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Incidence of Domestic Violence

Recent Idaho domestic violence statistics tell a confusing and apparently contradictory story. From 2003 to 2007, the annual filing of domestic violence petitions decreased from 5,906 to 4,689, more than a twenty-percent reduction. Over the same five years, yearly criminal prosecutions for domestic assault or battery dropped from 3,917 to 2,678, a better than thirty-percent decline.

The largest declines in domestic violence case filings came in the fourth, sixth, and seventh judicial districts. As it happens, these are the three districts with "integrated domestic violence courts," in which all of a family's pending legal issues- civil, criminal, juvenile, and child protection- can be consolidated before one judge.

But while these numbers appear encouraging, if one looks instead at incident reports and lethality statistics, rather than case filings, an opposite trend is evident. Statewide, the Idaho State Police reports that incidents of domestic violence reported to law enforcement actually increased by 1.7%, to 6,360. The number of domestic violence-related fatalities spiked in 2007, to a total of 22 statewide.[1]

We do have more services available for victims of domestic violence than in the past. In addition to the three Domestic Violence courts,[2] every judicial district now has a Family Court Services coordinator. Family Court Services can arrange for visitation supervisors, can make referrals to batterers' programs and other social services, and can perform "Alternative Dispute Resolution" screenings under Rule 16(m) of the Idaho Rules of Civil Procedure.[3] We have one or more domestic violence shelters in each district. Legal representation for domestic violence and sexual assault victims is a high priority for Idaho Legal Aid Services, the University of Idaho Legal Aid Clinic, and for the Idaho Volunteer Lawyers Program, thanks to grant funding and other resources provided by the Idaho Coalition against Sexual and Domestic Violence. And the Coalition's Coordinated Response to Domestic and Sexual Violence project has developed a new Model Risk Assessment of Dangerousness Tool which is scheduled to be distributed to the Idaho judiciary, attorneys, law enforcement, and shelters this month to help gauge the level of risk present in various domestic violence situations.

Recent Legal Developments

Legislation—the 2008 Idaho Legislature enacted three statutes dealing with domestic violence. The most significant statute promises to be the creation of a new "Address Confidentiality Program" administered by the Idaho Secretary of State.[4] Victims of domestic violence, sexual assault or stalking may utilize this program to establish a mailing address for official governmental purposes which does not allow perpetrators to discover the victim's actual residential address using public records. Between July 1, 2008, when the law went into effect, and the end of October, three households totaling nine people signed up for the program, according to the Secretary of State's office.[5]

The legislature also doubled penalties for crimes, including domestic assault or battery, in which "conducted energy devices" (e.g. Tasers and cattle prods) are used. It also provided for an enhanced penalty for the third or subsequent conviction for violation of a no-contact order within five years.[6]

Cases—there were no reported appellate decisions dealing with Domestic Violence Protection Orders (DVPO's) this past year. *Schultz v. Schultz*,[7] dealt with domestic violence in the context of a custody case. It distinguished *Hopper v. Hopper*,[8] which held that a move-away by one joint custodian with the minor child to another state was not in the best interests of the child. In *Schultz*, there was evidence (four unrefuted incidents of domestic violence) that the non-move-away parent was an habitual perpetrator of domestic violence, and the magistrate failed to consider whether such evidence should have overcome the presumption in favor of joint custody pursuant to Idaho Code § 32-717B(5). When the move-away parent has been the victim of habitual domestic violence, the *Schultz* decision indicates the move may well be deemed to be in the child's best interests.

