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THE FAMILY VIOLENCE PROTECTION ACT: A NEW REMEDY FOR AN OLD PROBLEM

Almost daily, one can read a newspaper or magazine or hear a news broadcast in which family violence has threatened the tranquility of another American home. Contemporary television shows, books and other forms of popular entertainment dramatize the fear, frustration and even love which families caught in the grasp of domestic violence may feel. Domestic violence is not a fictitious creation of a screen-writer's imagination, but is a very real social ailment striking at all social and economic levels throughout the United States today.¹ Legislative responses to the problem of domestic violence include enactments which permit immediate intervention by police and courts, and provide timely temporary relief to the victims of domestic abuse.

Wyoming has now joined the ranks of those states which have adopted statutes intended to ameliorate the problem of domestic violence. The Family Violence Protective Act (FVPA)² was enacted during the 1982 legislative session.³ With this Act, the legislature provided a statutory mechanism designed to assist the individuals most immediately affected by domestic violence.

The purpose of this comment is to review the Act itself and assess its adequacy as a legal vehicle for defusing these potentially life-threatening situations.⁴ The comment will also offer some suggestions intended to assist the legislature in clarifying this Act's provisions. The FVPA is an important statement of public policy and demands the careful attention of all those who may ever find a need to utilize its provisions.

THE ACT'S PROVISIONS

Under the FVPA, the victim of domestic abuse may seek an order of protection.⁵ An order of protection directs the abusive party to "refrain from abusing the petitioner or any other household member."⁶ The order

1. See Comment, *Spouse Battering and Ohio's Domestic Violence Legislation*, 13 TOLEDO L. REV. 347, 356 (1982); D. Martin, *Overview — Scope of the Problem in BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 207 (U.S. Comm. Civ. Rts., 1978).

Wife-beating has been characterized as a persistent historical reality, which has been recognized only in the last century as a "problem." STACEY & SHUPE, *THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA* 9-10 (1983). The authors argue that this legacy dates back to the early Romans and Christians where women were relegated to a subordinate role. Physical punishment was simply a concomitant of the woman's inferior social status. *Id.* at 11-13.

The 19th century British husband had the right to chastise his wife, so long as he did not use a rod any thicker than his thumb to strike his wife. *Id.* at 12-13. *But see* PROSSER, *TORTS* § 27 (4th ed. 1971), where Prof. Prosser questions the truth of the rule of thumb legend.

It was only as recently as the 1800's that courts and legislatures began to disclaim these old notions and state that indiscriminate wife-beating would no longer be socially sanctioned. Since that time, however, the problem of spouse abuse has remained a subordinate ignored phenomenon. See Comment, *supra* note 1, at 349, n.13; STACEY & SHUPE, *supra* note 1, at 13.

2. WYO. STAT. §§ 35-21-101 to -107 (Supp. 1983).

3. 1982 WYO. SESS. LAWS Ch. 45.

4. See *infra* note 56 and accompanying text.

5. WYO. STAT. § 35-21-103(a) (Supp. 1983).

6. WYO. STAT. § 35-21-105(a) (Supp. 1983).

must specifically describe the behavior from which the abuser must refrain.⁷ The court is permitted, as part of the order of protection, to order other relief, as the situation may require. The court may grant sole possession of the household to the victim while the order is in effect or may order that the abusive household member provide "suitable alternative housing" for the victim and any children to whom the abuser owes a "legal obligation of support."⁸ The court may provide for temporary custody and visitation rights, child support and temporary support for the victim.⁹ It may also prohibit the abusive household member from abducting, removing or concealing any child in the victim's custody.¹⁰ The court may also restrain the abuser from "transferring, concealing, encumbering, or otherwise disposing of [the victim's] property or the joint property of the parties."¹¹ No order may permit the victim to "transfer, conceal, encumber or otherwise dispose of the [abuser's] property."¹² Nothing in the Act purports to affect title to any property.¹³

Additionally, the court may order the abusive party not to initiate contact with the victim,¹⁴ and may order any other injunctive relief the court "deems necessary for the protection of the [victim]."¹⁵ The Act's remedies are in addition to other civil and criminal remedies.¹⁶

A temporary *ex parte* order of protection may be granted immediately upon filing of the petition, if specific facts show that there exists a real danger of further domestic abuse.¹⁷ The *ex parte* temporary order lasts for only seventy-two hours.¹⁸ Within seventy-two hours, and after notice to the "alleged perpetrator of the domestic abuse,"¹⁹ the court granting the *ex parte* order of protection must hold a hearing on the question of continuing the order.²⁰ If the court has not previously granted the temporary *ex parte* order of protection, the court must hold a hearing on the victim's petition for an order of protection within seventy-two hours after filing of the petition.²¹

At the hearing, if the court finds that "an act of domestic abuse has occurred,"²² an order of protection may then be entered. If the court finds after a hearing that "an act of domestic violence has occurred or that there exists a real danger of further domestic abuse," the court may order the abusive party to undergo professional counselling for up to ninety days.²³

