

8-1-2014

Severing Ties: The Case For Indefinite Orders Of Protection For Survivors Of Domestic Violence

Kelly M. Driscoll

University of Montana School of Law

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Kelly M. Driscoll, *Severing Ties: The Case For Indefinite Orders Of Protection For Survivors Of Domestic Violence*, 75 Mont. L. Rev. 315 (2014).

Available at: <https://scholarship.law.umt.edu/mlr/vol75/iss2/5>

This Essay is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

SEVERING TIES: THE CASE FOR INDEFINITE ORDERS OF PROTECTION FOR SURVIVORS OF DOMESTIC VIOLENCE

Kelly M. Driscoll*

INTRODUCTION

Civil protective orders offer survivors of intimate partner violence an effective method of mitigating contact with abusive partners and decreasing violent episodes. Indefinite orders of protection provide increased security for survivors of domestic violence.¹ Short-term protective orders, the more common type of order granted in Montana, create a number of issues. These orders may not provide sufficient time for an individual to take steps to protect themselves. Orders that expire after a limited time may just delay a violent reaction. Finally, short duration orders require frequent renewal. This essay outlines how domestic violence protective orders have progressed historically and provides a recommendation for their future use in Montana.

Despite statutory provisions authorizing permanent, indefinite orders, judges rarely grant orders of a significant duration. Part I provides an overview of domestic violence, explains the impact of intimate partner violence on society, and describes the history of the domestic violence advocacy movement. Part II assesses Montana's order of protection statute and compares our law to other regional and notable laws across the country. Part III examines and critiques the arguments against lifetime orders of protection, while looking at the reasons indefinite orders are rare in Montana. Lastly, the essay explores the many ways lifetime orders of protection improve the safety and wellbeing of domestic violence survivors.

I. DOMESTIC VIOLENCE AND THE HISTORY OF CIVIL PROTECTIVE ORDERS

Domestic violence consists of patterns of power and control whereby one partner exercises all authority in the relationship and uses methods of

* Kelly M. Driscoll, Candidate for J.D. 2014, University of Montana School of Law. The author specifically thanks her husband, Pat Kujawa, and her parents, for their unwavering support. Special thanks to Professor Andrew King-Ries for his helpful advice and mentorship throughout the development of this article. The author offers additional thanks to the staff and editors of the *Montana Law Review* for their input and guidance.

1. I use the word "indefinite" or "lifetime" to refer to orders of protection not requiring subsequent renewal. This type of order may be granted under Mont. Code Ann. § 40-15-204 (2013).

violence, coercion, degradation, and humiliation to maintain control.² Domestic violence occurs in every culture, religion, socioeconomic class, and race.³ Domestic violence is also known as battering, intimate partner violence, domestic terrorism, and spousal abuse.⁴ Domestic abuse primarily affects women, although men can also be the victims of spousal abuse.⁵ The most common type of intimate partner violence occurs within heterosexual relationships; however, violence also occurs in same-sex relationships. Violent episodes with male victims are usually part of situational couple violence.⁶ Situational couple violence is distinguishable from domestic violence because it “is not rooted in a general pattern of control, but occurs when specific conflict situations escalate to violence.”⁷ This essay focuses exclusively on protective orders in the context of domestic violence.

Domestic violence affects one in four women.⁸ In America, three women die at the hands of a current or former intimate partner every day.⁹ Studies tell us that the number of women enduring domestic abuse is in the millions.¹⁰ According to the National Institute of Justice, more than 500,000 women are stalked every year and approximately 1.5 million women are sexually assaulted by an intimate partner annually.¹¹

Today, the legal system and community advocates provide a number of options for survivors of intimate partner violence, but before the 1970s, victims of intimate partner violence had few options.¹² Legal advocacy was extremely limited, shelters were largely unavailable, and the government viewed intimate partner violence as a private issue. Protective orders were

2. Natl. Dom. Violence Hotline, *Abuse Defined*, <http://www.thehotline.org/is-this-abuse/abuse-defined/> (accessed Mar. 27, 2014).

3. Mont. Coalition Against Dom. & Sexual Violence, *About Domestic Violence*, <http://mcadsv.com/domestic-violence/about-domestic-violence-2/> (accessed Mar. 27, 2014).

4. I will use these terms interchangeably throughout the essay.

5. Center for Disease Control and Prevention, *Understanding Intimate Partner Violence 1* (2012) (available at http://www.cdc.gov/violenceprevention/pdf/ipv_factsheet2012-a.pdf). I will primarily use female pronouns throughout this essay. The use of female pronouns is not meant to demean the experience of male victims of domestic abuse. I have chosen female pronouns because women experience domestic violence at higher rates than their male counterparts.

6. Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence*, 26 J. of Fam. Issues 322, 324–325 (Apr. 2005).

7. *Id.* at 324.

8. Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Nov. 2011) (available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

9. Natl. Org. for Women, *Violence against Women in the United States: Statistics*, <http://www.now.org/issues/violence/stats.html#endref1> (accessed Mar. 27, 2014).

10. Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Pub. Policy Rev. 51, 52 (2000).

11. Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence* iii (July 2000) (available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>).

12. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 10–11 (1999).

