

# With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women

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Cecilia came to the United States from South America. Her husband José is a lawful permanent resident. Throughout their 18 year marriage, José has physically abused Cecilia. When she was pregnant he would hit her in the abdomen. He hit her with his fists leaving bruises all over her body, he grabbed her, shook her, threw her against the wall, and tried to physically restrain her from leaving their home. He constantly harassed Cecilia in front of the children. On one occasion, he attempted to sodomize her while one of their children was present. Frequently, he would threaten to kill her if she left him. José controlled all of the money in the household. Although he began the process of getting permanent resident status for Cecilia, he later withdrew the petition and never filed another. Cecilia speaks little English and because of her immigration status, she cannot obtain work authorization. Therefore, she has no legal means of supporting herself and her children.<sup>1</sup>

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1. Robin L. Campo et al., *UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES*. Other cases illustrate that many times, the citizen or permanent resident spouse threatens his wife that he will report her to the INS to have her deported. When the threat is carried out, the immigrant wife is deported and may be indefinitely separated from her children.

This case narrative illustrates some of the unique legal, social, and economic problems suffered by battered immigrant women. The principal dynamics in a domestic violence relationship are power and control.<sup>2</sup> The batterer dominates his partner<sup>3</sup> by using physical abuse, sexual violence, threats, emotional insults, harassment, and economic deprivation.<sup>4</sup> For battered immigrant and refugee women in the United States, the typical problems of a battering relationship are further complicated by issues of gender, race, socioeconomic status, immigration status, and language.<sup>5</sup> A battered woman who is not a legal resident or whose immigrant status depends on her partner, is isolated by cultural dynamics which may prevent her from leaving her husband or seeking assistance from an unfamiliar American legal system.

This article explains some of the unique problems faced by battered immigrant women and offers creative solutions for family lawyers and battered women advocates who have immigrant or refugee clientele. Because battered immigrant women who seek to flee violence need assistance with both family law and immigration law matters, we will discuss both areas and highlight their interrelationship.

## **I. Civil Domestic Violence Remedies: Protection Orders**

All persons who are "residents"<sup>6</sup> of a particular state, regardless of their immigration status, may obtain civil domestic violence remedies including orders of protection.<sup>7</sup> A Civil Protection Order (CPO) is a form of injunctive relief which orders the offender to do or to refrain from doing certain acts for a specified period of time.<sup>8</sup> If crafted carefully, a protection order can serve as one of the most important remedies

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2. Deean L. Jang, *Caught in a Web: Immigrant Women and Domestic Violence*, 28 CLEARINGHOUSE REV. 397 (1994).

3. The authors refer to batterers as men because approximately 95% of the victims of domestic violence are women. Jang, *supra* note 2, citing BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983).

4. *Id.* at 397, n.3 (citing SUSAN SCHECTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES (1987)). A description of the typical pattern of domestic violence is available from the National Coalition Against Domestic Violence, Washington, DC.

5. *Id.* at 397.

6. *Id.* at 398 (citing *In re Dick*, 15 Cal. App. 4th 144 (1993) explaining that state law, not federal immigration law, determines the definition of "resident" for family law purposes).

7. For purposes of this discussion, civil orders of protection will be referred to as CPOs.

8. LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS, Remedies 1 (2d ed. 1992).

available to victims of domestic violence.<sup>9</sup> For battered immigrant women, however, a CPO can be of even greater importance because it can help end a cycle of violence. These orders must be carefully written in a manner that will not harm the victim's immigration status. In fact, if done properly a CPO and some of the relief available as part of a protection order may actually improve the battered immigrant woman's ability to legalize her immigration status. Thus, it is critical for advocates and family lawyers to formulate CPOs that meet the individual needs of their clients.

### A. *Unique Problems*

In order to provide effective assistance, advocates, attorneys, police, and courts must be willing to understand and address the individual needs of battered immigrant women. This includes listening carefully to battered immigrant women and crafting creative legal solutions that consider each individual's cultural experience and needs. While domestic violence occurs in all communities and crosses race, socio-economic, education, and language lines, culture will affect the excuses a batterer uses to justify his violence and will affect or complicate the barriers that a battered woman must overcome to successfully leave the violent relationship.

