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COMMENT

North Carolina's Domestic Violence Act: Preventing Spouse Abuse?

A young woman,* beaten again by her husband, fears for her life and the lives of her children. Heavy drinking, unemployment and financial trouble fuel his rage. Embarrassment and financial dependence keep her from turning to family or friends. Not wanting to hurt the children keeps her locked into the bad relationship. The children will be hurt, however, whether she leaves or not.

This scene typifies the violent domestic arena. The spouse abuse¹ it engenders is widespread.² Women are overwhelmingly more likely to be victims than are men.³ Wife beating is perpetuated from generation to generation,⁴ and is common in different socioeconomic groups.⁵

Until recently abused women seeking protection had few legal options.⁶ At most, a woman could get an injunction ordering her spouse not

* Although men are also victims of domestic violence, this comment recognizes the much greater frequency with which women are victimized. Accordingly, where reference is made to petitioners complaining of domestic violence, female gender is generally used.

1. Spouse abuse can involve physical and emotional domestic violence between spouses. North Carolina defines domestic violence quite broadly:

Domestic violence means the occurrence of one or more of the following acts between past or present spouses or between persons of the opposite sex who are living together or have lived together as if married, or between one of such persons and a minor child who is in the custody of or residing with the other person.

N.C. GEN. STAT. § 50B (Supp. 1985) (the Act was only recently amended in 1985 to protect children).

2. In 1978 murder between spouses and unmarried couples accounted for approximately 13% of all murders in the U.S. F.B.I., CRIME IN THE U.S. 9 (1978); CALIFORNIA ADVISORY COMM'N ON FAMILY LAW, DOMESTIC VIOLENCE app. F at 119 (1st report 1978) (sets nationwide figures of abused wives at one million annually).

3. Between married persons as opposed to unmarried, wives are the victims of more frequent and severe physical abuse. Each year from 1.8 to 3.3 million wives are beaten by their husbands to 280,000 husbands beaten by their wives. *Domestic Violence and Legislation With Respect to Domestic Violence: Hearings on S. 1728 Before the Subcommittee on Child and Human Development*, 95th Cong., 2d Sess. 44 (1978) [hereinafter cited as *Hearings*]; Note, *The Case for the Legal Remedies for Abused Woman*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 136-37 (1977) (cites figures ranging from one to twenty-eight million women beaten annually nationwide).

4. Boys who watch their fathers beat their mothers are likely to beat their spouses when adults. CALIFORNIA DEP'T OF JUSTICE, HANDBOOK ON DOMESTIC VIOLENCE 2 (3d ed. 1979).

5. A study in predominantly middle class Norwalk, Connecticut, showed police receive approximately the same number of domestic abuse complaints as do police in a lower socioeconomic-classed Harlem neighborhood. Barden, *Wife Beating: Few of Them Ever Appear Before a Court of Law*, N.Y. Times, Oct. 21, 1974, at A38, col. 1.

6. Lerman, *State Legislation on Domestic Violence*, Response to Violence in the Family, Sept.-Oct. 1981, at 1.

to abuse her while divorce, separation, or custody proceedings were pending.⁷ Criminal sanctions for assault against an abusive spouse have not been traditionally pursued because of a reluctance by law enforcement officials to enter the domestic domain.⁸ North Carolina responded to this problem in 1979 by enacting the Domestic Violence Act.⁹ Under the Act, a woman may motion the district court for emergency relief if she believes there is an imminent danger of serious bodily injury by the threat of force to herself or her minor children.¹⁰ Emergency relief includes temporary protective orders prohibiting alleged abusers from entering the parties' home, and awarding child custody to allegedly abused women for up to ten days before a hearing on the complaint.¹¹

In *Smart v. Smart* the North Carolina Court of Appeals held that the standard for showing good cause under the Act sufficient to grant emergency protective orders is an "[i]mmediate and present danger of such act of violence or attempted violence against the victim or minor children"¹² Such *ex parte* orders temporarily deprive alleged spouse abusers of significant liberty and property interests in the custody of their children and access to their homes.¹³ North Carolina has not yet addressed deprivation of respondents' due process rights in depth. Part I of this comment explores the nature and constitutionality of *ex parte* orders for emergency relief under the Act. Part II analyzes respondents' due process rights in light of decisions from other jurisdictions. Part III examines the practical application of North Carolina's Domestic Violence Act and compares it with legislation from other states. Finally, Part IV discusses the implementation of the Act in North Carolina since 1979, and suggests alternative procedures that may better aid the prevention of domestic abuse while not unduly burdening the due process rights of alleged abusers.

I. EX PARTE ORDERS FOR EMERGENCY RELIEF

Ex parte orders, also known as temporary restraining orders, are injunctions granted without notice to the defendant.¹⁴ The trial judge hears only the plaintiff's side of the story. The defendant does not have the chance to attack plaintiff's claim or present his own at this time.¹⁵

7. *Id.*

8. In California, police departments usually do not keep separate statistics on wife abuse, showing perhaps a low priority. CALIFORNIA DEP'T OF JUSTICE, *supra* note 4, at 122.

9. N.C. GEN. STAT. § 50B-1 (1981).

10. *Id.* § 50B-2(b) (1981). Although Chapter 50B recognizes the threat domestic violence poses to children, the vast problem of child abuse is beyond the scope of this comment.

11. *Id.* § 50B-2 (1981).

