



## Quarterly E-Newsletter

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### Case Summaries

The following are summaries of cases involving domestic violence that we hope will be useful to practitioners. If you know of recent cases that you would like to be included in future newsletters please send them to Robin Runge at [runger@staff.abanet.org](mailto:runger@staff.abanet.org).

**Cook v. McGrath**, 2006 WL 2479111 (N.D. Cal. August 28, 2006)

**Holding:** Petitioner Aaron James Cook filed for a writ of habeas corpus after the California Supreme Court affirmed his conviction for domestic violence-related offenses. Despite the habeas court's finding that the pre-*Crawford* trial court had erred in allowing petitioner's child's statements to police into evidence as excited utterances, the Court did not grant the writ since the statements did not have an "actual and prejudicial effect" on the jury.

**Summary:** Petitioner and Glenda Turner had a relationship for several years, which produced two daughters. Petitioner would use or threaten violence against Ms. Turner throughout the relationship. Ms. Turner eventually wished to separate and asked petitioner to move out of their house. Until June 9, 1998, petitioner still lived with Ms. Turner and their daughters. That night, Ms. Turner awoke on the floor. She was numb, bleeding freely and felt her face swelling. Petitioner offered to take her to the hospital, but Ms. Turner declined because she felt he was intoxicated. Petitioner then requested intercourse, to which Ms. Turner did not respond. Petitioner pulled off her clothes and they had intercourse against her will. After petitioner fell asleep, Ms. Turner called 911 and the police arrested petitioner. The police talked to one daughter, Tashika, to console her. Tashika reported that "Daddy had no clothes on" and that "Daddy was stepping on [Ms. Turner's] face."

In 1999, a jury convicted petitioner of inflicting corporal injury, assault, rape, child endangerment, and resisting arrest. Since petitioner was found to have two prior "strike" convictions under Penal Code § 667, the trial court sentenced him to 50-years-to-life plus 14 years. The California Court of Appeal, Sixth Appellate Division affirmed the conviction. The Supreme Court of California denied habeas corpus relief on March 19, 2003. This petition followed.

Citing the US Supreme Court decisions in *Crawford v. Washington* and *Davis v. Washington*, the District Court determined that Tashika's statements to police were testimonial in nature since "there was no emergency in progress" at the time she spoke with police. Her mother had already been taken to the hospital and her father had been arrested, so, despite the trauma of the experience, the exigency had passed. Nevertheless, the habeas court determined that the trial court's error in admitting Tashika's statements was harmless, and denied the petition for habeas corpus relief.

**In re Marriage of Cauley**, 138 Cal.App.4<sup>th</sup> 1100 (6th Dist., April 24, 2006)

**Holding:** Pursuant to California statute, a mutual agreement for spousal support is unenforceable when its enforcement would clearly violate public policy against domestic violence.

**Summary:** Mr. and Mrs. Cauley were married for 18 years when Mr. Cauley filed for divorce in 2002. In 2003, Mr. Cauley requested a temporary restraining order, saying Mrs. Cauley had threatened his life and physically attacked him numerous times over the past year. Mr. and Mrs. Cauley executed a stipulation for judgment in June 2003. The relevant portions provided Mrs. Cauley with "non-modifiable" spousal support of \$5,250 per month. From August 2003 to March 2004, Mrs. Cauley continued to make threats to Mr. Cauley telephonically and in person.

California Family Code §4325 provides that in any proceeding for dissolution of marriage where there is a criminal conviction for an act of domestic violence by one spouse against the other, there is a rebuttable presumption that any award of spousal support to the abusive spouse should not be made. In April 2004, the Court ordered a temporary cessation in spousal support under and a hearing for Mrs. Cauley to rebut the presumption that she was not entitled to receive spousal support.

The Court determined §4325 applied based on public policy grounds. The Court cited the Restatement of Contracts to show an agreement may be unenforceable if the interest in its enforcement is clearly outweighed by public policy. Here, Mr. Cauley's financial sponsorship of his own abuse proved more intolerable to the Court than enforcing the stipulation. However, the Court cautioned that voiding a contract should only occur in cases free from doubt.

**Spencer v. Spencer**, 191 S.W.3d 14 (Ky.App., April 14, 2006)

**Holding:** Despite the "safe harbor" provision of Kentucky's protective order statute, due process considerations prevent protective orders imposing affirmative duties upon defendants who do not have minimum contacts with the

state. However, an order that protects a victim who flees to Kentucky is permissible so long as no affirmative duty is imposed on the defendant.

**Summary:** Mr. and Mrs. Spencer have one son and lived in Oklahoma together. Mrs. Spencer and her son both suffered abuse and intimidation from Mr. Spencer. One weekend, Mr. Spencer flew to Las Vegas to find employment. Mrs. Spencer fled their Oklahoma residence with her son and settled in Kentucky. Mrs. Spencer subsequently requested and received an Emergency Protective Order and custody of her son. Mr. Spencer disputed the proceedings while still in Nevada. Mr. Spencer asserted Kentucky courts lacked jurisdiction over him because he had no minimum contacts with the state.