#### 1. PERCEPTION OF LEGAL SYSTEM

Some of the obstacles faced by battered immigrant women include a distrustful attitude toward the legal system, language and cultural barriers, and fear of deportation.<sup>10</sup> Some battered immigrant women do not seek legal assistance to free them from an abusive relationship because they fear the legal system.<sup>11</sup> This fear arises from their experiences with legal systems in their native countries.<sup>12</sup> Many immigrants come from countries which use a civil law system. In civil law systems,

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9. *Id.*

10. Catherine E. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1020 (1993) [hereinafter *Providing Legal Protection*].

11. Testimony of Leslye E. Orloff, Director, Clinica Latina, Ayuda, Inc., Before the Round Table Forum on Hispanics in the Courts, at 4-5, November 2, 1991, found in *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination*, Vol. 1: THE MOUNT PLEASANT REPORT, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, at 75, January 1993. [hereinafter *Orloff Testimony*]. "[T]he concept that justice can be obtained in the court system is not embraced by many Latino clients who must instead learn to trust our legal system through their experiences in courts. . . . Latinos seeking redress through the civil court process must initially overcome any fear and suspicion of the judicial system." [Italics omitted.]

12. See *Providing Legal Protection*, *supra* note 10, at 1020-21.

the courts primarily accept signed, notarized, and sealed affidavits as evidence.<sup>13</sup> Because oral testimony is not a form of evidence to which civil law courts attach any significant weight, immigrant litigants in the United States may find it difficult to understand the common law system which uses oral testimony as the primary form of evidence.<sup>14</sup> For battered immigrant women the fact that they can personally tell their story in court, and have a judge believe them is a baffling concept.

More significantly, many immigrants come from countries where the judiciary is not impartial and acts as an arm of a repressive government.<sup>15</sup> Many believe that only those who are rich or who have strong ties to the government prevail in court.<sup>16</sup> In domestic violence cases, batterers will manipulate these beliefs to coerce their partners into dropping charges or dismissing protection order petitions. The abusers may convince the battered woman that because the batterer is a citizen, has more money, and is a man, he is therefore more credible and will win in court.<sup>17</sup> Family lawyers who are aware of these concerns can address them directly with the battered immigrant woman client. Discussing these issues with the client, explaining the American legal system, and directly addressing client fears and misconceptions can dramatically affect the quality of the battered immigrant client's testimony in court. When left unaddressed, the client's fears about the court process can cause her testimony, however truthful it may be, to sound tentative and less credible.

## 2. OVERCOMING LANGUAGE BARRIERS

Few court systems guarantee that a battered immigrant litigant will be provided with the assistance of a certified interpreter when she appears in court. Most police departments cannot ensure that non-English speaking domestic violence victims can report their complaints effectively, nor can they assure that battered immigrants learn about their rights as domestic violence victims.<sup>18</sup> When these types of communication problems occur, batterers often go unprosecuted. One battered

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13. *Id.* at 1021 (citing the UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION 75 (1993)).

14. *Id.* at 1021.

15. *Id.*

16. *Id.*

17. *Id.*

18. Non-English speaking battered women have limited access to shelter. When non-English speaking women do seek shelter, shelter workers often deny their requests because of the shelter's general preference to offer limited numbers of slots to women who can theoretically make better use of shelter services. Nationally, few shelter programs provide bilingual access. *Id.* at 1021-22.

women's advocate reported that because a battered immigrant woman had difficulty communicating with police and prosecutors, and because courthouse information was only available in English, this particular victim arrived after the prosecutor decided not to prosecute, and the defendant and all other witnesses departed.<sup>19</sup> Failure in communication due to insufficient bilingual personnel at all levels—911 operators, police, court personnel—may jeopardize the safety of non-English speaking battered women. Thus, family law attorneys must ensure that they have ready access to bilingual and bicultural staff and that a translator will be present at any court hearing.

To best represent battered immigrant women, domestic violence advocates and family law attorneys should create alliances with social service providers, immigrant rights organizations, and church workers who work with immigrants and refugees. These organizations can help advocates and attorneys develop cultural competence and can help provide their clients with shelter, financial assistance, and food. Family lawyers should exchange information with bilingual and bicultural individuals willing to work together with the family lawyer in assisting battered immigrant women who seek help from the court system.<sup>20</sup>

### 3. INTERNATIONAL PARENTAL KIDNAPPING

In family law cases in which any of the parties are immigrants, parental kidnapping may have international significance.<sup>21</sup> Advocates and family law attorneys must request orders which prohibit the removal of a child from the United States. A copy of such an order must be filed with the embassy of the batterer's home country. Clients who fear that the batterer will take the children out of the country, should be advised to keep the children's birth certificates, social security cards, passports, immunization records, and health insurance cards in their

