

MINNESOTA SUPREME COURT TASK FORCE
FOR GENDER FAIRNESS IN THE COURTS

FINAL REPORT

SEPTEMBER 1989

In Memoriam

SUSANNE C. SEDGWICK

On April 8, 1988, during the course of the Task Force's work, we were deeply saddened by the death of our friend and Task Force Vice Chair Susanne C. Sedgwick.

Judge Sedgwick was a pioneer in the law throughout her career, having been Minnesota's first woman assistant county attorney, first woman lawyer elected to a judicial position, the first woman appointed to the district court, one of the first women appointed to the Minnesota Court of Appeals.

During her life Judge Sedgwick demonstrated a vital and continuing devotion to the welfare of the community through her work with the United Way, as a founding member of the Minnesota Women's Political Caucus, a founding member of the National Association of Women Judges, and participation in organizations throughout the community.

"Some leaders have a way of casting a shadow and those who follow walk in that shadow. But with Sue, we always walked in her sunshine."

The work of the Gender Fairness Task Force was the last work she laid down. This report is dedicated to her memory.

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PREFACE

The work of the Minnesota Task Force for Gender Fairness in the Courts has culminated in this report to Chief Justice Peter S. Popovich. The Task Force was established by Chief Justice Douglas K. Amdahl and the Minnesota Supreme Court in June, 1987. Its work has been funded by the Minnesota Legislature, the loving friends of Judge Susanne Sedgwick, grants from the State Justice Institute and the Minnesota State Bar Foundation, and in-kind contributions.

The mandate of the Task Force has been to explore the extent to which gender bias exists in the Minnesota state court system, to identify and document gender bias where found, and to recommend methods for its elimination.

The thirty members of the Task Force, carefully chosen on the basis of ability, gender, and geographic location, represent the judiciary — sixteen members from all levels of the courts; the bar — eleven members including a law school professor, the state court administrator, and practitioners of family, juvenile, civil and criminal law; and three public members, including a social scientist skilled in data collection. The time, the talent, the expertise, the commitment and the enthusiasm of this incredibly hard-working Task Force could never have been purchased. Nor could the work of even so gifted a task force have been accomplished without the essential contributions of our staff director Mary Grau and members of the staff of the office of the State Court Administrator and the Supreme Court.

The work of the Task Force concerned the judicial system examining itself to determine whether gender unfairly affects the application, interpretation and enforcement of the law. To accomplish this purpose the Task Force, under the guidance of our consultant, Dr. Norma Wikler, gathered a great wealth of information and materials in a number of ways and from a number of sources: six public hearings and four lawyers' meetings around the state, surveys of lawyers and judges, a survey of court employees who spend at least part of their time in the courtroom, written comments from citizens throughout the state, and research projects and studies. All of this data was digested, analyzed, organized and discussed first by the substantive committees of the Task Force and then by the Task Force itself. From this data emerged the findings and recommendations adopted by the Task Force en banc.

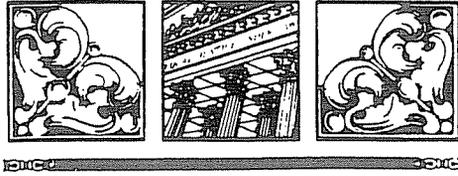
The entire process was educational but of particular note was the impact of the public hearings on the Task Force members. Each member sat for three hours a night at two or three hearings around the state. We heard much evidence from organizations and scholars. But most instructive and sobering was the experience of sitting and listening as ordinary, indeed extraordinary, citizens — women and men — came forward with great difficulty and obvious effort to share their agonizing experiences of how the court system had dealt with them and their perceptions of the quality of justice which had been afforded them. Thus did "some power the giftie gie us to see oursels as others see us" (Robert Burns).

This "gift" we now give back to the Supreme Court and Chief Justice Peter S. Popovich and the people of Minnesota.

We trust that through the continuing leadership of this court and its implementation committee, the increasing sensitivity of the bench and the support of the bar, the problems identified in this report will be addressed and resolved.

A handwritten signature in cursive script that reads "Rosalie E. Wahl". The signature is written in black ink on a white background.

Rosalie E. Wahl
Associate Justice
Minnesota Supreme Court
Chair, Minnesota Task Force for
Gender Fairness in the Courts
June 30, 1989



INTRODUCTION

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias . . . (Learned Hand)

“There are two principles” says Whitehead, “inherent in the very nature of things, the spirit of change, and the spirit of conservation.” If life feels the tug of these opposing tendencies, so also must the law which is to prescribe the rule of life. (Benjamin Cardozo)

The Minnesota Task Force for Gender Fairness in the Courts was created by order of the Minnesota Supreme Court in June, 1987. Thirty judges, lawyers, and public members were appointed to the Task Force by the Chief Justice. The Task Force conducted a two-year internal evaluation of the courts to determine whether gender bias affects the fairness of Minnesota courts.

The Task Force relied on qualitative data gathered at a series of public hearings, meetings with lawyers, written comments, relevant literature, and expert studies commissioned on particular issues. The primary sources of quantitative data were surveys of lawyers, judges and court personnel. The Task Force’s information-gathering methods are set out in more detail in the Appendix.

The cooperation of Minnesota judges, attorneys, and court personnel in completing the Task Force surveys was of enormous help in meeting the Task Force mandate. The return rate for the surveys was considerably greater than those in other states that have engaged in similar efforts. The lawyers’ survey questionnaire was sent to all registered attorneys in the state, numbering about 13,000. A smaller sample was randomly selected, prior to mailing, for statistical analysis. The return rate for the selected sample was 83.5%, with all categories (metropolitan area and Greater Minnesota, male and female) returning at least 82%. One factor in this return rate was the effective cover letter written by then-Chief Justice Douglas K. Amdahl to encourage participation.

The Task Force judges' survey was sent to all 281 judges in the state. The return rate of 93% indicated a significant commitment by the judiciary to this inquiry. The same was true of court employees, whose response rate to their survey was 87%.

Expectations and Surprises

The Task Force investigation of gender issues was a voyage of discovery for all its members and staff. While the question of gender bias proved to be as significant as the Task Force had expected, some other areas the Task Force originally set out to explore proved to be less significant than the experience of other states and the preliminary data had led the Task Force to expect. The Task Force investigation in the areas of sexual assault, sentencing, civil justice, and family law opened unforeseen issues and demonstrated the inaccessibility of data in some areas.

The Civil, Criminal, and Juvenile Justice Committee of the Task Force found, for example, that contrary to expectation, sexual assault in the form of "stranger rape" — assault by a person entirely unknown to the victim — is well-reported in Minnesota, and the victims are treated with some respect in the court system. Rape by a person known in some way to the victim, however, is a major problem as to both reporting and treatment of the victim by the courts. According to the Task Force study, judicial procedures for handling "acquaintance rape" promises to be one of the major issues with which the legal system must learn to deal effectively and with fairness to the victim.

Similarly, while the state's domestic abuse statutes were determined, as expected, to be among the most progressive in the country, investigation revealed a weakness in enforcement of civil Orders for Protection that had not been systematically discussed up to now.

On the other hand, while felony sentencing was suspected to be an area in which gender disparities would become evident, the practices under the state's sentencing guidelines appear to be gender-neutral. And in family law, the area of property division, which has been a major issue in other states, proved to be one in which our courts have treated both female and male parties fairly by regarding the contributions of the spouses to marital property as essentially equal regardless of who has generated income.

In several areas of civil justice, suspected issues proved to be almost impossible to document. Information about gender disparities in civil damage awards, based on undervaluation of women's economic contributions or potential, either is not regularly compiled or is held by inaccessible private sources. Unfair treatment of women who assert personal injury claims pertaining to birth control devices or similar gender-specific injuries, in the form of unnecessary questioning about personal history and practice, could be documented, if at all, only by mounting a case-by-case investigation beyond the resources of this Task Force. And treatment of female litigants with employment discrimination claims is not intensively documented at the state court level because most such claims are heard administratively or in federal court.

What We Heard

A primary concern of this Task Force, confirmed by the data, is the necessity that the legal system treat women and women's concerns as seriously as men and men's concerns

are treated. This issue of equal credibility before the law was raised consistently by witnesses at the public hearings, attorneys speaking at attorney meetings and in written commentary, written submissions from members of the public, and survey responses.

Family law practitioners reported that the failure to fully consider women's socioeconomic circumstances results in inconsistent tendencies to overvalue traditional female roles when granting child custody and then to underestimate the financial needs and employment constraints on women moving from traditional roles to economic independence. Female litigants in divorce and domestic abuse cases testified that they felt the court did not treat their testimony with seriousness or did not value the time and effort required to pursue claims that would have been unnecessary if the men involved in these actions were held to their legal obligations. Lawyers and domestic abuse advocates suggested that the emotional stress of the victim seeking a domestic abuse Order for Protection sometimes appears to be underestimated or dismissed by court personnel and judges.

In the criminal justice context, the data suggested that women's credibility as witnesses in rape cases is harshly questioned if they were even minimally acquainted with the alleged perpetrator. Juvenile females appeared to be taken less seriously as individuals capable of regulating their actions than juvenile males, as evidenced by rates of detention for status offenses.

Both attorneys and judges reported courtroom and chambers incidents and attitudes that, while not necessarily representative of a majority attitude, suggest that women litigants, witnesses, and attorneys face credibility issues that men do not. Disrespectful forms of address, inappropriate comments on dress, marital status or parental roles, and sexual harassment undermine women's credibility and effectiveness.

What We Learned

Lawyers are trained to understand that perception has an enormous effect on our comprehension of the world. People tell the truth about their experience as they perceive it. It is commonplace in the profession that witnesses' versions of events may differ in important details even when they are telling the truth about their observations.

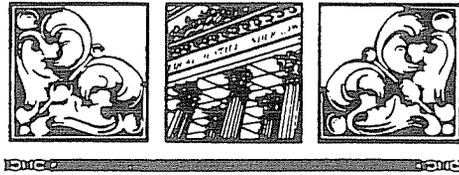
The answers of female and male attorneys and judges to some of the questions on the Task Force surveys indicate a significant difference in the perceptions of women and men as to the treatment of women in the judicial system, the courtroom, and the legal profession. For example, half of the male attorneys but only 9% of the female attorneys said that they had never seen gender bias exhibited in the courtroom. Similarly, in response to a question about attorneys' perceptions of gender bias against women in the Minnesota courts at the present time, 48% of the female attorneys, but only 10% of the male attorneys, said that gender bias in the courts is widespread but subtle and hard to detect, while 63% of the male attorneys, but only 45% of the female attorneys, thought that gender bias exists only with a few individuals in isolated instances.

The failure of men to notice as many incidents of gender bias as women notice may be the result of differing perceptions or the result of women's experience in courtroom and professional transactions. Women are not "observers" of bias in the way that men may be.

Both may be participants in acts of bias, but women are more likely than men to be its unwilling participants.

Irrespective of any factors of perception, the Task Force found much evidence of gender bias that is concrete and difficult and must be addressed in order to insure fairness in our judicial system. This evaluation was undertaken as a commitment to our judiciary. The examples of problems found in this study are offered in the spirit of change, which Benjamin Cardozo recognized as an integral part of the legal landscape. They are also included to help us understand and, as Learned Hand would urge us, to see a little farther.

The following topical sections discuss those gender issues that the Task Force determined to be the most significant at this time in the Minnesota courts. Out of thousands of pages of documentation, preliminary findings, and committee reports, this is the material that has remained the most challenging, conclusive, and compelling.



FAMILY LAW

Introduction

For many Minnesotans, the only contact they will have with the state's judicial system occurs at the time of divorce. The decisions that judges make in family law cases have a profound and lasting impact on the daily lives of the men, women and children who appear before them. In public hearings conducted by the Task Force, family law was the number one area in which concerns were voiced. And in the Task Force survey, a significant proportion of Minnesota lawyers report family law as part of their practice.

The Task Force examined judicial decision-making in the areas of spousal maintenance, property division, child support, custody determinations and access to the courts. A number of different data sources were used to investigate these issues. Both the judges' and attorneys' surveys contained questions on family law issues. Witnesses at each of the Task Force's public hearings spoke about family law topics. Witnesses included representatives from the Minnesota Child Support Commission, the Hennepin County Bar Association Family Law Section Executive Committee, the Minneapolis Legal Aid Society, and programs for displaced homemakers and fathers' rights groups. A number of individual men and women also testified about their personal experiences in the family court system. At the lawyers' meetings, attorneys reported observations about their experiences representing clients in family law matters.

The Task Force also received reports from Professor Kathryn Rettig of the University of Minnesota Department of Family Social Science, from Alice Berquist, an attorney who also has an adjunct appointment at William Mitchell College of Law, and from the Minnesota State Bar Association Committee on Legal Assistance to the Disadvantaged (LAD). Professor Rettig, together with Lois Yellowthunder, is conducting a longitudinal study on the economic consequences of divorce in Minnesota. Preliminary results of the study's first phase, which involved an examination of the court files in 1153 cases in which divorces were granted in Minnesota during 1986, were made available to the Task Force. (This study will be referred to throughout this report as the Rettig study.) Ms. Berquist reviewed the cases decided by the Minnesota Court of Appeals during 1987 in the areas of spousal maintenance, child support and custody. The LAD committee study addressed the availability of legal representation in the family law area for Minnesota's low income citizens.

SPOUSAL MAINTENANCE

Spousal maintenance is ordered much less frequently than most people, including lawyers, generally assume. Its significance as a gender issue is much greater than its incidence might indicate, however, because the questions involved in determining maintenance awards are pointedly representative of issues that affect women in every aspect of family law: credibility, trivialization of their circumstances, and access to justice.

