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PHASE THREE OF NEW YORK STATE DOMESTIC VIOLENCE LAW: THE FINANCIAL AFTERMATH

BY JENNIFER SARKEES

*PLEASE NOTE: Throughout this article, I have referred to batterers with masculine pronouns and victims with feminine ones. This is simply due to the fact that the majority of domestic violence cases in New York State, well over 80%, reflect such roles.¹ It was in no way meant to detract from the fact that there are female abusers and male victims, or that domestic violence exists between same-sex partners.

INTRODUCTION

Throughout the last several decades, due to a limited understanding of its full impact, there has been a very gradual recognition and, in turn, a very gradual reaction to domestic violence in the state of New York. The impacts of domestic violence proved greater and more broad-reaching than originally perceived and, in turn, led to the realization of additional issues to which the initial responses were insufficient. Thus, as new issues developed, new responses to domestic violence have also developed, resulting in what amounts to three phases of law reform.

I will address Phases One and Two briefly before focusing in some detail on Phase Three. Phase One includes the history of domestic violence recognition and criminalization and the limited scope of initial responses to domestic violence before its full impact was realized. Phase Two includes some of the currently recognized issues of domestic violence that have been addressed;

however, the law enacted as part of the law reform in response to these issues remains inadequate. In addition, Phase Two includes suggested improvements for the existing law reform. Phase Three will identify and discuss the currently unaddressed issues with respect to the financial aftermath of domestic violence faced by the victims of domestic violence and their children once they leave the violent situation. In addition, Phase Three will also provide proposed suggestions for new law reform to address these financial issues. Up until now, the main focus of domestic violence law has been on stopping ongoing abuse, preventing further abuse and removing victims and children from abusive situations. However, what has not been addressed is that once victims and their children are finally removed, they have a whole new set of obstacles to overcome so as not to feel compelled to return to their abusers. First, victims and their children need continued protection from their abusers even after they have left. Second, victims need the financial support necessary to obtain permanent housing. Finally, victims need the emotional support, counseling and training necessary to become independent, employable and self-supporting. In order to achieve these goals, Phase Three focuses on the necessary reform within the following five areas of the law: (1) Welfare Law; (2) Equitable Distribution Law; (3) Intestacy Law; (4) Bankruptcy Law; and (5) Taxation Law.

PHASE ONE: THE HISTORY OF DOMESTIC VIOLENCE RECOGNITION AND REFORM IN NEW YORK STATE

Due to a gross lack of education and information as well as a patriarchal societal mindset, domestic violence was not always viewed as a crime by police officers, lawyers, or judges. For decades, this type of abuse was seen as the husband’s right; a way to keep his wife in line. It was not uncommon, or even unsettling, for incidents of victims being blamed for the domestic violence, and these occurrences of domestic violence were rarely, if ever, treated as violent crimes. In addition, the courts did not treat incidents of domestic or family violence as criminal offenses because doing so was seen as the equivalent of violating a family’s privacy rights. Thus, the primary jurisdiction of such offenses was
within Family Court.² The courts have often justified domestic violence as the batterer’s reaction to the victim’s provocations, stating that had the victim not done this or that, the batterer would never have injured or even killed her.

Prior to the late 1970s, police officers would typically respond to domestic or family violence calls with a “separation and mediation” approach.³ Instead of making an arrest, the intention of the responding officer was to separate the batterer from the victim and to attempt to mediate or settle the dispute.⁴ The goal of the officer was neither to remove the batterer from “his own home” nor to arrest the batterer. In fact, a common approach was to have the batterer go for a walk or a drive and return home after having had a chance to “cool off.” Eventually, this caused domestic violence victims to begin suing police departments in the mid-1970s for failing to act on their behalf and provide them with adequate protection.⁵ In the late 1970s Article 8 of the Family Court Act finally allowed victims of domestic violence to seek relief in either Family Court or Criminal Court. Furthermore, the “72-hour rule” provided victims with 72 hours in which to make their decision. However, despite the fact that the United States Attorney General’s Task Force on Domestic Violence published a report in 1984 stating that arrest was the preferred response to incidents of domestic violence, New York State did not begin considering adopting “pro-arrest” policies until 1994.⁶

One of the most abhorrent shortcomings of the prior treatment of domestic violence was its failure to protect the children involved. It used to be that children who were exposed to domestic violence were rarely, if ever, factored into the equation when it came to divorce and/or custody proceedings between the victim and the batterer. Courts did not want to deprive parents of their rights and often viewed one spouse’s violent acts toward the

³ Id. at 10.
⁴ Id.
⁵ Id.
⁶ Id.
other as something totally separate from their abilities as a parent; as if the children had no knowledge of or ill-effects from witnessing one parent repeatedly abuse the other. In 1996, judges in New York were finally required by section 240 of the Domestic Relations Law (DRL) to "consider" domestic violence in determining custody and visitation. Eventually, legislation was passed prohibiting custody or visitation for a parent convicted of first or second degree murder of the other parent, but even that had exceptions.