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19. *Orloff Testimony*, *supra* note 11, at 77. See also *Providing Legal Protection*, *supra* note 10, at 1021, nn.1365-66 (citing to various state statutes that require the provision of bilingual information in civil protection order cases). For example, in New Mexico, the statute mandates that law enforcement agencies, prosecutors and judges must make all reasonable efforts to provide victims with an interpreter or translator so that they can be informed of their legal rights. N.M. STAT. ANN. § 31-24-5(C)(7) (Michie 1990). In Rhode Island, a statute requires that law enforcement officers provide domestic violence victims with notice of their rights in English, Portuguese, Spanish, Cambodian, Hmong, Laotian, Vietnamese, and French. R.I. GEN. LAWS § 8-8.15(B) (1988).

20. *Providing Legal Protection*, *supra* note 10, at 1020, n.1360. An excellent resource for attorneys, social workers and advocates who seek to learn how to advocate for the rights of battered immigrant women is DOMESTIC VIOLENCE IN IMMIGRATION & REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF THE BATTERED WOMAN (Deeana Jang et al. eds., 1991).

21. See Jang, *supra* note 2, at 398.

possession to prevent the issuance of visas for the children. In the alternative, counsel can assist the battered client in identifying a safe location, unknown and inaccessible to the batterer, where the documents can be stored.

The International Parental Kidnapping Crime Act of 1993 (PKCA) makes it a felony to abduct a child from the United States to another country.<sup>22</sup> However, some battered immigrant women may be forced to leave the United States with their children in order to protect themselves and their children from further abuse. The PKCA provides battered women with an affirmative defense for fleeing domestic violence. Thus, advocates must familiarize themselves with state parental kidnapping laws, the federal Parental Kidnapping Prevention Act,<sup>23</sup> and the International Child Abduction Remedies Act<sup>24</sup> if there is concern that either parent may remove the children from the United States.<sup>25</sup>

### B. *Sensitive and Creative Legal Assistance*

#### 1. ACCOMPANY CLIENT TO CPO HEARINGS

It is appropriate, helpful, and often essential for family lawyers to do everything in their power to ensure the physical safety of their clients. When a domestic violence victim seeks the assistance of a family lawyer for divorce, child custody or child support matters, the first course of action that the family lawyer should undertake is obtaining a protection order for his or her client. Litigation in a divorce or custody action against a batterer can exponentially raise the probability of continued violence against the client. Women who are divorced or separated from their batterers are at a higher risk of assault than those who stay with the abuser.<sup>26</sup>

Family lawyers should not enter into stipulations with counsel for the batterer in which the parties agree not to present evidence of abuse in divorce and custody cases. Such stipulations can have disastrous consequences for the domestic violence victim and her children. Experts agree that judges must hear evidence regarding the history of abuse and the effect that witnessing or experiencing abuse has had on the children in order to craft custody and visitation decisions that will

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22. *Id.* International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204 (1993).

23. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1995).

24. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610.

25. *See* Jang, *supra* note 2, at 398.

26. *Providing Legal Protection, supra* note 10, at 815, n.42 (citing BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION 3 (1988), which reveals that 75% of all reported domestic abuse was reported by women who left their abusers).

protect the abuse victims and will enable the children to effectively recover from the effects of the violence.<sup>27</sup> Even when reviewing proposed consent orders, judges need to be made aware of the history of violence in order to ensure that the proposed agreements have not required the abused party to trade safety for poverty or safety for custody.

Battered women increasingly need to have legal representation in civil protection order proceedings.<sup>28</sup> Some states specifically provide for the petitioner's legal representation in civil protection cases.<sup>29</sup> A pro se system, which allows battered women to seek protection orders without the assistance of an attorney, is far from ideal. In most cases after a violent incident, the battered woman sees her batterer for the first time after a violent incident at the court hearing for the CPO. At this hearing, without counsel, "the victim is terrified, unclear of her legal rights, and highly susceptible to the batterer's influence and control."<sup>30</sup> Many judges interviewed by the National Institute of Justice in a study of CPOs found that:

[v]ictims who are not represented by counsel are less likely to get protection orders and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights. . . .

Further, difficulties for victims in advocating effectively for their own rights may also stem from the climate of emotional crisis or fear that usually precipitates seeking a protection order . . . (thus) skilled legal assistance may be crucial in obtaining adequate protection orders.<sup>31</sup>

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27. *Id.* at 983 (citing THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATION FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1990), reprinted in 41 JUV. & FAM. CT. J. 25 (1990) [hereinafter FAMILY VIOLENCE PROJECT], in which the National Council of Juvenile and Family Court Judges strongly recommends that in cases of domestic violence, the court should consider violent conduct when entering custody and visitation orders).