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 317

seldom an available remedy, and were primarily limited to women in divorce proceedings.¹³ Unfortunately, with no safe place to escape to, women sometimes resorted to the worst potential option—killing their spouses in a desperate effort to end the abuse.¹⁴

The social movements of the 1960s and 1970s ushered in many changes for women, particularly for women in violent relationships. Domestic violence advocates argued that spousal abuse was a public problem deserving of community and legal attention. Advocates shifted the focus from family cohesion to ending violence.¹⁵ Specifically, attorneys and domestic violence advocates began exploring how the legal system could provide more options for women.¹⁶ The advocates' focus shifted to civil remedies such as protective orders, rather than simply criminal prosecutions.¹⁷ Today, legal remedies for survivors of domestic violence are available in every state and legal advocates have developed a number of tools for assisting survivors.¹⁸

One important instrument is the protective order, which is “a court order prohibiting or restricting a party from engaging in conduct . . . that unduly annoys or burdens the opposing party.”¹⁹ The growth and significance of protective orders in fighting intimate partner violence cannot be overstated. In 1976, only two states provided protective orders,²⁰ whereas today they are “the single most frequently used legal remedy to address intimate partner violence.”²¹ One explanation for the frequent use is that civil protective orders provide diverse remedies, including “provisions for child custody, maintenance, counseling, reduced filing-fees, and provisions requiring an abuser to vacate a shared residence.”²²

Despite progress by the battered women's movement, increased awareness, and the use of protective orders, domestic violence remains at crisis level. States have taken a step in the right direction by routinely evaluating and amending civil protective orders to better assist survivors.²³ Nonethe-

13. Jennifer Rios, Student Author, *What's the Hold-Up? Making the Case for Lifetime Orders of Protection in New York State*, 12 *Cardozo J.L. & Gender* 709, 715 (2006).

14. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 *U. Kan. L. Rev.* 269, 302–303 (2007).

15. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 *Yale L. & Policy Rev.* 93, 97 (2005).

16. Kellie K. Player, *Expanding Protective Order Coverage*, 43 *St. Mary's L.J.* 579, 584 (2012).

17. Smith, *supra* n. 15, at 99–100.

18. Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 *Ohio St. L.J.* 303, 306–307 (2011).

19. *Black's Law Dictionary* 1343 (Bryan A. Garner ed., 9th ed., West 2009).

20. Player, *supra* n. 16, at 584.

21. Stoeber, *supra* n. 18, at 318.

22. Smith, *supra* n. 15, at 95.

23. *Id.* at 100.

less, misconceptions about domestic violence continue to present obstacles to obtaining orders of protection. Some attorneys and judges maintain erroneous and stereotypical notions about survivors and batterers. Education and advocacy can greatly assuage these misconceptions, which are often held due to ignorance rather than mal intent.

II. DOMESTIC VIOLENCE LEGISLATION IN MONTANA AND NEIGHBORING STATES

A. *History of Montana's Protective Order Statute*

Montana's 1995 legislature enacted myriad laws pertaining to domestic violence.²⁴ It considered and approved Senate Bill 278, which made two significant changes to the state's domestic violence laws. First, Senate Bill 278 moved orders of protection from the marriage and divorce code to their own section.²⁵ As proponents of the bill testified, this movement was significant because it allowed single women to obtain orders of protection for dating violence, rape, and stalking when this option was previously available only for married women.²⁶ Removing the marriage requirement greatly expanded the use of protective orders in Montana by making the option available to a significantly larger number of individuals.

Second, Senate Bill 278 asked that the courts and law enforcement treat family violence like other violent crimes.²⁷ Proponents of the bill wanted the law to reflect the notion that crimes against loved ones carried the same serious penalties as crimes inflicted on strangers. Proponents expressed concern over many offenders' dismissive attitude toward order of protection violations.²⁸ To facilitate increased enforcement of violations, the bill proposed that the third violation result in a felony.²⁹ Additionally, the bill enabled statewide enforcement of orders and streamlined the procedure for obtaining an order.³⁰

The changes to the order of protection statute were widely supported. Organizations testifying in support at the House and Senate judiciary com-

24. Ch. 350, 1995 Mont. Laws 1106 (changing "domestic abuse" to "partner or family member assault"; providing local governments with authority to assign misdemeanor probation officers to PFMA offenders (*id.* at 1121); authorizing the seizure of weapons from a PFMA offender (*id.* at 1122); establishing requirements for healthcare workers to provide victims with a notice of rights (*id.*); and authorizing and delineating procedures for temporary and permanent orders of protection (*id.* at 1123–1127)).

25. Mont. Sen. Jud. Comm., *Hearing on Sen. 278*, 54th Legis., Reg. Sess. 9 (Feb. 3, 1995) (testimony of Judy Wang, Assistant City Attorney, Chair of Missoula Family Violence Council).

26. *Id.* at 10.

27. *Id.*

28. *See id.* at 9–10.

29. Mont. Sen. Jud. Comm., *supra* n. 25, at 10.

30. *Id.* at 10–11.

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 319

mittees included the following: Montana Coalition Against Domestic Violence, Montana Catholic Conference, Montana Women's Lobby, Montana Board of Crime Control, Montana Chiefs of Police Association, Montana County Attorneys' Association, the Department of Justice, various Montana judges, women's shelters, and domestic violence survivors.³¹ There was no oppositional testimony at either the Senate or the House committee hearings.³²

B. Montana's Order of Protection Statute

Montana law provides that an individual may seek a protective order upon request, regardless of dissolution proceedings.³³ The law provides for both "temporary" and "written" orders.³⁴ Temporary orders provide for 20 days of protection and do not require notice to the other party. To obtain a temporary order, the petitioner must sign a sworn affidavit declaring that she is in "reasonable apprehension of bodily injury."³⁵ If the petitioner needs further protection, she may request a "written" order of protection. "Written" orders are also commonly referred to as "permanent" orders, although that name is a misnomer as the duration varies according to the judge's order.³⁶ While the "written order of protection" statute specifically provides that an order may remain in effect "permanently,"³⁷ the duration may vary from a few months to a lifetime, indefinite order. The judge bears ultimate responsibility for deciding the appropriate duration.³⁸

To obtain a written order of protection, the petitioner must notify the respondent and the court will conduct a hearing. At the hearing, each party will be given the opportunity to testify and call witnesses. The court will determine the grounds for the protective order based on the "respondent's history of violence, the severity of the offense at issue, and the evidence presented at the hearing."³⁹ The policy behind the determination is to "avoid further injury or harm."⁴⁰ When children are included under the order, the court may make the order permanent only if the "minor was a vic-

31. Mont. H. Jud. Comm., *Hearing on Sen. 278*, 54th Legis., Reg. Sess. 28–29 (Mar. 7, 1995); Mont. Sen. Jud. Comm., *supra* n. 25, at 11–12.