12. 59 N.C. App. 533, 535 n.1, 297 S.E.2d 135, 137 n.1 (1982).

13. "Ex parte" means "by or for one party." BLACK'S LAW DICTIONARY 517 (5th ed. 1979).

14. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10, at 107 (1973).

15. *Id.*

Rule 65(b) of the Federal Rules of Civil Procedure requires that the applicant for a temporary restraining order (TRO) show (1) immediate and irreparable harm or damage will result to the applicant before the respondent can be heard in opposition, and (2) what effort, if any, has been made to give notice and why notice should not be required.¹⁶ Rule 65(b) of the North Carolina Rules of Civil Procedure requires essentially the same showing.¹⁷

The temporary *ex parte* order granted by the Act requires a showing by petitioner that she believes respondent is threatening her with serious and immediate injury.¹⁸ This is similar to the "irreparable injury" required by Rule 65(b) of both the Federal and North Carolina Rules of Civil Procedure. However, express reasons why notice should not be given before the court grants a protective order are not required. Only a finding of "good cause" is required under the Act, and is defined in *Smart* as an "immediate and present danger of such act of violence or attempted violence against the victim or minor children."¹⁹ This merely reiterates the irreparable injury standard. The North Carolina Legislature has chosen to lessen the burden on threatened women by dropping the usual TRO requirement of showing why notice is not needed. This significantly affects the due process rights of men accused of beating their wives and lovers, and has made some judges reluctant to grant *ex parte* relief.

Ex parte orders were traditionally used by creditors to garnish a debtor's wages or to repossess financed property in arrears.²⁰ Garnished property was seized at the beginning of the suit before a hearing on the merits of plaintiff's claim. Courts viewed this as an *in rem* action against the property and therefore, personal jurisdiction over the owner/defendant was unnecessary.²¹

The Supreme Court in 1969 halted garnishment without a prior hearing in *Sniadach v. Family Finance Corp.*, holding that prejudgment garnishment of wages by creditors without prior notice or a hearing violates procedural due process.²² Two years later the Court struck two replevin statutes in *Fuentes v. Shevin*, holding that prejudgment repossession of financed goods on petition by a creditor without prior hearing violates procedural due process.²³ In *North Georgia Finishing Co. v. Di-Chem*, the

16. FED. R. CIV. P. 65(b).

17. "A T.R.O. may be granted without notice . . . if it clearly appears . . . that immediate and irreparable injury, loss or damage will result before notice can be served and a hearing had thereon," and shall define "why the order was granted without notice." N.C.R. CIV. P. 65(b).

18. N.C. GEN. STAT. § 50B-2(b) (1984).

19. 59 N.C. App. at 535 n.1, 297 S.E.2d at 137 n.1.

20. M. GREEN, BASIC CIVIL PROCEDURE 48 (2d ed. 1979).

21. *Id.*

22. 395 U.S. 337, 339-42 (1969).

23. 407 U.S. 67, 96 (1972).

Court struck a state procedure which permitted any clerk of court to issue prejudgment orders garnishing the debtor's bank account on petition by the creditor without an early hearing.²⁴ Inadequate judicial review of the debtor's interest in his property led the Court to hold that procedural due process was violated in the three previous cases. The Court found adequate procedural protection under Louisiana's prejudgment sequestration system in *Mitchell v. W.T. Grant Co.*²⁵ Louisiana required a creditor to post a bond for the debtor's protection, file affidavits swearing to the truth of his claim, and allege that he had reason to believe the debtor would encumber or dispose of the property during the proceedings. This protection of the debtor's interest and minimization of the risk of the creditor's wrongful temporary possession led the Court to distinguish *Mitchell* from the above cases.

Depriving fundamental interests with *ex parte* orders is not without strong criticism. Note Justice Harlan's concurrence in *Sniadach*: "Since this deprivation cannot be characterized as *de minimis*, [respondent] must be assured the usual requisites of procedural due process: notice and a hearing."²⁶ Although procedural due process analysis has been extended since *Sniadach* to include balancing several competing factors,²⁷ the strong language repeated throughout the *Sniadach-Fuentes* line of cases requiring notice and a hearing before depriving due process interests is particularly applicable to pre-hearing deprivations of access to one's home and children as allowed under North Carolina's Domestic Violence Act.²⁸

II. RESPONDENTS' DUE PROCESS RIGHTS

"The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures . . . The

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented . . . [No] later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already assured.

Id. at 81-82. Such strong language against property deprivation absent procedural safeguards is tempered by the Court saying further that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or cancel disputed goods." *Id.* at 93. Note, however, that the *ex parte* garnishment cases involve temporary deprivation of property alone. The special procedural due process problems raised by depriving respondents' liberty interests in their children under the Act is addressed at the text accompanying notes 29-39 *infra*.

24. 419 U.S. 601, 606-08 (1975).

25. 416 U.S. 600, 606-08 (1974).

26. 395 U.S. at 342 (Harlan, J., concurring).

