

WOMEN AGAINST ABUSE LEGAL CENTER

**Testimony Before:
House Judiciary Committee**

**April 14, 1998
Hersey, PA**

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The biggest problem that non-profit organizations like ours have encountered related to the issue of attorneys fees has been confusion over whether non-profits are entitled to an award of attorney fees because they do not charge their clients.² This problem was recognized early on and in 1988, Senator Stewart Greenleaf proposed amendments to the Protection From Abuse Act which added the current language regarding attorney fees. He did so to "...clarif[y] that legal fees may be directed and paid to Legal Services which represents many plaintiffs in domestic violence cases."³

Despite this clear legislative intent, and what appeared to be clear statutory language, the issue of whether legal fees could be awarded to non-profit agencies under the Protection From Abuse Act has been raised, briefed and decided on numerous occasions since the 1988 amendment.⁴ Many programs, including ours have prepared trial court memoranda as well as appellate court briefs on this issue. This is a drain on programs which have scarce resources and heavy demands for services. Ultimately, to our knowledge, all courts presented with the issue have agreed that non-profit organizations are entitled to reasonable attorney fees under the Protection Against Abuse Act even though they received no compensation for their services. We believe that if this is explicitly stated in the Protection From Abuse Act the issue will no longer continue to emerge in our cases.

A second issue that concerns us is the fact that judges have awarded attorneys fees to defendants in some cases. This is very troubling to us because the Protection From Abuse Act states: "[t]he

² Programs funded by the Legal Services Corporation are currently not allowed to collect attorneys fees under their rules. They are probably the major service providers to victims of domestic violence outside of Philadelphia County in the Commonwealth. We hope that in the future their right to collect attorneys fees will be restored.

³ 3/30/88 letter from Stewart J. Greenleaf to Senator F. Joseph Loeper and Senator Edward Zempretti. (Attached)

⁴ Krasnoski v. Rosey, 685 A.2d 635 Pa. Super. 1996; Malinowski v. Malinowski, Phil. C.P. June Term 1988 No. 5476; Johanning v. Johanning, Phil.C.P. April Term 1992, No. 8144 Portley v. Portley, Phila. C.P. April Term 1990, No. 3757; Valora v. Valora, Adams C.P. No. 96-S-264, Jan. 13, 1993. (All cases attached except Malinowski and Johanning)

court may direct the defendant to pay reasonable attorneys fees."⁵ In spite of this language, courts have entered awards of attorney fees for defendants in cases where defendants have not even filed for relief under the Protection From Abuse Act. Although, we do not know of any case law that addresses this issue, attorneys have argued successfully at the trial court level that 42 Pa.C.S.A. §2503 permits this award.⁶

To stop this practice, we would like to further clarify the Protection From Abuse Act to explicitly bar an award of attorneys fees to a defendant in an action.

In addition, some courts have been requiring petitioners to post a bond or pay court costs prior to filing a future Protection From Abuse petition as part of the final order when a petitioner's case is dismissed. We think this seriously thwarts the intentions of the Protection From Abuse Act by blocking access to the courts by people who might be in danger and who should be entitled to file for relief but cannot pay the cost of the bond or the court costs prior to filing. We would like to see specific language barring this practice.

In accordance with the above recommendations, we propose that the following language be included in the Protection From Abuse Act:

§6108 Relief.

(a) General Rule. The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:

(8) Directing the defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, including medical, dental, relocation and moving

⁵23 Pa.C.S.A. §6108(8)

⁶42 Pa.C.S.A. §2503(7)&(9) entitle a party to reasonable counsel fees "...as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." or 42 P.C.S.A. §2503(8) "...because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith."

expenses; counseling; loss of earnings or support; costs of repair or replacement of real or personal property damaged, destroyed or taken by the defendant or at the direction of the defendant; and other out-of-pocket losses for injuries sustained. [In addition to out of pocket losses,] The court may direct the defendant to pay reasonable attorneys fees. Only the defendant in an action under this section may be ordered to pay attorneys fees. The court may not require a petitioner to pay any costs or to post a bond prior to filing a petition under this section. Non-profit organizations or attorneys who provide legal services to plaintiffs without charge are entitled to receive attorneys fees under this Act. An award under this chapter shall not constitute a bar to litigation for civil damages for injuries sustained from the acts of abuse giving rise to the award or a finding of contempt under this chapter.

In our proposed amendment, we have added a sentence which specifically entitles agencies or individuals who represent plaintiffs without charge to receive attorneys fees. In addition, we have deleted the words "In addition to out of pocket losses" for clarity because the current language could be construed to mean that before an award of attorneys fees can be made there must be out of pocket losses. We do believe that this meaning was intended by the legislature, and because the language can be easily misinterpreted and does not serve any purpose that we can think of, we suggest deleting those words.

Members of our staff have had lengthy discussions about the utility of the proposed mandatory attorneys fee amendment. At first it seemed very appealing because it appeared to strengthen the Protection From Abuse Act by encouraging defendants to take the process more seriously because they would be forced to pay attorneys fees in many cases. We also liked the idea that we might be able to generate additional revenue for our program which would enable us to expand our services.