Emerging Issues/Problem Areas

Mutual Protection Orders—in the years immediately following the 1988 adoption of the Domestic Violence Crime Prevention Act, Idaho Code § 39-6301, *et seq.*, it was common for Idaho magistrates to make Domestic Violence Protection Orders ("DVPOs") mutual, i.e., which prohibited both parties from having contact with each other, and from coming near the other party. In fact, the first iteration of standard DVPO forms approved by the Idaho Supreme Court contained a check box the judge could use to easily make the DVPO's no contact provisions apply mutually. The statutory authority cited for this practice was Idaho Code § 39-6306(e), which authorizes the court to grant "other relief ... as the court deems necessary for the protection of a family or household member..." However, the Full Faith and Credit provision of the federal Violence Against Women Act (VAWA) [9] only applies to DVPOs restraining a Petitioner if the Respondent has filed his own Petition seeking a protection order and the court has made specific findings that each party is entitled to such an order. Since this will but rarely reflect the typical domestic violence case, mutual DPVOs will rarely satisfy these two conditions and will therefore not be entitled to full faith and credit. Because of this, in 2006 the Idaho Supreme Court modified the standard DVPO forms to eliminate the check box to make the "no contact" provision mutual. Despite this change, some magistrates around the state continue to enter mutual orders using the "other" space on the DVPO forms,[10] whether or not the Respondent has petitioned for one, and without making express findings required by both I.C. § 39-6306(6) and 18 U.S.C. § 2265(c). This practice seems to persist despite education efforts by the Supreme Court and its Children and Families in the Courts Committee to discourage it, and despite VAWA withholding Full Faith and Credit for such orders. Not only does this practice render the protection order unenforceable in other state or tribal courts, but it arguably violates the Due Process clause of the Fourteenth Amendment.[11] Many policy reasons have also been advanced as to why the practice of entering mutual protection orders absent findings of culpability on the part of the petitioner should be discouraged. Among them are that such orders are confusing to police, the abuser, the parties' children and the victim. They may result in either dual arrests or no arrests when a violation of the order occurs.[12] And absent specific findings to the contrary, they imply that the batterer needs protection from his or her victim. But because of the fleeting nature of DVPO cases, the practice of issuing mutual protection orders is one which continues to escape appellate review.

Urinalysis Drug Testing in Domestic Violence Proceedings—the Domestic Violence Crime Prevention Act allows for a magistrate to issue a civil protection order that makes an award of temporary custody of the minor children of the parties.[13] In determining custody, a child's welfare and best interests are of paramount importance.[14] The custody factors found at I.C. § 32-717(1) would therefore apply to that custody decision. Domestic violence as defined in I. C. § 39-6303 is one of those factors.[15]

Alcohol and drug abuse by a parent seeking custody is a relevant consideration in a custody dispute.[16] "Substance use/abuse and intimate partner violence (IPV) often co-exist ... . Several studies indicate that a significant proportion of domestic violence cases involve illicit drug use or perpetrators with illicit drug use problems."[17]

Idaho has no statute or rule that expressly allows a magistrate to order a drug test of a party in a domestic violence or other civil proceeding. And yet according to attorneys around the state, it would appear that magistrates by and large do not hesitate to order drug testing in custody disputes where there is evidence of drug use for at least one parent. There are arguably four statutes or rules which provide that authority.

First, I.C. § 32-717(1) provides that the Court shall evaluate custody of the children as shall be in their best interests, and that the Court shall consider all relevant factors which may include seven enumerated factors. The fifth such factor is "the character and circumstances of all individuals involved." Credible evidence of drug use in one or both parents reflects character and is clearly relevant to custody. Urinalysis drug testing is a reliable test for recent use of illicit drugs. A court therefore arguably has implicit discretion to order a urinalysis drug test of such a parent in order to further the best interests of the children involved.

Second, the Domestic Violence Crime Prevention Act provides that after the full hearing on the merits, the court can order "temporary custody" or that the respondent "participate in treatment or counseling services" and "other relief ... as the court deems necessary for the protection of the family or household member ... ." I.C. § 39-6306(1) (a, d, and e). The foregoing argument for the inherent discretion of the court to order drug testing in order to further the best interests of the children would also apply in a domestic violence proceeding to order drug testing for the same purpose. It may be a stretch to try to characterize an order for drug testing as "treatment or counseling services." However, drug testing could reasonably be interpreted as "other relief" where the court deems that necessary for the protection of the children during times of physical custody with the alleged drug-using parent.

Third, IRCP Rule 35(a) provides that "when the mental or physical condition ... of a party, ... , is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or a qualified mental health professional ... ." This rule by its terms would appear to apply only to examination by a physician or mental health professional and would therefore not strictly apply to a drug test. However, the Idaho Rules of Civil Procedure are to be liberally construed to secure the just resolution of every action, and at least hospital labs are normally supervised by a physician. Other jurisdictions, as indicated below, have not hesitated to use their counterpart to Rule 35(a) to allow drug testing in the context of a contested custody case.

Fourth, IRCP Rule 65(g) provides that "in suits for divorce ... or custody of children, the court may make prohibitive or mandatory orders with or without notice or bond as may be just." Upon credible evidence that at least one parent is or has recently used drugs, it could clearly be just, in furtherance of the best interests of the children, to issue a mandatory order requiring that parent to submit to drug testing.