**PHASE TWO: CURRENTLY RECOGNIZED ISSUES THAT STILL LACK ADEQUATE REFORM**

New York is generally one of the last, if not the last State to enact adequate laws regarding domestic violence. It was not until the 1990s that New York State began to respond more appropriately to domestic violence. Eventually, even the courts came around in terms of viewing domestic violence as a violent crime. Currently, there are several effective laws and methods in place within New York State to protect victims of domestic violence. These include the Violence Against Women Act (VAWA) of 1994; the New York State Family Violence and Protection Act of 1994 and the Act’s mandatory arrest provision in 1996; “no-drop” prosecution policies; evidence-based prosecution; and the state-wide expansion of Integrated Domestic Violence (IDV) Courts in 2002. However, despite the many advances that have taken place, New York still has a long way to go.

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8 Act of July 7, 1998, ch. 150, §2, 1998 N.Y. Laws note (codified as amended at N.Y. DOM. REL. LAW § 240.1-c(a)) (McKinney 1998). (240.1-c.(a) provides that “I-c. (a) Notwithstanding any other provision of this chapter to the contrary, no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding…”)
New York currently lacks a specific domestic violence statute. Instead, domestic violence is addressed in certain sections of the Penal Law, Article 8 of the Family Court Act and DRL § 240. New York must strive to adopt one concise statute that addresses the now realized myriad of domestic violence issues and follows them up with required and appropriate responses at all levels (i.e., police response, victim and child removal and protection, judicial response, abuser accountability, etc.). Even if this new statute refers to other New York statutes currently in existence (such as the Penal Law), it will still eliminate the piecemeal legislation in New York and prevent discretionary and/or uninformed judgment from being the primary determinant of the safety and future of victims and children.

Despite the efforts of VAWA, which provided funding for judicial training programs, there are still a lot of judges and attorneys who lack the information necessary to properly handle domestic violence issues. When this happens, victims and children are deprived of even the limited benefit that the current New York Domestic Relations Law § 240(1)(a) – that judges "consider" domestic violence in custody and visitation cases – is designed to afford them. Judges often order anger management classes as a condition for an abuser's probation. That many judges fail to understand the difference between an "angry person" and a "batterer" results in methods that are ineffective in either educating the abuser or protecting the victim. To make matters worse, judges often grant adjournments in contemplation of dismissal (ACD) to first-time offenders. If the abuser meets the requirements of the ACD, the crime is expunged. Thus, upon a subsequent conviction, there will be no evidence of a prior record, which will likely result in inadequate disciplinary action.

Misinformed attorneys can do just as much harm as misinformed judges. An attorney who is unaware of or who fails to recognize the effects of domestic violence on both the victim and

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10 N.Y. DOM. REL. LAW § 240(a).
the child may fail to introduce evidence of the abuse at a custody proceeding, thereby canceling out the statutory requirement that the judge consider domestic violence as a factor in the determination. Even attorneys who are aware that domestic violence is an issue may advise their client to accept a settlement in exchange for promising not to introduce evidence of domestic violence to the court.

New York must enact legislation that requires law schools to discuss domestic violence in all areas of legal study and inform students on how to recognize and address it. Typically, domestic violence is addressed only in "family law" classes. However, certain classes within some family law concentrations (such as Estate Planning, Wills and Trusts, etc.) do not address domestic violence at all. Thus, it is highly likely that many law students, including those who take "family law" classes, will graduate from law school without ever having learned about the severity of domestic violence or how to address it. As a result, it is just as likely that these uninformed students will unwittingly encounter numerous clients who are victims of domestic violence without being capable of recognizing it much less effectively addressing it. If more law school classes addressed domestic violence, it would help to ensure that students who become lawyers and judges will not be hesitant to address domestic violence issues and will be competent to do so.

Moreover, New York must require mandatory periodic judicial instruction and continuing legal education regarding domestic violence in order to keep all members of the legal community apprised of the various impacts of domestic violence

13 Kurtz, Protecting New York’s Children, supra note 10, at 1363.
14 Judy Perry Martinez, Making a Difference: Some Thoughts on Community Collaboration and Individual Effort, 7 DOMESTIC VIOLENCE REP. 55, 55 (Apr./May 2002).
and how to effectively address it. This type of instruction would lead to more effective legal representation and better informed judicial decisions in cases where domestic violence is involved; and thus, prevent victims from being advised not to disclose domestic violence and inhibiting abusers from obtaining ACDs and a chance at a clean record.

