

# Representing Victims of Domestic Violence:

## A Kentucky Lawyer's Handbook

*The following manual is an outline of the law regarding issues of domestic violence in Kentucky. Nothing contained in this manual is to be considered as the rendering of legal advice for specific cases. The proper interpretation of application and the principles discussed to any particular case is a matter for the considered judgment of the individual practitioner.*

*Attorneys using these materials, or information otherwise conveyed during the program, and when handling a specific legal matter have a duty to research original and current sources of authority. The views expressed in this manual are solely those of the authors and not necessarily those of the sponsoring agencies or offices.*

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Dear Member of the Kentucky Bar:

Every year in this Commonwealth, thousands of our neighbors, friends and loved ones are harmed by domestic abuse. The hardship which this crime places on Kentucky families tears at the very fabric of our society. It is an insult to the justice which all of us hold so dear.

Historically the crime of domestic violence has been hidden behind a veil of secrecy. Concepts of property and privacy long operated together in our judicial system to shield abusers and legitimize crimes of violence against women. Legal theories which viewed women as the property of their husbands endowed men with the right to beat their wives with only minimal restriction. The concept of familial privacy, too, worked against victims of domestic violence. These historic legal constructs have permitted batterers to avoid responsibility for their actions and to claim that injuries they inflicted were not a crime at all, or that the victim herself somehow provoked the assault.

Today we have come far in lifting the veil of secrecy which hid domestic violence from public scrutiny. As attorneys, you play a key role in continuing to move us in this direction. It falls to you to hold perpetrators to the full scope of accountability provided in the law by aiding victims and their children to navigate our legal system. Recent legislation passed by the Kentucky General Assembly and federal legislation enacted under the Violence Against Women Act have provided us with powerful tools to increase victim safety and to ensure that domestic violence perpetrators answer fully for their crimes. With your assistance, these tools will help build a system where domestic violence victims can find support and safety and domestic violence perpetrators will find they, just like all other criminals, must be held accountable for the injuries they inflict.

With the active involvement of all members of the Kentucky Bar, Kentucky can build violence-free communities and move toward the 21<sup>st</sup> century with the full participation of all of our citizens. We ask you to help us in that effort.

Sincerely,

  
Paul E. Patton

  
Judi C. Patton



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# Introduction

Domestic violence presents significant complexities to the practice of law. Whether an attorney practices criminal law, domestic relations law, or any other specialty, she or he is likely to encounter cases of domestic abuse. To effectively represent a domestic violence victim, an understanding of the civil and criminal aspects of both state and federal law is imperative. Through grants from IOLTA Fund and the Kentucky Bar Foundation, the Access to Justice Foundation, the Governor's Office of Child Abuse and Domestic Violence Services and the Kentucky Domestic Violence Association have prepared this manual, *Representing Victims of Domestic Violence: A Kentucky Lawyer's Handbook*.

The first chapter of the manual lays the groundwork by discussing the scope and dynamics of crimes of violence against women. The application of criminal law and sections discussing applicable rules of evidence and trial practices are provided. The interests of children receive attention with chapters on child abuse and on custody related matters. Civil protective orders are discussed at length in several chapters, addressing both state and federal laws which impact their issuance and enforcement. Other civil matters are also included, including tort actions against perpetrators.

## Principles of Intervention in Cases of Domestic Violence

The roles of all attorneys and the court in domestic violence cases bring certain duties to the victim and to society. Underlying each of these duties is a set of principles of intervention which should establish the foundation upon which decisions related to a case are made. These include:

- Domestic violence is criminal behavior;
- Perpetrators of domestic violence are accountable for violent behavior. Violence is the responsibility of the individual who chooses to perpetrate it;
- The primary goal of treatment services for perpetrators is the cessation of the violence which will provide for the safety of victims and their children. This goal takes priority over family reunification, mediation, or the resolution of "relationship issues," and should be the foundation on which all sentencing, treatment and other case-related decisions with perpetrators are made;
- Intervention with victims of domestic violence should be predicated on the value that victims do not control and cannot be held responsible for victimization;
- Attorneys should practice cases in such a way not to give victims the perception that they contributed to or caused violence. This includes not mandating victims into court-ordered treatment, particularly treatment with the offender;
- Services to victims and perpetrators of domestic violence lose an element of effectiveness when provided by agencies in isolation. Thus, a community response rather than an individual agency response should be a priority

# Chapter 1: Overview of Violence Against Women

## Section 1A: Scope And Dynamics Of Domestic Violence

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### The Scope of Crimes of Violence Against Women

***The Federal Bureau of Investigation reports that domestic violence is the country's most prevalent violent crime . . . and the least reported.***

Annually, 5.9 million physical assaults are perpetrated against women in the United States and of these assaults, 76% are initiated by an intimate partner and 41% result in injury to the victim.<sup>1</sup> Criminal justice data shows that nearly two out of three women victimized by violent crime know their assailants. Victims of rape and domestic abuse are overwhelmingly female, and the perpetrators of these crimes are overwhelmingly male<sup>2</sup>. The data on crime in the United States not only documents the frequency of violence committed by known perpetrators, but also makes clear the severe impact of these crimes. Over the past two decades, over 30,000 women have been murdered by their intimate partners<sup>3</sup>. Violence by an intimate accounts for about 21% of the violent crime experienced by women but only 2% of the violent crime experienced by men<sup>4</sup>. The National Crime Victimization Survey reports the following about domestic violence victims:

- nearly 30 percent of all female homicide victims were killed by their husbands, former husbands or boyfriends;
- just over three percent of male homicide victims were known to have been killed by their wives, former wives, or girlfriends<sup>5</sup>.

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<sup>1</sup> *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey.* National Institute of Justice. Centers for Disease Control and Prevention, 1998.

<sup>2</sup> *Preventing Violence Against Women.* National Crime Prevention Council (U.S. Department of Justice, Bureau of Justice Statistics, 1995)

<sup>3</sup> *Violence by Intimates.* Bureau of Justice Statistics Factbook, (U.S. Department of Justice Statistics, March 1998)

<sup>4</sup> *Violence by Intimates.* U.S. Department of Justice

<sup>5</sup> *Violence by Intimates.* U.S. Department of Justice

Women victimized by domestic violence are not only vulnerable to a loss of life but also to a loss of their health and psychological well being. Studies show that 22% to 35% of women, who seek aid in emergency room settings, are in need of treatment for injuries stemming from domestic abuse<sup>6</sup>. The rate of depression for domestic abuse victims is twice that of the general population of women<sup>7</sup>. Studies of suicide show that 26% of all women (and 30% of women of color) who attempt suicide are battered and that one fourth of the population of women alcoholics is made up of domestic abuse victims<sup>8</sup>.

Not all women are equally at risk to be victimized by violent crime. Young African American and Hispanic women are more vulnerable to violent crime than their counterparts, as are poor single women who live in the inner city<sup>9</sup>. While the inner city may expose a woman to a greater risk of all types of violent crime, living in a suburb or in a rural area does not decrease a woman's risk of experiencing violence by a partner or other family member<sup>10</sup>. While data shows that the most frequent female victim of intimate violence is a woman aged sixteen to twenty four, the American Association of Retired Persons cites a survey that found that 58% of those elderly who said they were victims of physical abuse reported that the abuser was his or her spouse, compared to 24% who were victimized by an adult child<sup>11,12</sup>.

In Kentucky, an additional measure of the incidence of domestic violence is found in the data of the Cabinet for Families and Children showing reports of spouse abuse made to the Department for Community Based Services. The reports are mandated by Kentucky law and, as indicated in the chart which follows, reach over 17,000 reports yearly<sup>13</sup>.

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<sup>6</sup> *Violence Against Women in the United States: A Comprehensive Background Paper* (The Commonwealth Fund Commission on Women's Health, 1995) 43

<sup>7</sup> Walker, L. "Battered women, psychology, and public policy. *American Psychologist*. 1984: 39.

<sup>8</sup> Stark, E. *The Battering Syndromes: Social Knowledge, Social Therapy, and the Abuse of Women*. (Dissertation, Department of Social Work, University of New York, 1984).

