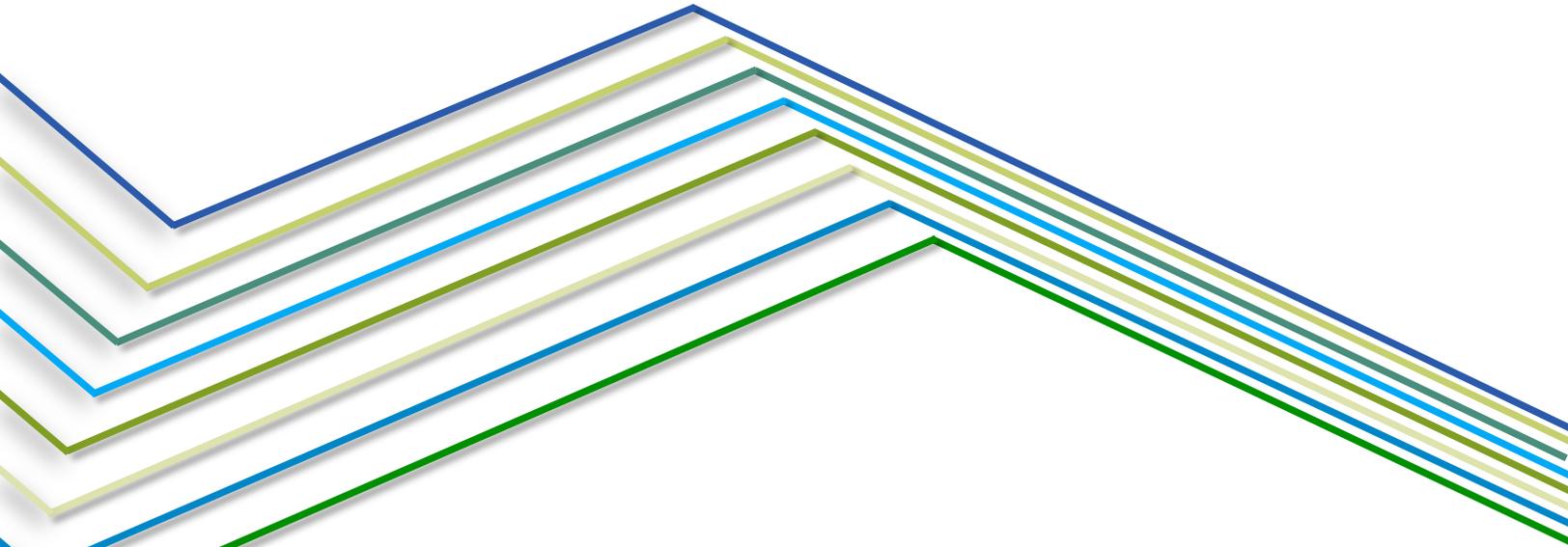


# GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR  
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



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A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR  
DOMESTIC VIOLENCE ATTORNEYS & LEGAL ADVOCATES

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**The Center for Survivor Agency and Justice** is a national organization dedicated to enhancing advocacy for survivors of intimate partner violence. CSAJ envisions a world where all people have equal access to physical safety, economic security, and human dignity. CSAJ develops and promotes advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors.

**The Consumer Rights for Domestic and Sexual Violence Survivors Initiative** (Consumer Rights Initiative) is a national project of CSAJ that seeks to enhance consumer rights for domestic and sexual violence survivors by enhancing the capacity of and partnerships between domestic/sexual violence and consumer law and advocacy. Consumer and other economic civil legal remedies have the potential to provide survivors with the legal tools to address issues such as debt collection, credit discrimination, bankruptcy, damaged credit, tax liability, and foreclosure. To achieve survivors' joint goals of physical and economic safety also requires purposeful cross-training, networking, and sustained partnership building on the local and national levels. Therefore, CSAJ's Consumer Rights Initiative offers technical assistance to lawyers, advocates, programs, and communities across the nation through: advocacy tools and resources, webinar trainings, national conferences, individual technical assistance, and Building Partnerships Demonstration Sites.

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This project is supported by Grant No. 2014-TA-AX-K023 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in the publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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# i. EXECUTIVE SUMMARY



There is no safety for survivors of domestic and sexual violence without economic security. Abuse creates economic hardship and poverty, in turn, restricts options for safety. Survivors of domestic and sexual violence (DV/SA) experience economic harms that extend far beyond the short term. Safety has real costs and survivors often contend with issues such as coerced debt, ruined credit, loss of housing and employment, and identity theft that compound economic insecurity and risk of violence across the lifecourse.

While the domestic violence movement has historically engaged in meaningful economic justice initiatives, current efforts tend to emphasize ways to maximize survivors' *future* income through financial literacy and employment training. Such efforts provide little sustainable benefit without first addressing the long-term economic harms from which survivors *currently* suffer.<sup>1</sup> As one attorney working with CSAJ lamented, "We're helping survivors build up their lives without getting them out of the quicksand first." Consumer law fills this gap. Consumer law provides a powerful legal tool to remedy accrued economic damage, minimize expenses, and protect current assets generated by things such as coerced debt, credit discrimination, bankruptcy, damaged credit, federal tax issues, criminal records, workplace discrimination, and housing eviction and foreclosure.

**The purpose of this Guidebook is to offer concrete consumer and economic civil legal remedies, as well as nonlegal advocacy strategies, through the lens of survivor centered advocacy – rooted in the experiences of survivors who are living in poverty.** This is not a black-letter consumer law guide. Rather, it is meant to increase understanding for those less familiar with consumer law, help generate innovative strategies, and promote an intersectional approach to legal advocacy on key economic and safety issues facing survivors.

This Guidebook, part of CSAJ's [Consumer Rights for Domestic and Sexual Violence Survivors Initiative](#) (Consumer Rights Initiative), was developed in direct response to these needs.

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<sup>1</sup> Sara J. Shoener & Erika A. Sussman, Economic Ripple Effect of IPV: Building Partnerships for Systemic Change, in Domestic Violence Report, September 2013.

Based on gaps identified in a [National Needs Assessment](#), the Consumer Rights Initiative is a national project of CSAJ that seeks to enhance consumer rights for domestic violence survivors by building the *capacity of* and *partnerships between* domestic violence and consumer lawyers and advocates. This work leverages the power of consumer law, and requires purposeful cross-training, networking, and sustained partnership building on the local and national levels. In coalition with a cadre of diverse organizational partners and expert advisors, the Consumer Rights Initiative has: developed advocacy tools and resources, offered webinar trainings, national conferences, and individual technical assistance, and facilitated four Building Partnerships Demonstration Sites.

This Guidebook was authored and developed in coalition with advocates and attorneys across the country who hold unique expertise at the intersection of consumer law/economic advocacy and domestic violence. Chapters feature a range of consumer and economic civil legal issues, including:

- ▲ Credit reporting and repair, including discriminatory credit and identity theft
- ▲ Debt collections and defense, including navigating student loans
- ▲ Bankruptcy and foreclosure
- ▲ Federal tax advocacy
- ▲ Economic relief in civil protection orders
- ▲ Economic issues in family law
- ▲ Barriers in civil court
- ▲ Rights and protections in housing and employment, including advocacy for survivors with criminal records

The intended audience for this Guidebook is attorneys and legal advocates working with survivors, but it can also be beneficial to a wider audience. Each chapter provides concrete and creative strategies to assist domestic violence attorneys and legal advocates in addressing the simultaneous economic security and physical safety needs of survivors. In addition, attorneys, advocates, and program directors alike can benefit from the practice tips, considerations, and strategies offered. As such, we encourage programs to share this guide with staff as well as partners as a tool to foster collaboration *within* organizations, *between* DV, consumer and other sectors, and *across* social justice movements.

Acknowledging the breadth and depth of these issues, each chapter is infused with tools for issue spotting, opportunities to “think about it” (including how survivors’ intersecting identities might shape their economic experiences and, thus, relevant options), “practice tips” for individuals and organizations, as well as references to additional resources. Many supplemental training materials and resources on the chapter subjects, developed by the authors as well as other CSAJ Expert Advisors, can be accessed on CSAJ’s [Webinar Archive](#) and [Resource Library](#).

This Guidebook is not meant as a substitute for legal advice or representation. We encourage domestic violence advocates and attorneys to develop partnerships with consumer rights and other experts in your community to enhance the capacity of survivor-centered consumer and economic civil legal advocacy for survivors. CSAJ’s resource, [Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: An Assessment and Resource Tool](#), offers a starting point to assess and advance individual as well as organizational partnerships to enhance consumer rights for survivors.

We welcome feedback to improve and update this Guidebook as well as opportunities to assist your efforts in implementing the framework and strategies presented here. Please get in touch with us at [info@csaj.org](mailto:info@csaj.org).

## ii. ABOUT THE AUTHORS

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### In order of appearance



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Katie VonDeLinde provides training and education to advocates on issues of economics and survivor-defined advocacy with KMCV consultants. She is an instructor and academic advisor at Washington University and the University of Missouri St. Louis. She previously managed the Economic Action Program at Redevelopment Opportunities for Women, was assistant director of a domestic violence program in southeast Iowa, and worked with the Building Comprehensive Solutions to Domestic Violence Initiative of the NRCDV where she published several articles related to domestic violence and economic advocacy. Katie has been a CSAJ Expert Advisor since 2008.