7. *Id.*

8. WYO. STAT. § 35-21-105(a) (i) (Supp. 1983).

9. WYO. STAT. § 35-21-105(a) (ii) (Supp. 1983).

10. WYO. STAT. § 35-21-105(a) (iv) (Supp. 1983).

11. WYO. STAT. § 35-21-105(a) (v) (Supp. 1983).

12. WYO. STAT. § 35-21-105(c) (Supp. 1983).

13. *Id.*

14. WYO. STAT. § 35-21-105(a) (iii) (Supp. 1983).

15. WYO. STAT. § 35-21-105(a) (vi) (Supp. 1983).

16. WYO. STAT. § 35-21-106(d) (Supp. 1983).

17. WYO. STAT. § 35-21-104(a) (i) (Supp. 1983).

18. WYO. STAT. § 35-21-104(a) (iii) (Supp. 1983).

19. WYO. STAT. § 35-21-104(a) (ii) (Supp. 1983).

20. WYO. STAT. § 35-21-104(a) (iii) (Supp. 1983).

21. WYO. STAT. § 35-21-104(a) (iv) (Supp. 1983).

22. WYO. STAT. § 35-21-105(a) (Supp. 1983).

23. WYO. STAT. § 35-21-105(a) (vii) (Supp. 1983).

The order of protection can be effective for up to three months,²⁴ and may also be extended as much as an additional ninety days for good cause, upon motion of the victim.²⁵ Willful violation of an order of protection is contempt of court, which can result in fine or punishment.²⁶

The procedure for initiating a petition requesting an order of protection is set forth in section 35-21-103.²⁷ The victim of abuse requests relief initially by filing a petition for an order of protection with the court clerk.²⁸ Standard petition forms for the petitioner's use in filing are available from the clerk of court.²⁹ The victim must fill in the appropriate blanks on the forms herself and may proceed pro se.³⁰ The victim must stae in a verified affidavit the specific facts showing domestic abuse.³¹ Domestic abuse is defined as "physical abuse, threats of physical abuse or acts which unreasonably restrain the personal liberty of any household member by any other household member."³²

Filing fees may be waived upon affidavit that the victim is unable to pay.³³ The income of the alleged abuser is not to be considered in determining the victim's financial status.³⁴ Divorce, annulment or separation actions are not prerequisites to filing.³⁵

The Act also attempts to limit liability of law enforcement officers who act in "good faith and in a reasonable manner," when responding to requests for assistance.³⁶ Victims may, under the Act, request the assistance of the local law enforcement agency,³⁷ who may then "take whatever steps are reasonably necessary to protect the victim from further domestic abuse."³⁸ Such assistance may include advising the victims of remedies

24. WYO. STAT. § 35-21-106(b) (Supp. 1983).

25. *Id.*

26. WYO. STAT. §§ 35-21-105(b) and 106(c) (Supp. 1983).

27. WYO. STAT. § 35-21-103 (Supp. 1983). Presumably, the abuser would "think twice before choosing to ignore the order." J. Marquardt & C. Cox, *Violence Against Wives: Expected Effects of Utah's Spouse Abuse Act*, 5 J. CONTEMP. L. 277, 290 (1979).

28. WYO. STAT. § 35-21-103(a) (Supp. 1983). In 1983 the Act was amended to permit county courts to act upon family violence petitions and enter appropriate orders. 1983 WYO. SESS. LAWS Ch. 56. The definition of "court" has been expanded to include county courts. WYO. STAT. § 35-21-102(a) (ii) (Supp. 1983).

29. WYO. STAT. § 35-21-103(e) (Supp. 1983).

30. *Id.* The instruction sheets accompanying these forms state that the forms cannot be filled out by any person other than the victim. FVPA Form Packet, Instruction Sheet, 1, 3. See also notes 53-89 and accompanying text, which discusses the procedural mechanisms provided for by the FVPA.

31. WYO. STAT. § 35-21-103(b) (Supp. 1983).

32. WYO. STAT. § 35-21-102(a) (iii) (Supp. 1983). Social science research identifies the following as typical types of physical violence occurring between husbands and wives: throwing things, pushing, slapping, kicking or biting, hitting, beating-up, threatening with a gun or knife, and using a gun or knife. M. STRAUSS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS*, 33-34 (1980); Report, *THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 1* (U.S. Comm. Civ. Rts. 1982).

33. WYO. STAT. § 35-21-103(d) (Supp. 1983).

34. *Id.*

35. WYO. STAT. § 35-21-103(c) (Supp. 1983). In the past, courts have traditionally viewed divorce as the "cure" for any problems involving marital abuse. See Fields, *Wife Beating: Government Intervention Policies and Practices in BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 258-59 (U.S. Comm. Civ. Rts. 1978); Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. PRAC. & PROC. 549, 551-52 (1978).

36. WYO. STAT. § 35-21-107(c) (Supp. 1983).

37. WYO. STAT. § 35-21-107(a) (Supp. 1983).

38. WYO. STAT. § 35-21-107(b) (Supp. 1983).

available under the Act and of the availability of shelters, medical facilities, counselling, or other services,³⁹ providing transportation to medical facilities or shelters,⁴⁰ accompanying the victim to remove clothing and personal effects from the residence for the victim and children in the victim's care,⁴¹ arresting the abusive party,⁴² and advising the victim of procedures for initiating FVPA or criminal proceedings, as well as of the importance of preserving evidence.⁴³

Section 35-21-102 sets out the basic definitions used in the Act:

(i) "Adult" means a person who is sixteen (16) years of age or older, or legally married,

(ii) "Court" means the county court, or if the county does not have a county court, the district court in the county where an alleged victim of domestic abuse resides or is found;

(iii) "Domestic abuse" means physical abuse, threats of physical abuse or acts which unreasonably restrain the personal liberty of any household member by any other household member;

(iv) "Household member" means spouses, persons living together as spouses, former spouses, parents, adult children and other adults sharing a common household;

(v) "Order of protection" means a court order granted for the protection of victims of domestic abuse;

(vi) "This act" means W.S. 35-21-101 through 35-21-107.

ANALYSIS

There are several problems with the Act which may prevent the statute from being fully effective. These difficulties will be addressed separately in the sections to follow.