32. Mont. H. Jud. Comm., *supra* n. 31, at 29; Mont. Sen. Jud. Comm., *supra* n. 25, at 13.

33. Mont. Code Ann. § 40–15–204(1) (2013).

34. *Id.* at § 40–15–201, 204.

35. *Id.* at § 40–15–201.

36. *Id.* at § 40–15–204.

37. *Id.*

38. *Id.*

39. Mont. Code Ann. § 40–15–204(1).

40. *Id.*

tim of abuse, a witness to abuse, or endangered by the environment of abuse.”⁴¹

C. Other States’ Orders of Protection Statutes

The duration of protective orders varies across the country. The Domestic Violence Model Code recommends orders of protection remain effective indefinitely.⁴² Only ten states follow the recommendations from the Model Code, allowing judges to issue protective orders without time constraints.⁴³ Montana, like other states such as Minnesota and Oregon, allows orders to be longer than a year.⁴⁴ The majority of states permit orders to last only one year.⁴⁵ A number of states, including two in our region (Idaho and Utah), continue to limit the duration to six months or less, requiring petitioners to renew frequently.⁴⁶

In 1995, California amended their protective order statutes to specifically allow for indefinite orders of protection. While debating the bill, a California senator aptly described the rationale behind indefinite orders of protection. The senator stated, “Batterers often note the expiration date of the restraining orders and contact the petitioners as soon as the order expires. Consequently, the threat of violence is renewed and the women are understandably afraid.”⁴⁷

PART III: ANALYSIS OF INDEFINITE ORDERS OF PROTECTION

A. Indefinite Orders of Protection in Montana: An Exceptional Thing

The Montana order of protection statute grants judges wide discretion to determine an order’s duration.⁴⁸ To gain a better understanding of orders of protection, specifically the durations of orders, I surveyed advocates working in Montana. I sent survey requests to members of the Montana Coalition Against Sexual and Domestic Violence and crime victim advo-

41. *Id.*

42. Carolyn V. Williams, Student Author, *Not Everyone Will “Get It” Until We Do It: Advocating for an Indefinite Order of Protection in Arizona*, 40 *Ariz. St. L.J.* 371, 372 (2008).

43. *Id.* at 379–381 (Alaska, Colorado, Florida, Hawaii, Michigan, New Jersey, North Dakota, Oklahoma, Vermont, and Washington).

44. Rios, *supra* n. 13, at 719.

45. *Id.* at 718 (noting “[f]orty-two states, and the District of Columbia, have protective orders that last at least one year”).

46. *Id.* at 719 (Connecticut, Georgia, Idaho, New Mexico, South Carolina, Utah, West Virginia, and Wyoming).

47. Williams, *supra* n. 42, at 383–384 (quoting Cal. Sen. R. Comm., *Bill Analysis for Sen. Bill 187*, 1995–1996 Legis., Reg. Sess. 5 (Sept. 6, 1995)).

48. Mont. Code Ann. § 40–15–204(5).

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 321

cacy programs. Six agencies responded to the information request. Ultimately, five agencies were included in my findings.⁴⁹

1. *Characteristics of Survey Agencies*

The agencies have varied characteristics. Geographically, the agencies include both rural and urban communities. Western Montana is heavily represented in the responses. In terms of numbers of clients, the responding agencies represent organizations that serve only a few dozen victims to organizations that serve hundreds of individuals annually. The responding agencies include a crime victim advocacy office and services associated with women's domestic violence shelters.

My purpose in utilizing a survey was to gain firsthand accounts of how orders of protection function in the state. The responses do not seek to provide a basis for extrapolating to all orders of protection across the state. Rather, the advocates' responses provide a lens through which we can begin to examine the way orders of protection are administered. The responses are a snapshot into orders of protection in Montana.

2. *Survey Responses*

Montanans frequently use orders of protection, with thousands granted annually.⁵⁰ The survey results from different offices varied greatly: one office reported assisting with only 12 orders, while another handled roughly 350.⁵¹ For many petitioners, a temporary order can deter an abusive partner. In the five offices I surveyed, the percentage of petitioners who only obtained a temporary order ranged from 20% to nearly all of the total applicants.⁵²

The overarching trend in protection orders is one of limited duration. The survey respondents indicated that the usual duration is anywhere between three and twelve months.⁵³ Despite the plain language of the statute referencing "permanent" at least four times,⁵⁴ Montana judges appear reluctant to order truly permanent orders of protection. The statute's numerous references to permanent orders demonstrates that the Montana legislature

49. The sixth agency's responses were not included as the agency referred nearly all of their clients to one of the other responding agencies.

50. Mont. Jud. Branch, *Case Filing Statistical Summary: Calendar Year 2007 1* (2007) (available at http://courts.mt.gov/content/lcourt/stats/2007_case_stats) (data identifying 3,601 orders of protection in 2007 and 3,347 in 2006).

51. Kelly Driscoll, *Survey of Domestic Violence Legal Advocates* (Mar. 26, 2013–Apr. 16, 2013) (results are confidential, copy on file with Author).

