

# JOURNÉES QUÉBÉCOISES

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## La VULNÉRABILITÉ

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### MAKING THE COURTS ACCESSIBLE TO THE MOST VULNERABLE

#### Introduction

Women and children have always been universally recognized as the most vulnerable in any society. Yet, until a certain awaking in the late 20<sup>th</sup> Century, American courts were reluctant to offer protection to this group from the danger which they encounter most often, namely domestic violence.

There were historical reasons - cultural, sociological and religious - for this reluctance. That unfortunate situation could be traced to a vestige of earlier times when the concept of “*a man’s home is his castle*” was also interpreted to mean that any interference into family matters amounted to a violation of a sovereign power to control one’s family, and as governmental intrusion into home life.

This cultural trait was institutionalized in many ways. As late as 1980, Louisiana still maintained the “head and master” provisions of the Civil Code, making the position of women beneath that of men in the castle’s hierarchy. An unfortunate corollary of the head and master doctrine was a measure of tolerance toward violent behavior which would be unacceptable if practiced toward a stranger, or any non-member of the household.

In 1981, The U.S. Supreme Court found that the Louisiana law, inherited from the French Civil Code, was in violation of the equal protection guarantee of the U. S Constitution. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) In connection with a subsequent case rendered by the High Court, Justice Ruth Bader Ginsberg brought up the earlier jurisprudence as it relates to the role of partners in a domestic situation and made reference to the Louisiana case. The justice gave this assessment of the shift in the relationship of courts to the institution of marriage or any such domestic arrangement:

*“We have changed our idea about marriage is the point that I made earlier. Marriage today is not what it was under the common law tradition, under the civil law tradition. Marriage was a relationship of a dominant male to a subordinate female. That ended as a result of the Court’s decision in 1982 when Louisiana’s Head and Master rule was struck down.”*, Oral Arguments, supreme gov. 26 June 2015. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

As the legal and cultural barriers were removed, the courts could exercise a broader function as the protector of women and children in a domestic setting. ( *A National Portrait of Domestic Violence Courts*. U.S. Dept. Of Justice publication, Feb. 2010.) The 1990's saw the implementation of different approaches to the problem. Many states designated courts with a separate docket for domestic violence cases, while others assigned such cases to dedicated judges or judicial officers. ( Court Statistics Project of the National Center for State Courts - NCSC).

Louisiana has taken the third approach which is to integrate special

procedures into the existing structures of the District Courts' civil jurisdiction, Because the distribution and assignment of judges' duties vary with the local rules of the district courts, uniformity has been achieved by the adoption of a civil remedy, mandatory for every judicial district in the State, which procedure enables victims of domestic violence to gain immediate and easily accessible protection.

#### LOUISIANA'S SOLUTION

The legislation is found in LSA-R.S. 46:2131 et seq., and is referred to as the Domestic Abuse Assistance Act. ("the Act"). The Act has been modified and fine-tuned a number of times over the years with the latest amendments adopted in 2015. It provides that all courts which can hear family or juvenile matters have jurisdiction, and that would include all District Courts and such special courts which meet the definition.

#### BEHAVIOR IS COVERED BY THE ACT

The general definition in the Act of the "domestic abuse" encompassed by the legislation reads:

"...physical or sexual abuse and any offense against the person, physical or non-physical, as defined in the Criminal Code of Louisiana...committed by one family member, household member, or dating partner against another."

Expressly excluded from its purview are the crimes of "defamation" and any acts which would be categorized as simply being "negligent". Of course, these

exclusions may not be invoked if those offenses, or quasi-offenses, are extreme, egregious, and designed to harass and torment. The case law gives a number of examples of courts dealing with this vital distinction:

It has been held that family arguments without violence are not covered. *D.M.S. v. I. D.S*, 2014-0364 (La. App. 4 Cir. 3/4/15), 225 So. 3d 1127. The same is true of general harrassment which does not include physical or sexual abuse. *Shipp v. Colahan*, 47,928 (La. App. 2 Cir. 4/10/13) 113 So.3d 454. One court has held that unless an action constitutes an offense against the person as defined by the Louisiana Criminal Code, it is not covered by the Act. *Fontenot v. Newcomer*, 2010-1530 (La. App. 3 Cir. 5/4/11) 63 So. 3d 1149.

To be realistic in its utility, courts have come to understand that the Act should be applied liberally. An early case recognized this in holding that just a “possibility” of abuse could invoke its provisions. *Wise v. Wise*, 02-CA-574 (La. App. 5 Cir. 11/13/02), 833 So.2d 393.

In the *Wise* hearing, the defendant mounted evidence refuting abuse. The court nevertheless issued the requested protective orders and the defendant appealed. The court of appeal said the it could find “no manifest error” in the issuance of the protective orders, and thus upheld the trial judge’s discretionary choice.

In another example, courts have realized that the new world of social media

provides an opportunity for novel forms of abuse. A leading case has recognized that “cyberstalking” can be a form of abuse. The case involved ominous text messages, as well as the posting of embarrassing photographs and negative comments meant to harass. *Shaw v. Young*, 2015-0774 (La. App. 4 Cir. 8/17/16) 199 So. 3d 1180.