A. Who may invoke the Act's relief

As stated previously, the FVPA allows the victim of domestic abuse to petition the court for an order of protection. Only by cross-referencing to the definition section of the statute is one able to determine who is actually entitled to seek the FVPA's unique relief.⁴⁴ Section 35-21-102(a) (iii) defines domestic abuse to include abuse against any household member by any other household member. Household members include spouses and other adult persons sharing a common household, married or unmarried, such as adult children, parents and roommates.⁴⁵ Only adults,⁴⁶ persons sixteen

39. WYO. STAT. § 35-21-107(b) (i) (Supp. 1983).

40. WYO. STAT. § 35-21-107(b) (ii) (Supp. 1983).

41. WYO. STAT. § 35-21-107(b) (iii) (Supp. 1983).

42. WYO. STAT. § 35-21-107(b) (iv) (Supp. 1983).

43. WYO. STAT. § 35-21-107(b) (v) (Supp. 1983).

44. WYO. STAT. § 35-21-102(a) (iii) (Supp. 1983).

45. WYO. STAT. § 35-21-102(a) (iv) (Supp. 1983).

46. WYO. STAT. § 35-21-102(a) (i) (Supp. 1983).

years of age or older, or those who are legally married, will be considered household members for purposes of the Act.⁴⁷

The following hypothetical examples of various family units and living situations illustrate the persons within the scope of the Act's definitions:

Example 1: Sam and Alice were married in 1982. Both Sam and Alice were legal adults when they began to reside together as husband and wife. One evening, Sam and Alice had an argument, which culminated in Sam beating Alice over the head with his club. Clearly, Alice may seek an order of protection, as an adult household member who was physically abused by another adult household member.

Example 2: Joe and Mary have never been married legally. However, they began to cohabit while in college, and have continued to do so since that time. Both parties are over 16 years of age. Clearly, when a similar violent incident occurs between Mary and Joe, the FVPA will be applicable to provide Mary protection against Joe's abuse.

Example 3: Ken and Barbi ran away to get married this year, because both were under age. Even though both are less than 16 years of age, because they are legally married⁴⁸ if an incident of domestic abuse were to occur the FVPA could be invoked by the victim to seek an order of protection.

Example 4: Jane and George cohabit, but are not married. Being young, impetuous, and anxious to escape her parent's home, fifteen year old Jane took up residence with George, who is 20 years old. George and Jane argue; ultimately, George exerts a superior physical force against Jane, beating her severely. Jane, because she is only fifteen and is not legally married, could not receive protection under the FVPA, even though George is more than sixteen years of age.⁴⁹

Example 5: Whistler is a 35 year old male residing at home with his aged mother. The mother one day gets annoyed with Whistler's refusal to help around the house and begins to beat Whistler with a broom. She also threatens to continue the beatings if he does not start to behave like a "good son." Whistler could petition the court for an order of protection, as an adult household member, and also as an adult child residing with an abusive parent.

Example 6: The Average American family lives together in Cityville. At home are Father, Mother, 15 year old Son, and 14 year old Daughter. Father has a history of abusing both his wife and children. 15 year old Son finally tires of the family situation. Having heard about the FVPA from a schoolmate, Son decides to petition the court himself for a protective order. The protective order would have to be denied under the terms of the statute, as Son is not an adult household member. Son could not seek,

47. WYO. STAT. § 35-21-102(a) (iv) (Supp. 1983).

48. This example is premised on the assumption that the marriage was in fact valid when contracted.

49. See *infra* notes 60-61 and accompanying text.

independent from his mother, the protection provided for in FVPA. Nor could Son file a petition on behalf of Mother, as the statute requires the victim herself to petition for an order of protection.⁵⁰

If Mother had initiated the petition, she would be within the terms of the statute and could be granted an order of protection by the court. Part of the court's order could grant Mother temporary custody of both Son and Daughter, grant Mother sole possession of the family residence, and order Father not to initiate contact with Mother.

The Act's language most clearly addresses situations involving husband-wife violence. Legally married persons are always within the definition of "adult"⁵¹ and cohabiting spouses are always within the definition of household member.⁵² Recent psychological and sociological studies have disclosed that incidents of family violence, and in particular wife-battering, occur in an alarmingly high frequency. Estimates indicate that between 1.8 and 2 million⁵³ women are beaten every year by their husbands. This means that a wife is being beaten every thirty seconds.⁵⁴ Less conservative estimates indicate that perhaps as many as fifty to sixty percent of all couples experience marital violence.⁵⁵ Furthermore, wives end up being killed by their husbands four times as often as husbands are killed by their wives.⁵⁶ Consequently, battered wives are the individuals most likely statistically to seek the protection provided for in acts such as the FVPA.

Although husband-battering is a less frequent occurrence, such incidents do occur with some regularity.⁵⁷ The FVPA may also be utilized to provide protection to the husband who has suffered at the hand of his wife. The Act refers only to "spouses, persons living together as spouses, former spouses,"⁵⁸ without reference to gender and without the use of specific terms defining the wife as victim or husband as abuser.

50. See WYO. STAT. § 35-21-103(a) (Supp. 1983) and text accompanying notes 53-89.

51. WYO. STAT. § 35-21-102(a) (i) (Supp. 1983).

52. WYO. STAT. § 35-21-102(a) (iv) (Supp. 1983).

53. STRAUS, GELLES & STEINMETZ, *supra* note 32, at 32-35; Report, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 1 (U.S. Comm. Civ. Rts. 1982).

54. STACEY & SHUPE, *supra* note 1, at 2.

55. J. COSTA, ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION 2 (1983). For further resources regarding the incidence of domestic violence, see also D. Martin, *Overview—Scope of the Problem in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 205-07* (U.S. Comm. Civ. Rts. 1978); M. Straus, *Wife Beating: How Common and Why?* in THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE 30-31 (M. Straus & G. Hotaling, eds. 1980) (discusses the underreported nature of domestic violence); Taub, *Ex Parte Proceedings in Domestic Violence Situations: ALternative Framework for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95, 95 n.5 (1980).