52. *Id.*

53. *Id.*

54. Mont. Code Ann. § 40–15–204(1), (2), (4) through (5).

supported the granting of permanent, indefinite orders of protection. However, the survey indicates that very few survivors receive indefinite orders. For instance, in one Montana city where advocates assisted 230 individuals in obtaining written orders of protection,⁵⁵ only ten received indefinite orders.⁵⁶ Similarly, in another Montana city, advocates assisted approximately 101 individuals with written orders and only six received indefinite orders.⁵⁷ The most telling statement in the survey came from an advocate who stated:

It is very unusual for anything to be ordered longer than [3–12 months], and truly permanent orders of protection are nearly unheard of in our jurisdiction. Case in point, in the five and a half years that I have been assisting with [orders of protection], I can think of only one that went through Justice Court and was made permanent, and I can think of two—attached to parenting plans—through District Court that were made permanent.⁵⁸

B. Arguments Against Lifetime Orders

Why are judges in Montana granting so few indefinite orders of protection? This section explores the reasons why judges grant indefinite orders infrequently. The analysis relies on responses from the survey, as well as scholarly sources.

1. Respondent's Gun Rights

Opponents of indefinite orders argue that these orders unfairly restrict a respondent's right to possess firearms.⁵⁹ One respondent cited restrictions on gun rights as a concern among judges in their jurisdiction.⁶⁰ The advocate noted that sometimes a judge's reason for denying a request for an indefinite order "has been to reinstate gun rights."⁶¹ Federal laws 18 U.S.C. §922(g)(8)–(9), hereinafter "Domestic Violence Firearm Bans,"⁶² forbid the possession of firearms by an individual "subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner."⁶³ The laws reflect a concern that domestic violence offenders should not have the right to possess a deadly weapon, particularly when nearly one

55. "Written order of protection" refers to an order granted after a temporary order. Written orders are granted after notice is given to the respondent and the judge conducts a formal hearing.

56. Driscoll, *supra* n. 51.

57. *Id.*

58. Driscoll, *supra* n. 51.

59. See 18 U.S.C. § 922(g)(8) (2012).

60. *Id.*

61. *Id.*

62. Lisa D. May, *The Backfiring of the Domestic Violence Firearm Bans*, 14 Colum. J. Gender & L. 1, 5–6 (2005).

63. 18 U.S.C. § 922(g)(8)–(9).

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 323

in ten domestic violence episodes involve a gun.⁶⁴ Research suggests an “8-fold increase in intimate partner femicide risk associated with abusers’ access to firearms.”⁶⁵ The study, published by the American Journal of Public Health, found that “abusers who possess guns tend to inflict the most severe abuse.”⁶⁶

The Domestic Violence Firearm Ban has withstood multiple constitutional attacks.⁶⁷ *District of Columbia v. Heller* established that individuals have the right to keep guns in their homes for self-defense purposes.⁶⁸ However, the Supreme Court carefully noted that an individual’s Second Amendment right is “not unlimited.”⁶⁹ Rather, the Court stressed that the opinion did not nullify “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁷⁰ Courts, post-*Heller*, have upheld gun regulations in domestic violence cases, even when applying strict scrutiny to the gun regulations.⁷¹ As Stephen Kiehl notes, federal courts have held that “the government interest in preventing domestic violence was compelling and that the statute was narrowly tailored in that it applied only to those who were subject to court-issued protective orders.”⁷²

The Domestic Violence Firearm Ban remains good law and judges do not violate Second Amendment rights when setting protective orders of significant duration. A respondent’s gun rights should not trump the physical safety of the petitioner. When judges refuse to grant indefinite orders because of gun rights, “the result is judge-made law that disserves victims of domestic violence.”⁷³ Rather, when deciding on the duration of a protective

64. May, *supra* n. 62, at 3.

65. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. of Pub. Health 1089, 1092 (2003).

66. *Id.*

67. May, *supra* n. 62, at 11 (“Various parties have attempted to condemn the laws as violations of the Ex Post Facto Clause, the notice and fair warning principles of the Fifth Amendment, the equal protection component of the Fifth Amendment’s Due Process Clause, and the Tenth Amendment’s guarantee of state sovereignty. In addition, parties also condemn the laws as an overreaching of Congress’s Commerce Clause authority, as an impermissible Bill of Attainder, and as an impermissible restriction on the right to bear arms guaranteed by the Second Amendment.”).

68. *D.C. v. Heller*, 554 U.S. 570, 636 (2008).

69. *Id.* at 626.

70. *Id.* at 626–627.

71. Stephen Kiehl, *In Search of a Standard: Gun Regulations after Heller and McDonald*, 70 Md. L. Rev. 1131, 1146 (2011).

72. *Id.*

73. May, *supra* n. 62, at 22.

order judges should “consider the heightened risk of lethal violence associated with abusers’ access to firearms.”⁷⁴

2. *Lack of Education on Domestic Violence*

Another potential explanation for the low numbers of indefinite orders is judicial ignorance on domestic violence issues. Judicial discretion is important because it allows a judge to help tailor an order to the specific needs of the petitioner. For example, a judge can order the respondent to stay away from the petitioner’s school or workplace, to refrain from selling property, or to leave the family residence.⁷⁵ However, discretion can be a dangerous tool when a judge harbors misconceptions about survivors of domestic violence. In a national survey of over 300 members of the National Coalition Against Domestic violence, over half (55.7%) described victim-blaming commentary by the presiding judge during a hearing.⁷⁶ Furthermore, judges frequently make decisions beyond the state statutes, causing additional harm to victims.⁷⁷

Judges are the most visible and influential symbol of the justice system. In the context of a domestic violence case, a judge’s attitude has significant weight.⁷⁸ Judges can positively impact the safety of a victim by stressing the importance of the proceeding and the consequences of violating the order.⁷⁹ However, when a judge is dismissive of the petitioner’s requests or does not take the accusation of violence seriously, the respondent may believe the legal system endorses his control over the victim.⁸⁰ The best attitude assumed by a judge is one that considers each party’s testimony, emphasizes respect, fairness, and safety, and listens to each party’s requests.⁸¹ When victims report satisfaction with the court system it boosts their feelings of self-worth and increases the likelihood of utilizing the justice system throughout the process of leaving the batterer.⁸²

74. Campbell et al., *supra* n. 65, at 1094.

75. Mont. Code Ann. § 40–15–201(2)(d) through (g).

76. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 Tex. J. Women & L. 163, 167–168, 207–208 (1993).

