Chapter 4: Civil Actions in Domestic Violence Cases

Session 4A: Civil Protective Orders

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Overview

Domestic violence and abuse are defined, at KRS 403.720 (1), to mean physical injury, serious physical injury, sexual abuse, assault or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault.

An emergency protective order (EPO) may be awarded to any family member or member of an unmarried couple who is a resident of this state or has fled to this state to escape domestic violence. The survivor may seek a protective order in the county of her/his residence. KRS 403.725. A family member is defined to include a spouse, former spouse, parent, child, stepchild or any other person related by consanguinity or affinity within the second degree. KRS 403.720(2).

When a survivor of domestic violence seeks protection from the Kentucky Court system, she should be instructed to complete and file a verified domestic violence petition pursuant to KRS 403.725. A district or circuit Judge or trial commissioner should then review the petition. Based upon a review of the allegations contained in the petition, and a conclusion that an immediate and present danger of domestic violence and abuse exists, the decision-maker chooses whether or not to issue an ex parte EPO.

The protective options available for inclusion in the EPO are listed in KRS 403.740 and include:

- restraining the adverse party from contact or communication with the petitioner;
- restraining the adverse party from committing further acts of domestic violence and abuse;
- restraining the adverse party from disposing of or damaging any of the parties' property;
- directing the adverse party to vacate the residence shared by the parties;
- granting temporary custody using the criteria set forth in the divorce statutes; and
- entering other orders of assistance to eliminate future acts of domestic violence and abuse.

After the respondent is served, a hearing is held to determine whether or not an act of domestic violence and abuse did in fact occur. The hearing shall occur within fourteen days of the issuance of the summons. If the respondent has not been served, the summons may be reissued, and the EPO may be renewed for fourteen days at a time. The statute contains no limit on the number of times an EPO may be reissued.

Although the violation of a protective order is a criminal offense, the restrained party must have received notice of the order to be convicted of violating it. Without service, the restrained party might be successfully prosecuted for an underlying offense, such as battery, but not for violation of the EPO.

If the court determines that an act of domestic violence and abuse did occur, it may issue a domestic violence order (DVO) pursuant to KRS 403.750, which can include all of the features listed in 403.740, as well as provisions for temporary child support and counseling services. Federal law also provides that persons restrained under a DVO may not, with certain exceptions, possess or attempt to possess a firearm. (See Chapter 10)

Domestic violence orders may be issued for a period of time not to exceed three years. Although the statute provides for potential reissuance "upon expiration", the petitioner should be advised to move the Court for reissuance approximately one month before the actual date of expiration. See KRS 403.750.

A person who violates an emergency protective order or domestic violence order can be immediately arrested by the police when there is probable cause to believe a violation of the order has occurred. KRS 403.760(2). This makes an emergency protective order or domestic violence order more effective than a civil restraining order, which is enforceable only by motion before the civil court, and offers greater protection to the survivors of domestic violence and abuse.

Enforcement of Protective Orders
KRS 403.7539 provides that enforcement of a domestic violence order (DVO) or emergency protective order (EPO) may be pursued through a criminal action or a civil contempt action, but not both. Jefferson Family Court Rule of Procedure 808 provides that violations of protective features of orders shall be processed as criminal warrants, and that violations of other features of orders, such a firearm possession, visitation, counseling, and child support, shall be docketed for civil contempt hearings.

Attorneys must advise clients of the scope of the protective features of the orders in a very clear fashion. Because the domestic violence hearing is often quite traumatic for the survivor, each feature of the order should be explained in detail. Clients often do not understand that orders providing for no contact mean just that. The client should be encouraged to file criminal warrants upon receiving superficially harmless love letters, flowers, or other tokens of affection. If the abuser violates the court's order during the honeymoon phase of the domestic violence cycle and no repercussions follow, he is less likely to be deterred from committing even more harmful and dangerous acts in the future. The survivor will also understand that she has failed to report all violations as they occur, and may feel self-blame when more serious violations follow. Enforcing the order strictly can help restore a sense of control to the survivor.

Some violations are obviously difficult to prove. Clients should be advised to keep a journal of suspected violations. Repeated telephone hang-ups, pages, slashed car tires, or drive-bys may

not prompt swift action from enforcing courts where it is not clear that the abuser is to blame. However, if one incident can be linked to the abuser, and is supported by client testimony and documentation of patterns of harassment indicating time, place, and manner, courts may be more responsive. Clients should be advised to notify neighbors and local law enforcement of the description of the abuser and his vehicle. Otherwise difficult to prove violations of specific zones of no-contact could be proven by the clients carrying a camera. If the survivor files a warrant for violation of the protective order which requires the perpetrator to remain five hundred feet from her based upon his driving by her house, she should measure the distance from her house to the road, and be prepared to testify accordingly.

Violation of an Order of Protection – Contempt or a Misdemeanor?

Until 1992, violations of orders of protection were typically punished through the use of the contempt powers of the issuing court. In 1992, the General Assembly passed KRS 403.760 which reads as follows:

> (1) Violation of the terms or conditions of an order issued under the provisions of KRS 403.740 or 403.750, whether an emergency protective order, or an order following a hearing, after service of the order on the respondent, or notice of the order to the respondent, shall constitute contempt of court.[1]
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> (2) Any peace officer having probable cause to believe a violation has occurred of an order issued under the provisions of KRS 403.740 or 403.750, whether an emergency protective order or an order following a hearing, and after service on the respondent or notice to the respondent as provided under KRS 403.735, shall arrest the respondent without a warrant for violation of a protective order pursuant to KRS 500.020, 403.715, and 403.740. Following a hearing the district court in the county in which the peace officer made the arrest for the violation may punish the violation of a protective order as a violation of a protective order.
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> (3) Court proceedings for contempt of court, under KRS 403.715 to 403.785, shall be held in the county where the order, whether an emergency protective order or order following a hearing, was issued.
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> (4) Nothing in this section shall preclude the Commonwealth from prosecuting and convicting the respondent of criminal offenses other than violation of a protective order.
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> (5) Civil proceedings and criminal proceedings for violation of a protective order for the same violation of a protective order shall be mutually exclusive. Once

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[1]Although frequently referred to as "civil" contempt, apparently because it occurs from a violation of an order issued in a civil proceeding, violation of an order of protection is actually "criminal" contempt. *Commonwealth v. Burge*, Ky., 947 S.W.2d 805 (1997).

either proceeding has been initiated the other shall not be undertaken regardless of the outcome of the original proceeding.

