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MONTANA'S NEW DOMESTIC ABUSE STATUTES: A NEW RESPONSE TO AN OLD PROBLEM

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I. INTRODUCTION

In 1984 at least 2,368 women in Montana suffered domestic abuse.¹ Domestic abuse involves a complex cycle of violence.² Traditionally, society treated the problem as a private family matter.³ The reluctance of police officers and prosecutors to invade the private family sphere⁴ resulted from the traditional view which considered women the property of men;⁵ police officers and prosecutors understood neither the problem nor the best way to respond to that problem.⁶ Their lack of response perpetuated the cycle of violence.⁷ Therefore, many states, including Montana, enacted new legislation to provide early intervention in domestic abuse cases.⁸

This article discusses the new domestic abuse act, the historical responses to domestic abuse, and the reasons why those responses usually failed. It also discusses the abolition of the marital rape exception to the sexual intercourse without consent statute and amendments to laws governing temporary restraining orders.

II. THE DOMESTIC ABUSE ACT

A. Introduction

In 1985 the legislature recognized and addressed the problem of domestic abuse by passing a domestic abuse act [the "Act"].

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1. This number represents the number of female victims who stayed in Montana shelters in 1985. Thus, it does not represent the total number of domestic abuse victims for 1985. For the purpose of this article, the authors will refer to victims as women because the vast majority of victims are women. In 1985, Montana shelters only served 12 male victims compared to 2,368 female victims. Montana Coalition Against Domestic Violence, Vol. 4, No. 1 (1986).

2. L. WALKER, *THE BATTERED WOMAN* 55 (1979) [hereinafter cited as WALKER].

3. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 3 (1984) [hereinafter cited as TASK FORCE].

4. *Id.* See also *State v. Oliver*, 70 N.C. 44, 45 (1874), for a discussion of historical reluctance to invade the family sphere.

5. *Bradley v. State*, 2 Miss. (1 Walker) 156 (1824).

6. TASK FORCE, *supra* note 3, at 3-5.

7. *Id.* at 3.

8. See, e.g., FLA. STAT. ANN. § 901.15(6), (7) (West 1985); MASS. ANN. LAWS ch. 209A, § 6 (Law. Co-op. Supp. 1985); OR. REV. STAT. ANN. § 133.055(2), (3) (1984).

The Act defines domestic abuse as a crime,⁹ makes arrest the preferred response to that crime,¹⁰ requires police officers to file a written report when they do not arrest,¹¹ requires police officers to provide victims with a notice of victim's rights,¹² and establishes that an alleged abuser's bail must be personally determined by a judge.¹³ The Act represents a significant departure from the historical response to domestic abuse.

B. *Historical Response*

1. *Shelters and Safe Homes*

During the 1970's, shelters and safe homes began offering emergency housing for victims who leave their homes because of abuse.¹⁴ Shelters and safe homes, when available, provide some essential services to domestic abuse victims; but they have several limitations. Only the larger cities in Montana have shelters; many small towns and rural areas lack the financial base to support a permanent shelter.¹⁵ Further, because of space constraints, victims can stay in shelters only temporarily.¹⁶ The unavailability of housing may force victims to remain in the abusive situation at home. Finally, shelter volunteers only address one player in the domestic abuse cycle—the victim. Shelter volunteers provide valuable counseling for the victim, but they have no contact with the abuser and cannot compel the abuser to attend counseling. The abuser causes domestic abuse, yet he typically receives no instruction on changing his behavior.¹⁷ Unless the abuser receives counseling, the cycle of abuse will probably continue.¹⁸

9. MONT. CODE ANN. § 45-5-206 (1985).

10. MONT. CODE ANN. § 46-6-401(2) (1985).

11. MONT. CODE ANN. § 46-6-421 (1985).

12. MONT. CODE ANN. § 46-6-422 (1985).

13. MONT. CODE ANN. § 46-9-302 (1985).

14. A shelter is a permanent facility that offers emergency housing and other support services, such as crisis counseling and referral to appropriate service providers. MONT. ADMIN. R. 46.5.1101(4) (1982). A safe home is a private family home that offers emergency housing to victims. MONT. ADMIN. R. 46.5.1101(5) (1982). Revenue from marriage license fees provides some of the funding for shelters and safe homes in Montana. MONT. CODE ANN. § 40-2-405(1) (1985).

15. TASK FORCE, *supra* note 3, at 50.

16. For example, victims can only stay at the Missoula YWCA Battered Women's Shelter for three to five days without making special arrangements. Interview with Pam Tuthill, Director, Missoula YWCA Battered Women's Shelter, Dec. 18, 1985.

