

New Public Acts of Significance to Family Law Clients Affected by Domestic Violence

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Attorneys representing clients in cases involving domestic violence should be familiar with laws applicable to criminal, personal protection, domestic relations, and dependency matters, because domestic violence often invokes justice system responses in these multiple contexts. Connections with community human service agencies are also helpful, because clients affected by domestic violence often need referrals for supportive social services in addition to legal assistance. This article highlights recent public acts of interest to family law practitioners seeking to develop an interdisciplinary outlook on cases involving domestic violence.

The authors understand that “domestic violence” is a pattern of controlling behaviors, some of which are criminal, that include but are not limited to physical and/or sexual assault, emotional abuse, isolation, economic coercion, threats, stalking, and intimidation. These behaviors are used in an effort to control an intimate partner and may be directed at pets, property or others with the effect of controlling the intimate partner.¹

A. Information Sharing Between Friend of the Court Offices and Children’s Protective Services

Effective immediately 2008 PA 300, 405, 510 and 511 amend several sections of the child protection law and the Friend of the Court Act to enhance information sharing

¹ See Batterer Intervention Standards for the State of Michigan, Sec. 4.1 (Jan. 20, 1999) at http://www.michigan.gov/documents/DVBISCStandards_24600_7.pdf. MCL 400.1501 provides a consistent statutory definition:

“(d) ‘Domestic violence’ means the occurrence of any of the following acts by a person that is not an act of self-defense:

- (i) Causing or attempting to cause physical or mental harm to a family or household member.
- (ii) Placing a family or household member in fear of physical or mental harm.
- (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

“(e) ‘Family or household member’ includes any of the following:

- (i) A spouse or former spouse.
- (ii) An individual with whom the person resides or has resided.
- (iii) An individual with whom the person has or has had a dating relationship.
- (iv) An individual with whom the person is or has engaged in a sexual relationship.
- (v) An individual to whom the person is related or was formerly related by marriage.
- (vi) An individual with whom the person has a child in common.
- (vii) The minor child of an individual described in subparagraphs (i) to (vi).”

between the Department of Human Services, Children’s Protective Services (CPS) and the Friend of the Court (FOC).

1. Information that CPS Must Share with FOC

2008 PA 300 adds several new sections to MCL 722.628 addressing communication between CPS, and local FOC offices. CPS must determine whether there is an open FOC case regarding a child who is the subject of a CPS investigation for abuse or neglect, if the investigation results in one of the following dispositions:

- Preponderance of the evidence that abuse or neglect has occurred;
- Emergency removal of the child before the investigation is complete;
- The court takes jurisdiction over the child who remains at home;
- 1 or more of the children are removed and 1 or more remains in the home;
- Any other circumstances related to child safety;

If CPS determines that there is an open FOC case and one of the above dispositions applies, it must notify the local FOC that there is an investigation regarding a child. CPS must also report to the local FOC when there is a change in the child’s placement.

CPS may, but is not required to, report to FOC whenever a parent makes unfounded abuse or neglect reports more than three times in a year or makes five cumulative reports over several years.

Finally, if CPS determines there is an open FOC case, CPS must provide noncustodial parents of a child who is suspected of being abused or neglected with a form explaining how to change a custody or parenting time order.

2. Information that FOC Staff Must Share with CPS

2008 PA 300 and 510 amend the Child Protection Law (MCL 722.623) to add “a person employed in a professional capacity in any office of the friend of the court” to the list of professions required to report suspected child abuse or neglect.²

2008 PA 405 amends MCL 552.520 of the Friend of the Court Act to provide that if a local FOC receives the notice from CPS described above in 2008 PA 300 regarding a child who is subject to a proceeding to establish or modify custody or parenting time, FOC must notify CPS of procedural developments in the case until a final order regarding the pending dispute is entered.

3. Advocacy Implications for Attorneys Representing Victims of Domestic Violence

Improving communication between CPS and FOC is an important step to better outcomes for children because it encourages improved coordination between these agencies.