Permanent Maintenance

In 1986, maintenance was awarded in only ten percent of Minnesota divorces, according to preliminary findings of the Rettig study. Permanent maintenance was awarded in only four (less than one-half of one percent) of the cases in the sample. These numbers are lower than the national figures, which indicate that in 1985 approximately fifteen percent of all divorced women were awarded maintenance.¹

Minnesota family law attorneys have concluded that permanent maintenance is so difficult to obtain that they come close to dismissing it as a possibility. A male lawyer from Greater Minnesota wrote on the Task Force lawyers' survey that in his practice "no judge has awarded permanent maintenance in the past six years." A representative from Minnesota Women Lawyers testified in a public hearing that an informal survey of women lawyers conducted several years ago found that permanent maintenance was difficult, if not impossible, to obtain, even in long-term marriages. And a female lawyer noted on the attorneys' survey that "male judges have very little idea how difficult it is for a woman who had previously been a homemaker to get a good job; it's particularly difficult to get permanent maintenance."

Furthermore, when maintenance is awarded in Minnesota, it is rarely high enough to allow the economically dependent spouse, who in the great majority of cases is the woman, to maintain her previous standard of living. As family law practitioners see it:

Older women are left with enough to sustain and not to maintain a lifestyle – many women settle for a smaller amount because they are unable to afford to contest the issue.
(Rochester lawyers' meeting)

It's very hard to get more than nominal amounts in support, even for people who've been out of the labor force for ten years or more. (St. Cloud lawyers' meeting)

"Rehabilitative" Maintenance

The rationale for an award of rehabilitative or short-term maintenance lies in the statute, which provides that one of the factors to be used in determining awards shall be

¹ U.S. Department of Commerce, Bureau of the Census, Current Population Reports: Child Support and Alimony: 1985.

the amount of time required for the economically dependent spouse to become self-supporting.² The evidence presented to the Task Force, however, showed that where rehabilitative maintenance is awarded, the awards are rarely sufficient in either amount or duration to adequately provide for education or training for the economically dependent spouse.

“Rehabilitative” is an unfortunate and limiting label for an award designed to help the economically dependent spouse move forward into a new stage of life. The term carries the connotation that a married woman – and it is usually women who receive it – has been disabled by the marriage and needs rehabilitation to become a productive member of society, a concept that demeans both marriage and women. It also suggests that there is a specific point at which one can be pronounced “rehabilitated,” when in reality, a person may never totally recover economically from spending many years outside the paid labor force. If the purpose of short-term maintenance is to help people become economically independent, the goal is not well served by characterizing it as rehabilitation.

The phrase “short-term maintenance” also is problematic. When this term is used, judges tend to underestimate the period of time required for the financially dependent spouse to adjust and re-educate or become employed.

Statewide, male and female lawyers practicing in the area of family law agree that maintenance awards are inadequate. Of the respondents to the lawyers’ survey, less than half of the men and only 11% of the women think that in awarding rehabilitative or short-term maintenance judges commonly have a realistic understanding of the likelihood of the economically dependent spouse finding employment. Over 60% of the male lawyers, and 90% of the female lawyers, believe that short-term maintenance awards usually are not sufficient to allow for education or training.

One of the most difficult problems is that of women who have been in twenty year marriages, have high school educations, have been homemakers, and whose husbands can earn \$30,000 at the time of divorce. Generally, she will not get more than two to three years of rehabilitative spousal maintenance because she is young (less than 45 years of age) and “employable,” despite the fact that she will be earning minimum wage and can never reach parity for years lost in the labor market. (Female attorney, Twin Cities)

Rehabilitative maintenance is a rather meaningless concept where the husband’s income is not substantial. The wife does not receive an amount sufficient to allow any meaningful rehabilitation. She simply goes out and gets a job, any job. I think its “gender bias” for the system to hide behind this label as though we were giving her some golden opportunity to pursue an education. (Male attorney, Twin Cities)

Another male practitioner described what happened recently to one of his clients:

2 M.S.A. § 518.552, subd. 2(6) (1988).

I had a couple that were married for thirteen years with a yearly marital income of \$54,000 per year. I represented the wife, 41 years old, who was a traditional homemaker the last three years of marriage. Wife was given a property settlement of \$18,000 and rehabilitative maintenance for 2 years at \$300 per month. Husband was given the house and lake cabin and wife was forced to live a much lower standard of living while she attempted to go back to school. Incidentally, the wife never graduated from high school. (Male attorney, Twin Cities)

The perception that maintenance awards are too low and are issued for unrealistically short periods of time is confirmed by data from the Rettig study: researchers found the median amount of maintenance in Minnesota to be only \$250 per month (\$3,000 annually), with a median duration of three years. The Minnesota figures fall below the (1985) national average of \$3,730 per year.³

Judicial Attitudes Toward Maintenance

The Task Force received a substantial amount of testimony suggesting that maintenance awards are inadequate because Minnesota judges do not have an accurate perception of the earning capacity and educational needs of women who have been out of the paid labor force for a significant period of time.

A majority of both male and female lawyers in the state think that, in considering permanent maintenance, judges lack a realistic idea of the likely future earnings of a homemaker who has not worked outside the home for many years; in the lawyers' survey, only 42% of the men and 21% of the women reported that judges always or often understand the economic realities facing these women. A number of witnesses at the public hearings and lawyers' meetings also told the Task Force that judges seem to lack a full understanding of economic reality.

It appears from the judges' survey data, however, that judges may have a better understanding of current economic realities than might be concluded from looking at maintenance awards. In the survey, judges were asked to estimate the likely earning capacity of a 50-year-old homemaker with a high school degree who had been out of the labor force for 25 years. Forty-six percent of the male judges and 39% of the female judges responded that this woman would be able to earn less than \$10,000 per year. Another 43% of the male judges and 61% of the female judges thought her earnings would be between \$10,000 and \$15,000 per year. Only 11% of the male judges, and none of the female judges, thought that the woman was likely to earn more than \$15,000 per year.

3 U.S. Department of Commerce, Bureau of the Census, Child Support and Alimony: 1985.

These responses are generally in line with the most recent available Census Bureau data on earnings. According to the data, in 1987 the median income of all U.S. women between the ages of 45 and 64 was \$11,219 per year. For women between the ages of 55 and 64, the median yearly income dropped to \$7445.⁴

Judges also were asked to answer a hypothetical question about the length of time necessary for retraining of a 42-year-old homemaker with a non-specialized B.A. degree who had never held a job outside the home. Although there were some differences between the responses of male and female judges, a majority of both women and men felt that the period for retraining would have to last four or more years in order to be considered adequate. Fifty-three percent of the male judges and 70% of the female judges were of the opinion that the woman would need at least four years for retraining.

In the hypothetical questions, judges also were asked what additional factors they take into account in determining maintenance. Although most judges mentioned more than one factor in their responses to this question, very few indicated that they would consider all of the statutory factors which must be taken into account in determining maintenance. This tendency to focus on one or two of the statutory maintenance factors underscores a need for more complete findings in dissolution decrees.

The Rettig study indicates that maintenance awards do not reflect the apparent judicial awareness of the economic plight of the long-term or marginally employed homemaker facing a divorce. For example, the median duration of a maintenance order in Minnesota is three years, while a majority of the state's judges think that a minimum of four years is necessary in most cases to allow for adequate training.

One theme recurring in testimony about maintenance was expressed this way by an attorney at the Twin Cities lawyers' meeting:

The concept of how much money it takes to be self-supporting is different for women and men. Women are expected to be self-supporting on less income than men would be.

A female judge wrote to the Task Force to say that in her experience some of her fellow trial court judges

are of the opinion that a 47-year-old woman, who has been a homemaker for over 20 years, should be satisfied if she can, after a period of retraining and on the job experience, obtain a job which requires 40 hours of work on a \$20,000 salary — this perception of what her level of expectation should be seems to obtain even where her husband had been, throughout the marriage, earning upwards of \$100,000 or \$200,000 annually.

⁴ In contrast, the median yearly income for all males was \$17,752, and for men between 45 and 54, it was \$28,685. Female workers with a high school education had a median yearly income of \$8,954. These figures are from the U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Money, Income of Households, Families and Persons in the United States: 1987. Median is the middle value when a set of scores is ranked from high to low.

Several men expressed the opinion that maintenance awards, especially long-term awards, are not fair to the man:

Suppose that after supporting the traditional mother and children for twenty years, the traditional father finds that his wife . . . wants a divorce . . . the father will end up paying alimony for the rest of his life. This doesn't seem to be fair treatment of a person who has supported his wife for twenty years, particularly where spousal maintenance is awarded without fault. (Male attorney, Twin Cities)

These attitudes about maintenance are demonstrated graphically in the cases appealed to the Court of Appeals in 1987 on maintenance issues. Nineteen of the 37 appeals from dissolution orders were by husbands, a substantial number of whom were appealing awards that left the wife, and frequently the wife and minor children, with a lower monthly income than the husband. In a substantial number of the cases appealed by wives, the circumstances were similar. Well over half of the judgments were upheld as within the discretion of the trial court (several were remanded for further findings; only a few were reversed).

Given the broad discretion of the trial court in determining maintenance issues, trial courts must exercise care not to act on unacknowledged assumptions that women need less to live on than men or that maintenance awards are a division of "his" income rather than a sharing of family resources to help the economically dependent spouse through a period of economic adjustment.

This point of view is suggested in the concern articulated at the Duluth lawyers' meeting that "in attempting to treat people equally, there has developed a reluctance to impose long-term obligations on males." A lawyer attending the St. Cloud meeting concurred. She testified that in her experience, the judge's attitude towards maintenance was often, "okay, you want to be equal, so now be equal," resulting in denial of maintenance.

Data presented to the Task Force do not support the perception that the husband suffers at the expense of his former wife when he is ordered to pay maintenance. Quite the contrary appears to be true. Lenore Weitzman did much to raise the nation's consciousness on this point with her finding that in California, the standard of living of the female spouse and children decreased by 73% in the first year after divorce, while that of the male increased by 42%.⁵ Studies in other states also have demonstrated that after divorce, the standard of living of the man increases, while that of the wife and children

5 L. Weitzman, The Divorce Revolution, xii (1985).

declines.⁶ The preliminary data from the Rettig study confirm that this pattern holds in Minnesota as well.

The reluctance to impose long-term financial obligations on men is illustrated by a series of Minnesota Supreme Court cases dealing with spousal maintenance. In Otis v. Otis,⁷ the court affirmed a trial court award that limited maintenance to four years for a woman who was 47 years old and had not worked outside of the home for more than 20 years. At the time of the divorce, the husband's annual salary was over \$120,000.

The Otis decision appeared to conclude that legislative provisions enacted in 1978 intended maintenance for rehabilitative purposes only. The legislature responded by amending the maintenance statute in 1982 to make it clear that this was not the case. However, in 1984, the Court decided two companion cases, Abuzzahab v. Abuzzahab⁸ and McClelland v. McClelland,⁹ which revealed its continuing preference for rehabilitative over permanent maintenance. In these cases the Court reversed trial court awards of permanent maintenance to two homemakers in their mid to late forties, each of whom had been married for over 20 years. In a dissent, two justices pointed out the purpose of the spousal maintenance law:

The legislature intended permanent maintenance to be, not a "lifetime pension" in every case, but an option in those cases where the earning capacity of a long-term homemaker has become permanently diminished during the course of marriage. (Abuzzahab, at 18.)

The legislature responded by adding further language to the statute, making it clear that any questions about the appropriate duration of a maintenance award were to be resolved in favor of permanent maintenance. Finally, in a recent case, Nardini v. Nardini,¹⁰ the Court has adopted this position. In that decision, the Court reversed an order of short-term maintenance for a 50-year-old woman who had been married 30 years and remanded the case to the trial court with instructions to award permanent maintenance. Several witnesses appearing before the Task Force expressed the hope that the Nardini decision would result in an increase in the number of permanent maintenance awards in Minnesota. Only a dramatic change in the courts' approach to all maintenance issues, however, will increase the number, duration, and amount of maintenance awards.

6 McLindon, Separate but Equal: The Economic Disaster of Divorce for Women & Children, 21 Family Law Quarterly (Fall 1987)(New Haven, Connecticut); Wishik, Economics of Divorce, An Exploratory Study, 20 Family Law Quarterly (Spring 1986)(Vermont); Bell, Alimony & the Financially Dependent Spouse in Montgomery County, Maryland, 22 Family Law Quarterly (Fall 1988); McGraw, Stein & Davis, A Case Study in Divorce Law Reform and Its Aftermath, 20 Journal of Family Law 443 (1981-1982)(Ohio); B. Baker, Family Equity at Issue: A Study of the Economic Consequences of Divorce on Women and Children (October 1987) (available from the Alaska Women's Commission).

7 299 N.W.2d 114 (Minn. 1980).

8 359 N.W.2d 12 (Minn. 1984).

9 359 N.W.2d 7 (Minn. 1984).

10 414 N.W.2d 184 (Minn. 1987).

Findings

1. Spousal maintenance is rarely ordered in Minnesota, even in long-term marriages.
2. When maintenance is awarded, it may sustain the economically dependent spouse at a minimal level but generally does not permit that spouse to maintain a previous standard of living.
3. Courts are reluctant to impose long-term maintenance obligations.
4. Maintenance awards are not sufficient in duration or amount to adequately provide for education or training of the economically dependent spouse.