In addition to the above-mentioned issues, there are several other aspects of domestic violence that have been identified, yet inadequately addressed, by New York State. For instance, in 1998, it was proposed that no custody or visitation be granted to a parent convicted of first or second degree murder or first degree manslaughter of the other parent.\(^{15}\) In 2002, it was proposed that there be a presumption that no custody or visitation be granted to a parent who committed an act of domestic violence on the other parent.\(^{16}\) Several states have adopted this presumption; however, New York has not.\(^{17}\) Finally, in 2003 it was proposed that parents or guardians who had committed certain homicidal offenses against the other parent be prevented from having custody or visitation.\(^{18}\) Not only has New York State declined to adopt any of these broad-reaching, stringent proposals, it has chosen to enact laws that are inadequate instead.

The aforementioned DRL § 240(1)(a) requiring judges to merely "consider" domestic violence in determining custody and visitation does not go far enough to protect victims of domestic violence and their children.\(^{19}\) It lacks specificity in that it fails to state how much weight judges should give domestic violence, leaving it to the trial courts' discretion.\(^{20}\) Unfortunately, it is still

often the case that attorneys and judges are undereducated about domestic violence; thus, the current New York statutes that do address domestic violence often fall short of protecting the victims and children who are dealing with it.\textsuperscript{21} New York must modify DRL § 240(1)(a) to reflect the legislation proposed in 2002. If so modified, New York would join the over 40 states that have adopted the domestic violence Commission’s recommendation from 1997 – that the following two rebuttable presumptions be adopted regarding custody and visitation of children in domestic violence cases: (1) that sole or joint custody of a child not be granted to a perpetrator of domestic violence; and (2) that visitation, if granted at all, be supervised.\textsuperscript{22} However, where the abuser is granted supervised visitation rights, New York must also enact legislation to protect the victim from exposure to further abuse, via away-from-home drop-off and pick-up provisions and/or supervised or no-contact drop-off and pick-up provisions.

Another inadequacy within New York’s DRL appears in § 240.1-c(a), which deprives a parent convicted of first or second degree murder of the other parent custody or visitation rights “unless the child, being of the appropriate age to assent to custody or visitation, does so and the court finds that it is in the child’s best interest.”\textsuperscript{23} DRL § 240.1-c(a) must be relieved of this exception. Instead, a parent so convicted should absolutely be denied custody and visitation with the only exception being for victims of domestic violence who killed their abusers in self-defense.

Despite the inadequacy of some of the existing reform, there is no question that domestic violence laws in New York State have come a long way in the past several decades. However, there seems to be no logical reason why New York is so hesitant to go a step further in so many areas – especially in areas, such as custody and visitation, that have been urged by the Legislature and already expanded upon in other states. Although New York has made many advancements in domestic violence law, these advancements

\textsuperscript{21} Id. at 1361.


\textsuperscript{23} \textsc{N.Y. Dom. Rel. Law} § 240.1-c(a) (McKinney 1998).
have virtually no bearing on the victims who, for a number of
reasons, do not use them. In particular, there is a severe lack of
legal and financial assistance available to indigent and low-income
victims as well as victims whose spouses control the family’s
finances. Even when these victims finally gain the courage
necessary to leave an abusive situation, where can they go?
Without little money to support themselves and their children let
alone pay legal fees, what can they do? The answer is nothing,
which is exactly what most of these victims are forced to do. This
brings us to Phase Three of New York State domestic violence
law, which identifies and addresses the financial problems facing
victims and their children once they leave an abusive situation.

PHASE THREE: NEW AREAS IN NEED OF RECOGNITION – THE
FINANCIAL AFTERMATH

WELFARE LAW

I have included welfare reform as the first “new” area
simply because it is the key to reforming most of the other issues
in this section. Domestic violence victims’ needs from the welfare
system greatly differ from the needs of non-victims.24 They
include: (1) continued access to benefits and specialized services25
to recover from post-traumatic stress disorder (PTSD) in order to
become self-supporting;26 (2) protection from abusers during this
process;27 (3) affordable permanent housing;28 (4) new teaching

24 Joan Zorza, Women, Welfare, Work and Battering, 2 DOMESTIC VIOLENCE
Battering].
25 Anne L. Perry & Joan Zorza, Bread and Butter Issues for Survivors of
Domestic Violence: Income, Employment and Housing, 5 DOMESTIC VIOLENCE
REP. 7, 7-8 (Oct./Nov. 1999) [hereinafter Perry & Zorza, Bread and Butter
Issues for Survivors of Domestic Violence].
26 Id.
28 Perry & Zorza, Bread and Butter Issues for Survivors of Domestic Violence,
supra note 24 at 7-8.
techniques to help them concentrate and "learn to learn"; and (5) a job market that meets their particular needs (i.e., one that will not fire a victim or hold her responsible for the abuser's disruptive acts).