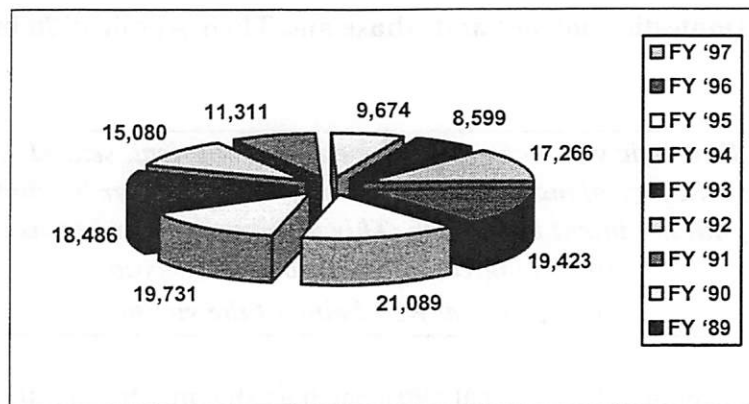
<sup>9</sup> *Violence Against Women*, A National Crime Victimization Survey Report (U.S. Department of Justice Statistics, 1994)

<sup>10</sup> *Preventing Violence Against Women*. National Crime Prevention Council (U.S. Department of Justice, Bureau of Justice Statistics, 1995)

<sup>11</sup> *Violence by Intimates*. Bureau of Justice Statistics Factbook, (U.S. Department of Justice Statistics, March 1998)

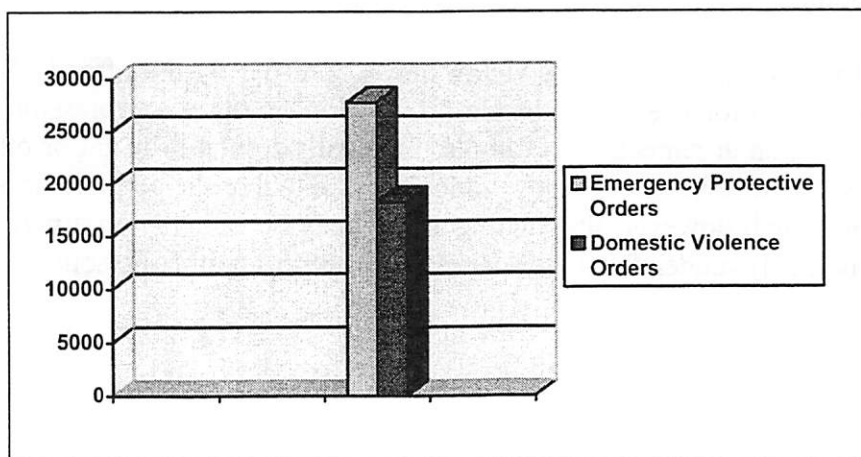
<sup>12</sup> *Preventing Violence Against Women*. National Crime Prevention Council (U.S. Department of Justice, Bureau of Justice Statistics, 1995)

<sup>13</sup> Cabinet for Families and Children, Adult Abuse Reporting Data, 1989 - 1997



**TOTAL SPOUSE ABUSE REPORTS  
 FY '89-97**

A final measure for determining the extent of domestic violence in Kentucky is through analysis of the number of domestic violence protective orders issued annually. As early as 1984, the Kentucky General Assembly acknowledged that criminal remedies for domestic violence victims were not sufficient to protect their lives and well being and passed the far-reaching Domestic Violence and Abuse Act. The Act was intended, not to replace criminal sanctions, but to afford victims additional civil protections which the criminal justice system does not provide. The unique strength of pairing civil protective orders and criminal prosecution means that victims can seek relief for themselves or on behalf of their children under both systems in order to maximize their protection. Emergency protective orders (temporary ex parte orders valid for fourteen days) and domestic violence orders (orders issued after a hearing valid up to three years) have become an integral part of the Commonwealth's safety net for victims of domestic violence, as is evidenced by the number of petitions for protection sought annually<sup>14</sup>:



<sup>14</sup> Number of protective orders issued as reported by the Kentucky State Police

## The Types of Domestic Violence and Abuse and Their Application in Kentucky Law

***Domestic violence means the chronic physical, sexual and psychological maltreatment of one family member by another with the intent to control. This misuse of power harms the psychological, social, economic, sexual and physical well-being of the victim.***

Domestic Violence includes physical abuse such as shoving, hitting, the use of weapons, or other acts which result in injury or death. Secondly, it includes emotional or psychological abuse which works to destroy a victim's self-esteem. Third, sexual offenses occur in the context of domestic violence. Finally, it is characteristic of domestic violence cases that perpetrators control the victim's environment.

To assist attorneys, examples of Kentucky Revised Statutes which are applicable to each of these four types of domestic abuse are described below. The list of statutes is not intended to be all inclusive, but rather, is provided for the purpose of example. Additionally, the types of abuse described are not mutually exclusive, that is, when a spouse or partner confines the other person to the home ("environmental abuse"), that is also likely to inflict fear or other distress on the victim as well ("psychological abuse").

- ♦ *Physical violence and abuse* - nonaccidental injury which is the result of acts of commission by a partner. Physical abuse involves behaviors such as pushing, shoving, slapping, hitting, kicking, biting, the use of weapons, or other acts which result in injury or death. It is the most common pattern in domestic violence cases for the specific form of physical violence and the resultant injury to grow more severe as abuse continues in the relationship.

The type of injury sustained by the victim may also differ by the offender's motivation for the violence. Violence which results from an inappropriate expression of emotion occurring during an argument, for example, frequently results in facial or other types of visible injury. In those instances where violence is the tool of the perpetrator by which the victim is controlled, however, the victim's injury may be inflicted on a part of the body which may be easily hidden from view, and as a result, from other persons.

**Examples of Kentucky Revised Statutes Applicable to  
Physical Form of Domestic Violence**

***Wanton Endangerment and Assault***

A perpetrator who wantonly engages in conduct which creates a substantial danger of physical injury to his victim commits the crime of second-degree wanton endangerment. The charge escalates to first degree wanton endangerment if the conduct created a substantial danger of death or serious physical injury and the defendant acted under circumstances manifesting extreme indifference to the value of human life. KRS 508.060-508.070. For example, pointing a gun, whether loaded or unloaded (provided there is a reason to believe that the gun may be loaded) at any person constitutes conduct that "creates a substantial danger of death or serious physical injury to another person" in violation of the statute governing the offense of wanton endangerment in the first degree. Key v. Com., Ky.App., 840 S.W.2d 827 (1992); see also Hancock v. Com., Ky., 998 S.W.2d 496 (1996) (where the court held that the defendant was properly convicted of wanton endangerment based on allegations that he had sexual intercourse with the victim and failed to inform her that he was positive for the human immunodeficiency virus (HIV)).

When a perpetrator actually physically injures his victim, he has committed the crime of assault. KRS 508.010-508.030. There are four degrees of assault, varying in the intent with which the perpetrator committed the assault, the seriousness of the injury inflicted, and the weapon (if any) used in the attack. Assault may result in either physical injury or serious physical injury, both of which are defined terms. While the statute defines "physical injury" as "substantial physical pain or any impairment of physical condition," the courts have interpreted the statute as including any injury. KRS 500.080. Covington v Commonwealth, Ky., 849 S.W.2d 560 (1992). "Serious physical injury" means physical injury which creates a substantial risk of death, causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of a bodily organ. KRS 500.080. The use of a deadly weapon or a dangerous instrument enhances the level of the assault offense. The victim need not sustain *serious* physical injuries when one injures another by means of a deadly weapon or dangerous instrument. Potts v. Commonwealth, Ky., 884 S.W.2d 654, 655 (1994) (where steel-toed shoes and scissors were deemed dangerous instruments); Taylor v. Com., Ky., 995 S.W.2d 355 (1999) (where the Supreme Court held that the stock of a .22 rifle used to strike the victim in the head was a deadly weapon); Wyatt v. Commonwealth, Ky. App., 738 S.W.2d 832 abrogated in part by McGuire v. Com., Ky., 885 S.W.2d 931 (1994) (where the court deemed a vehicle a dangerous

instrument); Binion v. Com., Ky., 891 S.W.2d 385 (1995) (where the court held that a glass ashtray was a dangerous instrument). Perhaps indicative that most objects can be turned into dangerous instruments is the case of Smith v. Commonwealth, Ky., 610 S.W.2d 602 (1980), where the court determined that a carrot was a dangerous instrument. In that case, the defendant forcibly inserted a carrot into his wife's rectum and vagina, causing physical injury.