27. See *infra* text accompanying note 35.

28. See *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982). Unlike garnishment, protection orders under Chapter 50B carry stiff criminal penalties if violated. See *infra* text accompanying note 60.

answer to that question is not to be found in [state law]."²⁹ Justice White's proclamation for the Court in *Cleveland Board of Education v. Loudermill* affirmed that whenever individual liberty or property interests have been deprived by state procedures, due process requires that certain processes be provided to the individual before depriving him of these interests. Traditionally such procedural due process requires notice and a hearing prior to deprivation.³⁰

Natural parents have a fundamental liberty interest in the care and custody of their children.³¹ This liberty interest has been recognized by the Court for years.³² There is also a constitutionally protected fundamental property interest in one's home.³³

"[O]nce it is determined that the Due Process Clause applies, 'the question remains what process is due.'"³⁴ What process is due to someone whose liberty or property rights have been deprived requires a balancing of:

- (1) their private interest that will be affected by the official action,
- (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the procedures entail.³⁵

Although North Carolina has not yet addressed respondents' due process rights under the Act, cases from other jurisdictions can guide North Carolina courts in applying and reviewing the constitutionality of the Act. In *State ex rel. Williams v. Marsh*,³⁶ the Missouri Supreme Court upheld the constitutionality of Missouri's newly enacted Adult Abuse

29. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

30. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

31. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

32. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A parent's right in controlling the upbringing of his child is limited by the right of unmarried minors to obtain an abortion without parental consent. *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52 (1976) (parental consent requirement was held unconstitutional only if the minor's right to seek an abortion was unduly burdened).

33. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982). The due process property interest in access to one's home implicated by the governmental procedures used, such as in Chapter 50B, is recognized by the due process clauses of the 5th and 14th amendments as part of procedural due process analysis, distinct from an unjustly compensated taking of property under the taking clause of the 5th amendment. Although such deprivation of access to one's home may also constitute an unjust taking under the 5th amendment, such is beyond the scope of this comment.

Some criticisms of procedural due process analysis are found in Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984). Professor Gunther suggests that the Burger Court, by "shrinking" the scope of liberty in procedural due process cases, may be casting doubt on the Court's broad interpretation of liberty in the substantive due process cases. G. GUNTHER, *CONSTITUTIONAL LAW* 578 (11th ed. 1985).

34. *Loudermill*, 470 U.S. at 541 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

35. *Mathews*, 424 U.S. at 334-35.

36. 626 S.W.2d 223 (Mo. 1982).

Act as applied to a respondent alleged to have abused his spouse. He was restrained from abusing the petitioner and prevented from entering the parties' home. Petitioner secured this relief through an *ex parte* protection order which required the respondent to be notified of the order and the date set for a hearing on the merits.

In *Marsh*, the respondent's liberty and property interests in his home and children were clearly deprived. The court weighed these private interests as substantial under *Mathews v. Eldridge*.³⁷ Nevertheless, the risk of an erroneous deprivation of these rights by granting a protection order to a petitioner absent any real threat of immediate harm did not outweigh the state's substantial interest in protecting women and children from physical violence. The process due the respondent was a hearing to determine the merits of the petitioner's allegations. The urgency of protecting families from violence justified depriving the respondent of access to his home and children before the hearing.

Loudermill, which requires enough of a prior hearing to give one an "opportunity to present his side of the story,"³⁸ involved the dismissal of a tenured public employee. That situation is clearly distinguishable from one arising under the Act: the requirement of a hearing before dismissal for tenured employees implicates a greater property interest than restraining one from his home and children for up to ten days. Depriving a person of his livelihood can be permanently devastating. Restraining a person's access to his children or property for ten days, although potentially as devastating, is a short lived deprivation. A tenured employee's need to tell his side of the story before dismissal overrides the government's need for administrative efficiency. In contrast, an alleged abuser can seek the hearing any time before the ten day maximum under the Act. He could be back in the house the next day if both parties are available and the judge so decides. The reason for not requiring a pre-deprivation hearing for an alleged abuser is the urgent state interest in protecting women and children from immediate harm. As the court in *Marsh* held, this is reason enough to grant a temporary restraining order before a hearing. Although *Loudermill* is the latest and most affirmative word from the Supreme Court regarding the procedural due process right to a hearing before deprivation of a state created property interest, respondents challenging the constitutionality of the Act for lack of a pre-deprivation hearing may have to look elsewhere for controlling precedent. *Loudermill* seems sufficiently distinguishable from situations arising under the Act to make it inapplicable on its facts.

In *Smart*, the North Carolina Court of Appeals held that temporary orders under the Act, granting petitioner emergency relief and child cus-

37. 424 U.S. 319 (1976).

38. *Loudermill*, 470 U.S. at 546.

tody pending a hearing, are interlocutory and do not affect any substantial rights of the respondent which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits.³⁹ It declined to address the defendant's contention that the Act is unconstitutional as applied to him.⁴⁰

In a footnote the court stated that the standard for showing good cause is a showing of "immediate and present danger" before temporarily depriving alleged abusers of liberty and/or property rights under the Act.⁴¹ No clear evidentiary standard is given. New York's "fair preponderance of the evidence" standard used when terminating parental rights due to neglect was held to be inadequate due process in *Santosky v. Kramer*.⁴² Instead, a "clear, cogent, and convincing" standard is now required in proceedings terminating parental rights.⁴³ One can only guess what the standard of proof is in North Carolina for showing an "immediate and present danger" when alleging threatened abuse sufficient to deprive respondents of access to their children and homes for up to ten days before a hearing. A clear, cogent and convincing standard may be too high a burden for such a short term deprivation of interests under the Act. The probable cause standard used for issuing arrest warrants is a better alternative; a lower standard is more conducive to the emergency situations that call for TRO's wherein evidence must be gathered quickly.