In 1998, New York adopted the Federal Family Violence Option (FVO), intended to allow states to address the safety needs of domestic violence victims and their children within the state welfare plans. However, statistics show that it is not being properly implemented in New York, resulting in very few victims receiving the available waivers that FVO is intended to grant in order to help victims escape domestic violence. This impropriety is attributed to various things such as the following: counties ignoring New York's directives addressing the specifics of FVO and the roles of domestic violence liaisons; advocates failing to adequately communicate with clients; victims being ashamed to admit domestic violence to a stranger and unsure about confidentiality; domestic violence screening forms being buried in the lengthy application never to be seen by victims; and advocates failing to coordinate with domestic violence liaisons.

Because of the particularized needs of victims within the welfare system, domestic violence must be an exception to the five-year time limit on Clinton's Welfare-to-work program. Services must be provided to assist victims with PTSD, current abuse, "learning to learn," and securing permanent housing. New York must insure that every county is properly implementing FVO by ensuring the following: that safeguards exist for proper implementation; that advocates ask clients if they have been screened for domestic violence and advise them that they can be screened at any time; that applicants receive the screening form

30 Perry & Zorza, Bread and Butter Issues for Survivors of Domestic Violence, supra note 24 at 7-8.
32 Id.
33 Id.
separately from the rest of the application and are instructed as to the form’s purpose; and that districts screen all applicants and re-certifications for domestic violence face-to-face.\textsuperscript{34}

**EQUITABLE DISTRIBUTION LAW**

In terms of divorce, New York is currently a “fault” state, meaning that in order to obtain a divorce, the spouse filing must show fault (in the form of at least one of six grounds listed under DRL § 170) on the part of the other spouse.\textsuperscript{35} Despite a big push toward making it a “no-fault” state, New York remains a fault divorce state for the time being. However, although New York is a fault state regarding divorce, it is a no-fault state regarding the distribution of assets pursuant to a divorce. In other words, a spouse will be required to show fault in order to obtain a divorce in New York. However, the evidence of such fault – or of marital misconduct such as domestic violence – shall generally have no bearing whatsoever on the distribution of assets or an award of compensation in favor of the victim spouse\textsuperscript{36} unless the court chooses to take marital fault into consideration pursuant to the statute’s catchall provision (DRL § 236(B)(5)(d)(13)), which allows consideration of “any other factor” which may be “just and proper.”\textsuperscript{37} Moreover, marital fault is only to be taken into consideration under DRL § 236(B)(5)(d)(13) where “the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship – misconduct that “shocks the conscience” of the court thereby compelling it to invoke its equitable power to do justice between the parties.”\textsuperscript{38}

In most situations, however, New York does not consider marital fault when determining equitable distribution, which is the division of all marital property (property acquired during the marriage, regardless of whose name it’s in) in a divorce

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} N.Y. DOM. REL. LAW § 170 (McKinney 1998).
\textsuperscript{38} \textit{Id.} at 344, 751 N.Y.S.2d at 452.
proceeding.\textsuperscript{39} It is important to note that equitable distribution does not mean equal distribution. DRL § 236(B), the equitable distribution law, generally does not apply in any action unless the marriage is actually terminated (i.e., a divorce).\textsuperscript{40} Thus, if the victim dies while married to the abuser, regardless of how she dies, and the court does not allow domestic violence to trump the equitable distribution law, the abuser keeps everything. This is because there is no divorce to trigger DRL § 236(B) and, in turn, to entitle the victim’s estate to her portion of the marital assets. Moreover, where the victim survives and a divorce ensues, fault is generally not to be considered in the court’s determination of equitable distribution.\textsuperscript{41} However, in \textit{Havell v. Islam},\textsuperscript{42} the court did take domestic violence into account when it granted the victim over 95\% of all marital assets.\textsuperscript{43} Here, the abuser beat the victim severely with a barbell\textsuperscript{44} – a “vicious assault” that was “so egregious as to shock the [judicial] conscience.”\textsuperscript{45} However, this case is extreme. To what extent must the victim be abused in order for it to be egregious enough to shock the judicial conscience so as to provoke the court to consider fault pursuant to New York’s DRL?