The 1996 Legislature passed a penalty enhancement provision for fourth degree assault (a Class A misdemeanor) committed in the context of domestic violence. If, in the previous five years, an individual has been found guilty of committing three or more crimes of fourth degree assault against a victim who is either a family member or a member of an unmarried couple, the person may be convicted of a Class D felony. KRS 508.032. The five-year period is measured from the day the offenses were committed, and the victim need not be the same in each assault.

#### Criminal Abuse

The crime of criminal abuse provides that a defendant will be found guilty not only if he abuses another, but also if he permits another person of whom he has actual custody to be abused. KRS 508.100-508.110. The victim must be seriously physically injured or placed in a situation that may cause serious physical injury. The degree of the abuse committed depends upon the mental state of the defendant.

#### Criminal Homicide and Manslaughter

Both perpetrators of domestic violence who kill their victims, and battered women who kill face punishment for homicide or manslaughter. A battered woman who kills her batterer may want to assert that she killed him in self-defense. A self defense claim requires that the person be defending against the use of force which is imminent and which causes her to believe that she is at risk of death, serious physical injury, kidnapping, or compelled sexual intercourse. KRS 503.050. The fact that the battered woman believes danger is imminent can be inferred from a past pattern of repeated serious abuse, and a battered woman may introduce into evidence past acts of domestic abuse to establish the justifiability of the woman's use of physical force. KRS 503.010, 503.050. In such cases, the victim may be permitted to introduce evidence of battered spouse syndrome. In Springer v. Com., Ky., 998 S.W.2d 439 (1999), the Supreme Court addressed the availability of the defense to domestic violence victims who either perpetrate the homicide or assist in the murder. The Court stated:

"The enactment of 503.080(1) and 508.050(1) shortly after the emergence of the "battered woman syndrome" as a phenomenon scientifically accepted in

the medical community reflects a legislative intent to allow the defense of self-protection to be premised upon "battered woman syndrome" evidence. If sufficient competent evidence is introduced to create a jury issue that a defendant was a victim of domestic violence and abuse and killed or assaulted his or her abuser under a belief that there was an "impending danger" of being subjected to unlawful physical force at the hands of the abuser, the defendant is entitled to an instruction on self-protection."

Springer, 998 S.W.2d at 454. Battered women who are convicted for killing or retaliating against their abusers are exempted from the violent offender provisions, which mandate that such offenders serve designated portions of their sentence before being released on parole. KRS 439.3401 and 439.3402.

#### Special Conditions of Bond

In order to maximize safety for victims of domestic violence, the 1996 Legislature also passed provisions mandating specialized pre-trial release procedures for perpetrators charged with any violations under chapter KRS 508 and 510 (i.e., various forms of assault and sex offenses), or with violating a domestic violence protective order. KRS 431.064. This statute requires that before making a decision concerning the pretrial release of such an individual, the court must review the facts to determine whether the perpetrator presents a threat to the victim and is reasonably likely to appear in court.

Before releasing the individual, the court must then make findings, on the record if possible, concerning its decision and impose conditions of release upon the individual. Many of the suggested conditions of release delineated in the statute are similar to those of domestic violence protective orders and include the provision that the court may issue "any other order required to protect the safety of the alleged victim and to ensure the appearance of the person in court." KRS 431.064(2)(f). The victim is entitled to receive a free certified copy of the conditions of release upon request to the clerk's office. KRS 431.064(6). The circuit clerk or its designee shall cause the conditions of release to be entered into the computer system maintained by the clerk and the Administrative Office of the Courts within twenty-four (24) hours following its filing, excluding weekends and holidays. KRS 431.064(7). Individuals who violate the conditions of release are guilty of committing a Class A misdemeanor. KRS 431.064(10).



♦ *Sexual violence and abuse* - a non-consenting sexual encounter in which an adult is either pressured, coerced (expressed or implied), or forced into sexual activity with the partner. Sexual violence or abuse involves fondling, fellatio or cunnilingus, anal or vaginal penetration, and exploitation through photography or prostitution.

Until recent years, discussions related to sexual assault have excluded the significant number of battered spouses who are also victimized by this crime. In one of the first studies of its kind, Diana Russell found that over 12% of women reported that their husbands had committed acts against them which would qualify under the legal definition of rape<sup>15</sup>. It is undoubtedly the case that this figure is lower than the actual incidence of marital rape in that many women share the common stereotype that rape is an act committed by a stranger, and as a result, are less likely to label the experience of forced sexual relations with a spouse as "rape". In review of Russell's work and from subsequent research, Finkelhor and Yllo estimate that rape by a spouse is one of the forms of sexual coercion which a woman is most likely to experience<sup>16</sup>.

**The 1990 Kentucky General Assembly passed legislation to recognize the crime of rape in marriage by removing the spousal exclusion in the sexual offense chapter of the penal code. By 1993, every state in the nation had done so.**

The growing understanding of marital rape has revealed three primary types<sup>17</sup>. Particularly relevant to the discussion of domestic violence is the category of "battering rapes" where sexual assault occurs in combination with physical beatings and psychological abuse. The primary emotional motivation for the marital rapist in this case is anger. In "sex specific rapes", the sexual assault is not accompanied by physical assault, but rather is the primary means by which the partner is victimized. In these instances, the amount of physical violence used is only as much force as is necessary to coerce the victim into sex, and appears to be motivated primarily by a desire to be powerful over the woman. The third type of marital rape is perpetrated by individuals with deviant sexual arousal patterns. Typically involving obsessive forced sex, these victims are required to have an inordinantly high number of sexual encounters, or to have sex which is associated with sadistic, brutal or perverse behavior.

Finkelhor and Yllo also describe in detail the psychological impact which marital or partner rape has on victims, noting that the trauma experienced is significant both in the immediate aftermath and over the long term. According to the researchers the victims of marital rape in their study:

“. . . felt an overwhelming sense of shock, followed by a profound sense of despondency. They could not believe that their husbands, who were

<sup>15</sup> Russell, Diana. *Rape in Marriage* (New York: Macmillan, 1982)

<sup>16</sup> Finkelhor, David and Kersti Yllo. *License to Rape: Sexual Abuse of Wives* (New York: Holt, Rinehart and Winston, 1985)

<sup>17</sup> Finkelhor & Yllo, 1985

supposed to have a special regard for them, could have done something so frightening, so humiliating and so demeaning. Compounding the betrayal for many women was the realization that their husbands had no awareness of the effect of the brutal behavior.”

*In addition to the immediate trauma of marital rape, the victims we talked to reported serious long-term effects. Some were still experiencing them five or ten years after they had divorced their husbands. They talked about an inability to trust. They talked about lingering fear and emotional pain. They talked about terrifying flashbacks and nightmares. They talked about apprehensions about men and sexual dysfunctions - problems that kept them from having a social life, or that interfered with subsequent marriages.”*

**Examples of Kentucky Revised Statutes Applicable to  
Sexual Forms of Domestic Violence\***

**Rape and Sodomy**

The sexual assault provisions contained in Chapter 510 of the Penal Code consist of the crimes of rape, sodomy, and sexual abuse. Rape in the first degree consists of engaging in sexual intercourse with another by forcible compulsion or engaging in sexual intercourse with a child under twelve or one who is physically helpless. KRS 510.040. Sexual intercourse is defined as sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by the perpetrator. KRS 510.010(8). Given this definition, the Smith case, where the defendant used a carrot to vaginally and anally penetrate his wife, would have been prosecuted as a rape, not as an assault.

Forcible compulsion means not only force but also a threat of force, either express or implied that places a person in fear of immediate death, physical injury, fear of immediate kidnap, or being the victim of a crime found within the chapter. KRS 510.010(2).

In one case, for example, the perpetrator kept his step-children in a home environment where they lived in a continual state of fear concerning what he might do to them. See Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992). There, the court determined such threats and emotional abuse met the definition of forcible compulsion. The 1996 General Assembly amended the definition so that it now explicitly states that physical resistance on the part of the victim shall not be necessary. Before the amendment, many cases, while not explicitly stating that resistance on the

part of the victim was required, nonetheless appeared to be indirectly using physical resistance as the proof that the perpetrator had used forcible compulsion.

While first-degree sodomy applies to deviate sexual intercourse, like first-degree rape it applies when the perpetrator commits his crime through the use of forcible compulsion, or against a victim who is physically helpless or a child less than twelve. KRS 510.070. Deviate sexual intercourse is defined as any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by the perpetrator. KRS 510.010(1).