28. *Providing Legal Protection*, *supra* note 10, at 1058 (citing Peter Finn & Sarah Colson, National Inst. of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 19 (1990)).

29. *Id.* Family law attorneys should check the relevant statutes of their jurisdiction for guidance.

30. *Id.* at 1059.

31. *Id.* at 1060-61. The D.C. Task Force has concluded that CPOs are more likely to be awarded after trial if the petitioner is represented by counsel. The Task Force reported that counsel should be appointed to represent petitioners in CPO contempt actions for enforcement, and that representation of petitioners by members of the private bar should be encouraged. *Id.* at 1061, n.1612 (citing TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, DISTRICT OF COLUMBIA COURTS, FINAL REPORT 146, 161 (May 1992)).

The need for legal representation at civil protection order hearings is even more compelling when the client is a battered immigrant woman. For these clients, an inability to communicate emotionally charged experiences effectively in English, compounded by fears and misconceptions of the legal system, makes it virtually impossible for her to obtain an effective protection order without legal assistance. Sending a battered immigrant woman into the court system to fend for herself against a batterer who is more fluent in English and more knowledgeable about the legal system can have disastrous results. Thus, family law practitioners must familiarize their battered immigrant clients with their legal rights and how the legal process works, and must be present at any protection order hearings.

## 2. FACT GATHERING AND INTERVIEWING TECHNIQUES

For battered women to flee violence successfully, they must be able to create a new life apart from their batterer. To do this, battered women must have a means to survive economically, must obtain child support, legal custody of their children, and must have a place to live with their children that can be made secure against continued violence by their batterer. Each battered woman will have unique needs which must be addressed if she is to be empowered to leave. The remedies she must ultimately seek from the legal system will be aimed at breaking the cycle of power and control in which her batterer has carefully locked her.

Advocates and attorneys should first discover the unique problems faced by each individual client. When a client who has been battered seeks assistance, the lawyer must first listen to her needs, concerns, and fears.<sup>32</sup> The lawyer needs to ask the client what will help her leave the batterer before explaining what the legal, social service, and medical systems can offer. This technique helps to ensure the lawyer will craft solutions and safety plans that respond to each person's individual needs, instead of being guided by a fixed list of standard remedies. Using a standard list limits options and often misses creative, culturally sensitive remedies and self-help solutions.

There are, however, certain needs common to most battered women. These include:

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32. Leslye E. Orloff, Remarks on Societal Issues and Family Violence, published in the American Medical Association's National Conference on Family Violence: Health and Justice, Conference Proceedings (Mar. 12, 1993, Washington, DC), at 67-72.



- Safe housing (a protection order evicting the batterer and prohibiting contact, shelter, or locating another residence the location of which is unknown to the batterer);
- Custody of children (if the parties have children, custody must be addressed);
- Visitation provisions which protect the client and the children (i.e., supervised visitation);<sup>33</sup>
- Economic support for the abused spouse and children (including child support, mortgage or rental payments, payment of medical bills and insurance);
- Comprehensive no-contact provisions (including no phone calls or contact via third parties not authorized by the court).

### 3. CATCH-ALL REMEDY PROVISIONS

Family lawyers should rely on catch-all remedy provisions of state domestic violence statutes, rather than solely on an enumerated list of remedies.<sup>34</sup> This strategy will produce stronger civil protection orders that will directly address those aspects of the abusive relationship which, if left unaddressed, can serve as continuing arenas for conflict.<sup>35</sup> At least forty-two jurisdictions in the United States explicitly authorize judges great latitude to order *any* constitutionally defensible relief that is warranted to prevent continuing domestic violence.<sup>36</sup>

Courts broadly interpret statutory catch-all provisions, using them as an opportunity to legally resolve outstanding issues of continuing conflict. For example, in Washington, D.C., the court has the authority to award monetary relief, such as child support, mortgage payments, and rental expenses.<sup>37</sup> If other remedies will decrease the potential for violence, advocates and attorneys should request that the court order this relief as well. The catch-all remedies that a lawyer can obtain on the client's behalf will be defined by the client's needs and will only be limited by the lawyer's own creativity and ability to demonstrate a nexus between the relief requested and the statutory purpose of preventing future violence. Effective use of catch-all provisions and enumerated statutory remedies will place the client in the best possible

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33. Judicial authorities strongly prefer supervised visitation as the method of visitation in cases of domestic violence to lessen the risk of violence between the parties. *Providing Legal Protection*, *supra* note 10, at 983 (citing FAMILY VIOLENCE PROJECT, *supra* note 27, at 19-20).

