

Abstract for AALS Midyear Conference:

Who Holds the Power? The Enforcement of Custody Provisions for Abuse Survivors

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In all fifty states and the District of Columbia, victims of domestic violence can obtain protection orders by petitioning the court. The protection offered in these orders not only directs the abusive party to refrain from further abuse, but across the nation, courts are empowered to also adjudicate custody and visitation within these injunctions. If parties share a child, the court, in an expedited hearing, may resolve issues of physical and legal custody for the duration of the order. Because domestic relations cases that adjudicate permanent custody and visitation can take substantial time to be resolved in court, this expedited relief can be essential to the safety of domestic violence victims and to the wellbeing and stability of children during this tumultuous time in a family's life.

Under protection order statutes, within several weeks parties can leave court with a protection order that establishes which parent has physical and legal custody and when, where, and how often visitation or parenting time will occur with the nonresidential parent. Physical custody, which dictates where the child will live, provides children and parents with concrete expectations about a child's primary residence. Legal custody, also critically important, determines who will make essential decisions for the child that include issues related to schooling, religion, and medical care. A parenting time order establishes routines and expectations for parents and children about when and how a nonresidential parent will spend time with the children.

If the order is breached, criminal enforcement can follow. Statutes around the country criminalize the violation of a protection order as a misdemeanor crime. The order also can be enforced through criminal or civil contempt actions, authorized either through specific statutory or generally through equitable principles. For violent breaches of protection orders and even for failure to make payments required in protection orders, this enforcement system has been fairly reliable. The government holds the power to enforce orders criminally and exercises that power quite reliably. Aggrieved parties themselves or the government are authorized to enforce orders requiring payment, such as child support. As long as party has the means to make the payment, a party can coerce that payment.

What is unclear is where the power resides to enforce the custody and visitation provisions of the protection order. Legally, the power to enforce those remedies resides with same actors who have the power to enforce other relief. However, in practice, the power to enforce those remedies is often declined or is elusive, leaving the remedies themselves without value. This Article explores the absence of deployable power to enforce the custody provisions of a protection order. This gap in enforceability has been previously unrecognized and analyzed. This Article seeks to surface the issue and to explore ways to locate and reify that power so that the family law provision of protection orders are more than ephemeral.

In Part I, this Article first introduces Mrs. Jones, whose case illustrates the unpredictability of custody and parenting time relief in protection orders. Against this backdrop in Part II, the Article considers the three avenues of enforcing family law remedies in protection orders that include criminal prosecution, and criminal and civil contempt. Part III interrogates the central question of where the power actually resides to enforce the domestic relations provisions of protection orders through criminal contempt looking specifically at protected parties, the court, and at the prosecutors. This Part ultimately considers the implications that the actors who hold truly reliable power to enforce the family law

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remedies of the order have either little incentive to do so or are severely curtailed in their ability based on resources. In Part IV, the Article looks specifically at the power to enforce domestic relations provisions of protection orders through civil contempt, looking at why the power, which is officially held by the aggrieved party, is often nearly impossible to deploy.

In Part V, the Article considers the problem from a larger context, considering whether the power to enforce other civil orders is similarly elusive. In acknowledging that civil orders often pose enforcement challenges, this Part considers the use criminal and civil contempt to enforce other types of civil orders and also analyzes the enforcement mechanisms that apply to longer term domestic relations orders. Finally, the Article concludes by considering avenues that might make the power to enforce domestic relations provision of protection orders more meaningful.

I. Problem in Context.

Mrs. Jones fled in the middle of the night. Her husband had been beating her and isolating her from her friends and family for many years. One time she loaded the dishwasher wrong. A mug had flipped and filled with water; in response her husband punched her in front of her children. The night she fled he had held her at gunpoint in their bedroom. He told her he would kill her for her suspected infidelity. They lived in a rural county in which the closest sheriff's station about a hundred miles away. When her husband finally fell asleep, she called the sheriff and asked where the closest domestic violence shelter was located. She asked them if she should bring her children with her. They told her children were not allowed in the shelter. So, she left them with their father.

The next day Mrs. Jones filed for a protection order. She sought an order that directed Mr. Jones to stay away from her, to refrain from contacting her, to not abuse her, and to grant the parties joint custody. Mrs. Jones had no idea where she would live now that she had left her husband's home. Indeed the shelter she had found did not permit children to stay. As a further complication, her youngest child of the four had an immune disorder. He could live only in the most sterile environments. Though Mr. Jones had abused and denigrated her, he had never been violent with the children and had successfully homeschooled them for several years. She sought an order that would allow her husband to keep the children until she had permanent, safe housing. And an order that would grant her 10 hours of visitation each week.