Recommendations

1. Judicial education courses and continuing education courses for lawyers in family law should address spousal maintenance. These courses should contain: 1) information about the economic realities faced by women attempting to reenter the labor market after extended absences, including practical exercises dealing with spousal maintenance determinations; and 2) information emphasizing the need to make specific findings on all of the factors which state law requires courts to consider in awarding maintenance.
2. Courts should discontinue the use of the terms “rehabilitative” or “short-term” and adopt the term “maintenance” as standard usage.

PROPERTY DIVISION

Minnesota law requires that marital property be distributed equitably upon divorce. The Task Force found that, by and large, equitable distribution works well in the state, with courts usually achieving close to a 50-50 division of the marital assets. This differentiates Minnesota from those states in which statutorily mandated "equitable" property distribution has not been interpreted to result in equal distribution.

Problems which have been identified in other states, such as the failure to properly value and apportion pension benefits, do not appear to arise with any frequency in Minnesota. And, although exceptions exist, most Minnesota judges appear to recognize that under state law the efforts of a homemaker spouse must be treated as a contribution to the marital estate.

Judges were asked on the survey whether the husband's income producing contribution entitled him to a larger share of the marital property than a spouse whose primary contribution to the marriage was as a homemaker. Eighty-nine percent of the male judges and 95% of the female judges responded that this should rarely or never happen. Judges were also asked whether, when one spouse has built and run a privately owned business during the marriage, the contribution of the homemaker spouse should be considered a contribution to the business. Ninety percent of the male judges and 100% of the female judges reported that it should be.

The Task Force found that while property is divided equally in most cases, the nature of the property division, with the wife usually receiving the home or non-liquid assets, and the husband receiving the majority of the couple's income-producing assets, can create inequities.

A judge with experience in family law emphasized the difficulties encountered by women who do not have access to liquid assets while the dissolution is pending:

The perception that a man can manage the parties' assets more appropriately during the pendency of a dissolution proceeding works against a preliminary distribution to the woman so that she can, for example, pay her own attorney's fees, invest and manage her own portion of the estate, etc.

Of course, in many cases the wife, as the parent who most often has custody of the children, wants the house and plans to remain there, if she can, until the children are grown. And many couples do not have substantial liquid or income-producing assets. However, where cash or other liquid assets and income-producing property do exist, the Task Force believes that judges should be encouraged to divide it so that each of the parties have some liquid assets, both while the dissolution is pending and after divorce.

Finding

While property is divided equally in most instances, the nature of the property division, with the husband receiving the majority of the liquid and income-producing assets, can create inequities.

Recommendation

Judicial education programs should address the need for judges to divide marital property so that each of the parties retains some liquid and income-producing assets after divorce.

CHILD SUPPORT

Minnesota established statewide guidelines for the payment of child support in 1983.¹¹ Uniform guidelines represent a legislative effort to improve the financial well-being of the children of divorce and to bring increased consistency and fairness to the system.

The guidelines call for the non-custodial parent to pay a percentage of net monthly income as support, with the percentage increasing as the payor's income and the number of children to be supported increases. Payors with net monthly incomes over \$4,000 pay no more support than those at the \$4,000 level unless, as rarely happens, the court justifies a higher award.

Although there is general agreement that use of the guidelines has resulted in more consistent awards, it is clear that the goal of improving the financial well-being of children has not yet been reached. The Task Force found compelling evidence that custodial parents in Minnesota, who are most often women, and their children, often face a bleak financial future after divorce.¹²

The Child Support Guidelines

The Task Force found that the payment levels established by the guidelines are not high enough to provide adequately for the support of children. Testimony presented to the Task Force by Nancy Jones, an assistant Hennepin County attorney and staff attorney to the State Child Support Commission, indicated that Minnesota's guidelines are significantly lower at both the low and high end of the payor's income range than the guidelines of other states. Ms. Jones also testified that under the Minnesota guidelines, the percentage of the non-custodial parent's monthly income that is paid in support is far less than the percentage of income that parent would have been expending on the children if the family had remained intact.

The inadequacy of the dollar amounts of the guidelines is aggravated by the fact that in some cases Minnesota judges are not even ordering support at guideline levels. Ms. Jones testified that a 1985 study performed by the State Child Support Commission in conjunction with the office of Senate Counsel found that, while most judges issued support

11 See Minn. Stat. § 518.551 (1988). The 1983 statute was based on guidelines that had been developed several years earlier for use in cases where the custodial parent received Aid to Families with Dependent Children.

12 Women received sole physical custody of the children in 81% of the divorces analyzed in the Rettig study.

at the guidelines amount, the most common deviations were downward. The preliminary findings of the Rettig study confirm this.¹³

Families with comparatively high pre-divorce incomes appear to be the most severely affected by downward deviations from the guidelines. The Rettig study researchers identified a pattern in which the extent of the downward deviation increased as the payor's income level increased. They found, for example, that where the payor's net monthly income was \$4,001 or above, the average deviation downward from the guidelines was \$434 per month. Where the payor's income was between \$3,001 and \$4,000, the downward deviation was \$145. By way of comparison, where the payor's net monthly income was between \$1,500 and \$2,000, the average downward deviation was \$22.¹⁴

A number of witnesses at the public hearings and lawyers' meetings, and in written comments submitted to the Task Force, attested to the inadequacy of child support orders. A male family law practitioner commented:

judges and referees have a tendency to blindly follow the guidelines . . . the result is that the mother gets less child support than is appropriate and the burden is much less on the father who is able to pay. (Male attorney, Twin Cities)

A prosecutor from southeastern Minnesota said at the Rochester lawyers' meeting that in four years of prosecuting child support cases she estimated that downward departures occurred in approximately one in every five cases; she had never seen a judge deviate upward. A custodial mother of two children told the Task Force that she had received no child support for seven years, and then received an order of \$275 per month when the guidelines called for \$700. She said that her ex-husband has a higher monthly income than she and the two children combined.

A family law practitioner testified that one of the reasons for low child support awards was that judges too often address the problem from the non-custodial parent's point of view. They look primarily at what they think the non-custodial father can pay, regardless of the needs of the custodial mother and children. A family court judge in the metropolitan area told the Task Force that in her experience

these gender-based stereotypes influence child support awards and skew them unfairly against custodial parents;

a) a working man needs a certain basic level of income in order to provide clothing, a car, etc., commensurate with his position in the work force; and

¹³ The Rettig study determined that the median child support award in Minnesota for 1986 was \$300 per month; the median number of children in the sample was two. This represented an average overall discrepancy downward from the guidelines of \$15 per month. Eighty-two cases in the sample specifically mentioned deviation from the guidelines in the court records; of these, 17 cases involved an upward deviation and 65 cases involved downward deviations. In those cases where the amount of child support was a contested issue ultimately resolved by the judge, the median child support award was \$317; this represented an average deviation downward from the guidelines for this population of \$158 per month.

¹⁴ The sole departure from this pattern occurred in cases where the payor's net monthly income was between \$2,001 and \$3,000; for these cases there was an average deviation upward of \$4.

b) a man is not handy in the kitchen, therefore he needs between \$200 and \$300 a month for food for himself alone; on the other hand, a woman and her two or three or more children can survive on the same or a lesser amount of food because she knows how to make things stretch in the kitchen.

Judges' survey responses suggest that they see themselves as more willing to deviate upward from the guidelines than attorneys think they are, or than the Rettig study suggests.

TABLE 1.1
UNDER WHICH OF THE FOLLOWING CIRCUMSTANCES WOULD
YOU DEVIATE UPWARD FROM THE CHILD SUPPORT GUIDELINES

	Judges	
	Male	Female
1. When the income of the non-custodial parent allows it?	70%	82%
2. When the child has special needs?	95%	95%
3. To cover day care expenses?	43%	68%
4. If the standard of living of the parties warrants it?	3%	9%
5. If the parties agree?	2%	5%

However, when asked to estimate the percentage of cases in the last two years in which they had actually deviated upward from the guidelines, the majority of Minnesota judges – both male and female – said that they had done so in less than 5% of the cases.

The reluctance of judges to deviate upward is especially disturbing in light of the legislative purpose of the statute. The guidelines were intended to be used as a floor for setting support levels, not as a ceiling. They were designed to create a minimum rather than a maximum level of obligation for non-custodial parents.¹⁵

The Effect of Inadequate Awards

The most serious consequence of inadequate child support awards is the severe economic dislocation that results for women and children after divorce.

The custodial parent (usually female) definitely gets the short end of the stick financially. For example, a father takes home \$1,500 monthly and the mother takes home \$500 monthly. This average family with two children have \$2,000 a month to support 4 people (\$500 per person). Now the parents divorce, mom gets the kids, child support is set in accordance with the guidelines of \$450 per month. Dad now has \$1,050 for him-

¹⁵ Johnson, Do Minnesota Child Support Guidelines "Support" Children, 3 J. L. & Inequality, 357, 358 (1985).

self. Mom and the kids live on \$950 a month for the three of them. If she has the option of working more hours, she also pays increased child care costs. (Female attorney, Greater Minnesota)

Data from the Rettig study on the economic consequences of divorce also support the finding that women and children in Minnesota suffer financial hardship after divorce at a greater rate than men. The Rettig researchers compared post-divorce incomes of custodial and non-custodial parents to U.S. poverty level figures using the median amounts for net yearly income and child support found in their study. They determined that after divorce, if the non-custodial father pays the support as ordered, the income of a typical custodial mother of two children in Minnesota is 1.45 times the poverty level, while that of the non-custodial father is more than double the poverty level:

TABLE 1.2
INCOME EQUIVALENCE OF HOUSEHOLDS BASED ON
MEDIAN INCOMES AND ACTUAL CHILD SUPPORT AWARDS
FOR 1986 MINNESOTA DISSOLUTIONS, SOLE PHYSICAL CUSTODY

	Custodial Parents	Child Support Obligors
Yearly Net Income	\$9,600 ^a	\$14,442 ^b
Yearly Child Support Awards	+ \$3,600 ^c	-\$13,600
Post Divorce Net Income After Transfer	\$13,200	\$10,842
Poverty Level (1986)	\$9,120 (3 persons)	\$5,360 (1 person)
Ratio of Income to Needs: ^d	$\frac{\$13,200}{\$9,120} = 1.45$	$\frac{\$10,842}{\$5,360} = 2.02$

^a = 420 cases

^b = 504 cases

^c = 495 cases

^d = poverty level, 1.25 = near poor

The Rettig study also indicates that failure of the guidelines and divorce decrees to deal with factors such as post-secondary education, dental care, and verification of health coverage, results in a situation where these costs are often borne by the custodial parent, which serves to widen even further the gulf between the parties' post divorce standards of living.

The Special Problems of Low Income Parents

Low income custodial parents face additional disadvantages in establishing child support. At the St. Cloud lawyers' meeting witnesses told the Task Force that when a custodial parent receives Aid to Families with Dependent Children (AFDC) it is easy for the other parent to negotiate a low child support award. When these custodial parents stop receiving public assistance they are left with the bare minimum in support. A practitioner

from the Twin Cities metropolitan area described an experience that he had with a client with five children receiving AFDC:

The judge in chambers at the temporary hearing expressed the fact that the poor husband could not afford to pay even though he had a good job with the state. The judge said he was not going to award temporary support because the mother was on AFDC so was getting money already and didn't really need the money. (Male attorney, Twin Cities)

This attorney also noted that the judge told the husband's counsel in chambers that "women are always whining about something."

The Concerns of Non-Custodial Parents

Members of groups representing non-custodial parents, including R-Kids and Divorce Reform, Inc., contended at the public hearings that Minnesota's child support guidelines are too stringent and that the duty to support children after divorce falls disproportionately on non-custodial fathers. The evidence presented to the Task Force demonstrates that this is not the case; that in fact, it is custodial parents who have been assuming more than their share of the financial burden of caring for children once the family is no longer intact. In a comment addressed to attempts by certain groups to reduce the guidelines, a family law practitioner from rural Minnesota stated:

The legislature . . . is being pressured to undo what the guidelines have provided and this is unfortunate, because women and children still do not receive fair treatment in child support cases. (Male attorney, Greater Minnesota)

Child Support Enforcement

The plight of custodial parents and children after divorce is further exacerbated by the fact that courts are too often inconsistent and unfair in their enforcement of child support awards.

Nancy Jones of the State Child Support Commission testified that nationally, less than 50% of custodial parents receive their court ordered support and that within Minnesota, local child support agencies have reported collecting support in approximately 40% of their cases. Mandatory automatic income withholding of child support will be implemented by November of 1990 in Minnesota for all cases in which the child support enforcement agency is collecting support. In addition, federal law requires the implementation of mandatory withholding for all child support cases statewide by January 1, 1994. These measures will go a long way toward ameliorating the problems that occur when non-custodial parents do

not pay their support. However, a number of witnesses testified that child support enforcement is especially difficult when the payor is self-employed. For these parents, automatic wage withholding may never be a viable option and custodial parents will continue to rely on the courts' enforcement powers.¹⁶

Witnesses at the public hearings and lawyers' meetings told the Task Force that the courts are too reluctant to use contempt to enforce support orders, that stays and continuances are too easy to obtain, and that judges may find non-paying parents in contempt but often balk at incarceration.

A participant in the Twin Cities lawyers' meeting commented:

There is an unwillingness to use the contempt sanction where appropriate and a reluctance to use remedies, such as the appointment of special masters and sequestration of assets, that would routinely be considered in other civil matters.

Another lawyer attending the meeting emphasized that when judges do not enforce child support orders aggressively they give non-paying parents the message that child support is not the kind of obligation that needs to be taken seriously, and that this encourages some to defy the system.