III. PREVENTING DOMESTIC VIOLENCE IN NORTH CAROLINA

A. Chapter 50B—The Domestic Violence Act

By 1978 almost all states provided some type of temporary emergency relief from domestic violence.⁴⁴ In 1978 North Carolina lacked even a civil injunction against abusive spouses.⁴⁵ The State Legislature responded in 1979 by adopting the Domestic Violence Act, offering broad relief upon commencement of a civil action by threatened spouses.⁴⁶

The Act defines domestic violence as attempted or actual physical in-

39. 59 N.C. App. at 536, 297 S.E.2d at 137-38.

40. *Id.* at 534, 297 S.E.2d at 135.

41. *Id.* at 535 n.1, 297 S.E.2d at 137 n.1.

42. 455 U.S. 745, 747-48 (1982) (Rehnquist, J., dissenting).

43. *Id.*

44. *The Progress of State Domestic Violence Legislation*, 4 FAM. L. REP. (BNA) MONOGRAPH No. 5 (July 25, 1978).

45. *Id.*

46. N.C. GEN. STAT. § 50B (1984) (effective October 1, 1979) [hereinafter referred to as the Act]. Mr. Fred Stang, Director of the Change Program of Durham-Orange Counties, a counseling program for men who physically abuse women, is concerned that the financial cost of bringing a private civil action for a temporary restraining order under Chapter 50B discourages its use. The paperwork is confusing, establishing sufficient proof to convince the magistrate to issue relief is difficult, and placing the burden of proof on the abused woman decreases Chapter 50B's utility. Interview with Fred Stang, Director of the Change Program of Durham-Orange Counties, North Carolina, in Durham, North Carolina (Aug. 7, 1985).

jury between past or present spouses or persons of the opposite sex living together or who have lived together, or placing that other person in fear of immediate serious bodily injury by threat of force.⁴⁷

Civil actions for relief are limited to persons residing in North Carolina.⁴⁸ District courts have original jurisdiction over these civil actions⁴⁹ and a hearing must be held within ten days of the filing of the motion.⁵⁰

"Prior to the hearing and upon a finding of good cause the court shall enter such temporary orders as it deems necessary to protect petitioner or minor children. Immediate and present danger of such acts upon the petitioner or minor children constitutes good cause."⁵¹

"District courts may grant any protective order or approve any consent agreement to bring about a cessation of acts of domestic violence."⁵² Contrasted with North Carolina Rule of Civil Procedure, Rule 65(b), the broad relief available under the Act reflects the urgency of state legislatures in preventing a proliferation of domestic violence.⁵³ Relief includes: 1) directing a party to refrain from violent acts; 2) granting possession of the residence to petitioner and excluding respondent's access; 3) requiring respondent to provide petitioner and her children suitable alternative housing; 4) awarding temporary custody of minor children and establishing temporary visitation rights; 5) evicting respondent from the residence and assisting petitioner in returning to it; 6) ordering either party to pay support of a minor child as required by law; 7) ordering either party to pay support of a spouse as required by law; 8) providing for possession of personal property of the parties; 9) ordering respondent to refrain from harassing or interfering with petitioner; and 10) awarding costs and attorney's fees to either party.⁵⁴ Protective or consent orders entered or approved are not to exceed one year and are to

47. N.C. GEN. STAT. § 50B-1 (1984). Homosexuals would not have a cause of action since Chapter 50B limits the definition of domestic violence to persons of the opposite sex. Although this ignores the possibility that gay cohabitants can threaten one another with violence as readily as heterosexual cohabitants, Chapter 50B is consistent with cases refusing to recognize a due process right to engage in homosexual conduct. See *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (the Court summarily affirmed, without a hearing or giving reasons, a federal court's dismissal of a challenge by male homosexuals to Virginia's anti-sodomy statute); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (An unsuccessful attack on the Navy's policy of mandatory discharge of homosexuals. The court refuted the claim that private consensual homosexual activity falls within the constitutionally protected zones of privacy under the *Griswold-Roe* line of cases.). For a review of the status of a due process right to engage in homosexual conduct, see Note, *Dronenburg v. Zech: The Wrong Case for Asserting a Right of Privacy for Homosexuals*, 63 N.C.L. REV. 749 (1985).

48. N.C. GEN. STAT. § 50B-2(a) (1984).

49. *Id.*

50. *Id.* § 50B-2(b).

51. *Id.* § 50B-2(c); see *supra* text accompanying note 12.

52. N.C. GEN. STAT. § 50B-3(a) (1984).

53. Att'y Gen. Task Force on Family Violence, 1984 ATT'Y GEN. REP. 2, 2-5.

54. N.C. GEN. STAT. § 50B-3(a) (1984).

be for a fixed period of time.⁵⁵

Although respondent is due a hearing within ten days of receiving notice of the court's issuance of the protective order, deprivation of respondents' interests may continue after the hearing for up to one year. The Act's vagueness causes problems here; no mention is made as to what kind of evidence is sufficient to allow continuance of protective orders beyond the date of the hearing. Assuming the hearing is an opportunity for respondent to "answer the complaint,"⁵⁶ no mention is given as to whether the usual rules of procedure and discovery apply. Does respondent need to assert affirmative defenses? If normal filing deadlines apply and respondent fails to respond in time, does petitioner's motion for relief become a final judgment entitling her to permanent possession of the home if the temporary relief excludes respondent from the home? Or does she only get sole possession from the time of the order not to exceed one year? If respondent does not respond to the hearing, is his failure to appear tantamount to an admission of petitioner's averments of threats of physical violence? These questions and possible answers must be addressed by future legislators.

