

Domestic Violence in North Carolina:

The Pre-Trial No Contact Order & How It Impacts the Alleged Offender and Victim

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LITERATURE REVIEW

"Legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between victim and the abuser." ~ Sarah Krieger

The Chetson Firm, PLLC of Raleigh, North Carolina's website highlights a lot of the basic information in regards to domestic violence in the state of North Carolina. Their website is a reliable place to find answers to questions in regards to the essentials of North Carolina law, as well as options that people may have based on their individual situation. It includes answers to questions such as: How can I avoid a domestic violence charge? What do I do if my husband is arrested for domestic violence? Should I enroll in a deferred prosecution agreement? As well as other important question in regards to North Carolina law. Although the Chetson Firm, PLLC of Raleigh, North Carolina only provides basic information in regards to North Carolina law and domestic violence, it is beneficial to detailing present information.

Sarah Krieger's article entitled *The Dangers of Mediation in Domestic Violence Cases*, in the *Cardozo Women's Law Journal* 8(235) 2002 addresses domestic violence, and alternative dispute resolution; including both the negative and positive aspects of the process. Although Krieger explains that mediation is the most popular avenue for family disputes (as of 2002), she notes that it is not an effective route for domestic violence. Most notably, she argues that the reasoning behind the ineffectiveness is the lack of proper training, unwillingness of partners, lack of screening before mediation, "and the inevitable re-privatization of domestic violence which will set back the legislative progress achieved by the battered women's movement, mediation continues to be an inadequate response to family issues(1)." The author also explains the cycle

of domestic violence cases, the battered women's movement, the legislative response to domestic violence, and the reasons why these specific cases are not decent for mediation.

In addition, Krieger notes various state statutes, and cases; illustrating how mandatory mediation and domestic violence cases have played out in the past. In 2002, Krieger cites North Carolina court's right to waive mandatory mediation based "on the motion of either party or on the court's own motion, the court may waive the mandatory setting Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse or spouse abuse.... North Carolina's policy is more liberal than other states. It allows courts to waive mediation on the basis of good cause. Additionally, it only requires allegations of abuse, as opposed to a finding of fact or even probable cause, to waive mediation (1)."

Diane F. Medley's 1994 article in the St. Thomas Law Review entitled "Separating the Victim from the Abuser: Chapter 94-135 and the Florida Legislature's Most Recent Attempts to Control Domestic Violence", illustrates domestic violence in the state of Florida, and the various pieces of legislature that have come to pass. It is a very thorough article, and the author makes a comparative analysis of different states, and how legislature has impacted domestic violence across the board. Medley's article details the differences, and the similarities of the various states' laws, statutes, and a substantial timeline of domestic violence throughout the course of the last few decades. The key argument that the author makes in the article is central to Chapter 94-135, which became effective July 1st, 1994. The act she is focused on relates to repeat offenders in the state of Florida, and Medley's purpose is to analyze whether it has stopped repeat offenders or not. She concludes her argument by stating, however this act is a step (somewhat in the right direction), and further legislation needs to be created to stop domestic violence.

In a 2006 issue of the Yale Law Journal, Jeannie Suk's article entitled *Criminal Law Comes Home*, centralizes on the protection order in domestic violence cases. The author's objective is to examine how protection orders in domestic violence cases further problems between intimate partners. She states that criminal law's use of the protection order has become a state-imposed de facto divorce, wherein the displacement of "the choice to live like intimate partners exemplifies the changing legal meaning of the home(1)", and that the household is imposed to criminal law. Suk also contests that domestic violence protection orders are transforming the law of burglary. Noting that the protection order has led some courts to equate it with that of burglary; therefore redefining domestic violence as a "home invasion by an intruder(1)," the author suggests that it also serves to "enable the criminalization of presence in the home as a proxy for DV(1)."

Another important aspect of Suk's article regards the difference between criminal and civil protection orders. She states that in criminal courts, the prosecutor issues protection orders which shift the case from the victim to the state. This shift ultimately can cause confusion for the victim by taking away their right from participating in the case. Suk also makes a strong argument upon how the criminal protection order is becoming the basis for punishment for domestic violence cases as opposed to imprisonment, fines, and other penalties.