Nonetheless, we have many concerns about making attorneys fees mandatory. After weighing the pros and cons of amending the Protection From Abuse Act to mandate that attorney fees be paid by defendants, we have concluded that the problems this change would create outweigh the possible benefits.

2) FAMILY LAW STATUTES RARELY MANDATE RELIEF

In family law cases, judges generally have discretion in

fashioning relief. There are frequently guidelines or enumerated factors for judges to consider but rarely are there absolute mandates because the cases are so fact-sensitive. Even in the Protection From Abuse Act, judges have discretion when choosing what relief to enter under the sub sections of 23 Pa.C.S.A. § 6108.⁷

The Family Law Quarterly published an article which discusses the tension between "rules" and "discretion" for judges. In the present situation, "rules" can be equated with mandates. The article states: "It might be said that the problem with rules is exactly that they work by establishing large categories in which a range of factual situations is subsumed. Even though a group of cases fits under a single rule, there will usually be some differences among them. In other words, rules lump cases together which are not identical, and in this way rules seem to ensure that like cases will not be decided alike."⁸ We are concerned that the proposed attorneys fees mandate will cause unexpected and unwanted results as discussed below.

3) THE PROPOSED AMENDMENT IS NOT CLEAR AND MAY DETER DEFENDANTS FROM ENTERING INTO AGREEMENTS IN ORDER TO AVOID PAYING ATTORNEYS FEES

Many Protection From Abuse cases are resolved by agreement of the parties and subsequent approval of the agreement by the court. It is not clear from the way the amendments are currently drafted if parties must include attorneys fees in an agreement in order for a judge to approve it.

The proposed language does not give the court guidance in cases where orders are entered by default which often occurs, in Philadelphia County. If the defendant has to pay attorney fees even in cases which resolve by agreement of the parties, it will be more difficult to obtain agreements. Many petitioners do not want to have to testify in court about the allegations and want to be able to enter into agreements.

4) DEFENDANTS WILL BE ENCOURAGED TO COUNTER-FILE THEIR OWN PROTECTION FROM ABUSE PETITIONS TO TRY TO AVOID PAYMENT OF

⁷ *Snyder v. Snyder*, 629 A.2d 977, 427 Pa. Super. 494 (1993).

⁸ Carl E. Schneider, The Tension Between Rules and Discretion in Family Law: A Report and Reflection, Fam. L. Q., 229, 240 (Summer 1993).

MANDATORY ATTORNEYS FEES.

Mandating that defendants pay attorneys fees may lead many of them to file their own Protection From Abuse petitions with the court in an attempt to even the playing field and eliminate the possibility of having to pay attorneys fees. This strategy would be very unfortunate for the truly abused party and would also waste court resources.

5) COURT RESOURCES ARE BETTER DIRECTED TOWARDS HEARING PROTECTION FROM ABUSE CASES THAN TOWARD HEARING TESTIMONY ABOUT ATTORNEYS FEES

In Philadelphia County, the Family Court has to allocate judicial resources to cover a large volume of cases. In addition to the Protection From Abuse cases that the court hears annually, it also hear thousands of custody cases.⁹ Family Court deals with large numbers of individuals and the court administration estimates that between 80% and 90% of the cases are filed pro se.

On a typical day in Family Court, a judge may have a docket of forty-five (45) Protection From Abuse cases. A judge may order many types of relief in a Protection From Abuse case including eviction from a household, temporary child custody, temporary child and spousal support and restitution for out -of- pocket expenses incurred as a result of abuse. If judges are also required to address the issue of what constitutes "reasonable" mandatory attorneys fees, time will be used which could be devoted to the other issues in the cases.

Our concern is that judges may be forced to take testimony on the attorneys fees issue because they have been mandated to do so and, because of time constraints, will fail to take testimony on forms of relief which may be more critical to the plaintiff. It is already difficult for courts to address child custody and support in the context of Protection From Abuse hearings. This relief is often critical to the safety of plaintiffs and children and may determine whether or not a plaintiff can escape an abusive relationship. The proposed amendment may exacerbate this problem by leaving even less time for crucial issues to be heard by the court.

6) A DEFENDANT'S RESOURCES ARE BETTER DIRECTED TOWARD SUPPORT OR COMPENSATION OF THE VICTIM

⁹ Philadelphia Family Court received approximately nine thousand (9,000) custody petitions in 1997.

The proposed amendment might encourage judges to impose mandatory attorneys fees instead of ordering defendants to pay support or property damages in cases where defendants claim to have little income. We would rather have judges hear testimony and award plaintiffs out- of- pocket losses or support before imposing mandatory attorney fees. As the statute now reads, a judge may award attorneys fees in appropriate cases.

CONCLUSION

We hope you will consider the suggestions we have offered for amending the Protection From Abuse Act. Thank you for the opportunity to share our opinions and concerns with you.