occurred several months prior to the filing of a civil protection order petition. Moreover, some courts also require before the issuance of the protection order a finding of family violence and that there is a likelihood that violence will continue. When this occurs, advocates and attorneys working with battered immigrants who need protection orders should be prepared to demonstrate to the court the need for the victim to have future, ongoing protection. They should demonstrate the dynamic of power and control and how it may escalate if the case is denied for a lack of a recent incident of abuse. The battered immigrant may want to consider locating an attorney who can help with an appeal.

Who can obtain a protection order?

Any person can obtain a protection order, including all immigrants, because protection orders are designed to deter criminal acts against intimate partners, spouses, or family members. Regardless of immigration status, all persons are entitled to this protection. To deny access to family court relief because of immigration status is a violation of Equal Protection and Due Process.²⁹ If protection orders were not available for all persons, then abusers would be free to abuse immigrants and escape the criminal ramifications of such action. No justice system official, including police, prosecutors, court staff or judges, should be asking victims about their immigration status or if they have a social security number when they call for help or seek a protection order.³⁰

State statutes vary on which relationships are covered under protection order laws. Advocates and attorneys should determine if the relationship between the client and her abuser is covered by the state's protection order statute. The relationship between the parties generally included in state protection order statutes are defined as follows:³¹

- Current or previous spouses;
- Family members related by blood or marriage (i.e., parents, minor children, adult children, aunts, uncles, siblings, grandparents, and in-laws);
- Current or previous household members regardless of their marriage or blood relation;
- Unmarried spouses of different genders who have lived as spouses or currently living as spouses;
- Persons who have a common child;
- Persons who were previously or are currently in a dating or intimate relationship;
- Persons who were previously or are currently in a same-sex relationship, regardless of whether they live or have lived together;
- Household members of an abuse victim that is stalked or harassed; and
- A few states allow protection orders to be extended to those that offer refuge to victims of domestic violence as well as to the victim's employers.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 42 U.S.C.S. § 1981(a); See also, *Plyer v. Doe*, 457 U.S. 202, 210-213, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982).

³⁰ If such inquiries are being made in your jurisdiction, contact the National Immigrant Women's Advocacy Project (NIWAP) for technical assistance: 4910 Massachusetts Ave NW, Suite 16, Washington, DC 20016; 202-274-4457; info@niwap.org.

³¹ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 814-46 (1993).

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At least two state statutes specify that an adult may file for another adult who is unable to go to court.³² Most states allow an adult to file on behalf of an incompetent adult or a child.³³ Some states allow certain teenage minors to petition for their own protection order.³⁴ Depending on the relationship of the parties, state statutes may provide different types of civil protection order remedies, and/or may require parties to litigate the case in a particular court. For example, in some jurisdictions, if the parties are intimate partners, have a child in common, or were previously intimate partners, the protection order is sought in Family Court. If a family member of the abused person seeks a protection order against the abuser (perhaps for stalking or making threats to the family home), some jurisdictions require the litigants to go to District Court or to obtain a “no-contact” order that does not statutorily provide other remedies (including the catch-all and creative remedies discussed in this chapter).

Parties do not need to separate in order for the victim to obtain a protection order. Many people believe that victims of domestic violence can easily leave an abusive home or relationship, but this is not necessarily true.³⁵ Violent relationships are often characterized by power disparities that make leaving very difficult, particularly for women with children.³⁶ Economic control is an important component of the abuser’s system of maintaining control over the victim.³⁷ A woman who decides to leave her abuser faces great economic challenges regardless of her income level because she frequently has to leave behind her only financial resources or support.³⁸ Women also face social pressure to maintain their relationship. They may believe that society, the legal system, and their communities consider dissolution of their relationships undesirable. Victims courageous enough to take the first step in overcoming all these obstacles by seeking a protection order need to be able to access protection orders whether or not they are currently planning to separate from their abusers.

A battered immigrant woman may prefer to remain with the abuser because of religious or cultural reasons. In many cases, the victim’s immigration status is linked to the abuser and she may just now have learned that she can apply for lawful permanent residence on her own through VAWA. In other cases, the immigrant victim’s legal status may be tied to a spouse with a legal work visa. These immigrant victims may qualify to apply for immigration benefits under the VAWA 2000 crime victim visa provisions, but since this process can take some time, victims may want to continue living with their abusers until they can receive legal immigration status through the U-visa process.³⁹ This is particularly true since INS has not yet issued regulations for processing U-visas. In cases in which battered immigrants plan to try to continuing living with their abuser, the protection order should require that the abuser attend an intervention program and refrain from assaulting, threatening, or harassing the victim. This type of protection order would not include an order that the abuser stay a minimum distance away from the victim, rather it emphasizes that the abuser cease harmful behavior. Some battered immigrants may prefer this sort of temporary arrangement until the INS approves their self-petition, or victim of crime case (U-visa) and grants them work authorization, after which they may choose to try to leave their abusers. Once the victim separates from her abuser, her protection order may be modified to include a separation or “no contact” clause.

Grounds for Issuance of a Protection Order

Generally, state statutes condition issuance of a protection order on the existence of an underlying act of abuse which constitutes a criminal act, including: assault, battery, burglary, kidnapping, criminal trespassing, interference with child custody, sexual assault, rape, threats and attempts to do violence or bodily harm,

³² *Id.*

³³ *Id.* at 846.

³⁴ *Id.* at 820-21.

³⁵ See Sara M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Victims Stay*, 28 COLO.LAW. 19 (1999).

³⁶ See Ethan Brennan Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW & INEQ. 471, 477 (1997).

³⁷ Numerous victims are forced to go back to their abusers because of lack of money or housing. U.S. Gen. Accounting Office, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-8 GAO/HEHS 99-12 (1998) (detailing evidence that desire for economic control underlies many brutal crimes against women).

³⁸ Leslye E. Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 616-19 (2001).

³⁹ INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

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interference with personal liberty, unlawful or forcible entry into a residence, child abuse, false imprisonment, stalking, , and destruction of property.⁴⁰ Some states will issue protection orders based on emotional abuse and harassment that might not have directly caused physical harm to the victim.⁴¹

Jurisdiction⁴²

Courts have jurisdiction to issue protection orders generally in one of two locations: in the state where the acts of abuse or threats have occurred, or the state in which the victim is currently present.

Under the Violence Against Women Act of 1994,⁴³ federal law requires that each state, tribe, or territory give full faith and credit to a sister state's protection order (including an emergency order) as long as due process requirements were met in the state where the order was issued. The full faith and credit provision of the Violence Against Women Act says that a valid protection order must be enforced throughout the United States. This means that if a victim receives a valid protection order, it is good in the community where it was issued as well as in all other jurisdictions or locations in the United States. These full faith and credit provisions apply to protection orders issued in all 50 states, Indian tribal lands, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands, and Guam.⁴⁴

Whether a tribe, state, the District of Columbia, or a U.S. territory issues a protection order, if the order complies with federal requirements, it is entitled to full faith and credit if it is valid under the full faith and credit law. A protection order is valid if the issuing court had authority over the victim and the abuser and had authority to hear and decide the case, and the abuser was given notice and an opportunity to be heard.⁴⁵ Protection orders issued with due process are enforceable in any US jurisdiction. Victims should be able to call police in a neighboring state to have their protection orders enforced. Some jurisdictions require that a victim moving to a new jurisdiction follow specified steps to have her protection order recognized and enforced.⁴⁶

If the victim is planning to move away from the original jurisdiction in which she obtained the protection order, contact the state domestic violence coalition or another domestic violence program in the new jurisdiction to verify what the procedures are in the different jurisdiction. These procedures need to be followed in order for the protection order to be enforced. For programs working with migrant worker victims of domestic violence, familiarity with VAWA full faith and credit provisions is essential. It is also useful for programs to develop relationships with other domestic violence and legal services agencies in the communities migrant workers come from or typically travel to for work. Find out if registration of the protection order is required, and if any fees are required. Recommend that the victim obtain a certified or court-issued official copy of the protection order. The victim should be instructed to carry the order with her and staple to it a copy of the statutory language of the VAWA full faith and credit provisions.

Although states are required to recognize another state's protection order, some states have not enacted legislation implementing VAWA's full faith and credit provisions. In these states, the police may not want to enforce an out-of-state protection order, despite the federal law requirement. State domestic violence programs and coalitions can be helpful in advocating with police to enforce protection orders issued in other states.

⁴⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 849-50 (1993).

⁴¹ *Id.* at 866-73.

⁴² For a more detailed discussion on jurisdiction please refer to Immigrant Status and Family Court Jurisdiction section of Chapter 8.

⁴³ 42 U.S.C. § 13981 (1994).

⁴⁴ Ctr. on Full Faith & Credit & Pa. Coalition Against Domestic Violence, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES, at <http://www.vaw.umn.edu/FinalDocuments/survivorbrochure.asp> (last modified Sept. 15, 2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

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Obtaining Effective Remedies – Creative Protection Order Remedies

To be most effective, protection orders should contain all the relief a battered immigrant woman needs to address the abuse, taking into consideration the unique “power and control” issues experienced within the particular relationship. Relief in the protection order should be as detailed as possible, and should ensure that the individual needs of the victim are addressed. Gaps in the relief listed in the order, or a lack of specificity, may lead to further violence and may make the order difficult, and, in some cases, impossible to enforce.

Protection orders can contain a wide range of remedies that can be used to address the specific needs of a battered immigrant. For example, certain protections are critically needed by most victims when the abuser and victim have children. The protection order should always contain orders regarding custody. Advocates and attorneys should also consider naming the children explicitly as protected parties in their mother’s protection order. Additionally, when immigrant women take steps to protect themselves against further abuse, abusers may retaliate against the woman’s family members. Protection orders therefore also should include prohibitions against contact or harassment of the immigrant victim’s family members.

We will first discuss traditional protection order provisions that are explicitly listed in most state statutes. As we discuss each provision, we will highlight how they can be best used creatively to help immigrant victims. Second, we will discuss other creative protection order remedies that courts can order under their catch-all provisions to offer further life saving help to immigrant victims. Although a client may or may not directly request each of the following provisions, it is important that she is aware all the potential options available to her.

TRADITIONAL PROVISIONS OF A CIVIL PROTECTION ORDER

- *The respondent shall not assault, molest, harass, or in any manner threaten or physically abuse the petitioner and/or his/her child(ren).*

A “no further abuse” clause is essential to every protection order. Enforcement through criminal or contempt prosecution is very difficult without this clause. The clause should be clearly worded so the abuser is aware of exactly what types of actions are prohibited.

If a battered immigrant chooses to live with her abuser, the protection order may include only this provision. The advocate or attorney should keep in mind that the battered immigrant does not need to leave her abuser in order for a protection order to be issued. Advocates and attorneys should interview victims and identify their fears, needs, and barriers to leaving their abusers. The advocate should be aware of cultural and religious traditions that might hinder the victim from seeking a protection order that requires separation. The victim may simply want a protection order, which requires the abuser to receive counseling and refrain from violent behavior. When the parties have children, full contact protection orders that allow the parties to continue to live together can also contain provisions that award custody to the victim should the parties separate. Such orders can also require that child support payments begin while the parties still reside together, which can be helpful when the abuser has been denying the victim access to money she needs to buy food or other essential items for the household and the children. Obtaining an order that child support commence while the parties still reside together provides the victim the greater economic security of having this already in place, should she decide to separate from the abuser in the future.

These types of protection orders are valid in all jurisdictions. In fact, protection orders in these cases can help shift the balance of power in relationships, reduce the violence the victim has been experiencing, and should be evaluated as an initial option for any battered immigrant. It is important that the battered immigrant obtain a protection order, despite the abuser’s promise that he will change his behavior. Advocates should remind the victim that if the abuser is serious about changing his ways, then he should be willing to make a formal promise in court. The judge can then issue a protection order stating that the abuser agrees to stop further abuse and harassment of the victim.

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There are two important advantages to obtaining a protection order even when the parties plan to continue living together. First, if the order is violated, the respondent can be charged with a criminal offense and the police will respond seriously when called for help. Second, the protection order provides crucial evidence that will support the victim's VAWA or U-visa immigration cases. Battered immigrants need not leave their abusers to obtain VAWA immigration relief⁴⁷.