**Erika Sussman, JD, LLM, Executive Director of the Center for Survivor Agency and Justice**

Erika Sussman is the Founder and Executive Director of the Center for Survivor Agency and Justice. During her tenure, CSAJ has launched the Consumer Rights for Domestic and Sexual Violence Survivors Initiative, the Safe Economic Security Atlas Project, the Legal Impact for Racial and Economic Equity of Survivors Project, and engaged in other work focused on survivor-centered advocacy and economic security for survivors living at the margins. For many years, Ms. Sussman served as an adjunct professor at Cornell Law School and Georgetown University's Domestic Violence Clinic. She has published numerous articles and chapters and served as faculty for various academic and practitioner workshops related to violence against women, with a particular emphasis on survivor-centered advocacy and economic justice.



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Diane is a staff attorney with The Legal Aid Society's Domestic Violence Consumer Advocacy Project, a new initiative she spearheaded as a Kirkland & Ellis Fellow. Her practice focuses on unwinding the consequences of financial abuse for domestic violence survivors through consumer debt and personal bankruptcy representation, community education, and systemic advocacy. Diane is a 2015 graduate of NYU School of Law, where she was a Root-Tilden-Kern scholar.



**Amy Cao, Program Associate at The Financial Clinic**

Amy Cao is a Program Associate at The Financial Clinic, a New York City-based nonprofit building financial security and improving financial mobility throughout the nation. Amy supports the Clinic's financial security ecosystem model, a holistic partnership approach built on the Clinic's web-based platform, Change Machine, by reporting and analyzing direct service data, facilitating capacity building trainings, and contributing research and writing. She also leads the Clinic's financial security products work that aims to enhance service delivery through innovative technology and tools. Amy is particularly interested in studying and understanding the ways that financial security leads to stability and empowerment for working poor women and their communities. She holds a B.A. in Economics, and a minor in Asian Studies, from Vassar College.

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Persis Yu is a staff attorney at the National Consumer Law Center and the director of NCLC's Student Loan Borrower Assistance Project. She is a contributing author to NCLC's Fair Credit Reporting and Student Loan Law. She has also authored several reports including: Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies. The National Consumer Law Center is America's leading consumer law organization, helping consumers, their advocates, and public policy makers use powerful consumer laws to build financial security and assure marketplace justice.



**Karen Merrill Tjapkes,\* JD, Director of Strategic Litigation with Legal Aid of Western Michigan**

Karen Merrill Tjapkes is Director of Strategic Litigation as well as the director of the Homeownership Preservation Project at Legal Aid of Western Michigan in Grand Rapids. Her practice is concentrated on consumer law, housing law and mortgage litigation. Ms. Tjapkes is the past chair of the Consumer Law Section Council of the State Bar of Michigan, sits on the steering committee of the Grand Rapids Area Coalition to End Homelessness, and has presented on mortgage lending issues for the Michigan Foreclosure Prevention Project, the Debtor's Bar of West Michigan, the Michigan Conference on Affordable Housing and the National Consumer Law Center's Consumer Rights Litigation Conference.



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Sarah Bolling Mancini is Of Counsel for NCLC half-time, focusing on foreclosures and mortgage lending, and works half-time as an attorney in the Home Defense Program of Atlanta Legal Aid. She has experience representing homeowners in bankruptcy cases and litigating in state, federal, and bankruptcy courts. She received her B.A. in public policy from Princeton University and her J.D. from Harvard Law School.



**Jamie Andree, JD,\* Attorney at Law with Indiana Legal Services, Inc. and Director of ILS's Low Income Taxpayer Clinic.**

Jamie Andree has worked as an attorney for Indiana Legal Services (ILS) since 1979 and has been the Director of the ILS Low Income Taxpayer Clinic since 2006. She has represented hundreds of low-income taxpayers to resolve controversies with the IRS, working closely with both abuse survivors and their advocates. She has also served as a trainer in multiple events aimed at taxpayers, attorneys, and other advocates.



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Laura A. Russell is the Co-Citywide Supervising attorney of the Family Law and Domestic Violence Unit of The Legal Aid Society in New York City. She also supervises the Domestic Violence/Consumer Practice Unit and has supervised the Foreclosure Defense Unit. She has represented domestic violence survivors in family, matrimonial, consumer, foreclosure and bankruptcy matters. She is a frequent lecturer on these topics and sits on several court committees to address





**Jenna Smith,\* Senior Program Associate of Domestic Violence Programs with the Center for Court Innovation**

Jenna Smith is the senior program associate of the Domestic Violence Program at the Center for Court Innovation, which provides expert assistance to courts and communities across the country that seek to improve their response to domestic violence, sexual assault, and human trafficking. Prior to joining the Center, Ms. Smith worked for Hour Children, a nonprofit that runs parenting programs for incarcerated mothers at Bedford Hills Correctional Facility in New York.



**Nida Abbasi,\* JD, Coordinator of Domestic Violence Programs with the Center for Court Innovation**

Nida provides technical assistance to courts and communities seeking to enhance their approach to domestic and sexual violence. Previously, she represented domestic violence survivors on orders of protection and family law matters as a civil legal aid attorney. She has also worked on policy reform and gender-based violence issues in Detroit, Chicago, and Cape Town.



**Karlo Ng, Staff Attorney with the National Housing Law Project**

Karlo Ng is an attorney at the National Housing Law Project (NHLPP) where she manages the organization’s Domestic and Sexual Violence Project, an OVC TA Provider that offers technical assistance, trainings, and support to advocates on the rights of survivors accessing and maintaining housing. Karlo further serves on the advisory committee of the National Alliance for Safe Housing, a program funded by the federal government to provide greater access to safe housing for survivors of domestic and sexual violence.



**Lisalyn R. Jacobs, JD, Legal & Policy Director with the Center for Survivor Agency and Justice**

Lisalyn R. Jacobs currently leads a groundbreaking new initiative with CSAJ, the Legal Impact for Racial & Economic Equity for Survivors Project (REEP); a project seeking to address the systemic economic barriers facing survivors of color. Throughout her career she has fought for and secured needed protections for poor women and survivors of violence in a number of key federal laws including two reauthorizations of the Violence Against Women Act (2005 and 2013), the 2006 reauthorization of Temporary Assistance to Needy Families, and the 2009 amendments to the Stimulus law.

**With Contributions by:**

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- **Jessica Park**, intern with the National Consumer Law Center\*
- **Brenda Star Adams, JD**, Staff Attorney of the Domestic Violence Unit with the Alameda County Regional Office of Bay Area Legal Aid
- **Beth Johnson, JD**, Director of Legal Programs and **Nikki Donnelley, JD**, Criminal Records Fellow with Cabrini Green Legal Aid
- **The Domestic Violence Economic Justice Taskforce in New York City**
- **Salma Attia and Alex Jacobs**, Legal Fellows with the Center for Survivor Agency and Justice

**Coordinated and Edited by:** Sara Wee, MPH, Director of Research and Programs with the Center for Survivor Agency and Justice

\*These authors serve as Expert Advisors to CSAJ’s Consumer Rights for Domestic and Sexual Violence Survivors Initiative, a national project enhancing economic justice for survivors by building the capacity of and building partnerships between the domestic and sexual violence and consumer rights fields.

## iii. Acknowledgements



This Guidebook, part of CSAJ’s Consumer Rights for Domestic and Sexual Violence Survivors Initiative, is born out of a decade of learning from and with survivors, advocates, attorneys, programs, communities, and others working with survivors of domestic and sexual violence. The vision, partnership, and contributions offered by each of the authors and contributors grounded this Guidebook in the lived experiences of survivors with whom we work each day.

We also express deep gratitude to several others who have provided critical partnership to CSAJ in this project and beyond: Dora Galacatos, Julie Goldsheid, Valenda Applegarth, Kris Billhardt, Jill Davies, Maya Raghu, and Krista DelGallo. You have shaped and advanced this work in meaningful ways. We also thank Sara Shoener, who’s research, deep commitment, and friendship offer continued vision to CSAJ in countless ways.

Special thanks to CSAJ Expert Advisor, Katie VonDeLinde, for providing both conceptual and substantive vision to this project. Our deepest gratitude for your extraordinary (yet seemingly effortless) commitment to elevating the lived experiences of survivors and bringing this Guidebook to life.

# INTRODUCTION



## Economic Coercion and Survivor-Centered Economic Advocacy

By Katie VonDeLinde & Erika Sussman

### The Link Between Poverty and Violence

There is a reciprocal relationship between domestic violence<sup>1</sup> and economic insecurity. Abuse creates economic instability for survivors. And poverty, in turn, reduces safety options and creates increased vulnerability to future violence. Furthermore, the economic impact of DV has profound consequences that compound across the lifespan. While the domestic violence movement has engaged in important work to enhance economic justice for survivors, current efforts tend to focus on discrete and immediate economic incidents through financial skills development, leaving the depth and breath of economic harms largely unaddressed.