Similarly, first degree sexual abuse applies to a perpetrator who subjects another person to sexual contact by forcible compulsion, or has sexual contact with someone physically helpless or a child under the age of twelve. The remaining degrees of rape, sodomy, and sexual abuse require no element of forcible compulsion and generally apply to underage victims. KRS 510.050, 510.060, 510.080, 510.090, 510.120, 510.130.

#### Marital Rape

While Kentucky criminal statutes used to forbid the prosecution of a sexual assault committed by one spouse against the other, legislation passed by the 1990 General Assembly removed the marital rape exception. Sexual assaults committed by one spouse against another may now be prosecuted in the same manner as all other sexual offenses. However, when the legislature removed the marital rape exception, it set forth three requirements governing the crimes of marital rape and sodomy. First, the legislature imposed a one-year deadline on the victim for reporting the crime of rape or sodomy to the police for the case to be prosecuted. This one-year reporting requirement differentiated the crimes of marital rape and sodomy from all other felonies, for there is no statute of limitations for felony prosecutions. In other words, such crimes may be prosecuted at any time, no matter how remote the offense. Second, if one spouse accuses the other of any sexual offense under Chapter 510, the arrest record of the accused spouse shall be expunged if the charge was either dismissed with prejudice or a verdict of not guilty on the charge resulted. KRS 510.300. And third, in child custody or visitation suits, "no evidence that one has been charged with violation of this statute, if the person charged and the complainant are married or that such a proceeding is pending, or any evidence regarding the circumstances on which such charge is based, shall be admissible into evidence on the issue of custody or visitation, nor shall any weight be given by any court to the existence of such a proceeding or the facts on which such proceeding is based." The 2000 General Assembly repealed the first and third requirements. In other words, the reporting requirement no longer exists and evidence that one

party has been charged with a sexual assault of the other is admissible into evidence on the issues of custody and visitation.

#### Rape Shield Law

Under certain circumstances, the Kentucky Rules of Evidence prohibit the introduction into evidence of the victim's previous sexual history in criminal cases of sexual assault and incest. Called the rape shield law and codified in KRE 412, this exclusionary rule extends beyond cases of rape to all prosecutions brought under KRS Chapter 510 (i.e., sexual offenses), for incest pursuant to KRS 530.020, and for conspiracies or attempts to commit any such offenses.

The purpose of KRE 412 is "to prevent the victim in a sexually related crime from becoming the defendant at a trial." Smith v. Commonwealth, Ky.App., 566 S.W.2d 181, 183 (1978). Before the enactment of the rape shield law, "evidence of the victim's prior sexual conduct was admissible to support the proposition that if she consented to have relations with one or more persons then she consented to the relations with the defendant." Smith, 566 S.W.2d at 183. KRE 412(b) sets forth three exceptions to this rule, which may be summarized as follows: (1) to prove Appellant was not the source of the semen or injury; (2) to prove that the victim consented to the sexual behavior; or (3) to prove any other fact directly pertaining to the offense charged. Stringer v. Com., Ky., 956 S.W.2d 883, 892 (1997). While KRE 412 does permit the introduction into evidence of the victim's sexual history under limited circumstances, its "balancing test contains 'an obvious tilt toward exclusion over admission.'" Commonwealth v. Dunn, Ky., 899 S.W.2d 492, 494 (1995), citing R. Lawson, The Kentucky Evidence Law Handbook Section 2.30 (3d ed. 1993). While the analogous Federal Rule of Evidence extends the rape shield law into both civil and criminal proceedings, the Kentucky statute is strictly limited to the criminal context.

\*(See later section of the manual for additional legal discourse on sexual assault in marriage.)

♦ Emotional and psychological abuse - emotional abuse, whether dealt in a manner of name calling, ridicule, threats, or other forms, is systematic and purposeful, and has the effect of giving power to the abusive partner. This effect is most often the desired result of a perpetrator whose low self-esteem stimulates insecurity and fears of abandonment which are mitigated by the victim's growing dependence and feelings of self-worthlessness. When threats occur within a relationship in which violence has previously occurred, their ability to induce fear is significantly enhanced. This so-called "psychological battering" is particularly terrorizing, for a victim need not imagine what violence might be like, nor is she able to deny the possibility that violence might actually

occur. In the case of psychological battery, the victim's anticipatory anxiety which results from threats can be as debilitating as the violence itself.

The incidence of Post-Traumatic Stress Disorder (PTSD) among battered women is now documented. One of the factors which plays a significant role in the risk of PTSD among domestic abuse victims is the psychological abuse they endure, particularly as that abuse relates to establishing control over the victim. As expressed by Herman<sup>18</sup>

*The methods of establishing control over another person are based upon the systematic, repetitive infliction of psychological trauma. These methods are designed to instill terror and helplessness, to destroy the victim's sense of self in relation to others, and to foster a pathologic attachment to the perpetrator. Although violence is a universal method of instilling terror, the threat of death or serious harm, either to the victim or to others close to her, is much more frequent than the actual resort to violence. Fear is also increased by unpredictable outbursts of violence, and by inconsistent enforcement of numerous trivial demands and petty rules.*

*In addition to inducing terror, the perpetrator seeks to destroy the victim's sense of autonomy. This is achieved by control of the victim's body and bodily functions. Deprivation of food, sleep, shelter, exercise, personal hygiene, or privacy are common practices. Once the perpetrator has established this degree of control, he becomes a potential source of solace as well as humiliation. The capricious granting of small indulgences may undermine the psychological resistance of the victim far more effectively than unremitting deprivation and fear.*

**Examples of Kentucky Revised Statutes Applicable to  
Psychological Forms of Domestic Violence**

***Menacing, Terroristic Threatening and Harassment***

A perpetrator who places a victim in reasonable apprehension of imminent physical injury is guilty of menacing. KRS 508.050. This crime does not require that the perpetrator make an explicit threat: for example, simply waving a gun at someone would meet the elements of this statute. Graham v. Commonwealth, Ky.App., 667 S.W.2d 697 (1983). A perpetrator who threatens to kill or seriously physically injure a victim has committed the crime of terroristic threatening. KRS 508.080. A perpetrator who makes no threat but follows a person about public places or engages in a course of

<sup>18</sup> Herman, J.L. *Trauma and Recovery; The Aftermath of Violence from Domestic Abuse to Political Terror*. (New York: Basis Books, 1992)

conduct which alarms or seriously annoys another and which serves no legitimate purpose has committed harassment. KRS 525.070. Harassment may also be committed by striking, shoving, kicking or otherwise submitting the victim to physical contact.

A related crime is that of harassing communications, committed when a perpetrator, with the intent to harass, annoy or alarm another person, communicates by telephone, mail or any other form of written communication, or simply makes a telephone call with no purpose of legitimate communication. KRS 525.080. Anonymous communications are included, and the statute extends to include telephone calls even where no communication ensues, i.e. including hang ups or complete silence.

Stalking

If the perpetrator both continually follows and threatens his victim with physical injury, death, or sexual contact, he has committed the crime of stalking. KRS 508.130-508.150. Stalking requires a pattern of conduct consisting of at least two acts which seriously alarm, annoy, intimidate or harass the victim and would cause a reasonable person to suffer substantial distress. Stalking is a misdemeanor, but escalates to a felony when a protective order has been issued and the perpetrator received notice of such, a criminal complaint by the same victim is currently pending and the perpetrator has received notice, the perpetrator committed his crime of stalking while in possession of a deadly weapon, or the defendant previously has been found guilty of a felony or Class A misdemeanor committed against the same victim. Also, the felony crime of stalking requires that the threat place the victim in reasonable fear of serious physical injury, versus mere physical injury for the misdemeanor. The Court of Appeals has upheld the stalking statute against a constitutional challenge of vagueness.

Monhollen v. Commonwealth, Ky.App., 647 S.W.2d 61 (1997). Neither terroristic threatening nor stalking requires that a perpetrator physically injure his victim.

- ♦ Environmental abuse - as has been stated, it is characteristic of domestic violence cases that perpetrators exert efforts to control the victim's environment. Such behaviors may include isolating victims from family members; restricting access to bank accounts; following or monitoring telephone calls; and other measures. As in the case of emotional abuse, such controls allow the perpetrator to increase the victim's dependence and create a perspective in her that she has no alternatives to the violent relationship. Additionally, when perpetrators destroy the valued property or pets of victims, an unmistakable message regarding the victim's vulnerability is clear.