- *The respondent shall stay 200 yards away from the petitioner's home, person, school, place of worship, workplace, day care provider, community center, and other specified locations.*

It is very important to **clearly define** where the respondent is forbidden to go. Include in the provision all locations frequented by the petitioner, including homes of relatives and friends, the petitioner's community center and place of worship, the petitioner's hairdresser and health care provider.

In preparation for the CPO hearing, advocates and attorneys should carefully review with the petitioner all of the various locations the abuser should be ordered to stay away from. Problems can arise when the parties are both active in the same church, community establishment, or other religious meeting place. One possible solution to this problem is to order that the abuser may only attend a church, community event, or religious event at specified times that are at different times from when the victim will be attending. When such an order is entered, the petitioner should provide copies of the order to church personnel, community personnel, or other religious personnel so that they can help her enforce the order if needed.

If the petitioner is in hiding, the provision should not reveal her exact location, but merely state that the respondent is required to stay away from her person and her residence. It is also important to state that respondent is not allowed to locate or attempt to locate the petitioner either directly, or through third parties. The order may also specify a minimum distance that the respondent is required to stay away from the petitioner and from specified locations.

It is also crucial to specify that the respondent must refrain from contacting the petitioner's workplace. A battered immigrant may only be able to work at a workplace that INS has approved when granting her a work-related visa and may lose her job because of the respondent's harassment. This could cause her to violate the terms of her legal immigration visa, making her more susceptible to deportation, or may cause the victim to lose her job.

- *The respondent may not contact the petitioner and/or his children in any manner, either personally, by telephone, in writing, by computer communication, or through third parties.*

Batterers often find other ways to harass the victim after the issuance of a protection order. This may include threatening phone calls, e-mails, letters, sending unwanted deliveries to her home (i.e., flowers), and other forms of communication. While these activities are still attempts to maintain power and control, the batterer may not be in violation of the specific provisions of the protection order. It is therefore important that the above clause be included in the protection order. To obtain evidence of violations of this provision, the victim can screen phone calls through an answering machine or caller ID. This will provide documentary evidence of the respondent's attempt at communication. The victim should also keep copies of any written communication and take photos of (with date stamps, if possible) any things delivered to the house by the abuser. Any third party contact and/or communications (e.g., through his family members) should also be documented.

- *The respondent shall vacate the residence at (location) immediately. The (local) police department shall accompany the respondent and respondent allow 15 minutes to collect his personal belongings. Personal belongings may include toiletries, clothes, one set of sheets, and pillowcases. The petitioner's permission is required to remove any other items. The police shall take all keys and garage openers from the respondent, test them to make sure they are the right ones, and then return them to the petitioner.*

⁴⁷ See Chapter 10 in this manual for more information.

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Vacate orders require the respondent to vacate the home shared with, owned by, or co-owned with the petitioner. Advocates and attorney should check with local law enforcement and follow language in the state statute and expand if possible. The order should also specify the exact manner in which the vacate provision should be carried out. It should establish time limits on the respondent and include additional provisions, which prohibit him from reentering the home, and should order the respondent to surrender all keys, to refrain from damaging the property or premises, and to refrain from tampering or interfering with utilities or mail service.

In cases involving battered immigrant women, it is important that vacate orders go into effect immediately. If abusers are given advance notice of a vacate order, they may destroy, remove, or hide essential documents and evidence that the battered immigrant will need to win her domestic violence-related immigration case. When the victim has fled the family home and has sought a protection order to remove the abuser and return her and the children to possession of the family home, there may be financial records in the home that the victim will want access to. When this is true, the vacate order can explicitly state that the abuser is not allowed to remove any financial records or other papers from the home when he vacates it. This way, the victim can gain access to financial records in the home that could be useful to her in obtaining child support, spousal support, or an equitable distribution of property.

When an advocate or attorney helps a petitioner obtain a vacate order, it is important to also follow up with telephone and utility companies making needed changes in account numbers and asking that only persons with special, secure passwords be able to access the account information or make any changes in account service. Advocates and attorney should consider including in the protection order (both in the temporary and final order) language that requires the respondent to not interfere with utility services and also including enforcement language (e.g., if respondent violates the provision, respondent is ordered to pay \$500 fine or up to six months in jail or both for each violation). Immigrant victims should immediately cut off the abuser's ability to make calls using telephone service either directly, using calling cards, making collect calls, or charging calls to her number. This will prevent the abuser from running up her telephone bill with international phone calls. It may inhibit his ability to harass or threaten her relatives abroad. Most importantly, it may help her prevent the phone company from cutting off her service for non-payment thereby cutting her off from an ability to call the police for help. If victims already have high phone bills left when the abuser vacates, there are two possible options: he can be ordered to pay the phone bills or advocates and attorneys can obtain help, for example, from a local church or charitable organization, to pay her outstanding bill so that her phone with a new number can be reconnected. Advocates and attorneys may also want to consider negotiating with utility companies on the victim's behalf to structure a payment plan and maintain minimum service.

In some states, utility companies have begun requiring social security numbers to open accounts. For immigrant victims of domestic violence who obtain vacate orders and need to transfer utility accounts into their own names, this can create real dangers. Victims may be able to remove abusers from the family home but then face the danger of having the electricity, gas, or water service turned off. There is no federal requirement that social security numbers be provided for utility services. Utilities services are not government agencies. Advocates and attorneys working with immigrant victims should contact utilities with such requirements and seek waivers for immigrant victims, explaining the dangers posed for the victim and her children, and explaining any immigration relief available to the particular victim. In the alternative, advocates should seek to have the utility company allow her to use the social security number of one of her U.S. citizen children, or the number of the account, or should allow a friend or family member to co-sign the contract using his/her social security number. As a last resort, as part of the protection order or in a motion to modify the protection order, if the abuser is ordered to leave the home, he should also be ordered to leave the utilities in his name with his social security number, and not to interfere with the service. When talking with utility companies about such cases, advocates should consider advocating that utility companies change these newly imposed social security requirements because of the danger they pose to immigrant victims of domestic violence and child abuse.

- *The respondent shall relinquish possession and/or use of the following personal property (list specifically itemizing property in question) as of (date and time).*

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This provision orders that the respondent relinquish personal property, such as the family vehicle and particular documents. This is very important for battered immigrants who have left their home and need to retrieve documents she will need for any immigration case she has or may file.⁴⁸ The order should also include essential documents she will need for herself and the children for identification, health care, school, and child support. Prior to the hearing, the petitioner should make a list of the items that she needs. It may be possible, if the respondent is represented, for the belongings to be brought to the hearing. If this is not possible, advocates and attorneys should make sure that petitioner has a way of picking up items and/or having a place to store the items. The list of property should include items that are irreplaceable and that have sentimental value to her so that the abuser will not be able to maintain power and control by taking or destroying these items, e.g., family photos and heirlooms. Abusers of immigrant victims may try to take control of, or destroy, items that have sentimental or cultural value to the victim. Further, when the immigrant victim needs the car for transportation to work, granting her use and possession of the car can be of particular importance. If the protection order has a vacate provision, the order can request that the respondent relinquish possession of all property except for personal belongings and other items listed in the order. The language should also specify that a police escort accompany either the abuser or battered immigrant back into the home to retrieve belongings.

- *As of (date and time) the respondent shall turn over to the (local) police department any and all weapons that the respondent possesses or owns and all licenses that allow the respondent to possess or purchase weapons.*

This provision prohibits the respondent from possessing a weapon or firearm. It also revokes the respondent's weapon's license. This will prohibit the respondent from purchasing or receiving a weapon during the duration of the protection order. To further prohibit the respondent from possessing a weapon, the provision can order the local police to search for and confiscate weapons during the vacate order, when they are called for assistance in enforcing the protection order, when they are ordered by the court, by the victim's request, or they can be sent to the abuser's home to confiscate weapons. The court should require the respondent to produce a receipt proving that the weapons were relinquished. If the respondent is a police officer or in the armed forces, some jurisdictions may waive this requirement for battered immigrant women. The advocate or attorney should ask the victim what, if any, weapons the abuser owns or were used against her. The order should include anything used, including knives and machetes.

- *The respondent shall participate in and successfully complete the following (treatment program).*

The protection order may require the respondent to attend a treatment program in addition to other provisions. These programs may be batterer intervention, substance abuse, parenting classes, or mental health counseling. Only those batterer intervention programs that are certified as having a specific expertise in working with domestic violence abusers should be used. In cases of domestic violence, joint or family counseling is not appropriate, and should not be ordered or agreed to by the victim. Research indicates that family counseling can actually increase danger to the victim. The batterer should only be ordered to attend programs without the victim's presence. If the batterer is a substance abuser, he should first attend a substance abuse program and, once he has completed this program, he should be ordered to attend a batterer's intervention program. Advocates and attorneys should be familiar with the range of treatment programs available and should also seek a signed authorization from the respondent, allowing counsel to obtain information from the treatment program regarding respondent's completion, or participation. It is important to note that in certain jurisdictions, it may be difficult for courts to enforce and/or monitor compliance. There are very few programs available for batterers, thus making it difficult to mandate participation and compliance.

If the respondent is not fluent in English, he should be ordered to attend a certified program in a language in which he is able to communicate. If there is no program in the respondent's language, he should be ordered to arrange for an accompanying interpreter for all sessions. In some jurisdictions, the abuser can

⁴⁸ For a full list of documents she may need for immigration case, see Chapter 3 of this manual for evidence checklists.

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be ordered to use a court certified interpreter that he pays for on a sliding scale. If there is no counseling in the respondent's native language, he will likely use this as an excuse not to attend. This specific issue must be addressed whenever the respondent's native language is not English. If alternate provisions are not listed in the order, it is likely that the respondent will not attend counseling sessions.

Advocates for victims whose abusers are not English speaking should identify potential interpreters in advance whom the abuser could pay to interpret during treatment sessions. Church-based groups or community groups who work with immigrants may be able to identify potential interpreters. These groups could also assist in providing interpreters that could be trained in domestic violence by the local domestic violence coalition or shelter. These interpreters could assist victims at hearings and when victims wish to participate in battered women's counseling groups.⁴⁹ Domestic violence programs should include a line item in their budget to cover the costs of interpreters on an as-needed basis.⁵⁰ Battered women's advocates involved in coordinated community response teams should also encourage other community agencies (police, treatment programs, courts, probation officers, legal services, etc.) to hire bilingual staff and include interpreter line items in their budgets.

- *Temporary custody of the minor child(ren) is awarded to the petitioner until further order of the court, or until the expiration date of this order.*

It is important to include a custody order whenever children are involved in an abusive relationship. Research has found that approximately 70% of batterers also abuse their children, this demonstrating that children can also be physically harmed by domestic violence.⁵¹ Even if children may not have been directly abused, studies have proven that children living in violent homes are negatively affected.⁵² After separation, the batterer may use children as a form of control over the victim. If legal custody is not specified in the protection order, a battered immigrant may be forced to work out child custody with the abuser, posing enhanced danger to the victim and the children.

It is essential that the protection order include a custody clause if the children are involved. Generally, battered immigrant women should resolve custody questions as part of the immediate relief they receive in their protection order. The batterer may also tell the victim that she will lose her children if she leaves him. A protection order without a custody clause could therefore cause the victim to believe that she will lose legal custody over her children and may cause her to return to the abusive relationship.

If custody is not awarded in the protection order, it is more likely that the victim will return to the abuser. Few battered immigrants are aware of the U.S laws regarding custody, particularly those that favor awarding custody to the non-abusive parent even when the abusive parent is a citizen and the non-abusive parent is not.⁵³ What battered immigrants do know is often told to them by their abusers. Battered immigrants often assume that as in their home country, U.S. courts will automatically assign custody to the male head of the household, or to the parent with the greater earning capacity or superior immigration or citizenship status. Misinformation combines with incorrect assumptions and fear that their abuser will cut them off from their children altogether, making battered immigrants hesitant to seek child custody as part of their protection order or other family law case.

Advocates should explain the child custody process to the victim and that American courts often award custody to immigrant victims and other battered women instead of granting custody to their abusers. This explanation should include a discussion of the best interest of the child standard used by courts across the country in making child custody determinations. Factors that courts consider in making best interest determination in the local jurisdiction could include the wishes of the child's parent or parents as to his or her custody; the wishes of the child as to his or her custodian; the interaction and

⁴⁹ Battered women should not be ordered into counseling as part of their civil protection order.