This Guidebook presents domestic violence attorneys and advocates with consumer law and other economic civil legal remedies to address the profound and enduring economic harms that stand in the way of survivors' long-term economic security, such as coerced debt, damaged credit and credit discrimination, bankruptcy, foreclosure, and key intersections with family law and court access. Authors of each chapter are on-the-ground

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<sup>1</sup> Complex social problems rooted in oppression challenge us to find language that is both specific enough to describe a phenomenon like domestic violence yet also inclusive enough to describe a wide variety of experiences. For the purposes of this guidebook, we will use the term **domestic violence** (DV) to describe relationships in which one individual uses strategies designed to, “establish domination in a partner’s personal life based on fear, dependence, and deprivation of basic human rights using strategies including intimidation, degradation, isolation and control” (Stark, 2007).

experts who provide concrete legal remedies and innovative advocacy strategies from a survivor-centered and intersectional perspective (one that holds the economic and safety risks at once). The strategies presented throughout this Guidebook are based on data collected and technical assistance provided for over a decade; it is rooted in deep work with survivors, domestic violence programs and legal services agencies, communities, and coalitions— all seeking to enhance economic security and safety for survivors.

Drawing on a survivor’s story, this introductory chapter offers context and framework for survivor centered economic advocacy, serving as the foundation for the following fourteen chapters. It does this in four sections:

- An overview of the link between economic hardship and violence <sup>2</sup>
- A legal ethics basis for survivor centered advocacy
- The framework and approach to survivor centered economic advocacy
- Survivor centered economic advocacy at the individual, organizational, and policy practice level

## What is safety?

As advocates and attorneys, we work daily with individuals who struggle with violent relationships and economic hardship, but we rarely pause to examine what safety means to us, personally. Take a moment to close your eyes, ask yourself these questions, and think about your answers:

- What does safety mean to me? How do I know when I am safe?
- What is economic safety for me?

Visualizing safety helps us to understand our own perspective about what is safe and asks us to define safety in our own lives. For many of us, it is difficult to imagine being “safe” without economic security. Economic safety ensures that we have adequate housing, reliable transportation, healthy food, and maybe most importantly, financial choices. For example, currently available economic safety nets would give us the financial freedom to leave a job where we were experiencing harassment.

### Visioning “Safety”

In a recent webinar hosted by the Center for Survivor Agency and Justice, domestic violence advocates from around the nation defined economic safety as: feeling secure; having choices; being able to act on our own decisions and choices; and financial independence.<sup>3</sup> Life choices for survivors struggling with domestic violence are constrained by their partner’s economic abuse *and* by their life circumstances (for example, their access to quality education, childcare, and safe housing as well as their experiences with racism and sexism, etc.).<sup>4</sup>

<sup>2</sup> The guidebook refers to individuals being controlled in domestic violence relationships as “survivors ” and people who perpetrate violence as “abusive partners.” While the term “victim” is widely accepted in the legal system and correctly describes someone who has experienced a crime, victim has negative connotations as someone who is passive and can be a harmful representation of those who struggle to survive and thrive in the midst of violence. However, some individuals who experience domestic violence do not like the term survivor and feel that it diminishes the terrible acts of violence perpetrated by their partner. When working with individuals who experience domestic violence, it is important to follow the language used by that individual or to ask what language they would like you to use, especially when describing their abusive partner.

While research and practice experience continues to show that a majority of individuals who are impacted by coercive controlling domestic violence are women and that women are disproportionately impacted by the consequences of domestic violence [for more on this, see below], men do experience domestic violence. Instead of referring to survivors with gendered pronouns, the inclusive term “survivor” is used in this guidebook.

<sup>3</sup> Access the webinar recording and materials here: <https://csaj.org/news/view/webinar-resource-survivor-centered-economic-advocacy>

<sup>4</sup> Davies, J. and Lyon, E. (2014) 2<sup>nd</sup> Ed. Domestic violence advocacy: Complex lives, difficult choices. Sage Publishing.

## Sonia's Story

*Sonia just got off from her swing shift at a skilled nursing center where she works as a certified nurse assistant, and she's coming to talk to you about her current situation. She is eager to tell you what's going on for her, and behind her tired expression, you see a light in her eyes. Sonia is a thirty-two-year woman who describes herself as, "a hard worker and dreamer whose life took a turn I wasn't expecting." Sonia's parents are from Puerto Rico, and they raised Sonia in Miami.*

*Sonia met Robert ten years ago when he was the dental assistant in her dentist's office. Their relationship started out slow and loving, and Sonia was thrilled when they got married a year into their relationship. In the last five years, however, Robert has become increasingly jealous and doesn't want Sonia going anywhere except for work and her children's school. Sonia and Robert have two kids, Danny, 9 and Samantha, 7. Danny has autism, is non-verbal, and requires a lot of care. Sonia advocates hard to make sure Danny's needs are met at school, and she's relieved that this year Danny's services are well organized, and he has a loving and smart teacher who seems to "get him."*

*Sonia is coming to you because she is at her wit's end. Robert forces Sonia to directly deposit her paycheck into a banking account that she can't access. She thinks it may be a joint account but isn't sure, and Robert has never given her an ATM card or the account number. Sonia is also very upset because she just received notice that a credit card company is suing her. She doesn't recognize the account, and when she told Robert about it, he just laughed and said, "Yeah, I guess I should've told you I took that out in your name." Sonia has no idea what other accounts he may have opened using her name and information. She also recently found out that Robert has not been paying the mortgage consistently and they've received some kind of notice from the bank, but Robert won't show it to Sonia. Sonia is worried that they could lose their home.*

*Sonia loves her job and gets a lot of good feedback from her co-workers and supervisor, but lately, Sonia says, "Robert is even trying to ruin that for me." Robert accuses Sonia of sleeping with a co-worker and calls and texts Sonia dozens of times during her shifts. Recently, he showed up at her workplace, loudly yelling her name at the front desk as he came in. Sonia has told her supervisor pieces of what is going on with Robert, and while her supervisor has been tolerant, she is beginning to lose patience.*

*Sonia tells you that Robert has hit her, but only very occasionally. Sonia says Robert's name-calling hurts a lot worse than the physical abuse, and she misses spending time with her family and friends. She wants to get divorced, but she is worried that Robert, who has access to more of their money and has a better paying job, will get custody of their children, and she doesn't want to leave her school district due to her son's educational needs.*

### **Think About It**

How does the domestic violence impact Sonia's choices and economic situation? How do Sonia's life circumstances impact her choices? What are your reactions to Sonia's situation (feelings, thoughts, what do you want to do)?

Like Sonia (like all of us), survivors do not explicitly present all their risks or concerns nor always contextualize them in relation to their multiple identities. Therefore, each chapter in this Guidebook is written through an intersectional lens, presenting survivors as complex individuals with multiple identities and varying needs, resiliencies, and strategies for safety. We present questions, probes, and opportunities for self-reflection in each chapter through “Think About It” sidebars. These are necessarily limited and not meant to replace the requirement that in partnering with survivors in our advocacy we must reflect on our own status, identities, and role, then see safety and economic options through survivors’ perspectives and facilitate open dialogue.

## Risks for survivors of domestic violence

Survivors of domestic violence must constantly weigh the risks they face, as they make choices about their daily lives.<sup>6</sup> To understand the complex nature of these choices, we

### 1) Risks created by the battering partner

- Physical injury or illness
- Psychological effects (mental health, substance abuse, suicide)
- Loss or harm to children
- Economic insecurity
- Lost or damaged relationships (family, friends, other social supports)
- Arrest or legal implications (due to legal status, protracted legal case, etc.)<sup>5</sup>

### 2) Risks created by the survivor’s life circumstances

- Access to quality education
- Employment options
- Childcare
- Safe housing
- Transportation
- Availability of social or public services

Experiences of racism, sexism, homophobia, etc.

must pay attention to survivors’ economic options and risks, their life circumstances, and *our own* reactions and assumptions. Davies and Lyon describe the two types of risks that survivors weigh as:

To advocate effectively for survivors of domestic violence, we need to understand the myriad of risks they face. One of the biggest risks with which survivors contend is economic hardship.

As you read Sonia’s story, what were some risks that she is weighing?

Sonia’s Risks	
FROM HER PARTNER	INHERENT IN HER LIFE
Emotional abuse	Gender (sexism)
Isolation	Race/ethnicity (racism)
Physical abuse	Mother of a child with disabilities
Credit abuse	<i>What else?</i>
Work interference	
<i>What else?</i>	

<sup>5</sup> Davies, J. (1997). Safety planning. VAW Net. Retrieved from: [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/BCS\\_SafePlan.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/BCS_SafePlan.pdf)

<sup>6</sup> Davies & Lyon, 2014

What's missing from the chart above? For example, Sonia's story doesn't tell us this explicitly, but she may also be weighing her risks as a woman (for example, because of her gender, she may make less money than men doing her same job, etc.), and as a Latina (she may have a hard time accessing appropriate resources because of discrimination). Finally, as we take stock of the various risks and choices, we must also consider survivors' strengths: What are some of Sonia's strengths? She is familiar with the educational and health systems and is skilled in navigating them both on behalf of her son; she has a steady job in nursing; and she has strong familial and cultural ties as well as allies within her employment setting.