As a result of this statute, when the terms of an emergency protective order, or domestic violence order are violated one of two proceedings may be brought against the respondent, a criminal charge ("violation of a protective order")[2] or a proceeding for contempt of court.
KRS 403.760 specifically states that "civil proceedings and criminal proceedings for violation of a protective order shall be mutually exclusive. Once either proceeding has been initiated the other shall not be undertaken regardless of the outcome of the original proceeding." Therefore, before assisting a client in having the respondent held in contempt by the court or advising a client to so proceed, consideration should be given to which of the two proceedings is most appropriate under the facts and circumstances of the individual case.[3]

Child Support
Because child support can be awarded at DVO hearings, the petitioner should be prepared to testify regarding her own income. She should bring recent paystubs, W-2 forms, or the previous year's income tax return, if possible. If she has access to the respondent's financial documents, she should bring those as well. If these documents are not available, then she should be prepared to testify regarding the current, recent, and past income of herself and the respondent. Also helpful will be documentary proof of child care expenses, maintenance paid to a prior spouse, support paid for a prior born child, and expenditures for health insurance. The child support guidelines, located at KRS 403.212, will be utilized.

Mediation
KRS 403.275 (5) provides that courts may not require mediation, conciliation or counseling as a condition precedent to entry of a protective order. Some courts require parties to "discuss" whether an agreement can be reached before a domestic violence hearing will be held. This practice raises several concerns.

First, the practice may be in violation of the above statute, as the "discussion" may very well constitute mediation or conciliation for the purpose of the above statute. Second, an unrepresented, often frightened petitioner may be at a significant disadvantage if negotiating with an attorney for a respondent. An agreement may be reached that the parties will "stay away" from each other. The protective order entered will very likely fail to include a finding that a perpetrator did commit an act of domestic violence. Without this finding, any order entered is merely a civil restraining order and cannot be prosecuted criminally.

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[2]KRS 403.763 states "(1) A person is guilty of a violation of a protective order when he intentionally violates the provisions of an order issued pursuant to KRS 403.715 to 403.785 with which he has been served or has been given notice. (2) Violation of a protective order is a Class A misdemeanor." See also KRS 403.7539; 403.763 which makes violation of the terms of a foreign protective order a Class A misdemeanor.

[3]In cases where law enforcement has been called and the respondent has been arrested as required by KRS 403.760, a criminal proceeding for violation of a protective order may have been initiated thereby eliminating the option of a contempt of court proceeding.

KRS 403.036 provides that a court may not require mediation between parties in divorce or child custody cases when a finding has been made pursuant to 403.720 that an act of domestic violence and abuse has occurred between them, except under certain circumstances. This prohibition exists because mediation is predicated upon the belief that two parties to a dispute can represent their own interests well enough to state their respective position and negotiate toward an equitable result. Domestic violence is based upon one party's attempts to control the other through physical violence or threats. When parties are involved in the cycle of abuse, these attempts to control have likely had some degree of success in the past. The mediation process is tainted by the perpetrator's attempts to control the survivor, and the survivor's fear of being a strong advocate for herself and her position.

The General Assembly recognized this dynamic when including in KRS 403.036 provisions requiring that mediation may only be ordered when the victim specifically requests the mediation. Further, the court must conduct an additional inquiry resulting in a finding that the request is voluntary and not a result of coercion, and that the mediation will, despite the violence, be a realistic and viable alternative. The court is in this way given the burden of examining the dynamics between the parties in question before ordering any mediation. Although this examination may very well consist only of brief interviews of the parties, it should be seen as significant that the legislature has placed this burden upon the court.

Some cases involving domestic violence may obviously be much less dangerous than others. If the violence was not an element of a well-developed pattern of controlling behavior, it might well have been an isolated incident, which might not be repeated. After parties have separated, repeated incidents of this type may be even less likely. If the parties believe that they will be able to co-operate in the future, especially as regards common children, then mediation may be an attractive option. If parties are contemplating sharing joint custody, then mediation might be a good experiment indicating the possible success of future shared decision-making.

Cross Petitions

KRS 403.735 (2) provides that courts may issue mutual protective orders only if a separate petition is filed by the respondent. Cross-petitions are not uncommon, as perpetrators often engage in a "race to the courthouse," or file a cross-petition as a response to receipt of an EPO.

Even in the absence of a cross-petition, some courts attempt to restrain the petitioner from contacting the respondent by entering a restraining order under authority of KRS 403.750 (h), which permits the court to "enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse." The attorney should attempt to convince the court that this might not be the best course of action. One problem with mutual orders is that they often make it difficult for law enforcement to recognize who is the perpetrator and who is the victim. The General Assembly recognized this potential problem when KRS 403.735 (2) was adopted, which provides that if mutual orders (pursuant to cross-petitions) are issued "the court shall then provide orders, sufficiently specific to apprise any peace officer as to

which party has violated the order if there is probable cause to believe a violation of the order has occurred."

Entry of a restraining order against a domestic violence survivor could send a wrong message to both parties that the survivor has done something wrong. If the parties are deeply involved in the cycle of domestic violence, the court's action in restraining the petitioner could reinforce the perpetrator's idea that he remains in control, and the survivor's idea that she has no control.

If there is mutual abuse between the parties to a domestic violence action, the respondent is able to file a petition on his own behalf. The availability of this procedure to both sides is the option chosen by the General Assembly for dealing with mutual abuse and fits into the overall statutory philosophy.

If a cross-order is properly entered pursuant to a cross petition, the attorney will want to utilize 403.735 (2) to have very specific orders entered providing for when parties are to be in specific places. Each party would likely have no good reason to be at the workplace or home of the other. Very detailed provisions regarding exchange of children during visitation should be requested, and clients should be advised to follow those provisions diligently.

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Section 4B: Appealing the Denial of a Domestic Violence Order

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If a court denies a petitioner's request for a domestic violence order (DVO), a petitioner may, like any other civil litigant, appeal that order. However, the standard appellate process is lengthy and time consuming. Unfortunately, the Kentucky legislature did not provide an expedited appellate process in the domestic violence statute, KRS 403.720, leaving petitioners who have been denied a DVO without any civil protection from their abuser while their case is on appeal. Thus, lawyers who are appealing the denial of a DVO must be concerned not only with reversing the trial court and obtaining a DVO, but also with providing their client temporary legal protection while the case is on appeal.