Despite arguments to the contrary, fault should play a role in post-divorce finances such as the distribution of assets, the award of maintenance and the determination of compensation pursuant to divorce cases involving domestic violence.\textsuperscript{46} Opponents of this notion fear that the “narratives” required from the divorcing parties in order to assess fault will ultimately lead to exaggerated, inflamed depictions of marriages that are far worse

\textsuperscript{39} N.Y. DOM. REL. LAW § 236B (McKinney 2003).
\textsuperscript{40} \textit{Id}.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dept. 2002).
\textsuperscript{43} \textit{Id}. at 348, 751 N.Y.S.2d at 455.
\textsuperscript{44} \textit{Id}. at 341, 751 N.Y.S.2d at 450.
\textsuperscript{45} \textit{Id}. at 343, 751 N.Y.S.2d at 452.
than what the marriages are like in reality.\textsuperscript{47} However, a fault-blind approach to domestic violence adversely affects victims when it comes to property and financial distribution by failing to provide them with affirmative protection.\textsuperscript{48} Such an approach also sends the message that only damage to tangible property counts, while emotional damage does not, even when done recklessly and intentionally.\textsuperscript{49}

Courts must allow domestic violence to take precedence over equitable distribution law. This will ensure that if the victim dies during the marriage, regardless of whether or not the abusive spouse killed her, her estate will be entitled to her equitable share of the marital assets. It will also prevent the abuser from retaining all marital assets due to the non-occurrence of a divorce, which generally triggers equitable distribution. This is especially important where the abusive spouse does kill the victim. Here, the abuser, in preventing the occurrence of a divorce by killing the victim, will potentially be rewarded for his wrongdoing by avoiding equitable distribution and keeping all marital assets. Once courts allow domestic violence to take precedence over equitable distribution, then the victim’s equitable share of any property should go to one of three places: (1) her adult children, if any; and/or (2) in trust for her minor children, if any, with the trustee being someone other than the abuser or anyone without an adverse interest to the abuser; or (3) if there are no children, to her estate, where it can be distributed accordingly to the members of her family (parents, siblings, etc.).

In addition, although the general rule in New York is that marital fault is not to be considered in determining equitable distribution, New York must allow domestic violence, regardless of its severity, to be the exception to this rule. Then – once domestic violence has been established – based on the duration of the marriage and the degree and duration of domestic violence throughout the marriage, the victim should get a portion of the assets over and above her equitable share. In many cases, this will

\textsuperscript{47} Id. at 2547.
\textsuperscript{48} Id. at 2530-31.
\textsuperscript{49} Id. at 2567.
aid victims in obtaining the financial means necessary to support themselves and their children while seeking the requisite services to recover from PTSD and secure permanent housing until they are able to be self-supporting. In addition, this will ensure that, to the extent possible, the abusers will pay for the victims' counseling and housing until the victims are self-supporting; thus, allowing New York State to allocate more funding to indigent victims.

INTESTACY RIGHTS

Intestacy rights are the rights of a spouse or relative of a decedent to take a share of the decedent's estate if the decedent dies intestate (i.e., without a will). Generally, the surviving spouse is the first person— and the only non-blood, non-adoptive relative— provided for under New York's Estates, Powers & Trusts Law (EPTL) if the decedent spouse dies intestate. However, if a victim kills her abusive spouse, she may be left without intestacy rights. According to *Riggs v. Palmer*, by law, "one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered." However, a wrongdoer may acquire property from his victim if the slayer was insane at the time of the commission of his act, if the killing was accidental or in self-defense, or if the wrongdoer is negligent or guilty of "minor manslaughter." But, what if the victim cannot prove insanity, accident or self-defense? What if she is found guilty of more than "minor manslaughter"? She stands to lose all intestacy rights in these cases.

A major factor in the victim's loss of intestacy rights is the existence of what is called a joint tenancy. A joint tenancy is a form of ownership between two or more people (such as a husband and wife). Each joint tenant has a "right of survivorship" that, upon the death of one of the joint tenants, automatically passes the deceased joint tenant's title to the surviving joint tenant(s). It is important to note that the decedent joint tenant's share of the

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50 N.Y. EST. POWERS & TRUST LAW § 4-1.1 (McKinney 2004).
52 *Id.* at 513.
property does not go to the decedent’s heirs or to the relatives or persons named in the decedent’s will. However, a joint tenancy may be terminated by any of the joint tenants, even against the wishes of the other joint tenant(s). This automatically converts the joint tenancy into a tenancy in common, which has no right of survivorship.

Consistent with Civil Rights Law § 79-b, a victim who kills her abusive spouse does not forfeit her own vested interested in one-half of the joint tenancy because allowing her to keep it does not afford her any benefit from her “wrongdoing” (it was already hers before the wrongdoing occurred). However, upon killing the abusive spouse in self-defense, any property held in joint tenancy by the victim and the abusive spouse will revert to a tenancy in common; thus, destroying the victim’s right of survivorship to the decedent spouse’s share of that property. This is because Riggs prevents the victim from succeeding to the survivorship interest that would ordinarily arise upon the death of her joint tenant and from allowing her to benefit from her “wrongdoing.”