17. *Id.*

18. Mele, *Major Evidentiary Issues in Prosecutions of Family Abuse Cases*, 11 OHIO N.U.L. REV. 245, 245 (1984).

2. Legislative Response

The Montana Legislature first responded to the problem of domestic abuse in 1967 by amending prior laws and providing that police officers could make warrantless arrests if they had probable cause to believe that a misdemeanor had been committed.¹⁹ Formerly, officers needed an arrest warrant for any misdemeanor offenses not committed in their presence.²⁰ The 1967 legislation demonstrated an intent to authorize warrantless misdemeanor arrests in domestic abuse situations.²¹ The legislative response failed, however, because police officers usually refused to arrest the abuser and required the victim to file charges with the city or county prosecutor if she wanted him prosecuted.²²

3. Police Response

In the past, police departments often gave domestic abuse calls low priority. This response resulted both from a lack of education about the problem and from the feeling that police officers were not the proper persons to respond to domestic abuse.²³ When officers did respond, they served as temporary mediators²⁴ who separated the abuser from the victim and temporarily subdued the abuser's violent behavior.²⁵ A fundamental problem with this approach evolved from the officers' focus on the relationships between family members rather than on the crime committed by the abuser.²⁶ This approach usually resulted in inadequate mediation or the sending of one party away from the home for a temporary period. It failed to communicate the seriousness of the offense to the abuser or prevent future violence.²⁷

4. Prosecutors

When police officers did arrest an abuser, prosecution rarely

19. 1967 Mont. Laws ch. 196, § 1 (amended by Supreme Ct. Ord. 11450-2-3-4 (October 10, 1968)) (codified at REV. CODES MONT. § 95-608 (1947)).

20. REV. CODES MONT. § 11753 (1935).

21. M. ADRIAN & C. MITCHELL, A STUDY OF SPOUSE BATTERING IN MONTANA 97 (1979) [hereinafter cited as SPOUSE BATTERING IN MONTANA].

22. TASK FORCE, *supra* note 3, at 23.

23. UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12-14 (1982) [hereinafter cited as UNDER THE RULE OF THUMB].

24. TASK FORCE, *supra* note 3, at 22-23.

25. *Id.* at 23.

26. *Id.* at 4.

27. *Id.* at 23.

occurred.²⁸ Prosecutors generally refused to prosecute domestic abuse cases, because of a belief that their efforts would be unproductive since a majority of victims succumbed to their abusers' pressure and threats,²⁹ and eventually requested that the charges against their abusers be dropped.³⁰ Prosecutors failed to demonstrate to abusers that they would be punished for their violent behavior; in turn, victims did not learn of their right to be free from abuse, and society continued to view domestic abuse as a private family matter.³¹

The traditional responses to domestic abuse failed. They failed because the legislature, police, and prosecutors did not understand their role in averting abusers' violent behavior. They failed because none of the persons involved in the problem really understood the problem itself.

C. *The Cycle of Abuse: Why Women Stay*

The cycle of abuse describes the dynamics that occur between a victim and an abuser.³² It is important that police and prosecutors understand the complexities of the cycle so that they may effectively address the problem.³³ The cycle has three identifiable phases: the tension-building phase, the acute battering phase, and the loving phase.³⁴ These phases are a major factor in why abuse victims stay in abusive relationships.

1. *The Tension-Building Phase*

Minor battering incidents such as a slap or a shove characterize the tension-building phase. The victim usually attempts to calm the abuser through compliance and nurturance.³⁵ As the minor battering incidents become more acute, however, the victim loses control over the situation and begins to withdraw. The abuser becomes more apprehensive toward the victim's withdrawal; when the tension between the two becomes unbearable, the cycle progresses to phase two.³⁶

28. UNDER THE RULE OF THUMB, *supra* note 23, at 23-34.

29. L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL RESPONSE 19 (1981) [hereinafter cited as LERMAN].

30. TASK FORCE, *supra* note 3, at 28.

31. *Id.* at 4-5.

32. WALKER, *supra* note 2, at 55.

33. *Id.*; TASK FORCE, *supra* note 3, at 5.

34. WALKER, *supra* note 2, at 55.

35. *Id.* at 56.

36. *Id.* at 59.

2. *The Acute Battering Phase*

The acute battering phase is characterized by an "uncontrollable discharge of the tensions that have built up during phase one."³⁷ Both the abuser and victim accept that the battering is out of control. The victim does not usually resist the attack, because she has learned this may further enrage the abuser. She feels psychologically trapped and unable to flee the situation.³⁸

The reasons why an abuser finally ends the attack remain unknown, but when he does, both parties rationalize the incident. The victim minimizes any physical injuries sustained.³⁹ Later the victim may embark on a search for help but may also feel that no one can help, that the abuser is "beyond the grasp of the law."⁴⁰

3. *The Loving Phase*

By the end of phase two, the victim is both lonely and angry. This is the most likely time for her to try to remove herself from the situation,⁴¹ but at this time the abuser, who sincerely regrets his behavior, reacts with kindness, and begs for forgiveness. The victim usually succumbs to feelings of guilt and accepts the abuser's promise not to abuse her again.⁴² This then becomes the most difficult time for the victim to leave and the most likely time for her to request that any pending charges against her abuser be dropped.⁴³

The loving phase has no distinct ending.⁴⁴ It gradually transforms into the tension-building phase. Persons who do not understand the cycle often mistakenly assume that the victim can end the cycle at any time by removing herself from the situation. There are, however, many complex psychological and sociological aspects that perpetuate the cycle of abuse.⁴⁵

4. *Learned Helplessness*

Learned helplessness is an overwhelming belief that a person

37. *Id.*

38. *Id.* at 60, 62.

