



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 81
Issue 4 *Dickinson Law Review - Volume 81,*
1976-1977

6-1-1977

Relief for Victims of Intra-Family Assault-The Pennsylvania Protection from Abuse Act

Barbara H. Schickling

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Barbara H. Schickling, *Relief for Victims of Intra-Family Assault-The Pennsylvania Protection from Abuse Act*, 81 DICK. L. REV. 815 (1977).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol81/iss4/10>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

NOTES

Relief for Victims of Intra-family Assaults — The Pennsylvania Protection from Abuse Act

Instances of one family member physically assaulting another habitually arise from domestic disputes.¹ Although these disputes are often a prelude to the more serious offenses of aggravated assault and homicide, the frequency and extent of domestic violence is difficult to gauge since it frequently goes unreported.² A significant reason why this violence is not reported is that relief has generally been ineffectual when authorities were contacted by the injured party in the past. Unless the police are called and arrest the offender on the scene, the victim could find that in lieu of terminating the relationship through divorce or legal separation, filing a criminal complaint against the offending party³ is his or her only recourse. In the context of most domestic cases, the consequences of resorting to the criminal justice system for relief make it an undesirable solution.⁴ In situations in which the abused party chooses not

1. There are diverse causes of domestic disputes, such as finances, alcohol, infidelity, family discipline, or more trivial matters. While most of these disputes remain verbal and brief, it is when the response to the stresses of family living become exaggerated that the threatening or physically assaulting of one of the family can result. Parnas, *Police Response to the Domestic Disturbance*, 1967 WISC. L. REV. 914.

2. *Id.* at 959. In Pennsylvania, in 1975, of 798 murders reported, 20.6% occurred intrafamily; one-half of these were murder of spouse by spouse. "Crime in Pennsylvania," UNIF. CRIME REP., 41 (1975). Separate statistics for aggravated assaults between family members are lacking; it should be noted, however, that the 16,135 aggravated assaults reported represented 41.5% of all violent crimes for 1975. *Id.* at 53. Earlier statistics for the United States showed that 40% of reported aggravated assaults occurred in the victim's home; 45% of these were committed by someone the victim knew. The figures reported to the police, however, represented only 65% of the aggravated assaults believed to have occurred. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259 (1971).

3. Various social and economic pressures exist that are unique to the family assault situation. If the husband is charged with a felony, bail could deplete the couple's financial resources. If bail is not possible, the incarceration may aggravate the conditions giving rise to the original violence. Other factors such as potential for loss of employment, length of time required to obtain final disposition, the hesitancy of the police to intervene, and discouragement by those who would prosecute deter use of the criminal justice system for relief in this area. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 263-64 (1971).

4. Obtaining a peace bond is another alternative; its use is not extensive, however, because of doubt as to its constitutionality. PA. STAT. ANN. tit. 19, § 23 (Purdon 1964). Tate v. Short, 401 U.S. 395 (1971), held that to imprison an indigent for his inability to pay traffic fines was a violation of equal protection. It has been suggested that if an indigent's inability

to break up the family, the unavailability of suitable remedial aid has resulted in the victim's having to suffer the abuse silently.

The Pennsylvania legislature, with the enactment of the Protection from Abuse Act,⁵ has created an alternative to this silence, based upon equity principles, that provides access to a civil proceeding for immediate protection from abuse by persons who live in the same household.⁶ The Act makes available various forms of relief, extending from a protective order to "refrain from abuse" to the ultimate relief of ordering the offending party to "vacate" the home for a period up to one year.⁷ Temporary custody and visitation rights with regard to minor children may also be provided under the Act.⁸

Prompted by legal service offices and numerous women's organizations to provide a procedure whereby a victim of domestic violence could obtain immediate relief, the Pennsylvania House of Representatives first introduced legislation directed toward this end in House Bill 1051.⁹ House Bill 1051 proposed the eviction of a cohabitant from a dwelling when there was an "immediate and present danger to an adult or child cohabitant." Opposition was encountered when the bill was considered informally by the House Judiciary Committee because it was designed to protect the "mental" as well as the physical well-being of the cohabitant. Except for this mental cruelty provision, the other basic substantive provisions of this bill were similar to Senate Bill 1243.¹⁰ Senate Bill 1243, the Protection from Abuse Act, won approval in both houses. It was signed October 7, 1976, becoming effective in sixty days.