⁵⁰ See Chapter 10 of this manual for a fuller discussion of interpreter services.

⁵¹ Bowker, Arbitell, & McFerron,., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, (Kersti Yilo & Michelle Bogard, eds., 1988).

⁵² See e.g., HOWARD A. DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, American Bar Association Center on Children and the Law. (1994).

⁵³ *Id.*

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interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to his or her home, school and community; and the mental and physical health of all individuals involved, and who, if anyone, perpetrated domestic violence in the relationship.⁵⁴ Immigration status of a parent is not a factor that is properly considered as part of this best interest test.⁵⁵

When courts allow the abuser to raise immigration status in custody cases, the abuser can use the court process to further intimidate and threaten the victim with the loss of her children and possible deportation. If immigration issues are raised, the battered immigrant should find counsel to represent her. If she does not have counsel and does not have a way to address immigration issues in open court, then it is likely that she will return to her batterer. For more information on how to respond when the abuser raises immigration status in a custody or protection order case, please see the chapter on immigration and child custody included in this manual.

In preparing a battered immigrant for any family court case at which custody could be contested, attorneys⁵⁶ and advocates should be prepared to put on evidence including the battered immigrant's testimony, testimony of other witnesses, and other evidence (e.g., photographs, police reports, school and medical reports) that demonstrate:

- The client is the primary caretaker of the children (have her testify about a typical day with the children and who is responsible for what childrearing tasks);
- Respondent is not the primary caretaker of the children (have her testify about respondent's typical day, e.g., respondent leaves the home for work and does not return until very late at night, etc.);
- How respondent interacts with the children, how he disciplines the children, etc.;
- The history of DV and how it has affected the children (if the children have counselors, health care providers, schoolteachers, or advocates who can address this effect, they should be called as witnesses);
- Whether the children were abused directly or affected by witnessing the abuse;
- Who has been responsible for the children's health care, schooling, religious activities;
- How well the children are adjusted in their current school and community; and
- In a highly contested case, attorneys should consider having an expert witness testify about the effects of domestic violence on these children.

Depending on the age of the child/ren, attorneys can consider requesting the court to confer with the child/ren in chambers.

Battered immigrants contemplating moving with the children to another, safer jurisdiction should consult a family lawyer who can advise them on how to best make such a move without the battered immigrant woman becoming subject to parental kidnapping charges. The Hague Convention,⁵⁷ the Federal Parental Kidnapping Prevention Act,⁵⁸ state parental kidnapping acts, and State Uniform Child jurisdiction and enforcement acts⁵⁹ can all be factors in this decision.⁶⁰ It is very important that battered immigrant women who are considering moving with their children do so in a manner that does not violate these

⁵⁴ National Coalition Against Domestic Violence, *Myths and Facts Regarding Domestic Violence and Child Custody Disputes*, August 1997; Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states' custody statutes).

⁵⁵ For more information see Chapter 8 of this manual.

⁵⁶ While trained advocates can effectively help immigrant victims obtain culturally effective protection orders, attorney resources in your community should be particularly used in contested custody cases involving immigrant victims.

⁵⁷ Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10494 (March 26, 1986).

⁵⁸ Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568 (1980) (codified in 28 U.S.C. § 1738A (1994)). The Act requires states to give full faith and credit to custody decisions of other states that conform with the Act.

⁵⁹ UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 257 (1997).

⁶⁰ See Chapter 8 of this manual, which discusses the interaction of these laws and provides for a framework for advising battered immigrants on these issues.

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statutes. Criminal kidnapping charges that could result from violating these statutes could result in the non-citizen parent's deportation⁶¹ and/or loss of custody and visitation.

- *The respondent has rights of visitation with the minor child(ren) under the following conditions (requirements).*

If a custody clause is included in the protection order, a clause granting visitation to the respondent will generally be included as well. In 60% of cases, respondents retain visitation rights, and in only 11% of cases is the respondent required to have supervised visitation only.⁶² The National Council of Juvenile and Family Court Judges recommends supervised visitation until the batterer has completed a domestic violence treatment and a substance abuse program. Supervised visitation can be arranged at a supervised visitation center or with an approved third party. If a supervised visitation center is not available, advocates should work with the victim to find third parties with whom the victim feels comfortable, to ensure the safety of herself and her children. Possible third parties could be friends, family members, clergy, or social workers.

If the petitioner does not wish to request supervised visitation, orders authorizing unsupervised visitation should clearly state all of the specifics of abuser's visitation rights. The provisions should specify when, where, and how visitation should take place. If there is to be no contact between the abuser and the victim, the order should clearly state a drop off and pick up arrangement that will not require contact between the parties. A third party can be involved in picking up and dropping off the children. A third party's home can also be used as the site of the pick up and drop off. If this is not possible, the exchange of children should occur at a public place, such as a restaurant. In this situation, the victim should ensure that a third party accompanies her to the exchange location. This can offer her protection and ensure that she has a witness with her should there be problems with the abuser during the exchange of children. The victim can also exchange children at the local police precinct. This ensures her safety and provides police witnesses should problems arise such as the abuser's failure to return the children. The police can also require that the abuser remain at the precinct for fifteen minutes after the victim leaves the children so that if she is living at an undisclosed location, he is prevented from following her after she picks up the children.

The visitation provision can also order that the respondent not use drugs or alcohol during or in the 24 hours prior to the visitation. If the respondent is found in violation of this provision, the court should be asked to make clear to the respondent that visitation rights can be suspended.

If visitation is awarded, it is important that the order set forth a visitation arrangement that is detailed, sets particular pick up and drop off times, and provides a clear arrangement for exchange of children that ideally does not require contact between the parties. Ambiguous and non-specific visitation provisions create situations in which the abuser can continue to have contact with the victim. More importantly, non-specific visitation clauses often allow the abuser to use the children to maintain power and control over the victim.

If the petitioner's and/or children's safety cannot be ensured during visitation, the petitioner should ask that visitation be suspended until further court order. It is very difficult to convince the court to suspend an abuser's visitation rights or to require supervised visitation. When such relief is needed to protect the victim and the children, the victim will need to secure the assistance of counsel. The attorney should be ready to show why visitation is not feasible and argue that suspending visitation rights is in the child's best interest. Depending on the jurisdiction, it may be appropriate if the battered immigrant is planning on divorcing the abuser, and there is strong argument for supervised visitation, that counsel for the victim ask the court to defer visitation for the divorce action.

⁶¹ You may also contact NIWAP for technical assistance on these matters: 4910 Massachusetts Ave NW, Suite 16 lower level, Washington, DC 20016; 202-274-4457; or info@niwap.org.

⁶² Keilitz, Hannaford & Efke, 1997.

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- *The respondent shall pay child support for (minor child) in the amount of (dollar amount), biweekly, weekly, or monthly and/or spousal support for the petitioner in the amount of (dollar amount), biweekly, weekly, or monthly.*

Protection orders for all battered women with minor children should also include child support awards and, if applicable, spousal maintenance awards. The state's child support guidelines should be used to determine the amount of the award. It is important to ensure that the child support amount is paid through wage-withholding, so the respondent cannot use child support payments to exert control over the victim. With wage-withholding, the payments come directly from the abuser's paycheck and are paid by the abuser's employer directly to the victim through the court.

Other creative arrangements can require the respondent to pay specific bills, rent, mortgage payments, health insurance, or spousal support. If health insurance is ordered, the respondent must be ordered to provide to the court by a specific date, evidence that the children have been included in his health insurance coverage. The abuser can be ordered to file income tax returns and to turn over to the victim all or a specified proportion (at least half) of the tax refund. The protection order can state that the petitioner, not the respondent, has the legal right to claim the children as dependents on income tax returns. This can be ordered even when the abuser is paying child support, since the costs associated with supporting the children are usually significantly more than the child support award.

Financial support is important for battered immigrants who do not have work authorization, who are undocumented, or who have pending VAWA self-petitions and are only able to receive limited public assistance. If battered immigrants do not have financial support, they may be more likely to return to the abuser. For battered immigrants, obtaining child support can also strengthen a battered victim's INS case, as it will demonstrate that she is a person of good moral character who has taken all possible steps to ensure that her children have financial support. Obtaining a child support order can help her attain lawful permanent residency through VAWA, as the support order can be used to demonstrate sources of income that she is entitled to receive now and in the future. This can help her demonstrate that she will be able to support herself and will not have to rely on public benefits.

- *The respondent shall pay for all medical expenses the petitioner incurred as a result of the respondent's violence and shall pay for the repair of the door to the petitioner's house and all costs associated with the changing of the petitioner's locks.*

The protection order can include a provision that orders the batterer to provide other specific forms of monetary relief to the petitioner. Victims can receive court ordered reimbursement for economic losses, including repair of damaged property, medical costs, attorney's fees, and court costs. In addition, if the parties are married, the court can order that the abuser maintain the victim on his medical insurance. Payment of medical expenses and costs associated with damage to property is especially important for immigrants and their children. Ordering the abuser to pay for damage to property may help prevent the victim's eviction from her home. It can be difficult for immigrant women to find alternative housing, as they may have difficulty establishing employment history and landlords may discriminate against renting to immigrants or domestic violence victims.

By ordering the abuser to pay for medical expenses, the victim can receive needed medical treatment. Medical bills will not accumulate and there may be less need for the battered immigrant to become reliant on public benefits, thus strengthening her immigration case.

- *The (local) Police Department or Sheriff shall assist the petitioner in enforcing this order and shall pay special attention to calls for assistance from petitioner and/or (petitioner's address).*

The protection order may provide a provision with instructions for law enforcement to assist with vacate orders, transport the petitioner to a shelter, accompany the petitioner home, serve process, or carry out orders regarding the abuser's relinquishment of personal property or weapons. The protection order may also state that law enforcement officials monitor the victim's residence and respond quickly to future calls from the petitioner's residence.

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Catch-All Provisions

Catch-all provisions can be used to creatively obtain specific culturally competent relief for battered immigrant women. In virtually all jurisdictions, protection order statutes contain catch-all provisions. These provisions can provide victims with relief specifically needed in each case to help cut off the abusers' ability to exert continued control over their victims and reduce the abusers' opportunities for ongoing abuse. These provisions can be used to remove barriers that prevent victims from being able to leave their abusers. Through catch-all provisions, protection orders can address areas of potential conflict. Creative use of catch all provisions can also address petitioner's cultural and/or immigration status related needs.

Catch-all provisions can be broadly interpreted and allow the courts to exercise discretion to order additional relief as necessary to prevent abuse. For example in *Powell vs. Powell*,⁶³ the District of Columbia Court of Appeals determined that the courts had the authority under the statute's catch-all provision to grant monetary relief in civil protection order proceedings, though the remedy was not specifically provided by statute.⁶⁴ The court broadly interpreted the District of Columbia's intrafamily offenses act and concluded that

y interpreted the District of Columbia's intrafamily offenses act and concluded that interpreted the District of Columbia's intrafamily offenses act and concluded that

[W]hile it is true that monetary relief is not specifically mentioned...the plain intent of the legislature was an expansive reading of the Act, which we think must be accorded to the catchall provision as well.⁶⁵

In *Maldonado v. Maldonado*,⁶⁶ the court confirmed the wide range of relief provided by a catch-all provision and included provisions to assist the battered immigrant petitioner:

[T]he husband shall relinquish possession and/or use of the wife's pocketbook, wallet, working permit, ID Card, bank card, Social Security card, passport and any other item of the children's personal belongings, table, four chairs and dishes....the husband shall not withdraw the application for permanent residence that he had filed on behalf of the wife.⁶⁷

Specific Protection Order Provisions That Assist Battered Immigrants

It is important to screen a battered immigrant to determine her eligibility for immigration relief under the Violence Against Women Act (VAWA), the crime victim visa (U-visa) or other forms of immigration relief when assisting her in obtaining a protection order. The INS requires that a battered immigrant prove that she has been a victim of domestic violence (battering or extreme cruelty) when applying for domestic violence-related immigration relief. The protection order provides documentary proof that she has been a victim of domestic violence and she can submit a copy of the protection order to INS as evidence. In addition to proving domestic violence, she must also prove to INS that she has a valid marriage, that her abuser is a citizen or lawful permanent resident, and that she is married to her abuser. Provisions contained in the protection order can be used to help the immigrant client obtain evidence that she can then use to prove each of the required elements of immigration her case. A protection order that uses the catchall provisions to address the client's needs for evidence for her immigration case will likely reduce the client's fear of deportation, as well as reduce the likelihood that she will actually be deported. When the evidence she

⁶³ *Powell v. Powell*, 547 A.2d 973 (D.C. 1993)

⁶⁴ *Id.* at 975.