34. *See Providing Legal Protection*, *supra* note 10, at 1020.

35. *Id.*

36. *See ORLOFF & KLEIN*, *supra* note 8, at Remedies 6.

37. *Id.* (citing *Powell v. Powell*, 547 A.2d 973 (D.C. 1988)).

position to live apart from her batterer, and may prevent a financial crisis that would drive her back to live with her batterer.<sup>38</sup>

The following examples demonstrate how a CPO for battered immigrant women can be drafted to respond appropriately to their particular needs:

- In cases in which there is the possibility of international child kidnapping, family law attorneys should request that the court order the respondent to sign a statement to be forwarded to the appropriate embassy prohibiting issuance of a visa to the parties' children absent court order.<sup>39</sup> The court might also order that the children's passports be held by the court in the court record.
- When the battered spouse has an "immediate relative" visa petition filed on her behalf which had been approved by the Immigration and Naturalization Service (INS) pending a visa appointment date before a U.S. Consulate, advocates should request the court to order that the respondent shall not contact INS, the U.S. Consulate, or take any action to withdraw that petition.<sup>40</sup>
- In CPO contempt actions, domestic relations practitioners should suggest creative sentences that educate as well as punish the offender. Batterers are most likely to stop or reduce violence when the social cost of using violence to control family members becomes too high. An understanding of the batterer's culture can be very helpful in crafting sentences that will raise the social cost of a batterer's violence most effectively. For instance, ordering a batterer to serve a sentence on weekends for three months during soccer season, including Sundays, the days that he plays soccer.<sup>41</sup>
- Courts have ordered the permanent transfer of jointly owned real estate, the removal of a family dog, and compensatory and punitive damages.<sup>42</sup>

The specific remedies that will resolve any particular domestic abuse matter will vary greatly from case to case.<sup>43</sup> Thus, a family lawyer should examine the client's case carefully and discuss fully with the client everything that the client believes will assist her.<sup>44</sup> Attorneys should evaluate the power and control dynamics of the relationship and

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38. *Id.* at Remedies 7.

39. *Id.* at Remedies 6.

40. *Id.* at Remedies 8.

41. *Id.*

42. See *Providing Legal Protection*, *supra* note 10, at 912 (providing examples of catch all remedies ordered by courts).

43. ORLOFF & KLEIN, *supra* note 8, at Remedies 9.

44. *Id.*

the client's needs so that they can request all remedies which will help to reduce the tension between the parties or will enable the client to carry on with her life independently of the respondent.<sup>45</sup>

In addition, when representing immigrant battered women, advocates and attorneys must object strenuously to any questioning at trial about the client's immigration status. Questions about immigration status have no relevance to a CPO proceeding or any family court proceeding.<sup>46</sup> In the ABA's report on the Impact of Domestic Violence on Children, it is recommended that

parties should not be able to raise and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings. This change will ensure that children of immigrant domestic violence victims will benefit from reforms in the laws (like presumptions against awarding custody or unsupervised visitation to batterers) in the same manner as all children.<sup>47</sup>

Allowing the client to be subjected to this questioning will prevent her from viewing the court as a place to which she can safely turn for help.

This will be equally true for women who have legal immigration status as it will be for undocumented women. This is because batterers in immigrant families control much of the information that the battered wife receives about American culture. If the batterer convinces her that she will be deported if she seeks help, she will believe that to be true even when there are no legal grounds for deportation. Furthermore, few immigrant and refugee women will have a complete understanding that the court system is not an arm of the INS, or that in seeking a protection order the judge will not report her to immigration. These issues should be reviewed with the battered immigrant client. Finally, family lawyers should be very careful not to raise any issues in the case that will "open the door" for questioning regarding immigration status. If the issue is raised by the respondent or the judge, family law attorneys must object strenuously.<sup>48</sup>

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45. *Id.*

46. *Id.* at Remedies 7. Even in cases in which the opposing party wishes to raise immigration status as part of an argument that the client might flee with the children, immigration status *per se* is not relevant. If a party wishes to prove that the other party will flee with the children, that can be proven by a wide variety of more probative evidence: airline tickets, contacts with family and friends in the United States and abroad, actions to obtain passports, threats to leave the country, etc.

