



Judge Fehng-Shian Gau

*The Protection of Children
from Violence*

The Child Protection System under the Domestic Violence Prevention and Treatment Act of Taiwan

Fehng-Shian Gau, Judge, Taiwan High Court

I. Preface

In August 1995, taking the Model Code on Domestic and Family Violence of the United States as a blueprint, and with reference to Domestic Violence laws prevalent in many other countries, I drew up our Domestic Violence Prevention and Treatment Act ("DVPTA"). Thanks to the tremendous efforts by Legislator Wei-kang Pan, the Modern Women's Foundation, and a number of scholars, experts, and feminists, DVPTA was promulgated by our president on June 24, 1998.

DVPTA contains a total of 54 articles in seven chapters. It took effect on the day of promulgation, except for Chapters II~IV, Articles 40~41 of Chapter V, and Chapter VI which would be put into enforcement one year from promulgation. DVPTA is intended to safeguard victims in quite extensive categories, notably marital violence, and child and elderly abuse. In an effort to safeguard children, it also contains many provisions protecting them.

In Taiwan, DVPTA has received widespread approval and support since it was first put into enforcement. It has brought government powers into families in an active way, redirecting the entire society away from the conventional concept that violence within a family is a domestic affair to which laws should not be applicable. It provides remedies different from Civil or Criminal Codes or otherwise, with specific protection provisions over child victims who have either received or witnessed violence. Rather than adopting passive measures to provide post-violence shelter or compensation, the DVPTA aims at eliminating domestic violence and providing children with a safe and violence-free environment to live and grow with by bringing judicial officers, police, social workers, medical specialists and educators into close cooperation.

II. The protection order system

DVPTA expressly provides three types of civil protection orders:

Full protection orders which may be issued after hearing, temporary protection orders which may be issued without hearing, and emergency protection orders which may be issued without hearing and outside of office hours (Articles 9, 11, 13).

Civil protection orders provide quite an extensive scope of relief, including enjoining from violence, prohibiting of communications, removing the batterers from the residence of the victims, ordering the batterers to stay away from a specified site, ordering the possession of essential personal effects, granting temporary custody. A full protection order further includes specifying arrangements for temporary visitation, ordering to pay rent and support, ordering to pay for medication or damages to properties, ordering complete batterer treatment programs, ordering to pay attorneys' fees, etc., Civil or family judges may, on petition or ex officio, issue civil protection orders enabling either victims or children to receive appropriate protection. Victims or children may petition to police or court for compulsory enforcement in the event the batterer ignores the civil protection order (Article 20). Violation of a

protection order (e.g. orders for restraining, no-contact, kick-out, stay away, completing a batterer treatment program , etc.) may result in a violation of protection order charge. (Article 50).

Other than Civil Protection Orders, prosecutors, criminal judges, and authorities in charge of parole may condition pretrial release, suspension of punishment, or parole for batterers to enjoin them from continual violence, order them to move out and ban them from approaching the victims. In the event of conditions in suspension of punishment, it may order batterers to receive batterer treatment programs. An offender shall be subject to detention, revocation of suspension or parole (Articles 23, 24, 25, 30, 31). Such conditional suspension, pretrial release and parole are termed as criminal protection orders theoretically.

Protection orders are system of protecting victims and their children. In Taiwan, the criminal protection order system has not been put into a full play. However, civil protection orders have been most widely used as a legal remedy because, compared with conventional legal resort, they provide more prompt, mild and fundamental remedies to victims and their children.

In comparison, the protection order system of the DVPTA provides more positive and fundamental measures against violence, notably with the following characteristics:

A. Moderation in measures

DVPTA authorizes trial courts to award petitioners very comprehensive relief. In an occasional minor domestic violence case, for instance, a protection order to enjoin violence would be sufficient to safeguard victims and their children. Such order is significantly less serious and complicated than conventional legal remedies. In a critical or habitual domestic violence case where the batterer must be temporarily separated from the victim, the court may grant the following relief in a protection order: enjoining the batterer from committing acts of violence, prohibiting the batterer from contacting the victim, removing the batterer from the residence of the victim, order the batterer to stay away from specified locations, or direct the batterer to complete a batterer treatment program for receiving mental treatment or psychological counseling.