⁶⁵ *Id.*

⁶⁶ *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993).

⁶⁷ *Id.* at 41.

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obtains through the protection order helps her prove her domestic violence-related immigration case, it can also help her attain legal immigration status.

While in court, it is important that any battered woman or any battered immigrant seeking creative catch-all relief demonstrate that the specific provisions sought are designed to help curb the violence. She should pay special attention to showing how the requested creative relief will help prevent future harassment to her or her children and/or will enhance her ability to flee her abuser and create a safe life for herself and her children.

Some judges may not be willing to incorporate these provisions into a protection order. If faced with this dilemma, advocates and attorneys must educate local judges on the importance of these provisions for protection orders to offer the most effective, culturally appropriate protection possible. Part of this training should provide an overview, with examples, of the imperfect role traditional protection order provisions play for battered immigrants. If judges in a particular jurisdiction have not ordered creative relief, advocates should insure that battered immigrants seeking such relief have legal representation. Counsel for immigrant victims seeking creative relief would demonstrate to the court through evidence why the relief sought should contribute to reducing the abuser's power and control and the potential for future abuse of the petitioner. Immigrant victims needing creative protection order remedies should include evidence of immigration-related abuse in the petition for a protection order. Then, if the protection order is issued by consent, there is evidence in the record (the victim's uncontested affidavit). If creative relief is requested, evidence supporting the request was presented to the court, and the relief was denied, counsel should consider appealing the court's decision to deny relief.

Attorneys should request all the relief that a client needs as a battered immigrant. If for some reason, the judge denies such relief, the advocate or the attorney must state: "Objection, your Honor. Could you please state for the record why this relief is being denied?" This will create a record so an attorney can appeal the decision. (See discussion of appeals below.)

The following are examples of creative provisions that can be particularly helpful to battered immigrants:

- *The respondent shall give petitioner access to, or copies of, any documents related to or needed for petitioner's immigration application.*

If the battered immigrant's husband has filed her immigration papers for her, she may need these documents and copies of information he filed with INS to support her own individual immigration case. Any immigration case that the abuser has filed on the victim or the children's behalf will contain information that can be used to prove his immigration status and to prove other aspects of her VAWA immigration case. Advocates should assist the petitioner in consulting with an immigration attorney⁶⁸ to find out what the petitioner may qualify for and which specific documents will be necessary for the client's case. Connection between this relief and violence: Helping the petitioner access documents and papers she will need to attain legal immigration status without the abuser's knowledge or assistance will counter the batterer's threats of deportation and allow the client to obtain legal immigration status on her own. It will rob the batterer of a powerful tool (deportation) he has over the battered immigrant, and facilitates her ability to attain any legal immigration status for which she qualifies.

- *The respondent shall not withdraw an application for permanent residency that he has filed on the petitioner's behalf, and shall take any and all action to ensure that the petitioner's application for permanent residency is approved.*

Batterers who have filed immigration papers on behalf of the victim often use this fact as a means to control and threaten the victim with deportation. The batterer may threaten to withdraw the application if the victim leaves him or reports violence to local authorities. The batterer therefore can exert powerful control over the victim and can use this to further abuse and harass. Protection orders can require abusers not to undermine their spouse's immigration case, and can prevent abusers from withdrawing

⁶⁸ The immigration lawyer will know when and whether it is necessary to contact INS about the client's case.

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applications, thus allowing the victim to obtain legal permanent residency. The amount of evidence required to obtain legal permanent residency through an application filed by a citizen or lawful permanent resident husband is substantially less than the burden of proof required for VAWA relief. Therefore, it is important in some cases to try to get the abuser to complete the petition that he has filed. By ordering the abuser not to withdraw her petition, it may also prevent him from taking steps to have the petitioner deported before she can file for VAWA immigration relief.

- *The respondent shall not contact any government agency, including, but not limited to, the INS, the (particular) Embassy, or the (particular) Consulate about the petitioner, absent permission from the court, a police employee, or a subpoena.*

In addition to contacting the INS to withdraw or harm the petitioner's immigration case, the respondent may also attempt to interfere by contacting the U.S. Embassy and/or Consulate processing the case. Protection order provisions limiting the abuser's ability to contact INS or other government agencies about the victim lessens the abuser's ability to interfere with the processing of her immigration case, thus lessening his ability to threaten her. Ordering the respondent not to contact INS, the U.S. Consulate, or Embassy about the victim's case can be particularly helpful to victims whose options for legal immigration status have been included in their spouse's immigration case. Further, many immigrant victims either have or are able to attain legal immigration status based on an immigration visa or immigration case initiated by the abuser. Ordering him to follow through on such a case, or not to withdraw her application based on a case he may have filed, can help many battered immigrant victims (e.g., derivative spouse's of work visas, asylees, workers for international organizations).

Once she has obtained a protection order and has informed INS that her spouse is an abuser by filing a VAWA case (by providing INS a copy of the protection order or any other means), VAWA confidentiality provisions preclude the INS from using unfavorable information provided by the abuser against the petitioner. This provision protects the victim from being harmed if the batterer continues abuse through the withdrawal of her immigration papers. This provision essentially lessens the amount of control that the batterer has over the victim and lessens his ability to abuse the victim through immigration-related abuse. It is important to note that research has found that immigration-related abuse almost always occurs in relationships that are also physically and sexually abusive. The existence of immigration-related abuse corroborates physical or sexual abuse or is a lethality factor that predicts the potential for escalation of the abuse in the relationship.⁶⁹ When there is immigration-related abuse in the relationship, it is advisable to seek the assistance of counsel for the protection order case. Counsel should present evidence to the court about the immigration-related abuse and demonstrate how the abuser uses these threats to control her. Counsel should also consider having a local immigration attorney testify as an expert witness about the petitioner's immigration options and to be available to answer any of the court's immigration-related questions. Creating a record connecting immigration-related threats and abuse would provide support in the record for the court to award the victim the immigration-related relief she seeks.

An order restricting an abuser's ability to communicate with government agencies about the victim can withstand any first amendment free speech challenges.⁷⁰ If a batterer contends that the protection order is restricting his ability to contact government officials concerning his wife and infringes on his free speech rights protected by the First Amendment, advocates can challenge the assertion in two ways. First, attorneys for the victim can assert that any threats a batterer makes to report a victim to immigration authorities constitutes non-speech elements of communication and are in essence, conduct that warrants no First Amendment protections.⁷¹ Second, attorneys should assert that "no contact with

⁶⁹ See generally Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (Summer 2000).

⁷⁰ A brief on this issue *Ruiz v. Carrasco* is included in the appendix to this chapter.

⁷¹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Supreme Court held that words threatening injury to a person, i.e., "fighting words," are not deserving of First Amendment protection, in that "their very utterance inflict injury or tend to incite an immediate breach of peace." *Id.* at 572. See also *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Supreme Court further stated that "It had never been deemed an abridgment of freedom of speech or press to make a

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government agencies provisions” were designed not as an effort to restrain speech, but rather, as a remedy for a batterer’s past conduct.⁷² Courts using a balancing test have consistently upheld restrictions on batterers’ speech (threats, harassment, communication with victims) because these restrictions are narrowly crafted so as to restrict only speech that harms or can cause harm to the domestic violence victim. If an abuser files an appeal or otherwise contests entry of such order, victims should obtain the assistance of counsel to oppose his motions and appeals to invalidate this or other protection order provisions on constitutional grounds. **Any attempts to make these arguments must be done with the assistance of an attorney.**

- *The respondent shall pay any and all fees associated with the petitioner’s and/or children’s immigration cases.*

This provision requires the batterer to pay immigration fees for the victim and her children, and ensures that financial burdens will not hinder her immigration application. In some cases, requesting fee waivers can delay the immigration case or cause an immigration official to question whether she is likely to become a public charge.⁷³ The connection here between relief and abuse is that in many cases but for the abuser’s refusal to file, or the withdrawal of the petitioner’s immigration case, she would have legal immigration status. He would have filed and paid the fees for filing an immigration case for her. Ordering the abuser to pay filing fees or other fees related to the victim’s immigration case removes financial disincentives to her filing and helps assure that her case will be resolved quickly and successfully. Further, by his payment to her of these costs, it enhances the likelihood that she will be granted lawful permanent residence without encountering public charge problems.

- *The respondent shall immediately relinquish possession and/or use of and transfer to the petitioner the following items:*

Petitioner’s Property

This should include clothing, personal affects, jewelry, and toys of the petitioner’s children, as well as cultural and personal items, such as family photos from the petitioner’s home country, mementos from the petitioner’s home country, personal religious items such as statues, rosaries and bibles, pictures of the petitioner’s children, gifts from family members, clothing, letters, books, the petitioner’s pocketbook, and any other items of personal importance or sentimental value to the petitioner. This provision will prevent the batterer from inflicting emotional abuse through the destruction or sequestering of petitioner’s or the children’s property.

-Petitioner’s Property (needed to prove or attain legal status)⁷⁴

These include the petitioner’s essential documents, such as the petitioner’s work permit, ID card, social security card, border-crossing card, pay stubs, bank card, alien registration receipt card, passport, or passport stamp to prove permanent residency. If the battered immigrant is a lawful permanent resident or a non-immigrant visa holder with permission to work and live in the U.S, she will need these essential documents to prove her status and her ability to work legally. Connection between relief and violence: This helps the victim prove her legal status, as well as her right to work and reside in the U.S. It prevents the batterer from withholding or destroying these essential documents, thereby making it harder for her to work.

course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed.” *Id.* at 555-56 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 409, 502 (1949)).

⁷² See *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988), where the Fourth Circuit held harassment is not protected speech. *Id.* at 243. See also, *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1996), where the court assumed that threats to harm another person constitute conduct that the state may prohibit, rather than speech protected by the First Amendment. *Id.* at 43. See also, *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) where the Supreme Court upheld an injunction prohibiting a course of unlawful conduct, not because of the content of speech, but rather as a remedy for prior unlawful conduct. *Id.* at 763 n.2.

⁷³ Advocates and attorneys can also explore whether domestic violence organizations, faith-based organizations or other groups in your community have established programs designed to help battered immigrants pay the fees associated with filing immigration cases.

⁷⁴ For a detailed list of the documents that will be helpful to an immigrant victims filing a VAWA immigration case, see Chapter 3 of this manual.

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NOTE: A police escort should also be included in this provision if necessary.

The following documents should also be obtained through a protection order. They can be very important for battered immigrants attempting to gain immigration relief, especially if they are married to, or are the children of, abusive U.S. citizens or lawful permanent residents. This provision can allow the petitioner to obtain evidence needed to prove a VAWA, crime victim visa (U-visa), or other domestic violence-related immigration cases.

-Copies of Information or Documents of the Respondent (VAWA related)⁷⁵

These items are essential for the victim's VAWA related case and may be needed to prove specific elements of the case, such as the respondent's immigration status. Examples of these documents include: the respondent's passport, work permit, certificate of naturalization or citizenship, alien registration card or passport stamp to prove permanent residency, bank card, ID card, Social Security card, abuser's baptismal certificate, birth certificate, military card, and copies of any documents the abuser may have filed with the INS on the client's or the children's behalf. Connection between relief and violence: The battered immigrant must prove that her abuser is a lawful permanent resident or citizen in order to be granted immigration benefits under VAWA. If the abuser refuses to produce evidence of his immigration status, he can continue to control the victim's access to legal immigration.

-Evidence of a Good Faith Marriage⁷⁶

Evidence of a good faith marriage may be necessary to prove that the battered immigrant entered into a good faith marriage, one aspect of a VAWA immigration case. Examples of evidence include: the parties' marriage license application, marriage certificate, wedding photos, joint bank accounts, income tax returns, deeds, correspondence addressed to both parties, photos from family trips or events, papers, documentation, or other objects relating to the marriage, copies of the respondent's divorce certificates from any previous marriages, and/or information about where such divorce decrees may be obtained. Connection between relief and violence: This provides essential evidence for a VAWA case and undermines the ability of her abuser to harm her immigration case by not withholding or destroying these documents.