47. AMERICAN BAR ASSOCIATION, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* (1994).

48. ORLOFF & KLEIN, *supra* note 8, at Remedies 7, n.19. See case law in each jurisdiction to clarify boundaries.

#### 4. ECONOMIC CONSIDERATIONS

Regardless of a battered woman's immigration status, when she leaves her abuser, she faces the intimidating task of financially sustaining herself and her family. The battered immigrant spouse rarely obtains the cooperation of her husband in obtaining a work visa; when she does, it is often at a high physical cost. In addition, virtually all public assistance programs bar undocumented immigrants from receiving benefits and limit the eligibility of legal residents.<sup>49</sup>

For battered immigrant women whose spouses did assist them in obtaining permanent residence, their spouses were required under current law to certify that they would "sponsor" the alien spouse who is applying for permanent residence status. When a battered immigrant woman has been "sponsored" by her citizen or lawful permanent resident spouse, the sponsor's income will be deemed available for the support of the sponsored alien, and it will be unlikely that she will be able to receive Aid to Families with Dependent Children (AFDC) until three years after she has entered the United States.<sup>50</sup> Obtaining child support instead of AFDC is also difficult for battered immigrant women, as few batterers who are married to immigrants provide income information to their spouses. Without access to this information, the battered immigrant woman has difficulty cooperating with the information requirements of the state agency that assists with child support and awards AFDC payments. This leaves a battered immigrant woman whose husband will not provide her with access to this information without any financial support. Here again, the law requires the battered woman to obtain the cooperation of her batterer to free herself from an abusive relationship.

## II. Immigration Law and The Violence Against Women Act

Immigration law has the most far-reaching consequences for battered immigrant women, because the assistance that advocates and family lawyers provide to immigrant domestic violence victims could potentially result in her deportation.<sup>51</sup> Because an immigrant wife of a U.S. citizen or permanent resident often depends completely on her hus-

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49. Jang, *supra* note 2, at 403 (citing to various programs that are not available or are available on a restricted basis to immigrants including food stamps, Medicaid, and Aid to Families with Dependent Children). *See also* NATIONAL IMMIGRATION LAW CENTER, GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS (2d ed. 1993). Further restrictions on access may occur in the future. *See* Family Self-Sufficiency Act of 1995.

50. *Id.*

51. *Id.* at 400.

band's cooperation to obtain permanent residence, her husband may use this power to trap her in an abusive relationship.<sup>52</sup> Therefore, advocates and attorneys must carefully consider their clients' immigration status under new immigration laws before taking any action.

On September 13, 1994, President Clinton signed the Violence Against Women Act (VAWA).<sup>53</sup> The Violence Against Women Act contains provisions which are specifically intended to ensure that U.S. citizens and permanent resident batterers will no longer be able to use U.S. immigration laws to perpetrate physical, mental, emotional, or economic violence against their spouses and children.<sup>54</sup> These provisions of VAWA allow battered immigrant women and their children to obtain legal immigrant status without having to rely on the cooperation of their U.S. citizen or lawful permanent resident batterers.

Specifically, the Act provides two forms of relief for battered immigrant women: they may self-petition for permanent resident status or apply for suspension of deportation. These forms of relief are available to battered spouses, battered children, and the parents of battered children.<sup>55</sup> Battered women may file self-petitions directly with the INS without the commencement of deportation proceedings. Currently, however, a battered woman may only seek suspension of deportation by asking the INS to place her in deportation proceedings. Once deportation proceedings begin, battered women may receive either form of relief from the immigration judge.

#### *A. Self-Petitioning for Permanent Resident Status*

The self-petitioning provisions of VAWA became effective on January 1, 1995. In order for an undocumented battered woman to petition for a "green card" she must complete a two-step process. First, the applicant must be part of a group of people from whom the Immigration and Naturalization Service will accept the application. Second, the self-petitioner must apply for permanent residency and must prove that

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52. *Id.* (citing to a survey conducted by AYUDA, Inc. of Washington, D.C. which revealed that 69% of the cases in which undocumented or recently documented Latino women were married to U.S. citizens or documented Latino women were married to U.S. citizens or permanent residents, the husband never filed a visa petition on behalf of his wife. In cases in which the husbands filed visa petitions, husbands delayed filing the petition from 1.5 to 9 years after marriage.)

53. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A., and 42 U.S.C.A.) [hereinafter VAWA].