This was a case of first impression in Kentucky. After reviewing other states' responses to the issue, the Court followed the New Jersey interpretation of a similar act. New Jersey courts balanced the due process rights of defendants with the state's interest in the safety of domestic violence victims in Shah v. Shah, 875 A.2d 931. The court distinguished between a prohibitory order (that prohibited acts of domestic violence) and an affirmative order (that made the defendant take action). In its opinion, the court determined it could issue a prohibitory order against defendants who had no minimum contacts with the state. However, it also determined that issuing an affirmative order would unjustifiably coerce a defendant to take action. The Kentucky court resolved that insofar as the order kept Mr. Spencer from approaching Mrs. Spencer and her son, it could stand. The case was remanded based on these determinations.

**Fox v. Encounters International**,  
2006 WL 952317 (C.A.4 (Md.) April 13, 2006)

**Holding:** The Court held that Defendant, an international marriage broker, breached her fiduciary duty to Ms. Fox, a Ukrainian woman, by withholding information concerning her immigration rights as a battered spouse. The Court further held that Ms. Spivack committed fraud by inducing Ms. Fox not to leave her husband for fear of deportation.

**Note:** As a per curiam opinion, this decision is not binding in the 4<sup>th</sup> Circuit, pursuant to Local Rule 36(c).

**Summary:** In the Ukraine, Ms. Fox registered with Encounters International ("EI") as a potential bride. EI brought Ms. Fox to the United States to marry a client, but the arrangement fizzled. Ms. Spivack, the sole owner of Encounters, induced Ms. Fox to stay and promised to take care of her. Ms. Spivack soon arranged a match between her and Mr. Fox, and the pair was married in November 1998. Two months later, Mr. Fox began mentally abusing Ms. Fox; by May 1999, he abused her physically as well. This abuse continued throughout their marriage and Ms. Fox's pregnancy. When Ms. Fox spoke to Ms. Spivack about the abuse on 3 different occasions, Ms. Spivack minimized her suffering, and advised Ms.

Fox that she would be deported if she left her husband, notwithstanding the fact that EI was governed by the Mail Order Bride Act of 1996, 8 U.S.C. § 1375, which requires international matchmakers to inform recruits about the “battered spouse waiver” (which permits immigrants in abusive marriages to self-petition for legal permanent residency, without sponsorship of their abusive spouse).

Based on EI’s advice, Ms. Fox remained with Mr. Fox. On July 6, 2000, Mr. Fox mentally and physically abused Ms. Fox for 2 hours, which only stopped when Ms. Fox suffered severe chest pain. Ms. Fox was rushed to the hospital, where physicians noted obvious physical injuries indicative of abuse. At their urging, Ms. Fox and her newborn moved into a battered women’s shelter. At the shelter, Ms. Fox learned for the first time about the “battered spouse waiver.” After securing legal permanent residency, she sued EI and Spivack for breach of fiduciary relationship and fraud. The trial court found for Ms. Fox and awarded her \$433,500 in compensatory and punitive damages.

The court found a common-law fiduciary relationship where a person places special confidence on another to act in good faith and with due regard for the interests of the confiding person. Other factors in such a relationship include knowledge of person’s particular vulnerabilities and that the confiding person is in a position of weakness or inferiority to the person who hears the confidences. Ms. Spivack had represented herself to Ms. Fox as a psychologist and an expert in matchmaking. She would always speak Russian to comfort Ms. Fox. She advised Ms. Fox on immigration matters, cultural issues, and relationship counseling. Ms. Spivack had also specifically assured Ms. Fox: “Don’t worry, you are in the right place to be and I’ll take care of you.” These factors all support the finding of a fiduciary relationship. Thus, a reasonable juror could conclude Ms. Fox was led to trust Ms. Spivack’s advice and suggestions.

For actual or constructive fraud, the court required clear and convincing evidence that one has represented a falsehood as truth such that a reasonable person would believe it and with intent that the person will act on the representation. Ms. Spivack knew about the battered spouse waiver at the time Ms. Fox asked for help. However, Ms. Spivack gave Ms. Fox only two options: cope with the abuse, or be deported. Ms. Spivack hoped Ms. Fox would rely on her advice, as she wished to retain the high success rate of Encounters’ matchmaking service. In light of her admitted knowledge of the waiver, Ms. Spivack intentionally withheld information relevant to Fox’s plight.