-Other Materials which the INS needs to establish that the parties have resided together and that the petitioner currently resides in the United States, or that abuse against her occurred in the United States⁷⁷

As part of the petitioner's VAWA case she must prove that for some period of time she resided with the abuser. She must also prove that she currently resides in the United States or that one or more incidents of abuse occurred in the United States.⁷⁸ She may need evidence that may be in the abuser's control to prove these facts. Examples of this type of evidence includes leases, rent receipts, children's school records, utility bills, cancelled mail addressed to either or both of the parties at the same addresses during the same time frame, and income tax returns. Connection between relief and violence: It lessens the ability of the abuser to control the victim and allows the petitioner to gather evidence for her immigration case.

The battered immigrant needs access to property, documents and information that may be in the abuser's control. This is true when she remains in the family home and evicts him and when she leaves the family home. The process for obtaining the information under a protection order may be different depending on whether she leaves or removes the abuser from the home. If she leaves, her protection order should include a provision ordering that the police accompany her to the family home and stand by to ensure that the petitioner collects all items listed in the order in each of the categories discussed above. If the abuser refuses to turn over documents, the police can charge him with violation of the protection order. If he claims that he does not have listed items, the police should document that in a police report so that the victim can return to court

⁷⁵ Refer to VAWA Chapter 3 for a full list.

⁷⁶ Refer to VAWA Chapter 3 for a full list.

⁷⁷ Refer to VAWA Chapter 3 for a full list.

⁷⁸ This is true unless her abuser is a member of the U.S. military or a U.S. government employee stationed abroad.

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to have her order modified to require the abuser to pay any costs associated with replacing the missing documents.

If the abuser will be evicted from the family home, the police should be ordered to:

- accompany the victim to the home;
- serve the abuser with the protection order or temporary protection order; and
- stand by while the respondent removes only those items that are his personal clothing, personal effects, and items that the protection order says he can remove.

It is best that the victim prepare a full list of what the respondent can take with him in advance, and ideally have it attached to or included in the protection order. If she has not included these items in the protection order, she can work with her advocate to prepare this list and present it to the police. It is not advisable to put the battered immigrant victim in the position of negotiating with the abuser in front of the police regarding which items the abuser can and cannot take. With any potentially disputed items and any items the abuser may claim are his, which the victim may need for her immigration case or for a custody case or child support case, use and possession of these should be granted to the petitioner as part of her protection order.

If the battered immigrant is concerned that her abuser may try to destroy documents in his control that she may need for her immigration case and if she can show she is in imminent danger, she should obtain a temporary protection order removing the abuser from the house and ordering him to stay away. Once the abuser is removed from the house, if the documents that she needs cannot be located at the house, she can either ask that the abuser turn them over to her in open court, on a certain date, or ask that the abuser pays the cost of her securing duplicate documents as part of her full protection order, or as part of a modified protection order. (See previous section on modification.)

-The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden or claimed to be missing by the respondent, including the petitioner's or the children's passports, alien registration cards, social security cards, birth certificates, bank cards, work authorization documents, driver's licenses, or papers in any immigration case filed on behalf of the petitioner or the children.

By requiring the respondent to assume financial responsibility for destroyed documents, he is less likely to destroy essential documents. The destruction of documents can affect a battered woman's legal right to work, ability to establish her or her children's identity and right to legal immigration status. If the abuser does destroy or hide immigration documents or other documents or papers the victim may need for immigration or a child support case, the respondent should be ordered to pay for replacements so that the respondent's actions will not succeed in interfering with her immigration case.

The respondent's destruction of documents also has cultural ramifications as in many countries official documents are essential to functioning in normal society, and the respondent may feel that by destroying these documents he is exerting control over the victim. Many abusers who have destroyed or hidden documents may deny they are exerting control and may try to minimize in court the importance of document destruction. By downplaying these actions they hope to convince the judge that the document destruction is unimportant. Many judges who have not received training to understand the particular role importance of identity documents for immigrants may wrongly dismiss evidence of document destruction as irrelevant. Counsel for battered immigrants needs to present evidence to help judges understand that document destruction is strong evidence of the abuser's power and control over the immigrant victim. It is important to hold the abuser responsible for document replacement. The connection between document destruction and abuse: Ordering the abuser to replace destroyed, lost, or missing documents will further the victim's ability to work legally, and obtain public benefits and, in some states, a driver's license.

-The respondent shall sign a document in open court in which he provides under oath, both orally on the official court record, and in writing, the following information: the state, city and country of his birth, and the hospital in which he was born. The respondent shall sign the state form required to obtain a copy of his birth certificate in open court.

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This allows the petitioner to obtain a copy of the respondent's birth certificate, which may be necessary to prove his citizenship for a VAWA immigration case. His birthplace information is provided in open court. Some statutes require a signature for release of birth certificate information. In such cases, the judge may need to set another court date at which the respondent shall sign necessary forms. This second hearing will be needed to allow petitioner's counsel or advocate to obtain the proper forms from the state in which the abuser was born. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship makes it easier for her to proceed with her VAWA immigration case.

-The respondent shall sign a prepared FOIA (Freedom of Information Act) INS form with the results of this form to be sent the petitioner or the petitioner's attorney.

A signed FOIA form can be used to obtain copies of a respondent's immigration case file and any case the respondent may have filed on behalf of the petitioner or the children. His immigration files may include the respondent's immigration case in which he obtained lawful permanent residency, the file in which he became a naturalized citizen, or the file that he completed on behalf of his abused spouse or children. This provision is useful if the respondent has been withholding information from the petitioner regarding the status of the immigration petition that he filed on her behalf and/or documentation of her legal status. The petitioner will be unable to access this information from INS unless the respondent signs an FOIA form. A signed FOIA form can also be useful if the INS has in its records information that is needed to prove that the respondent is a citizen or lawful permanent resident or needed to prove the respondent's prior divorces. (See Appendix for sample FOIA form). Connection between violence and relief: Lessens the batterer's control over the victim's immigration status, thus lessening his ability to abuse her.

-The respondent shall turn over his A-number or a copy of his U.S. passport in open court along with a copy of documentation proving that he has provided the correct number.

An essential requirement of a VAWA immigration case is providing proof of the abuser's immigration status. Foreign born naturalized citizens and lawful permanent residents will have been assigned an "A-number" – an immigration case number – when they applied for lawful permanent residency. Obtaining this number is the most effective way for an immigrant victim to prove the immigration status of her abusive spouse or parent. Submitting the A-number as part of her VAWA immigration case allows the Department of Homeland Security to search its own records to verify that her abusive spouse is a naturalized citizen or lawful permanent resident. Similarly obtaining a copy of a U.S. born citizen's passport provides evidence of citizenship that the victim will need for her VAWA immigration case. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship or lawful permanent residency status makes it easier for her to proceed with her VAWA immigration case.

-The respondent shall under oath, sign a document in open court stating whether he has been previously married and identifying the jurisdiction in which each prior marriage was terminated, including the date each prior divorce or annulment order was issued. He shall also state whether or not he has copies of his divorce or annulment decree(s) and shall turn over to the petitioner copies of each decree.

It is best if battered immigrants can include in their VAWA self-petitions evidence of the abuser's prior divorces. Battered immigrants who can prove that they went through a formal marriage ceremony with the abuser can file for VAWA relief even if the abuser was a bigamist. However, until the statutory change included in VAWA 2000 is incorporated in new INS regulations, it may be easier to request that the abuser provide this information. This provision helps the petitioner safely obtain this information and gives the petitioner access to proof that will facilitate swifter approval of her VAWA self-petition.

-The respondent shall not remove the children from the court's jurisdiction and/or the United States absent a court order, and shall relinquish the children's passports to the petitioner or the court.

As a control tactic, batterers often threaten to abduct children and, in many cases, actually carry out these threats. In 1988, the Department of Justice estimated that parents or family members abducted 354,000

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children in the United States.⁷⁹ It is suspected that 31.8% of these abducted children were taken out of the U.S.⁸⁰ If batterers manage to remove children to other countries, it may be particularly difficult to trace or retrieve the children. If a provision designed to prevent removal of the children from the United States is included in the protection order, a copy of the order must be forwarded to the Office of Passport Services within the Bureau of Consular Affairs of the United States Department of State to prevent the issuance of passports or duplicate passports for the children if the respondent attempts to obtain them.⁸¹ The children should also be registered in the State Department's Children's Passport Alert Program that will notify the victim if the abuser tries to obtain another passport for the children.⁸² Connection between violence and relief: The dangers of international child abduction are real. Too often courts and attorneys do not take these threats seriously. Anytime the abuser makes threats that he will take the children and/or that he will prevent the victim from seeing the children ever again, it is important to explore with the victim the likelihood of future international child kidnapping situation. Some of the questions to ask include the following:

1. Does the abuser have family members or friends living abroad?
2. Does the abuser have the financial means to travel abroad with the children?
3. Has he in fact taken trips abroad in the past to visit family living abroad?
4. Has the abuser himself lived abroad?
5. Is the abuser's country of origin a member and signatory to the Hague Convention?
6. Has the abuser made threats to kidnap or sequester the children or prevent her from seeing them?
7. Did the abuser recently lose or leave his job here in the United States?

Obtaining a protection order containing provisions that require that the abuser not remove the children from the court's jurisdiction can help prevent international kidnapping. Orders restricting the respondent from kidnapping the petitioner's children, and/or requiring respondent to turn over the children's passports, lessen his ability to threaten and abuse the victim. This provision should be included in the protection order whenever the abusive relationship has included threats of parental kidnapping.

The order should also address the mechanics of how and to whom the passports should be turned over. They can be turned over in open court to the petitioner at a hearing before the judge in a few days time. The turn over of the passports could also occur at a visitation center on a date certain specified in the protection order. The passports could also be turned into the court to be held in the court record and turned over by the court to the petitioner.

-The respondent shall sign a statement that will also be signed by the petitioner and the judge informing a (particular) embassy or consulate that it should not issue a passport (in the case of dual national children) or for U.S. citizen children a visitors' visas or any other visa to the child(ren) of the parties absent an order of the court.

This provision provides an additional mechanism to prevent possible international kidnapping. A copy of the protection order must be filed by the petitioner with any potentially relevant consulates, passport offices, embassies, and airlines to prevent the issuance of a visa and the removal of the parties' children from the United States. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive father.

-The respondent shall post a \$_____ bond that shall be forfeited if the respondent removes the children from the jurisdiction or from the country. The respondent shall purchase for the petitioner a full fair open unrestricted airline ticket to the respondent's country of origin and provide the ticket by ___ date to the petitioner.

⁷⁹ LINDA K. GIRDNER, PHD AND PATRICIA M. HOFF, ESQ. OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN. Department of Justice- Office of Juvenile Justice and Delinquency Prevention. 1 (1994).

⁸⁰ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 981 (1993).

⁸¹ For a more detailed discussion on the removal of children, see the Hague Convention chapter, Chapter 8.

⁸² See chapter 8 of this manual for more information on how to use the Children's Passport Alert Program.

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Both these provisions either separately or together can be included in a protection order to deter international child abduction. The bond should be set at a sufficient level to effectively serve as a deterrent to flight. Purchase of the airline ticket ensures that, should the children be abducted, the petitioner will have the means to travel to the abuser's home country in connection with legal actions to secure the return of her abducted children. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive father.

Trial Issues⁸³

SERVICE OF PROCESS

Most states require that notice of the protection order hearing and any *ex parte* order be served personally on the respondent by either the local police sheriff, or a process server hired by the petitioner. If petitioner does not know where respondent is, attorneys should find out if petitioner knows where respondent's parents, brother, sisters, and other relatives or friends who may know the respondent's whereabouts. Petitioner may be able to file motion for substituted service instead of personal service. Many states require that the police serve the respondent. Some states allow for service by publication, if personal service is not possible.⁸⁴ If the battered immigrant will be arranging for service through a process server, she should consider having service carried out at the abuser's work place, where it may be safest. If the petitioner has obtained a temporary protection order removing the abuser from the family home, that order should be served by the police on the respondent when they accompany her to the home.