54. H.R. REP. NO. 395, 103d Cong., 1st. Sess. (1993), at 26-27, 37-38.

55. Although these VAWA provisions are applicable to children, we will only refer to the battered spouse in this discussion.

she meets all of the qualifications to attain that status.<sup>56</sup> Under the VAWA immigration provisions, battered immigrant women married to U.S. citizens and lawful permanent residents meet this first requirement and may file self-petitions.

The spouse of a U.S. citizen or permanent resident will qualify for self-petitioning and will be allowed to file for legal immigrant status without the sponsorship of the U.S. citizen or resident spouse if she is a person of good moral character and she has resided in the United States with the U.S. citizen or resident spouse.<sup>57</sup> Furthermore, she must demonstrate that: (1) she is currently residing in the United States; (2) she married her spouse in good faith; (3) during the marriage, her spouse battered her or subjected her to extreme cruelty; and (4) the Attorney General believes that deportation would result in extreme hardship to her or her children.<sup>58</sup>

### *B. Request for Suspension of Deportation*

The suspension of deportation provisions of VAWA came into effect on September 13, 1994. A battered spouse of a permanent resident or U.S. citizen who is undocumented and who is at risk of being deported by the INS can also apply for a waiver of deportation, which will result in lawful permanent residency if she meets the following requirements: (1) she has lived in the United States continuously for three years immediately preceding her filing of her suspension of deportation application; (2) her spouse subjected her to battering or extreme cruelty while she was in the United States; (3) she is determined to have "good moral character"; and, (4) the Attorney General believes that leaving the United States would cause her extreme hardship to herself or her children.<sup>59</sup>

### *C. The Extreme Hardship Requirement*

Applicants in both self-petitioning and suspension cases must prove that their deportation would result in extreme hardship to themselves and

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56. For example, the self-petitioner must demonstrate that she has not engaged in criminal behavior, she is not a threat to national security, she is not likely to become a public charge in the future, she has no serious health problems such as HIV infection, drug abuse, or serious mental illness.

57. VAWA, 8 U.S.C.A. §§ 1154(a)(1)(A)(iii)(I), 1154 (a)(1)(B)(ii).

58. VAWA, 8 U.S.C.A. § 1154(a)(1)(A)(iii)(I) & (II). Battered immigrant children who are abused by their citizen or resident parent and the undocumented parent of a battered citizen or immigrant child can also apply for a green card in this way. The undocumented parent of an undocumented battered child must file an application together with the child's application. *See* VAWA, 8 U.S.C.A. § 1154(a)(1)(A)(iv).

59. VAWA, 8 U.S.C.A. § 1254(a)(3). Battered immigrant children who are abused by their citizen or resident parent and the undocumented parent of a battered citizen or immigrant can also apply for a green card in this way.

their children. Thus, it is absolutely imperative that attorneys and advocates make sure that any VAWA applicant consult an immigration attorney to assess the likelihood of proving extreme hardship in her jurisdiction. Although the INS has not yet promulgated regulations which determine what factors will be evaluated in determining extreme hardship, attorneys and advocates should carefully document the circumstances of each client's case. It is possible that INS may consider the following factors as probative of extreme hardship: the loss of protection from further abuse if deported; the applicant's children are subject to abuse and neglect proceedings; domestic violence laws in the country to which the victim will be deported will not provide her with protection from abuse; the batterer is economically able to travel to the country to which the applicant will be deported; the abuser's relatives in the applicant's country of origin pose a danger to her; and the applicant needs support services for battered women that are available in the United States, but are not available in her country of origin.

Advocates and attorneys should also consider whether their client can prove extreme hardship by traditional standards which do not take into account violence against the applicant. Because courts differ on what factors constitute extreme hardship in traditional suspension of deportation cases, advocates and attorneys must consult the law in their jurisdictions to determine what factors meet the extreme hardship test. For example, judges have considered the effects of deportation when they review suspension cases such as: how family separation will affect the mother and the child if the mother is deported and the children remain in the United States; the effect deportation will have on pre-existing custody, visitation, and child support orders; whether the abused victim or her children will lose counseling and support services needed to overcome abuse; the stress and deprivation that U.S. citizen children suffer if they are forced to leave the community in which they have been raised and to which they have adapted in terms of cultural values and education; health problems faced by the client or her children for which there is no treatment in her country of origin; human rights violations which will likely affect the client if returned to her country of origin; whether the client is an asset to her community; and the economic, standard of living, and political conditions in her country of origin.