**Barry v. Barry**, 2006 WL 2773556 (Ohio App. 8 Dist., Sept. 28, 2006)

**Holding:** Wife appealed the divorce court’s judgment awarding custody of the parties’ two minor children to Husband, attorney fees to Husband, Husband 50% interest in Wife’s retirement savings and 100% interest in his own retirement savings, and finding a marital loan taken by the parties from Wife’s father had an outstanding balance of \$38,000 and ordered Wife responsible for \$35,251.08 and

Husband responsible for \$2,748.92. The appellate court, finding an abuse of discretion, reversed and remanded on the issues of the allocation of parental rights and responsibilities, division of marital retirement assets, payment of attorney fees, and allocation of responsibility for marital debt to Wife's father.

**Summary:** On January 9, 2004, Ms. Barry filed a complaint for divorce and a domestic violence petition. An ex parte civil protection order and a temporary restraining order were granted on February 9. On March 16, Mr. Barry filed an answer, a counterclaim, and request for a restraining order, which was granted the same day. On September 26, after a one-day trial in which Wife proceeded pro se, the trial court issued its judgment entry of divorce, including sole legal custody of the couple's two minor children to the husband, and unequal allocation of attorney's fees, retirement assets, and debts.

On appeal, Ms. Barry argued the trial court prevented her from presenting evidence of Mr. Barry's domestic violence. When Ms. Barry questioned her brother and brother-in-law regarding Mr. Barry's violent tendencies, the trial court sustained Mr. Barry's objections. Further, the trial court did not allow the children's therapist to testify.

The appellate court found the trial court had abused its discretion by disallowing Ms. Barry's evidence of Mr. Barry's domestic violence. The Court considered evidence of domestic violence relevant for a determination of custody. Moreover, they held Ms. Barry had a right to present evidence in the context of its effect on the children, saying "We cannot conceive how domestic violence by one spouse against another could not be relevant in a determination of an allocation of parental rights and responsibilities as regarding their children."

The Court further determined the trial court had awarded custody to the father in contravention of a local rule requiring divorcing parents to attend a court-approved seminar before determination of custody. Father failed to attend the course, though the duration of the trial afforded him ample time to do so. The Court ruled the trial court abused its discretion by naming the non-compliant party as the primary parent.

Finally, regarding the financial matters, the appellate court found that the trial court had abused its discretion by making an unequal distribution of assets and debts, without any findings or evidence in the record to support such a disproportionate allocation.

**State of West Virginia v. Mechling,**  
633 S.E.2d 311 (W.Va., June 30, 2006)

**Holding:** Mr. Mechling was convicted of misdemeanor domestic battery entirely on the basis of witness testimony regarding the victim's statements at the scene. The victim (his girlfriend) did not appear at trial. The Appellate Court found

reversible error in admitting the witness testimony in violation of the Confrontation Clause.

**Summary:** On March 20, 2004, Mr. Mechling reportedly struck his girlfriend, Ms. Thorn. Three individuals at the scene testified that Mr. Mechling had struck Ms. Thorn. However, none of the witnesses actually saw Mr. Mechling make physical contact with Ms. Thorn. A neighbor, Mr. Alvarez, observed the scene, but his view was obstructed by a tree. Mr. Alvarez testified that he saw Mr. Mechling "take a swing" at Ms. Thorn, but did not see the nature or result of the battery. Mr. Alvarez tried to approach them, but Mr. Mechling fled. When the police arrived, they interviewed Ms. Thorn about her injuries. Ms. Thorn told them Mr. Mechling struck her and caused two lumps to form on her head. The officers physically verified Ms. Thorn's reported lumps. On the basis of these witnesses' testimony, the trial court convicted Mr. Mechling of misdemeanor domestic battery.

This Court considered the case in light of the US Supreme Court rulings in *Crawford v. Washington*, *Davis v. Washington* and *Hammon v. Indiana*, and determined that the string of West Virginia caselaw regarding the US and WV confrontation clauses had been effectively overruled, requiring a new rule of law for West Virginia.

The Court distilled the *Davis* and *Hammon* decisions into three guidelines: 1) a testimonial statement is a statement made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; 2) a witness' statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness' statement is to establish or prove past events potentially relevant to later criminal prosecution; and 3) a court assessing whether a witness' out-of-court statement is "testimonial" should focus more upon the witness' statement, and less upon any interrogator's questions.

With this reasoning, the Court concluded it was constitutional error to allow the police officers to testify to their conversations with Ms. Thorn, and overturned Mechling's conviction.

However, the court then entered into an extended discussion acknowledging that the new rule of law would have potentially devastating consequences for domestic violence prosecution, and for victims. Citing the *Crawford* and *Davis* courts' references to the equitable doctrine of forfeiture—which would prevent a windfall to defendants who procure the "unavailability" of their accusers by abusive behaviors—the Court encouraged the trial court on remand to consider whether Mechling had forfeited his Confrontation Clause rights by intimidating Ms. Thorn. The Court also encouraged the prosecutor to utilize third-party and hearsay evidence of intimidation, noting that "If a victim is

too scared to testify against the accused, for fear of retribution, the victim will probably also be too scared to testify in any pre-trial forfeiture proceeding.”

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