56. STACEY & SHUPE, *supra* note 1, at 15; M. Wolfgang, *A Sociological Analysis of Criminal Homicide in STUDIES IN HOMICIDE* 23 (M. Wolfgang, ed. 1967). See also Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. PRAC. & PROC. 549, 560 n.66 (1978).

57. Husband abuse by wives is not totally unheard of. For further discussion regarding the incidence of husband-battering, see Comment, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1 U. ILL. L. REV. 261, n.3 (1983); M. Straus, *Wife-Beating: How Common & Why?* in THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE 31-33 (M. Straus & G. Hotaling, eds. 1980); and STRAUS, GELLES & STEINMETZ, *supra* note 33, at 41.

58. WYO. STAT. § 35-21-102(a) (iv) (Supp. 1983).

Because the Act refers to those living together as spouses, unmarried cohabitators over the age of 16 will be within the Act's definitional scheme.⁵⁹ Furthermore, the Act's definitions are broad enough to legitimately provide protection to same-sex roommates over 16 years of age who are the victims of domestic violence. Social science research has not focused upon such conflicts. Therefore, it remains unclear how frequently domestic abuse statutes would likely be used to obtain physical protection from an abusive roommate.

The more difficult situation is hypothesized in Example 6. In the circumstances where an abusive father resides with his family, for instance, the children would not be in a position to seek FVPA relief directly, even though they have been "victims" of the father's abuse. The mother herself could seek a protective order, which can incidentally protect the children by granting her temporary custody of the children. However, if the mother is for one reason or another unable or unwilling to petition for a protective order, the children remain without remedy under the FVPA. This result is not as incongruous as it may seem initially, because other statutory mechanisms exist which specifically protect neglected and abused children.⁶⁰

The standardized form packet available for use in petitioning for an FVPA order of protection⁶¹ is inconsistent with the Act's statutory language. The Instruction Sheets state that a "person who is sixteen (16) years of age or older or legally married *and* who has been physically abused or is being threatened with physical abuse by any person over nineteen (19) years of age, who shares a home with the petitioner,"⁶² is entitled to receive protection under the FVPA. This statement properly denotes who the petitioner is. It does not comport with the Act's provisions concerning which persons may be ordered to refrain from abuse. Nowhere in the Act is the term "abuser" defined. However, under the Act's definitional scheme an abusive 17 year old household member could be a proper defendant and could be ordered by the court to refrain from further abusive conduct. It is probable that the Act will require legislative clarification to define who the "abuser" is, and which victims of domestic abuse are entitled to relief.

B. Procedural mechanisms for filing the petition for an order of protection under the FVPA

The Act requires the court clerk to furnish standardized forms for the victim to use in initiating proceedings under the FVPA.⁶³ This form packet is the source of one of the Act's greatest practical weaknesses. More than four legal sized pages of instructions accompany the form petition for a protective order. In these instructions, the victim is told about the FVPA and how the Act works, as well as about the actual process of obtaining relief.

59. See generally Comment, *Spouse Abuse: A Novel Remedy for a Historic Problem*, 84 DICK. L. REV. 147, 147 nn.2-3 (1979); Marquardt & Cox, *supra* note 27, at 277.

60. See, e.g., WYO. STAT. §§ 14-3-201 to -215 (1977 & Supp. 1983).

61. The form packet is made available pursuant to WYO. STAT. § 35-21-103(e) (Supp. 1983).

62. FVPA Form Packet Instruction Sheet 1.

63. WYO. STAT. § 35-21-103(a) (Supp. 1983).

To begin her⁶⁴ action, the instruction sheets tell the victim to file the petition with the clerk of the district court in the district where the victim lives or is presently staying.⁶⁵ The victim is required to pay the \$25.00 filing fee when she files, unless she has a sworn affidavit regarding her inability to pay.⁶⁶ Service fees must also be paid to the sheriff's office.⁶⁷ Once the "Complaint" has been filed, the petitioner must take the petition (erroneously labeled "Complaint" on Form 1 itself) to the judge. If she is seeking the temporary ex parte order, that form must also be filled out and taken to the judge. The judge signs the temporary ex parte order⁶⁸ if the victim is entitled to such relief. The victim then returns to the clerk's office to obtain two certified copies of the petition and ex parte order if the judge signed it, as well as two copies of the Summons Form 2.⁶⁹ The clerk may then require the victim to deliver the papers to the sheriff's office or process server.⁷⁰

The forms tell the victim to request a copy of the proof of service, after the defendant has been served,⁷¹ and to deliver a copy of the ex parte order to the local law enforcement agency.⁷² The victim is directed to appear for the hearing at the date and time scheduled by the judge and is told to expect that the defendant will also be present at that hearing.⁷³

The difficulties with the form packet are several. The language in the instructions and forms is not consistent throughout. The petition is called a "Complaint" on Form 1, and the instructions refer to both the Complaint and the petition. This is a rather minor difficulty, but one which may be confusing to the lay persons using the forms. The emotionally distraught and physically battered woman may not be capable of sorting out and making sense of this "legalese" without assistance.

The statute does require the victim herself to initiate the action for an order of protection.⁷⁴ The instruction sheets have a comparable provision requiring the victim to fill the forms out herself at the time she initiates her action.⁷⁵ The problem with requiring the victim to fill in the forms and walk through the filing process herself is that it is too easy for mistakes to be made and for misunderstandings to occur. Without the cooperation of court clerks and judges, the victim's petition may be defective from its inception.

64. Throughout most of this section and the remainder of this comment, it will be assumed that the wife or other resident adult female has been the victim of the abuse. This is primarily for convenience and is not intended to ignore problems of husband abuse by the wife.

