ABA Commission on Domestic Violence
Justice and Safety for Victims of Domestic Violence

Quarterly E-Newsletter

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NEW LEGAL RESOURCES AND CASE UPDATES

VAWA 2005 Guide for Attorneys

The ABA Commission on Domestic Violence has prepared a brief summary of the legal provisions of VAWA 2005 that impact the provision of legal representation to victims of domestic violence, sexual assault, stalking, dating violence, and trafficking. It is not intended to be a comprehensive analysis of these provisions, but rather a reference tool for attorneys to ensure that they are incorporating VAWA 2005 provisions into their representation of survivors of domestic violence, sexual assault, dating violence, stalking and trafficking. View the attorney's guide by visiting our website www.abanet.org/domviol.

VAWA 2005 Increases Immigrant Crime Victims' Access to Legal Services

Historically, Legal Services Corporation (LSC) funded service providers were not permitted to provide legal services to undocumented aliens. However, VAWA 2005 signed into law by President Bush on January 5, 2006, has explicitly expanded the scope of services that LSC grantees may provide to victims of domestic violence, sexual assault, and trafficking, regardless of the victims' immigration status.

Prior to VAWA 2005 LSC grantees were permitted to provide legal assistance to undocumented victims of domestic violence under a very narrow exception: only when

the violence was perpetrated by a spouse or parent and the assistance was funded wholly with non-LSC funds. (Kennedy Amendment). VAWA 2005 expanded this exception in three ways:

> (1) recipients may use both LSC and non-LSC funds to provide "directly related" legal services to serve aliens (and their children) who have been battered or subjected to extreme cruelty, victims of sexual assault or trafficking, or other crimes as listed in 8 USC §1101(a)(15)(U)(iii);
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> (2) LSC grantees may provide "related legal assistance" to undocumented victims of domestic abuse even if they are not married to, or the child of, their abusers; and,
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> (3) LSC grantees may now provide related legal assistance to new categories of otherwise ineligible aliens.

For more detailed information, please go to: http://www.lsc.gov/pdfs/progltr06-2.pdf

U.S. Supreme Court Hears Cases with Important Ramifications for Victims of Domestic Violence

On March 20, 2006, the U.S. Supreme Court heard oral arguments of two cases involving victims of domestic violence the outcomes of which will significantly impact the prosecution of domestic violence and sexual assault perpetrators.

In *Washington v. Davis*, 154 Wash.2d 291 (2005), a woman called 911 and hung up before speaking to anyone. When the 911 operator called her back, the woman said that someone was jumping on her and stated that Adrian Davis was attacking her. She also stated that he had beaten her with his fists and that he had left. 154 Wash.2d at 296. At trial, the victim did not testify as the prosecution was unable to locate her, and the court permitted the admission of the 911 call over objections from Davis. Id. The jury found Davis guilty of a felony violation of the victim's protective order against him. Id. Davis appealed the trial court decision and the Court of Appeals upheld the conviction rejecting his argument that the 911 call should not have been admitted. *State v. Davis*, 116 Wash. App. 81 (2003). Davis appealed this decision to the Washington State Supreme Court which affirmed the lower courts' decisions that the admission of a 911 call did not violate the defendant's Sixth Amendment right to confrontation under the U.S. Supreme Court's decision in *Crawford v. Washington* 541 U.S. 36 (2004), 111 P.3d 844 (Wash. 2005).

In *Hammon v. Indiana*, two police officers arrived at the Hammons' home in response to a report of a domestic disturbance. When they arrived, they found Mrs. Hammon on the front porch and reported that she looked "somewhat frightened." 829 N.E. 2d 444, 446 (Ind. 2005). After surveying the scene, one of the officers went back outside to the porch and asked Mrs. Hammon for the second time what had happened. In court, this officer testified that Mrs. Hammon told him that she and her husband had been in a physical

fight in which he threw her down, pushed her onto the ground and had punched her in the chest. 829 N.E. 2d at 447. The State charged and convicted Mr. Hammon of domestic battery. Although she was subpoenaed, Mrs. Hammon was not present at trial to testify, and the court agreed to admit the officer's testimony over Mr. Hammon's objection. Id. The Court of Appeals upheld the trial court's admissions of Mrs. Hammon's statements to the officer under the hearsay exception for excited utterances. *Hammon v. State*, 809 N.E. 2d 945, 949 (In. Ct. App. 2004). Upon petition to transfer, the Supreme Court of Indiana upheld the lower courts' decision regarding admission of Mrs. Hammon's statements to the police officer, holding that her statement was not testimonial and was admissible under the Confrontation Clause even without an opportunity to cross examine her.