39. *Id.* at 63.

40. *Id.* at 64.

41. *Id.* at 66.

42. *Id.*

43. *Id.* at 66-67. Some of these reasons include guilt, shame, embarrassment and fear of further violence. If, however, prosecutors recognize the special concerns of domestic abuse victims and are flexible and sensitive in dealing with the complexities of these cases, victims will be more likely to cooperate. See TASK FORCE, *supra* note 3, at 28.

44. WALKER, *supra* note 2, at 69.

45. See J. FLEMING, STOPPING WIFE ABUSE 81-88 (1979).

cannot control what happens to her.⁴⁶ In part, it results from gender-role stereotyping that has taught a woman to be dependent and submissive.⁴⁷ For example, "cultural conditions, marriage laws, economic realities, physical inferiority—all these teach women they have no direct control over the circumstances in their lives."⁴⁸

When society stereotypes a woman into a dependent role and the woman later becomes an abuse victim, her self-esteem dwindles. Repeated batterings diminish her motivation to respond to abuse. Finally, the perception that her response will never generate a positive outcome overcomes the victim.⁴⁹

D. *Analysis of the Domestic Abuse Act*

Society is beginning to recognize all of the complexities of domestic abuse and that the abuse cycle is passed on through the generations.⁵⁰ Recent government studies concerning domestic abuse have revealed that early intervention and increased enforcement of domestic abuse laws reduces repeated episodes of violence.⁵¹ In 1985, the Montana Legislature recognized the importance of early intervention and the need to clarify arrest powers in domestic abuse cases.

1. *The Crime of Domestic Abuse*

By specifically creating the crime of domestic abuse,⁵² the legislature recognized domestic abuse as a serious criminal act rather than a private family dispute. The elements of domestic abuse are similar to the elements of assault.⁵³ A person commits domestic abuse if he purposely or knowingly causes bodily injury or causes reasonable apprehension of bodily injury in a family or household member.⁵⁴ "[F]amily or household member' means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant."⁵⁵ This definition addresses a

46. WALKER, *supra* note 2, at 48.

47. *Id.* at 51.

48. *Id.* at 52.

49. *Id.* at 49-50.

50. TASK FORCE, *supra* note 3, at 2-3.

51. Sherman & Berle, *The Minneapolis Domestic Violence Experiment*, 1 POLICE FOUND. REP. 5-6 (1984); Jolin, *Domestic Violence Legislation: An Impact Assessment*, 11 J. POLICE SCI. & AD. 134 (1983).

52. MONT. CODE ANN. § 45-5-206 (1985).

53. See MONT. CODE ANN. § 45-5-201 (1985) for the elements of assault.

54. MONT. CODE ANN. § 45-5-206 (1985).

55. *Id.*

wide array of relationships including husband/wife, ex-husband/ex-wife, boyfriend/girlfriend, and parent/adult child.⁵⁶

Domestic abuse is "a misdemeanor punishable by a \$500 fine and/or six months in the county jail."⁵⁷ A third conviction of domestic abuse, however, is "a felony punishable by a fine not to exceed \$50,000 and/or five years in the state prison."⁵⁸ The punishment scheme forces the abuser to take responsibility for his actions but gives the abuser two opportunities to address his behavior through counseling before the scheme elevates the offense to a felony.

2. Clarification of Arrest Powers

In the past, police officers were uncertain of their authority to arrest in domestic abuse situations when they did not witness the abuse.⁵⁹ In 1967, the legislature intended to clarify arrest powers⁶⁰ but failed to do so. Thus, the 1985 Act specifically provides for arrest upon probable cause "even though the offense did not take place in the presence of the peace officer."⁶¹

3. Arrest as the Preferred Response

Most significantly, the Act makes arrest the preferred response to domestic abuse cases involving injury or imminent injury to the victim.⁶² This accomplishes a strong statement of public policy to encourage stricter enforcement of the law.

The arrest preference has several impacts. It clearly directs that police officers should arrest when they have probable cause to do so. This makes police officers rather than the victim responsible

56. This definition does not include minor children because they are protected by other sections of the criminal code. See MONT. CODE ANN. §§ 45-5-622, -625 (1985).

57. MONT. CODE ANN. § 45-5-206 (1985).

58. *Id.*

59. SPOUSE BATTERING IN MONTANA, *supra* note 21, at 97.

60. See REV. CODES MONT. § 95-608 (1947), *supra* note 19.

61. MONT. CODE ANN. § 46-6-401(2) (1985). In *Payton v. New York*, 445 U.S. 573, 583-90 (1980), the United States Supreme Court ruled that absent consent or exigent circumstances, police officers must have an arrest warrant and reason to believe the suspect is at home before entering the home to make an arrest. If consent or exigent circumstances do not exist, a warrantless home arrest violates the suspect's privacy interests. Exigent circumstances exist when immediate action is required to prevent dire consequences. See *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). MONT. CODE ANN. § 46-6-401(2) provides: "A summons of a peace officer to a place of residence by a family or household member constitutes an exigent circumstance for making an arrest." If the police are summoned to the house by a third party, exigent circumstances may still exist. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (danger to human life is an exigent circumstance); *Mincey*, 437 U.S. at 392 (the avoidance of further injury is an exigent circumstance).