STANDARD OF PROOF IN *EX PARTE* PROCEEDINGS

The standard of proof in *ex parte* proceedings is usually good cause, but may vary by state. Good cause can be proven through testimony and other evidence that establishes (1) the respondent abused the petitioner; and (2) the petitioner's reasonable fear of future abuse. Case law suggests that the petitioner must show that she is at risk of imminent harm⁸⁵ and that she must show this by a preponderance of the evidence.⁸⁶ In most, if not all jurisdictions, evidence of recent physical violence is sufficient proof of imminent harm.⁸⁷ Further case law illustrates that a broad range of acts, threats, or situations are sufficient to constitute imminent harm, including petitioner's fear that respondent would kidnap their children, the respondent's visitation violations, and an anonymous tip to the police that the batterer was going to kill the petitioner.⁸⁸

STANDARD OF PROOF IN FULL PROTECTION ORDER PROCEEDINGS

The standard of proof in full protection order hearings is generally a preponderance of the evidence, but this may vary by state.⁸⁹ This standard of proof can be established by showing that the petitioner has been the victim of recent abuse by the respondent. Some jurisdictions have removed the requirement of a recent act from their state's statute. In order to determine whether the standard of proof has been met, courts have acknowledged that past abuse is a factor that the court will consider. Thus, it is highly recommended that the petitioner include not only a listing of recent abuse but also an overview of the history of violence in her protection order petition. The petitioner should include as many specific incidents of violence and threats as she can remember with approximate dates. The petitioner should also include a sentence in her petition stating that "the abuse in the relationship began in (year) and has continued to date with violent incidents occurring approximately every (week, month, etc.) and with incidents typically including (hits, burns, kicks, punches, insults, threats, threats of deportation, sexual assault, etc.)." This is particularly important because it

⁸³ See Chapter 3 of this manual for evidence checklist that can be useful in preparation for a protection order hearing.

⁸⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 877-80 (1993).

⁸⁵ *Id.* at 1036.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1043-48. Preponderance of the evidence is generally considered that the credibility scales tip toward believing the petitioner (51%).

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gives notice to the abuser that the entire history of the abusive relationship is at issue. It allows the petitioner to submit evidence at the protection order hearing of any and all abusive incidents that occurred during the relationship. In addition, a statement that there have been other incidents of violence, including but not limited to those within the affidavit.

A petitioner's testimony alone can meet the standard of proof for issuance of a protection order. Thus it is very important that advocates and attorneys working with battered immigrants carefully explain that her testimony *is* valid evidence in the United States legal system. The testimony of immigrant victims will be more credible if the victim's fears about the legal system are addressed, if she has correct information about the system and if she has had an opportunity to see how the judicial system protects battered women before she will need to testify in her case. In addition to the battered immigrant's testimony, attorneys and advocates should assist battered immigrants in gathering and presenting other evidence that will be helpful to the court. Examples include witnesses, photographs, police reports, and medical reports to corroborate the victim's testimony. Presenting these types of evidence will help victims obtain comprehensive remedies addressing their specific needs. These forms of corroborating evidence will also assist the petitioner in proving her case if the respondent contests the case, seeks custody of the children, or comes to court with an attorney.

PREPARATION

Advocates and attorneys should prepare battered immigrants thoroughly for the protection order hearing or any open legal proceeding, including a review of the court procedures, potential questions that will be asked, proper courtroom attire, and behavior. Before explaining how the U.S legal system functions, ask immigrant clients about their expectations of the legal system and help them understand how our system differs from the legal system in their home countries. Battered immigrants are often unfamiliar with the U.S. legal system. Unless they are informed otherwise, they expect it to function much like the legal system in their country of origin. In their home country, oral testimony may not be valid evidence; judges are both the prosecutor and the judge and may not be impartial, and the person with the most money and political connections wins (this is usually the abuser).

When immigrant victims are being prepared to present testimony at the protection order trial, it is very important for attorneys and advocates to explain that testimony is valued evidence in the U.S, and that a woman's testimony has the same value as a man's. Failure to identify and address the battered immigrant's concerns or misinformation about our legal system could affect the quality of her testimony and ultimately her credibility. Reviewing these issues with a client may significantly improve the client's credibility as a witness, as she will be able to better understand the proceedings and therefore be more forthcoming with details of her abuse. The client will testify more effectively if she thinks the court will believe her, if she knows that in our system testimony is valid evidence, and if she knows that the respondent is an equal party and cannot bribe the judge or court officials. This will allow the client to witness the importance of a victim's personal testimony, and see the court issue a protection order crediting the victim's oral testimony. It may be helpful to take the immigrant victim to court in advance of her hearing to watch other cases in order to bolster her confidence in our system and make her a more credible witness. It is recommended that an attorney prepare the immigrant victim through moot trials, so that she is comfortable with the line of questioning, the role of the judge, opposing attorney, and various other key participants and witnesses in her case. To summarize: advocates and attorneys can do the following to help prepare battered immigrant clients for

- civil protection order hearings;
- ask clients about what they expect of the legal system;
- describe how the U.S. legal system works;
- describe the difference between the U.S. system and that in her country of origin;
- review procedures used in the local court;
- offer to take the client to court to see protection order proceedings in other cases;
- review the questions that may be asked should a hearing be necessary with the client;
- review the questions that the defense attorney and/or the judge may ask; and
- explain proper courtroom behavior and dress.

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When preparing the client for her testimony in court, it is important to recognize the psychological impact of physical, psychological, and sexual abuse that may interfere with the quality and credibility of her testimony. The victim may appear angry, hostile, withdrawn, passive, anxious, terrorized, or numb. Each of these presentations may be a “normal” reaction to trauma. A battered immigrant’s demeanor and oral testimony in court may be strongly affected if the victim is encountering the batterer for the first time again. However, a victim with strong support from family, friends, and advocates will appear more assertive, strong, and competent as a witness.⁹⁰

It is also important to recognize the cultural factors that may restrict the client from discussing intimate abuse, especially in the presence of her abuser and other male strangers. Advocates and attorneys need to work through these issues beforehand, to ensure that the client gives a complete, accurate, and uninhibited account of her abuse. It may be the first time she has shared such intimate and traumatic details with anyone, so she may not be emotionally prepared to tell her “story” in a manner that can be used as testimony. Specifically, attorneys and advocates should explore whether the respondent ever forced the petitioner to engage in sexual relations against her will, and if so, how often. Often times, clients will believe that if they are married to their abusers it is not against the law to force her to have sex.

It is important to make sure that a professional interpreter is available if needed. The court may not always have the resources to provide interpreters, they may charge fees for interpreting services, or they may have interpreters who, while certified and free, are not trained in domestic violence issues. Interpreters from the petitioner’s family or tight-knit cultural community may not translate appropriately due to shame, embarrassment, or loyalty to the respondent. It is possible to find qualified interpreters through nonprofit organizations in the petitioner’s community, through a local university, or a domestic violence organization with bilingual staff. Interpretation should not only be available at the court hearing; it should also be available to lawyers/advocates who need interpretation to communicate with their clients. It is important to have interpreters trained in domestic violence issues and cost-effective (or free) professional interpreters throughout the advocacy process.

Attorneys and advocates should take steps in advance to address the interpretation needs of clients. Hiring bilingual staff that can provide interpretive service is the best way to address this need for significant language minority population.⁹¹ Paid staff could include part-time interpreters who have been trained on domestic violence issues. They can be on-call, and paid on an as needed hourly basis. Part-time interpreters may be recruited from local universities, church groups, social services agencies, and immigrant rights groups. Other ideas include funds in the agency budget to hire interpreters from the Language Line, and other similar resources for languages spoken by immigrant victims who are isolated from others who speak their language. In the long run, the best and most cost-effective approach is for advocates and attorneys to urge local domestic violence coordinating councils to advocate for passage of an interpreter statute or court rule that requires state or local jurisdiction to establish an interpreter service that is provided by the court to all who need its services in criminal and family court. These services should be free to indigent clients and available on a sliding fee scale for other litigants with some means to pay.

OBTAINING A JURISDICTIONALLY SOUND PROTECTION ORDER

Advocates and/or attorneys should attempt to negotiate a consent order with the respondent or the respondent’s counsel (if represented). If the respondent does not agree to the provisions listed, the battered immigrant’s attorney should be prepared to litigate the case. As more and more battered immigrants seek protection orders, courts are seeing higher caseloads, and are seeking ways to dispose of these cases more quickly. In response, some jurisdictions have begun to encourage greater numbers “of consent” protection orders.

⁹⁰ Dr. Mary Dutton & Giselle Haas, AMERICAN BAR ASSOCIATION MANUAL ON VAWA CASES. (forthcoming 1999).

⁹¹ Leslye E. Orloff & Rachel Little, SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN: A “HOW TO” MANUAL FOR BATTERED WOMEN’S ADVOCATES AND SERVICE PROVIDERS, 67-76 (Ayuda 1999).

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It is absolutely essential that battered immigrants NOT agree to accept a consent protection order that, on its face, states that it is being issued without any finding of abuse or admission by the respondent, as such orders can undermine the petitioner's immigration case. Protection orders that explicitly state that no findings of abuse are being made by the court risk being found on appeal to be jurisdictionally unsound.

Subject matter jurisdiction in a civil protection order case under all state protection order statutes is conferred when an incident of domestic violence, as defined by the state statute, has occurred. Without any type of finding by the court that domestic violence has occurred, the court lacks the authority to issue a protection order. Parties by consent cannot confer subject matter jurisdiction on a court that does not have it.⁹² Subject matter jurisdiction is fundamental to the court's authority to issue a protection order.⁹³ Thus, courts should not be issuing protection orders that on their face state that the order is being issued "without findings" and/or that the court is entering the order without making any finding as to abuse.

Such orders are dangerous for abuse victims for a number of reasons. First, an order without findings may undermine the ability of courts to have abusers turn over weapons. Second, it limits victims' access to immigration relief and public benefits. Third, it allows the abuser to avoid accepting responsibility for his violent and abusive behavior, thereby undermining the protection order's effectiveness.

This does not mean, however, that courts cannot issue protection orders by consent of the parties. The court can issue a valid jurisdictionally sound protection order in one of three ways:

1. *The abuser can admit facts sufficient to support the issuance of a protection order either in the process of consent negotiations or to the court.* Although the victim may have included numerous incidents of abuse in her petition, the abuser need only be willing to admit one offense, however minor (e.g. a push, shove, or threat of violence) that qualifies under the domestic violence statute. Courts often successfully issue consent protection orders on this basis.
2. If the abuser is willing to consent to the issuance of a protection order with the remedies the victim is seeking but is unwilling to admit the abuse specifically, *the court can base subject matter jurisdiction on the uncontested affidavit of the petitioner.* The court should review the affidavit and determine whether it contains facts that constitute domestic violence under state law. If the facts in the petitioner's affidavit are sufficient to support the issuance of a protection order, the court can treat it as any other uncontested civil court action and grant the protection order based upon the uncontested affidavit of the petitioner that the court finds to be credible. In practice, any time the parties agree to relief, the court, after reviewing the petitioner's affidavit, can issue the consent protection order on the standard form that contains a reference to the statutory authority for issuance of protection orders. The petition must plead facts that would constitute an intra-family offense. That gives that court statutory authority to issue the protection order. When the court issues a consent protection order, the court should issue the order on the standard court form just as it would do after a hearing. The provisions of the protection order can be those agreed upon by the parties. Courts in jurisdictions across this country currently issue consent protection orders in this manner.
3. If the respondent is unwilling to admit any abuse and is unwilling to agree to the relief the petitioner is seeking, or is only willing to agree to the issuance of a protection order "without a finding," *the petitioner should ask the court for a hearing.* Issuance of a protection order without findings can be harmful to the battered immigrant for several reasons:
 - It can undermine her domestic violence-related immigration case;
 - It can be more difficult for the battered immigrant to be awarded custody of the parties' children;

⁹² Bush v. U.S., 703 F.2d 491 (11th Cir. 1983); Latin American Cas. Ins. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477 (11th Cir. 1989); American Policyholders Ins. Co. v. Nyacol Products, Inc. 989 F.2d 1256 (1st Cir. 1993).

⁹³ See generally Billingsley v. CIR 868 F.2d 1081 (9th Cir. 1989).