**Examples of Kentucky Revised Statutes Applicable to  
Environmental Forms of Domestic Violence**

*Unlawful Imprisonment and Kidnapping*

A perpetrator who knowingly and unlawfully restrains another person commits unlawful imprisonment in the second degree, with the offense increasing to first degree if the perpetrator's act of restraint exposes the victim to a risk of serious physical injury. KRS 509.020 and 509.030. The offense escalates to kidnapping if the perpetrator restrains the victim to accomplish the commission of a felony, to inflict bodily injury to terrorize the victim, or to use the victim as a shield or hostage. KRS 509.040. Kidnapping ranges from a Class B felony to a capital offense, depending upon the degree of injury sustained by the victim.

In keeping with principles of double jeopardy and statutory requirements, the kidnapping statute does not apply to circumstances where the perpetrator intended to commit a separate felony and interfered with the victim's liberty only to the extent necessary to commit that felony. KRS 509.050. In order to qualify for the kidnapping exemption, the restraint must be close in distance and brief in time. See Griffin v. Commonwealth, Ky., 576 S.W.2d 514 (1978) (kidnapping exemption did not apply and kidnapping had been committed when the defendant seized victim and took him to a house a half a block away, where the defendant sodomized him for ninety minutes).

*Trespass, Burglary, Arson and Criminal Mischief*

Perpetrators who destroy or unlawfully enter the house of the victim risk facing charges of trespass, burglary or arson. A perpetrator commits trespass when he knowingly enters or remains unlawfully in a dwelling. KRS 511.060. Burglary is committed when a perpetrator, with the intent to commit a crime, not only knowingly enters or remains unlawfully in a dwelling but also does so with the intent to commit a crime. KRS 511.030. The Supreme Court has clearly declared that burglary extends to a spouse. McCarthy v. Commonwealth, Ky., 867 S.W.2d 469, 470 (1993) ("We continue to reject the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break into the home of the other with the intent to commit a crime"); see also Hedges v. Commonwealth, Ky., 937 S.W.2d 703, 705-06 (1997) (where court reversed a burglary conviction based on husband's assault of estranged wife after she permitted him entrance to her home stating "the mere violation of a domestic violence protective order without the intent to commit an independent crime does not support a burglary conviction"). Robey v. Commonwealth, Ky., 943 S.W.2d 616 (1997) (where the court reversed the burglary conviction of defendant opining that because the

victim had invited the perpetrator into her apartment, a requisite element of the offense was lacking).

A perpetrator who starts a fire or causes an explosion to a building commits arson, with the degree of the offense depending upon injuries sustained by the victim, and whether the defendant believed the building to be occupied. KRS 513.020-513.040. The Code broadly defines "building" to include any dwelling, hotel, or commercial structure, as well as any automobile or vehicle. KRS 513.010. And criminal mischief occurs when a perpetrator intentionally or wantonly defaces, destroys or damages any property while having no right to do so or any reasonable grounds to believe in having such a right. KRS 512.020

Custodial Interference

A perpetrator who wrongfully gains access to the children of the victim may be guilty of committing custodial interference. This crime is committed when a person, knowing he has no legal right to do so, takes, entices or keeps from lawful custody any person entrusted by authority of law to the custody of another. KRS 509.070. It is a defense that the perpetrator voluntarily returned the child before arrest or the issuance of a warrant.

**Domestic Violence Fatalities**

Domestic violence fatalities are those deaths that occur in the context of an intimate partner relationship and impact not only the victim, offender and their families, but also the way in which the issue of domestic violence is viewed and addressed within a community. Although the US Department of Justice reports that intimate partner fatalities have declined dramatically in the past decade, over 1800 women and men lost their lives at the hands of an intimate partner in the past year. Additionally, domestic violence fatalities involving non-married white females have increased in the past two decades.<sup>19</sup> The issue of firearms also significantly impacts the rate of domestic violence fatalities to the extent that intimate assaults associated with guns are 12 times more likely to be fatal than non-firearm assaults<sup>20</sup> and households with guns are 7.8 times more likely to have a firearm fatality at the hands of an intimate partner than homes without guns.<sup>21</sup>

<sup>19</sup> *Homicide Trends in the United States*. (U.S. Department of Justice, Bureau of Justice Statistics, 1999)

<sup>20</sup> Saltzman, L.E., "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults". *Journal of the American Medical Association*, 1992.

<sup>21</sup> Kellerman, A.L., et al, "Gun Ownership as a Risk Factor for Homicide in the Home". *New England Journal of Medicine*, 1993.



### *Why Don't Battered Women Leave?*

*The question, "why don't battered women leave," is based on the assumption that leaving will end the violence.*

While this may be true for some women who leave after the first or second incident of violence, more often the risk of serious or lethal violence actually increases when the victim attempts to leave the relationship. Similarly, the greatest risk of serious physical injury or death occurs at the point of separation. Studies estimate that over 50% of battered women who leave are followed, harassed or attacked by their partners. The majority of homicide-suicides in domestic violence cases occur at the point of the victim's separation from the offender.

Fear often motivates victims to remain in a violent relationship since offenders have both the means and opportunity to harm not only the victim but also her children and extended family. Similarly, the fear of leaving a situation in which a victim has some level of comfort and consistency is often paralyzing once the crisis has passed. In many cases, victims want the violence to end, not the relationship.

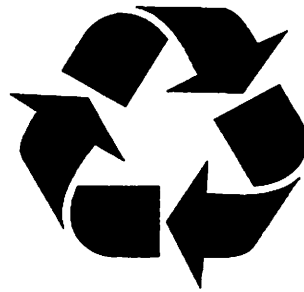
Other factors which impact a victim's decision to remain in or return to the relationship include:

- ◆ financial considerations
- ◆ lack of job skills or other resources
- ◆ offender threatens death of victim or children
- ◆ offender threatens to kidnap the children
- ◆ victim loves the offender and believes the offender's promise that the violence will end
- ◆ victim believes in traditional values of keeping families together and remaining married
- ◆ victim has low self-esteem resulting from repeated abuse which leaves her believing she has no alternatives to the abusive relationship
- ◆ perceived or actual ineffective community response to domestic violence

### **The Cycle of Violence**

In some of her early research with women who were battered, Lenore Walker<sup>22</sup> offered a tri-phase conceptualization of violence in relationships to describe what she perceived to be their common experience, coining the term the "cycle of violence." It was Walker's early finding that a pattern of tension building in the relationship, followed by an outburst of violence and then contriteness on the part of the offender was characteristic of domestic violence cases. While the Cycle she describes may be less applicable to cases involving antisocial offenders who use violence in a deliberate fashion and who do not feel remorse, Walker's model does fit the experience of many battered women:

**PHASE 2:**  
*Violence and Abuse Phase*



**PHASE 1:**  
*Tension Building Phase*

**PHASE 3:**  
*Honeymoon Phase*

***First Phase***

According to Walker, the first phase of the cycle involves the escalation of tension between family members. This may be precipitated by interpersonal, economic, health, or other stressors, and may occur concomitantly with increased substance use or abuse by one or both partners. Emotionally or psychologically abusive behaviors directed at the victim also increase during this period. Without some form of intervention or relief, tension rises until an abusive episode occurs.

***Second Phase***

The second phase of the cycle involves the discharge or acting out of tension through physical abuse. As violence continues in the relationship, the degree of abuse tends to worsen in severity. Walker also suggests that a continuation of the cycle leads to an increase in the frequency with which the abuse occurs.

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<sup>22</sup> Walker, L.E. *The Battered Woman* (New York: Harper and Row, 1979)

### ***Third Phase***

The third and final phase of the cycle of violence is a contrite phase characterized by apology, the reestablishment of intimacy between partners, and a return to a homeostasis to which the family is accustomed. In long-standing and severely abusive relationships, the cycle evolves such that both the tension and contrite phases of the cycle shrink in duration. As a result, in these families violence is triggered with minimal or no precipitation, and genuine expressions of remorse following the abuse are negligible. As depicted in the cycle, abuse is reinforced because it causes an end to escalating conflict or other stressors and because it leads directly to the most positive phase of the relationship.