The Act spells out remedies and procedures for adults and children who are subject to physical "abuse" by persons who reside in the same household. The definition of "abuse" in the Act was derived from the current definitions of simple and aggravated assault found in the Pennsylvania Crimes Code.¹¹ Engaging in the following activities will constitute

to provide a peace bond resulted in his incarceration, this would be a violation of equal protection since no crime is involved in nonpayment. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 265-67 (1971). Cf. *Commonwealth v. Miller*, 452 Pa. 35, 305 A.2d 346 (1973).

5. Act of Oct. 7, 1976, P.L. —, No. 218 (to be codified in PA. STAT. ANN. tit. 35, §§ 10181-90) [hereinafter cited as the Act].

6. Concern for the welfare of abused children is the focus of recent Pennsylvania legislation. PA. STAT. ANN. tit. 11, §§ 2201-24 (Purdon Supp. 1976). The basic remedy is to remove the abused child from the harmful environment. PA. STAT. ANN. tit. 11, § 2208 (Purdon Supp. 1976). Note, *The Pennsylvania Child Protective Services Law*, 81 DICK. L. REV. 823 (1977). While the emphasis has been upon protecting children, there is a developing public awareness that an adult member of the family may also be subject to forms of physical abuse. See generally Gingold, *One of These Days—POW! Right in the Kisser: The Truth About Battered Wives*, 5 Ms. 51, Aug. 1976; Bonner, *Wife Beating on the Rise*, Washington Post, Nov. 19, 1975, at B-1, col. 5; Peterson, *Battered Wife Syndrome*, Washington Post, Sept. 13, 1975, at A-6, col. 4; Cass, *The Hidden Ordeal of Beaten Wives*, Philadelphia Inquirer, June 8, 1975, (Today Magazine), at 22, col. 2.

7. Act of Oct. 7, 1976, P.L. —, No. 218, § 6.

8. *Id.* § 6(a)(4).

9. H.B. 1051, Session of 1975.

10. S.B. 1243, Session of 1975.

11. 18 PA. CONS. STAT. ANN. §§ 2701, 2702 (Purdon 1973).

abuse: attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;¹² placing, by physical menace, another in fear of imminent serious bodily injury;¹³ or sexually abusing minor children as defined pursuant to the Child Protective Services Law.¹⁴

Any person eighteen years of age or older will be considered an "adult" for purposes of the Act. "Family or household members" include spouses, persons living as spouses, parents and children, or other persons related by blood or marriage who reside in the same household.¹⁵ Any reference to "court" in the Act means the court of common pleas, which has jurisdiction over all proceedings under the Act.¹⁶

Proceedings against the offending household member are commenced by filing with the prothonotary a petition setting forth the alleged abuse¹⁷ or by certification to the court of common pleas of an order of a district justice entered under the Act's emergency relief provision.¹⁸ The initiative is upon the abused person to seek relief for himself, or upon a parent or adult household member to seek relief on behalf of minor children.¹⁹ A hearing must be held within ten days of the commencement of the proceedings, at which time the plaintiff must prove the allegations of abuse by a preponderance of the evidence.²⁰ In cases in which an immediate and present danger of abuse is shown, the court is empowered to entertain an *ex parte* proceeding and to issue temporary orders to protect the plaintiff or minor children.²¹

The court may grant relief varying from the issuance of protective orders to the approval of consent agreements. Relief may include:

- (1) Directing the defendant to refrain from abusing the plaintiff or minor children.²²
- (2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant and/or restoring possession to the plaintiff when the residence or household is jointly owned or leased by the parties.²³
- (3) When the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant and/or restoring possession

12. The definition of "attempt" found at *id.*, § 901(a); "intentionally" at *id.*, § 302(b)(1); "knowingly" at *id.*, § 302(b)(2); "recklessly" at *id.*, § 302(b)(3); "bodily injury," "serious bodily injury," and "deadly weapon" at *id.*, § 2301.

13. *Id.* § 2701(a)(3).

14. PA. STAT. ANN. tit. 11, § 2203 (Purdon Supp. 1976).

15. Act of Oct. 7, 1976, P.L. —, No. 218, § 2.

16. *Id.* § 3.

17. *Id.* § 4; PA. R.C.P. 1901(a) (proposed).

18. *Id.* § 8; PA. R.C.P. 1901(b) (proposed).