There are remarkably few cases nationwide, and none in Idaho, that address the issue of the authority of a trial court judge to order alleged drug-using parents to undergo drug testing.[18] Most of the reported cases approve the use of their counterpart to IRCP Rule 35(a) and find no constitutional problem with that approach. In *Walsh v. Ferguson*,[19] the Texas Court of Appeals found that in order to compel drug testing pursuant to the Texas counterpart of IRCP Rule 35(a), a party must make an affirmative showing that a parent's mental or physical condition was in controversy and that there was good cause for such testing upon a showing of adequate proof. In the Pennsylvania case of *Luminella v. Marcocci*,[20] the trial court's order that the mother undergo random drug testing did not violate the Fourth Amendment of the United States Constitution. The trial court had ordered such testing for both parents. Although it did not specify its authority for this order, the Pennsylvania Superior Court found that the trial court could have cited the Pennsylvania counterpart to IRCP Rule 35(a). Since that rule did not require that the court articulate a basis of reasonable suspicion for drug use based upon evidence presented by the parties, and no other Pennsylvania statute required that basis, it was not necessary for the trial court to do so to order drug testing. Such a rule facilitates the State's exercise of its compelling interest in the welfare of the children.

In the case of *Burgel v. Burgel*,[21] the New York Supreme Court approved the New York counterpart to IRCP Rule 35(a) as a basis for hair follicle testing in a child custody dispute. The husband alleged that the wife was a cocaine user, and the wife admitted that she had used cocaine in the past but claimed she was no longer a user. The trial court ordered a hair follicle test pursuant to New York's version of IRCP Rule 35(a). The New York Supreme Court ruled that there was to be liberal discovery in civil actions, that the wife's physical and mental condition was at issue, and that where the welfare of the children was at stake and the best interest of the children was of paramount concern, the broadest possible latitude should be accorded to reasonable discovery requests. Since this was a civil and not a criminal matter, Fourth Amendment precepts were not implicated.

In *Raney v. Raney*,[22] the Ohio Court of Appeals found inherent authority in the trial court to order drug testing by finding that the best interests of the children was the trial court's primary concern and that there had been no abuse of discretion or constitutional defect in ordering the father to undergo drug testing and imposing supervised visitation until the drug test results had been received. "Drug testing may be ordered or agreed to when the best interests of a child is at stake."[23]

The only jurisdiction that the authors have found that imposed constitutional constraints on drug testing in custody disputes was California. In *Wainwright v. Superior Court of Humboldt County*,[24] the Court of Appeals found that California's statute allowing for consideration of drug use in custody disputes did not justify a court ordered drug testing. California at that time had a family law statute that directed the trial court to consider certain factors in determining the best interests of the child, including drug use by a parent. Mother alleged father's drug use and requested drug testing. The trial court assumed that it had jurisdiction to order drug testing based on the statute, so it ordered a hair drug analysis with mother to pay the costs. Father sought a writ of mandate from the Court of Appeals to vacate that order, and the Court of Appeals held that the family law statute, without any substantive or procedural safeguards, did not authorize any court ordered drug testing.

In response to this case, the California legislature passed California Family Code § 3041.5(a) for drug and alcohol abuse testing. It provided that if there has been a judicial determination based on a preponderance of the evidence that a parent is a habitual, frequent or continual illegal user of controlled substances, or a habitual or continual abuser of alcohol, then the trial court may order drug testing subject to the following conditions: (1) the court must use the least intrusive method of drug testing; (2) the drug testing must be in conformity with the procedures and standards of the United States Department of Health and Human Services for drug testing of federal employees; (3) the party subject to the drug test has the right to request a hearing to challenge any positive test results; (4) any positive test result alone shall not be grounds for any adverse custody decision; (5) the test results shall be confidential and shall not be disclosed to anyone other than as authorized by statute; (6) any breach of that confidentiality shall be punishable by a civil fine not to exceed $2,500.00; and (7) the test results may not be used for any other purpose than in determining the best interests of the child in the current proceeding. In the subsequent case of *Deborah v. Superior Court of San Diego County*,[25] the California Court of Appeals held that the trial court could not order hair follicle testing pursuant to the new California statute, since that statute requires that any court ordered drug testing conform to federal drug testing procedures and standards, and those standards currently only allow for urine tests.