65. FVPA Form Packet Instruction Sheet 2.

66. *Id.*

67. *Id.*

68. *Id.* at 3.

69. *Id.* at 3-4.

70. *Id.* at 4.

71. The Instruction Sheets fail to disclose to the petitioner exactly how she finds out whether or not the defendant has been served.

72. FVPA Form Packet Instruction Sheet 4.

73. *Id.*

74. WYO. STAT. § 35-21-103(a) (Supp. 1983).

75. FVPA Form Packet Instruction Sheet 3.

A number of states have provisions in their domestic abuse statutes which permit court clerks⁷⁶ to provide the victim assistance in filing her petition. There are several advantages to a court clerk help provision. One advantage is that the court clerk is readily available in the clerk's office to answer basic questions in a consistent, knowledgeable manner. The court clerk is also familiar with the procedures in filing a civil action, and could provide guidance to the victim as to what steps remain to be accomplished in the filing process.⁷⁷

The Wyoming form packet contemplates that the victim will have other persons available, in addition to the court clerk, who could answer the questions about the Act and the forms themselves. Some of the possible sources of assistance include representatives of the local family violence program, local police or sheriff's department, local public assistance and social services office, as well as representatives from local mental health programs.⁷⁸ Although the Wyoming statute, does not expressly prohibit the court clerk from assisting the victim in these functions, it does not permit it expressly. If the victim has not sought the aid of these other persons, it is quite likely she will never fully grasp the actual limits of the protective order, and may also misunderstand the nature of the civil action.

The FVPA does permit the court to appoint an attorney to assist and advise the victim,⁷⁹ but it is not clear whether this provision allows appointment of counsel prior to the time proceedings under the Act are initiated or only after the petition itself has been filed. This provision for appointment of counsel is laudable, for it recognizes many women in peril simply do not have the resources to hire an attorney,⁸⁰ and that some reliable legal assistance may be essential if the victim is to protect her right to be physically secure under the Act.⁸¹

Nothing in the Act allows another family or household member to proceed on the victim's behalf in the event that the victim is incapacitated by domestic abuse. Such a provision would be commendable, because it recognizes that domestic abuse can, and in fact frequently does, occur with

76. See e.g., MO. ANN. STAT. § 455.025 (Vernon Supp. 1984); MINN. STAT. ANN. § 518B.01, subd. 4(d) (West Supp. 1984).

77. A court clerk help provision in the Minnesota Adult Abuse Act withstood constitutional challenge in *Minnesota v. Errington*, 310 N.W.2d 681 (Minn. 1981). This provision was challenged as a violation of the separation of powers doctrine, in that the legislature had ordered the court to perform functions in which it was required to act as a biased advocate. *Id.* at 682. The court disagreed, stating the court clerk, not the court, was performing a ministerial function and that the legislature had a shared constitutional power to order the clerk to perform certain functions. *Id.* The court's conclusion is a reasonable one in that the court clerk's help is primarily a part of an "information gathering process and not a biased presentation of one party's claim." Comment, *supra* note 57, at 282.

78. FVPA Form Packet Instruction Sheet 1-3.

79. WYO. STAT. § 35-21-103(e) (Supp. 1983).

80. D. Martin, *Overview—Scope of the Problem* in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 215 (U.S. Comm. Civ. Rts. 1978).

81. See generally Comment, *supra* note 57, at 280-81.

Another provision notably absent from the FVPA is one which would permit the court to appoint counsel to represent the allegedly abusive party at the hearing held on the petition for the order of protection. It is quite obvious that the abuser can suffer the deprivation of valuable rights and should also receive adequate representation in his effort to protect his rights.

an unexpected degree of severity.⁸² The victim of exceptionally severe abuse, for example, may require hospitalization and medical treatment. Because of the severe injuries, it is even more appropriate that the incapacitated victim be entitled to seek an FVPA protective order. Allowing some other person to proceed on her behalf expedites the matter and can minimize the occurrence of repeated violent incidents.⁸³

Another notable gap is that the FVPA has no provision which allows the victim to seek relief after regular court hours. Research indicates that most incidents of domestic abuse are likely to occur during these "off" times.⁸⁴ Such a provision is essential to fully implement the Act and to provide immediate protection to the battered spouse.⁸⁵ A few states do provide for emergency protection orders which may be issued at night or during times when the court is not in session.⁸⁶ These emergency orders generally last until the regular court re-opens. When the court does re-open, the victim must re-apply for a temporary protection order.⁸⁷ A comparable provision in the FVPA would contribute to fully effectuating the purposes of the FVPA and is recommended. The battered spouse's greatest need is immediate protection from further abuse. Imposing unnecessary delays diminishes the prospects that the violent cycle⁸⁸ will be broken and that the victim's immediate needs will be met.⁸⁹

C. Interagency Communication and Cooperation

The FVPA requires that a copy of the order of protection be delivered to the county sheriff.⁹⁰ This provision attempts to deter and prevent further incidents of domestic abuse from occurring.⁹¹ It allows law enforcement authorities to keep appropriate records of all protective orders issued. When further domestic violence does occur, prior to the time they arrive at the scene the officer should have been informed of past incidents of abuse and of the protective order's effective dates. Consequently, the order becomes enforceable and much further abuse can be thwarted.⁹²

82. The victim must file the petition. WYO. STAT. § 35-21-103(a) (Supp. 1983).

83. See Comment, *supra* note 57, at 287. This author includes such a provision in his proposed model legislation.

84. See STACEY & SHUPE, *supra* note 1, at 16-17. The author (citing R. Gelles, *No Place To Go: The Social Dynamics of Marital Violence*, in BATTERED WOMEN 418-55 (M. Roy, ed. 1977)) states that most physical conflicts occur between 8 and 11:30 p.m., and that weekends and holidays are especially critical times. *Id.* See also Costa, *supra* note 55, at 2.