Most petitions for DVO's will be heard by a district court. Appeals from district court are governed by CR 72.02. Neither the domestic violence legislation no CR72.02 explain or provide a mechanism for lawyers to seek a temporary protective order for their client pending appeal. Lawyers thus need to get creative. One possible approach, is to file "Motion for Relief Pending Appeal" with the appellate court. The motion should explain to the court that the appellant is seeking immediate temporary injunctive protection to insure for her (or his) safety pending a ruling on the merits of the appeal. The temporary order should provide the same protection found in an Emergency Protective Order (EPO). (See appendix.)

Appellate Process

As for the appeal itself, lawyers need to follow the procedures set forth in CR 72.02. Below is a brief summary of that process, although you should always read and refer back to the actual rules when filing an appeal:

Notice of Appeal - CR 72.02(1).

1. File Notice of Appeal in the court which heard the petition (i.e., district court).
2. You must also include a filling fee pursuant to KRS 23A.210. See CR 72.02(2).
3. **TIME** - you have 30 days to file Notice of Appeal after the date of notation of service or judgment order. CR 73.02(1).

Perfecting the Appeal - CR 72.06 and CR 72.10.

1. **Time** - an appeal from the District Court must be perfected within 30 days after the date of filing the first Notice of Appeal. CR 72.08.
2. An appeal is perfected by filing a Statement of Appeal with the Clerk of the Circuit Court. CR 72.06 and CR 72.10.

Statement of Appeal - CR 72.10 and CR 76.03(3)(a) - (f).

1. A statement of appeal should contain the style of the case and court docket number; the name mailing address and telephone number of each attorney whose appearances entered in the case along with the name of the party represented by the attorney; the name of the judge who presided over the matter being appealed; the date on which the notice of appeal and any other notice of cross-appeal was filed; statement as to whether the matter has been on appeal before; and the type of litigation. CR 76.03 (3) (a)-(f).
2. A statement of whether appellant wants an oral argument;
3. A fair and accurate summary of the evidence heard by the District Court, or a statement that the appeal does not require consideration of the evidence;
4. A concise statement of legal questions and propositions on which appellant relies for reversal of the judgment with citations of pertinent authorities;
5. And the relief which appellant contends she is entitled.

Page Limits and counter Appeals

It is important to keep in mind that once a statement of appeal has been filed, the other side has 30 days to file a counterstatement of appeal. When appealing from the district court, the rules do not place a page limit upon the appellant. However appellees counter statement of appeal, which is due within 30 days after appellant's statement of appeal is filed, is limited to 10 pages.

Costs

CR 72.13 provides that the unsuccessful party can bear the cost of the filing fee. Attorneys can make a motion for such costs and enforce liability for reimbursement without the necessity of filing a new action.

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Section 4C: Other Civil Remedies

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Victims of sexual assault and domestic violence often choose to pursue criminal charges against the perpetrator. In addition, both victims and their attorneys may wish to consider the option of pursuing **other** civil remedies against the perpetrator, options that may offer the victim a measure of relief against the perpetrator that the criminal system cannot deliver. For example, a civil action for damages may be the victim's sole recourse against the perpetrator when a criminal case will not be prosecuted. Far too often, criminal cases cannot be prosecuted due to insufficient evidence. Given that the burden of proof in a civil case (preponderance of the evidence) is less than that of a criminal case (beyond a reasonable doubt), a victim may choose to pursue a civil action against the perpetrator when a criminal action is not possible. A civil action against the perpetrator has the potential of greater monetary benefits for the victim, including possible compensatory and punitive damages, as well as potential recovery of legal fees. Finally, civil actions offer the intangible but valuable benefit of providing the victim with a greater degree of autonomy. With a civil action, a victim may choose the attorney, the cause of action, and perhaps even the court in which the action will be litigated.

When preparing a case for a sexual assault or domestic violence victim, the attorney must consider all possible defendants. Not only can the actual perpetrator be listed as a defendant, but the attorney may also wish to name as defendants those individuals who had a duty to protect or to care for the victim or who had a particular relationship with the wrongdoer. Principles of indemnification may also broaden the possible defendants. In Degener v. Hall Contracting Corp., Ky., 27 S.W.3d 775 (2000) an employer, who worked as a scrub technician, sued Dupont Surgery Center under KRS 344.040(1) and 344.450 for sexual harassment by its surgeon Salazar. Dupont in turn brought a third-party complaint against Salazar. The trial court dismissed the complaint. The Court of Appeals reversed. In affirming the Court of Appeals decision, the Supreme Court stated that the right to indemnity is available to one exposed to liability because of the wrongful act of another with whom it is not *in pari delecto*, or of equal fault. Id. at 780. If the doctor was the active wrongdoer and the employer's liability is premised solely upon its failure to prevent him from sexually harassing the victim, the employer is entitled to indemnification.

I. STATE AND FEDERAL REMEDIES

Attorneys representing victims of domestic violence will want to consider both state and federal remedies.

A. State Civil Remedies

Below is an outline setting forth various criminal charges and their corresponding state civil remedies.

1. Death of the Victim

Criminal Homicide (KRS Chapter 507). Criminal homicide is divided into four categories: murder, manslaughter in the first degree, manslaughter in the second degree and reckless homicide. The offenses vary in the mental state required in the defendant, ranging from deliberate intent to kill the victim in the capital offense of murder, to recklessly causing the death in the Class D felony of reckless homicide.

Wrongful death action (KRS 411.130). When death results from injury inflicted by negligence or a wrongful action of another, damages may be recovered for the death of the individual from the person who caused it or whose agent or servant caused the death. The personal representative of the deceased must commence the action. Only spouses, children, parents or the general estate may recover. Recovery is limited to the lost power to earn. However, punitive damages are available where the death was caused by the willful actions or gross negligence of the defendant.

Case(s): In Rufo v. Simpson, Cal.App. 103 Cal.Rpt.2d 492 (2001), the Court of Appeals upheld the jury's $8.5 million compensatory and $12.5 million punitive damage awards to heirs and estates of Nicole Brown Simpson and Ronald Goldman where jury found that O.J. Simpson committed the homicides willfully and wrongfully with oppression and malice.