## Poverty leads to increased vulnerability to violence

For survivors of domestic violence, safety often hinges on access to economic resources. Those who can access and mobilize economic resources have more options for safety. As a consequence, although anyone can experience domestic violence (DV),<sup>7</sup> women living in poverty are nearly **twice** as likely to experience DV.<sup>89</sup> The fact that violence can frequently be a factor in the lives of poor women has led some observers to mistakenly conclude that poor people are more violent. (See, "The Role of Poverty," below for further discussion.)

### Think About It

*What are some factors of economic hardship or poverty you see at play in Sonia's experience? Do they influence her safety strategies?*

This economic gender gap widens for those further marginalized by race, ability, sexual orientation experience, citizenship status, and other identities.<sup>10</sup> For example, while 1 in 10 white people live at or below the poverty line, *at least* 1 in 4 (and higher) people of all other racial-ethnic groups live in poverty. So, while anyone can experience violence and economic hardship, our unique systems of discrimination restrict those on the social margins from equal options to safety and economic security.

## Economic abuse as a form of domestic violence

All forms of abuse create economic instability for survivors in ways that linger, interact, and compound over time. The vast majority of abusive partners use economic tactics to control their partners, stripping them of the material and financial means to access safety and security.<sup>11</sup> In fact, 99% of survivors report experiencing some form of economi

<sup>7</sup> Black, M. C., Basile, K. C., Breiding, M. J., Smith, S. G., Walters, M. L., Merrick, M. T., ... Stevens, M. R. (2011). The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Retrieved from [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_executive\\_summary-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf)

<sup>8</sup> Vest, J. R., Catlin, T. K., Chen, J. J., & Brownson, R. C. (2002). Multistate analysis of factors associated with intimate partner violence. *American Journal of Preventive Medicine*, 22(3), 156–164. [http://doi.org/10.1016/S0749-3797\(01\)00431-7](http://doi.org/10.1016/S0749-3797(01)00431-7)

<sup>9</sup> Put differently, women with household incomes less than \$7500 are seven times more likely to report domestic violence than women in households with incomes over \$75,000. See, Rennison, C.M. & Welchans, S. (2000). Bureau of Justice statistics special report: Intimate partner violence. U.S. Department of Justice, Office of Justice Programs. Report No. NCJ 178247. Retrieved from:

[http://www.popcenter.org/problems/domestic\\_violence/PDFs/Rennison%26Welchans\\_2000.pdf](http://www.popcenter.org/problems/domestic_violence/PDFs/Rennison%26Welchans_2000.pdf); Similarly, More than half of homeless women report a history of assault by an intimate partner and 70% of women receiving public benefits (Temporary Assistance for Needy Families, WIC, Food stamps) report experiencing domestic violence. See, Lyon, E. (2000). Welfare, Poverty, and Abused Women: New Research and its Implications (Building Comprehensive Solutions to Domestic Violence). National Resource Center on Domestic Violence. Retrieved from [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/BCS10\\_POV.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/BCS10_POV.pdf)

<sup>10</sup> For a more detailed analysis, see CSAJ's forthcoming Accounting for Economic Security Atlas (will be available in our [Resource Library](#))

<sup>11</sup> **Coercive control** is defined by Evan Stark (2009) as "a pattern of violent acts and their political framework – the pattern of social, institutional, and interpersonal controls – that usurp a survivor's capacity to determine her destiny."

abuse by their partners.<sup>12</sup> Economic abuse is defined as “controlling a survivors ability to acquire, use and maintain economic resources.”<sup>13</sup>

### Think About It

*What is Sonia experiencing that you would consider economic abuse?*

Abusive partners frequently control survivors’ ability to acquire and keep financial resources by interfering with, obtaining, or maintaining work, education, or community or government benefits. Sixty percent of survivors of domestic violence report experiencing work

interference (including sabotaging transportation, childcare, destroying uniforms, harassment at work, etc.). from an abusive partner.<sup>14</sup> Survivors also experience financially devastating banking, asset, income, credit and debt coercion from abusive partners.

Abusive partners destroy survivor’s credit by fraudulently opening accounts in the survivor’s name, lying about paying bills in the survivor’s name, overcharging credit accounts, or coercing survivors to sign for loans, credit lines, or other expenses. In some abusive relationships, partners also use force or threats to coerce survivors into

### Think About It

*In what ways did Sonia’s partner, Robert, control her ability to acquire income, affect her employment, or access needed resources?*

*Did Robert prevent or control Sonia’s use of her or their joint resources? In what ways? What safety implications can you see?*

*In what ways did Sonia’s partner, Robert, impact Sonia’s credit? Does Sonia have a clear picture of Robert’s impact on her credit?*

participating in illegal activity (for example, TANF or SNAP fraud, prostitution, and writing bad checks, etc.). By destroying a survivor’s credit or creating a criminal history, perpetrators gain further financial control over survivors’ current and future economic choices.<sup>15</sup>

Sonia’s options for safety were constrained by Robert’s control of their finances, work sabotage, and other forms of abuse. In turn, the economic hardship and risk of

poverty or homelessness restricted Sonia from accessing many safety options for her and her children. As seen in Sonia’s story, domestic violence has both short- and long-term negative effects that accumulate over a lifetime (CSAJ refers to this as the “Economic

## The Role of Poverty: A Slippery Slope

That a woman living in poverty is twice as likely to be a victim of domestic violence may cause some to mistakenly believe that poverty is a cause, or the cause of domestic violence. On the contrary, poverty functions to restrict survivors’ economic options for obtaining safety. An abusive partner can make a survivor’s economic instability more intractable by using economic tactics to exert control over the survivor (such as paying or refusing to pay for items the survivor needs for themselves or their children, e.g. rent, childcare, car payment or food). Conversely, when abusive partners experience economic problems (lost jobs or chronic unemployment) this can trigger or exacerbate the abusive behavior. For example, the probability of intimate partner homicide increases significantly if an abusive partner is unemployed. Also see CSAJ’s Accounting for Economic Security Atlas, which presents a more nuanced discussion of the intersecting harms presented by abuse and poverty.

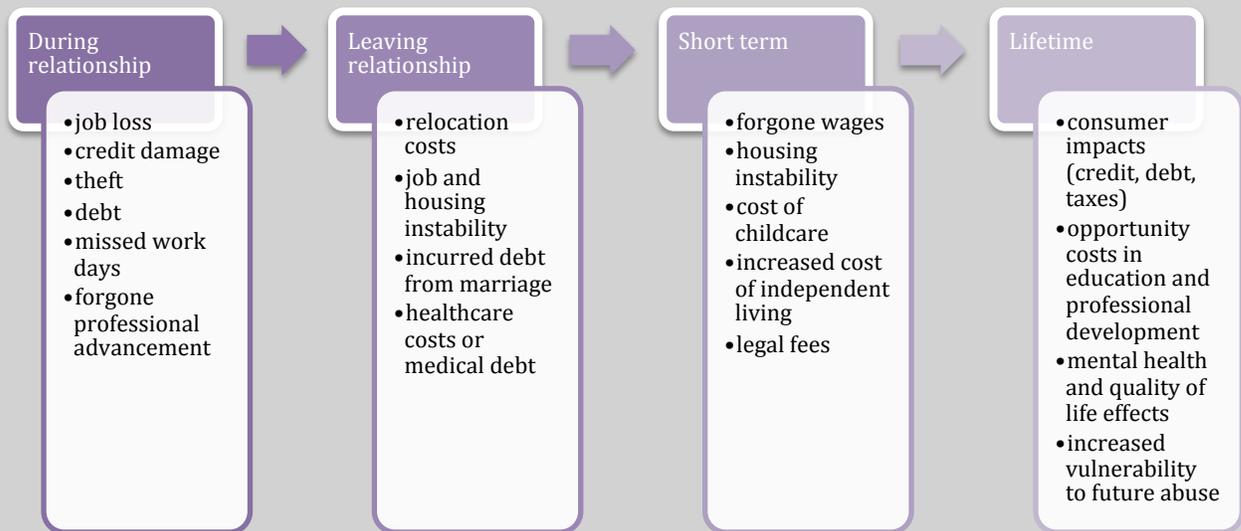
<sup>12</sup> Adams, A. E., Sullivan, C. M., Bybee, D., & Greeson, M. R. (2008). Development of the scale of economic abuse. *Violence Against Women*, 14(5), 563–588. <http://doi.org/10.1177/1077801208315529>

<sup>13</sup> Adams et al., 2008

<sup>14</sup> Alexander, P.C. (2011). Childhood maltreatment, intimate partner violence, work interference and women’s employment. *Journal of Family Violence*: 26(4), p 255-261.