Protection orders may effectively cause batterers to stay away from the victims during the specified period instead of leaving the unfortunate victims to escape by running away from home. Through such measures, batterers may continuously maintain their employment, education and interpersonal relations even though deprived of certain freedoms or subject to certain restrictions, without having the relative ties with the victims severed. Batterers are only ordered to stay away temporarily, and are still free of any penalty such as imprisonment or the like. Compared with conventional laws, such measures are both more practical and moderate.

B. Light burden of proof

As a non-contentious matter, a protection order is issued by the court by means of a

ruling instead of a judgement. Normally, temporary and emergency protection orders are of a short duration. They remain in effect until the court issues a full protection order or dismisses the petition. (Article 15, Sec.5). The maximum duration of a full protection order is one year, with only one extension permitted. Even when a full protection order is still in force, it loses its effect whenever a court ruling or judgement becomes final otherwise (Article 14).

In summary, protection orders are a sort of non-contentious matter and of a short duration, as a sort of temporary protection measure. Naturally, it is less effective than a court judgement, or even a court ruling. For instance, when a court ruling or judgement on child custody becomes final, the temporary child custody order loses its effect forthwith.

As a result, when a petitioner applies for a protection order, the court shall not require the petitioner to bear the burden of proof as strictly as traditionally required in a civil procedure. Particularly in a temporary or emergency protection order case, if the proof provided by the petitioner can "explain" that domestic violence has occurred and there is danger of further acts or threats of domestic violence, the court may issue a temporary or emergency order to prevent further abuse. The victims and their children, with their safety assured, are in a position to provide added proof to conduct attack and defense in the proceedings of full protection orders, criminal, or other civil cases.

C. A fundamental remedy

For protecting against violence, the protection order system is not only a passive measure to enjoin the batterer from committing acts of violence or require the batterer to stay away from the victim temporarily. It is in fact a positive measure. The court may order the batterer to complete a batterer treatment program for receiving drug or alcoholic rehabilitation, mental treatment, or psychiatric counseling. Although during the lawmaking process, the compulsory treatment system was objected to on the grounds that it was not effective enough, the system passed the legislative process in the end. Since the DVPTA aims at preventing domestic violence, the compulsory treatment system signifies the main goal of the DVPTA.

As a matter of fact, our nation and society have paid the cost of domestic violence far beyond what has been anticipated. Domestic violence appears to have intergenerational effects*1. Children of violent families are more likely to be violent themselves. Moreover, if batterers are not provided with fundamental treatment or counseling, they may take new targets after their victims or children have left them. Therefore, the DVPTA requires that the Department of Health (DOH) of the Executive Yuan (the Cabinet) enact the norms for batterer treatment programs in order to enable private or public agencies concerned to develop a variety of batterer treatment programs, developing fundamental measures to restore domestic harmony, and causing violence to pass into oblivion.

If the protection order system is effectively enforced, the victims may receive sound safeguarding to free themselves from being forced to run away from home. Moreover, when the victims hesitate or do not dare to resort to divorce or litigation, this system provides victims with some very constructive measures to combat

domestic violence.

III. Child custody

DVPTA provides the following specific clauses regarding child custody in cases of domestic violence:

A. Presumptions concerning custody

Article 35 of the DVPTA provides that in every child custody proceeding, a determination by the court that domestic violence has occurred raises a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of the perpetrator.

The legislation of this Article does not exclude the principle of the best interest to the child, nor is it intended to bring judgement on who is right and who is to blame between a couple into the criteria of child custody, or intended to penalize the batterers or to indemnify the victims. More accurately speaking, it is intended to interpret the principle of the best interest of the child within the concept of the impact of domestic violence upon children, and to pass the burden of proof onto batterers.

Domestic violence has a huge impact on children. When children experience or witness violence in the home, the cycle of violence and abuse is likely to be repeated in later generations. Research on the effects of domestic violence on children has found that children in violent families are significantly more likely to experience physical harm from both parents than those in a nonviolent family. Furthermore, even if they are not physically harmed, children suffer enormously from simply witnessing the violence. Frequent witnessing of abuse by children leads to behavioral and emotional problems. They may repeat the pattern of violence in their own families when they grow up. Moreover, children in violent families may be abused by both parents. One study found that battered women are twice as likely to abuse their children as women who are not abused*2.