A person who has been charged with violating an order entered on behalf of the petitioner under the Act may be retained in custody for a reasonable time before the court determines conditions of pretrial release if, in the discretion of the judge, release of the person poses a threat of injury to the petitioner.⁵⁷ Upon pretrial release the defendant may be ordered to a) stay away from the petitioner's home, school, or place of employment, b) refrain from assaulting, beating, molesting, or wounding the petitioner, c) refrain from removing or injuring certain property, and d) may only visit her or her children as provided by an order entered by the judge.⁵⁸ These orders are similar to the relief granted under § 50B-3 of the Act. They differ in that upon violation of the former the defendant increases his chances of imprisonment whereas violation of the civil orders under the Act usually increases his chances of extending the denial of access to his property and family.

Petitioner can motion for contempt for violations by the respondent of any order under the Act.⁵⁹ Police may arrest respondent and take him into custody if the officer has probable cause to believe that respondent has violated a court order excluding him from the residence occupied by the petitioner or directing him to refrain from harassing or interfering

55. *Id.* § 50B-3(b).

56. "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." N.C.R. Civ. P. 8(b).

57. N.C. GEN. STAT. § 15A-534.1(1) (1983).

58. *Id.* § 15A-534.1(2)(a)-(d).

59. *Id.* § 50B-4(a) (1984).

with the petitioner.⁶⁰ The petitioner must give the officer a copy of the temporary order for relief granted from the court, or the officer may determine that such an order exists through phone, radio, or other communication with appropriate authorities.⁶¹ Under this section the respondent who is arrested is entitled to pre-trial release under the provisions of section 15A-534.1 of the North Carolina General Statutes. Under § 15A, the respondent has usually been apprehended by police without action by the petitioner. Under the Act, however, petitioner initiates police proceedings against the respondent via the Chapter 50B protective order. The Act offers police-protection to bolster the effectiveness of the *ex parte* order.

Other emergency assistance is available under the Act to persons alleging that they have been victims of domestic violence or threats of violence.⁶² Local law enforcement personnel shall respond to the request for help as soon as practicable. They are not required, however, to respond in instances of multiple complaints from the same person if such complaints are made within forty-eight hours and the local law enforcement agency has reasonable cause to believe that immediate assistance is not required. The responding officer is authorized to take whatever steps are reasonably necessary to protect the petitioner from harm. The officer may advise the petitioner of available shelter, medical care, counseling, and other services. When feasible the officer shall, upon petitioner's request, transport her to the hospital, magistrate's office, or other public or private facilities. He may accompany petitioner to her residence when within the jurisdiction where the request was made so that she may remove food, clothing, medication, and other personal property as is reasonably necessary to enable her and any minor children in her care to remain elsewhere pending further proceedings. No officer may be held criminally or civilly liable on account of any reasonable measures taken in providing authorized emergency assistance.⁶³

The Act should not be construed as granting a status for any purpose other than those expressly stated in the Act.⁶⁴ The remedies provided by the Act are not exclusive but are additional to remedies provided in Chapter 50 of the North Carolina General Statutes on Divorce and Alimony.⁶⁵ Granting of a protective order, approval of a consent agreement, prosecution for violation of the Act, or granting of any relief under the Act should not be construed to afford a defense to any person charged with fornication and adultery or any other offense against the

60. *Id.* § 50B-4(b).

61. *Id.*

62. *Id.* § 50B-5(a) (1984).

63. *Id.* § 50B-5(b).

64. *Id.* § 50B-6.

65. *Id.* § 50B-7.

public morals.⁶⁶

B. *North Carolina's Act as Compared to Legislation in Other States*

Over half the states grant orders of one form or another protecting persons from domestic violence.⁶⁷ Such orders are usually injunctions designed to prevent violence by one member of a household against another. North Carolina allows district courts to order the eviction of alleged abusers from the home, as do at least thirty other states. The Act does not restrict the temporary grant of eviction to petitioners who are joint tenants with the respondent. West Virginia, on the other hand, expressly limits the temporary grant of sole possession of the residence to petitioners who jointly own or rent with the respondent.⁶⁸

The temporary grant of sole possession is perhaps the most important form of relief provided by preventive domestic violence legislation.⁶⁹ It gives the potential abuser the chance to diffuse anger outside the original hostility-producing environs. Although "cooling off" periods are essential to preventing the threat of immediate violence, domestic legislation which does not provide funding for long-term counseling of abusive men does not fully treat the problem. Only with services such as the Change Program of Durham and Orange Counties which offer counseling to men who are abusive toward women can the long-term problems of domestic violence be mitigated.⁷⁰

The Act protects present and former spouses, and persons living together or who have lived together as if married. Cohabitants are thereby protected from each other, although cohabitation is unlawful in North Carolina.⁷¹

66. *Id.* § 50B-8.

67. Lerman, *supra* note 6, at 2.

68. W. VA. CODE § 48-2A-6(1)(b) (1980). Although North Carolina grants temporary possession of the residence to women whether or not they jointly own or rent with the respondent, such an order is difficult to get if the judge is reluctant to remove a man from the home. See *infra* text accompanying notes 103-04.