Moreover, as In Matter of Covert establishes, Civil Rights Law § 79-b cuts both ways. If the abusive spouse kills the victim, he will not have to forfeit any of his existing interest in any real or personal property held in joint tenancy either. For instance, if the abuser and the victim have a “true” joint bank account, which is generally considered to be a joint tenancy (as opposed to “convenience” joint bank account, set up solely for the contributor’s convenience, but not considered to be a joint tenancy), and the abuser kills the victim, there are two possibilities: (1) if the abusive spouse is convicted of first or second degree murder, he is still entitled to all of the money that he contributed to the account. The money contributed by the victim goes to her estate. However, if the abuser is the sole provider and the only one who contributed to the account, he is entitled to the entire contents of the account, despite a first or second degree

54 N.Y. CIV. RIGHTS LAW § 79-b (McKinney 2005).
55 Case name is In re Estates of Covert, 97 N.Y.2d 68, 75-76, 735 N.Y.S.2d 879, 884 (2001).
56 N.Y. EST. POWERS & TRUST LAW § 4-1.6 (McKinney 2004).
57 Id.
murder conviction; and (2) if the abusive spouse is not convicted of first or second degree murder (i.e., a lesser conviction of manslaughter or no conviction), the abuser is entitled to the entire contents of the joint account, including the victim's contributions. None of it goes to her estate!

Currently, under EPTL § 4-1.1, a surviving spouse is entitled to $50,000.00 plus one-half of the residue of any of the deceased spouse’s property that is not disposed of by will. In addition, EPTL § 5-1.1-A entitles a surviving spouse to a “right of election” whereby the surviving spouse may choose either: (1) what the deceased spouse devised to him by will; or (2) the “elective share,” which is the greater of $50,000.00 or one-third of the deceased’s estate upon death. In other words, if the deceased spouse executed a will that left an amount less than the elective share to the surviving spouse, the EPTL allows the survivor to exercise his right of election and receive his elective share. Although §§ 4-1.1 and 5-1.1-A are intended to protect surviving spouses in the event the deceased spouse dies intestate or leaves a will that unjustifiably disinherits him, the statute could end up backfiring. Where a victim dies intestate while married to her abusive spouse, he will be entitled under § 4-1.1 to $50,000.00 plus one-half of the rest of the victim’s estate upon her death. In addition, where a victim dies during the marriage with a will that either disinherits the abusive spouse completely or leaves him less than the elective share, and no proof of domestic violence is presented to the court, the abuser may be deemed unjustifiably disinherited or inadequately provided for under § 5-1.1-A and thus entitled to take his elective share of $50,000.00 or one-third of the victim’s estate at death, whichever is greater.

New York must enact a mechanism within the EPTL to prevent abusive spouses from inheriting from their victims. This mechanism must apply regardless of whether the abusive spouse kills the victim via domestic violence or the abusive spouse fails to kill her and she dies from something totally unrelated to domestic violence.

58 See Id.
59 N.Y. EST. POWERS & TRUST LAW § 4-1.1 (McKinney 2004).
60 N.Y. EST. POWERS & TRUST LAW § 5-1.1-A (McKinney 2004).
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violence. In the event a victim of domestic violence dies while married to her abuser, regardless of when or how she dies, the existence of domestic violence alone should prevent him from inheriting from her either by will or by intestacy. In order for this to happen, several changes must be made in New York State. First, the EPTL must be modified to insure that, upon the victim’s death, the abusive spouse will neither be entitled to his intestacy rights under EPTL § 4-1.1 nor to his elective share under EPTL § 5-1.1-A. Second, victim spouses must be informed about the laws of intestacy. They must be instructed to either disinherit abusive spouses via will or get rid of their wills altogether so that the laws of intestacy kick in. It is important to note that absent the suggested modifications to §§ 4-1.1 and 5-1.1-A, these options cannot be effectuated. This is because under § 4-1.1 the abusive spouse will likely be protected if the victim dies intestate. In addition, if there is no proof of domestic violence that can be presented to the court, § 5-1.1-A may not allow the victim to effectively disinherit the abusive spouse via will without first showing that the abuser was not unjustifiably disinherited.

BANKRUPTCY LAW

The number of women filing for bankruptcy between 1979 and 1999 increased by 800%61 and that figure is still rising. There is a powerful connection between economic vulnerability and domestic violence as victims’ economic dependence on their abusers often provides a significant hurdle to leaving an abusive relationship.62 The Bankruptcy Reform Act of 2001, which passed the Senate on March 10, 2005 and is expected to become law63 on October 17, 2005,64 contains over 100 “gender-neutral”

61 Elizabeth Warren, What is a Women’s Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics, 25 HARV. WOMEN’S L.J. 19, 30 (2002) [hereinafter Warren, What is a Women’s Issue?].
62 Id. at 56 n.27.
proposals. However, these changes will have the harshest impact on women attempting to file bankruptcy, especially those who are heads of households trying to support their children. They will bear the brunt of higher costs, more restrictions and less protection from creditor abuses. In addition, although they may not themselves file for bankruptcy, ex-wives of men who declare bankruptcy will also bear a heavy burden – their ability to collect maintenance and child support will be adversely affected. The current bankruptcy system protects women who are trying to collect court-ordered support; however, the proposed legislation will undermine this protection.