Therefore, Article 35 of the DVPTA provides that it is against the best interest of the child to place the child with the batterer unless the batterer can prove that it is in the best interest of the child to award him child custody.

B. Modification of child custody

Regarding modification of child custody, Article 36 of the DVPTA provides as follows: "when a court finds that domestic violence has occurred since the last custody or visitation determination, the court may, for the best interest of the child, modify the determination upon the petition of the victims, minors children competent government authorities, social welfare organizations or interested parties otherwise".

Under Article 1055, Sec. 2 and 3 of our civil Code, child custody determination shall not be modified except under three conditions: the child custody agreement is against the interest of the child, the guardian fails to protect and educate the child, the guardian's behavior is adverse to the interest of the child. As mentioned earlier, domestic violence casts extremely heavy shadows over children. Therefore, DVPTA

specifically eases the prerequisites for modification of child custody providing that occurrence of domestic violence provides the cause required for modification. It further provides that the right to petition for modification rests upon the victims instead of the batterers, endowing the unfortunate victims with added chances to win guardianship and better safeguard minor children.

C. Temporary custody

Our Civil Code provides that a parent can petition for child custody only upon or after a divorce. Under Article 13, Sec. 2, Paragraph (6) and Article 15, Sec. 2 of the DVPTA, court judges may grant temporary custody upon issuance of protection orders. A protection order may be issued before a divorce, not necessarily after a divorce.

Under the DVPT A, the court, when finding the facts of domestic violence and considering **necessary**, may issue protection orders either ex officio or on petition to grant temporary custody of minors children to either party or both parties, and specify the contents and manner of child custody, with an order to surrender children when necessary.

Regarding the proceeding of protection orders, Article 12, Sec. 1 of DVPT A requires a closed trial. Under Sec. 3 of that same article, until the trial proceedings are concluded, the court may take opinions offered by the municipal, county (city) level competent government authorities or social welfare organizations.

Article 14, Sec. 1 of the DVPTA provides that a full protection order normally remains effect for a maximum of one year from the time of issue. Under Sec. 2 of the same article, a court may, on a petition by a party or the victim, revoke or modify a full protection order or extend its duration prior to expiration. The extension may be granted only once, and with a maximum of one year. That is to mean a full protection order may last up to two years maximum.

As set forth in Article 15, Sec. 5 of the DVPTA, a temporary or emergency protection order loses its effect when a full protection order is issued or when the petition is dismissed. Accordingly, a temporary or emergency protection order lasts for an indefinite duration. In actual practice at the moment, the trial proceedings for a full protection order begin with the issuance of a temporary or emergency protection order. Therefore, the duration of a temporary or emergency protection order depends upon how long the court proceeds with the full protection order trial, and is not subject to an extension.

In addition, under Article 14, Sec. 3 of the DVPTA, a full protection order loses its effect when it expires or when the court comes to a final ruling or judgement. Accordingly, after the court issues a full protection order regarding temporary custody, if the court later comes to a final ruling or judgement on child custody, the temporary custody order loses its effect when that ruling or judgement becomes final.

IV. Child Visitation

DVPTA provides specific clauses regarding child visitation in cases of domestic violence:

A. Modification of child visitation

In case of modification of child visitation, Article 36 of the DVPTA provides as follows: "when a court finds that domestic violence has occurred since the last custody or visitation determination, the court may, for the best interest of the child, modify the determination upon the petition of the victims, minor children, competent government authorities, social welfare organizations or interested parties otherwise".

Under Article 1055, Sec. 5 of our Civil Code, child visitation may be modified only when the visitation is against the interest of the child. Since domestic violence has a huge impact on children, the DVPTA specifically eases the prerequisites for modifications of child visitation, providing that occurrence of domestic violence provides the cause for a modification. For preventing the batterers from continual control or abuse of the victims and their children by taking advantage of visitation, DVPTA provides that the right to petition for modification rests upon the victim instead of the batterer.