In the 2014 edition of *The Conflict Resolution Handbook*, Morton Deutsch introduces "Cooperation, Competition, and Conflict". Deutsch's purposes of examining the different avenues for people to handle conflict introduces interpersonal methods. The author also briefly details how couples, families, and other personal issues are affected by emotion, behavior, societal norms, and core beliefs. He explains the importance in cooperation among conflicting family members (most notably, intimate partners), as well as other types of important

relationships. Deutsch then addresses the negative aspects of competition, as he evaluates the importance of cooperation within personal conflicts.

INTRODUCTION

In the state of North Carolina, at the time of arrest for a charge of domestic violence by one individual against a significant other, there is an additional automatic stipulation that the parties involved cannot contact one another until the case is heard in court. Almost all domestic violence crimes result in an automatic no-contact order that will be imposed when the person first appears before a magistrate, and at the first appearance before a District Court judge. That order is a condition of pre-trial detention or release, and requires that the person have no contact with the victim, direct or indirect, by any means, unless the judge specially modifies the order to permit contact for particular reasons. This criminal pre-trial domestic violence no-contact order typically remains in effect until the case is resolved, either through trial, a plea, or a deferral agreement. At that point, the no contact order will be lifted, if the person is found not guilty at trial, or may be modified by the plea agreement, the judgment if the person is found guilty, or the deferred prosecution agreement.¹

The purpose of the following research is to elaborate upon how the automatic pre-trial no contact order can create severe consequences for both of the individuals involved in a domestic violence case. Also, by examining the details of North Carolina's pre-trial no contact order, it is the intention of the following to suggest improvements in the process of a domestic violence

¹ Domestic Violence Cases in NC | Raleigh Criminal Attorney & DWI Lawyer. (n.d.). Retrieved October 16, 2014, from <https://www.chetson.com/2014/03/domestic-violence-cases-in-nc/>

charge, and ultimately manage and resolve such a particular conflict in a manner that does not jeopardize the relationship of the alleged offender and victim before the case is heard in court.

NO-CONTACT ORDERS: Victim & Offender

"What becomes visible is a shift in emphasis from the goal of punishing violence to state control of intimate relationships in the home. This shift is not completely accomplished, but it is underway. Of course, we must continue to pursue remediation of the flawed criminal justice models of the past that simply reified the distinction between private and public."

~ Jeannie Suk

Unlike the civil protection order, which is always sought by a specific petitioner, usually the victim, a criminal protection order does not require a specific petitioner. Civil protection orders require a petitioner as a procedural safeguard, assuring that only interested parties who have made proper showing of need can restrict the rights of another. In contrast, most criminal protection orders do not require that a specific petitioner be named. In some states, the victim's name will appear as the petitioner only because statutory requirements allow members of the criminal justice system to file in the victim's name. The court may even be able to issue, *sua sponte*, a temporary protection order. By removing the victim as the petitioner, the system quells the victim's input, leaving the court without the information it needs to weigh the victim's wishes properly.

"Innocent before proven guilty" is a phrase that Americans believe to be an imperative aspect of our criminal law system. Until a particular case is heard, and the accused is allowed an opportunity to defend themselves, typically there are no stipulations unless the court believes that they are a danger to them self, or someone else. In domestic violence cases, the actual act of violence can range anywhere from a nudge to sending a victim to the emergency room for serious infliction. In North Carolina, the prosecutor and judge determine whether to mandate a no-contact order determined by the accused past history with violence, and the situation that caused the arrest at the present time in question. The prosecutor does ask the victim what they would like to have happen, but after the initial arrest, the case is between the accused and the state; leaving the victim in a very difficult position.

Accordingly, the accused may not violate an order, and the alleged victim may not give the accused permission to violate the order. If the wife is the alleged victim but wishes to have contact with the offender, they still may not make contact if a no contact order exists, even if the wife promises not to tell police. Only a judge may modify the order. It is important that the accused does not violate the order. It is also important that the offender carefully read and consider the order, and honor all of the provisions.