<sup>15</sup> Littwin, A. (2012). Coerced Debt: The role of consumer credit in domestic violence. *California Law Review*, 100(4), 951. <http://doi.org/doi:10.15779/Z38VR6G>

## The Economic Ripple Effect of IPV<sup>1</sup>



- **During a relationship**, abusive partners engage in behaviors that strip survivors of access to economic and material resources for safety.
- **In seeking safety, or leaving**, survivors literally pay a cost for safety (whether having to rely on credit or losing income or housing). This results in collateral economic damages, which affect survivors in the short term and manifest in various ways throughout the life course.
- **In the short-term**, our systems of support – from housing, to inadequate and expensive legal systems, to enduring employment insecurity, to abusive financial practices (from Payday lending to redlining)– fall short in remedying the economic hardships experienced by survivors, and, at worst, lead to increased danger.
- **Across the lifespan**, abuse creates a pathway of economic disadvantage, including lost work and economic opportunities, consumer impacts, and the lingering effects of poor physical and mental health and decreased quality of life.

Ripple Effect of IPV." See the sidebar for more). Survivors who struggle with domestic violence experience reduced wages, job experience, job stability and economic well-being over time.<sup>16</sup>

## A Legal Ethics Basis for Survivor-Centered Economic Advocacy

What ethical obligations govern lawyers' representation of domestic and sexual violence survivors? Let us begin where lawyers often do: the rules. The Model Code of Professional Responsibility, which provides all lawyers with the baseline standards of legal representation,<sup>17</sup> lends support for survivor-centered advocacy.

Rule 1.1 The Model Code of Professional Responsibility requires that a lawyer provides "**competent**" representation to their client; competent representation requires, not only knowledge of the law, but also, "skill, thoroughness, and preparation reasonably necessary

<sup>16</sup> Hughes, M. M., & Brush, L. D. (2015). The price of protection: A trajectory analysis of civil remedies for abuse and women's earnings. *American Sociological Review*, 80(1), 140–165. <http://doi.org/10.1177/0003122414561117>

<sup>17</sup> Note that the ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases offers helpful guidance. Though the document is focused specifically on representation in civil protection order matters, the concepts are relevant to all areas of practice for attorneys representing survivors. "The purpose of these Standards of Practice is to provide a reference for lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases, and to encourage lawyers to provide high-quality legal representation to those clients. These Standards keep the needs of the client at the center of representation and strive to build public confidence in a just and fair legal system by working to promote safety for victims of domestic violence, sexual assault and stalking, and accountability for perpetrators."

for the preparation.” And, competence includes “inquiry into the analysis of the factual and legal elements of the problem.” Therefore, lawyers representing survivors must know not only the legal elements of a remedy, but also the facts. Given the complex nature of domestic violence, it is not enough to be familiar with the limited facts of a particular incident. Rather, lawyers representing survivors must gather a rich understanding of the entire context of coercive control.<sup>18</sup> They must develop a detailed picture of both the batterer-generated risks and the life-generated risks that a particular survivor faces, in order to tailor their representation to consider and be responsive to the complexity of their life circumstances.<sup>19</sup> In addition, even if the lawyer has a limited scope of representation (i.e., protection order representation), he or she should screen for issues related to the survivor’s safety and security, and if he or she is not able to represent the client in those matters, for example, consumer and economic civil legal issues, “the lawyer has a duty to refer to the client to competent counsel.”<sup>20</sup>

Rule 1.2 of the Model Code of Professional Responsibility, which speaks to the “**Scope of Representation and Allocation of Authority Between Client and Lawyer**,” provides: “a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.” The comment to the Rule further explains that this “confers upon the client the *ultimate authority* to determine the purposes to be served by legal representation.” Therefore, lawyers are ethically, if not morally, required to represent domestic violence survivors according to the survivor’s own decision-making. The remedies we seek and even our litigation strategies should be crafted in consultation with our clients.<sup>21</sup> The ABA Standards apply this rule to domestic violence representation, noting that representation of domestic violence survivors should be “client-centered,” where decision-making authority rests with the survivor.<sup>22</sup> Thus, “the role of advocacy is to understand the [survivor’s] perspective, provide relevant information and the opportunity for survivors to make decisions and plans, and then to work with them to implement those plans.”<sup>23</sup>

**Communication** between lawyer and client is critical. Rule 1.4 of the Model Code of Professional Responsibility provides that a lawyer shall: 1) inform the client of issues where informed consent is required, 2) consult with the client about the *means* by which the client’s objectives are to be accomplished. Also, a lawyer shall “explain a matter to the extent reasonably necessary” to enable the client to make “informed decisions regarding the representation.” We know that survivors of domestic violence face an array of risks resulting from their abusive partner’s behavior—physical, emotional, financial, economic, etc. As a result, when working with a survivor, we must be particularly attuned to the potential consequences of the remedies available, as well as the consequences arising

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<sup>18</sup> The ABA Standard includes a provision on “Client Safety,” II(E), which indicates that lawyers should “ensure safety planning occur with the client” and that lawyers “be sensitive to the effects of trauma on their clients.”

<sup>19</sup> The ABA Standards provides: “in a civil protection order case, the lawyer should have competent knowledge of the dynamics of domestic violence, sexual assault and/or stalking. In particular, the lawyer should understand the potential risk of escalated violence due to litigation, and how the experience of domestic violence, sexual assault and/ or stalking may affect the client-lawyer relationship, including the process of establishing rapport with and gathering information, evidence and case direction from the client.”

<sup>20</sup> ABA Standards, III(A)(1), A. Competent Knowledge of Law, 1) Knowledge of Related Legal Issues. The comment to this standard notes that “economic stability is tantamount to client safety in many cases,” the attorney should be knowledgeable about “economic concerns.”

<sup>21</sup> The ABA Standards apply this rule to domestic violence representation, noting that representation of domestic violence survivors should be “client-centered,” where decision-making authority rests with the survivor

<sup>22</sup> ABA Standards of Practice, III(F)

<sup>23</sup> Page 16

from the legal system that one must navigate to access those remedies. Consideration of both remedies and systems must be done in partnership with the survivor, as they holds all of the information needed to assess the risks and benefits associated with the remedies and systems as they will play out in their own life.<sup>24</sup>

Given the ethical rules laid out, effective legal advocacy for survivors requires, as Jill Davies sets forth in her tool on legal advocacy for survivors: understanding the survivor's perspective, determining whether the legal system may be able to help a survivor meet their goals and address their fears, conveying your knowledge about the legal remedies to the survivor and analyzing them with them, and helping the survivor to implement their choices.<sup>25</sup>

## Survivor-Centered Advocacy

Economic coercion combined with poverty and other challenging life circumstances make domestic violence cases very complex for advocates and lawyers. What is the best way to respond to these difficult cases? What can we do to help create meaningful change in the lives of survivors?

### **Survivor-centered advocacy is an evidence-supported practice**

Survivor-centered advocacy is a practice that accentuates clients' choices and strengths, focuses on the importance of building and supporting a partnership between the survivor and service provider, and pays attention to the context of the survivor's life (for more, see callout box below).<sup>26</sup> Survivor-centered advocacy (also called survivor-defined or women-defined practice) starts with the belief that the survivor's perspective, lived experiences, and knowledge of their own situation are paramount.<sup>27</sup> A survivor-centered advocacy partnership between the lawyer/advocate and the survivor is built through open assessment, non-judgmental active listening and tailored advocacy strategies created jointly through honest and respectful dialogue between the advocate/attorney and the survivor. Through this dialogue, advocates and lawyers build a relationship with the client to: a) understand the survivor's strengths and the full extent of the survivor's risks and then b) to honestly and respectfully present information that enhances the survivor's knowledge.

The focus is on *advocacy* as opposed to *service delivery*. While service delivery offers survivors particular services based on an organization's focus, advocacy partners with individual survivors to ensure access to resources and opportunities that are relevant to the individual survivor's needs and life circumstances.<sup>28</sup>

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<sup>24</sup> The ABA Standards note that effective client communication requires unique skills on the part of attorneys representing survivors, "because their legal concerns are often embedded in very personal, private matters. Effective representation requires that the lawyer earns the trust of a client who has experienced betrayal and/or abuse."

<sup>25</sup> Jill Davies, *An Approach to Legal Advocacy for Individual Battered Women*, Greater Hartford Legal Aid, Resource Manual, 2nd edition.

<sup>26</sup> Goodman et al., (2014). Survivor defined practice in domestic violence work: Measure development and preliminary evidence of link to empowerment. *Journal of Interpersonal Violence*, p. 1-23.

<sup>27</sup> Davies and Lyon, 2014

<sup>28</sup> Knitzer, J. (1982). *Unclaimed children: The failure of public responsibility to children and adolescents in need of mental health services*. Washington, DC: Children's Defense Fund.

## Survivor-centered advocacy requires full, open and ongoing assessment

In order to engage fully with a survivor's risks, the advocate/attorney needs a clear understanding of how abuse tactics are impacting the survivor's life and choices without judgment or fear of reprisals from the advocate or attorney. If a survivor feels judgment from an attorney or advocate or senses that an advocate or attorney wants the survivor to choose a certain course of action (for example, file for bankruptcy, get new employment, etc.), the survivor may paint a picture that they think will satisfy the advocate or attorney.

### Think About It

When working with Sonia, the advocate/attorney may believe that the best solution for Sonia is to leave her partner. This unspoken desire of the advocate/attorney may influence what services he or she offers (for example, an order of protection) and the focus of the safety plan. As a result, Sonia may not share with the attorney that she has decided to stay with her partner (unless things get much worse) until her children are out of the home. This work would not be a partnership, would not meet Sonia's needs in the long term, and may miss key opportunities to increase Sonia's safety while living with her partner. When advocates project their own judgment, they lose trust with their clients, and their advocacy becomes less effective, at best, or dangerous, at worst.