## PERSONS COVERED

The class of persons covered by the Act is given its broadest meaning. The category of “Family members” is written to include:

1. Current spouses and former spouses.
2. Parents, including stepparents and foster parents.
3. Children, including stepchildren and foster children.
4. “Household members” means any person living in the same residence as the defendant, and who has been involved in a sexual or intimate relationship with the defendant.
5. “Dating partner” mean any person with whom the victim is having or has had an intimate relationship. (This category was added by later legislation to provide the same remedies for victims who did not reside with an abuser, but had a significant relationship of intimate or romantic features.)

## COMMENCEMENT OF PROCEEDINGS

Like any other civil matter, the proceedings are begun with the filing of a petition. The Louisiana Supreme Court has crafted a standardized form to be used for an application under the Act. Several features in place to make the remedies more accessible to those in need can be mentioned here:

1. Although the form is lengthy and would be daunting to a lay person, designated personnel in the office of the Clerk of Court (or occasionally in the judge's offices) assist in the preparation of the petition. There is no prohibition against the involvement of an attorney at this point, and while some applicants are represented by hired legal counsel, most are not.

2. The petitioner is not required to pre-pay any costs for the filing of the petition, or for the issuance of any orders or other process.

3. The petition must be notarized, but the Clerk of Court, or the judge's office, will supply a notary public and there is no notarial fee.

4. Based on the petition alone, the court is empowered to issue *ex parte* orders for the protection of the petitioner, minor children or other incompetents.

5. The court may, in its discretion, even grant an emergency temporary restraining order outside of regular court hours.

The *ex parte* orders can address any immediate need. An illustrative, but non-exclusive list would include:

1. Injunctive relief from violence or threats of violence, and such specific

temporary restraining orders as prohibitions against a) going to a residence or place of employment; b) alienating community property; c) cancelling utility services; d) doing any act designed to inconvenience or endanger the petitioner.

2. Such positive relief as assigning exclusive use of a family home or vehicle to the petitioner, and

3. Awarding temporary custody of minor children.

#### PROTECTIVE ORDERS - DUE PROCESS

If a temporary restraining order is granted without notice, the matter shall be set within twenty-one days for a rule to show cause why a permanent order should not be issued, at which time the petitioner must prove the allegations of abuse by a preponderance of the evidence. In those cases where no temporary restraining order has been granted, the court shall issue a rule to show cause why the protective order should not be issued, and set the rule for hearing on the earliest day that the business of the court will permit

The normal rules of Civil Procedure are utilized in any protective order hearing, but because the parties are often unrepresented, it is usually the judges who informally conducts the interrogations and presentation of evidence. Of course, the judge must strive to remain the impartial arbitrator. The task of maintaining this role while insuring that both parties - an alleged victim and an

alleged perpetrator - can present their side of the dispute, always presents a challenge.

The Act goes on to provide that, after the reasonable notice and opportunity to be heard has been accorded the defendant, the TRO's may be extended and/or modified by either a consent agreement or by further orders of the court. The protective orders may address a much larger range of issues, including but not limited to such matters as financial support, medical evaluations, counseling needs, etc.

#### PROTECTIVE ORDERS - DURATION

Protective orders usually consist of several distinct directives. The portion of any protective which prohibits abusive or harassing behavior can be for a fixed period of time, or for an indefinite period of time, depending on the language of the order pursuant to a motion by either the plaintiff or the court. Those remaining portions are to be effective for the time fixed in the judgment, not to exceed eighteen (18) months. There are procedures for the extension of all orders.

#### PROTECTIVE ORDERS - ENFORCEMENT

The Act provides that upon violation of a temporary restraining order, a protective order, or a court-approved consent agreement, the court may hold the defendant in contempt of court and punish the defendant by imprisonment in the parish jail for not more than six months or a fine of not more than five hundred

dollars, or both, and may order that all or a part of any fine be forwarded for the support of petitioner and dependents, in the discretion of the court. Punishment may also include loss of visitation rights with minor children. Additionally, a violator may be prosecuted under the Louisiana Criminal Code for violation of a domestic protective order.

## CONCLUSION

In addition to the Domestic Assistance Act, the victims of domestic violence in Louisiana have access to all remedies available to the general public. The Act contains this provision:

“The granting of any relief authorized under this Part shall not preclude any other relief authorized by law.”

Besides civil causes of action envisioned by our Civil Code and other legislation, the Criminal Code can be effective in curtailing domestic violence. However, the full range of state law was not discussed, for in keeping with the theme of this conference, this paper focused on the singular legislation designed to benefit those who may be denied access to the courts in the usual or traditional order of things. Furthermore, it must be noted that many details and peripheral matters were not discussed, for it was the intent of the author to give a brief overview of the scheme adopted by Louisiana.

Finally, It is gratifying to note that the success of the Act is reflected in its wide use, and in the awareness which it has brought to the frequent disenfranchisement of those we identify as the most vulnerable.