The survey data reinforce the view of those who do not believe that support orders are adequately enforced. Only 28% of the male lawyers and 6% of the female lawyers responding to the survey think that judges always or often jail non-payors of support.

A former family law practitioner commented on the survey:

One of the reasons I got out of family law was because I didn't enjoy working in an area where the clients, most of mine were female, were starting out at a disadvantage because of their sex. I had at least seven clients forced onto AFDC because of the courts' unwillingness to use their enforcement powers. It became too disillusioning to continue to watch. (Female attorney, Twin Cities)

Another lawyer wrote:

One client's ex-husband refuses to pay child support. In the past three years we have brought six contempt motions. He has never been penalized, never ordered to pay attorney fees, but merely given extra time to pay or had his arrearage amount reserved. He now has close to \$3,000 in arrearages reserved, but no judge will reduce the amount to judgment for

¹⁶ Minnesota's judges are enthusiastic supporters of automatic wage withholding. On the survey, 74% of the male judges and 77% of the female judges agreed with the statement, "mandatory income withholding for those ordered to pay child support is a good policy." This appears to contrast sharply with the attitudes of the state's family law attorneys. Only 19% of the male attorneys and 20% of the female attorneys said that they always or often encourage their clients to use wage withholding where it is not mandatory. Fifty-nine percent of the male lawyers and 48% of the female lawyers said they rarely or never do so.

collection and no judge will jail him. There are three children involved. (Female attorney, Twin Cities)

And from another lawyer:

I believe that most judges have much more sympathy and understanding for non-custodial men who are (purposely) unemployed, underemployed or change careers voluntarily and cannot or will not pay child support. The judges rarely mention the fact that the custodial mother and children are often forced to live on small AFDC grants, food stamps and subsidized housing. This is subtle but pervasive discrimination against women and children on an economic basis. (Female attorney, suburban)

While the majority of Minnesota judges responding to the judges' survey say that they are willing to use their contempt powers to enforce child support awards, they do not do so very often. Judges were asked how many non-paying parents they had found in contempt within the last two years and how many of those found in contempt had been jailed. The median number of non-paying obligors found in contempt was only 10 for male judges and 11 for female judges. The median number of non-payors jailed was two for male judges and three for female judges. Nine percent of the male judges and 17% of the female judges said that they had not found anyone in contempt in the last two years.

Those who do use the contempt power note its effectiveness. One family court judge from the metropolitan area commented, "They all seem to find their checkbooks on the way to the holding room." Or as a judge from rural Minnesota put it, "They all paid when the sheriff picked them up." However, the small number of contempt findings remains troubling, especially in light of the figures indicating that less than half of the nation's custodial parents are receiving regular support payments.

Findings

1. Minnesota's child support guidelines are too low.
2. Courts are misinterpreting the guidelines as a maximum level of support for non-custodial parents, rather than the minimum level as intended by the legislature.
3. Deviations downward from the guidelines are much more common than upward deviations.
4. The standard of living of the custodial parent and children decreases substantially after divorce, while that of the non-custodial parent often improves.
5. Low income custodial parents are especially disadvantaged in establishing child support.
6. Inconsistency in the enforcement of child support awards results in unfairness to custodial parents and their children.

Recommendations

1. Judges should enforce child support orders through the use of contempt.
2. In keeping with the original legislative intent, judges should interpret the child support guidelines as the minimum level of the non-custodial parent's obligation, rather than the maximum.
3. When the Minnesota Legislature reexamines its child support guidelines, as required by federal law, it should adopt an approach to establishing child support levels that reduces the disparity between the standard of living of custodial parents and children and non-custodial parents after divorce.
4. Judges should calculate the effects of a downward deviation from the guidelines on the post-divorce standard of living of both parties before ordering a downward deviation. Judicial education courses in family law should contain information on how to perform these calculations.
5. Judges should use other statutorily authorized judicial sanctions for failure to pay child support, such as the appointment of receivers, where appropriate, and should consider developing additional creative sanctions, all of which should be incorporated into statewide enforcement policies.

CHILD CUSTODY

Some of the most heartfelt testimony presented to the Task Force addressed the issue of child custody. The Task Force found that gender-based stereotypes about proper roles for women and men, and about their capacity to serve as caretakers for children, are prevalent throughout Minnesota's judicial system. These stereotypes work to the disadvantage of both fathers and mothers.

Stereotypes That Disadvantage Fathers

The primary stereotype about fathers that affects judicial decision-making is that they are not capable of caring for young children. A number of witnesses told the Task Force that it is very difficult for men to prevail in custody disputes because judges assume that mothers are the more appropriate caretakers for young children. Data from the lawyers' survey support this: 69% of the state's male lawyers and 40% of the female lawyers think that judges always or often seem to assume that children belong with their mother. Ninety-four percent of the male attorneys and 84% of the female attorneys think that judges make this assumption at least some of the time; only 6% of the men and 16% of the women think that judges rarely or never favor the mother.

A lawyer commented on the survey that "out here on the prairie, children belong with their mamas – at least that seems to be the prevailing notion." (Male attorney, Greater Minnesota) Another lawyer noted that part of the reason for judges' reluctance to give fathers custody may be the unreasonable expectations that society places on mothers:

The biggest problem facing this area of family law may be society's view that a mother cannot and should not give up custody of her children. (Male attorney, Greater Minnesota)

Judges were asked on the survey whether they agreed with this statement: "Other things being equal, I believe young children belong with their mother." Fifty-six percent of both male and female judges said that they did agree.¹⁷ A judge noted on his questionnaire that:

In most cases mothers receive custody, but this probably reflects contemporary cultural standards. There is a tendency to require fathers of young children to prove their ability to parent while mothers are assumed to be able. (Male judge, Greater Minnesota)

Another judge made his position on the subject quite clear with this observation:

I believe that God has given women a psychological makeup that is better tuned to caring for small children. Men are

¹⁷ Caution must be used in interpreting these responses, however; a number of judges said that they found the question difficult to answer in the absence of a more precise description of the "other things" referred to in the question.

usually more objective and not as emotional. (Male judge, Greater Minnesota)

On the other hand, a number of lawyers pointed out the dangers of oversimplification in this area; judicial reluctance to award fathers custody is not always the result of stereotypical thinking.

I tend to discourage fathers from seeking physical custody because they seldom are successful. Generally, they are not successful because their motivations are poor – i.e., seek custody to spite wife, not for best interests of children. (Male attorney, suburban)

I believe that it is very difficult for a man to obtain custody, but I believe this is due to the fact that, in this culture, men traditionally do much less of the caretaking during the marriage, even if the woman works outside the home. When I do an initial interview with men in a custody case, I am amazed with their lack of involvement with and knowledge of their children's day-to-day needs. Most of these men love their children and are well-intentioned, but they don't have the background to pursue custody . . . So I don't perceive this as "gender bias," but as reality. Why would a judge take children away from a person who has been providing day to day care of the children? (Female attorney, Twin Cities)

The picture is further complicated by the preliminary findings of the Rettig study on disputed custody cases. Only two percent of the cases in the sample went to trial. In almost all of the cases in the study in which women obtained sole physical custody of children at the time of divorce, the parties themselves agreed that this was in the children's best interests. In those cases that did not settle and were decided by a judge, the mother obtained sole physical custody of all children exactly half of the time. The husband obtained sole physical custody 33% of the time, joint physical custody was ordered in 8% of the cases, split (siblings split up) in 4% of the cases, and other arrangements were made in the remaining 4% of the disputed cases.

Stereotypes That Disadvantage Mothers

Judges also make stereotypical assumptions about women that improperly affect custody determinations. In some cases, mothers who work outside the home are penalized for non-traditional behavior. A male family law practitioner wrote, for example, that in his experience the most flagrant examples of gender bias in Minnesota's courts involve "certain male judges who believe it is inappropriate for custodial mothers to pursue a career."

In other cases, judges apply a double standard to personal behavior:

I believe that judges generally hold women to a far stricter standard of ethics and morality than they do men. This varies with each judge, but the biases of society do not disappear

when the robe is donned. (Male attorney, Greater Minnesota)

Judges will attach to females the stigma of “mentally unfit” if the person has sought some form of treatment or even just counseling. (Male attorney, Twin Cities)

Mother who had a single extra-marital relationship lost custody and homestead rights to father even though he had a history of philandering. (Female attorney, Twin Cities)

My client, the wife, and her husband were investigated by child protection for having a messy house. Both parents lived in the home at the time, yet the husband’s argument that the wife was unfit because of a messy house hit home with both the judge and the custody evaluator. Judges in general seem to have much higher moral standards for mothers than for fathers. (Female attorney, Greater Minnesota)

In a third category of cases judges sometimes overestimate the father’s parenting contributions. A respondent to the lawyers’ survey observed that:

Fathers seem to get more weight given to their direct care activities than do mothers. Mothers may do 90-95% of the actual caretaking, but if father does anything at all then he often gets credit for more than his 5-10%. (Male attorney Greater Minnesota)

Participants in the Twin Cities lawyers’ meeting described it as giving fathers extra “parenting points” for doing things like changing the baby’s diapers or putting the children to bed. Several people observed that this tendency to exaggerate the father’s involvement may be due to the fact that in our culture women are still expected to care for children and men are not.

A number of respondents to the lawyers’ survey also spoke of the additional onus placed upon poor women in custody disputes, especially when the woman is on public assistance. Lawyers noted that these women often face an uphill battle when they try to convince a judge that their children should live with them rather than with a more financially secure father. As one male attorney put it, “Being poor is a cardinal sin in our society.” Others commented:

One referee is famous for his statement to female AFDC recipients appearing before him: “How much of the taxpayers money are you currently receiving?” (Female attorney, Twin Cities)

The poor women I have represented do receive unequal treatment – not because they are poor per se, but because of all the consequences of poverty such as frequent moves (read as a stability problem), an inability to manage money (read as an incapability to provide for the needs of children), attempts

at schooling and jobs (again instability), frequent babysitters, etc. These factors are a result of poverty—as is therapy, etc.—but are often ignored as such, giving way to bias in favor of the most financially secure (read stable). (Male attorney, Greater Minnesota)

The Role of the Custody Evaluator

The Task Force found that misconceptions about sex roles in the judicial system are not limited to the courtroom; court personnel who perform custody mediation services and custody evaluations are subject to the same stereotypes that affect judges. A participant in the Twin Cities lawyers' meeting described a custody evaluation that contained this statement:

(The father) appears to have adopted a feminine lifestyle and rejected the male sex role . . . he claims many interests that are traditionally considered feminine and seems insecure in the masculine role.

The evaluator was commenting on the fact that the father did the housework and cared for his children during the day.

Court personnel are also just as likely as judges to be biased against working mothers or AFDC recipients, to apply a double standard regarding personal morality, or to, as one lawyer said, go "overboard with enthusiasm" for fathers who take any interest in caring for their children.

Family law practitioners also expressed concern about the difficulty they often have in determining whether the individuals performing custody evaluations are familiar with the appropriate legal standard for determining the best interests of the child. This is especially important because of the crucial role that the evaluator plays in a custody dispute. Judges rely heavily on the opinions of court services workers; on the judges' survey 74% of the male judges and 63% of the female judges said they often followed the recommendations of the custody evaluator in making custody decisions. Under these circumstances it is crucial that the people who perform custody evaluations be knowledgeable about the law and sensitive to the impact of stereotypical thinking on their decision-making.

Custody Mediation

The Task Force identified a serious problem of judges ordering custody mediation in cases involving domestic abuse. State law expressly prohibits judges from requiring the parties in a custody dispute to participate in mediation where there is probable cause to believe that domestic abuse has occurred.¹⁸ In spite of this clear statutory prohibition, judges in Minnesota regularly order abused women into custody mediation. A number of witnesses, both at the public hearings and in the lawyers' meetings, testified about the routine nature of this practice, and data from the attorney and judges' surveys confirm that it is widespread.

18 Minn. Stat. § 518.69, subd. 2 (1988).

Over 75% of both the male and female lawyers surveyed say that judges sometimes order custody mediation in cases where there is a history of domestic violence. And over one-half of the male judges responding to the survey agreed with the statement that custody mediation usually is appropriate in cases where abuse has occurred. Women judges seem more aware of the law in this area than their male counterparts; only 15% of the female judges agreed with the statement. However, a significant percentage of women judges — about one-third — report that they order custody mediation in Order for Protection proceedings at least some of the time. Sixty percent of the male judges provide for custody mediation in Orders for Protection at least sometimes.

Loretta Frederick of the Minnesota Coalition for Battered Women testified about the harm that results when abused women are forced into mediation:

Battered women go into mediation scared to death to assert themselves, frightened to say what they really think should happen with their children, sometimes getting literally beaten up in the parking lot afterwards for having opened their mouths, and ending up with custody and visitation [agreements] that are not in the best interests of the children.

Joint Custody

Minnesota law contains a rebuttable presumption in favor of joint legal custody where at least one of the parents has requested it.¹⁹ There is no corresponding statutory presumption favoring joint physical custody, although the court may impose a joint arrangement if doing so would serve the child's best interests.²⁰

According to data from the Rettig study, joint legal custody was awarded in 49.6% of the divorces granted in Minnesota in 1986. Joint physical custody was awarded 6.1% of the time. In cases in which the custody issue was litigated, joint legal custody was awarded 62.5% of the time; joint physical custody was court-imposed in 8.3% of the cases. The Task Force found that some judges are too willing to impose joint custody in situations where the parents cannot agree and there is no evidence that joint custody would be in the children's best interests.