***Risk Factors do not create domestic violence, but their presence can make the occurrence of violence more likely:***

#### ***Individual Influences***

- fighting within the home of origin
- exposure to parental violence
- previous violence in other relationships
- isolation from family and friends
- high levels of expressed anger and impulsivity
- inappropriate expectations of children
- aggressive response to actual and perceived stress
- rigid acceptance of traditional concepts of men's
- entitlement to superiority and control over family members
- biological and neuropsychological factors
- alcohol and drug abuse

#### ***Sociocultural Influences***

- acceptance of marital fighting
- assumption and social expectations that men are superior to women and entitled to exert control over family members
- poverty
- guns in the home or easy access to weapons
- violent environment or neighborhood
- gender stereotypes

Report of the American Psychological Association Presidential Task Force on Violence in the Family, 1996

## The Psychological Impact of Victimization

### *Typical Psychological Effects of Battering*

- ◆ fear and terror
- ◆ low self-esteem
- ◆ difficulty concentrating
- ◆ difficulty with trust and intimacy
- ◆ sexual difficulties
- ◆ anxiety
- ◆ problems with memory
- ◆ cognitive confusion
- ◆ depression
- ◆ anger and irritability
- ◆ shame and embarrassment
- ◆ health concerns
- ◆ nightmares
- ◆ increased startle response and physiological arousal
- ◆ numbing and avoidance

*Report of the American Psychological  
Association Presidential Task Force on  
Violence and the Family*

As the literature has documented the extent of violence, attention has focused on the psychological impact which the crime may have on adults who are its victims and children who witness abuse. Rates of depression among battered women have been found to be significantly higher than rates in the general population of women<sup>23</sup> and battered women have been found in substantial numbers among cases of attempted suicide and alcoholism<sup>24</sup>. Additionally, research within the past five years has begun to take a broader view of who is victimized by domestic violence by beginning to address the negative psychological impact on children of witnessing violence between parents<sup>25</sup>.

### *Impact of Domestic Violence on Adult Victims*

As mental health professionals intervene with battered women, distinct levels of mental health need become apparent. A first category of women has as its primary source of distress, the violence of the partner. When the stressor is removed, either by separation from the partner, by the prosecution of the offender, by the introduction of protection through orders issued by the court, or by the offender's meaningful involvement in treatment, psychological distress in the victim also tends to be ameliorated.

The mental health need of a second category of victims is more profound, resulting from long-standing exposure to the traumatic stress of violence. Victims in this category frequently exhibit post-trauma related symptoms and may appear to mimic the behavior of a hostage held captive for an extended period. These may be victims seen by the court as quiet, withdrawn and reticent to prosecute the offender. They may ask that charges or protective orders be withdrawn and choose to return to live with the offender. They may refuse outside help or even tell their attorneys that they do not fear the offender. These can be behaviors which appear confusing to

<sup>23</sup> Plichta, S. (forthcoming) "Violence, Health and Use of Health Services." In Women's Health and Care Seeking Behavior. Baltimore: John Hopkins University Press

<sup>24</sup> Stark, E. The Battering syndromes: Social Knowledge, Social Therapy, and the Abuse of Women. Dissertation, department of Social Work, State University of New York, Binghamton, New York, 1984.

<sup>25</sup> Davis, L.V., & Carlson, B. (1987) "Observation of Spouse Abuse: What happens to the Children?" *Journal of Interpersonal Violence* 3 278 - 291.

attorneys and to the court or appear to appease the offender, but are from the point of view of the victim, means of surviving a life threatening circumstance.

The perception of the victim, not what the facts tend to make attorneys, judges, clerks, social workers, therapists or other professionals believe, is the critical factor which regulates her or his behavior. If they perceive they will be killed by their partner for disclosing the abuse or prosecuting; if they perceive that law enforcement and the courts will not or cannot protect them; if they perceive they are not strong enough to raise a family without a partner; perceptions such as these will determine the choices they make.

Not surprisingly, a growing body of research indicates that battered women frequently present symptoms characteristic of Post-Traumatic Stress Disorder (PTSD), a diagnostic category which is specifically linked to the experience of a traumatic event and is characterized by a re-experiencing of the trauma; avoidance of stimuli associated with the event; and increased autonomic arousal<sup>26</sup>. The likelihood of developing PTSD has been found to increase when stressors are experienced under conditions of perceived life threat, injury, and a great deal of force, all of which are characteristic of domestic abuse cases.

#### ***Battered Woman Syndrome***

The effects of domestic abuse manifested in victims of domestic abuse define the battered woman syndrome. The syndrome, which is accurately applied to some but not all victims, can be seen in victims who tend to be less able to respond effectively to the violence around them. Battered woman syndrome has three major components:

- ◆ post-trauma symptoms associated with victimization, specifically including reexperiencing the violence through intrusive thoughts or dreams and numbing or reduced expression of affect.
- ◆ “learned helplessness” resulting from repeated abuse. Depression and a sense of lacking control of the environment are often artifacts of learned helplessness, but it does not necessarily result in passivity on the part of the victim. (*Note: the term “learned helplessness” must be used with caution as it may imply unintended negative traits in victims of abuse.*)
- ◆ coping responses viewed as self-destructive by others, including behaviors which appear to placate the offender or numb the victim to the abusive environment.

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<sup>26</sup> American Psychiatric Association. *Diagnostic and Statistical Manual of Psychiatric Disorders*. (Washington, D.C.: American Psychiatric Press)

### ***Impact of Domestic Violence on Child Witnesses***

Historically, children have been the “forgotten victims” of domestic violence as there has been a mistaken belief that children can somehow escape direct exposure to the violence and its effects. Research now suggests that children are present in 80 percent of homes where there is violence against a women<sup>27</sup>, and that ninety percent of these children witness the violence directed by one parent against another<sup>28</sup>. A correlation between spouse abuse and the physical or sexual abuse of children in the home is also now documented. Abuse of the mother usually precedes violence against the child and a positive correlation exists between the severity of abuse directed at spouses and children<sup>29</sup>.

The impact of domestic violence on children is complex, as it must take into account cases where children witness adult violence, cases in which children also targeted for abuse by the batterer, and cases where a child is injured by stepping in to protect a victimized parent. The impact is manifested in emotional, behavioral, cognitive and physical spheres of the child’s life. Some children withdraw and manifest internalized behavioral difficulties, such as somatic disorders, insomnia and heightened anxiety, depression, guilt and damaged self-esteem, many of which result from the self-perception of helplessness in the face of violence<sup>30 31 32</sup>. Post-trauma symptoms are also seen in child witnesses of violence, in large part due to the overstimulation and terror to which they are routinely exposed<sup>33</sup>.

Children’s reactions to witnessing domestic abuse may also be more aggressive in nature. A child may model the offender and act out aggressively with parents, siblings, peers or others<sup>34</sup>. Finally, studies also note that children in violent families are at risk for developing psychological adjustment problems in response to parental neglect when perpetrating or surviving violence is the primary focus of both parents<sup>35</sup>.

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<sup>27</sup> Bureau of Justice Statistics Factbook, (U.S. Department of Justice Statistics, 1993)

<sup>28</sup> Pagelow, M.D. “Children in Violent Families: Direct and Indirect Victims. In S. Hill & B.J. Barnes (Eds) *Young Children and Their Families* (Lexington, MA: Lexington Books, 1992)

<sup>29</sup> Bowker, L.H., Arbitell, M., & McFerron, J.R. “On the Relationship Between Wife Beating and Child Abuse.” In K. Yllo & M. Bograd (Eds) *Feminist Perspectives on Wife Abuse* (Newbury Park, CA: Sage Publications, 1988)

<sup>30</sup> Jaffe, P., Wolfe, D.A. & Wilson, S.K. *Children of Battered Women* (Newbury Park, CA: Sage Publications, 1990)

<sup>31</sup> Hughes, H.M. (1988) “Psychological and Behavioral Correlates of Family Violence in Child Victims and Witnesses.” *American Journal of Orthopsychiatry* 58(1) 77 - 90

<sup>32</sup> Pynoos, R.S., & Eth, S. (1986) “Witness to Violence: the Child Interview.” *Journal of the American Academy of Child Psychiatry* 25 306 - 319.

<sup>33</sup> Silvern, L., & Kaersvang, L. (1995) “The Traumatized Children of Violent Marriages” *Child Welfare* 68 421 - 436.

<sup>34</sup> Straus, M.A., Gelles, R.J., & Steinmetz, S.K. *Behind Closed Doors: Violence in the American Family* (New York: Anchor Books, 1980)

<sup>35</sup> Straus et al, 1980

For additional statistical information on the impact of domestic violence on children, teenagers and during pregnancy compiled by the Kentucky Domestic Violence Association, see the appendix section.