KRS 411.150. The statute permits a cause of action for a surviving spouse or child of person killed with a deadly weapon. The surviving spouse and child, under the age of 18, of a person killed by the careless, wanton or malicious use of a deadly weapon, not used in self-defense, may have an action against the person who committed the killing and all others who aided or promoted. In those cases, the jury may also award vindictive damages. KRS 500.080 defines "deadly weapon" as gun; knife, other than a pocket or hunting knife; billy, nightstick or club; blackjack or slapjack; nunchaku karate sticks; shuriken or death star; or artificial knuckles made from metal, plastic or other similar hard material. It is routinely considered in conjunction with KRS 411.130 the general statute creating a civil right of action for wrongful death.

Cases: In Morehead's Adm'x v Bitner, 50 SW 857 (1899), the widow and the children of a decedent brought a cause of action for his wrongful death after he was assaulted with an iron bar. The court held that the action survives against the personal representative of the wrongdoer under KS 10 which provides in part that no right of action for personal injury shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation, etc. since a wrongful death action is based upon the wrong to the wife and children by depriving them of their natural support and protection and not an action for assault.

2. Physical Injury/Sexual Assault to Victim

a. Sexual Offenses (KRS Chapter 510). Rape, sodomy, sexual abuse and sexual misconduct constitute the types of sexual offenses outlined in Kentucky's Penal Code. A person is guilty of rape when he unlawfully engages in sexual intercourse. Sodomy involves unlawful deviate sexual intercourse. Sexual abuse occurs when a perpetrator subjects another person to unlawful sexual contact.

KRS 413.249: recovery of damages for injury or illness suffered as a result of childhood sexual abuse or sexual assault. This action must be brought before whichever of the following periods last expires: (1) within five years of commission of the act or last of a series of acts by the same perpetrator; or (2) within five years of the date the victim knew, or should have known, of the act; or (3) within five years after the victim attains the age of 18.

Cases: No cases in Kentucky.

KRS 431.082. It provides for damages against a defendant who has been convicted of any offense provided in KRS Chapter 510 (sexual offense) and Chapter 531 (pornography). Should the plaintiff prevail, she is entitled to attorney's fees, costs of litigation, and compensatory and punitive damages.

Cases: No cases.

b. Assault (KRS 508.010-.040). The different degrees of assault are determined by the level of physical injury sustained by the victim; the defendant's mental state (intentionally, wantonly or recklessly acted), and means of inflicting harm (use or absence of use of a deadly weapon or dangerous instrument)

c. Criminal Abuse (KRS 508.100-.120). A defendant commits criminal abuse when he intentionally abuses another or allows another person over whom he has physical custody to be abused and causes serious physical injury, or places the victim in a situation that may cause serious physical injury, or causes the victim to suffer torture, cruel confinement or cruel punishment.

Battery. The defendant must have intentionally caused the wrongful touching or harmful or offensive contact. This civil tort would extend to cases of both physical injury and sexual injury/contact.

Examples: Other types of conduct that constitute battery include touching another person in an angry manner; spitting on another; jostling her out of the way; pushing another person into her; throwing an object and hitting her; taking a hold of her clothes or anything she is holding.

Case(s): In Hatchett v. Blacketer, Ky., 172 S.W. 533 (1915), the jury awarded plaintiff damages for assault and battery where defendant laid his hand on her face, moved it to her shoulder and finally touched her breast. In Barley v. Little, 2000 WL 1901449 (Ohio.App.5 Dist.), the court of appeals upheld a jury award to plaintiff of $40,000 for assault, $40,000 for battery and $20,000 for intentional infliction of emotional distress where defendant entered plaintiff's bedroom and raped her. In Riniker v. Little, Iowa.App., 623 N.W.2d 220 (2000), the court of appeals upheld a jury award to plaintiff of $300,000 compensatory and $450,000 punitive damages for assault, battery, intentional infliction of emotional distress and loss of consortium where defendant, employer of plaintiff's husband, threatened to fire the husband if plaintiff did not submit to his sexual demands. Plaintiff claimed that defendant raped her then terrorized her for the following three and one-half year period. The court also upheld the jury's award of $100,000 to the husband for loss of consortium. And in Buckner v Standard, Ky.App., 561 S.W.2d 329 (1977), the Court of Appeals upheld a jury award of compensatory damages of $25,582.50 and punitive damages of $60,000.00 where jury had found that Standard, on two separate occasions, had broken into Buckner's home and raped her. The Court of Appeals further held, in part, that the trial court was not required to stay the civil action until the criminal prosecution was complete.

3. Threats of Physical Injury/Physical Contact to Victim

a. Menacing (KRS 508.050): placing victim in reasonable apprehension of imminent physical injury. No explicit threats are required. Waving a gun is sufficient to constitute menacing.

b. Wanton Endangerment (KRS 508.060-.070): wantonly engaging in conduct that creates a substantial danger of death or serious physical injury to the victim.

c. Terroristic Threatening (KRS 508.080): threatening to kill or seriously injury the victim.

d. Indecent Exposure (KRS 510.150): intentionally exposing one's genitals under circumstances which one knows or should know is likely to cause affront or alarm.

Assault: intentionally attempting to do bodily harm to another with violence.

Examples: shaking a fist at someone; swinging a bat at someone (and missing); chasing someone; making indecent gestures or propositions to someone in such a way as to put her in apprehension of physical injury. However, words alone are not enough; bad manners are not actionable.

Case(s): In Koch v. Stone, Ky., 332 S.W.2d 529 (1960), the defendant was held civilly liable for both assault and battery after bathing an eight-year old girl in his workshop. The court stated "where a defendant comes into physical contact with plaintiff by taking improper familiarities against her consent, he is guilty of an assault and battery upon her although she suffered no physical injuries therefrom. The injury resulting from fear, shame, humiliation, etc., is sufficient to entitle plaintiff to recover substantial damages for the assault."

e. **Stalking** (KRS 508.140-.150). A person is guilty of stalking in the first degree when he intentionally stalks another, makes explicit/implicit threats that place the victim in reasonable fear of sexual contact, serious physical injury or death, AND there exists a protective order protecting the victim from the defendant, or a criminal case is pending against the defendant involving the same victim, or the defendant has been convicted of or pled guilty to a felony offense involving the same victim or the act was perpetrated while the defendant possessed a deadly weapon.