77. Stoeber, *supra* n. 18, at 361.

78. *Id.* at 360.

79. *Id.*

80. *Id.*

81. *Id.*

82. Lauren Bennett Cattaneo & Lisa A. Goodman, *Through the Lens of Therapeutic Jurisprudence: The Relationship between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims*, 25 J. Interpersonal Violence 481, 497 (2010).

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 3253. *Due Process Concerns*

Opponents of indefinite protective orders argue that this type of order may violate the respondent's due process rights. Two responding agencies noted reluctance on the part of Montana judges in their districts to issue indefinite orders, instead preferring to "revisit" the issue in the future.⁸³ One advocate noted that judges in her district are resistant to indefinite orders because they are "so restrictive and long-reaching." These statements appear to reflect a concern that indefinite orders unduly restrict the parties' future actions after only one hearing.

Protection of due process rights is a serious and important concern. However, indefinite orders of protection do not violate respondent's due process rights. First, the intention behind protection orders is prevention, not punishment.⁸⁴ While there are criminal consequences for violating an order of protection, being a named respondent in a written order does not necessitate criminal sanctions. Rather, the respondent must refrain from contacting an individual whom he has harmed.⁸⁵

Secondly, the process required for obtaining indefinite orders of protection comports with constitutional due process standards. While many jurisdictions, including Montana, allow for temporary orders of protection without testimony from the abuser, these orders expire within twenty days.⁸⁶ If the petitioner requires further protection, she must petition for a written order of protection. At this point, the court conducts an evidentiary hearing whereby the respondent has the opportunity to testify regarding his version of the relationship.⁸⁷ Additionally, if an order is granted, the respondent may appeal the order.⁸⁸ The evidentiary hearing and right to appeal are consistent with the due process protections provided by the Consti-

83. Driscoll, *supra* n. 51 (noting one survey respondent's explanation that, generally, when a judge denies an indefinite order of protection "it seems the judge wants to revisit the need for the order after a period of time").

84. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 33 (2004).

85. Judges have considerable discretion in fashioning the order. The order may require the petitioner to refrain from threatening to or committing acts of violence against the petitioner, harassing or contacting the petitioner, and entering the petitioner's home, school, or work. Mont. Code Ann. § 40-15-201.

86. Mont. Code Ann. § 40-15-201(4) (the statute provides: "The court may, without requiring prior notice to the respondent, issue an immediate temporary order of protection for up to 20 days if the court finds, on the basis of the petitioner's sworn petition or other evidence, that harm may result to the petitioner if an order is not issued before the 20-day period for responding has elapsed.").

87. *Id.* at § 40-15-202(1).

88. *Id.* at § 40-15-302(1) (the statute provides: "An order issued by a justice's court, municipal court, or city court pursuant to 40-15-201 is immediately reviewable by the district judge upon the filing of a notice of appeal.").

tution and afforded to other defendants.⁸⁹ The judge protects the respondent's due process rights by granting an indefinite order only after considering all the evidence and testimony given at the hearing, and only in cases serious enough to justify a lifetime order.⁹⁰

4. *Credibility and Evidentiary Issues*

Another obstacle to obtaining an indefinite order of protection is a perceived lack of credibility.⁹¹ Challenges faced by individuals seeking long-term orders of protection include both the perception of the petitioner's testimony and erroneous evidentiary standards imposed by the court.⁹²

Many survivors of domestic violence bring a range of mental health issues into the courtroom. Effects of post-traumatic stress syndrome (PTSD), a condition often present in women who have survived severe violence, can make a petitioner appear to lack credibility.⁹³ PTSD is characterized by three major symptoms: a constant state of alertness ("hyperarousal"), recurring flashbacks ("intrusion"), and repression of violent memories ("dissociation").⁹⁴ The disorder may cause a credible petitioner to have a flat affect, have difficulty remembering, be paranoid, or experience flashbacks while testifying.⁹⁵ Judges may have difficulty understanding the behavior and erroneously interpret it as a lack of credibility.⁹⁶

Petitioners may also encounter other evidentiary obstacles to indefinite orders. Often, there are only two witnesses at the hearing, the victim and the batterer, resulting in a "he said, she said" battle. Another issue occurs when the only witnesses are directly connected to the parties, causing them to appear biased.⁹⁷ This is particularly common due to the personal nature of domestic violence, and is unfortunate as close family or friends are often the only people aware of the violent relationship, making them the best witnesses. Finally, judges may not view a petitioner as particularly credible when she has previously requested an order of protection.⁹⁸ Credibility evaluations based on such misunderstandings ignore the realities of domestic violence, and should not be applied in protective order hearings.

89. Williams, *supra* n. 42, at 386 n. 110 (citing *M.V. v. J.R.G.*, 711 A.2d 1379, 1381 (N.J. Super. Ch. Div. 1997)).

90. *Id.*

91. Epstein, *supra* n. 12, 41–42.

92. *Id.*

93. *Id.* at 40–41.

94. *Id.*

95. *Id.* at 41.