Data from the judges' survey indicate that judges view court-imposed, as opposed to stipulated, joint custody as an acceptable option. Over half of the judges surveyed — both male and female — agreed that joint legal custody is sometimes appropriate even if one or both parents objects. About 25% of the judges agree that joint physical custody can be appropriate where there is parental resistance. A number of judges, however, indicated on the survey that they were concerned about the use of joint custody as a panacea and worried about its long-term effects on children.

Family law practitioners also expressed concern about the value of joint custody orders. They saw them being used more as a means of placating the parent who would not

¹⁹ Minn. Stat. § 518.17, subd. 2 (1988).

²⁰ Joint legal custody means that both parents have the right to participate in major decisions about the child's upbringing; joint physical custody means that children will spend time living with each of their parents.

otherwise have obtained custody, usually the father, than as a way to advance the best interests of children:

The most predominant and overriding example [of gender bias] is the ordering of joint legal custody where the parties get along like oil and water. (Female attorney, Twin Cities)

I do not encourage joint legal custody (although it ultimately is almost always settled on) as I find a great deal of post-decree litigation. Husbands tend to use this as a means of punishing their ex-wives. (Male attorney, Twin Cities)

Other lawyers observed the tendency of some fathers seeking joint custody to use it as a means of securing economic leverage over mothers in divorce:

Custody disputes are used as ways to get around the support obligation and as “bargaining chips” in dissolution litigation. (Twin Cities lawyers’ meeting)

These commentators also noted that this strategy is frequently successful; women will often accept less child support or property than they are entitled to because they do not want to subject their children to the pain of a custody trial. One participant in the Twin Cities lawyers’ meeting suggested that

lawyers need to establish that it is unethical conduct to assert a custody claim in order to gain a financial advantage in the litigation.

Family law judges and attorneys have good reason to be concerned. The current scholarly literature indicates that, especially where court-imposed, joint custody – whether joint legal, physical, or both – may not be in the best interests of children, or their mothers, and should be used with great caution.

Martha Fineman, Professor of Law and Director of the Family Policy Program of the Institute for Legal Studies at the University of Wisconsin, argues that court imposed joint custody is unfair to mothers in that it has been advocated by fathers’ rights groups as a solution to the historic failure of non-custodial parents – usually fathers – to pay child support.²¹

Joint custody . . . empowers fathers as a group without requiring any demonstration of responsibility . . . in no other area does the law reward those who have failed in their duties as an incentive for them to change their behavior.

Professor Carol Bruch of the Martin Luther King, Jr. School of Law at the University of California at Davis, comments that, “although proponents of joint custody argue that

21 Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv.L.Rev. 727, 759 (1988).

joint custody enhances both paternal involvement and paternal financial support, research results do not as yet support these claims.” She notes the “growing consensus in the research literature that disapproves of joint custody orders that are entered into over the objection of one parent.”²²

And a longitudinal study of families involved in long running custody disputes, performed under the auspices of the Center for the Family in Transition, has found significant emotional and behavioral problems in children who spend time with both disputing parents. The authors caution against encouraging or mandating joint custody where the parents are in conflict.²³

Findings

1. Some judges make stereotypical assumptions about proper roles for women and men that disadvantage both fathers and mothers in custody determinations.
2. Custody mediators and custody evaluators are subject to the same gender-based stereotypes that affect judges.
3. Some judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases.
4. Fathers sometimes use the threat of joint custody to obtain an economic advantage over mothers.
5. Judges are sometimes too willing to order joint custody where there is no evidence that it is in the best interests of the children to do so.
6. When the court fails to make custody decisions promptly the children suffer harm.

Recommendations

1. Judicial education programs in family law must sensitize the bench to issues of bias in custody determinations; judges must recognize that fathers can be good custodians of small children and that mothers with careers can be good parents.
2. Judicial education programs in family law should educate judges about the need to make custody decisions promptly.
3. Custody mediation should not be ordered where domestic abuse has been documented by means of sworn statements, an OFP, or arrest records.
4. Counties using court services for custody evaluations should provide rigorous training and evaluation to ensure that social workers are sensitive to issues of bias in their investigation and reporting.

22 Bruch, And How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-being in the United States, 2 Int'l. J.L. & Fam. 106, 109 (1988).

23 Paper presented by Janet R. Johnston, Ph.D., Research Director for the Center for the Family in Transition, to the 45th Annual Meeting of the American Orthopsychiatric Association (March 30, 1988).

5. The Office of the State Court Administrator should develop a standardized format to be used throughout the state in custody evaluations and reports.
6. Where other evidence about custody is presented to the court, the court must carefully consider it along with any recommendation from a court services worker or private evaluator.
7. Judicial education programs in family law should examine the effects of joint custody orders.
8. Judges should use great caution in deciding to order joint custody; it should be imposed over the objections of one of the parents only where the court makes specific findings which identify the reasons why such an order is in the children's best interests.

ACCESS TO THE COURTS

The question of access is crucial to any meaningful inquiry into gender fairness in the courts. If women and men do not have an equal opportunity to seek relief from the courts, the fairness of the entire system is undermined. The Task Force learned that, especially in the family law area, women and men do not have equal access to the courts.

The barriers to equal access are primarily financial. As one attorney testified:

There is an imbalance of economic power between men and women, and those who have economic power have a stronger voice and are heard by the court system. (Duluth lawyers' meeting)

A representative of the Hennepin County Bar Association testified at one of the public hearings that in the Minneapolis area, for example, experienced family law attorneys require retainers of from \$1,500 to \$10,000 in dissolution cases. And according to the lawyers' survey data, most Minnesota lawyers do insist on retainers. Eighty-two percent of the male lawyers and 86% of the female lawyers in the state require a retainer from their family law clients.

Not surprisingly in this financial environment, it is the poor whose access to the system is most limited. Women, who are disproportionately represented in the poverty population, bear the heaviest burden. The Task Force found that it is extremely difficult for poor women in Minnesota to obtain legal representation in family law matters. Witness after witness at the public hearings spoke of the frustration of long waiting lists for legal representation from legal services programs that aid the poor.

The recent study by the Minnesota State Bar Association's Legal Assistance to the Disadvantaged Committee (LAD) confirms that legal services programs are simply unable to meet the need for legal representation in family law cases with their existing resources. The LAD committee surveyed legal services and volunteer attorney programs throughout Minnesota for a one month period during the fall of 1987 to obtain information about the need for family law assistance for low income people. The survey found that 71% of the people contacting these programs for help with family law matters were women. The committee's report notes that this is close to the ratio of women to men in the poverty population. The committee also found that during the survey period legal services and volunteer attorney programs were able to represent only 47% of the income-eligible people who contacted them for family law assistance. Based on these figures, the committee estimated that nearly 10,000 income-eligible persons will be turned away from these programs each year.

The LAD study concluded, and the Task Force concurs, that it is unrealistic to expect that this problem can be solved by the increased participation of volunteer attorneys, or that the present staff of legal services programs can be expected to substantially increase the amount of family law assistance they provide. The Task Force lawyers' survey confirms that family law practitioners already devote a good deal of time to pro bono representation.

The situation is not much better for those women who are not poor enough to qualify for free legal services. (Legal services programs operate under stringent income and asset

limitations imposed by federal law.) Lawyers told the Task Force about women who had to save money, a bit at a time, for months, and in some cases for years, before they could afford to hire a divorce lawyer. The problem is especially severe for women who do not work outside the home and do not have easy access to the family finances:

Women often cannot afford good counsel. I consider myself a good trial lawyer. I charge \$100 per hour and ask for retainers of \$1,000 to \$3,000 . . . Even the poorest of men find \$3,000 for an attorney. (Female attorney, Greater Minnesota)

Temporary Attorney Fees

Access problems are compounded by judges' reluctance to award temporary attorney fees. Sixty-five percent of the male lawyers surveyed and 93% of the female lawyers reported to the Task Force that the reluctance of courts to award temporary attorney fees in family law cases can preclude the economically dependent spouse from pursuing the litigation. A witness at the public hearing in Moorhead testified about the dilemma that family law attorneys and their female clients face:

In the area of awarding temporary attorney's fees, women are unfairly prejudiced. It is difficult for an attorney to accept a case knowing he or she will not be paid. Most of the time the husband has control of the finances and if temporary fees are not awarded to the woman she must get whatever representation she can without it.

Data from the judges' survey confirm that temporary attorney fees are ordered infrequently. Although 79% of the male judges and 83% of the female judges report that they award temporary fees at least some of the time, they do not do so regularly. Only 30% of the state's judges – 28% of the men and 44% of the women – responded that they award temporary attorney fees on a regular basis.

A number of family law practitioners told the Task Force that there is a direct connection between the court's failure to award temporary fees and their insistence on a retainer:

Temporary fees are rare so I cannot economically accept a case without a retainer and ability to pay. If the courts would start ordering temporary fees then I could accept these cases a little more readily. (Female attorney, Twin Cities)

It used to be that you could take a case without a retainer and know you would get something reasonable at the temporary hearing. This is no longer true. You must get your money up front and this makes it difficult, if not impossible, for some women to obtain representation equal to that of their husbands. Husbands often have access to marital resources or credit that women simply do not have and thus husbands can

I continue to find that in court orders there is no way to compel the male spouse to cooperate without burdening the female mid-life spouse with additional legal costs — a Catch 22 situation.

Findings

1. It is extremely difficult for poor people in Minnesota to obtain legal representation in family law matters.
2. The inability to obtain counsel affects women more severely than men.
3. The reluctance of judges to award reasonable temporary attorney fees and costs in family law cases prejudices the economically dependent spouse by making it impossible for that spouse in many cases to pursue the action.

Recommendations

1. State resources should be made available for the funding of legal representation for poor people in family law matters.
2. Whenever possible judges should award temporary attorney fees and costs to the economically dependent spouse in an amount that is sufficient to allow that spouse to effectively pursue relief in family court.

General Family Law Recommendations

1. Family law should be one of the subjects covered on the Minnesota bar examination.
2. Since family law and domestic abuse cases make up an ever increasing percentage of the caseload in Minnesota's courts at the trial court level, judges should be required to accumulate at least ten hours of judicial education credit in these two areas during each certification period.
3. Judges and attorneys must include more comprehensive economic information about the parties to a divorce in both temporary and final orders. Court records are often incomplete, and vital statistics data accumulated at the state level are presently not detailed enough to permit thorough analysis of the effects of divorce on families and children.
4. The Office of the State Court Administrator should develop materials which explain the function of the court in family law matters to litigants. These materials could include both pamphlets and videotapes. They should be distributed statewide.

normally come up with a substantial retainer. (Female attorney, Twin Cities)

A serious related problem concerns the reluctance of courts to advance the economically dependent spouse money for costs at the inception of the case. This can have a substantial impact on the ultimate resolution of the issues in divorce cases. Many lawyers told the Task Force they had to advise female clients to accept inadequate settlements because the client could not assume the expenses connected with thorough case preparation. A number of family law attorneys noted that this scenario has become more common as family law issues have become more complex:

The increasing importance of expert witnesses in family law, such as child psychologists, CPA's, vocational rehabilitation experts, etc. is making the court system much more biased against women without funds. (Male attorney, suburban)

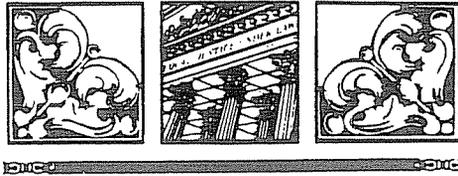
Family law attorneys told the Task Force repeatedly about clients who settled for less spousal maintenance than they were entitled to because they couldn't afford to hire the vocational experts necessary to establish reduced earning capacity, of women who could not afford to hire an independent expert to evaluate a closely held business, and of women who gave up custody or agreed to unreasonably low child support orders because they could not afford to go to trial.

My experience is limited to the family law situation in which a woman not working outside the home and not having independent assets, is unable to assert her rights effectively because of the inability to finance a long and arduous contested case. Emotional stability of the family unit also contributes to the decision to waive or concede on important issues. (Male attorney, Twin Cities)

I know personally of a case when a life-long housewife in her 60's finally decided to get a divorce. The husband's company, for which she had also worked, stuck up for the man, hiding the fact that certain bonuses were paid to the husband and paying him in cash for certain services . . . She was left with no money to fight him. (Female attorney, Twin Cities)

Fees in Post-Judgment Actions

A number of witnesses also told the Task Force that judges' reluctance to order attorney fees in post-judgment actions makes enforcement of court orders, once they are in place, problematic as well. Attorneys pointed out, for example, that it is very difficult to persuade courts to award attorney fees in post-divorce actions to enforce child support awards, because judges assume that the fees will be paid out of the accumulated support. A practitioner in rural Minnesota wrote to the Task Force about the frustration she feels when advising clients who are having trouble getting their spouses to comply with the court's orders:



DOMESTIC VIOLENCE

Introduction

Sixty-three thousand incidents of domestic abuse were reported in Minnesota in 1984.¹ Ninety percent of the victims were women. To address this problem, our state has some of the nation's most progressive domestic abuse statutes. It has, along with that, longstanding and knowledgeable advocates – both in the public and private sectors – of enforcement of the domestic abuse laws. In spite of these assets, the Task Force found compelling evidence to conclude that domestic abuse victims do not receive the relief, either civil or criminal, that our legislature intended to provide.

Although civil Orders for Protection (OFPs) are frequently issued and are relatively easy to obtain, they are rarely enforced. Although numerous criminal arrests are made and domestic assault charges brought, discretionary dismissal by prosecutors prevents final resolution of the cases in criminal court. The evidence reveals an enormous problem, much of which is occurring outside the reach of judicial intervention.