On October 31, 2005, the U.S. Supreme Court agreed to hear both *Hammon* and *Davis* in tandem to clarify the appropriate application of its previous decision in C*rawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court ruled that a crime witness' sworn statement at a police station could not be admitted against the defendant when the witness was not present in court and was not cross-examined. The *Crawford* Court interpreted the Confrontation Clause of the Sixth Amendment of the U.S. Constitution to require that "testimonial" statements may only be admitted against defendants if the declarant is available in court for cross-examination. However, the Court did not define "testimonial," and agreed to hear *Davis* and *Hammon* to clarify what statements are considered testimonial.

During oral arguments in *Davis* and *Hammon*, the Justices questioned counsel regarding how far the *Crawford* rule should be extended. While most of the Justices seemed skeptical about using victims' unsworn statements against defendants, Justice Ruth Bader Ginsburg showed particular concern for domestic violence victims who told the police about the abuse but then were reluctant to appear in court. "The practical reality" is that many women in these situations are "scared to death" to testify against the person who abused them, Justice Ginsburg said. She suggested that statements made to authorities during "emergencies" should be admissible as an exception to otherwise inadmissible testimonial statements made by witnesses who were not present in court. On the other hand, Justice Antonin Scalia, the author of *Crawford*, firmly advocated for the literal interpretation of the Confrontation Clause and stated that "there are better ways to solve the problem than to design our whole confrontation-clause jurisprudence based on what happens in spousal abuse cases."

Decisions in these cases are expected in June 2006 or July 2006. For a detailed discussion of *Davis*, *Hammon* and *Crawford*, click here to read an article by Professor Alan Raphael from the Loyola University Chicago Law School, which originally appeared in the Supreme Court Preview. This publication, found at www.supremecourtpreview.org, provides expert analysis of the issues and significance of each case slated to be heard by the Supreme Court.

New Resources Available for Attorneys and Advocates Assisting Victims of Sexual Violence

The Center for Law & Public Policy on Sexual Violence, a project of the National Crime Victim Law Institute of Lewis & Clark Law School has produced four great new resources about the legal remedies and needs of sexual violence victims and survivors with the generous support of the Office on Violence Against Women. These manuals can serve as valuable resources for attorneys, advocates, state coalitions and survivors:

- *A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence;*
- *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors;*
- *Tools for Pro Bono Recruitment: A Resource Guide; and*
- *Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions.*

The *Criminal Justice* guide provides an overview of survivor's rights in the criminal justice system within the context of a criminal prosecution, describes how to ensure enforcement of those rights, and explains to survivors how to navigate the criminal justice system. Its companion guide, *Rights and Remedies*, serves as a primer about survivors' civil legal needs, including: safety and protection, identity change, safe housing, employment rights, educational issues, tort litigation, and tribal law issues. The *Pro Bono* and *Confidentiality* guides provide frameworks that states can use to develop their own state specific manuals or programs.

To obtain a copy of these resources, please visit the NCVLI website at http://law.lclark.edu/org/ncvli/clpps.html or contact Jessica Mindlin, NCVLI Senior Staff Attorney at mindlin@lclark.edu or 503-768-6853.

Case Updates

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 see included in future E-Newsletters, please send them to Robin Runge at runger@staff.abanet.org.

Monterroso v. Moran, 37 Cal. App. 4th 732 (2006)

Holding: Upon Ms. Monterroso's appeal, the California Court of Appeal reversed the mutual restraining order that the Superior Court of Los Angeles County entered against Ms. Monterroso and her husband Mr. Moran, ruling that to enter a mutual restraining order under Family Code section 6305 a trial court must make detailed factual findings that both parties acted primarily as aggressors and neither party acted primarily in self-defense. The case was remanded to rule upon the merits of the restraining order application against Mr. Moran.

Summary: Ms. Monterroso and Mr. Moran were married, formerly lived together and have minor children together. They separated in August 2004. At the trial court proceeding, Ms. Monterroso had sought a temporary restraining order against her husband. On her application, she detailed three separate incidents of severe domestic violence which included verbal death threats and emotional/verbal abuse, attempts to

choke and smother Ms. Monterroso, hits, slaps, scratches to Ms. Monterroso's body and face, and threats of self-mutilation by Mr. Moran. At the third incident on January 1, 2005, Ms. Monterroso was able to call the police and Mr. Moran was arrested. Ms. Monterroso obtained an emergency protective order that day.

Both parties appeared for a hearing on the temporary restraining order. Mr. Moran was represented by counsel and Ms. Monterroso was not. Both parties were aided by a Spanish interpreter. The court read Ms. Monterroso's application but did not read Mr. Moran's answer to protect his constitutional right against self-incrimination.