96. *Id.*

97. Kinports & Fischer, *supra* n. 76, at 202.

98. Epstein, *supra* n. 12, at 42.

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 327

Lastly, self-defense can present difficulties for some petitioners. Our common cultural understanding of battered women centers on a meek and helpless victim, incapable of defending herself.⁹⁹ Some earlier scholarship supported this image.¹⁰⁰ However, the social science community has moved away from the “learned-helplessness”¹⁰¹ theory, and scholars now recognize that abuse victims are often resilient and defend themselves against abuse.¹⁰² Unfortunately, judges sometimes do not understand why victims fight back, and instead deny orders of protection when the situation involves self-defense.¹⁰³ One advocate stated that judges in her district are reluctant to grant orders of protection when the “victim did not act like a victim.”¹⁰⁴ Judges may misread self-defense as co-occurring couples’ violence if the victim does not behave within society’s expectations of abuse victims.

5. *False Reports*

A fifth argument against issuing indefinite orders of protection is that they will allow individuals to punish a former partner.¹⁰⁵ This argument is advocated primarily by fringe men’s rights organizations.¹⁰⁶ While these

99. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1086 (1991).

100. See e.g. Lenore A. Walker, *The Battered Woman* (Harper Collins 1980).

101. Renee Callahan, *Will the “Real” Battered Woman Please Stand Up? In Search of A Realistic Legal Definition of Battered Woman Syndrome*, 3 Am. U. J. Gender & L. 117, 122 (1994) (noting Walker’s theory of “learned-helplessness” expanded the work of Martin Seligman, a researcher studying the behavior of dogs exposed to electric shock. After repeated shocks, the dogs ceased trying to escape or stop the pain. Walker analogized battered women’s behavior to the dogs’ passive reactions.)

102. Leigh Goodmark, *When Is A Battered Woman Not A Battered Woman? When She Fights Back*, 20 Yale J.L. & Feminism 75, 129 (2008) (citing sociologist Susan L. Miller’s findings that “ninety-five percent of the women had used violence in reaction to a partner’s violence.”); see also L. Kevin Hamberger et al., *An Empirical Classification of Motivations for Domestic Violence*, 3 Violence Against Women 401 (1997); Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?*, 1 Victims & Violence 47, 50–51 (1986).

103. Telephone Interview with Anon. Mont. Advoc. (Feb. 14, 2014).

104. *Id.* (“Judges want the victim to act like a victim and cower in the corner. Judges don’t believe she is in fear if she does anything other than cower and call 911.”).

105. Cahn, *supra* n. 99, at 1085.

106. The Southern Poverty Law Center maintains a list of misogynistic groups (available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/misogyny-the-sites>). Those listed include SAVE, a group advocating for narrow definitions of domestic violence and accusing legal advocates of manufacturing accusations for protective order hearings (see SAVE, *How do Domestic Violence Laws Encourage False Allegations?*, <http://www.saveservices.org/falsely-accused/domestic-violence/tips/how-do-domestic-violence-laws-encourage-false-allegations/> (accessed 2014) (arguing broad definitions of domestic violence and victim advocates “who coach persons with minor problems how to present and embellish their complaints” help victims obtain protective orders based on false pretenses)). See also Eric Ross, *What Is “Domestic Violence”? – Anything Your Heart Desires, Honey!*, <https://ncfm.org/2012/07/news/domestic-abuse-violence/what-is-domestic-violence-anything-your-heart-desires-honey-a-word-of-wisdom-to-an-american-male/> (July 29, 2012) (asserting, “The alle-

groups represent a small population, they are increasingly aggressive and warrant examination due to the danger they present to the progress of the battered women's movement. The theory behind this argument is that women will use orders of protection as a tool in obtaining child custody or other advantages in dissolutions.¹⁰⁷ As orders of protection become more common and available, the concern is that judges will grant indefinite orders to individuals bent on revenge. This argument reflects faulty stereotypes about abused women.¹⁰⁸ Further, it can provide fodder to abusers who may accuse their former partner of manufacturing allegations.

There are few reliable statistics establishing the rates of false reports of domestic violence, while there are many sources supporting the prevalence of abuse against women.¹⁰⁹ Crime statistics indicate that one in four women endures abuse in her lifetime.¹¹⁰ One of the few studies on the subject, conducted with Los Angeles' police department, estimates false reports of stalking occur at a rate of six out of 341 cases.¹¹¹ The epidemic rates of violence, the thousands of homicides, and the serious impact on children who witness intimate partner violence greatly outweigh the risk of entertaining false reports.

Further, it is often not to a woman's advantage to instigate protective order proceedings against her former partner. The judicial system frequently discredits a woman's experience of abuse or subjects it to a higher standard of proof than other crimes.¹¹² "This disbelief is especially strong when the crime occurs between intimates or when the perpetrator is an otherwise non-violent, respected man."¹¹³ The legal system often puts a domestic violence survivor's life "on trial" and this type of public exposure acts as a

gations in the Orders of Protection, which are doled out to women like candy, oftentimes do not rise to the level of violence by a long shot.").

107. Williams, *supra* n. 42, at 397.

108. *Id.*

109. American Psychological Association, *Report of the American Psychological Association Presidential Task Force on Violence and The Family* 12 (1996) ("false reporting of family violence occurs infrequently."); see also Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 *Fam. Ct. Rev.* 500, 508 (2008) ("It is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators.").

110. Black et al., *supra* n. 8.

111. Kris Mohani, Chris Hachen & Det. Douglas Raymond, *False Victimization Syndrome in Stalking*, in *The Psychology of Stalking: Clinical and Forensic Perspectives* 225 (R. Meloy ed., Academic Press 1998).

112. Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 *Alb. L. Rev.* 1027, 1058–1059.