² The new law now defines mandatory reporters to include employees in agencies funded under the federal Violence Against Women Act who would otherwise be prohibited from reporting absent a state mandate or court order.

However, the new laws do not address differences in each agency's basic expectations for parents, which may create a "Catch-22" for some victims of domestic violence. For example, courts in domestic relations cases typically expect divorcing parents to work with one another cooperatively in order to reach amicable agreements about child-rearing that maximize a child's relationship with both parents. An abused parent's efforts to comply with these expectations might put that parent at odds with the child welfare agency's common expectation that abused parents have little or no contact with abuse perpetrators to protect their children from exposure to violence. On the other hand, that same parent's efforts to limit contact with the abuse perpetrator might be viewed as "uncooperative" by the domestic relations court, and penalized under the statutory best interest factors, particularly the "friendly parent" factor, MCL 722.23(j). Legal advocates must be alert to the potential for conflicting expectations of this nature so they can work to negotiate a coordinated response for their clients.³

Legal advocates should also be alert for information sharing that carries a risk of revealing victim information that abusers can use to harm victims. The provisions of 2008 PA 300 and 510 requiring professional FOC employees to report suspected child abuse or neglect are of particular concern in this regard. Familiarity with existing confidentiality statutes and court rules is essential to assessing the risks of disclosure to a particular client. The Child Protection Law, MCL 722.627(2)(f), provides that "a written report ... filed with [CPS] as provided in this act is a confidential record," available only to listed individuals. Persons who may access confidential CPS records include "[a] person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or neglect ... if the identity of the reporting person is protected as provided in section 5."⁴ In cases where a FOC employee reports to CPS regarding a party to a FOC case, MCL 722.627(2)(f) creates an apparent exception to MCR 3.218(A)-(B), which treats protective services reports as confidential information to which a party may not have access. If the subject of the FOC employee's report to CPS is also a perpetrator of domestic violence, the information in the report might endanger the adult victim by:

- revealing sensitive locating or other information, or
- triggering retaliation for disclosures made by the victim that appear in the report to CPS.

Thus, careful analysis is required to assess the risks of inter-agency disclosures to particular clients. Legal advocates should consider referring clients at risk to local domestic violence service agencies for assistance with safety planning.⁵ Both legal advocates and local FOC and CPS offices can help victims do advance safety planning by explaining agency child abuse/neglect reporting and other information-sharing practices to their clients.

³ Local FOC and CPS offices can also move towards better coordination by providing cross-training opportunities to foster mutual awareness of each agency's policy assumptions and statutory requirements.

⁴ MCL 722.625 provides that with some exceptions not pertinent here: "...the identity of a reporting person is confidential subject to disclosure only with the consent of that person or by judicial process."

⁵ A list of such agencies by county is found at www.michigan.gov/domesticviolence. (Click on "Michigan's Resource Directory.")

Other issues arising from mandated reporting of suspected child abuse/neglect by FOC employees include the impact that this requirement may have on the parties' interactions with the FOC. Domestic violence victims may be reluctant to disclose domestic violence occurring in the presence of children to FOC employees, fearing that such disclosures might result in a report to CPS. Legal advocates should be aware of CPS policies regarding reports of abuse or neglect based solely on an allegation that one of the parents is perpetrating violence on the other. Current CPS policy recognizes that treating exposure to domestic violence as child abuse per se is not helpful to families and children in many cases:⁶

The presence of DV [domestic violence] is not sufficient basis, in and of itself, for confirming a finding of child abuse and/or neglect. Policies in place to hold the perpetrator of the DV accountable (e.g. confirming the perpetrator of the DV as a perpetrator of CA/N) must be evaluated prior to confirming neglect against the victim of DV.

The victim of DV may use protective strategies that are obvious such as physically intervening to protect the child, reporting the risk to the child to law enforcement, or leaving the perpetrator in order to protect the child. There are additional, less obvious, protective strategies the victim of DV may use.... Gather information regarding the DV victim's efforts to protect the child. The following factors should be evaluated in determining whether or not to confirm failure to protect...