Stalking (KRS 411.220). A victim may initiate a civil right of action for stalking against any person who commits the conduct prohibited under KRS 508.140 or 508.150. The action may be initiated whether or not the individual who is alleged to have violated KRS 508.140 or 508.150 has been charged or convicted of the alleged crime. Liability under this section shall include the actual damages caused by the violation and may include punitive damages, court costs, and reasonable attorney's fees.

f. Unlawful Imprisonment (KRS 509.020-.030): knowingly and unlawfully restraining another person under circumstances that expose the victim to serious physical injury.

g. **Kidnapping** (KRS 509.040): unlawful imprisonment plus the intent to: (1) hold the victim for ransom/reward; (2) accomplish or advance the commission of a felony; (3) inflict bodily injury or terrorize the victim or another; (4) interfere with the performance of a governmental or political function; or (5) use the victim as a shield or hostage. Kidnapping ranges from a capital offense (death of victim) to a Class A felony (victim seriously injured) and Class B felony (victim released alive and safe).

False Imprisonment: intentional restraint or willful detention or interference with one's liberty or freedom contrary to her will and without authority of law. The detention may be accomplished by actual violence or threats of violence. If the words or conduct are of such a nature as to induce a reasonable apprehension of force (i.e., the threats inspire in the threatened person a just fear of injury to her person, reputation or property, if the person does not submit), then the restraint is such to support an action for false imprisonment.

Examples: False imprisonment may occur on a public street, in a vehicle, nightclub, grocery store as long as she cannot go about as she wishes.

Case(s): In Ashland Dry Goods Co., v. Wages, Ky., 195 S.W.2d 314 (1946), the defendant was found civilly liable for false imprisonment where he retained plaintiff's purse without her consent and against her will even though she was in no way restrained and could have left at any time. In Manikhi v. Mass. Transit Administration, Md., 758 A.2d 95 (2000), the court held that a female transit employee had cause of action against male co-worker for false imprisonment, based on allegations that, without employee's consent, co-worker locked back bus door, turned off lights, cut off employee's only other egress from confined area by placing himself between her and front door, stated that she could not get away, and barraged her with lascivious puerilities.

4. Injury to Victim's Property

a. Burglary (KRS ch. 511.020-040): intending to commit a crime, the perpetrator enters or remains unlawfully in a building or dwelling. The crime is elevated to first-degree burglary when the perpetrator is armed with a deadly weapon, injures the victim, or threatens to injure with the victim with a dangerous instrument.

b. Criminal Trespass (KRS 511.060-080): remaining unlawfully within a dwelling. A dwelling means any building occupied by someone lodging therein.

Trespass to Land. Trespass to land involves the intentional physical entry upon the land of another. It can be achieved merely by walking upon the land, by causing deleterious substances to be placed on land, causing objects (e.g., rocks and garbage) to be cast on the land, by firing projectiles on to the land, or by failing to remove property.

Case(s): In McCarthy v. Com, Ky., 867 S.W.2d 469 (1994), the Supreme Court held that there is no absolute right on part of one spouse to be with the other against the other's wishes, giving a right to break into home of the other with intent to commit a crime; burglary is invasion of possessory property right of another and extends to a spouse. For further discussion of the McCarthy case, see Chapter 7: The Sexual Assault of Battered Women.

c. Criminal Mischief. (KRS 512.020-.0440): intentionally or wantonly defacing, destroying, or damaging any property while having no right to do so or any reasonable grounds to believe in having such a right.

Conversion/Trespass to Chattels. Conversion is the wrongful exercise of dominion and control over the property of another. The measure of damages is the value of the property at the time of the conversion. However, if the interference is minor, the tort committed is trespass to chattels.

Examples: theft of a vehicle, destruction of property, or shooting a pet constitutes conversion. Borrowing the car for 10 minutes would constitute trespass to chattels.

Case(s): In Durham v. McCann, Or.App., 851 P.2d 1168 (1993), the defendant was found liable for conversion after he signed plaintiff's checks and deposited them into his own personal account. In Wiseman v. Schaffer, Idaho.App., 768 P.2d 800 (1989), the defendant was held liable for conversion after he towed plaintiff's car to a location to which she had not consented and the vehicle was stolen.

KRS 431.200 (Reparation for property stolen or damaged): It provides that any person convicted of a misdemeanor or felony for taking, injuring or destroying property shall restore the property or make reparation in damages, if not ordered to do so as a condition of probation. The provision does not prevent the victim from seeking full reparation for the injury sustained.

Cases: In People's Nat. Bank v Jones, Ky., 61 S.W.2d 17 (1933) the court held that the remedy provided for by KRS 431.200 was not the exclusive remedy available to an owner to recover property, which has been stolen from him.

5. Other Civil Remedies

a. Intentional Infliction of Emotional Distress: the wrongdoer's conduct must be intentional or reckless, the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality, there must be a causal connection between the wrongdoer's conduct and the emotional distress, and the distress suffered must be severe. This tort is typically considered to be a "gap filler", to be used only when the plaintiff has no other, more traditional, cause of action.

Case(s): In Craft v. Rice, Ky., 671 S.W.2d 247 (1984), the court recognized the tort of intentional infliction of mental distress when the defendant had harassed and placed the plaintiffs under surveillance. In Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996), the court held that the evidence satisfied the threshold requirements of the tort of outrageous conduct when plaintiff's employer engaged in a course of conduct which ultimately resulted in the plaintiff having a nervous breakdown. In Henrickson v. Cameron, Me., 622 A.2d 1135 (1993), the wife recovered $75,000 in compensatory

damages and $40,000 in punitive damages on her claim of intentional infliction of emotional distress resulting from the husband's physical and psychological abuse.