113. See *id.* at 1058.

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 329

deterrent against false reporting.¹¹⁴ Ultimately, the judge, as the decision maker and finder of facts, can guard against fraudulent claims.¹¹⁵

C. Why Indefinite Orders of Protection are Critical

Indefinite orders are an important tool in combating the rates of violence and high lethality risks occurring after leaving a violent relationship.¹¹⁶ Indefinite orders refer to protective orders that do not require renewal. This type of order is appropriate and necessary in relationships marked by severe violence. Indefinite orders still require the petitioner to complete the hearing process involved in orders of protection, but if a judge grants the order, an indefinite order will last until the petitioner requests otherwise.

States and organizations working within the legal system increasingly recognize the importance of granting long-term orders of protection as the best way to stem domestic violence. A diverse group including prosecutors, defense attorneys, judges, medical experts, and women's coalitions developed the Domestic Violence Model Code. The Code provides comprehensive statutory recommendations aimed at improving the legal field's response to domestic violence and reducing lethality risks.¹¹⁷ The Model Code recommends "civil orders of protection remain effective indefinitely, and gives courts the power to modify or dissolve their orders."¹¹⁸ The Model Code's recommendation reflects the belief that longer duration and indefinite orders help safeguard victims from future violence.

Indefinite orders of protection more effectively shelter women from abusers by eliminating exposure caused by court proceedings. Indefinite orders accomplish this in two ways. First, abusers use the legal system to perpetuate abuse. Indefinite orders may reduce this abuse and eventually prevent the abuser from using hearings as a means of contacting the woman. Second, requiring renewal of orders of protection exposes survivors of intimate partner violence to increased violence.

114. *Id.* at 1058 n. 152 (citing Susan S. M. Edwards, *Policing 'Domestic' Violence: Women, the Law and the State* 153 (Sage Publications 1989) ("The possibility of advancing a false claim of abuse weighs heavily on many lawyers.")).

115. Williams, *supra* n. 42, at 397.

116. Am. Bar Assn. Comm'n. on Dom. Violence, *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases*, Preface (Aug. 13, 2007) (available at <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/StandardsBlackLetter.authcheckdam.pdf>).

117. Natl. Council of Juv. & Fam. Ct. JJ., *Model Code on Domestic and Family Violence* ii-iii, v (1994) (available at http://www.ncjfcj.org/sites/default/files/modocode_fin_printable.pdf).

118. Williams, *supra* n. 42, at 372.

1. *Batterers Use the Legal System to Continue Abuse*

Judges should grant indefinite orders to petitioners who provide evidence establishing a history of violence. Without indefinite orders, the legal system serves as a conduit for future abuse by the batterer. Victims of domestic violence who utilize the justice system for recourse frequently report that the courts replace their homes as the “batterer’s forum for terrorizing his victim.”¹¹⁹ Often charming, well-spoken, and highly skilled at manipulating, batterers are savvy at using the legal system to maintain access to their former partners.¹²⁰ Some commentators argue victims are at increased risk levels during court hearings even when the victim is not required to attend.¹²¹

Research suggests batterers are skilled at using the courts to continue controlling their partner. A recent study in Massachusetts affirmed what domestic violence advocates have long asserted: “[B]atterers regularly file multiple, harassing or retaliatory motions; make false allegations against their victims in court; manipulate the court system to avoid child support; and use parallel actions in various courts and jurisdictions to gain advantage.”¹²² The findings demonstrate the myriad tools abusive individuals use to obstruct the survivor’s life. Further complicating the situation, victims of domestic violence often appear pro se.¹²³ The evidence clearly suggests batterers will use court proceedings (e.g. protective order renewal hearings for short-term orders) to harass and manipulate survivors. Indefinite orders of protection are not a golden ticket to ending abusive contact;¹²⁴ they do, however, provide a practical way for the survivor to assert her right to security and minimize the opportunities a batterer has to manipulate or malign the petitioner.

Batterers may also use renewal hearings as a chance to manipulate or reconnect with their victims. Requiring individuals already in possession of an order to reappear ignores the pressure the victim faces to reconcile with her partner.¹²⁵ Returning to an abusive partner is common for survivors of domestic violence. Studies suggest that a survivor will leave and subse-

119. Goodmark, *supra* n. 84, at 33.

120. Epstein, *supra* n. 12, at 41 (quoting former prosecutor Cheryl Hanna).

121. Natl. Council of Juv. & Fam. Ct JJ., *A Guide for Effective Issuance and Enforcement of Protection Orders* 67 (2005) (available at http://www.ncdsv.org/images/NCJFCJ_BurgundyBook.pdf).

122. Goodmark, *supra* n. 84, at 34.

123. Jennifer Thompson, *Who’s Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 Me. L. Rev. 407, 425 (2004) (quoting Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between “The Truly National and the Truly Local,”* 42 B.C. L. Rev. 1081, 1109 (2001)).

124. Petitioners must always be cognizant of the risk that the party against whom the order is enforced may violate the order.

125. Mayumi Waddy, *DVRO: Just a Piece of Paper*, 11 J. Contemp. Leg. Issues 81, 83 (2000).

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 331

quently return to her abuser an average of five to seven times before successfully leaving the relationship.¹²⁶ Pressure to reconcile comes from a variety of sources including family, economic necessity, religious or cultural beliefs, or the desire to be in the relationship without the violence.¹²⁷ In addition to pressure, victims of domestic violence are often fearful of their batterers. A victim may have suffered for years before developing the courage and ability to leave the batterer. Renewal requires victims to come “face to face” with an individual who may have terrorized them for years and the court system provides the means of access for the batterer.¹²⁸ In addition to the physical fear, petitioners fear the humiliation of telling their story of abuse and worry that the respondent will lie about them, insult their parenting, and accuse them of being crazy.¹²⁹ Indefinite orders help avoid the pressure and fear by requiring only one hearing, rather than the more frequent renewal hearings required under short-duration orders.