85. However, it is also arguable that such a provision is in fact unnecessary. The victim who has been hospitalized due to domestic violence is in a relatively safe and protected environment. The fact that there are numerous other individuals nearby at all times could serve to assure the victim's safety, at least while she is confined. This argument is only persuasive when the victim does require hospitalization. Many victims may not be injured severely enough to require such medical confinement, and may simply be bedridden for a day or two. In the latter instance, the victim would benefit from a provision allowing another to begin the FVPA action on her behalf.

86. See Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271, 273 (1980).

87. See, e.g., ALA. CODE § 30-5-9 (1983). IOWA CODE ANN. § 236-6 (Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 765.3 (1981).

88. The cycle of violence is described in detail in MARQUARDT & COX, *supra* note 27, at 279-81.

89. See Lerman, *supra* note 86, at 278-79.

90. WYO. STAT. § 35-21-106(a) (Supp. 1983).

91. FVPA Form Packet Instruction Sheet 4.

92. See also Comment, *supra* note 57, at 275.

Because the statute requires only that the order be sent to the county sheriff,⁹³ and because there may not be sufficient communication between local police and sheriff's departments to ensure that police also receive notice of the protective order, much of the deterrent effect of this particular provision could be nullified. Local law enforcement agencies, such as the local police department, are far more likely to respond to calls for domestic abuse in the cities. As a result of this poorly drafted provision, police may be without any knowledge of the protective order or its effective dates. Police could arrive on the scene of a domestic disturbance totally unapprised of the circumstances. Conceivably very real concerns for the police officer's individual safety⁹⁴ could decrease willingness to intervene in the ongoing domestic dispute.⁹⁵ Police could also simply rely upon their traditional training and attempt a reconciliation of the feuding spouses.⁹⁶ In such circumstances, the protective order would become worth no more than the paper it is written on, remaining unenforced according to its terms.

The FVPA does recognize that the cooperative efforts of courts, law enforcement agencies and social agencies are essential in providing an effective intervention framework. The Act provides that the abusive party can be ordered to undergo counselling,⁹⁷ and that police may refer and transport victims to places of shelter.⁹⁸ Thus, the battered victim can be taken out of immediate danger and away from the violent relationship, at least temporarily.

The shelter alternative is an important link in defusing the crisis faced by the victim of domestic abuse and provides a way for the victim to meet immediate, practical needs.⁹⁹ Shelters have often been criticized as places

93. WYO. STAT. § 35-21-106(a) (Supp. 1983). However, the form packet requires that a copy of the order be delivered to the "local law enforcement agency." Form Packet at 5, the terms of the Order of Protection, also in the form packet, simply require a copy of the order to be delivered to the "appropriate law enforcement agency." *Id.* at Form 5, para. 12 and Form 8, para. 2.

94. For example, statistics indicate that approximately one-third of police officers injured are hurt while intervening in domestic disputes. SCHONBORN, *DEALING WITH VIOLENCE: THE CHALLENGE FACED BY POLICE AND OTHER PEACEKEEPERS* 27 (1975).

95. See also Comment, *supra* note 57, at 268-69. For a discussion regarding traditional police responses when confronted with domestic disputes, see MARQUARDT & COX, *supra* note 27, at 284-85; Pence, *The Duluth Domestic Abuse Intervention Project*, 6 *HAMLIN L. REV.* 247, 252-54 (1983).

96. MARQUARDT & COX, *supra* note 27, at 284. See also K. SCHONBORN, *DEALING WITH VIOLENCE: THE CHALLENGE FACED BY POLICE AND OTHER PEACEKEEPERS* 30 (1975), wherein the author states, "[t]here is agreement among peacekeeping experts that it is better to mediate or refer than to expel or arrest" in instances of family conflict.

97. WYO. STAT. § 35-21-105(a) (vii) (Supp. 1983). One might question how effective mandatory counselling really is.

98. In Wyoming, Safe House services are available to adult battered women regardless of income. Advertising Leaflet, Wyoming Family Violence & Sexual Assault Program.

99. Shelter services can be quite broad. Shelters most generally offer emotional support, temporary housing, counselling, and education. The shelter's advocates may also act as a liaison between police, medical facilities and families. Twenty-four hour hot-line services and community education are also frequently provided. Pence, *The Duluth Domestic Abuse Intervention Project*, 6 *HAMLIN L. REV.* 247, 265-66 (1983).

For a listing of shelter services available to women in Wyoming, see COSTA, *supra* note 55, at 320-22. Some of these projects are also being expanded to provide counselling services for the abusive husband as well. *Id.* at 115. As a practical resource, Costa's book is invaluable. It has a 300 page bibliography, as well as a comprehensive listing for shelters and services available throughout the United States.

which encourage divorce and "provide lazy, pampered housewives with a place to go when they want to run away from their family responsibilities."¹⁰⁰ However, if one study is to be believed, this is not true. Shelters may have a significant impact in reuniting families and reducing the incidence of family violence. In this particular study, half of the women who had stayed in a shelter eventually did return home to live with their spouse or lover. Of that half, two thirds of the women said no violence had recurred in the home. Of those who said it did recur, the violence was less frequent and less severe than it had been before the women went to the shelter. Further, seventy-nine percent of all the women who had stayed in the shelters and later returned home stated that the batterer eventually sought counselling.¹⁰¹