Also, it would seem that some protected parties mistakenly believe that they themselves might be subject to criminal sanction should they allow their partner to live with them. In their perception, they are subject to the order as well. For a person who has substantial reason to fear running afoul of the law but lacks the sophistication to understand that the legal sanction applies only to the defendant, the shadow of the law operates quite differently than for the strategic consumer of the protection order. For the former, the shadow of protection can practically end

the relationship without her consent.² If the victim (the person the accused is not permitted to contact) contacts the offender, the offender may not return the contact. It is crucial for the offender to avoid contact, to not speak to the person, and to not respond to efforts to make contact. In fact, the accused may not send messages through third parties, such as parents, friends, or children, or by email, Facebook, Twitter, or messaging. Indeed, some people have been convicted for making off-hand comments about the case on Facebook because courts have held that the person knew or should have known that the comments would get back to the victim.³

Conversely, the protection order enables a particular mode of criminalization that is an important component of the criminalization of DV. It criminalizes conduct that is not generally criminal - namely presence at home - in order to punish or prevent the target criminal conduct. Presence at home is a proxy for DV. The protection order creates this proxy relation.⁴ The proxy relation implies that matters of the household are criminal, and the court dictates the manner in which the family members that reside in the household conduct themselves. In addition:

- In the world of misdemeanor DV, then, prosecutors routinely use arraignment, bail, and plea bargaining to obtain defendants' agreements to protection orders forcing long-term separation - de facto divorce - from their spouses. As a product of the plea bargain, de facto divorce goes into effect without the benefit of traditional criminal process or proof of the crime. The arrest may have come at the behest of neighbors rather than the victim herself. Or the victim may have called the police to seek specific intervention in that moment. But as a result of the initial arrest and through the operation of mandatory arrest and no-drop prosecution policies, the relationship can be, for practical purposes, dissolved by the force of the criminal law. Recall that this is a world in which the violence of DV has been defined down, and in which a mandatory protocol designed to deal with dangerous batterers applies in every case. De facto divorce is thus by and large

² Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

³ Domestic Violence Cases in NC | Raleigh Criminal Attorney & DWI Lawyer. (n.d.). Retrieved October 16, 2014, from <https://www.chetson.com/2014/03/domestic-violence-cases-in-nc/>

⁴ Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

imposed in misdemeanor cases, which by definition do not involve serious physical injury, and often involve little or no physical injury.⁵

Furthermore, studies have illustrated that due to the court order, relationships have worsened, not by the actual arrest for domestic violence nor the details of the incident, but rather the time period that the alleged offender and the victim are forced to be apart. There are several reasons for the deterioration of the relationship during this time period. For instance, the offender may not go back to the dwelling where both parties live, providing them with no access to their normal life before the offense allegedly occurred.

Essentially, the majority of the problems which the no contact order create are economical, but there are additional factors (i.e. the ability to participate in counseling or mediation to address or resolve issues) that create obstacles that languish the relationship. In addition, the economic factors can be resolved by requesting an officer to accompany the offender to collect their belongings, but this is the only option, and the offender is only given a limited timeframe as well as restricted from doing anything but collecting their personal belongings.

Additionally, a challenge that presents itself is that the other party must agree to let them in and to turn over any property to them. If they refuse (many times they do) the party must go to court to compel the other to turn over clothes, tools, etc. The court has no authority to make either party pay cell phone bills, rent etc. It is outside the Court's statutory authority for this particular type of case (J. Murphy, personal communication, October 18,2014). As Jeannie Suk suggests:

⁵ Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

- The protected party may use the order to their own advantage. Although it might not be typical behavior, because of the criminalization of presence in the house as a proxy for domestic violence cases: This difference between civil and criminal protection orders highlights the distinctive aspect of the criminal order that is of particular importance here: although the order may be used strategically in some circumstances, the issuance of the order does not derive from an autonomous decision of the protected party. She may have made the phone call to the police reporting an incident that gave rise to the order in the first place, but it is also possible that neighbors made the call upon hearing a disturbance. She may report a subsequent violation of the order, but again, the report may be made by a third party. Furthermore, the report of the violation may come directly from the police, who monitor the home and make routine visits to check whether the defendant is present where he should not be. The police surveillance, coupled with the possibility of third-party reports of violations, means that the protected party is not simply the recipient of a strategic tool that shifts power from the abuser to her. Power in the relationship is reallocated to her benefit, but not in a way that necessarily maximizes her autonomous decision-making ability. The criminal protection order regime curtails the autonomy of the protected party even as it may confer on her some powers.⁶

No-contact orders place the victim in a position of not being able to decide what is best for her and her family. The state can prosecute violations of its criminal statutes without violating the victims' rights to choose whom she maintains contact with and who lives in her home. No-contact orders barring defendants from having contact with the victims may keep victims safer, but forcing victims to cut ties to abusive partners may also place them at risk of increased danger as batterers often become more violent during separation. The victim is in a better position to choose, as she knows best what her partner is capable of and what is likely to occur from the separation.