62. MONT. CODE ANN. § 46-6-401(2) (1985).

for addressing the abuser's criminal conduct.⁶³ Also, when police officers make arrests and fully investigate domestic abuse cases, prosecutors have a greater chance of successfully prosecuting those cases.⁶⁴

4. *Requirement of Written Report*

The Act requires that when police officers respond to domestic abuse calls but do not arrest, they must file a written report with their supervisors detailing their decision.⁶⁵ Traditionally, police officers did not file any report detailing the circumstances of domestic abuse calls.⁶⁶ The written report requirement encourages police officers to make arrests when probable cause exists because their supervisors will review the report to determine if the officer made the correct decision. Furthermore, the written report preserves statistical data, and it may be valuable if police departments become involved in civil litigation.⁶⁷

5. *Notice of Victims' Rights*

The Act requires arresting officers to provide the abuse victim with a notice of her rights.⁶⁸ The notice must, at a minimum, advise the victim of the availability of a shelter and of her right to take legal action such as filing for a temporary restraining order.⁶⁹ The notice of rights provides the victim with important phone numbers⁷⁰ and reinforces her right to be free from abuse.

63. TASK FORCE, *supra* note 3, at 23-24.

64. LERMAN, *supra* note 29, at 119.

65. MONT. CODE ANN. § 46-6-421 (1985).

66. TASK FORCE, *supra* note 3, at 19.

67. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (police violated equal protection clause by providing less protection for domestic abuse victims, resulting in a \$3.2 million damage award). Other damage actions against police involving domestic abuse include: *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (allegation of discrimination by New York City Police against abused spouses is a justiciable cause); *Baker v. City of New York*, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966) (person issued an order of protection is owed a special duty of care); *Benway v. Watertown*, 1 A.D.2d 465, 151 N.Y.S.2d 485 (1956) (police liable for the negligent return of a gun to plaintiff's husband); *Sorichetti v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (1978), *aff'd*, 417 N.Y.S.2d 202 (1979) (denied motion to dismiss claim based on police's alleged negligent failure to arrest or provide protection); *Jones v. Herkimer*, 51 Misc. 2d 130, 272 N.Y.S.2d 925 (1966) (county's liability where police know of husband's violent history is a jury question); *Nearing v. Wearing*, 295 Or. 702, 670 P.2d 137 (1983) (police who knowingly fail to enforce protection orders are potentially liable for resulting harm).

68. MONT. CODE ANN. § 46-6-422 (1985).

69. *Id.*

70. For example, numbers for crisis lines, shelters, and Montana Legal Services Association.

6. Bail Provisions

The Act also addresses bail. A judge must personally determine bail after the abuser is arrested.⁷¹ The crime of domestic abuse may not be placed on a posted schedule of cash bail.⁷² While reasonable bail is a constitutional right,⁷³ an arrested person must be taken before the nearest and most accessible judge without unnecessary delay to have bail determined.⁷⁴ Unnecessary delay occurs when the arrested person can show prejudice or a deliberate attempt by the prosecution to circumvent a speedy appearance. Detaining a person until a judge's normal working hours is not unnecessary delay.⁷⁵

A practical result of requiring a judge to personally determine bail is that the abuser often spends the night in jail. This restriction on bail communicates to the abuser the seriousness of his conduct and results in a "cooling-off" period which, in turn, provides immediate protection for the victim.⁷⁶ Absent such a period, the abuser could immediately return to his victim. A brief detention would only increase his anger and hostility toward the victim.⁷⁷

The Act represents a comprehensive legislative response to encourage early intervention in the cycle of abuse. But the legislature went beyond the passage of the Act. It also amended other laws to address existing problems of domestic abuse cases.

III. ABOLITION OF MARITAL RAPE EXCEPTION

The marital rape exception is a statutory defense to the crime of rape between marital partners. In recent years, society has recognized marital rape as a part of the violent behavior an abuser inflicts upon his victim.⁷⁸ Historically, though, society refused to consider the possibility of rape within the marital relationship, and in Montana the legislature did not define marital rape as a crime.⁷⁹

71. MONT. CODE ANN. § 46-9-302 (1985).

72. *Id.* Some persons contend this is a constitutional violation. There is, however, no constitutional right to have bail determined according to a bail schedule. In fact, setting of bail by a bail schedule may violate due process by failing to consider individual circumstances. *Ackies v. Purdy*, 332 F. Supp. 38, 41 (S.D. Fla. 1970).

73. U.S. CONST. amend. VIII; MONT. CONST. art. II, §§ 21, 22.

74. MONT. CODE ANN. § 46-7-101(2) (1985).

75. See *State v. Plouffe*, ___ Mont. ___, 646 P.2d 533 (1982); *State v. Rodriguez*, ___ Mont. ___, 628 P.2d 280, 284 (1981).

76. TASK FORCE, *supra* note 3, at 105-06.

77. *Id.*

78. As of January 1985, 33 states have amended their statutes to allow prosecution in marital rape situations. Four additional states allow marital rape prosecutions.