As stated by Graham and Keller:

> *Willgruber could be an important case for victims claiming that their emotional injuries are due to domestic violence because it involves a factual pattern in which one party wrongfully sought to gain dominion and control over another party, whose emotional weakness and distress make him easy prey for the wrongdoer. Domestic violence often involves obsessive attempts to control a partner in addition to acts of physical violence. Both the Willgruber plaintiff and the plaintiffs in another Kentucky case, Craft v. Rice, were threatened with surveillance . . . . Each case involved significant elements of oppression and control calculated to force an individual into complying with unwarranted demands of the defendant. Each situation has similarities to a pattern of domestic violence because it involves attempts at psychological domination for impermissible ends.*

Domestic Relations Law, Section 5.18 at 136 (2d ed. 1997).

b. KRS 446.070: "a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

> **Cases:** See Hatchett v. Blacketer, above. In Alderman v. Bradley, Ky.App. 957 S.W2d 264 (1997), the court stated that KRS 446.060 was enacted to ensure that the person for whose benefit a statute was enacted can recover from an offender notwithstanding the fact that the statute does not prescribe a civil remedy for its violation.

c. KRS 346.050 (Compensation of Crime Victims). Provides compensation to any person, who has sustained personal physical or psychological injury as a result of criminal conduct. It also provides compensation to a victim's spouse, parent, child, or person who depends upon the victim for principal support, where the victim died as a direct result of such conduct. Finally, it provides compensation for one who is legally responsible for the medical or funeral expenses of the victim. To be eligible, police records must show that the crime was promptly reported within 48 hours of the incident and that the claimant fully cooperated with appropriate law enforcement agencies. The award, which covers only out of pocket expenses and cannot exceed $25,000, covers indebtedness reasonably incurred for medical and other services, including mental health services. Awards for lost earning cannot exceed $150 each week; awards for funeral expenses will not exceed $5000. Awards will be offset by payments received from or on behalf of the person who committed the crime, insurance programs, public funds and any emergency award provided by this law.

d. Loss of Consortium. KRS 411.145 permits a wife or husband to recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third

person. "Consortium" means the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband. Kentucky law does not recognize such a claim. A claim for loss of consortium is viable only for the period of time between the date of injury and the date of death. It does not reach beyond. Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247(1995) (citing Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977)). The loss of consortium claim is personal to the surviving spouse. Id. The Court of Appeals stated that:

> The purpose is to compensate for that period of time while the injured spouse was still alive but incapable of fully participating with the other spouse in conjugal relations attendant to the marital status. To extend the damages for loss of consortium beyond the date of death would result in a double recovery for the surviving spouse beyond that which the wrongful death statute affords. This was never available under the common law. KRS 411.130."

Id.

Minor children may bring a civil action for loss of parental consortium. Giuliani v. Guiler, Ky., 951 S.W.2d 318 (1997). The cause of action, however, is only available for the wrongful death of a parent. Lambert v. Franklin Real Estate Co., Ky.App., 37 S.W.3d 770 (2000). No such cause of action exists for loss of parental consortium associated with a parent's personal injury. Id. Emancipated adult children, however, may not recover for loss of parental consortium. Smith v. Vilvarajah, 2000 WL 1716357 (Ky.App., Nov 17, 2000) (NO. 1999-CA-002282-MR; Clements v. Moore, 2000 WL 1610656 (Ky.App., Oct 27, 2000) (NO. 1999-CA-000899-MR).

6. Third Party Liability

a. Landlord/Tenant

Negligence. A landlord may be held liable for failing to protect victim from harm by others.

Cases: In Waldon v. Housing Authority of Paducah, Ky.App., 854 S.W.2d 777 (1991) a tenant was shot and killed outside her residence in a public housing project. The evidence showed that the housing authority had been told by the victim that the assailant had made repeated threats to kill her. It was also aware that he was living in the same housing project and there were frequent occurrences of crime. Despite this knowledge, it did not evict assailant. Nor did it provide any security guards. The Court of Appeals held that the jury should consider whether the housing authority's failure to act was a proximate cause of the tenant's murder. In Tenney v. Atlantic Associates, Iowa, 594 N.W.2d 11 (Iowa 1999), the tenant was raped after someone accessed her apartment with the master key. Plaintiff alleged that the landlord was negligent in failing to maintain records of access to keys to the apartment, failing to change the lock when she moved in, and failing to maintain adequate security with regard to the keys kept in the manager's officer. The Supreme Court held that the a third party's willful act of raping tenant was not a superceding cause of injury resulting from the landlord's breach of duty to provide reasonable protection from foreseeable harm. Lord v. Saratoga Capital, Inc., 920 F. Supp. 840 (W.D.Tenn. 1995). An unknown assailant

entered plaintiff's apartment and raped and sodomized her. Plaintiff sued claiming that the landlord was negligent in breaching its duty to make the complex safe, it intentionally misrepresented that the complex had security by giving out advertising promotion about a security system which did not exist, and it failed to exercise reasonable care in making the claims of security.

b. Perpetrator's Employer

1. Negligent Hiring/Retention: an employer may be held liable for criminal acts of employee under the theory of negligent hiring/retention.

Cases: In Oakley v. Flor-shin, Inc., Ky.App., 964 S.W.2d 438 (1998), the court held that a store employee, who was raped by an employee of floor cleaning company, could maintain an action against the floor employee's employer for negligently hiring and retaining employee where employer had knowledge of employee's criminal history, which included an arrest for criminal attempt to commit rape in the first degree and for carrying a concealed deadly weapon. In Carlsen v. Wackenhut Corporation, 73 Wash.App. 247, 868 P.2d 882 (1994), the court held that a teen-age girl sexually assaulted by security guard at rock concert was permitted to sue guard's employer for negligent hiring even though there was no evidence that employer knew of prior criminal record. In Evan v. Hughson United Methodist Church, 8 Cal.App.4th 828, 10 Cal.Rptr.2d 748 (1992), a child, who was sexually molested by pastor, was entitled to proceed against church and church conference on theory of negligent hiring of pastor where pastor had been censored for inappropriate sexual behavior at previous employment). In J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391 (1988) a mother of ten-year-old raped by church employee was allowed to pursue claim of negligent hiring against church and its pastor where defendants knew or should have known of employee's recent conviction of sexual assault on a young girl and nevertheless "entrusted [him] with duties that encouraged him to come freely into contact with children" and gave him "keys that enabled him to lock and unlock all of the church's doors." In Copithorne v. Framingham Union Hospital, 401 Mass. 860, 520 N.E.2d 139 (1988), the court allowed a rape victim to pursue claim against hospital for its negligence in extending staff privileges to doctor where hospital was aware of other allegations of past sexual misconduct by the doctor. In Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn.1983), the court permitted a tenant, who was raped by the manager of apartment complex, to maintain action for negligent hiring because landlord/employer failed to make an adequate investigation of manager's employment background before entrusting manager with pass key.

2. Kentucky's Civil Rights Act: KRS 344.040 makes it unlawful for an employer " (1) ... to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex....."