Moreover, the abuser can manipulate bankruptcy laws by destroying the victim’s credit and preventing her from being financially independent; thus, forcing the victim to either file for bankruptcy or go on welfare in order to support herself and her children. In addition, the abuser himself may file for bankruptcy making it difficult for the victim to collect maintenance and child support. This will be especially true once the new law is passed. Furthermore, even if the abuser does not destroy the victim’s credit, she may still have to file for bankruptcy after leaving the abusive spouse if he prevented her from obtaining the skills necessary to be self-supporting and/or made it impossible for her to have a job during the marriage.

The argument that filing bankruptcy allows debtors to be let “off the hook” easily should not be dismissed. There are many wealthy (and even some not-so-wealthy) debtors who abuse the system by keeping property and income while eliminating debts that they are able to repay. Banks and other creditors estimate that bankruptcies cost them $40 billion each year and that this abuse increases the cost of goods and services purchased by other


65 Warren, What is a Women’s Issue?, supra note 60 at 30.
66 Id. at 20-21.
67 Id. at 31.
68 Id. at 32.
69 Id. at 34.
70 Epstein, The Rush to File Bankruptcy, supra note 63.
There is no doubt that debtors should be prohibited from using bankruptcy as a means of eliminating frivolous debt, especially when the debtor can be given a payment plan on which he/she is able to repay part or all of the debt over time.

However, where the debtor is a victim of domestic violence who is filing for bankruptcy as a result of the abuse or the abuser, certain exceptions must be made. Victims seeking to leave their abusers must be informed of the bankruptcy laws so they know what to expect from the start. A victim, especially one with children, who feels overwhelmed from the abuse and from the obstacles she must face in leaving her abusive spouse will likely feel frustrated and possibly return to the abusive relationship if she keeps encountering new obstacles at each step toward freedom. Regardless of why victims file for bankruptcy, if the new law takes effect as scheduled on October 17, 2005, New York must ensure that an exception exists within the new law for victims of domestic violence. Without such an exception, it will be more difficult for victims to collect maintenance and child support than it is now. This is because under the current law, maintenance and child support are not dischargeable in bankruptcy, while credit card debt is. Also, under the current law, creditors who would not receive any money owed may contest the ruling if it is a Chapter 7 case, but not if it is Chapter 13. Currently, a Chapter 13 affords the ex-spouse the benefit of a trustee to supervise all cases throughout the repayment period. The trustee communicates regularly with the applicant and can get a court order to garnish wages if payments, including maintenance and child support, are missed. In effect, the trustee acts as a collection agent for the ex-spouse. Thus, whenever possible, those owing support should, under the current law, be required to file for chapter 13 instead of chapter 7 bankruptcy.

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71 Id.
72 Id.
73 Warren, *What is a Women's Issue?*, supra note 60 at 34-35.
75 Warren, *What is a Women's Issue?*, supra note 60 at 33.
76 Id.
77 Id.
There have been conflicting statements about the new law in terms of maintenance and child support payments. Some say that under the new law, maintenance and child support will become the top debts to be repaid once bankruptcy is filed. Others say the new law will elevate credit card debt to the level of maintenance and child support, forcing ex-spouses to compete with credit card companies charging high interest rates because the right to contest will be allowed to creditors in chapter 13 filings as well as chapter 7 filings. In the latter situation, the credit card debt will obviously take precedence over maintenance and child support, which are not subject to high interest rates. Regardless of the outcome of the new law, once it is passed, New York must implement a mechanism to screen applicants who file for bankruptcy in order to determine if they are victims of domestic violence and if that is the reason they are filing. If so, they should be exempted from any harsher criteria of the new law. In addition, those who file for bankruptcy while owing maintenance and/or child support to their victim (or non-victim) ex-spouses should also be exempt from the new law to the extent that other creditors interfere with the payment of court-ordered support.

**TAXATION LAW**

The Internal Revenue Code creates another circumstance under which an abusive spouse may indebt the victim forcing her to file for bankruptcy. IRC § 6013(d)(3) says that if a joint federal income tax return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. In other words, whatever the tax liability, both spouses are liable for it and the Internal Revenue Service (IRS) can go after either or both of them in order to collect it. Thus, if the abusive spouse merely files a joint tax return where a tax liability exists, he may have, deliberately or inadvertently, made the victim liable for the debt. This is particularly detrimental where the

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79 Warren, *What is a Women's Issue?*, supra note 60 at 34-35.
amount owed is greater than either or both spouses can afford to pay. It is even worse where the debt was incurred primarily by the abusive spouse, but is at least partly allocable to the victim, because then she will potentially be required to pay the debt and/or file for bankruptcy as a result.