The trial court made no finding of fact but merely asked both parties if the matter could be resolved. Mr. Moran's attorney stated that both parties had agreed to make the restraining order mutual. The court asked Ms. Monterroso if she agreed to a mutual retraining order, she stated that she did and the court entered a mutual restraining order.

The requirements of Section 6305 state a court may not issue a mutual order unless both parties appear, present written proof of abuse and the court makes "detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense." In its discussion, the Court of Appeals stated that Section 6305 is clear and its plain meaning must be respected. The Court further stated that the trial court must make findings of fact to issue a mutual order and that it acted in excess of its jurisdiction.

The Court decided that the principles of estoppel did not bar a direct appeal in this case because it found that Ms. Monterroso did not consent to the mutual order. In its reasoning, the Court stated that because Ms. Monterroso was not represented, did not display any legal sophistication, needed an interpreter and was not told about the requirements or ramifications of a mutual restraining order by the lower court, she could not have consented. Therefore, since she did not agree to the mutual restraining order, the Court stated that she was not estopped from seeking redress on appeal.

In re the Welfare of J.M., 125 P.3d 245 (Wash. Ct. App. 2005)

Holding: Counsel's failure to object to admission of evidence of written psychiatric reports by non-testifying expert witnesses deprived mother of due process right to fair and meaningful hearing and constituted ineffective assistance of counsel. The trial court's decision to terminate mother's parental rights was reversed and the case was remanded.

Summary: The lower court terminated the parental rights of RC to her six year old daughter JM. RC had appointed counsel, however she became distraught prior to the hearing and she did not attend with her attorney. The State called the only witnesses in the case: Ms. Ross, Dept. of Social and Health Services social worker, and Ms. Hoyt, guardian ad litem. In addition, the court admitted exhibits offered by the State which consisted of several written reports by experts which were reviewed and approved by defense counsel.

Ms. Ross stated her department had received nine previous referrals about RC in regards to her other children and three other referrals alleging domestic violence involving RC's previous domestic partner. Ms. Ross testified that RC participated in substance abuse screening and had some criminal activity in her record.

Ms. Ross also testified regarding the observations and opinions expressed in written reports by the psychologist, child mental health specialist, therapist and visitation therapist although none of the authors of those reports were present and Ms. Ross was not involved in the research or development of any of the reports herself. The various health professionals' written reports stated: RC had a personality disorder, JM considered her mom RC to be unreliable, visitation sessions went well only because JM "accommodated" her mother, and that while RC was calm during visitation sessions, she would fly into a rage with the visitation therapist. Defense counsel did not cross-examine Ms. Ross at all, including regarding her testimony about the written reports.

Ms. Hoyt, the guardian ad litem, testified that JM seemed to have a better relationship with her foster mother than RC. Ms. Hoyt also testified about the child mental health specialist's written report that stated that JM wanted one mom instead of two and that JM had shown physical signs of distress, such as bed-wetting, during periods of visitation with RC. There was no cross examination of Ms. Hoyt. The State also introduced written reports of a previous guardian ad litem regarding RC's other children. In the report were apparent discrepancies and incorrect conclusions about the urinalysis tests that RC had taken. However, there was no challenge or explanations offered.

Counsel for defense stated she had no witnesses and that her client disputed all allegations and contentions in the matter. The lower court incorporated all of the written reports and terminated the parental rights of RC in its findings of fact.

On appeal, RC contended that she was denied effective assistance of counsel because competent counsel would have challenged the qualifications of the social worker and the guardian ad litem to offer expert opinions, objected to the experts' written reports as substantive evidence, objected to the admission of the written report written by a previous guardian ad litem and challenged the admission of any criminal history. The State responded that the records of the nontestifying expert witnesses were admissible because they were business records, an exception to the hearsay rule, and also because counsel stipulated to their admissibility.

The Appellate Court ruled that the business record exception did not apply here because the records as issue were not routine clerical notations of the occurrence of objective facts. Rather, the records involved a "high degree of skill of observation, analysis, and professional judgment."

In addition, the Court also stated that while the evidentiary rules allow a testifying expert to discuss materials that he/she relied on to reach his/her expert opinion, in this case, the caseworker and guardian ad litem did not form the expert opinions they gave and that

they were merely the communicators of the expert opinions. Therefore, the evidence was inadmissible.

Finally, the Court stated that the potential termination of parental rights, a significant and constitutionally protected liberty interest, requires a meaningful hearing. At a minimum this requires the opportunity to defend one's position and attack the other side's position. This did not happen in this case. The Court concluded that this hearing was neither meaningful nor fair, that RC was prejudiced by the failure of due process and reversed the lower court's judgment.