19. *Id.* § 4.

20. *Id.* § 5(a).

21. *Id.* § 5(b).

22. *Id.* § 6(a)(1).

23. *Id.* § 6(a)(2).

to the plaintiff, or by consent agreement allowing the defendant to provide suitable, alternate housing.²⁴

(4) Awarding temporary custody of and/or establishing temporary visitation rights with regard to minor children.²⁵

Any order or agreement shall not exceed one year²⁶ and may be amended at any time upon petition by either party. Experience with a similar provision in New York and the legislature's intent indicate that a "refrain from abuse" order is to be issued first. The severe "vacate" order will be issued only if the abuse persists or the danger of serious harm or death is great.²⁷

A copy of any order under the Act will be issued to the police department with appropriate jurisdiction.²⁸ This alerts the police that an order exists and that a potential for violations of the law exists within this particular household. The Act, however, does not empower the police to arrest for violations of the court order; therefore, when a protection order or an approved consent agreement is violated, the plaintiff will be required to institute contempt proceedings against the defendant to seek its enforcement.²⁹

The draftsmen of Pennsylvania's legislation drew upon the formulations and experiences of other states, particularly New York. In New York incidents of marital violence are handled exclusively by the family court.³⁰ Although a proceeding may be commenced by a civil petition or criminal complaint, the case will be transferred to the family court if the requisite relationship is found.³¹ By providing exclusive jurisdiction in family court for marital violence, a civil rights question is suggested since in incidents of assault involving two males there is recourse to either a civil or criminal remedy. Pennsylvania circumvents this problem by retaining the alternate criminal remedy for the abused spouse.³²

The New York courts have strictly construed "spouses" and "members of the same family or household" to include "relationships only where there is legal interdependence, either through a solemnized marriage or a recognized common-law union."³³ Under this interpretation, the New York courts do not have jurisdiction over an unmarried couple living together.³⁴ Recognizing that domestic violence in homes in which

24. *Id.* § 6(a)(3).

25. *Id.* § 6(a)(4).

26. *Id.* § 6(b). If the parties are unable to resolve the difficulties that resulted in violence within one year, a more permanent arrangement such as divorce or legal separation is generally indicated.

27. Marjory Fields, Esq., Brooklyn Legal Services, testified before the Pennsylvania Senate's Judiciary Committee in Harrisburg, Pa., May 11, 1976, on the practical operation of relevant portions of New York's Family Court Law. Interview with Ken Neeley, Staff Assistant, Senate Judiciary Committee, in Harrisburg, Pa., February 22, 1977.

28. Act of Oct. 7, 1976, P.L. —, No. 218, § 7.

29. *Id.* § 10.

30. N.Y. FAM. CT. ACT § 812 (29A McKinney 1975).

31. *Id.* § 813.

32. Act of Oct. 7, 1976, P.L. —, No. 218, § 9.

33. *People v. Allen*, 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970).

34. *Potter v. Bennett*, 40 App. Div. 2d 546, 334 N.Y.S.2d 511 (1972).

the couples are not legally married is a reality, the Pennsylvania Act includes persons "living as spouses" in the definition of "family or household members"³⁵ to avoid New York's dilemma.

Other differences between the New York and Pennsylvania statutes relate to who can institute a proceeding, what forms of alternate relief may be granted, and what sanctions may be imposed for violating court orders. Under the New York law, the parties who may petition the family court are not limited to the person suffering the abuse or to a parent or household member on behalf of a minor child. Additional parties who may institute a proceeding include "a duly authorized agency, association, society, or institution, a police officer, or a person on the court's own motion."³⁶ Pennsylvania limits those who can bring an action under the Act in an effort to avoid any criticism that the Act was designed to break up families.³⁷

The New York statute provides for issuance of mutual protective orders when there is some fault on both sides.³⁸ While not specifically indicated in Pennsylvania's Act, such orders could be granted pursuant to judicial discretion because the court is "empowered to grant any protection order or approve any consent agreement to bring about a cessation of abuse"³⁹ Legislation in both states provides for temporary protection orders on showing of good cause;⁴⁰ however, a weekend "emergency relief" provision allowing a district justice authority to grant a temporary "vacate" order⁴¹ is unique to Pennsylvania. Regarding enforcement of court orders, New York provides for a maximum six months' sentence for failure to obey a lawful court order;⁴² Pennsylvania, however, requires that violations of the protection orders under the Act be prosecuted through contempt proceedings.⁴³