69. Lerman, *supra* note 6, at 2.

70. See Interview with Fred Stang, *supra* note 46.

71. "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor." N.C. GEN. STAT. § 14-184 (1981). Petitioners must be of the opposite sex from the respondent to be protected under Chapter 50B. *Id.* § 50B-1 (1984). No state has explicitly recognized a due process right to engage in homosexual conduct. See *supra* note 46, discussing the lack of a due process right to engage in homosexual conduct under *Dronenburg v. Zech*. Such a right is unlikely to be upheld by an appellate court in the near future in light of *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), wherein the Court upheld a Georgia statute criminalizing sodomy, holding that due process does not include the right to engage in consensual homosexual activity. A recent Virginia Supreme Court decision denied child custody to a gay parent carrying on a homosexual relationship in the home where the child lived. [Such a denial was held to be in the child's interest.] *Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985). As a result of this decision it is unlikely that Virginia would grant even temporary custody of children to gay parents under an *ex parte* order granted to prevent domestic violence. Furthermore, since Virginia limits protective orders to excluding the petitioner's spouse from the marital

North Carolina does not specifically protect parents or other related household members. In Maryland,⁷² orders protecting household members from threatened violence extend to spouses, parents, children, and blood relatives who live together at the time of an abusive act.⁷³ Any of these household members may petition for relief from abuse by any other household member, not just spouses or children.⁷⁴

North Carolina and at least thirty-five other states grant temporary *ex parte* protective orders which usually last up to ten days before notice and a hearing must be afforded to the alleged abuser.⁷⁵ Oregon grants protective orders upon a showing of immediate and present danger of abuse for the longest available time—up to one year before a hearing.⁷⁶ The North Carolina Domestic Violence Act does not specify how long after the filing of the petition the order will be issued, but the protective order and its relief are effective immediately upon approval of the petition by the district court.

When physical violence is threatened at night or on weekends, some states such as Missouri provide special relief. Verified petitions may be filed with any circuit or associate circuit court judge in the city or court having jurisdiction to hear the petition.⁷⁷ North Carolina's Act is unclear here; emergency assistance is available to a petitioner from local law enforcement officials "as soon as possible."⁷⁸ Where feasible police may transport the petitioner to a magistrate's office, hospital or other facilities.⁷⁹ It can be inferred that this language directing officers to transport the petitioner to a magistrate's office in case of an emergency is for the purpose of filing an *ex parte* petition for emergency 50B relief. If this is so, then North Carolina provides some of the fastest relief from potential domestic violence available in the country.⁸⁰ However, the emergency relief section of the Act needs to be revised to include a week-night-weekend emergency filing procedure. This will make the provision procedurally understandable and thereby more efficient. Without a protective order in the petitioner's hand ordering law enforcement officials

home, homosexuals will not be protected as long as marriage is limited to persons of the opposite sex. VA. CODE § 20-103 (1983).

72. MD. FAM. LAW CODE ANN. § 4-501(e) (1984).

73. *Id.* § 4-504(a).

74. *Id.*

75. Lerman, *supra* note 6, at 3.

76. OR. REV. STAT. § 107.718 (1983).

77. MO. ANN. STAT. § 455.040(1) (Vernon 1985).

78. N.C. GEN. STAT. § 50B-5 (1984).

79. *Id.*

80. The author recently filed a 50B Complaint in the Wake County Domestic Court in Raleigh, North Carolina, on a Friday morning requesting, among other things, a protective order for his client. The client picked up her copy of the signed order that afternoon. Within an hour she was in the parties' marital home collecting food and clothing for herself and the parties' children, escorted by local police.

to cooperate, police are less likely to take a woman's allegations of physical abuse seriously. Missouri's Adult Abuse Act provides that "[a]t the hearing, if the petitioner has proved the allegation of abuse by a preponderance of the evidence, the court may issue a full order of protection for a definite period of time, not to exceed one hundred eighty days."⁸¹ North Carolina's Domestic Violence Act does not specify an evidentiary standard for either showing good cause when issuing an *ex parte* protective order,⁸² or later at the hearing before the district court on the merits.⁸³ The United States Supreme Court struck New York's preponderance of the evidence standard for parental rights termination proceedings in *Santosky v. Kramer*,⁸⁴ as an unconstitutional burden on the fundamental liberty interest of natural parents in the care and custody of their children.⁸⁵ There is no standard of proof under Chapter 50B to determine at the *ex parte* hearing the merits of a petitioner's allegations of threatened abuse by an alleged abuser. A standard must be supplied promptly, either by the legislature or the appellate courts, to comport with present constitutional analysis. As noted in *Santosky*, "this Court never has approved case-by-case determinations of the proper *standard of proof* for a given procedure Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."⁸⁶ Although deprivation of parental liberty interests in one's children of the type in *Santosky* is permanent, a temporary deprivation of the same interest under Chapter 50B does not warrant the complete absence of an evidentiary standard simply because the deprivation is temporary. Once fundamental due process interests are deprived, the only question remaining is what process is due, not whether process is due.⁸⁷ It behooves women living in North Carolina to lobby their legislators to amend Chapter 50B to include some evidentiary standard for the *ex parte* hearing on the merits. Protective orders granted on the basis of a hearing backed by a clearly articulated evidentiary standard are less likely to be held unconstitutional on appeal. A probable cause-type of standard would work well here. District court judges, accustomed to applying the probable cause standard to criminal arrest warrants, can review a woman's allegations of physical abuse under a 50B petition using the same standard.