B. Safe visitation

Regarding child visitation, Article 1055, Sec. 5 of our Civil Code provides that the court may, on petition or ex officio, determine the manner and duration of child visitation for the party given no guardianship. However, that article does not specify the manner of visitation.

In an specific effort to safeguard victims and minor children, the DVPTA has adopted a supervised visitation system prevalent in foreign countries. Article 37 of the DVPTA provides:

- “1. A court, when awarding visitation by a perpetrator of domestic violence, shall consider the safety of minor children and the victim and may issue one or several orders as follows:
 - (a) Order the exchange of a child to occur in a protected setting.
 - (b) Order the visitation be supervised by another person or agency and establish conditions to be followed during visitation.
 - (c) Order the perpetrator to complete batterer treatment programs or other designated counseling as a condition of visitation.
 - (d) Order the perpetrator to pay the costs of supervised visitation.
 - (e) Prohibit overnight visitation.
 - (f) Require a bond from the perpetrator for the return and safety of the child.
 - (g) Impose any other condition that is deemed necessary to protect the safety of the child, victim or other family members.
2. If a court finds that a visitation breaches the orders of the proceeding section, or arrangements for visitation can not protect the safety of the victim and the children, the court may, on application or ex officio, prohibit the visitation. In case of violation of the order of the proceeding section, paragraph (f), the court may confiscate the bond.
3. The court may, as necessary, order authorities or people concerned to keep the

address of the victim or the child in confidence.”

A divorce does not necessarily suggest the end of domestic violence. In some cases, batterers would display an even greater risk of domestic violence against victims and children after separation; this elevated risk often continues after legal interventions*3.

Accordingly, this Article provides that, when permitting a batterer to visit minor children, a court shall consider the safety of the children and the victims and may set one or several orders quoted in Section 1 as the conditions of child visitation. In terms of the supervised visitation provided in this Article, for preventing batterers from initiating any abuse, intimidation, seduction, or insult, the court may designate the victims' relatives, friends, police or other accredited professionals to serve as supervisors. The batterer may visit their children only in the presence of the designated supervisors and must follow the designated conditions during visitation (Sec.1, paragraph (b)). A court may additionally order the batterer to pay the costs incurred by the supervised visitation (Sec.1, paragraph (d)). Furthermore, a court may ban visitation if the batterer violates the conditions or when otherwise necessary (Sec.2). Furthermore, a court may order the address of the victim and the child to be kept confidential to safeguard their safety (Sec.3)*4.

C. Visitation center

In an effort to prevent domestic violence, protect the safety of the victims and children, and enable the batterers to visit children in order to maintain parenthood, Article 38 of DVPTA provides that the local government agencies shall provide visitation centers. In addition, they shall establish specialized procedures for supervised visitation and the transfer of children. Moreover, a visitation center must provide personnel trained in security and the avoidance of domestic violence.

D. Temporary visitation

According to our Civil Code, a court may award child visitation only upon or after a divorce.

Under DVPTA, if a court has made a finding of domestic violence, the court may, on application or ex officio, issue a full protection order and award temporary visitation by a perpetrator after notice and hearing. To safeguard the victims and children, the court may, when issuing a full protection order, specify the manner of visitation. The manner includes conditions of visitation provided in Article 37 of the DVPTA and may prohibit visitation as necessary (DVPTA, Art. 13, Sec. 2, paragraph (g)). A full protection order may be issued either before or after a divorce.

Furthermore, after a court awards temporary visitation in a full protection order, if there is contentious or non-contentious matters existent in the parties regarding child visitation for which a court comes to a final ruling or judgement, the temporary visitation order loses its effect forthwith (DVPTA, Article 14, Sec. 3).

However, a court may grant child custody but not child visitation in a temporary or emergency protection order (DVPTA, Article 15, Sec. 2). The reason is that issuance of a temporary or emergency protection order calls for no trial proceedings. In

awarding child visitation, a court must take stock of the interest of the child on the one hand, and consider the safety of the victim and the children on the other hand, without undue deprivation of the batterer's right of visitation. Moreover, when specifying arrangements for visitation, a court must consider a variety of situations and determine an appropriate method of visitation. The court should not unduly deprive the batterer's right of visitation. Accordingly, when awarding child visitation, a court shall notify both parties to appear at the court hearing and conduct investigation and trial proceedings beforehand. Therefore, the DVPTA provides that a court shall not award temporary child visitation when issuing a temporary or emergency protection order.