79. See MONT. CODE ANN. § 45-5-503 (1983) where the criminal code did not define marital rape as a crime. See also I. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREE-

Some persons still justify the exception, arguing that it promotes reconciliation in the marital relationship, prevents malicious prosecution by angry spouses, and protects an individual's right of privacy.⁸⁰

In *People v. Liberta*,⁸¹ the court found the reasons for preserving the marital rape exception to be based on faulty assumptions. First, a marriage where marital rape occurs may not be worth preserving.⁸² Second, the nature of the crime of rape makes malicious prosecution a minor worry.⁸³ Rape victims generally are reluctant to report the crime.⁸⁴ Finally, the right of privacy does not operate to shield rapists; it protects only consensual acts.⁸⁵ The court also found the marital rape exception unconstitutional because it violated the equal protection guarantee by making a distinction between single women and married women without a compelling state interest for doing so.⁸⁶

Rape violates and degrades, usually causing long-lasting physical and psychological harm to the victim, regardless of the victim's marital status. In *State v. Crisp*,⁸⁷ the court stated that "[p]rostitutes, as well as virgins, and those of all shades in between are entitled to the sanctity of their own bodies."⁸⁸ In 1985, the Montana Legislature abolished the marital rape exception⁸⁹ and recognized that a person, whether married or single, has the right to grant or withhold consent to sexual intercourse.

IV. SELF-HELP TEMPORARY RESTRAINING ORDERS

A. Introduction

In 1981, the Montana Legislature recognized that restraining orders failed to serve the state's substantial interest in aiding

MENTS (1984) for a thorough explanation of the evolution of marriage.

80. Two summaries of the justifications for the exemption are: Freeman, "But If You Can't Rape Your Wife, Who Can You Rape?": *The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1 (1981); Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980).

81. 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

82. *Id.* at ____, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

83. *Id.*

84. The Department of Justice estimates that only 47% of rape victims ever report their rapes. *Billings Gazette*, Dec. 1, 1985, at 7-B.

85. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

86. *Liberta*, 64 N.Y.2d at ____, 474 N.E.2d at 573, 485 N.Y.S.2d at 213. See also *Weishaupt v. Commonwealth*, 227 Va. 389, 315 S.E.2d 847 (1984); *Commonwealth v. Chretien*, 383 Mass. 123, 417 N.E.2d 1203 (1981); *State v. Smith*, 85 N.J. 212, 426 A.2d 38 (1981).

87. 629 S.W.2d 475 (Mo. App. 1981).

88. *Id.* at 478.

89. See MONT. CODE ANN. § 45-5-503 (1985). The Legislature eliminated the words "not his spouse" from this statute, making all sexual intercourse without consent a crime.

spouse abuse victims because they gave victims inadequate protection.⁹⁰ The legislature expanded the availability of temporary restraining orders [hereinafter referred to as TRO's] to allow a spouse abuse victim to obtain a TRO without filing the once-required petition for dissolution of marriage or legal separation.⁹¹ Four years later, unfortunately, TRO's remained inaccessible to many domestic abuse victims and ineffective for those who did obtain them.⁹²

B. *Temporary Restraining Orders Prior to 1985*

The former temporary order statute made temporary restraining orders for physical abuse available only to abused spouses.⁹³ While divorce does not end the abuse, and abuse also occurs between unmarried couples,⁹⁴ divorced or unmarried victims could not petition for a TRO.⁹⁵

The former statute authorized district court judges to issue TRO's.⁹⁶ This posed accessibility problems for victims living in rural areas of Montana: TRO's were available by law but inaccessible in practice.⁹⁷ TRO's could be obtained in rural areas only when the district judge was at the county seat. Although district court judges are more accessible in urban areas, at times, urban victims suffered similarly.⁹⁸

90. H.R. 405, 47th Leg., 1981 Laws of Montana 247. The legislature did not address abuse of other victims.

91. MONT. CODE ANN. § 40-4-106(3) (1981) provided:

A person may seek the relief provided for in subsection (2) of this section without filing a petition under this part for a dissolution of marriage or legal separation by filing a verified petition alleging physical abuse against the petitioner by a spouse and requesting injunctive relief under Title 27, chapter 19, part 3. Any preliminary injunction entered under this subsection must be for a fixed period of time, not to exceed 1 year, and may be modified as provided in Title 27, chapter 19, part 4, and 40-4-208.

In 1985, the code commissioner recodified MONT. CODE ANN. § 40-4-106 as §40-4-121.

92. Interview with Pam Tuthill, *supra* note 16; *Hearings on H.R. 310 Before the House Judiciary Comm.*, 49th Legis. (1985) (statement of Caryl Wickes Borchers, Executive Director, Great Falls Mercy Home and Representative, Montana Coalition Against Domestic Violence) [hereinafter referred to as *Hearings on H.R. 310*].

93. MONT. CODE ANN. § 40-4-106(1), (3) (1983); *see also* MONT. CODE ANN. § 27-19-201(5) (1983).

94. Interview with Klaus Sitte, Montana Legal Services Association, Missoula, Montana (Dec. 19, 1985).

95. The temporary order statute provided the only civil remedy for domestic abuse victims. Thus, divorced or unmarried victims had no civil remedies available to them.