***The Lessons of Domestic Violence in the Home***

Jaffe and his colleagues point out what children tend to learn in violent homes. He suggests that the extent to which children learn these lessons directly relates to their propensity to identify with the aggressor and model the violent behavior<sup>36</sup>:

- ◆ the interaction of family members normally contains violence
- ◆ conflict is resolved through violence
- ◆ violence is sanctioned as a mode of stress management
- ◆ victims of violence are, at best, to tolerate this behavior and, at worst, to examine their responsibility in bringing on the violence.

**The Profile of Domestic Violence Offenders**

Studies related to perpetrators of domestic violence have, for the most part, documented small percentages of a major mental illness among this population, but nonetheless indicate predominate dysfunction in the affective, cognitive, and interpersonal spheres of their lives. The clinical literature has revealed significant childhood histories of physical and sexual abuse<sup>37</sup> and witnessing violence between parents<sup>38</sup>; suicidality<sup>39</sup>; depression<sup>40</sup>; and evidence of personality disorders<sup>41</sup>. In some cases more serious psychiatric problems among perpetrators are seen, as evidenced in one study of a psychiatric hospital which

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<sup>36</sup> Jaffe, P., Wilson, S., & Wolfe, D.A. (1986) "Promoting Changes in Attitudes and Understanding of Conflict Resolution Among Child Witnesses of Family Violence" *Canadian Behavioral Science* 18 (4) 357-366.

<sup>37</sup> Sonkin, D.J. *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (New York: Springer, 1987)

<sup>38</sup> Hotaling, G.T., Sugarman, D.B. (1986) "An Analysis of Risk markers in Husband to Wife Violence: the Current state of Knowledge." *Violence and Victims* 1 101 - 124.

<sup>39</sup> Sonkin, D., Martin, J., Walker, L. *The Male Batterer: A Treatment Approach* (New York: Springer, 1985)

<sup>40</sup> Gondolf, E.W. (1985) "Fighting for Control: a Clinical Assessment of Men Who Batter. *Social Caseworker* 66 48-54.

<sup>41</sup> Hamberger, L.K., & Hastings, J. (1988) "Characteristics of Male Spouse Abusers Consistent With Personality disorders. *Hospital and community Psychiatry* 39 763 - 770.

found that 27 percent of the hospitalized men had inflicted violence upon a partner<sup>42</sup>. Studies also reveal a close correlative relationship between substance abuse and violence perpetration<sup>43</sup>.

### ***Domestic Violence Offenders***

Early research on perpetrators focused largely on finding what they had in common, although no singular diagnostic category for domestic violence offenders has been identified. This research indicated that domestic violence offenders tend to:

- be less assertive and have lower self esteem than non-offenders;
- are often hostile and frequently abuse alcohol;
- have a history of abuse in childhood when attitudes of acceptance of violence and specific targets and behaviors were learned;
- more likely hold stereotypic views of men and women;
- be emotionally impoverished;
- be manipulative, jealous, and possessive.

A variety of categories have been delineated in an effort to understand and describe domestic violence offenders. In a simplistic characterization, three types of offenders can be identified. The following typologies should be viewed as generalizations arising from studies of lethality in domestic violence offenders and other offenders whose patterns interface with domestic violence: 1) the reactive offender, 2) the instrumental offender, and 3) the antisocial offender. (It is important to note that these typologies are not entirely discrete and there can be considerable overlap of features in any one offender.)

### **Reactive Offenders**

The reactive offender is the one that most attorneys may think of when they approach domestic violence. It is this type of offender who is the subject of "anger management" program referrals because they are typically, although incorrectly, seen as not intending harm so much as being incapable of restraining themselves from causing harm. Judges and attorneys are cautioned about their understanding of this offender. This label for the problem presents a ready excuse for violent conduct which can lead to a depreciation of the seriousness of the offense.

Reactive offenders are generally characterized by poor socialization skills, poor inhibition of impulses, rapid escalation of anger, immaturity, and low verbalization skills. They are

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<sup>42</sup> Post, R.C., Willett, A.B., Franks, R.D. et al (1980) "A Preliminary Report on the Prevalence of Domestic Violence Among Psychiatric Inpatients. *American Journal of Psychiatry* 137 974 - 975.

<sup>43</sup> Sonkin, D., Martin, J., Walker, L. *The Male Batterer: A Treatment Approach* (New York: Springer, 1985)



especially likely to be emotionally abusive by yelling and cursing, but are less likely to make serious threats. Sexual offenses committed by reactive offenders are likely to be for the immediate gratification of urge, not for the conscious intent or purpose of hurting the partner. These offenders are frequently abusers of alcohol or other drugs and, by virtue of their immaturity, can exhibit a puzzling mixture of competency in some areas of their lives, but glaring incompetence in others - primarily in their partner relationships. The reactive offender is more likely to experience remorse for his conduct and is, in general, a more responsive client for court-ordered treatment programs.

### **Instrumental Offenders**

The instrumental offender may appear more competent than the reactive, but this strength can be very misleading. The instrumental offender generally finds a high degree of congruence between his controlling behavior and his world and self view. He frequently has a very possessive understanding of women and their roles with men. Violence is not an impulse, but a tool for the control of others. He is generally very dependent upon his partner, but will describe the relationship in opposite terms that portray the woman as "needing" him to make things work. He is persistently observant of her actions, may be prone to stalking, and is vulnerable to intense jealousy with his perception of the slightest "evidence" of her interaction with other males. He views her interest in other people as taking something away from him to which he is entitled. This may even include their children, who can be seen as an interference and impediment to his full enjoyment of his partner or to fully getting his needs met.

While any offender is likely to also commit sexual abuse, the instrumental offender is more likely to use sex acts for the humiliation of the partner than for actual sexual pleasure. He is not likely to experience remorse, and in extreme manifestations, is a very dangerous and difficult offender who should be only treated by domestic violence specialists. Like other perpetrators, he might use alcohol or other drugs, but these are rarely the dominant issue. His jealousy or paranoia might appear to be a product of psychosis, but this is generally not the case. He is very unlikely to leave the relationship and will exert threats, stalking and other means of terror to prevent her leaving. He is vulnerable to suicidal thoughts and his risk of lethality to others increases as suicidality becomes more intense.

### **Antisocial Offenders**

The antisocial offender uses his relationship with his partner to further his other interests. Unlike the instrumental offender, he does not have a dependent attachment to his partner, and, as a result, is generally less lethal. He is more likely to be an alcohol and/or drug user and the courts are likely to have seen him for prior criminal conduct involving offenses other than domestic violence. His violent behavior may appear similar to either the reactive or instrumental types in that he very likely has poor impulse inhibitions, but also can use violence and threats to get his way. Unlike the reactive offender, he generally is not using his violence to dominate so much as to get his way - which might actually mean relieving his sense of being controlled by his partner. These relationships

generally do not last a long time and the woman's risk of harm decreases when the offender leaves the relationship.

### ***Stalking in the Context of Domestic Violence***

Recent research has begun to focus on the stalking behavior of domestic violence offenders. Attention to stalking in domestic violence cases is important in part because of its frequency, but also because of its indication of increased danger risk for victims.

Dziegielewski & Roberts<sup>44</sup> have identified a typology of three types of stalkers, including:

- ◆ domestic violence stalkers, who comprise 75-80 percent of the total;
- ◆ erotomania or delusional stalkers; and
- ◆ nuisance stalkers.

Domestic violence stalkers tend to be motivated by the need to continue or reestablish the relationship and the control of the victim. Those offenders who are characteristically dependent upon the victim often feel desperate in the fear of losing the relationship. These types of stalkers and their obsessive thinking and behavior tend to pose significant danger to the victim and any children in the home. See prior section for discussion on the elements of the criminal offense of stalking in Kentucky law.

## **Risk Assessment in Domestic Violence Cases**

### ***The Domains of Risk***

While attorneys should not be asked to play the role of forensic mental health professionals in assessing clinical lethality, some information regarding how to judge the dangerousness of an offender is imperative for the legal profession.

Monahan & Steadman<sup>45</sup> outline four domains which should be assessed in order to determine the danger potential of violent individuals: 1) dispositional factors, 2) clinical factors, 3) historical features and 4) the context or environment within which the individual lives. These four factors may be applied to domestic violence cases to assess a

<sup>44</sup> Dziegielewski, S.F. & Roberts, A.R. (1995) "Stalking Victims and Survivors: Identification, Legal Remedies, and Crisis Treatment." In A.R. Roberts, (Ed) *Crisis Intervention and Time-Limited Cognitive Treatment* (Newbury Park, Ca: Sage Publications)

<sup>45</sup> Monahan, J. & Steadman, H.J. *Violence and Mental Disorder: Developments in Risk Assessment*. (Chicago: University of Chicago Press, 1994)

reasonably reliable level of risk. Importantly, no one factor alone will tell the court how dangerous an individual is; it is the combination of trait, state and situational context that define the level of potential harm.