2. *Renewal Significantly Increases Victims’ Safety Risks*

Evidence suggests that women face the greatest risk of murder when leaving their violent relationship and during separation.¹³⁰ The risk of death or severe injury increases by 75% for women who leave their batterers.¹³¹ Requiring individuals to revisit the issue of the protective order exposes them to significantly increased safety risks, and therefore victims must remain cautious during this time period.

Many victims make incredible efforts to hide from their abuser. These include leaving their homes and belongings to move to a shelter, changing their names, changing social security numbers, disconnecting phone lines, and quitting their jobs. When the survivor must renew her order, there is potential that her efforts to hide will be exposed. At a minimum, it notifies the respondent that the petitioner is still in the area. This exposure presents serious safety concerns for survivors of domestic violence and their children.

126. Stoever, *supra* n. 18, at 333 n. 146 (citing Jill M. Davies et al., *Safety Planning With Battered Women: Complex Lives/Difficult Choices* 79–80 (Sage Publications 1998) (stating women leave abusive partners approximately five times over eight years before leaving permanently)); Kathleen J. Ferraro, *Battered Women: Strategies for Survival*, in *Violence between Intimate Partners: Patterns, Causes, and Effects* 124, 133 (Albert P. Cardarelli ed., Boston 1997) (noting women make between five and seven attempts at leaving before they are finally successful).

127. See Waddy, *supra* n. 125, at 83.

128. Rios, *supra* n. 13, at 711.

129. Waddy, *supra* n. 125, at 83–84.

130. Janice Roehl, Ph.D., et al., *Intimate Partner Violence Risk Assessment Validation Study, Final Report* 4 (Mar. 28, 2005) (unpublished research report submitted to the U.S. Dept. of J., May 2005) (available at <https://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf>).

131. Allison Smith-Estelle & Mitzi Vorachek, *Montana Lawyers Need to be Educated about Domestic Violence*, 36 Mont. L. Rev. 12, 26 (Mar. 2011).

Courthouse violence in domestic cases is on the rise across the country, and Montana is no exception.¹³² In a national study, “Disorder in the Court,” researchers found 238 violent incidents, not including shootings, at courthouses.¹³³ Montana had at least three violent episodes in recent years.¹³⁴ For example, in June of 2011, a Helena man assaulted his former partner’s friend while she was obtaining a restraining order.¹³⁵ Unfortunately, many Montana courthouses seem to lack the police personnel or facilities to adequately protect women who are renewing their orders of protection. While police officers make many efforts to safeguard petitioners, women often face exposure to violence while entering and leaving the courthouse. Furthermore, obsessed batterers may follow the victim home or to a shelter after leaving the hearing.

Indefinite orders of protection help assuage some of the safety concerns for women fleeing violent relationships.¹³⁶ First, indefinite orders are maintenance-free, meaning the orders remain in effect and do not require subsequent contact with the abuser. In a 2003 study, researchers identified maintenance of the order as a primary indicator for safety.¹³⁷ Another study following women for eighteen months found that women with long-term orders experienced a “rapid and significant decline in violence.”¹³⁸ Second, an indefinite order recognizes a victim’s agency and “accepts [the victim’s] terrifying reality.”¹³⁹ When granting indefinite orders, the state puts actual, practical meaning to policy statements about the seriousness of domestic violence prevention.

CONCLUSION

The battered women’s movement has accomplished significant progress in finding social and legal solutions for survivors of domestic vio-

132. See Mia Consalvo, *3 Shot Dead in Courthouse: Examining News Coverage of Domestic Violence and Mail-order Brides*, 21 *Women’s Studies in Comm.*, 188 (1998) (In Washington state, Timothy Blackwell murdered his pregnant wife and two others during divorce proceedings.); see also Tom Hals, *Two Women, Gunman Killed in Delaware Courthouse Gun Battle*, Reuters (Feb. 11, 2013) (available at <http://www.reuters.com/article/2013/02/11/us-usa-delaware-courthouse-idUSBRE91A0M220130211>).

133. Ctr. for Jud. & Exec. Sec., *Disorder in the Court: Incidents of Courthouse Violence* 6 (Jan. 2012) (available at <http://www.cjesconsultants.com/assets/documents/CJES-JCVI-Disorder-in-the-Court-Incidents-IV.pdf>).

134. *Id.* at 7–8.

135. *Id.* at 8.

136. Williams, *supra* n. 42, at 373.

137. Victoria L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?* 24 *Am. J. of Preventative Med.* 16 (2003).

138. Stoeber, *supra* n. 18, at 319 (quoting Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 *Am. J. Pub. Health* 613, 617 (2004)).

139. Cahn, *supra* n. 99, at 1085.

2014 *THE CASE FOR INDEFINITE ORDERS OF PROTECTION* 333

lence. Unfortunately, domestic violence continues in our country at alarming rates. Attorneys and the courts can play an important role in providing survivors with workable tools and solutions to break the cycle of abuse and enjoy violence-free lives. Indefinite orders of protection are an important device for individuals seeking to protect themselves and their children. Without long-term orders, harassment and increased safety risks remain the norm for survivors. The evidence clearly indicates indefinite orders decrease violence, respect respondent's due process rights, and facilitate a healthier future for survivors of intimate partner violence. The Montana legal community is positioned to help decrease the number of fatalities and improve the lives of countless survivors of domestic violence. Montana judges should use their wide discretion to grant lifetime orders of protections and help empower survivors to start a new life free from harassment and violence.