V. Child support

Under the DVPTA, a court may order the batterer to pay for the support of minor children in a full protection order (DVPTA, Article 13, Sec. 2, Paragraph (h)). Nevertheless, a court may not order child support when issuing a temporary or emergency protection order (DVPTA, Article 15, Sec.2).

According to our Civil Code, the extent of maintenance shall be determined according to the needs of the person entitled to maintenance, and the means and social status of the person bound to furnish it. Therefore, when ordering child support, a court shall notify both parties to appear at the court hearing and conduct investigation and trial proceedings beforehand. Since temporary or emergency protection orders may be issued without a hearing, the DVPTA provides that a court may not grant child support in a temporary or emergency protection order.

In addition, after a court issues a full protection order with child support, if there is contentious or non-contentious matters existent in the parties regarding child support for which a court comes to a final ruling or judgement, the child support order loses its effect immediately (DVPTA, Article 14, Sec. 3).

VI. Reconciliation and mediation

Victims of domestic violence have never had equality within the relationship, therefore, they do not often have the power to negotiate in a reconciliation or a mediation. Since victims are unable to adequately assert themselves in a mediation or reconciliation session, they often receive unfair results. The nature of domestic violence precludes an equal partnership between the victim and the batterer, whereas reconciliation or mediation is a process that requires equal bargaining power. Under batterers' intimidation, victims get no choices of their own and are very often worried about their children. Therefore, a reconciliation or a mediation is normally not a sort of appropriate dispute resolution*5.

In a case of domestic violence involving reconciliation or mediation, the DVPTA does not encourage reconciliation and mediation. Instead, it provides restriction or even a prohibition on reconciliation and mediation. As a sort of Special Act, the DVPTA is preferentially applicable to reconciliation and mediation compared with our Code of Civil Procedures.

A. Chapter IV of the DVPTA

In Chapter IV of the DVPTA, there is a clause regarding procedures and restrictions upon reconciliation and mediation. Article 39 of the DVPTA provides: "In a proceeding of action or mediation, if a court has determined that domestic violence has occurred, the court shall not engage in reconciliation or mediation unless:

1. The reconciler or mediator is trained in domestic violence in a specialized manner that protects the safety of the victim.
2. The victim is permitted to have in attendance at reconciliation or mediation a supporting person of his or her choice.
3. Any other procedure deemed necessary by the reconciler or mediator to protect the victim from intimidation from the alleged perpetrator."

This Article applies to not only the action concerning marriage but equally to other contentious and non-contentious cases. However, the application is limited only to the proceedings of action and mediation conducted by a court. It is not applicable to mediation or reconciliation proceedings conducted by other agencies or organizations.

B. Chapter II of the DVPTA

In Chapter II of the DVPTA, there is a clause prohibits reconciliation and mediation. Article 12, Sec. 4 of the DVPTA provides: "Reconciliation or mediation shall not be engaged in a proceeding concerning protection orders."

Accordingly, all reconciliation and mediation is banned on protection order related cases without exception. The reason is that a protection order is intended to provide victims and their children with prompt and accurate temporary protection. For protecting the safety of the victim and their children, it is unadvisable to utilize compromise between both parties.

VII. Police powers and responsibility

Until the DVPTA was enacted and enforced in Taiwan, police officers had normally adopted a nonintervention policy in domestic violence related cases. Police would not act to collect evidence unless an involved party filed a criminal complaint. Once such a party filed a lawsuit, the police would only take summary process in collecting evidence. For instance, they would request the victims to undergo diagnosis at a hospital or clinic to prove the injury, or they would take depositions during interrogation. In responding to criticism, the police would contend that they were not empowered by law to take a positive role in domestic violence related cases. Sometimes police officers felt helpless and powerless even when they were enthusiastic in helping the victims or combating violence.