The Task Force comes to these conclusions after receiving a considerable amount of data on the subject of domestic violence. In addition to public hearing testimony by officials responsible for the handling of domestic violence cases, there was testimony by attorneys who represent parties in such cases and by victims of domestic assault. Representatives of advocacy projects testified orally and in writing. The lawyers' and judges' surveys included questions on both the civil and criminal aspects of domestic violence cases.

The Task Force gathered statistical data from public agencies, met with interested citizens, attorneys, and judges, and studied reports and proposals of various prosecuting authorities – such as the Hennepin County Criminal Justice Coordinating Committee and the Attorney General's Task Force on Violence Against Women. The Task Force also commissioned a separate study to examine the characteristics of criminal domestic assault cases from six Minnesota jurisdictions during 1987. The study was carried out under the

¹ This is the most recent available official figure. The number of incidents is compiled by the Minnesota Department of Corrections, Program for Battered Women, based upon mandatory reporting by police agencies.

direction of University of Minnesota Law School Clinical Professor Beverly Balos, who wrote the final report. It is referred to in this report as the Task Force Domestic Violence study.

The Task Force Domestic Violence Study was designed to provide preliminary data on the incidence of prosecutorial dismissal of misdemeanor domestic assault cases prior to trial. Cases from St. Paul, Duluth, Little Falls, Kandiyohi County, Brooklyn Park and Brooklyn Center were included to provide a look at urban, rural, and suburban caseloads. The researchers attempted to trace the effect of intervention projects on case dismissal rates. In addition, the data gathering form provided for the collection of a variety of facts from the case files. The full analysis of the data is appended to the Task Force report.

Task Force meetings have resulted in probing discussion of the subject of domestic violence, and a unanimous conclusion that the Task Force recommend dramatic, meaningful steps to address the matter.

CONTEXT OF THE PROBLEM

In addressing the matter of domestic violence, the Task Force began with two assumptions, both of which were ultimately borne out by the cumulative data. First, was that Minnesota indeed has a progressive statutory scheme to handle domestic violence cases. Second, was that the legal system is ill-equipped to handle the caseload generated by the high incidence of domestic abuse.

Minnesota's domestic abuse laws provide both civil and criminal avenues into the judicial process. Both approaches are available in a given case, either simultaneously, or in any sequence. The Domestic Abuse Act² allows a victim of domestic abuse to obtain a civil *ex parte* order (an order without a hearing based upon the affidavit of one party). This *ex parte* order may provide relief to a victim who is in immediate and present danger of abuse. The relief may include removal of the alleged perpetrator from the residence, granting of temporary custody of the children to the petitioner, a temporary award of personal property, a no-contact order and a temporary restraining order. While this order provides for immediate relief, it is effective for a maximum of 14 days, after which a hearing is required. At the hearing, the judge has the opportunity to hear from both the alleged abuser and the alleged victim. The judge may then issue a further order, an Order for Protection (OFP). Violation of an OFP is a misdemeanor criminal offense, punishable by up to 90 days in jail, a \$700 fine, or both.

While the victim of domestic abuse decides alone whether to go into civil court, only a public prosecutor may decide whether to pursue domestic violence cases in criminal court. A variety of criminal statutes may be used to prosecute an incident of domestic abuse. In addition, special arrest and victims' rights statutes apply to cases of domestic violence.

Minnesota has a comprehensive criminal assault statute which sets forth five degrees of attempted or actual infliction of bodily harm or causing the fear of bodily harm or death.³ Additionally, as described above, the civil Domestic Abuse Act includes the misdemeanor offense of violating an Order for Protection.⁴ The trespassing, criminal damage to property, and witness tampering statutes are sometimes used to prosecute related offenses in the domestic abuse cases.⁵

2 Minn. Stat. § 518B.01-19 (1988).

3 Minn. Stat. § 609.221 (1988) (felony assault involving great bodily harm); Minn. Stat. § 609.222 (1988) (felony assault involving dangerous weapons); Minn. Stat. § 609.223 (1988) (felony assault involving substantial bodily harm); Minn. Stat. § 609.224 (1988) (misdemeanor and gross misdemeanor assault involving ordinary bodily harm).

4 Minn. Stat. § 518B.01, subd. 14(a) (1988).

5 Minn. Stat. § 609.605 (1988); Minn. Stat. § 609.595 (1988); Minn. Stat. § 609.498 (1988).

Police may, but are not required to, make domestic violence arrests if a reasonable basis exists to believe such a domestic assault occurred in the four hours prior to the police call. If an arrest is made, the arrested person must be removed from the premises and cannot be released without bail or a charge.⁶ Individual districts may have local mandatory arrest policies and court rules governing detention and release of criminal domestic violence suspects. Arrest is mandatory for violation of the civil OFP.⁷

Under Minnesota's Crime Victims Rights Act, victims of domestic abuse have the right to be informed of the status of the proceedings and to participate to a limited degree in the disposition of the case.⁸ Victims may have input on the issues of pretrial diversion, plea negotiations, restitution, and prisoner release. Also, victims have procedural protection on privacy of their addresses and phone numbers, changes in court schedule, and speedy trial. Finally, victims have the right to have a supportive person in the courtroom and to have the defendant segregated from them in the courthouse.

If a presentence investigation report is used in a given case, the person preparing the report must inform the victim of the requirements of the Crime Victims Rights Act and facilitate the victim's exercise of these rights. However, presentence investigations are not required in domestic abuse cases.

It is clear that both these civil and criminal avenues have produced increasing caseloads,⁹ according to figures provided by the State Court Administrator.

TABLE 2.1
Number of OFP
Petitions Filed

1986	7821
1987	8652
1988	9440

Similarly, the St. Paul City Attorney's Office has seen a consistent increase in the number of misdemeanor domestic assault prosecutions, from 451 in 1985 to 636 the next year.¹⁰ The Hennepin County Criminal Justice Coordinating Committee, in its April 1988 Report on Domestic Assault, foresees increasing numbers of such cases.

6 Minn. Stat. § 629.341 (1988); Minn. Stat. § 629.72 (1988).

7 Minn. Stat. § 518B.01, subd. 14(b)(1988).

8 Minn. Stat. § 611A.01-.68 (1988).

9 It is unknown whether increased caseloads reflect an increase in the number of domestic abuse incidents, an increase in the proportion presenting themselves to the court, or both.

10 Testimony of Gerald Hendrickson, Chief Prosecutor, St. Paul City Attorney's Office, at Twin Cities public hearing (March 29, 1988).

The Task Force Domestic Violence Study showed 88% of the defendants to be male and to be either married or cohabitating with a female victim.¹¹ In the judges' survey, judges reported that in their experience, 95% of the victims of domestic abuse were women.¹² Significantly, in three-quarters of the cases in the Task Force Domestic Violence study, there was physical injury to the victim.

This evidence leaves little doubt that thousands of Minnesota women suffer seriously from domestic abuse. The Task Force heard numerous accounts of domestic abuse cases in which the victim's efforts to invoke the judicial process resulted in greater victimization. The following two accounts, provided by the victims, reflect that reality in both the civil and criminal contexts. They are representative of a disturbing number of such accounts provided to the Task Force, not only by victims but by judges, domestic abuse advocates, prosecutors, and defense lawyers.

In the civil case, a middle-aged, middle-class homemaker with a 25-year history of abuse wrote to the Task Force of her attempt to use the court system for the first time after her husband threw a golf ball at her twelve-year old son. Her petition for an OFP was denied. She said the judge told her that she was "the type who requested an order one day and asked to have it rescinded the next." The judge suggested that she provoke a more serious incident in order to make sure that her case was strong enough to support the OFP. She said, "I guess I need a knife in my back or at least to be bleeding profusely from the head and shoulders to get an OFP." The judge told her, "That's just about it."

In the criminal case, the victim of the domestic assault testified at a public hearing. She stated that police were present when she was brought to a hospital emergency room by the man with whom she was living. She was bleeding profusely from all ten fingers and required five hours of surgery and forty stitches. According to the police report, she had a cut in excess of six inches on her back and bruises on her body. The man reported that she had attacked him and then self-inflicted the wounds. The woman testified at the public hearing that he had cut the inside flesh of each of her fingers with a pair of scissors in the course of a beating. The case was charged as a third-degree felony assault.

This woman testified that she had called police repeatedly over a four-year period, reporting instances of abuse. Each time no charges were filed. The county attorney's office dismissed this felony case one week before trial, over her vigorous objection.

Frustration over the failure of the court system to provide relief in cases such as these was echoed by members of Minnesota's judiciary. A metro judge commented, "Domestic violence is an outrage. Our system of justice does a very poor job of dealing with this problem." Another judge noted:

We have a good Domestic Abuse statute, but it is not being enforced by police and sheriff's departments, city and county attorneys or the courts. (Female judge, Twin Cities)

11 Because of disparities in size, this study sampled cases from different jurisdictions disproportionately. Therefore, these figures should not be generalized to the entire population of domestic violence cases in Minnesota.

12 Figures compiled by the Bureau of Justice Standards National Crime Survey indicate that nationally in 1978-1982 about 90% of domestic violence victims were women.

In this context the Task Force examined critical facets of both the civil and criminal process and the handling of domestic abuse cases in both areas.

Stereotyping and Sensitivity

Gender bias results when men or women are perceived as conforming to a single personality profile or a small range of behaviors deemed typical of their gender. The Task Force identified several kinds of stereotypical thinking about both women and men that have a negative effect on the administration of justice in domestic abuse proceedings.

Many of the examples of stereotypes described to the Task Force involved victim-blaming. The “nagging female” stereotype, suggesting that the woman asks for abuse, is evidenced by the police officer’s comment, related by a women’s advocate, that “the problem with battered women is that their alligator mouths can’t keep up with their hummingbird brains.” Women who live with men outside of marriage are seen to be asking for trouble by getting into unsanctioned relationships. A number of attorneys, primarily male, responding to the lawyers’ survey suggested that women are crafty schemers who use the OFP proceeding to punish men or gain advantage in a dissolution proceeding. Some male attorneys also suggested that sometimes paternalistic judges grant unwarranted OFPs and encourage women to use the victim image to unfair advantage.

Men also may be victimized by stereotypes, such as “wife-beater” or, in the case of male victims, “wimp.” In both cases, stereotypes prevent a fair evaluation of the man’s position.

Stereotypical thinking about women and men at this entry point in the judicial process, when they are under extreme stress and are at a turning point in their lives, is especially devastating. Connie Fanning of the Minneapolis Domestic Abuse Project testified:

Court orders of no contact with the victim are repeatedly violated by perpetrators. Judges who are responsible for imposing orders, whether as a condition of bail or as a condition of probation, will often not enforce them . . . Clearly, women are not listened to by court personnel and police . . . At every level of the court system, women’s attempts to access the system for their protection are circumvented.

“If you’d have supper on the table this wouldn’t happen,” was one judicial comment relayed at the Marshall public hearing. “You’ve been married for ten years, you must like being hit,” was a judge’s comment reported at the Moorhead public hearing.

A judge’s insensitivity to the circumstances of abuse can result in the denial of badly needed relief. A male lawyer wrote to the Task Force about a client who sought an OFP after her husband struck her in the head, threw her to the floor, threatened her life and the lives of her children, and then forced her into his truck while he drove around for an hour while continuing to threaten her. The woman lost consciousness for a short time after her husband hit her. The judge found that the husband had committed domestic abuse and ordered him to move out of the home, but allowed him to return to the property whenever he “deemed it appropriate,” in order to feed his dog. Another attorney commented on the lawyers’ survey:

A sitting district court judge once told me in chambers while both sides were trying to reach a stipulation in a final hearing for an OFP that “if my wife slept around I’d kick her butt too.” The judge went on to deny the woman’s petition. (Male attorney, Greater Minnesota)

Yet another lawyer, a participant at the lawyers’ meeting in St. Cloud, told the Task Force of a woman whose boyfriend threatened to kill her if she didn’t leave the house. The judge said, “Well, he gave you a choice,” and refused to issue a protective order.

THE CIVIL PROCESS: ORDERS FOR PROTECTION

Many victims of domestic abuse attempt to obtain relief from the abuse by requesting a civil Order for Protection. While the OFP process appears to be readily usable by victims, the Task Force found that attitudes of some judges and court personnel and enforcement issues present obstacles to effective implementation of the Domestic Abuse Act.

Problems In Obtaining OFPs

The Minnesota Domestic Abuse Act requires court personnel to assist petitioners in preparing and filing the forms necessary for an OFP.¹³ This is an area in which the Task Force found that circumstances vary a great deal from county to county. A number of witnesses made a point of crediting helpful court personnel for their supportive role. In some areas, however, the attitudes of court employees actively discourage petitioners from attempting to use the system.