## Survivor-centered advocacy is built on the principle of partnership

Effective partnerships are built on shared power and a willingness to be transparent and learn from one another. Just as survivors assess the ways advocates and attorneys direct them, they can also sense bias (whether due to educational level, race, religion, sexual orientation, etc.). Survivor-centered advocates and attorneys work hard to understand how their own power and/or identities may be influencing the survivor's assessment of their work together. Survivor-centered advocates and attorneys also understand that trust is essential in partnerships and needs to be built over time.

### Practice Tip

Imagine Sonia is working with a lawyer or advocate who tells her to pull her credit report immediately to determine what is happening with her accounts. What are some possible benefits of pulling her credit report? Potential negative consequences? How might Sonia react to the lawyer/advocate directing her to pull the credit report?

If Sonia followed her lawyer/advocates request and pulled her credit report, her husband, who has illegally pulled Sonia's credit report in the past, could see evidence of Sonia's credit request and may increase his physical, emotional, or financial abuse as a result.

What would be a survivor-centered approach to this situation?

## Survivor-centered advocacy is flexible and responds to the changing needs of the survivor

**Case Scenario:** *During one visit to your office, Sonia prioritizes increasing safety with her employer. You work together to create strategies to increase her safety at work and role play telling her supervisor and employees what she needs to increase her safety. During her next visit, Sonia may not want to focus on her employment and may want to spend time discussing options she has around her joint bank accounts. Survivor-centered advocates and attorneys allow Sonia's needs and her own assessment of her current safety and risks guide the process while continuing to assess for strengths and risks and providing information to enhance Sonia's safety across various priority areas.*

Many of us go into domestic violence or public interest law because we care about making a real difference in the lives of survivors of domestic violence. We see how inequality, violence, and injustice work together to keep people stuck in painful life circumstances, and our impulse is to help. We also have work experience showing what clients have tried and what has and hasn't worked. We want to protect our clients from going down negative paths. Therefore, at times, we tell our clients what to do or what not to do. When we follow that impulse, we shift from survivor-centered advocacy to provider-defined advocacy. This comes from the best of intentions; we really want to help. And as people who seek services, we can relate to wanting someone else just to tell us what to do. But we also know, from our own life experience, that solutions are most effective when they match our needs, utilize our strengths, and fit into our own lives.

Some survivors fear that they will suffer negative consequences for not following the advice of a lawyer/advocate because they do not have as much institutional power as the advocate or lawyer. Survivors of domestic violence have power and choices taken away from them by their abusive partners. By engaging in provider-directed advocacy, lawyers and advocates mimic this behavior and diminish the agency of survivors at a time when they need it most. Rather than educating or increasing choices for survivors, provider-directed advocacy removes choices, disregards the survivors' expertise, and discounts the survivor's personal and community strengths and assets. All of these things decrease the likelihood that the advocacy we offer will be relevant to the survivor's life, and may, in fact, increase the risks that survivors face.

## Survivor-Centered Economic Advocacy

What does survivor-centered advocacy look like when economics are the focus of advocacy? Survivor-centered economic advocacy addresses both the physical and the economic safety needs of survivors. Many advocates or lawyers are well versed in *either* domestic violence or consumer issues; however, survivors' lives aren't separated into silos of "financial risks" and "domestic violence risks." Survivors' economic needs are intimately connected with the risks they face within their abusive relationship, and their options for safety have real financial costs, which require access to resources. Sonia won't be fully safe until her financial needs *and* her physical and emotional risks are attended to.

Survivor-centered economic advocacy is holistic. It responds to the wide array of life- and batterer-generated risks and does not decide for the survivor how the risks are prioritized. Rather, survivor-centered economic advocates try to understand the survivor's complex domestic violence and financial situations and use a safety-lens as they partner with survivors to address credit, employment, housing, taxes, budgeting, transportation, childcare, banking, and other economic issues.

A survivor-centered economic advocate asks questions to understand a survivor's priorities, whatever they are, and works with the survivor toward their goals. Without such knowledge, advocates cannot link economic concerns to safety nor can they appreciate the safety implications of different economic decisions. For example, because of our deep insight into Sonia's situation, if she comes to us prioritizing her employment over her physical safety, we understand that her priority may be related to the fact that she enjoys her job and wants to maintain it as a safe place, and she needs a source of income. If she's more concerned about her housing and the mortgage delinquency, we understand that a stable and safe home for her son, given his needs, makes sense to her long-term safety plan.

The conditions of poverty – poor housing, fear of losing housing, limited employment options, health issues, food insecurity, financial stress – feel more oppressive and dangerous than the risk of physical violence. In fact, when low-income domestic violence survivors were asked about the most stressful or upsetting event that they had to cope with in the last month, over half reported something other than the physical violence.<sup>34</sup>

## Evidence Supporting Survivor-Centered Advocacy

This research shows that the relationships built from survivor-centered advocacy, as well as the process of receiving it, are important to survivors in and of themselves *and* lead to outcomes that survivors' value.

- Three factors are associated with positive advocacy outcomes: orientation to the whole person, unconditional validation and acceptance, and orientation to information provision and action.<sup>29</sup>
- Survivors with individualized comprehensive community advocates were more effective in acquiring needed community resources than survivors without survivor-centered advocates.<sup>30</sup>
- Survivors who report having greater control over the help-seeking process are more satisfied with services (including legal, criminal justice and community-based domestic violence advocacy) and more likely to use those services in the future.<sup>31</sup>
- Survivors who felt that the advocacy they received was responsive to their goals appear to be more optimistic about the support those resources can provide.<sup>32</sup>
- Survivor-centered advocacy is positively related to a survivor's belief in their internal resources (tools/skills) and confidence that they know how to move forward positively in their own lives (agency).<sup>33</sup>

<sup>29</sup> Allen, N.E. et al. (2013). Exploring the Core Service Delivery Processes of an Evidence-Based Community Advocacy Program for Women with Abusive Partners. *Journal of Community Psychology*, 41(1), 1-19.

<sup>30</sup> Sullivan, 1999; Allen, 2004

<sup>31</sup> Goodman, L.A., Thomas, K., Cattaneo, L.B., Heimel, D., Woulfe, J., & Chong, S.K. (2014). Survivor-defined practice in domestic violence work: Measure development and preliminary evidence of link to empowerment. *Journal of Interpersonal Violence*, p. 1-23.

<sup>32</sup> Goodman, 2014

<sup>33</sup> Goodman, 2014

<sup>34</sup> Eby, K.K. (2004). Exploring the stressors of low-income women with abusive partners: Understanding their needs and developing effective community strategies. *Journal of Family Violence*, 19(4): p. 221-232.

Furthermore, safety and economic security are inherently linked, so for a survivor, there may be no safety without stable and affordable housing. A survivor-centered economic advocate works to understand these complexities and does not judge a survivor for putting other needs in front of issues with a battering partner.

The goal of survivor-centered economic advocacy is reduction of risk and movement toward long-term safety in its broadest sense- physical, emotional, financial, even spiritual, safety and human dignity.<sup>35</sup> There is a clear evidence base from research that supports a survivor-centered approach to advocacy (See side bar for a summary of the research).

## **Full and open economic assessment**

The first step of survivor-centered consumer advocacy is a full and open assessment of the survivor's financial situation including an understanding of how the abuse is tied into the survivor's financial safety. The assessment asks survivors open-ended questions allowing them to describe and explore their current situation fully. For example, you may ask, "What are your biggest concerns about money right now?" followed by "How does your partner impact your financial concerns?" For more assessment questions, please see CSAJ's [Consumer Rights Screening Tool for Domestic Violence Advocates and Lawyers](#). Each chapter in this guidebook offers issue-spotting screening questions to help guide your advocacy. However, they are both non-exhaustive and not all required (nor in one sitting) to assess survivors' economic needs. Financial and safety assessment is an on-going process that will continue throughout the advocacy relationship.

## **Review economic plans**

As a part of a thorough assessment, survivor-centered advocates and attorneys review the survivor's past, current and future economic plans. For example, an advocate or attorney working with Sonia will ask, "What do you want to do about your money situation now?" and "What worked well for you in the past with your financial plans? Why? What didn't work for you in the past?" By understanding the survivor's past and current plans, the survivor-centered advocate and attorney builds on the survivor's strengths and respects the work that the client has already accomplished. The survivor's experiences also frame what hasn't worked well, so that the advocate/attorney understands what strategies have not been a good fit in the client's life and why.

Survivor-centered economic advocacy requires looking at economic situations through the lens of safety while giving clients the right to make decisions in their own lives. We simply cannot predict the future. Even though we may have years of experience with clients and we understand the dynamics of domestic violence, we never know exactly what will happen in survivor's lives. This uncertainty demands that we respond to client's situations with humility and flexibility. While an advocate/attorney using provider-directed advocacy says, "The best strategy for you seems to be...", an advocate/attorney using survivor centered economic advocacy says, "I want to understand...tell me more about..."