96. MONT. CODE ANN. §§ 3-2-205(2), 3-5-302 (1983).

97. Interview with Pam Tuthill, *supra* note 16. For example, one judicial district covers the counties of Meagher, Wheatland, Golden Valley and Musselshell. MONT. CODE ANN. § 3-5-101 (1985).

98. For an entire month in the summer of 1984, domestic abuse victims in Butte

Additionally, filing a petition for a TRO in district court raised other practical accessibility obstacles: expense and time. The process typically required the services of an attorney, an expense many victims could not afford.⁹⁹ Time posed an obstacle to all victims, regardless of their income level. TRO's are issued ex parte when a judge finds irreparable injury will result to the petitioner.¹⁰⁰ But it may take many days to obtain even an ex parte order in district court. TRO's must be available immediately to be effective.¹⁰¹

Finally, TRO's often failed to provide the victim with any real security. Violation of the civil order could lead only to a civil contempt of court charge.¹⁰² A victim usually had to retain an attorney again to initiate a contempt of court charge. The amount of time and money involved did not make a TRO an effective remedy for an individual in a continuously abusive situation.

C. *The New Self-Help Temporary Restraining Order*

The 1985 Montana Legislature made several significant changes in the law to further increase the availability and effectiveness of domestic abuse TRO's.¹⁰³ The relationship between the victim and the abuser must be that of a "family or household member."¹⁰⁴ "Persons who may request relief . . . include spouses, former spouses, and persons cohabiting¹⁰⁵ or who have cohabited with the other party within 1 year immediately preceding the filing of the petition."¹⁰⁶

lacked access to a district judge; one district judge was on vacation and the other was ill. Butte victims had nowhere to turn for this emergency relief. Telephone interview with Erin Lapham, President, Montana Coalition Against Domestic Violence (April 28, 1986).

99. *Hearings on H.R. 310* (statement of Rep. Steve Waldron, Chief Sponsor), *supra* note 92.

100. MONT. CODE ANN. § 40-4-121(4) (1985).

101. TASK FORCE, *supra* note 3, at 40.

102. MONT. CODE ANN. § 3-1-501(1)(e) (1983).

103. *Hearings on H.R. 310* (statement of Holly Franz, Women's Law Caucus, University of Montana Law School), *supra* note 92.

104. MONT. CODE ANN. § 40-4-121(3)(a) (1985).

105. "Cohabit" is not defined in this section. A definition does appear in the criminal code, MONT. CODE ANN. § 45-2-101(6): "'Cohabit' means to live together under the representation of being married."

106. MONT. CODE ANN. § 40-4-121(3)(b) (1985). This definition of family or household member differs from the definition used for the crime of domestic abuse. *See supra* notes 55 & 56 and accompanying text. As introduced, the domestic abuse temporary restraining order "family or household member" definition read, "persons who may request relief under this subsection include spouses, former spouses, adult persons related by blood or marriage, and persons cohabiting or who have cohabited with the other party within 1 year immediately preceding the filing of the petition." H.R. 310, as introduced. The law as enacted does not include "adult persons related by blood or marriage." Therefore, while parents, grandpar-

Another significant change addresses jurisdiction. District courts, municipal courts and justice courts have concurrent jurisdiction to hear and issue domestic abuse TRO's.¹⁰⁷ Concurrent jurisdiction greatly increases access to this emergency relief. Although one district court judge may serve many counties, every county has at least one justice of the peace.¹⁰⁸ Concurrent jurisdiction does not extend to other actions between the parties. Therefore, when a related action¹⁰⁹ is pending between the parties in district court, the municipal judge or justice of the peace must suspend proceedings on the TRO and certify the pleadings and the TRO to the clerk of the district court.¹¹⁰ The district judge will then decide all the related matters between the two parties.¹¹¹

Finally, the legislature changed the method of enforcing TRO's. Violation of a domestic abuse TRO is a criminal misdemeanor.¹¹² The new temporary order statute increases victims' security because they know the sheriff and the police will enforce TRO's.

ents, siblings, and in-laws cannot petition for a domestic abuse temporary restraining order, a person who purposely or knowingly causes bodily injury or reasonable apprehension of bodily injury to one of these persons has committed the criminal offense of domestic abuse. MONT. CODE ANN. § 45-5-206 (1985).

107. MONT. CODE ANN. § 40-4-123(1) (1985).

108. MONT. CONST. art. VII, § 5.

109. *E.g.*, declaration of invalidity of a marriage, legal separation, dissolution of marriage, or child custody. MONT. CODE ANN. § 40-4-123(2) (1985).

110. MONT. CODE ANN. § 40-4-123(2) (1985). A district judge may gain jurisdiction of a TRO issued by a justice of the peace or municipal judge under two other circumstances: (1) when a party files a notice of appeal, and (2) when a party files a notice of removal. MONT. CODE ANN. § 40-4-124 (1985) authorizes district court review:

(1) An order issued by a municipal court or justice court pursuant to 40-4-121(3) is immediately reviewable by the judge of the district court at chambers upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a municipal court or justice court made pursuant to 40-4-121(3).