Sexual abuse, both emotional and physical, can lead to or may itself be

81. MO. ANN. STAT. § 455.040(1) (Vernon 1986).

82. N.C. GEN. STAT. § 50B-2(b) (1984).

83. *Smart v. Smart*, 59 N.C. App. 533, 535 n.1, 297 S.E.2d 135, 137 n.1 (1982).

84. 455 U.S. 745, 753-54 (1982) (Rehnquist, J., dissenting).

85. *Id.* at 757.

86. *Id.* at 757 (emphasis in the original).

87. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

domestic violence. The state of protective orders from sexual abuse is among the most inconsistent and ineffective in domestic violence legislation. North Carolina can pave new legislative ground by expressly prohibiting the attempted or threatened sexual abuse of women and children as acts from which petitioners may seek temporary *ex parte* emergency relief by so amending the Act.

North Carolina authorizes law enforcement agencies to accompany a victim to her residence to pick up children or personal property.⁸⁸ However, the general reluctance of patrol officers to respond to calls of domestic violence makes it unlikely that this type of emergency assistance is easily attainable by victims.⁸⁹ Police fear for their own safety in domestic situations. That the domestic dwelling can become a domestic battleground⁹⁰ must be recognized by women seeking police help. Lawyers advising abused women looking for legal assistance may want to advise their clients to seek alternative shelter rather than wait for police escort into the marital home. Many of the great number of murdered spouses or lovers were killed at home.⁹¹ Despite this general fear and reluctance, mental health professionals in Durham, North Carolina, note the somewhat favorable response of public safety officers to the emergency assistance needs of abused women in their city.⁹² Other cities enjoy favorable responses from local officials, as well as wide use of protective orders.⁹³ This strengthens the importance of arming abused women with protective orders before re-entering the marital home after an explosive episode.

To perhaps assuage local police reluctance (as well as protect governmental subdivisions from liability), the Act includes a disclaimer of criminal or civil liability for any police officer giving emergency assistance on account of reasonable measures taken under authority of the Act's emergency assistance provisions.⁹⁴ This may partly explain the generally favorable response of Durham's public safety officers to calls alleging domestic violence.

Police also have discretion under chapter 50B not to respond to calls for help where a single petitioner has made multiple complaints within forty-eight hours and there is "reasonable cause" to believe that immediate assistance is not needed.⁹⁵ None of the other states in the Fourth Circuit have a similar provision. Neither does Missouri or Maryland,

88. N.C. GEN. STAT. § 50B-5(a) (1984).

89. See generally CALIFORNIA DEP'T OF JUSTICE, *supra* note 4.

90. See generally *Hearings*, *supra* note 3.

91. *Id.*

92. See Interview with Fred Stang, *supra* note 46.

93. Brown, *Remaining Problems with the Adult Abuse Act*, 1982 J. Mo. B. 582, 583.

94. N.C. GEN. STAT. § 50B-5(b) (1984).

95. *Id.* § 50B-5(a).

both with preventive domestic violence legislation more comprehensive than North Carolina.

Governmental enforcement of Chapter 50B depends on the Act's constitutionality. A statute vague on its face is unconstitutional, and must therefore give sufficient notice of the conduct proscribed or required.⁹⁶ A statute is unconstitutionally vague if men of common intelligence must necessarily guess as to its meaning and differ as to its application.⁹⁷ To avoid unconstitutional vagueness legislation must "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'"⁹⁸

The provision of Chapter 50B that allows police not to respond on the belief that there is reasonable cause not to do so⁹⁹ may be challenged as unconstitutionally vague. Although not a true vagueness problem in that 50B does not proscribe conduct in a general sense, i.e. conduct prohibited by law, the "reasonable cause" standard is not clear enough to prevent arbitrary and discriminatory enforcement by police. The provision gives police ultimate discretion to decide whether a situation from which they are physically removed warrants police response. Police obviously cannot respond to every call. But, if the legislature's intent to prevent domestic violence is to be effective, the police decision to respond must be made with prevention in mind. Limiting police discretion should be considered when amending the Act.

IV. IMPLEMENTING CHAPTER 50B IN NORTH CAROLINA

Little statistical data is available showing how often *ex parte* protective relief under Chapter 50B has been granted. Aside from a survey of North Carolina magistrates by the Governor's Task Force on Domestic Violence,¹⁰⁰ no data has been published reflecting the frequency of petitions granted by district courts throughout the state. The City of St. Louis Circuit Court recorded 1,438 *ex parte* orders issued in 1981.¹⁰¹ One of the shortcomings noted in Chapter 50B is a lack of provision for data collection, which greatly helps law enforcement personnel keep track of the effectiveness of the act as preventative.¹⁰²

First hand experience from the bench is illuminating. Durham County District Court Judge Orlando F. Hudson says that granting *ex parte* or-

96. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

97. *Zwickler v. Koota*, 389 U.S. 241 (1967).

98. *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (footnote omitted) (vagueness standard in first amendment context).

99. N.C. GEN. STAT. § 50B-5(a) (1984).

100. Magistrate's Survey: Governor's Task Force on Domestic Violence, Aug. 9, 1984.

101. See *Brown*, *supra* note 93 (citing St. Louis County Reports 575, Greene County Reports 90, and Jackson County Reports 74).