Flexible advocates/attorneys know that survivor's risks may change and that this change may result in shifting advocacy priorities or strategies. In our example, if Sonia loses her job as a result of Robert's harassment at work, her work with an advocate/attorney may drastically change from looking at banking options to finding new employment.

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<sup>35</sup> This expansive definition of safety is reflected in CSAJ's vision statement, which reads: "The Center for Survivor Agency and Justice envisions a world where all people have equal access to physical safety, economic security, and human dignity."

## Information sharing

Survivor-centered economic advocates ask survivors if they would like a piece of information and then explore with the survivor whether and how that information fits their life. For example, when exploring Sonia's desire to find a banking institution you could say, "It sounds like you are weighing your choices regarding a banking institution. I have some information I could provide for you about some of the differences between commercial banks and credit unions. Would it be helpful if I shared that information with you now?" Sonia may say that she is overwhelmed right now and as she gets closer to making that decision she will let you know, but not now. Be sure to validate that feeling and reassure her that you can talk when she's ready. However, Sonia may be ready, and if she agrees, after sharing the information with her you would ask, "How does that information fit with your situation? What questions do you have about what I explained?"

## Weighing economic strategies

After understanding a survivor's economic situation and financial plans and providing financial information, survivor-centered economic advocates work with the survivor to weigh survivor's economic strategies in the light of the client's life and risks generated by an abusive partner.

## Challenges and Benefits of Survivor Centered Advocacy for Lawyers and Advocates

What does survivor centered economic advocacy look like in practice? This work presents several challenges to lawyers and advocates. However, these challenges can also be reframed as benefits to the work. Below is a description of the challenges and benefits of survivor-centered advocacy, as well sample strategies to help you think of ways to move towards the benefits of survivor centered economic advocacy. Can you think of others?

**Challenge:** The holistic nature of survivor-centered advocacy may be difficult for attorneys and advocates who work in compartmentalized organizations. If you are tasked to work with clients on domestic violence family law issues solely, it may stretch resources and cut against institutional ideology to expand your advocacy to include both economic and domestic violence needs.

**Benefit:** By working on both the economic *and* the domestic violence issues at the same time, you can be confident that advocacy efforts will both be safe and sustaining. For example, if you are working on orders of protection with a survivor, by also attending to the economic needs of the survivor, you can work to request financial relief as a piece of the order of protection. This work then becomes more efficient and more effective in creating lasting change in the lives of survivors.

### Strategies: Working towards the benefits

What economic implications arise in your legal advocacy? What can you ask, generally, to get a sense of safety and/or economic needs? Hold an agency-wide staff meeting where you discuss: How can you better coordinate between departments, expertise, etc.? Train each other on the essentials of assessing for linkages and plan ways to coordinate a case or bring in needed partners or outside expertise.

**Challenge:** There is no formula to survivor-centered advocacy. It seems like it would take too long.

**Benefit:** Because there is no formula for survivor-centered advocacy and because the strategies are framed by the survivor's experiences, risks, and strengths, advocates and attorneys have the opportunity to be creative and build new community partnerships. And, while survivor-centered advocacy may take longer up front, there is an increased likelihood that the tailored intervention will increase the survivor's safety

**Strategies: Working towards the benefits**

Instead of an advocate or attorney briefly reviewing a case and saying to a client, "X" (organization or action) can help you with "Y" (issue) (for example, "Houses 'R Us can help you find a new apartment."), and instead of wasting time referring a client to an organization that upon further exploration is not a good fit, *on-going assessment* helps you devise interventions that truly match the survivor's situation. An attorney or advocate engaged in ongoing assessment would instead ask, "How has Y (issue) impacted your life? What have you done in the past regarding Y that was helpful?" Asking questions in this way creates an assessment of the issue in the context of the survivor's whole reality and evokes responses (X) instead of directing the survivor on what they should do. By partnering with the survivor, you may find that you need "new" partners in the community. You may develop a rich network of relationships with bankers, anti-poverty advocates, mechanics, tenant-rights groups, landlords, etc. that benefit not only the client you have now but many others in the future.

**Challenge:** Survivor-centered economic advocacy challenges the traditional view of the lawyer or advocate as the expert. By partnering with the survivor, building on the survivor's strengths, understanding what has worked for the survivor and what hasn't worked, advocates and attorneys may wonder, *how can I find my voice as an expert? What if I disagree with a client's assessment of their safety?*

**Benefit:** Survivor-centered economic advocacy takes the pressure off of the attorney or advocate to be "right" and know what works for everyone. The attorney/advocate does not have to tell anyone what to do or how to do it, but instead builds upon an individual's strengths and assets and lets the survivor guide the advocacy--a true partnership.

**Strategies: Working towards the benefits**

What if you are concerned about the way a survivor is weighing risks and you are afraid for their safety? Survivor-centered economic advocacy is a partnership, so as one partner, you do not have to keep your fears to yourself and you may have some information that is key to the survivor's risk analysis. However, before sharing your fears with the survivor, be slow to react, and do a self-assessment (Davies and Lyon, 2014). What about this situation is concerning for me? Do any of my identities (race, gender, sexual orientation, class, education, etc.) or perspectives influence how I am thinking about this situation? If so, how? Is this situation bringing something up for me from another experience (another client, your own life experience, etc.)? After a self-assessment, if you determine that you are still concerned, proceed carefully. State your concern, give evidence of your concern, and ask the survivor how the statement of those fears sounds for them.

**Think About It**

What's missing from these scenarios? What are some other strategies you think would help break down siloes, enhance creativity and flexibility, and take some pressure off the need to be "right" or "the expert"? Attorneys and advocates that proceed in advocacy with humility, flexibility, partnership and information sharing can provide effective economic work with survivors.

**Case Scenario:** *For example, if Sonia stated that she wanted to open a bank account without telling Robert, and she didn't think he would be too upset about it if he found out, you may say, "It sounds like you don't think Robert will be upset if he finds out that you opened a new bank account, on the other hand, you told me that when you put cash aside last year and hid it from him, and he found it, he was very upset and hurt you pretty badly. I am concerned about how he may respond, but I may be missing something. Tell me how you see this situation as different."*

## Organizational Readiness: Institutionalizing Survivor-Centered Advocacy

While you as an advocate or attorney may embrace survivor-centered economic advocacy, practicing survivor-centered economic advocacy with the full support of your organization is powerful. CSAJ created a readiness/organizational assessment tool to use with your organization. When visualizing and implementing change in your organization, it is helpful to see how other domestic violence or legal organizations have increased organizational survivor-centered advocacy capacity. CSAJ has worked with four groundbreaking demonstration project sites to enhance economic and consumer rights for domestic violence survivors. The Building Partnerships Report offers strategies useful to organizations embarking on survivor-centered economic justice work. Check out the following resources for more:

- [Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: A Resource and Assessment Tool](#)
- [Building Partnerships for Economic Justice: A Report on CSAJ's Innovative Pilot Projects](#)
- Mapping the Economic Landscape for Survivors: A Community Needs Assessment Toolkit (forthcoming)

## Systems Change and Policy Work

While individual advocacy is necessary to access rights and resources available to survivors, systems and policy changes are critical to ensure that institutions support the economic security of all survivors. Survivor-centered economic advocacy with individual survivors provides lawyers and advocates with rich information regarding the common economic challenges faced by domestic violence survivors. By listening and responding to the needs and priorities of survivors, lawyers and advocates are able to identify systemic barriers and formulate institutional and policy reforms needed to address those barriers and increase their safety. Survivor-centered advocates have the opportunity to use their knowledge to inform policy makers, partner with advocacy groups, and advocate for systemic changes. While individual advocacy is necessary for accessing rights and resources available to survivors, systems and policy changes are critical for transforming the landscape to ensure that institutions support the economic security of all survivors.

Examples of CSAJ's systems-level work, include:

- CSAJ's systems advocacy efforts with the [Department of Education](#) and [Consumer Financial Protection Bureau](#)
- Accounting for Economic Security: An Atlas for Direct Service Providers (forthcoming)
- [Housing Policy and Systems Advocacy](#)

Furthermore, an **intersectional approach** to advocacy is required to address the disparate impact that policies and institutions have on survivors who are socially and politically marginalized, restricting their access to the resources needed for their long-term safety. Intersectional IPV approaches address the individual and structural barriers by employing tools that target multiple forms of oppression. CSAJ's [Legal Impact for Racial & Economic Equity of Survivors Project \(REEP\)](#) seeks to remedy the systemic inequalities facing survivors of color that currently impair their access to economic security and safety. [In partnership](#) with diverse anti-poverty, race equity, and violence against women practitioners, REEP will shift the current violence against women paradigm by employing impact strategies that engage communities in identifying inequalities and by employing impact legal and policy strategies that facilitate access to economic opportunity for survivors of color.

## Conclusion

Attorneys and advocates for survivors of domestic violence can meaningfully enhance survivors' access to long-term safety by engaging in survivor-centered economic advocacy. There is a reciprocal relationship between domestic violence and economic hardship; and, domestic violence has an economic ripple effect on survivors' lives. While many domestic violence advocacy programs provide financial literacy skills training, such interventions often fail to address the profound economic harms that survivors face, both as a result of living in poverty and as a result of the economic and physical coercion they have experienced.