D. Scope of protection under FVPA

The Act is ambiguous in describing when protection may actually be granted. An *ex parte* temporary restraining order may be granted upon a showing of a "real danger of further domestic abuse."¹⁰² The definition of domestic abuse includes actual or threatened physical abuse.¹⁰³ However, an order of protection may only be granted upon a finding that "an act of domestic abuse has occurred."¹⁰⁴ It is not clear that the court is empowered to grant the order of protection if there has only been a finding of threatened abuse. The statute may be construed to mean that if the court finds that *any* of the acts enumerated in the definition of domestic abuse have occurred, including mere threats of physical abuse, the court may grant relief. However, the language is ambiguous enough to also construe the statute to mean that an order of protection may issue only if a specified act of actual physical abuse has in fact occurred.¹⁰⁵

The author advocates the more liberal construction of the Act's provisions, so as to allow an order of protection to be granted when there is only a threat of further abuse. This construction would be more likely to effectuate the Act's purposes. Domestic abuse statutes are intended to provide immediate relief to the abused party and advance the legitimate goal of preventing domestic violence. If there is an immediate, present danger of abuse, certainly no advantage is gained by requiring the actual event of abuse to occur as a predicate for issuing the order of protection.

There are indications that the availability of shelter services is not adequate to meet present needs throughout the country. One survey indicates that shelter would have been welcome in 25 percent of the cases in that survey, but that it was provided in only two percent of those cases. See Report, THE FEDERAL RESPONSE TO DOMESTIC VIOLENCE 1 (U.S. Comm. Civ. Rts. 1982).

100. STACEY & SHUPE, *supra* note 1, at 133-34.

101. *Id.* at 149-50 (citing Evaluation Report of Family Violence Centers in Texas 1979-80, 7).

102. WYO. STAT. § 35-21-104(a) (i) (Supp. 1983).

103. WYO. STAT. § 35-21-102(c) (iii) (Supp. 1983).

104. WYO. STAT. § 35-21-105(a) (Supp. 1983).

105. The form packet also reflects this ambiguity and has the potential to lull the victim into a false sense of security, believing she is protected when in fact she is not. The instructions tell the victim that a judge can grant the *ex parte* order if it appears in her petition that the "[d]efendant will physically abuse [the victim] or threaten to physically abuse [her] before a hearing can be held." Form Packet at 2. These instructions tell the victim the judge decides to issue the Order of Protection after hearing both sides and that the order may be entered if it is shown that it "continues to appear that there is a real danger that the Defendant will physically abuse [the victim] or threaten to physically abuse [the victim]." *Id.*

Furthermore, judges are detached from the situation and are well qualified to determine the potential for domestic abuse and to sort out the petitioners who are just "crying wolf." Such determinations are routinely made by courts exercising their equitable powers,¹⁰⁶ as when courts must decide whether to grant injunctive relief in other civil actions. The victim must allege the actual incidents of abuse that occurred prior to filing the petition for a protective order.¹⁰⁷ Broad, general allegations of abuse would not be sufficient as a basis for granting the ex parte temporary order. The specific allegations serve to prevent unjustified and erroneous orders from issuing by giving the court a factual basis or history to use in making the decision to grant or deny the order.

The risks associated with the issuance of an erroneous ex parte order are minimal in view of the limited duration of an ex parte order. The maximum period of time an erroneous order could be outstanding is 72 hours.¹⁰⁸ The court could, after the subsequent hearing, either deny further relief or tailor the order to fit the real needs of the parties. Early intervention of courts and police is legitimate, and can ultimately serve to prevent domestic violence from escalating into yet another family-related homicide.¹⁰⁹

When considering the appropriate construction the Act should be given, the nature of the proceeding must be a factor in that analysis. The FVPA is a civil action which creates an independent, legal and enforceable right for the abused spouse to be safe in her home.¹¹⁰ One of the primary advantages of the FVPA is that it is *not* a criminal proceeding. This permits the wife, frequently reluctant to take criminal action against her abusive spouse for either personal or economic reasons,¹¹¹ to avoid the system of criminal law that often fails to provide any effective remedy at all.

One of the reasons criminal actions are less than satisfactory to the battered wife is the fact that bail proceedings are generally available to the abusive spouse.¹¹² If the abuser is able to take advantage of bail, he is free to return to the home and resume his abusive behavior. When the wife prefers criminal charges against her husband, this can serve to provoke future violence in the home upon the abusive spouse's release from jail.¹¹³

106. See Taub, *supra* note 55, at 117.

107. WYO. STAT. § 35-21-103(b) (Supp. 1983); FVPA Form Packet, Form 1. See also Taub, *supra* note 55, at 117, where the author argues the procedural mechanism of a verified complaint provides additional safeguards, particularly for ex parte temporary orders of protection.

108. WYO. STAT. § 35-21-104(a) (iii) (Supp. 1983).

109. See M. Fields, *Wife Beating: Government Intervention Policies and Practices in BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 260-66 (U.S. Comm. Civ. Rts. 1978). See also *supra* note 56 and accompanying text concerning the incidence of husband and wife homicides.

110. Lerman, *supra* note 86, at 272.

111. Many women are economically vulnerable and will not pursue criminal remedies because of the possible loss of financial support that occurs when the husband is incarcerated. D. Martin, *Overview—Scope of the Problem in BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 215-16 (U.S. Comm. Civ. Rts. 1978); Comment, *supra* note 59, at 157-58 and n.71.

112. See Comment, *supra* note 59, at 160 n.89; Pence, *The Duluth Domestic Abuse Intervention Project*, 6 HAMLIN L. REV. 247, 249-50 (1983).

113. Commentaries indicate that in criminal proceedings convictions are relatively rare. STACEY & SHUPE, *supra* note 1, at 164.