Cases: In Meyers v. Chapman Printing Company, Ky., 840 S.W.2d 814 (1992), the Supreme Court upheld the jury award of $100,000 in damages to plaintiff for mental and emotional injuries resulting from a sexually hostile and offensive work environment. Plaintiff claimed that her supervisor routinely conducted sales meetings where she was the only woman during which he used language loaded with obscenity and sexual innuendo, and included embarrassing comments and terminology addressed directly to her. Additionally, on several occasions he called her into his office where conversations took place suggesting that women in general, and she in particular, were unfit for the work. Finally, there was testimony supporting the inference that his sexually demeaning attitude towards women pervaded the whole sales operation, in the form of gender-based discrimination in assignments and conversations with other employees on the job reporting his hostility to women.

c. Law Enforcement.

In Ashby v. City of Louisville, Ky.App., 841 S.W.2d 184 (1992), a domestic violence victim was murdered by batterer after victim had received an EPO against him. Plaintiff's executrix brought action for negligence, claiming that police officers failed to arrest perpetrator pursuant to an alleged mandatory arrest warrant despite several opportunities to do so, failed to know about the existing EPO order, failed to respond appropriately to acts of domestic violence, and failed to provide victim with necessary and appropriate assistance. The Court held that KRS 65.2003 did not provide the appellees with immunity, since it extended only to actions involving the exercise of legislative, judicial, quasi-legislative, or quasi-judicial functions. The police investigation at issue did not involve any regulatory functions, and therefore the city was not entitled to statutory immunity. Additionally, the Court held that the individual police officers were not immune from personal liability. The "general rule of thumb in Kentucky . . . is that a public officer of employee 'may be personally liable for negligence or bad faith in performing ministerial duties . . . but is not subject to tort liability in certain circumstances for actions taken in the performance of discretionary duties." Id, at 188 (citations omitted). Since some of the plaintiff's allegations -- in particular those regarding the officers' failure to comply with mandatory reporting, recording, and arrest requirements -- involved ministerial duties, no immunity would be granted to the officers.

B. Federal Civil Remedies

1. Employer/Employee:

Sexual Harassment: Title VII (42 U.S.C. § 2000e) provides that an employee may seek damages from an employer where the sexual harassment created a hostile or offensive work environment that was severe and pervasive, and the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action.

Cases: In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) the U.S. Supreme Court held that a bank employee's allegations that supervisor made repeated demands for sexual

favors, both during and after business hours, and that supervisor fondled her in front of other employees, followed her into women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions, were sufficient to state claim for "hostile environment" sexual harassment in violation of Title VII prohibiting sex discrimination in employment. In Torres v. Pisano, 116 F.3d. 625 (2d. Cir. 1997), the Second Circuit held that a female employee of Puerto Rican background established a prima facie case that male supervisor's conduct created a sexually and racially hostile work environment, based on allegations that supervisor repeatedly referred to her as a "dumb cunt," suggested that she was in the habit of performing oral sex for money, ridiculed her pregnancy, commented on her anatomy and his desire to have sex with her, allowed friends of his who visited him at the office to make crude sexual remarks about her, repeatedly called her a "dumb spic," and told her that she should stay home, go on welfare, and collect food stamps like the rest of the "spics." And in Hutchison v. Amateur Electronic Supply, Inc., 42 F.3d 1037 (7th Cir. 1994), the Seventh Circuit held that plaintiff set forth an actionable "hostile environment" sexual harassment claim for Title VII purposes where male employer engaged in sexually explicit telephone conversations and left his office door open to ensure that female complainant and the other primarily female office workers would overhear his salacious comments, employer refused to stop the offensively loud conversations, employer referred to one of complainant's supervisees as "Ms. Boobs" both to her face and to others including manufacturer representatives from outside the company, employer regularly commented on complainant's appearance, telling her "I like the way you look today" while looking her up and down, and employer frequently attempted physical contact with the complainant and other female employees.

2. Schools

Title IX of the Education Amendments of 1972. (20 U.S.C. § 1681(a)). This federal statute provides that a claim for monetary damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities, and only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to a educational opportunity or benefit.

Cases: In Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the Supreme Court held that a student could maintain a cause of action against the school board. She alleged that the school board failed to take any action against a student, who repeatedly sexually harassed and assaulted her. For example, she claimed that he attempted to touch her breasts and genital area and made vulgar statements such as " 'I want to get in bed with you'.' " She also reported he placed a doorstop in his pants and acted in a sexual manner towards her. She alleged other incidents of sexual battery. Though she and her mother both reported the incidents, the student was never disciplined.

3. State Actors

Federal 1983 Civil Rights Action (42 U.S.C. 1983): "every person who, under color of any statute, ordinance. . . of any State . . . subjects, or causes to be subjected, any citizen of the

United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." The United States Supreme Court has ruled that, in the absence of a "special relationship" with the victim, the state has no duty to protect a victim from other individuals. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). A special relationship arises, creating a duty of state protection, when "the state creates a dangerous situation or renders citizens more vulnerable to danger." Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993), cert. denied, 126 L.Ed.2d 337 (1993).

> **Cases:** In Ashby v. City of Louisville, supra, following DeShaney, the Kentucky courts rejected the argument that a "special relationship" existed between the victim and the city requiring that the city had an affirmative duty to act on the victim's behalf. However, nationally some cases have found the existence of such a special relationship creating an affirmative duty to act on the part of the government. In Sadrud-Din v. City of Chicago, 883 F. Supp. 270 (N.D.Ill. 1995), the domestic violence victim was killed by an off-duty police officer. The court found the existence of such a special relationship based on the facts that the city had permitted the perpetrator to continue to carry his police-issued weapon, repeatedly failed to arrest the perpetrator, and knew that the perpetrator had repeatedly threatened the victim's life and violated orders of protection. In Smith v. City of Elyria, 857 F. Supp. 1203 (N.D. Ohio 1994), the court found that the police officers' affirmative acts had increased the danger to the domestic violence victim, who was subsequently murdered by the perpetrator. "The police officers did not merely fail to perform their duties; they told Alfred Guerrant that he did not have to leave, and advised him to go back if Karen tried to throw him out . . . Alfred used the apparent authority given to him by the police to remain in his ex-wife's home against her will, and later killed her." Elyria, at 1210. In Macias v. Ihde, 219 F.3d 1018 (9th Cir. 2000), the Ninth Circuit permitted an action to go forward where estate and family members of a domestic violence homicide victim sued the local sheriff's department alleging it violated the deceased's constitutional right to equal protection of the law. Prior to her murder by her estranged husband, the victim had called police 22 times in the year before he killed her. The estate and family claimed that law enforcement provided inferior police protection because of her status as a woman, a Latina and victim of domestic violence. See also Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990)(permitting plaintiff to amend complaint to demonstrate possible existence of special relationship when police chief had a close, personal relationship with perpetrator and repeatedly acted to interfere with the protective services which would have otherwise been available in the community); Culberson v. Doan, 125 F.Supp.2d 252 (S.D.Ohio 2001) (where family of woman murdered by her boyfriend sued police chief claiming that law enforcement deprived them of their Fourteenth Amendment right to substantive due process because it failed to secure a crime scene where the victim's body was purportedly located).