- Disciplining the child so the perpetrator does not.
- Not leaving the perpetrator of DV in order to protect the child (e.g., the perpetrator may have made threats against the child if the victim of DV should attempt to leave or the victim of DV may feel the child is at greater risk in a different environment).
- Shifting the perpetrator's abuse from the child to the adult victim of DV.
- Leaving child with others (outside the home) as a way to protect the child.

Finally, legal advocates should be aware that the new information sharing provisions do not change current required procedures to modify custody or parenting time orders. A parent who suspects the other parent of abusing or neglecting a child must petition to change the order in the domestic relations case. CPS has no authority to initiate a change of custody proceeding in a domestic relations action. CPS must, however, advise parents involved in an investigation how that parent may change a current order.

⁶ CFP 713-8, pp. 12-13 (10/1/08). This policy can be found online at: <http://www.mfia.state.mi.us/olmweb/ex/cfp/713-8.pdf>. See also *Nicholson v Scopetta*, 820 N.E.2d 840, 844 (NY, 2004), holding that a parent may not be found responsible for "neglect" under New York's state dependency statutes based solely on the fact that the child has been exposed to domestic violence perpetrated against the parent, and Edleson, J.L. (2006, October), *Emerging Responses to Children Exposed to Domestic Violence*. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence. Retrieved 1/26/08: <http://www.vawnet.org>.

For more information about communications between CPS and FOC offices, see “Recommendations for Coordination between Friends of the Court and Department of Human Services Children’s Protective Services” available at: http://www.michigan.gov/documents/dhs/DHS-CPS-FOC-Recommendations_230561_7.pdf

B. Amendments to MCL 750.136b, Imposing Criminal Liability for Child Abuse/Neglect

Effective April 1, 2009, 2008 PA 577 amends MCL 750.136b to change the statute’s definitions for criminal child abuse/neglect in the second, third and fourth degrees as follows:

- *2d degree child abuse/neglect* currently involves, among other acts, 1) an omission causing “serious physical harm or serious mental harm to a child,” or 2) a reckless act causing “serious physical harm to a child.” 2008 PA 577 amends the second of these alternatives, punishing reckless acts that cause either serious physical harm or “serious mental harm” to a child. The public act leaves unchanged the statute’s current definition of “serious mental harm,” as well as other provisions giving rise to liability for 2d degree child abuse/neglect.⁷
- *3rd degree child abuse/neglect* currently involves “knowingly or intentionally caus[ing] physical harm to a child.” 2008 PA __ adds the following alternative: “The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.” Effective April 1, 2009, 3d degree child abuse is a 2-year felony rather than a 2-year misdemeanor as under current law.
- *4th degree child abuse/neglect* can currently be charged if “the person’s omission or reckless act causes physical harm to a child.” 2008 PA __ adds to this the following alternative: “The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.”

In general, perpetrators of adult domestic violence are at risk of prosecution under MCL 750.136b, because they present an increased statistical risk for physical abuse of their children – abuse that may continue or increase after a couple separates.⁸ A less obvious application of the statute is against abused parents, who may be charged with criminal neglect. The penalties for “omissions” imposed in cases of 2d degree child abuse/neglect under current law and 2008 PA 577 are particularly susceptible of use against abused

⁷ “Serious mental harm” is “an injury to a child’s mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” Other conduct described in current law and in 2008 PA 577 that gives rise to liability for 2d degree child abuse is as follows:

“(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

“(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results”.

⁸ L. Bancroft & J. Silverman, *The Batterer as Parent*, p 157 (Sage Publications, 2002).

parents who “fail to protect” their children from exposure to adult domestic violence. Charging abused parents with criminal neglect is problematic, for several reasons:

- An abused parent may lack the power and resources to control children’s exposure to domestic violence if the adult abuse involves one parent’s ongoing pattern of asserting control over the other by means of assaults, threats, financial coercion, or other tactics.
- Remaining in the home with the abuser may reasonably be perceived by the non-offending parent as the safest option for the children. This is particularly true where the abused parent has been able to shield the children from direct abuse by the perpetrator or where the perpetrator has threatened to kidnap or kill the children if the other parent attempts to leave. Domestic violence involves the abuser’s exercise of control over an intimate partner (often through the children), so that leaving the home may cause the violence to escalate – perhaps to lethal levels – as the perpetrator seeks to regain dominance in the relationship or to punish a partner for leaving.
- Criminal neglect prosecutions of abused parents can reinforce abusers’ controlling tactics, allowing abusers to threaten their partners with neglect proceedings to deter them from calling police, or seeking other outside help against the violence.