An advocate testified at the Moorhead public hearing about a battered woman who was told “this county doesn’t do OFPs.” In other counties court employees will notify the respondent that the petitioner is seeking an order. The Task Force also heard of counties in which court employees improperly screen OFP petitions and unilaterally decide which cases will be presented to the judge. A lawyer from rural Minnesota commented on the survey about the practice in one county:

The Director of Court Services tells [abused women], “OFP’s are a pain in the ass . . .” A petitioner cannot see the judge. She must first see the Director of Court Services who goes over the petition and then on some occasions he will call the abusing party and ask to hear how he feels about the OFP and get his side of what happened. (Female attorney, Greater Minnesota)

Many women who need Orders for Protection are indigent and must obtain an In Forma Pauperis (IFP) order signed by a judge so that they can proceed without paying a filing fee. Witnesses at the public hearings told the Task Force that in some parts of the state these orders are difficult to obtain. Some counties do not accept IFP petitions at all. In others, judges will waive the filing fee for women who receive Aid to Families with Dependent Children, but refuse to do so for other low-income petitioners who are not receiving public assistance.¹⁴

In some areas of the state battered women’s advocates assist the abuse victim in preparing the OFP petition and accompany her to court for the hearing. As a result, some advocates have been accused of engaging in the unauthorized practice of law. When asked on the survey whether they allow victim advocates to speak in court during OFP proceedings, Minnesota judges responded as follows:

13 Minn. Stat. § 518B.01, subd. 4(e) (1988).

14 This problem has been addressed by legislation passed during the 1989 session which clarifies the standards to be used in acting on IFP petitions.

TABLE 2.2
IF ASKED, I ALLOW VICTIM ADVOCATES TO SPEAK IN COURT
DURING OFP PROCEEDINGS,
EVEN IF THE ADVOCATE IS NOT A LAWYER

	<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
Male Judges	38%	23%	17%	10%	12%
Female Judges	25%	6%	38%	25%	6%

Several witnesses recommended to the Task Force that the role of the advocate within the system be clarified. Given the valuable part that advocates for battered women play in the judicial system, as discussed in more detail below with respect to criminal domestic abuse prosecutions, the Task Force agrees that clarification of their role would be beneficial.

Issuance of Mutual OFP's

The Task Force found that, at least in some areas of the state, judges in Minnesota continue to issue mutual OFPs in cases in which only one person has petitioned for an order and there is no evidence of mutual abuse. A 1987 Minnesota Court of Appeals decision, Fitzgerald v. Fitzgerald¹⁵ makes it clear that such orders are improper. In spite of Fitzgerald, 33% of the male Minnesota judges surveyed by the Task Force and 21% of the female judges report that they sometimes issue mutual OFPs when only one party has petitioned. Male judges in the metropolitan area are much more likely to issue mutual orders (42%) than male judges in other parts of the state (24%).

The practice of issuing mutual OFP's appears to vary greatly by county. Some domestic abuse advocates told the Task Force that while mutual orders had been common in the past, judges in their area were aware of the Fitzgerald case and had stopped using them. Other advocates reported that, in their county at least, mutual OFP's are still routinely issued. An advocate said that the staff of the program for battered women where she works knew of seven or eight mutual OFP's within the prior month. In each of these cases the petitioner proved her allegations of abuse and the respondent did not file a petition of his own. The advocate noted that judges will frequently initiate discussion about a mutual OFP by asking the petitioner if she objects. Very few petitioners do so, because they don't want to antagonize the judge. A family law attorney wrote to the Task Force about one county in which, out of eighteen OFPs issued over a period of several months, all but two contained mutual restraining orders.

The harmful consequences of mutual OFPs were illustrated by testimony at the public hearings and lawyers' meetings and in written comments from battered women and advocates. Witnesses told the Task Force that when a judge issues a mutual OFP there is a significant disincentive to seek enforcement. When police officers are called out to enforce the order and learn that it is a mutual OFP they often arrest both parties, "just to be safe," even if there isn't any evidence of mutual abuse. Other witnesses pointed out that issuance of mutual OFPs gives abusers the wrong message. Mutual OFPs suggest that the

15 406 N.W.2d 52 (Minn. Ct. App. 1987).

court is not serious about holding the abuser accountable for the violent behavior. Mutual orders also reinforce the notion that the victim is to blame for the abuse.

Denial of Supervised Visitation

The Minnesota Domestic Abuse Act explicitly authorizes the judge in an OFP proceeding to restrict or condition the time, place, or manner of a non-custodial parent's visitation with his or her children if the court finds that the safety of the victim or the parties' children would be jeopardized by an order that does not provide for supervision.¹⁶

Battered women and advocates expressed concern that some judges do not issue orders for supervised visitation because they fail to understand the dynamic of an abusive relationship. Judges tend to order "reasonable visitation" where a more structured order, setting conditions or requiring the presence of a third party, would reduce the potential for violence. On the judges' survey less than half of the respondents — 46% of the men and 42% of the women — said that they often order supervised visitation during OFP proceedings.

Witnesses at several of the public hearings told of judges who refused to order supervised visitation in cases with long histories of violence. One woman explained what happened when she asked a judge to require that her ex-husband's visitation with their four children be supervised. She had been divorced for about a year when her former husband began harassing her. She told the Task Force that he was chemically dependent and had lost his driver's license as a result, that he was violent towards her and also a danger to himself — he had apparently tried to commit suicide while serving time in jail. She petitioned for an OFP and asked for supervised visitation as part of the order. She said the judge believed her ex-husband's assurances that he wasn't using drugs in spite of her contrary testimony, his long history of drug abuse, and the fact that at the time of the hearing his driver's license had been revoked. The judge denied the woman's request for supervised visitation, and when the ex-husband pointed out that he could not drive and therefore could not pick up the children for visitation, the judge ordered her to transport the children to and from his home — a distance of about forty-five miles each way.

Another battered woman told the Task Force of a judge who threatened to order her to let her child's father take the boy for visitation even if the father was "crawling up the sidewalk drunk." According to this woman, the judge was annoyed with her for objecting to his order, which defined "supervised" as having to contact a third party once a day during visitation. The father in this case had a history of heavy drinking and drug abuse and had threatened the mother's life more than once.

Other witnesses told the Task Force of judges who will issue an OFP excluding the abuser from the petitioner's residence and then order unsupervised visitation to take place at that residence. The witnesses emphasized that this kind of order defeats the purpose of an OFP.

16 Minn. Stat. § 518B.01, subd. 6(3) (1988).

Enforcement

Witnesses testified at the public hearings and lawyers' meetings concerning poor enforcement of Orders for Protection. While 56% of male judges and 65% of female judges claim that they always or often sentence OFP violators to jail, attorneys are somewhat less likely to perceive judges as willing to sentence violators to jail. Only 21% of male attorneys and 10% of female attorneys say that judges always or often sentence OFP violators to jail.

At the second Twin Cities public hearing, Beverly Balos testified that a study she performed for the Minnesota Department of Corrections raised serious questions about the effectiveness of OFPs and the ability of the system to protect victims. The authors studied 898 OFPs filed in Hennepin County and Beltrami County in 1984. The purpose of the study was to record post-order violence and to track enforcement of the order. One of the most significant study findings was that 22% of the persons who were under the protection of court-issued OFPs were later the victims of violence in documented police reports. Only 22% of those subsequent perpetrators were arrested by police. An additional 35% of the OFP petitioners stated that they had suffered subsequent violence, but had not called the police.

One percent of the cases of subsequent reported violence resulted in prosecution. Of those, in every case in which a not guilty plea was entered, the case was dismissed. This funnel effect, in which civil domestic assault cases disappear from the system in progressive fashion, led the researchers to conclude that in reality domestic violence carries only minimal consequences.

This conclusion also held true when Balos looked at use of the contempt power to enforce OFPs. She found that only 4% of respondents were returned to court on contempt motions, with a contempt order entered in only 16% of those cases.

Proposed Solutions

Two of the significant reasons for difficulty in enforcing OFPs are the inaccessibility of the orders — they are not registered outside the county of issue and are not readily accessible to law enforcement officers — and a lack of systematic compliance supervision. A proposal by the Hennepin County Criminal Justice Coordinating Committee would help solve these problems by establishing a county-wide domestic violence computer bank with access by law enforcement, prosecuting attorneys, probation and the courts. It contemplates entry of OFPs, criminal prosecution data including conditions of release and conditions of probation, and listing under both the petitioners' and respondents' names.

The Task Force suggests that such a data bank be established statewide. The availability of OFP information to a law enforcement officer during a squad-car computer check, for example, will enhance the opportunity for OFP enforcement. Access by prosecutors will provide additional access to evidence for use in criminal prosecutions, and access by probation and court services will ensure the setting of more meaningful bail conditions and better founded sentencing.

Findings

1. Domestic violence is one of the most serious problems faced by our society.
2. Minnesota has strong and progressive statutes which are not adequately implemented or enforced.
3. Judges, lawyers, court personnel, and law enforcement officers are not sufficiently sensitive to the problems of victims of domestic abuse.
4. Some judges in Minnesota continue to improperly issue mutual Orders for Protection in situations where only one person has requested an order and there is no evidence of mutual abuse.
5. Petitioners for OFPs often do not receive adequate relief.
6. In certain cases the process discourages abuse victims from attempting to obtain protective orders.
7. The usefulness of the OFP is undercut at the local level through absence of clear enforcement procedures and standards.
8. Advocates for victims of abuse play a valuable part in the system; their role should be clarified to ensure their continued participation.

Recommendations

1. Judges, attorneys, court personnel and law enforcement officers should be sensitized to the problems of individuals who have been victims of domestic abuse.
2. The topic of domestic abuse and Orders for Protection – including information about the abuse dynamic and the dangers of victim blaming – should be addressed in judicial education programs.
3. Courts should not issue mutual Orders for Protection in cases without cross-petitions.
4. Continuing legal education programs should address domestic abuse issues.
5. The topic of domestic abuse should become part of the curriculum in family law courses in the state's law schools.
6. Domestic abuse issues should be addressed at local bar association meetings. The Minnesota State Bar Association could prepare a videotape presentation for use by local bar associations.
7. Court administrators and their deputies should have training in the area of domestic abuse as well as a good understanding of Minnesota's Domestic Abuse Act.
8. The state's courts should set a uniform standard regarding the role of the domestic abuse advocate at OFP hearings. The advocate should be allowed to attend the hearing, be present at counsel table and address the court. The courts should also take

action to ensure that advocates are allowed to assist in the preparation of OFP petitions.

9. State funding for the hiring and training of advocates should be increased.
10. The forms used to petition the court for an Order for Protection should be simplified. For example, proposed orders could contain more sections which would be checked off by the judge.

CRIMINAL ENFORCEMENT: DISMISSALS

At the heart of criminal enforcement of domestic violence complaints is the phenomenon of discretionary dismissal by the prosecutor, before the charge can be determined on the merits either by guilty plea or by trial. Variability of dismissal rates among jurisdictions suggests that prosecutorial policies and practices are the key determinant of dismissals. The essential prosecutorial issues are the handling of what is commonly referred to as the "victim cooperation" question and the devotion of energy to use of evidentiary tools. The most basic factor may be dedication of adequate prosecutorial resources, especially in the misdemeanor prosecution area. All of these issues must be addressed in a coordinated fashion in order for the judicial system to respond adequately to cases of criminal domestic violence.

The dismissal problem is real. Prosecutors stated in narrative comments on the survey:

Our dismissal rates for these types of cases run 80 to 90% in a jurisdiction that bills itself as being in the forefront of domestic abuse . . . Prosecution is, largely, a waste of time. (Male attorney, Twin Cities)

In my 8-9 years as a prosecutor, I would say that approximately 85% of all charges of domestic abuse against a female victim involve the victim requesting dismissal of the charges within one to two weeks after the police issue the tab charges . . . I take the position that I will have an uncooperative witness and will dismiss. (Male attorney, Greater Minnesota)

In all 15 cases, the victims demanded we dismiss. I have never tried any of the cases because of these witness problems. The cops arrest with probable cause without a warrant; I draft the complaints; the victims demand dismissal. I dismiss. These are all misdemeanor charges. (Male attorney, Greater Minnesota)

These comments indicate not only a pervasive dismissal practice, but a related issue of prosecutorial attitudes which contribute to the problem.¹⁷

The St. Paul Intervention Project submitted a compilation of cases dismissed by the St. Paul City Attorney's Office. The Hennepin County Attorney, Thomas L. Johnson, testified that although the rate of concluded prosecutions on the merits in felony domestic violence cases has increased in that jurisdiction, it nonetheless continues to lag behind case conclusion or survival rates for other crimes. Judges' narratives corroborated this phenomenon of discretionary dismissal by prosecutors.

The dismissal phenomenon is further verified by the Task Force's Domestic Violence Study of 1987 misdemeanor prosecutions in six jurisdictions. In St. Paul, the dismissal rate

17 Some judges require the prosecutor to state the reasons for dismissal in a domestic violence case on the record.

of the reviewed group of cases was 73%. In Duluth, the rate was 47%; in Kandiyohi County it was 25%. By comparison, in Brooklyn Park and Brooklyn Center, dismissals accounted for only 6% and 4% of the cases, respectively. There were no dismissals of the small number of charged cases in Little Falls. A full analysis of the dismissal data, including the average time elapsing before dismissal, is set forth in the study report.

Like Balos' study of 1984 OFP violations, the Task Force Domestic Violence Study of 1987 criminal assault cases showed that no cases in which a not guilty plea was entered ever were tried. Of the 224 cases reviewed, not one went to trial by jury. All case dispositions were by guilty plea or dismissal before trial.¹⁸ The Task Force is convinced that dismissal impairs enforcement of the criminal domestic violence laws, and is further convinced that this phenomenon can and must be reversed. The variability of dismissal rates in the study, data from surveys, and further examination of the reasons for dismissal lead to this conclusion.

The dismissal phenomenon can best be addressed by coordinated efforts to bring more victims to court, to use domestic abuse intervention advocates, to vigorously use evidentiary tools, and to commit adequate prosecutorial resources to the problem.