Economic considerations may also deter the battered spouse from pursuing criminal actions.¹¹⁴ The potential loss of income and support which would result if the husband was to be incarcerated after a successful prosecution in a criminal action may dissuade the victim from pursuing the criminal remedies available. Under the FVPA, economic considerations need not be decisive factors in the victim's decision to protect herself from further abuse.¹¹⁵ The FVPA permits the court to order the abuser to provide temporary support of children and victim as part of the protective order,¹¹⁶ while accomplishing the goal of separating the warring spouses.¹¹⁷

Courts have traditionally viewed such intrusions into the family as detrimental and unwarranted.¹¹⁸ Rather than intervene between the spouses, courts traditionally have encouraged reconciliation.¹¹⁹ The battered wife was often, in the past, viewed as experiencing "minor marital problems,"¹²⁰ when in reality the incident was one of "unpardonable violence."¹²¹ Domestic abuse statutes attempt to change this attitude, and create a well-defined statement of public policy which requires judicial intervention into the family home. A man's home is no longer his castle, at least if he beats his wife. Domestic abuse statutes permit the courts to begin to break the cycle of violence and provide a legal framework for immediately quelling the domestic dispute.

E. Constitutional Questions

When the FVPA was enacted in 1982, questions concerning the Act's constitutionality arose immediately.¹²² Because the Act's scope awaits precise definition by the Wyoming Legislature, an analysis of the potential constitutional issues premised upon the current statutory provisions could be inapposite and, therefore, is beyond the scope of this comment. The few litigated cases¹²³ and scholarly commentaries¹²⁴ suggest that domestic

114. See *supra* note 111.

115. M. Strauss, *A Sociological Perspective on the Prevention of Wife-Beating in THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE* 222-23 (M. Strauss & G. Hotaling, eds. 1980).

116. WYO. STAT. § 35-21-105(a) (iii) (Supp. 1983).

117. The remedies under the FVPA are in addition to other available civil and criminal remedies. WYO. STAT. § 35-21-106(d) (Supp. 1983). The victim is not required under the Act to first resort to other traditionally available remedies, such as divorce, in order to secure relief. WYO. STAT. § 35-21-103(c) (Supp. 1983).

118. See Comment, *supra* note 57, at 269.

119. See, e.g., Comment, *supra* note 57, at 270; Comment, *supra* note 1, at 349; D. Martin, *Overview—The Scope of the Problem in BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 208 (U.S. Comm. Civ. Rts. 1978); MARQUARDT & COX, *supra* note 27, at 283-84.

120. MARQUARDT & COX, *supra* note 27, at 284.

121. *Id.*

122. See, e.g., Casper Star Tribune, May 27, 1982 at B3, where one district court judge argued the FVPA violated federally protected rights associated with the home and that the FVPA was unconstitutionally vague. See also Laramie Daily Boomerang, June 3, 1983 at 2, col. 1, where another district court judge expressed concerns about the Act's vagueness.

123. There is a real dearth of caselaw addressing constitutional issues which arise under domestic abuse statutes. See *Boyle v. Boyle*, 12 Pa.D & C.3d 767 (1979) (reported in 5 Fam. L. Rep. 2916 (1979)) (upholding the Pennsylvania Protection From Abuse Act. The decision does not review relevant caselaw or due process considerations. As authority, it is a bare-bones decision upholding an act similar to Wyoming's FVPA); *State v. Errington*, 310 N.W.2d 681 (Minn. 1981) (upheld provisions in Minnesota's Domestic Abuse Act which provided for court clerk assistance); *State ex rel Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982) (*en banc*) (upheld Missouri Adult Abuse Act, when challenged as violative

abuse legislation such as the FVPA is constitutionally sound. These acts can be interpreted to permit states to act promptly and intervene in times of genuine emergency to protect the battered victim from further abuse.¹²⁵ The victim's need for such immediate protection should not be subordinated to other less compelling, albeit legitimate, interests which may be encroached upon when an order of protection is issued. The important underlying public policy justifies the relief within domestic child abuse statutes, and carefully drafted statutes can avoid clashing with other constitutional imperatives.

CONCLUSION

Although the FVPA does have deficiencies, it is important legislation. The legislature should act to clarify some of the Act's ambiguities, as well as to fill in the more prominent gaps which tend to make the Act's current provisions nugatory. The Act addresses a problem of great social consequence. Judicious utilization of the FVPA could contribute significantly to a diminished incidence of domestic abuse. By itself, the FVPA cannot remedy completely the problem of domestic violence. The additional cooperative efforts of police and shelters are important adjuncts to the Act. Admittedly, the FVPA alone provides no more than a stop-gap solution intended to aid the victims of domestic abuse. However, the Act is a place to begin eliminating from the legal system the "implicit toleration of wife-beating."¹²⁶

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of due process. This court applied the Supreme Court's three part test from *Mathews v. Eldridge*, 424 U.S. 319 (1976) of presumptive constitutionality).

The three factors to be considered in determining the process due a particular interest are:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

124. One of the more exhaustive analyses of the constitutional issues involved in temporary ex parte proceedings is presented in Taub, *supra* note 55. It reviews the relevant Supreme Court precedent in great detail. See also Comment, *supra* note 57, at 281-87. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657 (1981), also reviews many constitutional issues which arise out of domestic disputes. However, the primary consideration of this article is not the constitutionality of domestic abuse statutes.
125. The FVPA is limited to a maximum period of protection of 6 months. WYO. STAT. § 35-21-106(b) (Supp. 1983). Presumably, by that time the victim has found a way to extricate herself from the abusive home situation or has sought other legal relief. The Act is not intended to provide the victim with perpetual protection and thus, requires her to draw upon other resources.
126. M. Straus, *A Sociological Perspective in the Prevention of Wife Beating* in THE SOCIAL CAUSES OF HUSBAND-WIFE VIOLENCE 226 (M. Straus & G. Hotaling, eds. 1980).