- **Dispositional Factors:** While research has yet a long way to go to identify distinct dispositional markers or personality traits for perpetrators of domestic abuse, there are some generalizations that can be made. The court should be alert for personality traits in an offender such as propensity for aggressive reactions, hyperactivity, attentional deficits, passivity, conflict avoidance or conflict-seeking styles, thrill-seeking, or other sustained temperamental features.

Two dispositional factors which have the most significant relevance with respect to the dangerousness of a domestic violence offender include impulsivity and anger. Impulsivity can be manifested cognitively (e.g. a hair-trigger temper followed by remorse); or by motor impulsivity which may involve “acting without thinking”. The manifestations of anger which may be most associated with lethality include suspicion and an expectation of being harmed by others; rumination and obsessive thinking (particularly as it relates to the victim); and a combat-oriented approach to the external world.

- **Clinical Factors:** Examples of clinical factors with domestic violence offenders include depression, periods of psychosis (although a small number of domestic violence cases feature psychotic illness), anxiety or panic, and related disorders. The degree to which the clinical factors associated with the offender are moderated by treatment or social supports can be an additional finding of significance. Factors which appear to be unaffected by treatment or the addition of social supports tend to pose greater risk. Paranoia, particularly the more characterological version, can be a serious and significant clinical factor in assessing risk of harm to a partner.

Clinical factors may also include the presence of personality disorders (particularly those with antagonistic or hostile traits) and substance abuse. There are two aspects of substances that can contribute to higher lethality. The disinhibition principle applies mostly to alcohol since this drug impairs the individual’s ability to inhibit impulsivity. Second, the stimulant properties of cocaine can activate aggressiveness even in those who are not predisposed to be violent. Cocaine is increasingly associated with violence and aggression.

- **Historical Factors:** The history of childhood victimization or exposure to domestic violence as a child is a significant factor in the prediction of

offending behavior among perpetrators who act out the behavior they have learned. A positive relationship between childhood abuse is also positively related to greater vulnerability to victimization in adulthood. In addition to childhood histories of violence, the history of violence in prior relationships and outside the marital or intimate relationship is also important to assess, as is criminal history.

- Contextual Factors: An individual's traits, state and history exist in a context - a specific situation. This variable is perhaps one that receives less attention than it should in traditional risk assessment for harm to others as well as to self. This is unfortunate because the validity of risk assessment (ie: whether it will actually predict dangerousness in a given individual) is improved significantly when viewed with consideration of the context within which the victim and perpetrator live. In domestic violence situations, it becomes paramount because sudden changes in the situational context can easily account for a dramatic shift from low lethality to very high risk. For example, an offender's loss of contact with others or more social isolation can increase lethality which was previously modulated by a supportive environment. An index factor associated with increased risk of the most severe domestic violence is a victim's decision to separate from the offender.

Attempts by the court to modulate or reduce the danger which an offender appears to pose to self or others should focus primarily on clinical and contextual factors. Obviously, a person's history cannot be altered, and characterological traits tend to be more intractable. Management of the clinical features of depression or psychotic symptoms, for example, can be attended to if a court mandates an individual into treatment. Courts can also reduce lethality by addressing contextual factors, including requiring the offender to attend substance abuse counseling and treatment to eliminate violence; through the introduction of social supports; by requiring the offender to vacate a residence if proximity to a victim poses too much harm; and many other orders.

### **Risk and Lethality Assessment in Cases of Domestic Violence**

The following items should be viewed as general characteristics that point toward an increased risk of violence in a partner relationship. Risk assessment should take an additive approach to these features - namely the more of them that apply, the higher the risk probability rating. *(For a checklist prepared by the American Bar Association, refer to the appendix section.)*

#### **Dispositional Factors**

- thrill seeking
- irritability
- poor impulse inhibition
- aggressiveness

- poor affect and emotion regulation
- low verbalization ability
- attentional deficits
- hyperactivity
- genetic vulnerabilities to violence

#### **Clinical Factors**

- depression, dysphoria
- post-traumatic stress disorder
- anxiety and/or panic
- personality disorder, particularly B cluster
- alcohol and/or drug abuse
- closed head injury
- bipolar disorder
- suicidal thinking
- delusional disorder

#### **Historical Factors**

- childhood victim of physical abuse
- childhood witness to domestic violence
- early history of aggressive and violent acts (even early childhood)
- pattern of dysfunctional dating and romantic relationships
- poor adaptations to social norms in school and work
- progressive history of violent conduct
- repetitive sequences of aggression
- lack of accommodation or change resulting from negative consequences
- history of threats toward others - particularly toward the partner

#### **Contextual Factors**

- partner's decision or action to separate/divorce
- presence and availability of guns - particularly handguns
- unstable employment or loss of job
- financial problems - recent or mounting
- partner has children from an earlier relationship living in the family
- partner has a relationship with another man or woman
- partner is enjoying greater success in work or other social settings
- primary socialization with men - or social isolation

#### **Crisis Intervention in Domestic Violence Cases**

There are several crisis intervention steps that can be taken to diminish risk of harm in domestic violence situations. Courts and attorneys should not attempt reconciliation of a couple or mediation as a crisis management technique. Safety interests of victims should take precedence over all other steps during the crisis period. Close coordination with protective services agencies (including the local spouse abuse center and the Department

for Community Based Services), law enforcement and the criminal justice system is vital in assisting victims to remain safe.

### Working With Offenders

When working with an offender, emphasis should be placed on staying away from the partner and seeking a "time-out" that will allow him an opportunity to think things through and get counsel from others. This is an important time for courts to give a message to the offender that domestic violence will not be tolerated and that consequences will arise from violent conduct or from violation of orders of the court. Research has shown that court orders for offender treatment are associated with lower criminal recidivism for assault or violation of a protective order and that lower criminal recidivism is also associated with cumulative effects of successful prosecution, probation monitoring, court-ordered counseling<sup>46</sup>.

### Safety Planning and Intervention with Victims of Domestic Abuse

As earlier sections have demonstrated, domestic violence poses a real threat to a victim's physical safety. All attorneys and court personnel working with victims should become familiar with safety planning and how to guide victims through this process.

In the most basic sense, a safety plan is a victim's strategy for exiting a dangerous environment. It can also be a tool for increasing safety if the victim remains in the home. A victim must direct the course of safety planning with the assistance of concerned individuals. Ownership of the process must be with the victim in order to ensure effective utilization of the plan in a time of crisis. Development of a safety plan is often time consuming and difficult since issues of denial and minimization are often challenged, requiring high levels of patience and persistence on the part of the helper. If a high level of lethality exists, a plan should be developed immediately.

In addition to increasing a victim's ability to protect both self and children, an effective safety plan can help a victim continually assess the level of danger from the offender. Many victims remain, at least temporarily, in violent relationships due to lack of support from formal or informal resources; lack of job skills or financial security; and fear of the offender's continued violence upon separation. Safety planning also involves strategies to assist victims with emotional and psychological protection once they are physically removed from a dangerous environment. Consistent emotional support from friends, family and professionals often contributes to a victim's ability to resist an offender's manipulation and increases the conviction that leaving a violent environment is the ultimate empowering act.

<sup>46</sup> Murphy, C.M., Musser, P.H., & Maton, K.I. (1998) "Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism." *Journal of Family Violence* 13 (3).

what consequences?

In order to provide the greatest opportunity for protection, each safety plan should be:

- SPECIFIC- It takes time to find out what is most dangerous for each victim. Though they may share common issues, individual resources and abilities must be addressed in order to provide the maximum amount of protection.
- DETAILED- No questions is trivial if it is related to a plan to remain safe.
- PRACTICAL- Although victim resources exist in the community, they may not be accessible to all victims for a variety of reasons. Exploring these issues is crucial to creating an effective plan.

While physical safety cannot be guaranteed, steps can be taken to increase the victim's degree of protection. These include:

- contacting law enforcement. Be certain that the victim knows how to contact city police, county police, state police, or the sheriff
- contacting or entering a spouse abuse center
- accessing an emergency order of protection from the court
- receiving protective services offered through the Department for Community Based Services
- accessing the services of a victim advocate