COMPARATIVE ANALYSIS OF U.S. STATES

Unlike the civil protection order, which is always sought by a specific petitioner, usually the victim, a criminal protection order does not require a specific petitioner. Civil protection orders require a petitioner as a procedural safeguard, assuring that only interested parties who

⁶ Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

have made proper showing of need can restrict the rights of another. In contrast, most criminal protection orders do not require that a specific petitioner be named. In some states, the victim's name will appear as the petitioner only because statutory requirements allow members of the criminal justice system to file in the victim's name. The court may even be able to issue, *sua sponte*, a temporary protection order. By removing the victim as the petitioner, the system quells the victim's input, leaving the court without the information it needs to weigh the victim's wishes properly.⁷

By the same token, Colorado, in mandating the issuance of restraining orders against domestic violence defendants, requires that the order be issued immediately, upon first appearance before the court, and continue until final disposition of the action. Similarly, both South Dakota and Utah also mandate a no-contact order whenever bond is set in domestic violence cases. Although these statutes are meant to protect victims from ongoing battering, they also impose upon the victim the same "no contact" condition, causing a split in her family without consideration of, or in opposition to, her wishes.⁸

In contrast, other jurisdictions require the court to evaluate factors such as past conduct by the defendant, drug or alcohol abuse and access to weapons before determining whether a no-contact order is appropriate. The Florida statute requires the State Attorney's office to investigate the defendant's history, including prior arrests for domestic violence, prior arrests for non-domestic charges and prior injunctions for protection filed against the defendant. This provision allows the court to consider properly the safety of the victim when determining pretrial release

⁷ Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

⁸ The Scholar: St. Mary's Law Review on Minority Issues. (2006, January 1). Retrieved November 3, 2014, from <http://0-www.lexisnexis.com.libcat.uncw.edu/hottopics/lnacademic/>

conditions.⁹ New York requires a similar review of the defendant's history by requiring the courts to make a considered determination before directing the defendant to stay away from the home. When a statute requires the court to consider factors such as those above before determining whether a no-contact order should be issued, the opportunity exists for the victim to express her wishes. Of those states that have statutorily instituted criminal protection orders in domestic violence cases, none have expressly required courts to solicit or consider the victim's concerns. Wisconsin, however, does allow the victim to waive the requirement for a temporary restraining order within the first seventy-two hours of the arrest, thereby restricting the court's discretion in imposing conditions upon the defendant's release.¹⁰

The Louisiana legislature has stated that it is aware that family violence often increases when families separate but that: child custody and visitation become the new forum for the continuations of the abuse.... Current laws relative to child custody and visitation are based on an assumption that even divorcing parents are in relatively equal positions of power and that such parent's act in the children's best interest.... These laws often work against the protection of the children and the abused spouse in families with a history of family violence.

In addition, the Model Standards of Practice for Divorce and Family Mediators (hereinafter the "Model") stresses in its introduction, that mediation is not a substitute for legal advice and psychological counseling. It also stresses that not all families are appropriate for mediation. The question remains: if the parties to mediation must still pay for extra services, and if many of them are not even appropriate candidates for mediation, what good is the system?

⁹ Medley, D. (1994, January 1). Separating the Victim from the Abuser: Chapter 94-135 and the Florid Legislature's Most Recent Attempts to Control Domestic Violence. Retrieved September 30, 2014, from <http://0-www.lexisnexis.com.libcat.uncw.edu/hottopics/Inacademic/>

¹⁰ Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

Moreover, the Model states: Experience has, however, established that, as a component of a multifaceted dispute resolution system, family mediation is a valuable option for many families because it can: (1) increase the self-determination of family members; (2) promote the best interests of children; and (3) reduce the economic and emotional costs involved in resolution of family disputes.¹¹

CONCLUSION

"Fools rush in where angels fear to tread" is especially true for interventions involving violence. Solutions that begin without careful diagnosis have the potential to cause additional harm. Because there are many kinds of violence, many kinds of aggressors, and many contexts in which violence can occur, no one conflict resolution intervention is always suitable. In addition, accurate diagnosis of violent conflicts consider the issues, parties' motivations, beliefs, values, and attitudes. It can also identify those affected by direct and structural violence, including secondary victims, such as children or elderly relatives who depend on primary victims for their well-being.