“Victim Cooperation”

If discretionary dismissal is at the heart of the criminal domestic violence enforcement problem, then the issue of “victim cooperation” is at the heart of discretionary dismissal. The term is used in quotations because it connotes a responsibility on the victim for the survival of the case. The views of the three prosecutors quoted at the outset of this section reflect that notion. But as one Twin Cities judge suggested in her narrative comments, that responsibility is misplaced:

Fifth Degree Assault [the typical charge in domestic abuse cases] is the only crime I know of where we force the victim to see that the system works. These victims, more than others, need support to make it through all the hoops.

The crucial issue is whether the victim shows up in court. The Task Force Domestic Violence Study showed that in almost two-thirds of the cases examined, the victim was the only witness to the charged assault other than the defendant. This is typically true of the misdemeanor assault case, as reflected in narrative comments and testimony. Although it is possible, in some small percentage of cases, to prosecute the case without the victim present, even a resourceful and committed lawyer can be stymied by lack of victim testimony.

The subject of whether the prosecutor bears responsibility for getting the victim to court has raised a complex question of the victim's relationship to the law. The judge who refused the OFP petition of the woman in the golf-ball incident because she was the “type who changed her mind” reflects serious derogatory thinking about victims of domestic abuse. Or, as a female attorney from the Twin Cities reported:

18 The Balos study also found that those who plead guilty to domestic assault were rarely fined.

I have had a judge tell me, in chambers, perhaps my female client deserved to be beaten up by her husband; maybe she said or did something that really angered him.

This victim-blaming is similar to the stereotypical thinking about sexual assault victims described later in this report, in which the focus is on the victim's characteristics rather than on the defendant's conduct. In addition, witnesses and survey comments described incidents of intimidation – threatened or actual reprisals and further battery – by criminal domestic assault defendants attempting to force dismissals. The combination of victim-blaming in the legal system and victim intimidation outside of the system can effectively deter prosecution of criminal domestic assault.

The prosecutor's willingness to dismiss criminal domestic assault charges in this milieu is a contributory factor to cycles of violence and the inability of the criminal process to deal with domestic violence. It is, further, a *de facto* delegation of the prosecutorial responsibility to enforce the domestic violence laws to the victims of the crime.

American criminal law, at its root, is premised on the notion that private citizens may not invoke the criminal process, for fear that the process, with its penal consequences, may be misused for improper purposes. The interposition of a responsible public officer is the institutional aspect of the criminal justice system designed to promote the community's interest in criminal justice. It is contrary to the principles of this system to even indirectly hold victims of domestic violence responsible for law enforcement in the area of their victimization.

If it is incumbent on the prosecutor to get the victim to court, and to treat the victim as a witness, rather than as the associate prosecutor, it may be necessary for the prosecutor to subpoena the victim to appear in court. At least one witness expressed the opinion that use of the subpoena power and its attendant contempt penalties for failure to appear may be a second victimization.¹⁹ Insensitive use of the subpoena can and does result in such victimization in some cases. In a prosecutor-victim relationship where the victim comes to know and trust the prosecutor at the outset of the case, and believes that the prosecutor will do everything possible to pursue the case, the result of subpoena use can be remarkably different. A subpoena could then serve as a means of taking the pressure off the victim, making it clear that the government, rather than the victim, is responsible for the pending prosecution. In two-thirds of the 1987 cases studied by the Task Force, prosecutors did not issue subpoenas to the victims for either pretrial or trial proceedings. (The data on subpoenas issued was available in all but 3% of the cases.)

If, as the Task Force Domestic Violence Study found, two-thirds of the cases involve the victim as the sole witness, and if prosecutors take the responsibility for getting the victim to court, there is a strong basis for concluding that more prosecutions can survive. Minnesota's judges would virtually always let the case go to jury deliberation on the testimony of the victim alone, as the table illustrates:

19 Testimony of Stephen Cooper, Minnesota Department of Human Rights Commissioner, Twin Cities public hearing (April 19, 1988).

TABLE 2.3
CREDIBLE VICTIM TESTIMONY STANDING ALONE,
IS A SUFFICIENT BASIS FOR ME TO DENY A
MOTION FOR A JUDGMENT OF ACQUITTAL:

	<u>Always</u>	<u>Often</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>
Male Judges	62%	26%	9%	3%	-
Female Judges	80%	20%	-	-	-

Similarly, approximately three-fourths of the attorneys surveyed viewed prosecutors as always or often willing to go forward with victim testimony alone.

Consistent, sensitive use of subpoena power, coupled with the uniform involvement of domestic abuse intervention projects would make a stark difference in dismissal rates.

Intervention and Victim Advocacy

Survey results, narratives, and evidence from the model Duluth Domestic Abuse Intervention Project (DAIP) suggest that intervention and victim advocacy projects are extremely helpful in increasing victim cooperation and case survival rates. Innumerable judges' narratives commented upon the enhanced chances of the case getting to trial if advocates were involved to minimize the intimidation factor, whether express or tacit. The judge's survey results indicate that 100% of female judges think that victim advocate programs are helpful in the prosecution of domestic violence cases, while 88% of male judges agree. Attorneys concur on the question of whether the presence of advocate intervention reduces dismissals. Forty-four percent of male attorneys and 61% of female attorneys stated that they always or often serve that purpose. About 60% of female prosecutors and defense lawyers fall into that category, while lower percentages of male prosecutors and defense lawyers agree.²⁰

The Duluth system, which involves both working with offenders to maintain their compliance with dispositional conditions and use of advocates to support the victims, went into effect in 1982. In that year domestic disturbance calls dropped by approximately ten percent. Arrests went up to 105 in 1982, compared to 21 in 1980. The conviction rate rose from 20% of those arrested in 1980 to 82% in 1982. The courts ordered 190 abusers into counseling in 1982, compared to eight in 1980. This is a dramatic rise in arrests and convictions. The program continues to work and is now being cited nationally as an excellent model.

If the two-pronged approach of victim subpoena and victim advocacy is used effectively to increase victim availability, prosecutors still must deal with questions of whether to prosecute in cases where the victim fails to appear or changes her testimony, and presentation of successful cases where the victim is the only witness.

²⁰ The Task Force Domestic Abuse Study data gatherers were surprised to find that information on participation by advocacy and intervention projects was not available from prosecutors, law enforcement, or court records. Such information could help develop a data base on the role of these projects.

Evidentiary Tools

A number of evidentiary tools are available or can be developed, which may help the prosecutor go forward with the case in the absence of the victim or in cases with recanting victims. Depending on the other evidence that has been preserved, the case may be no less prosecutable than a homicide case, where, by definition, the victim is unavailable. Statutory enactments to allow for the development of evidentiary tools and preservation of evidence can assist in the enforcement of the domestic violence laws.

Medical Evidence. The Task Force Domestic Violence Study showed that physical injury was present in three-fourths of the cases examined, with many such injuries observed by the police. Many victims received outpatient care at a hospital or doctor's office. The police report in all such cases can be required to contain a photograph of all physical injuries. A protocol can be developed with medical care providers for the gathering of photographic and physical evidence in much the same manner that "sexual assault kits" are completed on rape victims. The reporting requirement for medical personnel to report child abuse can be expanded to include mandatory reporting of domestic abuse and submission of medical records to the prosecuting authority. With these measures, the evidence of physical injury can be preserved.

"Prompt Complaint" Evidence. Each domestic assault criminal complaint involves a victim's description of the assaultive encounter. In sexual assault and child abuse cases, such prompt complaint of victimization is often allowed as evidence in trial as an exception to the hearsay rule. A concerted effort to document the original complaint of the domestic violence victim in the victim's own words, whether by videotape or audio record, would make such evidence available to the prosecuting lawyer. A police officer's paraphrase in a written report fails to serve this evidentiary function.

Computerized Data Base. The statewide domestic abuse computerized data base recommended in this report in the civil context would serve the additional function of allowing prosecutors access to knowledge of outstanding or prior OFPs, which may not be otherwise known. The realities of large-volume misdemeanor prosecution eliminate much police investigative follow-up for trial preparation. The data base also would provide access to prior criminal history which the prosecutor may evaluate for use as evidence of the crimes.

Witness Statements. Police interviews of eyewitnesses other than the victim provide valuable assistance in getting the case to disposition on the merits. In one-third of the Task Force Domestic Violence study cases, there were eyewitnesses; of those eyewitnesses, police had interviewed more than three-fourths of them. The majority of the eyewitnesses were adults.

Same Prosecutor. Effective use of these suggested evidentiary tools, including close interaction with the victim, requires that a single attorney be assigned to handle a case from the initial charge through trial. Testimony of victims and intervention project personnel indicates that in some jurisdictions, the identity of the trial prosecutor is unknown until the assigned day of trial. To that end, establishment of special domestic assault prosecutors has been recommended.

Prosecutor Resources. Each of the preceding parts of the discussion on dismissal entails the commitment of prosecutorial resources beyond those normally allotted in the high-volume, fast-paced criminal misdemeanor practice. If prosecution is intensified, more calendar time in the criminal courts will have to be dedicated to these cases. If the domestic violence problem is serious, and if misdemeanor courts are where the most commonly enforceable remedy is available, the Task Force concludes that these resource allocations must be made. The physical trauma to thousands of victims, the familial upheaval, and the secondary consequences in the workplace, the schools, and the cultural environment may well be a greater cost to society than the cost of judicial and prosecutorial resources necessary to deal comprehensively with the problem of domestic abuse.

Addressing Enforcement Issues

The problems of domestic abuse enforcement are not unlike the problem of drunken driving, which the state has just recently confronted. Many of the obstacles to effective enforcement of both civil and criminal domestic abuse laws parallel those that, until recently, prevented effective enforcement of drunken driving laws:

- cultural reluctance to intervene in what was seen as essentially a private matter;
- inconsistent attitudes toward enforcement from prosecutor to prosecutor and judge to judge; and
- insufficient commitment of law enforcement and judicial resources.

Despite these obstacles, a dramatic shift has occurred in public attitudes toward drunken driving. Attributable largely to the public education efforts of nonprofessional individuals devoted to their task, this shift has resulted in changed laws, commitment of law enforcement offices and invigorated prosecution. There is now a pervasive perception in Minnesota that drunken driving will not be tolerated.

Enforcement of domestic abuse laws, if it is to be effective, will occur only when Minnesotans decide that they will not tolerate within families conduct that they will not tolerate on the street. It is a simple truth that in a civilized society, people are not allowed to physically injure one another except in the most extraordinary circumstances. The Task Force recommends that this simple truth be brought home in every sense of the word.

As it now stands, disturbing numbers of Minnesota women suffer physical injury within their homes and family settings, without adequate recourse in the courts. Such systemic inability to consider the merits of domestic violence cases in our courts should cause serious thinking and action by the bench, the bar, and the public.

Findings

1. The survival rate of domestic assault prosecutions is significantly diminished by a practice of dismissal by the prosecutor before trial.
2. Prosecutors' offices are handicapped in their responsibility to enforce the Domestic Abuse Act by the lack of adequate resources and the absence of sufficient evidentiary tools.

3. Lack of coordination between the civil and criminal enforcements of the Domestic Abuse Act often leads to conflicting or confused handling of cases.
4. Domestic abuse intervention projects substantially enhance the number of cases finally resolved on their merits.

Recommendations

1. Legislation should be enacted that mandates funds and makes available domestic abuse advocacy programs in each county of the state.
2. The state should create a statewide computerized data base on domestic violence, available to law enforcement, prosecutors, courts, and probation, to be accessed under both victim and abuser names, to include:
 - (a) existing OFPs and their conditions;
 - (b) existing conditions of bond or probation;
 - (c) pending criminal charges;
 - (d) past domestic violence criminal history; and
 - (e) past OFPs.
3. Police reporting requirements regarding domestic violence should be expanded to require law enforcement officers, prosecutors, courts and probation officers to report the items above into the statewide data base.
4. Legislation should require medical care providers to report incidents of domestic violence to law enforcement authorities, and to preserve and make available physical evidence of injury to the victim.
5. Legislation should mandate presentence investigations in all cases of conviction for domestic violence, without ability to waive the requirement.
6. Legislation should require all county and city prosecuting authorities to have a plan for the effective prosecution of domestic violence cases.
7. A policy commitment should be implemented to end discretionary dismissals for reasons of "victim cooperation," and to develop effective means of reversing this phenomenon.
8. A single prosecutor should be responsible for each case from initial charge to disposition.
9. Early contact between prosecutor and victim, with earliest possible domestic abuse advocate intervention, should be used to explain the use of subpoenas, and the role of victim as a witness.
10. The use of subpoenas should become standard procedure in all domestic violence prosecutions necessitating appearance of the victim.
11. Coordination should be established with law enforcement authorities to preserve prompt complaint evidence by means of videotape or audio recording.
12. Adequate resources must be allocated to permit prosecutors to execute the foregoing.

13. The Supreme Court should promulgate a rule which provides that domestic abuse advocates do not commit the unauthorized practice of law when appearing with or assisting victims of domestic violence in criminal proceedings.
14. The prosecutor's statutory obligation to notify domestic violence victims in advance of case dismissals should be uniformly enforced and coupled with a requirement that prosecutors state the reason for dismissal in open court.
15. Courts should require supervision of conditions of release by court services pending trial in criminal actions and of probationary conditions following sentence.
16. Courts should create uniform forms for statewide use in bail matters for criminal domestic violence proceedings.
17. Courts should enforce the statutory mandatory fine requirement in instances of conviction for domestic violence, except in cases of sworn indigency.
18. Police and sheriff's departments should be encouraged to present in-service training programs concerning domestic abuse. Post Board credit should be offered and the programs should be made as realistic as possible.