The authors would suggest that Idaho courts have inherent discretionary authority to order urinalysis drug testing in a domestic

violence or other civil setting when the best interest of a child is at stake. There is no language in the Domestic Violence Crime Prevention Act or in reported cases requiring that the drug use or its effects occur during an incident of domestic violence in order for the court to order the drug-using parent to submit to drug testing. Such a requirement would ignore the best interest of the children. Fourth Amendment concerns are not implicated since the setting for such drug testing is a civil custody setting and not a criminal case. If a court should prefer additional statutory or rule authority, I.C. § 39-6306(1) (e), IRCP Rule 35(a), and IRCP Rule 65(g) would reasonably provide such authority. If any magistrate were to be persuaded by the reasoning of the *Wainwright* decision, then it could simply incorporate in its order the conditions for drug testing in the California statute in order to satisfy any constitutional challenge to the drug testing.

Recent and Remote Domestic Violence—When the Domestic Violence Crime Prevention Act was enacted in 1988, a magistrate could grant an *ex parte* temporary protection order upon an allegation that "irreparable injury could result from domestic violence if an order [was] not issued immediately without prior notice to the respondent, ..." [26] Irreparable injury "includes but is not limited to situations in which the respondent has recently threatened the petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner."[27] If a magistrate granted an application for an *ex parte* temporary protection order, then a full hearing would be set for not later than 14 days from the issuance of the temporary order.[28]

After a hearing, the magistrate can extend the *ex parte* temporary order for up to one year "upon a showing that there is an immediate and present danger of domestic violence to the petitioner . . . ."[29] The definition of "immediate and present danger" largely tracks the definition of "irreparable injury" and "includes but is not limited to, situations in which the respondent has recently threatened the petitioner with bodily harm or engaged in domestic violence against the petitioner."[30] Based upon the foregoing statutory definitions, magistrates often assumed that they could extend a protection order only upon a showing of a recent threat or act of domestic violence. Based on current anecdotal evidence, magistrates, in interpreting the word "recent," tend to require that the threat or domestic violence occur no more than three weeks prior to the filing of an application for the temporary order. There is no statutory definition for the word "recent" and no appellate interpretation of the word.

However, in 2006 the legislature expanded the definition of "immediate and present danger" from recent threats or recent domestic violence to include situations "where there is reasonable cause to believe bodily harm may result."[31] This third prong for issuing a protection order does not include any reference to recent threats of domestic violence, and there is no reasonable interpretation of its language that could transport the word "recently" to its meaning. A magistrate may therefore issue a one year civil protection order upon a showing of recent threats of bodily harm, recent acts of domestic violence, or where there is reasonable cause to believe bodily harm may result to the petitioner.

This third prong to the definition of "immediate and present danger" is a sensible addition to the definition. It could apply to the situation where a petitioner learns that a prior perpetrator of felony domestic violence against the petitioner is about to be released from prison and the petitioner believes that, based upon his or her cooperation with law enforcement that put the perpetrator in prison, he or she needs the protection of the law for at least some period of time after the perpetrator's release from prison. There could clearly be reasonable cause to believe that bodily harm may result to the petitioner, even though there have been no recent threats or acts of violence by the perpetrator against the petitioner.

Another possible scenario would include the case of a petitioner who has been subject to severe unreported domestic violence in a cycle that includes acts of domestic violence every two or three months. The petitioner knows the cycles of the perpetrator and what tends to set him off, notwithstanding his or her efforts to avoid the violence, and the petitioner now realizes that the next domestic violence episode is about to occur. Although there have been no recent acts of domestic violence, the petitioner has genuine reasonable cause to believe that bodily harm may result without the legal protection of a civil protection order. A magistrate who is well-informed about the patterns of domestic violence would be sensitive to the petitioner's fear, and would only need credible evidence of those patterns in the particular case to feel warranted in issuing a protection order to the petitioner.

Conclusion

Domestic violence continues to present a significant problem throughout the State of Idaho. Increasing services are available for victims of domestic violence, and the 2008 Idaho Legislature took steps to address the issue of domestic violence by enacting three pieces of legislation. However, problem areas—or areas needing further judicial analysis—still exist, particularly with respect to mutual protection orders, court ordered drug testing, and protection orders for petitioners who reasonably fear domestic violence but have not experienced a recent episode. The authors encourage other family law attorneys to share their views on these topics and to engage in dialogues regarding other trends, emerging issues, and problem areas they have encountered.

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Endnotes

[1] When this article went to press, however, the number of domestic violence-related fatalities for 2008 appeared headed toward more typical pre-2007 levels of around ten fatalities per year.

[2] The three integrated domestic violence courts reported serving 1,360 victims in 2007. 2007 Idaho Sup. Ct. Ann. Rep., *Children and Families in the Courts*, 2.