Mandatory state interventions, such as arrest, no-contact orders, prosecution, and reporting, "categorically ignore the battered woman's perspective [and] can themselves be forms of abuse."¹² Mandatory policies remove the battered woman's decision-making abilities and place her wishes and concerns second to those of the state. Respecting and considering the

¹¹Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

¹²Deutsch, M. (2000). *The Handbook of Conflict Resolution Theory and Practice*. San Francisco, Calif.: Jossey-Bass.

victim's right to choose does not necessarily mean not reporting, arresting, or prosecuting each time a battered woman so requests. Clearly, this would place batterers in a position to influence victims to act in the batterers' best interests. However, legislatures, law enforcement agencies, prosecutors, and judges handling domestic abuse cases should develop policies that require victim input and that consider victims' perspectives in the final decision.¹³

In addition, a well-trained mediator can assist the parties in managing their conflict itself, in order to resolve important issues; whereas the state can only merely resolve matters of law itself. A court of law does not intend to provide positive assistance to a family's personal situation, but in cases such as domestic violence, it plays a crucial role in making decision that consist of negative outcomes. Although mediation itself is in its infancy, problems that arise; such as no-contact orders in domestic violence cases prove the need for mediation services in areas where it is not currently available.

Aggressive policies were needed to address the pervasiveness of domestic violence in American society and the institutionalized non-interventionist approach of the criminal justice system. The introduction of mandatory arrest, prosecutorial mandates such as no-drop and participation policies and mandatory no-contact orders heightened the awareness of and response to domestic violence crimes within the justice system. Each of these policies, however, progressively removed the victim from the decision-making process. In doing so, the state's interest in addressing crimes of domestic violence was enhanced while the victim's deliberative and decisional autonomy was overlooked.¹⁴

¹³ Deutsch, M. (2000). *The Handbook of Conflict Resolution Theory and Practice*. San Francisco, Calif.: Jossey-Bass.

¹⁴ Suk, J. (2006). *Criminal Law Comes Home*. *The Yale Law Journal*, 116(2), 1-48.

Lastly, American society strongly needs to further its' develop on domestic violence, by utilizing alternative conflict management and resolution programs in particular cases; most notably, those accused of misdemeanors, without prior violent histories. Providing new offenders with alternatives in order to diagnose parties involved can provide a positive outcome that a court of law cannot provide. For example, if such an assessment of the parties can be gathered prior to a court mandated no-contact order, given the victim's authority; the negative socio-economic results of domestic violence charges may be resolved.

References:

Deutsch, M. (2000). *The Handbook of Conflict Resolution Theory and Practice*. San Francisco, Calif.: Jossey-Bass.

Domestic Violence Cases in NC | Raleigh Criminal Attorney & DWI Lawyer. (n.d.). Retrieved October 16, 2014, from <https://www.chetson.com/2014/03/domestic-violence-cases-in-nc/>

Krieger, S. (2002). The Dangers of Mediation in Domestic Violence Cases. *Cardozo Women's Law Journal*, 8(235).

Medley, D. (1994, January 1). Separating the Victim from the Abuser: Chapter 94-135 and the Florida Legislature's Most Recent Attempts to Control Domestic Violence. Retrieved September 30, 2014, from <http://0-www.lexisnexis.com.libcat.uncw.edu/hottopics/lnacademic/>?

Suk, J. (2006). Criminal Law Comes Home. *The Yale Law Journal*, 116(2), 1-48.

The Scholar: St. Mary's Law Review on Minority Issues. (2006, January 1). Retrieved November 3, 2014, from <http://0-www.lexisnexis.com.libcat.uncw.edu/hottopics/lnacademic/>?