Legislation similar to the Pennsylvania Act has also been adopted in Massachusetts.⁴⁴ It provides for a "vacate" order not exceeding ninety days upon the filing for divorce, for nullity of marriage, or for separate support or maintenance. The time of the vacate order can be extended upon further motion if, after hearing, the court finds that the health, safety or welfare of the plaintiff or minor children would be endangered or substantially impaired. Massachusetts' law differs from the Pennsyl-

35. Act of Oct. 7, 1976, P.L. —, No. 218, § 2.

36. N.Y. FAM. CT. ACT § 822 (29A McKinney 1975).

37. Act of Oct. 7, 1976, P.L. —, No. 218, § 4.

38. N.Y. FAM. CT. ACT § 842 (29A McKinney 1975). In addition to refrain from abuse and vacate orders, New York's law provides that one spouse may be ordered "to give proper attention to the care of the home" or "to refrain from acts of commission or omission that tend to make the home not a proper place for the child."

39. Act of Oct. 7, 1976, P.L. —, No. 218, § 6(a).

40. *Id.* § 5(b); N.Y. FAM. CT. ACT § 828 (29A McKinney 1975).

41. Act of Oct. 7, 1976, P.L. —, No. 218, § 8(a).

42. N.Y. FAM. CT. ACT § 846 (29A McKinney 1975).

43. Act of Oct. 7, 1976, P.L. —, No. 218, § 10.

44. MASS. GEN. LAWS ANN. ch., 208, § 34B (West Supp. 1976).

vania Act in dealing only with married persons⁴⁵ and making no distinction between physical and mental abuse.⁴⁶

While the Pennsylvania legislation is seemingly complete in terms of relief, various questions are left unresolved by the Act. For example, in situations involving spouse beating, Pennsylvania's interspousal immunity doctrine⁴⁷ suggests a possible conflict with the Act's requirement that a plaintiff commence civil proceedings and prove abuse by a preponderance of the evidence. Although a specific repealer clause abrogating interspousal immunity is not contained in the Act,⁴⁸ the legislature's intent to repeal any acts or parts of acts that are inconsistent with the Act seems clear.⁴⁹

Although "no order or agreement under the Act can affect title to real property,"⁵⁰ there may also be a question of whether the deprivation of property under a "vacate" order denies the evicted party due process. The Act makes various provisions to assure the defendant his right to notice and an opportunity to be heard.⁵¹ A hearing must be held before a common pleas judge within ten days of the filing of a petition, at which time the plaintiff must prove the allegations in the petition by a preponderance of the evidence.⁵² The defendant has a right to be represented by counsel⁵³ and must be issued a copy of any order.⁵⁴ A temporary order can be issued in an ex parte proceeding only when there is an immediate and present danger of abuse.⁵⁵

45. *Id.*

46. *Id.* Other distinctions include the time limits for hearings with Massachusetts guaranteeing the defendant at least three day's notice of hearing for a protective order while Pennsylvania law provides that within ten days of filing of a petition a hearing will be held. When a temporary order is entered in Massachusetts, the defendant has five days to respond on the question of continuing the temporary order.

47. Pennsylvania law still denies a married woman the right to sue her husband except in a divorce proceeding or in equity to protect and recover her separate property. PA. STAT. ANN. tit. 48, § 111 (Purdon 1965).

48. The interspousal privilege of confidentiality, PA. STAT. ANN. tit. 28, § 316 (Purdon 1958), has been abrogated in hearings on matters of child abuse. PA. STAT. ANN. tit. 11, § 2222 (Purdon Supp. 1976). It is reasonable to assume that the legislature intended that the same rules would prevail in a child abuse hearing under the Act.

49. The Statutory Construction Act of 1972 provides that when there is an irreconcilable conflict, the statute of the latest enactment prevails. 1 PA. CONS. STAT. § 1936 (1975).