(2) Any case in which an order has been issued by a municipal court or justice court pursuant to 40-4-121(3) may be removed to district court upon filing of a notice of removal.

111. Certification to the district court is triggered "on motion" to the municipal judge or justice of the peace. MONT. CODE ANN. § 40-4-123(2) (1985). But the statute is unclear as to which party is responsible for notifying the municipal judge or justice of the peace. The Montana Magistrates Association expressed concern over the absence of a clear duty on the part of either party to notify the municipal or justice court, by motion, that related actions are pending in district court. Interview with Nancy Sabo, Ravalli County Justice of the Peace and President, Montana Magistrates Association (Dec. 23, 1985). If neither party has an affirmative duty to notify the municipal judge or justice of the peace, it is possible the TRO action could proceed in a municipal or justice court while an action for dissolution of marriage is pending between the same two parties in district court.

112. MONT. CODE ANN. § 45-5-626(1) (1985).

D. *Obtaining a Self-Help Temporary Restraining Order*

A victim of domestic abuse may obtain a self-help TRO without providing notice to the abuser.¹¹³ A victim may petition for a TRO in the county where she or the abuser lives or in the county where the physical abuse occurred.¹¹⁴ To obtain a TRO, a victim must complete two forms: an application for preliminary injunction and temporary restraining order (domestic abuse) and an affidavit in support of application for preliminary injunction and temporary restraining order (domestic abuse).¹¹⁵ If a victim cannot pay the court filing fees and the costs of serving the TRO documents, she may request a waiver of fees by completing another form.¹¹⁶

Clerks of the district court, justices of the peace, and municipal court judges must make these forms available at no charge.¹¹⁷ The forms provide that a victim need not disclose her address if she has fled the family residence.¹¹⁸ The victim must provide the court with her current address and phone number when she files her application for a TRO,¹¹⁹ but the court will withhold this information from the abuser unless he shows good cause for obtaining it.¹²⁰

Once a victim obtains the forms, the court may refer her to a shelter, safe home, or crisis center advocate.¹²¹ The advocate, a lay person, helps the victim complete the necessary forms and accompanies her to the judge's initial review of the application and to the show cause hearing.¹²² The TRO forms are fairly explicit. Nevertheless, TRO proceedings may be intimidating to a victim suffering

113. MONT. CODE ANN. § 27-19-315(2) (1985).

114. MONT. CODE ANN. § 40-4-123(3) (1985). This statute should be amended to conform with MONT. CODE ANN. § 40-4-121(3)(a) listing "physical abuse, harm, or bodily injury."

115. These two forms meet the requirement of a "verified petition" specified in MONT. CODE ANN. § 40-4-121(3) (1985).

116. This form is an affidavit of inability to pay filing fees and other costs.

117. MONT. CODE ANN. § 40-4-122 (1985).

118. D. CLARK & M. MORRIS, *THE SELF-HELP TRO IN MONTANA: GETTING A TEMPORARY RESTRAINING ORDER TO PREVENT DOMESTIC ABUSE 1* (unpublished manuscript) (available at Missoula County Courthouse).

119. *Id.*

120. *Id.* This nondisclosure provision is essential for the victim's safety. Many abusers relentlessly track down victims. Some abusers even find victims who have changed their names and moved thousands of miles away. Interview with Klaus Sitte, *supra* note 94.

121. Interviews with Nancy Sabo, *supra* note 111; Pam Tuthill, *supra* note 16. Telephone interviews with John Albrecht, Teton County Justice of the Peace (Jan. 3, 1986); Caryl Wickes Borchers (Dec. 20, 1985), *supra* note 92; Robert Larson, Dawson County Justice of the Peace (Dec. 31, 1985); Linda Taylor, Lincoln County Justice of the Peace (Dec. 31, 1985).

122. Interview with Pam Tuthill, *supra* note 16.

the trauma of domestic abuse.¹²³ Advocates provide the practical and emotional support which victims need to break the cycle of abuse. Advocates also give information on counseling, housing, child care, job training, and legal assistance.¹²⁴

Injunctive relief available includes orders to the abuser to (1) stop the abuse; (2) leave the family home; (3) stay away from the victim's residence, the victim, and any children; (4) refrain from transferring property; and (5) refrain from removing a child from the jurisdiction of the court.¹²⁵ A victim may request "other injunctive relief proper in the circumstances."¹²⁶ The victim must, however, specify the type of relief she desires and describe the facts and circumstances necessitating the relief.¹²⁷ After a victim completes the TRO application forms, the judge reviews the forms and hears the victim's testimony. The statute provides that "[t]he court may issue a temporary restraining order . . . if . . . irreparable injury will result to the moving party . . ."¹²⁸ If the judge issues the TRO, he schedules a show cause hearing to be held within twenty days.¹²⁹ Once the judge signs the TRO, the self-help TRO instructions direct the victim to take the TRO and supporting documents to the sheriff for service on the abuser.¹³⁰