2008 PA 577 recognizes some of the above complexities by providing an affirmative defense to a prosecution under MCL 750.136b where the defendant’s conduct involving the child was “a reasonable response to an act of domestic violence in light of all the facts and circumstances known to the defendant at the time in question.”⁹ The defendant has the burden to prove this defense by preponderance of the evidence. Likewise, the amendments to the definitions of child abuse/neglect in the 3d and 4th degrees require prosecutors to consider the totality of circumstances experienced by the defendant, taking account of whether a defendant’s actions were reasonable responses to the actions of a domestic violence perpetrator.

The amendments introduced by 2008 PA 577 bring MCL 750.136b more closely in line with current Children’s Protective Services policies, which are noted above in part A.3.

C. New Provisions to Pay for Sexual Assault Medical Forensic Examinations

Effective December 29, 2008, 2008 PA 390 - 391 create a mechanism to pay health care providers for sexual assault medical forensic examinations without burdening the victim of the assault with this cost.¹⁰ These specialized exams can be a critical support for

⁹ 2008 PA 577 defines “domestic violence” as provided in MCL 400.1501, cited at fn. 1. For a discussion of factors to consider in determining whether an act involving a child exposed to domestic violence is reasonable under the circumstances, see *Nicholson v Scopetta*, *supra*, p. 846.

¹⁰ A medical forensic exam offers a sexual assault victim all of the following:

- a) A medical history;
- b) A general medical exam, including (but not limited to) laboratory services and prescribed pharmacy items;
- c) One or more of these procedures:
 - i. A detailed oral exam;
 - ii. A detailed anal exam;

victims' recovery, and are needed to collect evidence immediately after an assault for later prosecution of the crime. The new laws state that sexual assault victims may no longer be billed for the costs of their own exams. Instead, health care providers must first seek payment from victims' insurance, or alternatively, from other sources.¹¹

Additionally, 2008 PA 391 creates a SAFE Response program within the Crime Victim Services Commission to pay health care providers a maximum of \$600 per examination in cases where insurance or other sources will not be used or are unavailable or incomplete.

Although victims' insurance are the payer of first resort under 2008 PA 391, health care providers must obtain signed, written victim consent before submitting a bill to insurance. Victims must be alerted verbally and in writing that they are not required to give consent to bill insurance if they have significant safety or privacy concerns. Fears about billing insurance may arise in several contexts, including cases of marital rape where the policy holder is also the perpetrator of the offense. In this situation, a victim may fear reprisal if the perpetrator is notified that the victim disclosed the assault and had a forensic exam.

The new laws do not change the current duties that medical professionals have to report certain crimes under MCL 750.411. However, 2008 PA 391 provides that sexual assault victims may not be forced to discuss the assault with law enforcement agencies as a condition of receiving a medical forensic examination or as a condition of being relieved of the costs of this examination. Sexual assault experts have found that some victims are uncertain or afraid about reporting the crime to police immediately after an assault, even though this is when a doctor or nurse must perform the medical forensic exam. Experts who work with these victims have found that they often will decide not to undergo the exam if they have to decide right away about reporting the assault. However, if these victims have time to recover from the assault before they have to think about investigating or prosecuting the crime, they are more likely to have the exam. This approach both provides for victims' immediate medical needs, and preserves evidence for possible future prosecution.

To contact the SAFE Response program, call 517-334-SAFE (7233) or contact the Crime Victim Services Commission.

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- iii. A detailed genital exam;
 - d) Administration of a sexual assault evidence kit and related medical procedures and laboratory and pharmacy services.

¹¹ Other sources may include grants or providers' internal funding.