The DVPTA has imposed heavy responsibility on police and increased their powers to deal with domestic violence cases, therefore enabling police to play the role of a law enforcer and effectively combat domestic violence. These responsibilities and powers can be generalized as follows: Applying for protection orders, enforcing protection orders, helping acquire emergency protection orders, taking protective measures over victims, arresting batterers according to law, making incident reports to authorities, providing assistance to social work authorities for interview or investigation, receiving continuing education concerning domestic violence, etc.,. Therefore, the DVPTA not only authorizes police powers to deal with domestic

violence cases, but also imposes obligations on them to take positive measures to protect victims. Particularly in dangerous or emergency cases, police shall stand in the first-line to help victims obtain and enforce protection orders. As a matter of fact, only when the police play a positive role in domestic violence cases, arrest batterers, and faithfully enforce the protection orders to safeguard victims, can protection orders issued by courts possibly demonstrate their supposed functions. In summing up, protection orders and the positive role of the police are complementary to each other and are both indispensable to the elimination of domestic violence.

VIII. Conclusion

In domestic violence related cases, minor children call for specific protection. If minor children become direct victims in domestic violence cases, as they are not yet fully grown physically and mentally, and lack financial backing and competence to defend and protect themselves, they can seldom recover even after the passage of many years. Even if they are not direct victims, as they would inevitably witness the process of violence, they can rarely rid themselves of the nightmares in their minds. When the violence leads to a divorce, minor children often lack someone to care for them in a broken family and cannot grow up in a sound environment.

In an attempt to protect the safety of minor children, the DVPTA Adopts the protection order system of other countries and provides specific clauses regarding child custody, child visitation and child support. Furthermore, DVPTA endows police with added powers, enabling the Government powers to be performed inside families for preventing continual Occurrence of violence, and freeing minor children from violence related nightmares. For a fundamental remedy of violence, the DVPTA provides that a court may order the batterer to a complete batterer treatment program in a full protection order (Article 13, Sec. 2, Paragraph(j)). In addition, a court may order the batterer to complete a batterer treatment program or other designated counseling as a condition of child visitation (Article 37, Sec. 1, Paragraph (c)), enabling batterers to receive treatment or counseling and rid themselves of drug or alcohol abuse. Besides , children in domestic violence families tend to be victimized or witness the process of violence or abuse. Therefore, they may need to receive mental or physical treatment or counseling. The DVPTA provides that a court may order the batterer to pay for such medical or counseling fees in a full protection order (Article 13, Sec. 2, Paragraph (i)).

In Taiwan, the DVPTA has become a useful tool to combat domestic violence. Civil protection orders can offer effective legal protection for battered and their children. With the Act, judges, police, social workers and health care practitioners can do more to protect victims.

Nevertheless, we have encountered quite a number of difficulties in the process of the enforcement of the DVPTA. In addition, batterer treatment programs are still in their developing stages. The government agencies concerned have run into significant shortages of funds and manpower for the time being.

Since there have been many compromises in the process of legislation, the DVPTA is at the key stage for overall review and amendment. This calls for overall teamwork from all people, both in and out of the government. The DVPTA aims at providing sound and workable means to victims of domestic violence, in particular

minor children, so that future generations can rid themselves of domestic violence and grow up in a wholesome environment.

- 1.Cohn, Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions, 44 Vanderbilt Law Review 1058(1991).
- 2.Id., at 1055-1057: C.Mcgill, M. Deutsch, & A.Zibbell, Visitation and Domestic Violence: A Clinical Modal of Family Assessment and Access Planning, Family and Conciliation Courts Review of AFCC 319-320(1999).
- 3.National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence, 35_1994_
- 4.Fehng-Shian Gau, The Special on Domestic Violence Related Laws 21 (February 2000).
- 5.J. Hart, Gentle Jeopardy; The Further Endangerment of Battered Women and Children in Custody Mediation, 7 Mediation Quarterly 317-326_summer 1990_; J. Hart, State Codes on Domestic Violence, Analysis, Commentary and Recommendations, Juvenile & Family Court Journal, Vol.43, No.4, at 37-39(1992); H. Weiner, Domestic violence and custody: Importing the American Law Institute's Principles of Law of Family Dissolution into Oregon Law, 35 Willamette law Review 677(1999).