50. Act of Oct. 7, 1976, P.L. —, No. 218, § 6(c).

51. The necessity for notice and an opportunity for a fair hearing in order to satisfy due process is well established. *See* North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975); Mitchell v. W.T. Grant, 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Furthermore, several states provide similar relief either through court decisions or by statute during the pendency of divorce proceedings and these have not been challenged. *See, e.g.,* Hardin v. Hardin, 277 Ala. 318, 169 So. 2d 762 (1964); Smith v. Smith, 49 Cal. 2d 716, 122 P.2d 346 (1942); Collier v. Collier, 228 Ga. 38, 183 S.E.2d 769 (1971); S. v. A., 118 N.J. Super. 69, 285 A.2d 588 (Ch. Div. 1972); Roberts v. Roberts, 106 N.J. Super. 108, 254 A.2d 323 (1969); *Ex parte* Cattell, 146 Ohio St. 112, 64 N.E.2d 416 (1945); ILL. ANN. STAT. ch. 40, § 21.4 (Smith-Hurd 1976); IND. CODE ANN. § 31-1-11.5-7 (Burns Supp. 1976).

52. Act of Oct. 7, 1976, P.L. —, No. 218, § 5(a).

53. *Id.*

54. *Id.* § 7.

55. *Id.* §§ 5(b), 8(a).

Any contention that proceedings under the Act are quasi-criminal and that the defendant has therefore a right to trial by jury before being deprived of his property without compensation appear settled by *Commonwealth v. Miller*,⁵⁶ which indicates that when crime preventive measures are taken, there is no conflict with the right to trial by jury.

A significant problem with the Act appears with regard to the "emergency relief" provision,⁵⁷ which empowers a district justice to grant a "vacate" order in an ex parte proceeding when an "immediate and present danger of abuse to plaintiff or minor children" is shown. The order is temporary⁵⁸ and may only be issued on weekends. While the desire to provide twenty-four hour relief to a victim has obvious merit, there is no provision for such relief when a judge is unavailable or on weekdays after court hours.

The effectiveness of the relief provided by the Act will depend upon how effectively court orders will be enforced, if violated. Although police departments should have notice of any such order,⁵⁹ the police are not provided with specific authority to arrest the defendant for a violation. Because the Act provides that any procedure will be in accordance with the Pennsylvania Rules of Civil Procedure,⁶⁰ the plaintiff apparently is required to return to court and institute a contempt proceeding before the defendant will be subject to any punishment for a violation of the order.⁶¹

Problems may be experienced particularly when a sole owner or lessee is evicted from his residence or household. This is the case because the Act does not address the practical considerations of who will make rent or mortgage payments, who is responsible for taxes, and whether the non-lessee possessor has any rights against the landlord to insure that housing code standards are maintained. If the evicted party is the sole owner, he will undoubtedly have incentive to make mortgage payments and pay taxes because he retains title and the property will revert to him at the expiration of the protection order. A lessor, however, would not have the same compulsion to assume these financial obligations.

Despite the suggested problem areas under the new Act, the concept of providing immediate relief from abuse has obvious merit. Many areas,

56. 452 Pa. 35, 305 A.2d 346 (1973).

57. Act of Oct. 7, 1976, P.L. —, No. 218, § 8.

58. This is not to exceed seventy-two hours. *Id.* The fact that a district justice is limited to granting "vacate" orders conflicts with the legislature's apparent intent that this extreme remedy would be rendered by common pleas judges. Restriction of the district justice's authority to the temporary "vacate" order could result in his issuing such an order when it is not fully warranted but when he believes some relief is needed. Furthermore, those persons who would misuse the procedure by filing spurious petitions would no doubt prefer a district justice since he would be unable to provide a moderate form of relief. Because of limitations regarding the time and extent of relief that may be granted, this provision appears to be an unwarranted extension of the district justice's authority into areas which should be reserved for a court of record.

59. Act of Oct. 7, 1976, P.L. —, No. 218, § 7.

60. *Id.* § 9.

61. *Id.* § 10.

nevertheless, remain to be improved. Amendments are needed to restructure the “emergency relief” provision⁶² to deter its misuse, either by empowering the district justice to grant a “refrain from abuse” order and to issue an order anytime the judge is unavailable, rather than only on weekends, or by making some provision that the court would be available on a twenty-four hour basis. Modification of Pennsylvania’s arrest rules to eliminate the need for the abused party to go back into court to institute contempt proceedings when there has been a violation of the protection order⁶³ and to provide adequate guidelines for the court when dealing with the practical considerations of a “vacate” order warrants additional legislative attention.

BARBARA H. SCHICKLING

62. *Id.* § 8.

63. *Id.*