102. See *Lerman*, *supra* note 6.

ders evicting men from their homes can be "constitutionally dangerous."¹⁰³ A man's fundamental property and liberty interests are strong in the eyes of the law. Judge Hudson says that evidence must be particularly convincing before he will issue a temporary *ex parte* protective order under Chapter 50B evicting a man from his own home. The judge is more likely to evict a man from leased premises as part of a grant of relief to the woman.

In support of Chapter 50B, Judge Hudson believes that even with its questionable constitutionality an *ex parte* protective order is the best response to the emergencies of domestic violence. The judge simply uses his discretion. The bad part is that judges get only one party's story. Also, there is no provision in Chapter 50B allowing damages to respondents who may be economically injured by frivolous claims (i.e. time away from work to appear in court, and/or attorney's fees). The ability to award damages to men who have been subjected to frivolous claims might make a judge more willing to order exclusive possession of the marital home to the woman for ten days until the hearing with both parties. The threat of frivolous claims weakens the validity of the allegations of abuse in Chapter 50B petitions. "Revenge," notes Judge Hudson, "is not a far-fetched motive in domestic cases."¹⁰⁴

A. Alternatives

A hearing within forty-eight hours of filing instead of ten days would lessen the effects of an erroneous deprivation of a respondent's liberty and property interests in his children and home.

Chapter 50B should require notice of service of the protective order upon the allegedly abusive man to be served the same day as the granting of the *ex parte* order to the petitioner. Service should be directed on the individual named in the order, unlike Missouri practice which allows anyone at the residence over age fifteen to be served.¹⁰⁵ A clear evidentiary standard must be supplied for the judge to decide the sufficiency of the petitioner's allegations at the *ex parte* hearing. A clear, cogent and

103. Interview with Orlando F. Hudson, District Court Judge for Durham County, North Carolina, in Durham, North Carolina (Oct. 15, 1985). One practitioner emphasizes the sorry state of judicial regard toward Chapter 50B protective orders: Ilene B. Nelson notes that at least three Wake County District Court judges flatly refuse to grant petitioners temporary restraining orders against allegedly abusive men. Ms. Nelson has to choose her judges carefully in order to get relief for her clients under Chapter 50B. As for prosecutorial regard, she recently tried to get a prosecutor to acknowledge four prior assault convictions against a man who was tried a fifth time for assaulting his wife, this time with a loaded pistol. The prosecutor never returned Ms. Nelson's calls. The husband was convicted again for assaulting his wife, but without evidence of the prior convictions. He was fined fifty dollars. Interview with Ilene B. Nelson, Associate Attorney, Edelstein & Payne, Raleigh, North Carolina, in Chapel Hill, North Carolina (Jan. 3, 1986).

104. Interview with Orlando F. Hudson, District Court Judge for Durham County, North Carolina, in Durham, North Carolina (Oct. 15, 1985).

105. See MO. REV. STAT. § 455.035 (1985).

convincing standard may be too strict for petitioners to meet. A probable cause type of standard would be easier to apply.

As public funding has been scarce for shelters or alternative housing for abused women to turn to for help, private groups such as the Cleveland County Abuse Prevention Council of North Carolina are funding housing in and around the homes of abused and battered women who cannot live at home with an abusive man, but who also cannot leave the area because of work or school locations.¹⁰⁶ State and local funding is needed to assist such private groups which are long on effort but sadly short on money.

CONCLUSION

North Carolina's recent response to the problem of domestic violence is Chapter 50B, the Domestic Violence Act. Chapter 50B provides abused spouses and lovers—overwhelmingly women—with emergency civil remedies protecting them from actual or threatened physical abuse. The most important provision allows women to petition a court for temporary emergency relief based solely on their allegations. The court can order the man not to abuse the woman, award the woman sole custody of the children, and even exclusive possession of the home for up to ten days before a hearing on the merits involving both parties.

The constitutionality of the Act has not been addressed yet by the North Carolina appellate courts. The one-sided nature of any procedure granting emergency relief based merely on one side's allegations raises procedural due process questions. Missouri's Supreme Court has recently upheld the constitutionality of a similar statute, holding that the governmental interest in protecting women and children from harm is substantial, and outweighs a man's interest in his home and children for ten days. There is no clear evidentiary standard for granting or denying a petition under Chapter 50B leaving the statute open to a vagueness attack on constitutional grounds. A probable cause standard for the *ex parte* hearing is urged either through legislative amendment or judicial development.

Implementing Chapter 50B in North Carolina is more difficult than may be expected. Although no data is kept, it is unlikely that protective orders are utilized in North Carolina as often as in St. Louis, Missouri, where over 1,400 similar orders were issued in 1981. Mandatory arrest and criminal prosecution of abusive men has been suggested to alert all parties involved of the seriousness of domestic violence. The Wake County defendant who was fined fifty dollars after a fifth conviction for

106. *Shelby Group Hopes To Open Battered Womens' Shelter*, The Charlotte Observer, Dec. 23, 1985, at 1B, col. 1.

assaulting his wife does not take Chapter 50B seriously. The North Carolina legislature must amend the statute with stricter, clearer guidelines for judges and lawyers to follow. The appellate courts must develop clear constitutional standards for trial courts to apply.

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