At court, Mr. Jones agreed to the protection order granting the stay away and no abuse provisions. The parties would share joint legal and physical custody, with the children living with Mr. Jones for the next three months. The parties set a court hearing for three months hence to reassess physical custody. Mr. Jones would bring the children to Mrs. Jones who would have twice weekly visitations amounting to 10 hours each week. During one of those visitations, she would take all four children to the hospital to obtain medical treatment for the youngest son.

The first visitation date finally arrived. Mrs. Jones waited at the designated location. She couldn't wait to see her children. They were late. Very late. She emailed, texted, called. No response. They never came. Three days later the next visitation day occurred. But visitation didn't happen that day either. Despite repeated calls, promises, plans, and disputes, Mr. Jones did not bring the children to see their mother for the entire three months leading up to the scheduled court hearing. During that time, Mr. Jones also decided that the youngest child did not need further medical treatment but instead would get acupuncture. He enrolled the two oldest children in school near his home. Mrs. Jones did not know about any of these decisions but only learned of them many months later.

At court, Mrs. Jones reported to the judge that Mr. Jones had failed to comply with the Order by preventing her from having visitation for three months. When questioned, Mr. Jones agreed that he had

not brought the children for visitation. He said he didn't want the children to see their mother. The judge warned him that he was under court order to deliver the children for visitation. He said he understood but that he did not intend to produce the children the following weekend as ordered. The judge suggested Mrs. Jones file for contempt. She did.

The prosecutors reviewed her motion for contempt as a motion for criminal contempt. They declined to prosecute. Under her jurisdiction's law, she had no private right of action for criminal contempt. The judge didn't, himself, initiate any contempt proceedings. She filed for civil contempt. At the hearing on the civil contempt motion, the judge asked Mrs. Jones if she had seen her children for visitation since they had last been in court. She said that she had. Mr. Jones had brought the children to her as ordered since she had filed her motion. The judge was pleased and told the parties that the case was dismissed. Mrs. Jones was baffled and dismayed. She asked the judge what he was going to do about the three months of visits that had been denied to her. The judge explained that now that Mr. Jones was in compliance, he had no authority to do anything about the past violations. She asked for increased visitation to compensate her for the lost hours. He refused. She asked what is to keep Mr. Jones from starting to violate the order again since it's clear that he can escape any type of repercussions by merely coming into compliance after the contempt motion is filed. The judge shrugged his shoulders.

Mr. Jones did not show up for the next visitation. Or the next. Again, Mrs. Jones filed for contempt. Once again, the case was dismissed after Mr. Jones complied with the visitation pending trial. And once again, he stopped delivering the children for visitation. During the year and half following her escape from her abusive husband, Mrs. Jones saw her children a handful of times for only an hour or two at a time. She repeatedly questioned her decision to have fled in the first place. Ultimately, the parties fought for custody in a different jurisdiction and, with the assistance of expert testimony on Mr. Jones' abuse of Mrs. Jones and of the system, the judge granted her sole legal and physical custody.

Mrs. Jones's story,¹ though complex, captures elements of the court experiences of a sizeable number of women coming seeking protection for themselves and their children. As one commentator notes "[t]hreatened or actual litigation regarding custody or visitation can become a critical avenue for the batterer to maintain control after separation."² Further, experts on fathers who abuse the mothers of their children note the prevalence of custody litigation in the context of domestic violence.³ They also note their frequent success⁴ at strategically manipulating the system to use custody litigation to their advantage.⁵ Flaunting custody and visitation provisions granted in a protection order may well represent a robust and successful tactic of abusive partners in controlling and harassing the other parent.

¹ The vast majority of the facts in this story are attributable to one client whom I worked with in D.C. Superior Court and who wanted very much to share her experiences to assist other women facing similar circumstances. For her safety, I have changed her name and identifying facts in this vignette.

² Tarr at 38 citing Bancroft and Silverman, *BATTERER AS PARENT*.

³ Bancroft and Silverman, *BATTERER AS PARENT*, p. 98 and 113.

⁴ See Bancroft at 98 (noting abusive fathers are more likely than non-battering fathers to seek custody and that they have an advantage over battered women in winning in a contested custody case).

⁵ Bancroft and Silverman, p. 122-128.