The clerk or judge must mail a copy of the TRO and a copy of the proof of service to "the appropriate law enforcement agencies designated in the order" within twenty-four hours of receiving proof of service of the TRO.¹³¹ The county sheriff's office and the city police department are the appropriate law enforcement agencies because they are responsible for enforcing the TRO. Thus, to ensure the victim's protection through proper enforcement, the judge should designate both the sheriff and the police when he

123. *Id.*

124. *Id.*

125. MONT. CODE ANN. § 40-4-121(2) (1985).

126. *Id.*

127. MONT. CODE ANN. § 40-4-121(1), (2) (1985). Consequently, a victim can request various forms of "other injunctive relief." For example, a victim may request court-ordered counseling for the abuser. This counseling might include drug and alcohol treatment and parenting skills training, as well as counseling for his abusive behavior. Interview with Klaus Sitte, *supra* note 94. The court may refuse to order counseling until the abuser has had an opportunity to respond at the show cause hearing. At the hearing, a victim can make a strong argument that the abuser must attend counseling to break the cycle of abuse and prevent further injury. Mele, *supra* note 18.

128. MONT. CODE ANN. § 40-4-121(4) (1985).

129. *Id.*; MONT. CODE ANN. § 27-19-314 (1985).

130. CLARK & MORRIS, *supra* note 118, at 3. In practice, some justice courts have assumed the responsibility of delivering the documents to the sheriff for service. Telephone interviews with John Albrecht, Robert Larson, and Linda Taylor, *supra* note 121.

131. MONT. CODE ANN. § 40-4-125(1) (1985).

signs the TRO. This designation is essential because the sheriff and the police will only enforce a TRO if it is registered in their records. Peace officers at the scene of an alleged violation must know whether the TRO is currently valid, so they can determine whether to arrest the abuser. The TRO registration statute directs law enforcement agencies to establish procedures for verifying the validity of TRO's, using the existing warrant verification system.¹³²

A person commits the offense of violation of a TRO "if he, with knowledge of the order, purposely or knowingly violates a provision of any order provided for in [Montana Code Annotated] § 40-4-121."¹³³ The sheriff's proof of service establishes the elements of "knowledge of the order" and "knowingly violates . . . any order." Making the violation of a domestic abuse TRO a misdemeanor is consistent with designating domestic abuse a crime.¹³⁴ The TRO more effectively deters abuse only when the abuser knows he will be arrested and prosecuted for a violation.¹³⁵ The TRO itself provides clear notice: "VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER SECTION 45-5-626, MCA."¹³⁶

Just as a victim can petition for a self-help TRO without an attorney, she can also seek enforcement of the TRO without an attorney. The support of the legal system alters the traditional imbalance of power between the victim and the abuser. As a victim acts to gain control of the abusive situation, she begins to abandon her learned helplessness and gain independence.

V. CONCLUSION

Montana's new domestic abuse laws foster a community approach for early intervention in violent relationships. A community approach¹³⁷ coordinates the various agencies intervening with the

132. MONT. CODE ANN. § 40-4-125(2) (1985).

133. MONT. CODE ANN. § 45-5-626 (1985).

134. See MONT. CODE ANN. § 45-5-206 (1985).

135. TASK FORCE, *supra* note 3, at 105.

136. CLARK & MORRIS, *supra* note 118, at 2. The sheriff may also give the abuser oral notice that violation of the order is a crime when he serves the TRO on the abuser. Interview with Nancy Sabo, *supra* note 111.

137. The City of Bellevue, Washington, established a community program to address domestic abuse in 1983. This program coordinates the services of police, prosecutors, judges, probation officers, and counselors. An evaluation of the Bellevue program after one year revealed it reduced the escalation of domestic violence while it protected victims and made abusers accountable for their acts. D. VAN BLARICOM, A COMMUNITY APPROACH TO DOMESTIC VIOLENCE 6 (1984).

Another Montana statute fits well with this community approach. The Crime Victims' Compensation Act of Montana, MONT. CODE ANN. §§ 53-9-101 to -113 (1985), provides that

couple: law enforcement and probation officers, city and county prosecutors, judges,¹³⁸ attorneys, counselors,¹³⁹ and lay advocates. This approach to domestic abuse acknowledges the unacceptability of violence in the home and promotes a system designed to interrupt and end the cycle of abuse.¹⁴⁰

medical or funeral expenses, loss of wages, or other relief may be provided to domestic abuse and other victims if certain criteria are met. The victim must agree to cooperate with prosecution of the offender and may not continue to live with the offender after the crime has been committed due to concerns about collusion and unjust enrichment. Community agencies should know of this program and refer needy victims. To apply, victims may contact the Montana Victims Compensation Program, Crime Victims Unit, Workers Compensation Division, 5 South Last Chance Gulch, Helena, Montana 59601.

138. A judge can order an abuser to have no contact with the victim as a condition of bail or sentencing.

139. Court-ordered counseling is an appropriate sentencing provision. The state has an important interest in preventing and reducing domestic abuse. The state can further this interest by funding counseling for abusers throughout Montana. The Bellevue program's counseling agency teaches abusers they can change their criminal behavior. VAN BLARICOM, *supra* note 137, at 18.

140. VAN BLARICOM, *supra* note 137, at 7.