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- It can allow the abuser to retain his firearms avoiding federal laws that require that abusers with protection orders be barred from purchasing fire arms and obtaining a fire arms license;
- It can make it less likely in a divorce case for the battered immigrant to be able to retain the family home or to obtain an equitable distribution of the family assets; and
- It can facilitate access to welfare benefits for battered immigrants, particularly those who are lawful permanent residents.

Advocates and attorneys must encourage battered immigrant clients to object to these consent orders, and request a full protection-order hearing. If the judge refuses to hold the hearing, the petitioner should object and appeal the decision. If the judge holds the hearing but retaliates in some way against the petitioner for demanding this hearing, she should appeal.

Particularly in a strongly contested situation, it is important that the survivor be prepared to prove her case. The victim's ability to win a hearing and/or appeal will be much improved if she has come to court ready to testify and with some evidence corroborating at least one incident of abuse. By doing so, the petitioner should be able to successfully argue that courts do not have the jurisdiction to issue protection orders without a finding or admission of abuse.

It should be noted that the process of obtaining a consent protection order is a *negotiation*. Domestic violence cases, including a battered immigrant case, should never be mediated. If the respondent does not agree to consent to the protection order, the petitioner should ask the judge to hold a hearing and issue an order at that hearing. In negotiations to determine if a consent protection order can be issued, advocates and attorneys working with battered immigrants should advise the client to litigate the case or sign the consent order based on the strength of the case, the court's willingness to grant specific provisions sought, the need for a judicial finding of domestic violence for future immigration, welfare, or custody cases, and the client's desire to testify and/or hold the batterer accountable. It is important to prioritize the client's safety, including how her safety will be enhanced by her ability to obtain immigration relief without her abuser's cooperation.

Obtaining a protection order at trial. It is important when working with battered immigrants to come to court on the date of the protection order hearing prepared to litigate. Advocates and attorneys working with battered immigrants should help the petitioner prepare and provide testimony and evidence informing the court about:

- The history of violence in the relationship;
- Any of the petitioner's or the petitioner's children's injuries;
- The affect of violence on the petitioner and/or children, including threats to abduct and/or harm the children;
- How the abuse has affected the children, and the children's counseling needs;
- The petitioner's role in the care and custody of the parties' children;
- Evidence supporting the petitioner's request that the respondent's visitation be supervised;
- The respondent's use of control over the petitioner's access to her immigration status as a tool to maintain power over her and perpetuate violence and abuse, and any threats or actions taken to call INS to report the petitioner, or other attempts to have her deported;
- Information about the respondent's financial status, employer, and earnings, so that the petitioner can be awarded support;
- A list of documents and items of which the victim needs to take possession, including documents that will help in the petitioner's immigration case;
- The respondent's possession of, threats about, or ability to obtain weapons;
- Threats against the petitioner and/or family members, both in the U.S. and abroad;
- The respondent's abuse of drugs and/or alcohol;
- Any history of mental illness of the respondent;
- The respondent's threats of suicide; and
- The criminal record of the respondent.

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To prove that the battered immigrant is entitled to a protection order, to prove each of the facts listed above, and to prove that the battered immigrant is entitled to the relief she is requesting be included in her protection order, the battered immigrant will need to provide testimony to the court. Additionally, she should identify persons who witnessed the abuse, the affects of the abuse, or her injuries, and who would be willing to testify at the hearing on her behalf. Testimony is particularly helpful from persons who may have witnessed the violence itself, have seen the injuries that resulted from the abuse, or who may have arrived at the home while the violence was taking place or shortly thereafter (e.g., police). Law enforcement officials will be less subject to intimidation from the abuser than other witnesses, so it is particularly useful to have them as witnesses in cases in which the abuser has threatened other witnesses.

There can be significant benefit to having potential witnesses arrive with the petitioner at the court. First, should the abuser be unwilling to consent to the issuance of the protection order, or should he contest relief she is seeking, the petitioner will be able to proceed directly to a hearing and will not have to worry about whether her witnesses will arrive on time. Second, the presence of the witnesses may encourage the abuser not to contest the issuance of the order containing the requested relief, because he may be less willing to have a hearing when he knows that there are witnesses ready to testify on the victim's behalf. This is particularly true when police officer witnesses come to court on the victim's behalf. Finally, witnesses can provide support to the victim who may be seeing her abuser for the first time since the last incident of domestic violence. Advocates should check the local court rules for issuance of witness subpoenas, to ensure that witnesses are present at the time of the hearing.

In addition to coming to court with witnesses, battered immigrant women's advocates and attorneys need to gather various forms of documentary evidence and be prepared to issue this evidence should there be a hearing. Examples of documentary evidence might include photographs of injuries and/or the crime scene; items torn, burned, or destroyed during the violence; transcripts or tapes of 911 calls; police records; and medical records.

Other Issues Regarding Protection Order Trials

Right to a Jury. The respondent does not have a right to a jury in proceedings for the issuance or modification of protection orders.⁹⁴

Right to Counsel. The respondent does not have a right to an appointed counsel at a court proceeding to issue or modify a protection order, even if custody is an issue.⁹⁵

Double Jeopardy. Since issuance of a protection order is a civil matter, the abuser cannot raise the defense of double jeopardy to prevent the issuance or modification of a protection order. Criminal prosecution would never preclude the victim from filing for a protection order based on the same incident of domestic violence. Battered immigrants should always try to obtain a civil protection order, even if a stay-away order has been issued in a criminal case. This provides protection for the victim in case the prosecution dismisses or does not successfully obtain a conviction in the criminal case. When the criminal case ends, so does the protection of the criminal stay-away order, even if the victim needs continued protection. The civil protection order will continue to protect her from her abuser without regard to the outcome of the criminal case.

Dangers of Mutual Protection Orders and Criss-Cross Protection Orders for Immigrant Victims

MUTUAL PROTECTION ORDERS

A mutual protection order is a protection order issued against both parties, although only one party has filed a petition and effected service on the opposing party. A mutual order is entered against both parties and

⁹⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1070 (1993).

⁹⁵ *Id.*

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requires both parties to abide by restraints and other forms of relief in the order. Rather than filing official petitions against their victims, some batterers may allege during a civil protection order hearing that they have also been abused. If this situation arises, courts may sometimes issue mutual protection orders under the mistaken belief that such orders will prevent future violence against either party. However, if mutual protection orders are issued against innocent victims, abusers are successfully manipulating the system. Courts and police are less willing to enforce mutual protection orders against the abuser and may find that the immigrant victim has violated the protection order that could make her deportable. Mutual orders therefore heighten danger for victims because the respondent has not been held fully responsible for his actions. For these reasons, mutual protection orders are unenforceable under the full faith and credit provisions of the Violence Against Women Act. Jurisdictions that receive VAWO funding are required to certify that they have laws and policies in place that prevent issuance of mutual protection orders.

To prevent the issuance of mutual protection orders, the Violence Against Women Act will only grant full faith and credit to protection orders that meet the following safeguards:

1. a petition has been filed articulating the jurisdictional grounds for issuance of each protection order;
2. the person against whom the protection order was entered was served with notice of the petition;
3. the person against whom the order was entered had an opportunity for a hearing before a court; and
4. the court made specific findings that each party was entitled to such an order.⁹⁶

All petitioners, including battered immigrants, should strongly contest the issuance of any protection order that does not meet these criteria.

Mutual orders that are entered against the petitioner without the respondent filing a petition, presenting evidence of abuse, and obtaining a court ruling that the petitioner committed an act of domestic violence should be opposed and appealed, since they violate the petitioner's due process rights.⁹⁷ Mutual orders can also undermine a battered immigrant's ability to gain legal custody of the children, immigration protection, and welfare benefits provided to battered immigrant women. Battered immigrants should **NEVER** consent to the issuance of a mutual protection order, or any protection order against them. If a judge tries to impose a mutual order on her, she should object, stating that the order violates her due process rights, and she should request a full hearing.

CRISS-CROSS PETITIONS

While mutual protection orders are unenforceable under VAWA's full faith and credit provisions, abusers can go to court and file a separate petition for a protection order against the victim, alleging that he has also been a victim of domestic violence. If this occurs, the battered immigrant must go to trial and oppose the issuance of an order against her. She should defend herself with evidence from witnesses, photographs, medical records, and police reports. A non-citizen victim should **NEVER** agree to a protection order issued against her and should appeal any judge's decision to issue her such an order. If a protection order is entered against the victim, she could be deported if a court finds that she has violated the order.

For this reason, battered immigrants whose abusers file protection order cases against them should be helped to obtain the assistance of counsel. Attorneys working with immigrant victims whose abusers have filed protection order cases against them should carefully interview the client to determine each of the following issues:

- Is there any merit to his claims that she committed an act of domestic violence against him?
- If she harmed him in any way, and were the acts that she claimed she committed against him committed in self-defense?
- Who is the primary perpetrator of abuse in the relationship?
- What is the history of domestic violence in the relationship?

⁹⁶ 18 U.S.C. § 2265(c)(1)(2) (1994).

⁹⁷ Klein & Orloff at 1074-78.

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- Are there letters, recorded telephone conversations, or copies of e-mails that will help prove that he is the abuser who has been threatening or who has harmed her?

If after conducting this interview, the attorney finds that there is no validity to the charges he filed against her or that she was acting in self-defense, the victim should contest the case. The attorney should be prepared to go to trial and should arrive at court with testimony prepared, witnesses and evidence to prove that she is the actual victim of abuse, and, if applicable, was acting in self-defense. A victim should not be encouraged under any circumstances to consent to the issuance of a protection order against her. If the victim goes to trial and loses, the harm is no greater than if she has a protection order issued against her by consent. Additionally, in some cases the abuser will have been the first to go to court to seek a protection order against the survivor. If she would qualify for a protection order against her abuser, she should file for her own protection order against him and serve him with a copy of her petition for a protection order prior to the date she is required to appear in court for a hearing on his protection order case.

In some instances the attorney will interview the client and discover that she may not have been acting in self-defense on this particular occasion although she has been a victim of domestic violence. When this occurs, if the client is a non-citizen, it is advisable that, rather than agree to issuance of a protection order against the immigrant client by consent, counsel assist the victim in filing a divorce, legal separation, or custody case in which the parties could agree to an injunction in the family court case that does not constitute a civil protection order.

In jurisdictions where a respondent can consent to a protection order without a finding, a battered immigrant respondent, with assistance from her attorney or advocate, must weigh the possibility of going to trial and getting a finding versus agreeing to a consent order with no finding. Another issue to also consider in a criss-cross petition situation is that, in jurisdictions where a finding of abuser creates a presumption against custody, the battered immigrant may lose her children if she goes to trial on the civil protection order case.

It is particularly important for battered immigrants to successfully contest the entry of any protection order against them, either in the form of a mutual protection order, or a protection order filed by her abuser. To intimidate the victim into dropping her protection order case, abusers may file protection orders against the victim falsely claiming to be victims of abuse. Often the victim takes legal action to protect herself from the abuser. If the victim attacked the abuser in self-defense, she must prove her claims and have all cases dismissed against her. It is very important that she secure the assistance of counsel to represent her in contesting the issuance of a protection order against her. Having a protection order issued against her brings her one step closer to potential deportation for domestic violence and should be avoided if at all possible. If a protection order is issued against the battered immigrant, it is important for her to understand that any violation of the order could lead to her deportation.

Modification of Protection Orders

If a battered immigrant wishes to amend any provisions of her protection order, she may file a motion to modify the order. Advocates and/or attorneys should inform her that she has the right to modify the order and support her in making that decision. She may wish to seek modification for a variety of reasons. She may not have received a form of relief in her original protection order that she now needs. For example, she may have wanted to continue living with her abuser originally, and now wishes to separate because there has been ongoing abuse or threats. In this case, she can choose to file a motion to modify her order based on continued abuse and ask the court to remove the abuser from the family home and grant her custody and child support, or she can file a motion for criminal contempt and modification of the order (see discussion of motions for contempt below in the section on enforcement).

On the other hand, she may have been separated from her abuser at the time she received her protection order and now wants to reunite with him. If she wants to reunite with her abuser, she may do so without being

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prosecuted for having violated her own protection order.⁹⁸ However, judges in contempt actions may be more lenient in sentencing abusers when the victim and abuser have reunited after the protection order was issued. Generally, judges will be willing to enforce the protection order should future violence occur despite reunification, even when the protection order was not modified. However, it may be more difficult should the victim want the abuser to move out and wish to enforce and modify the order to state “no contact” provisions without future violence or threats. If the petitioner wants to reunite or has reunited with her abuser, it is advisable that she seek modification of her protection order. Advocates or an attorney should remind her that she can always come back for legal assistance or advocacy in reinstating the old provisions of her protection order, if the parties again separate. It is vital that attorneys and advocates work with her to develop or revise a safety plan that uniquely addresses her situation upon reconciliation with the batterer.