However, IRC §§ 6015(b) and (c) may, under certain circumstances, provide the victim with some relief. Section 6015(b)(2) provides that where several criteria are met, the innocent spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such understatement (i.e., an understatement of income for the taxable year). In order to be relieved of the portion of the debt attributable to the innocent spouse, she must show the following: (1) a joint return was filed; (2) on the return there is an understatement of tax that is attributable to the error of the guilty spouse; (3) that in signing the return the innocent spouse did not know, and had no reason to know, that there was such understatement; (4) under the surrounding facts and circumstances, it is inequitable to hold the innocent spouse liable for the deficiency; and (5) the innocent spouse elects to seek the benefits of § 6015(b) within two years after the date the Secretary commences collection activities.

Moreover, the innocent spouse is only eligible to elect under § 6015(c) if: (1) at the time such election is filed, the innocent spouse is no longer married to, or is legally separated from, the guilty spouse; or (2) the innocent spouse was not a member of the same household as the guilty spouse at any time during the 12-month period ending on the date such election is filed. However, if the victim cannot meet the requirements set forth in § 6015, she may be obligated to pay the tax liability in addition to the other financial burdens she must bear upon leaving the abusive spouse creating one more reason why she may have to resort to filing for bankruptcy.

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Because of the fairly small window of opportunity the innocent spouse has to seek relief under IRC § 6015, it is imperative that all married taxpayers, whether or not domestic violence is an issue, are informed of the implications of filing a joint return. New York State must make known the severity of IRC § 6013 as well as the potential relief that may be obtained under § 6015, if sought within the two-year time limit. In addition, New York must require all attorneys and accountants who prepare and file joint tax returns to inform their clients (separately if necessary) about the impact of IRC §§ 6013 and 6015.

Furthermore, in many abusive situations, the abuser not only controls the victim, he controls the finances as well. As a result, victims of domestic violence often have no idea how much money the abusive spouses earn, how much is in their savings account or how much their property is worth. Thus, if a joint return is filed, it is unlikely that victim would realize an understatement or discrepancy within the return. It is also unlikely that, where an abuser control the victim’s exposure to his finances, she would even be made aware of such a discrepancy within the two-year time limit. Thus, upon leaving abusive situations, victims must be made aware of the existence and meaning IRC §§ 6013 and 6015. In addition, victims must be screened to determine if, to their knowledge, their spouses have ever filed a joint tax return and, if so, when. It must also be determined whether there was a discrepancy within the return and, if so, whether or not the Secretary has commenced collection activities. Finally, where a joint return is filed by spouses between whom domestic violence is an issue, New York State must allow an extension of the two-year time limit stated in § 6015(b) so that the victims will have the time necessary to overcome the many urgencies they will face when leaving their abusers — such as staying safe, feeding and supporting themselves and their children, securing permanent housing, obtaining counseling and finding employment — before they are forced to deal with their abusers’ inaccuracies and falsities on old joint tax returns.
CONCLUSION

New York State is definitely progressing with regard to domestic violence and that should not be diminished. However, this progress is occurring in baby steps instead of giant leaps. New York is typically reluctant to pass more protective, more stringent domestic violence laws, despite the proposal of such laws in our state and the enacting of them in the majority of other states. Although slow and steady progress is beneficial in many areas, it is fatal in the area of domestic violence.

New York’s initial response to domestic violence was based on a limited understanding of its impacts and a lack of protection from physical abuse. Currently, most, if not all, of New York’s past proposals and existing laws regarding domestic violence are focused on removing victims and children from violent situations. This is imperative indeed; however, now that we see the financial aftermath of domestic violence that faces victims and children after they leave their abusers, additional reform is essential. Once the aftermath of domestic violence is addressed, more victims may be willing to leave their abusers knowing that they will be able to lead free and independent lives on their own.

For every victim failed by the available laws and resources in New York State, a lifetime of violence, or perhaps death, awaits her and her children. For every child failed by these laws and resources, a future of abuse awaits him or her because the longer a child’s exposure to domestic violence, the greater that child’s odds of becoming a batterer or victim and repeating the vicious cycle. It is for these people that more funding must be allocated to legal services for victims. It is for these victims and children that New York State must heed past proposals and learn from the laws enacted in so many other states. It is for these people that New York must modify its current inadequate laws and pass additional laws where none exist. It is for these people that New York must address the financial aftermath of domestic violence and ensure that once victims find the courage and support necessary to leave their abusers, they will be able to stay away for good and to support themselves and their children and not be faced with a future of imprisonment or financial ruin. And it is for these people
that New York State must act quickly because for many, it will soon be too late.