#### *D. Appropriate Evidentiary Standard*

Prior to the enactment of the VAWA, immigration law had been amended to offer relief to a limited category of battered immigrant women. Battered immigrant women, usually married to U.S. citizens, who had obtained temporary "conditional" residency when their citizen spouse filed for them to obtain residency through the marriage

were allowed to file for a "battered spouse waiver" upon proving battering or extreme cruelty. This waiver allowed the battered spouse to obtain permanent residency without the abusive spouse's cooperation. Without this waiver, battered spouses with "conditional" residency were required as a matter of law to continue living with their abusive spouse for two years following the grant of the "conditional" residency. At the end of that two-year period she and her husband would have to jointly file a request for her permanent residency.

In cases in which the battered immigrant woman obtained a "battered spouse waiver" based on extreme cruelty, the INS had required an affidavit of a licensed mental health professional to prove that the battered spouse suffered "extreme cruelty." This requirement was misplaced because it focused the INS' inquiry on the effect the abuse had on the victim rather than the fact that the abuser's behavior constituted extreme cruelty. As a practical matter, this requirement was effectively out of reach to most battered immigrant women for a variety of reasons. Few mental health professionals have received any significant training on domestic violence, and of those who understand domestic violence, few have the language skills or cultural competence needed to work with battered immigrant women. Finally, even when an appropriate mental health professional can be identified, few battered women have the economic resources to undergo the needed examination. The Violence Against Women Act removes the requirement that battered women submit an affidavit of a licensed mental health professional. Instead, the Act requires the Attorney General to consider "any credible evidence" in granting all battered spouse benefits.<sup>60</sup>

### E. *Gaps in VAWA and Solutions*

The Violence Against Women Act promises safety and security for battered immigrant women. However, its actual effectiveness is still unknown. Although the self-petitioning and suspension of deportation provisions of VAWA were signed into law in September of 1994, the implementation of the legislation through regulations promulgated by the INS is not expected any sooner than August 1995. Until regulations have been

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60. Advocates and attorneys who are assisting battered immigrant women should not apply for the new relief without working closely with an immigration advocate or attorney. At this point, very few immigration practitioners are familiar with the relief available under the immigration provisions of VAWA. Attorneys and advocates who have battered women clients who are in deportation/exclusion proceedings or have a case pending with the INS should contact one of the following: Leslye E. Orloff, Minty Siu Chung, AYUDA, Washington, DC, 202/387-0434, or Gail Pendleton, National Lawyer's Guild Immigration Project, Boston, MA, 617/227-9727.



promulgated providing direction to self-petitioners and applicants for suspension of deportation under VAWA, the safety of battered immigrant women can not yet be guaranteed.

Advocates and family law practitioners should therefore keep a watchful eye on the INS, which is imminently expected to provide intermediate procedures through interim regulations that would allow battered immigrant women to file their immigration applications under VAWA. In addition, attorneys and advocates should prepare all necessary documentation for immediate filing when the INS finally announces regulations on the new VAWA provisions. Thus, family lawyers should carefully document the abuse suffered by their clients (photographs, medical records, police reports, lists of witnesses who can supply affidavits) and should file detailed civil protection orders to bolster their clients' cases of abuse and "extreme hardship."

Another problem posed by the lack of INS regulations is the uncertainty of whether and how the filing of a divorce by either party will affect the immigrant's application under the VAWA provisions. Thus, clients should not file for divorce until after the INS issues regulations that provide direction about what effect divorce may have on the battered immigrant woman's immigration case. VAWA applicants should seek the assistance of family lawyers in asking for continuances of divorce cases. In cases in which the batterer successfully obtains a divorce, VAWA applicants who have been in the United States for over three years should be able to obtain suspension of deportation.

A major risk of filing a petition under the VAWA immigration provisions is that the client will be exposed to the INS. Therefore, no one should apply for any form of relief under these provisions without the assistance of an immigration advocate or an attorney who understands the new law. Poor representation of battered immigrant women may result in deportation.

### **III. Conclusion**

Family lawyers and advocates who have battered immigrant women clientele must be keenly aware of the interrelationship between family law and immigration law matters to ensure effective representation of their clients. The unique cultural, economic, and social problems suffered by battered immigrant women and the uncertainty of how the immigration provisions under the Violence Against Women Act will be implemented by the INS undoubtedly complicates this endeavor. Thus, advocates and attorneys must be sensitive to each woman's individual needs and consider how any action taken may affect the client's immigration status.