[3] Family Court Services reported serving 33,000 parents and 14,560 children last year. *Id.*

[4] I.C. §§ 19-5701-08; I.C. § 9-340C(27).

[5] The application is available on the website at http://www.idos.state.id.us/ACP/ACP.htm.

[6] I.C. § 18-920 (providing for the enhanced penalty that the crime is deemed a felony punishable by a maximum of five years imprisonment and $5,000 fine).

[7] *Schultz v. Schultz*, 145 Idaho 859, 187 P.3d 1234 (2008).

[8] *Hopper v. Hopper*, 114 Idaho 624, 167 P.3d 761 (2007).

[9] 18 U.S.C. § 2265 (c).

[10] Para. 8 of the Temporary Protection Order form or para. 10 of the Protection Order form.

[11] See, e.g., *Bays v. Bays*, 779 So. 2d 754 (La. 2001); *Marco v. Superior Court*, 496 P.2d 636 (Ariz. Ct. App. 1972). The Louisiana statute relied upon by the *Bays* trial court as authority for the mutual protection order stated a court may grant "any" protective order necessary to bring about a cessation of violence, which is similar to the catch-all language of Idaho Code § 39-6306(e). However, the appellate court held that such language must be construed in context, and that if it were construed as broadly as the trial court had in this instance in order

to enter an order against the Petitioner absent a petition or request by the Respondent, it would violate the Petitioner's due process rights to notice and an opportunity to be heard.

[12] Joan Zorza, *What is Wrong with Mutual Orders of Protection?*, available at www.sevan.org/mutual_orders.htm (last visited Dec. 8, 2008).

[13] I.C. § 39-6306(1)(a).

[14] *Roeh v. Roeh*, 113 Idaho 557, 558, 746 P.2d 1016, 1017 (Ct. App. 1987).

[15] *Schultz v. Schultz*, 145 Idaho 859, 187 P.3d 1234 (2008).

[16] MATTHEW BENDER, CHILD CUSTODY AND VISITATION LAW AND PRACTICE, 201-04 (Vol. 2 1997); *see also* Mary E. Taylor, *Parent's Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 20 A.L.R. 5th 534 (1994); Nanette Reed, *Sacrificing the Child's Best Interests: Judicial Custody Award, and Parental Alcohol Abuse*, Sw. U. L. REV. (2005).

[17] NICKY ALI JACKSON, ENCYCLOPEDIA OF DOMESTIC VIOLENCE 296-97 (Routledge 2007); *see also* LUNDY BANCROFT AND JAY G. SILVERMAN, THE BATTERER AS PARENT (Sage Publication 2002) ("Although substance abuse is not causal in domestic violence, it can contribute to a batterer's frequency and severity of violence, and the most dangerous batterers have elevated rates of heavy substance abuse. Substance abuse history is an important factor in risk assessment.") (Citations omitted).

[18] In the criminal law context, an Idaho magistrate recently ordered that the parents of a juvenile offender on probation submit to random drug testing as a condition of their daughter's probation. The Idaho Court of Appeals held that the magistrate did not exceed his authority by so ordering. (However, the court further held that the order violated the parents' constitutional right to be free from unreasonable searches because the juvenile's crimes were unrelated to drugs.) *In re Doe*, __ P.3d __, 2008 WL 4880196 (Idaho Ct. App., Nov. 13, 2008).

[19] *Walsh v. Ferguson*, 712 S.W.2d 885 (Tex. App. 1986).

[20] *Luminella v. Marcocci*, 814 A.2d 711 (Pa. Super. Ct. 2002).

[21] *Burgel v. Burgel*, 533 N.Y.S.2d 735 (N.Y. 1988).

[22] *Raney v. Raney*, 1999 WL 58162 (Ohio Ct. App. 1999) (unpublished).

[23] *Id.*

[24] *Wainwright v. Superior Court of Humboldt County*, 100 Cal. Rptr. 2d 749 (Cal. Ct. App.2000).

[25] *Deborah M. v. Superior Court of San Diego County*, 27 Cal. Rptr. 3d 757 (Cal. Ct. App. 2005).

[26] I.C. § 39-6308(1).

[27] I.C. § 39-6308(3) (emphasis added).

[28] I.C. § 39-6308(5).

[29] I.C. § 39-6306(1). Section 39-6306(5) allows the order to extend beyond a year—even to be made permanent—upon motion and for good cause.

[30] I.C. § 39-6306(2) (emphasis added).

[31] *2006 Session Laws*, Chapter 287; I.C. § 39-6306(2).