Another reason women often seek modification of their civil protection orders is that they want to give the abuser generous visitation time with the children because they believe he is a “good father.” This is especially true when the abuser has not physically hit or injured the children. Abusers will often times use their visitation time to inflict more abuse by manipulating the children, bad-mouthing the victim, or by trying to use the children to find out information about their mother. In these situations, a motion to modify may be essential to protect the safety of the victim and children.

Protection Order Enforcement

Upon leaving the courthouse with a signed protection order, the advocate and/or attorney should explain enforcement procedures to the client, and make sure that she understands what actions she can take to enforce her order. Protection order violations are criminal offenses in all states. If a violation occurs, states can prosecute the respondent for criminal violation of the protection order.

The battered immigrant should also be informed that there are two ways to enforce a protection order if the abuser violates it. First, she can call the police to have her order enforced. When police and state prosecutors enforce protection orders, the enforcement proceeding will be a criminal case brought by and controlled by the prosecutor. Second, the victim can also file a contempt action if the respondent violates the protection order. Victims may file civil or criminal contempt actions to enforce protection orders. These cases are controlled by the victim. A civil contempt proceeding may be desirable when the provisions of the protection order the victim is seeking to enforce involve the abuser’s compliance with these types of protection-order violations:

- failure to vacate the family home;
- failure to turn over documents, items, or articles that the court has ordered the abuser to place in the petitioner’s possession;
- failure to pay child support, spousal support, rent, or mortgage payments or other payments;
- failure to turn over the children’s passports;
- failure to provide the victim with a copy of the abuser’s passport, birth certificate, or INS-issued “A” number; or
- failure to return children after visitation.

Generally, at the conclusion of a civil contempt proceeding, the abuser is given a specific time by which to pay the money or turn over the materials. If he fails to do so he is jailed until he complies. It is important to note that civil contempt proceedings for violation of the provisions of the protection order other than provisions that preclude violence, threats, attempts, harassment, and stalking, will not make the abuser deportable.⁹⁹

⁹⁸In all states, except Hawaii and Iowa, the protection order is between the court and the abuser, only the abuser may be prosecuted for protection order violations. Victims should not be prosecuted for aiding and abetting the abuser’s violation of the court order, if the parties resume living together in violation of court orders. A sample amicus brief in the case of *Harrison v. Harrison* articulating the legal arguments against enforcing protection orders against victims is included in the appendix to this chapter.

⁹⁹INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227 (a)(2)(E)(ii) (“Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a

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The battered immigrant may also enforce the order through a criminal contempt process. In a criminal contempt case, the victim brings charges for violation of the protection order against the abuser. This is a way to criminally enforce the order, potentially jailing the abuser as punishment for his protection order violations, in a case that the victim controls. Criminal contempt can be charged for:

- any further abuse
- harassment
- threats
- stalking
- violation of the stay away/no contact provisions
- failure to turn over the children after visitation
- kidnapping or sequestering the children

Convictions for violations of a protection order in a criminal contempt proceeding are deportable offenses for non-citizen abusers, as are criminal enforcement of the protection orders by police and prosecutors. Advocates and attorneys working with immigrant victims whose abusers are non-citizens should undertake safety planning to determine whether the immigrant victim can safely cooperate in the prosecution of the abuser for criminal contempt or criminal prosecution for violation of the protection order.

It is important to recognize that an abuser who commits a domestic violence-crime against a victim in violation of a protection order may be subject to two types of actions in criminal court: (1) a criminal contempt action by the survivor, and (2) a criminal prosecution by the local prosecutor for the crime itself. The victim can bring her own criminal contempt action against the abuser, without prosecution for the underlying domestic violence crimes, so long as she seeks criminal contempt convictions for violation of the protection order only and not for commission of the underlying crime.

Survivors who believe that a criminal prosecution against the abuser is possible therefore should carefully structure their enforcement actions to avoid the problem of double jeopardy. Double jeopardy occurs if the respondent is being simultaneously or subsequently prosecuted for the same exact crimes by both the court in the contempt case and the court in the criminal case. The petitioner can avoid a double jeopardy violation by filing a contempt action for the respondent's violation of the protection order, not his criminal actions that he committed when he also violated the protection order.¹⁰⁰

Take, for example, a case where the abuser violated the protection order on two separate occasions. In the first incident, he hit the petitioner with a frying pan, and in the second, he pushed her down a flight of stairs. The petitioner would file a criminal contempt action alleging these facts and ask that he be convicted of violating the protection order provisions that required that he not harm her in the future. After a hearing, the court would enter an order finding that the respondent did in fact violate the protection order on two occasions causing the petitioner injury and sentence him for criminal contempt. The local prosecutor would not be barred by double jeopardy from also prosecuting the abuser for assault with a deadly weapon (for the frying pan incident) and assault (for pushing her down the stairs). Both prosecutions can go forward. The criminal contempt provides the victim immediate relief and the state's prosecution punishes him for his domestic violence crimes.

Advocates should encourage the survivor to call the police if she is in danger, yet also support her decision not to call the police. This is particularly important if after lethality assessment and safety planning, she decides that her abuser's deportation actually enhances danger to her and her family members and/or may lead to attacks against herself, her children, or family members living in the United States or abroad.

protection order that involves protection against credible *threats of violence, repeated harassment, or bodily injury* to the person or persons for whom the protection order was issued is deportable.”(Emphasis added).

¹⁰⁰ For a full discussion, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1122-1128 (1993).

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When considering enforcing a civil protection order, victims should be informed that non-citizen abusers are deportable if convicted of violating protection orders. Advocates and attorneys working with battered immigrants considering enforcing protection orders need to do a thorough safety assessment to determine whether she can safely enforce her protection order if by doing so her abuser would be deported. Safety for some battered immigrants will be increased if the abuser is deported. For some other battered immigrants the danger to the victim and her family members could be worse if the abuser is deported. Further, if this is the first protection order violation and the victim experienced no substantial injury, she may wish to give the abuser the opportunity to seek treatment and comply with the order, even if his deportation will not endanger her.

Bringing criminal contempt actions, as opposed to having the protection order enforced by local police and prosecutors, can provide an opportunity for a battered immigrant victim to enforce her order and to coerce her abuser's compliance without necessarily making him deportable. If the battered immigrant brings a criminal contempt case and that case is opposed by the abuser, yet a finding of criminal contempt is entered by the judge trying the case, that finding is a deportable domestic violence offense. If, on the other hand, the abuser is willing to try to change his behavior, but the victim still wants the court system's help in curbing and controlling her non-citizen abuser's behavior, she can file a criminal contempt case. At the hearing before the judge, she may ask that the protection order be modified to include new relief needed (e.g., batterer's counseling). She may also ask the court to continue the criminal contempt case without a finding of abuse or any admission by the abuser and set the case for a status hearing before the judge in six months. If the abuser complies with the order and there is no further violence in six months or at a second status hearing, the court could dismiss the criminal contempt case in a year without prejudice.

Should there be future protection order violations, the victim could come back to court to hold the abuser in contempt, both for the first incident, and the second. If, on the other hand, the abuser again violates the protection order after the case has been continued for six months, the victim can return to court and ask that the court continue with the criminal contempt case against the abuser. In many cases, holding open a criminal contempt case can be a very effective means of court intervention to force non-citizen abusers to stop their domestic violence. Abusers may choose to control their behavior because they understand that failure to do so will lead to deportation.

There are important steps advocates and attorneys can encourage victims to take whether or not they are initially willing to use the justice system to enforce their protection orders. Attorneys working with immigrant victims must carefully explain to the victims the potential immigration consequences of enforcement. The following are steps clients can be encouraged to take whether or not they currently plan to enforce their protection orders:

- Calling the police to report violations even when the client is not asking the police to make an arrest or take other action. Most police departments have procedures for taking police reports of criminal activity after the fact and for handling cases in which they or the victim are not seeking an arrest at the time. Filing of such reports in a timely manner relatively soon following an incident, or to document past unreported incidents when the victim has delayed in coming to the advocate or attorney for help, can document the domestic violence should there be future incidents of abuse or should the survivor in the future decide that she needs to enforce her protection order.
- Keep a journal or make notations on a calendar of all protection-order violations.
- Document the effect that protection order violations have had on themselves and on their children.
- Tell someone else: a friend, a co-worker, a therapist, a trusted family member, or a member of the clergy about ongoing abuse and protection order violations.
- Take photographs of injuries, destruction of property, unwanted gifts.
- Keep letters, e-mails, and phone messages.
- Report injuries to health professionals.

It is important to explain to battered immigrant clients that having this type of documentation may increase their protection in the future. Should violence and/or violations of the protection order increase, immigrant

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victims who have been helped to gather this documentation will be better able to enforce their protection orders.

Advisals

When protection orders involve non-citizens as petitioner, respondent, or both, the issuance of a protection order can have certain benefits and/or consequences particular to non-citizen victims and respondents. Advocates and attorneys involved in coordinated community responses to domestic violence, in judicial training, in court systems advocacy, and/or in representation of battered immigrants seeking protection orders, should urge judges to provide critical information to both parties in all protection order cases. It is best if these advisals from the bench be given in all cases because the court, attorneys, and advocates can never know for sure whether one of the parties is an immigrant. If the courts are unwilling to do this in all cases, judges may be willing to do so in cases in which a party requests one or more of the advisals listed below, or in cases in which the court becomes aware that one or both of the parties is a non-citizen. When training judges, it is important to emphasize that it is not advisable for the court to seek out information about any party's immigration status. The court can convey the needed information to all parties, and any particular party's immigration status is not relevant to any family court or protection order proceeding.¹⁰¹

There are four issues courts should address in advisals to the parties in all protection order cases:

1. Any person can seek and receive a protection order without regard to immigration status.
2. The issuance of a protection order has no immigration consequences for either party.
3. Issuance of a protection order may provide evidence that could be helpful to a petitioner in her immigration case; and
4. Violation of a protection order is a deportable offense.

When the court opens proceedings each day, along with advising courtroom attendees that the petitioners are to sit on one side of the courtroom and respondents on the other, the court should inform all parties that the issuance of a protection order does not have any immigration consequences. Further, the judge should state that any person who has been abused might seek and obtain a protection order without immigration consequences. The court may also wish to advise respondents at this time that any violation of a protection order is a deportable offense for any non-citizen. Courts should be urged to provide the information that the issuance of a protection order could help petitioner's immigration case only upon issuing the protection order, so that having provided this information is not perceived by the court as influencing the victim's testimony should a hearing be necessary.

Recommended advisal at opening of protection order proceedings: "This court's role in these proceedings is to issue orders of protection in cases in which the court believes that a domestic violence offense under the statutes of this state occurred. The court will issue such orders without regard to the immigration status of either the petitioner or the respondent. Further, the issuance of a protection order will not have negative immigration consequences for either party. However, violation of a protection order issued by this court will be a deportable offense for any respondent who is a non-citizen."

Advisal upon issuing the protection order: Additionally, before issuing a consent protection order, or after holding a hearing on the issuance of a protection order, and before issuing the order the court should issue the following advisal in open court to both parties on the record:

"The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as codified at 8 U.S.C. Sec. 1227(a)(2)(E)) makes a violation of this Order a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, violation of this Order may result in your being deported.

¹⁰¹ See full discussion of immigration status and jurisdiction in Chapter 8 of this manual.

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The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 also makes a conviction for a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, and you violate this order or are convicted for one of the above listed offenses, you may be deported.¹⁰² Petitioners who have been awarded protection orders by the court should know that immigrant victims of domestic violence might be eligible to receive legal immigration status as victims of domestic violence. Any non-citizen who wants a referral to a battered women’s services agency that can advise her of her legal rights to immigration benefits and other services available for victims of domestic violence should ask the courtroom clerk for a brochure that will provide petitioners information about services available in our community to help victims of domestic violence.”

¹⁰² Suggested OFP Relief for Battered Immigrants. Centro Legal (3/16/98)

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