II. POSSIBLE WAIVER OF CIVIL CLAIMS

The law on civil remedies for victims of sexual assault and domestic violence is still relatively

new and therefore evolving. In domestic violence cases in particular, one possible issue of which attorneys need to be mindful is that executing a general release, commonly drafted as part of the divorce settlement, may later be construed by the courts to operate as a waiver of subsequent civil actions in which the victim seeks redress for the domestic violence inflicted during the marriage. In Overberg v. Lusby, 921 F.2d 90 (6th Cir. 1990), the plaintiff brought a personal injury against her former husband, asserting that he had intentionally or negligently transmitted to her a sexual disease. The court rejected the plaintiff's argument that the separation agreement concerned itself primarily with property matters, finding instead that it was "intended to tie up all loose ends and resolve all of the claims or disputes that might arise from the marriage relationship." Overberg, at 91. As a result, the court held that the separation agreement waived the plaintiff's subsequent personal injury action. As part of its analysis, the court relied on the fact that the plaintiff knew of her physical condition at the time of the separation, and that as a nurse, she "was fully knowledgeable about her medical condition and that she had a duty to inquire about her legal rights in that regard." Overberg, at 91. The court therefore left open the issue as to what would be the effect of such a release upon a plaintiff who knew absolutely nothing about the possibility of later civil actions arising from physical and emotional injuries sustained during the marriage relationship.

III. STATUTE OF LIMITATIONS

In state civil litigation, the statute of limitations ranges from one to five years. For actions for personal injury to the plaintiff, the statute of limitations is one year. KRS 413.140. Other actions (e.g., intentional infliction of emotional distress or trespass to property) must be brought within five years. KRS 413.120. If children are involved as victims, actions for recovery of damages due to child sexual abuse or assault must be brought within five years of the latest of the following: a) the commission of the act or the last of a series of acts by the perpetrator, b) the date the victim knew, or should have know, of the act, and c) the date the victim attains the age of eighteen. KRS 413.249. This legislation is retroactive, applying to all causes of action, which accrued before or after July 15, 1998. Civil rights claims under 42 U.S.C. Section 1983 are governed by state statutes of limitations for personal injury actions. Thus, the statute of limitations for cases arising out of Kentucky is one year. Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990).

Certain events or conditions may toll the statute of limitations. If the plaintiff is an infant or "of unsound mind" at the time the action accrued, the action may be brought within the same number of years after the removal of the disability . . . allowed to a person without the disability to bring the action after the right accrued." KRS 413.170. Unsound mind has been interpreted as being incapable of managing one's own affairs, a severe depression does not toll the statute. Southeastern Kentucky Baptist Hospital v. Gaylor, Ky., 756 S.W.2d 467 (1988). Memory repression will not toll the statute. Rigazio v. Archdiocese of Louisville, Ky.App., 853 S.W.2d 295 (1993). However, other jurisdictions, such as in New York, have extended the statute of limitations in cases of domestic violence when the victim was found to be suffering from a profound psychological trauma from the assault. When such trauma can be demonstrated, the plaintiff meets the New York statute's tolling requirement for cases of insanity.

If the defendant is absent from Kentucky or obstructs the action, the statute is also tolled. KRS 413.190. However, the perpetrator's instructing the victim not to tell anyone about the abuse does not equal obstruction. Rigazio, supra. In Roman Catholic Diocese of Covington v. Secter, Ky.App., 966 S.W.2d 286 (1998) the jury awarded the plaintiff compensatory damages and punitive damages for the negligent hiring, supervision and retention of a high school teacher who had sexually abused the plaintiff. The court held that the statute was tolled by the Catholic Dioceses' obstruction of the plaintiff's action. The court based its finding of obstruction upon the evidence that the Diocese knew prior to the time in which the plaintiff was abused by the teacher that the teacher had molested students and would continue to be a "problem", and took no action to discipline or sanction the teacher or to inform other students, teachers, parents, employees or authorities. Instead, the Diocese kept this information in a secret file. A key factor in the court's decision was the Diocese's failure to comply with Kentucky child abuse reporting requirements and fulfill its duty to report the abuse. "Where the law imposes a duty of disclosure, a failure of disclosure may constitute concealment under KRS 413.190(2), or at least amount to misleading or obstructive conduct." Secter, 966 S.W.2d at 290, citing Munday v. Mayfair Diagnostic Lab., Ky., 831 S.W.2d 912, 915 (1992).

IV. CIVIL ACTIONS PERPETRATOR MAY BRING AGAINST VICTIMS

With victims becoming more knowledgeable about the criminal justice system and more willing to seek punishment and accountability for their perpetrators, some perpetrators have, unfortunately, begun to use the civil system to subsequently further harass their victims. The most common cause of action seems to be that of malicious prosecution, as in Broaddus v. Campbell, Ky.App., 911 S.W.2d 281 (1995). In the criminal action, the case had been dismissed, on the Commonwealth's motion, for insufficient evidence, after the criminal defendant (the plaintiff in the civil case) had entered into a stipulation that probable cause existed for the issuance of the indictment. As stated in Broaddus, the elements of the cause of action are 1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary, 2) by, or at the instance, of the plaintiff, 3) the termination of such proceedings in defendant's favor, 4) malice in the institution of such proceeding, 5) want or lack of probable cause for the proceeding, and 6) the suffering of damage as a result of the proceeding. The Court dismissed the action, stating that "it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action, or where such a finding is made unnecessary by the defendant's agreement or acquiescence, a malicious prosecution action cannot be maintained." Broaddus, at 283. The court noted that "actions for malicious prosecution have traditionally been disfavored due to the chilling effect on those considering reporting a crime." Id., at 285.