Attorneys representing survivors are bound by legal ethics that support survivor-centered practice. Survivor-centered economic advocacy is an evidence-based practice that is based on a partnership between the attorney/advocate and the survivor, which draws upon their combined expertise and is driven by the survivor's priorities and decision-making. Survivor-centered advocacy holds both the economic and the safety needs of the survivor simultaneously, in order to forge complex strategies that address the risks, needs, assets, and opportunities facing an individual survivor.

While there are many challenges in implementing survivor-centered economic practice, strategies exist to overcome those challenges and implement it within differing institutional structures. Indeed, organizations and communities can assess their readiness and implement procedures to create the infrastructure needed to sustain the work. While individual advocacy efforts assist survivors in accessing their rights, systems and policy advocacy is critical to changing the landscape to support the economic security of all survivors better.

# Two



## Building & Repairing Survivors' Credit Reports

UNDERSTANDING OPTIONS AND SAFETY IMPLICATIONS FOR SURVIVORS

By **Katie VonDeLinde**<sup>1</sup>

### Introduction

As the result of economic abuse, coerced debt, and the long-term negative financial impacts of domestic violence, survivors frequently have complicated credit histories. In order to help advocates and attorneys increase economic options necessary for survivor safety, this chapter describes and explains credit reports and credit scores in the context of domestic violence and safety, then offers credit advocacy strategies, including: pulling and reviewing credit reports (and safety implications), disputing errors in credit reports, instituting credit protections, and repairing and rebuilding credit history.

### Domestic Violence and Credit

Abusive partners will use and abuse credit as a means of control. Abusive partners may open accounts without their partners' knowledge or consent, run up high balances, refuse to pay balances, force survivor's to obtain loans, and lie about paying the bills on time or at all. These actions can also be called *coerced debt*, which is "all non-consensual, credit

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<sup>1</sup> With contributions by The Legal Aid Society and the National Consumer Law Center.

related transactions that occur in a violent relationship.<sup>2</sup> Abusive partners may also keep the couple's assets in their name but keep the debts in the victim's name. Many survivors feel ashamed about their credit history, even when their abusive partner destroyed the survivor's credit history.

## Gloria's Story

Gloria's story highlights some of the impact domestic violence can have on personal credit.

*Gloria is a forty-six-year-old woman who left her abusive partner, Fred, last year after a six-year marriage and ten-year relationship. To provide distance from Fred, Gloria moved into a transitional housing program a few states away from her last residence. Gloria needs to find an apartment on her own in the next six months before she reaches her time limit in transitional housing. She is coming to you because she has received several phone calls lately from debt collectors regarding debt she doesn't know about. Gloria and Fred are still married but are separated. Divorce proceedings haven't begun yet because Gloria is afraid of how Fred will react.*

*For years, Fred controlled Gloria's spending. She wasn't allowed to have any credit cards and had to save up cash to buy small things for herself. However, Gloria secretly held onto a store account that she had since before her relationship with Fred. She hasn't used the store card for several years. Gloria is a pre-school teacher at a day care center. She loves her job, but wishes the pay were better. She receives the bare minimum of benefits and finds herself scraping by each month. Gloria hasn't seen her credit report for several years. She was denied credit when she tried to buy a car three years ago when Fred stopped picking her up from work on time. She gave up and started taking the bus. Gloria is also confused because she has been turned down for housing from five landlords, but she has a good rental history.*

*Gloria is coming to you to help understand and improve her credit report and to help her locate housing.*

### Think About It

Imagine that you are sitting down to meet with Gloria. What questions do you have for her? What questions do you have regarding her credit situation? What are your reactions (Feelings? Thoughts? Concerns?) How has Fred impacted Gloria's credit situation? What are some ideas you have about how to move forward with advocacy? What do you want to know more about (including how her employment, other family, and other identities shape her experiences)?

Some survivors may also use credit as a means of survival during the abusive relationship to make ends meet or to increase their safety while leaving. For example, survivors may use credit cards to rent hotel rooms, cars, or to change locks.

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<sup>2</sup> Littwin, 2012, p. 954

Survivors who are forced to use credit to keep safe from an abusive partner have to deal with the financial consequences of these life and death choices for years to come. Some clients worry that their poor credit history makes them seem untrustworthy and feel frustrated that companies and landlords make profound decisions about their lives based on a credit report, a mere piece of paper that does not tell their story of abuse and survival.

## Assessing credit history

Because of the complicated credit history and feelings surrounding credit for many survivors, credit advocacy work requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called “intake questions”), are not meant to be prescriptive, and conversations around credit should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Advocates who set the stage for a credit assessment by telling the survivor that they are not their credit history and that they can be completely trustworthy and still have poor credit will find that survivors are more willing to share their complex credit stories.

Credit screening or issue-spotting questions could include, but are not limited to:

- What are your biggest worries about your credit?
- When is the last time you reviewed your credit report?
- How has your partner impacted your credit history?
- Tell me about any concerns you have about looking at a credit report
- Have you even been rejected for an account or service because of your credit report or score?
- Have you ever had a fraud alert or credit freeze?
- How has your credit history impacted your life?

\* (For more information about financial assessment questions, please see CSAJs assessment tool)<sup>3</sup>

### Think About It

Consider your advocacy strategies for a moment: Assume that Gloria is: Latinx, African-American, in a wheelchair, obese, wearing a Hajib, or Native American and has submitted a housing application online. Despite her poor credit history, she has received positive feedback from landlords over the phone, but once she arrives to view the apartment, the landlord requests a bigger security deposit or suddenly requires a minimum credit score. How would your approach to dealing with Gloria's credit situation and its implication in other areas of her life would be different?

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<sup>3</sup> <https://csaj.org/library/view/consumer-rights-screening-tool-for-domestic-violence-advocates-and-lawyers>

When working with survivors of intimate partner violence, reviewing and rebuilding credit history is not routine. Often, seemingly benign information on a credit report can bring up traumatic memories or events for survivors. For example, Gloria may experience trauma, grief, fear, or anger as she sees a medical bill on her credit report that was caused by her partner's abuse. Gloria may also experience a myriad of feelings as she sees accounts that were fraudulently opened by her abusive partner. Advocates and attorneys should be prepared to assist survivors with these reactions and provide referrals to counseling if needed.

## The impact of credit history

The importance of credit history and having a strong credit background is difficult to overemphasize in today's economy. Not only do most Americans rely on credit to purchase homes and to receive a post-secondary education, but credit history is also used when they rent apartments and find employment. For survivors, damaged credit records can have profound long-term consequences in their lives as they try to find housing, set up utilities, or find work. Below is a breakdown of some of the sectors impacted by credit history:

- Housing
  - Apartments: landlords pull tenant screening<sup>4</sup> reports prior to renting an apartment
  - Home purchases: Must have good credit score to obtain a mortgage; those with mediocre credit scores but who qualify for a mortgage will pay higher interest rates and fees
- Employment
  - Nearly half of employers will pull a credit report when evaluating applicants
- Car and home insurance rates
- Loans: small business, home equity lines, car loans and car leasing
- Utilities: utility companies pull a credit report to review prior payment histories; they may require applicants with a low score or poor history to pay a deposit, submit letters of guarantee, or deny service.
- Banking: when attempting to open a bank account, financial institutions run a report from a specialized reporting agency such as ChexSystems or Early Warning Services. These companies have databases regarding unpaid overdrafts (bounced checks) and suspected fraud reported by banks and credit unions.

For survivors of domestic violence, a good credit history and access to credit can be crucial to their safety. Survivors may need a decent credit score to qualify for a cell phone contract or purchase a reliable vehicle. Survivors may need a credit card to rent a car, stay in a hotel, or pay for safety needs like car repair or re-keying their home. They may need a decent credit history to get employment on their own and to rent an

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<sup>4</sup> Tenant screening reports often incorporate a traditional credit report (see more below) as well as information from any Housing Court cases in which your client has been involved. These reports can be challenging to address because there are many more companies providing them, making it harder for an advocate to help the client ensure they are all accurate.

## Information Included in Credit Reports

### Personal information

- Name, address, social security number (SSN), date of birth, employment information

### Open/closed credit accounts (credit cards, mortgages, auto loans, etc.)

- Type of account, date account opened, closed (if applicable), payment history (include 30, 60, 90 days late), account balance, account limit or loan amount

### Collections accounts

#### Public records

- Tax liens, bankruptcy, monetary judgments, garnishments [CCW: "debts in collection" aren't public unless they become judgments]

#### Inquiries

- "Hard" inquiries: inquiries when you have applied for loans, employment, etc. These inquiries show up in credit reports sent to third parties. [CCW: permission not required for inquiries when consumer applies for loans]
- "Soft" inquiries: lenders who look at your report to review an existing account or to see if they would like to offer you pre-approval. These inquiries only appear in credit reports sent to you

apartment. Therefore, because domestic violence impacts survivor's credit and because survivors often rely on credit for their short, medium, and long-term goals, lawyers and advocates need to be proficient in credit advocacy while always attending to the client's safety needs and personal values.

## Defining Terms: Credit, Credit Report, and Credit Score

Often the terms credit, credit report, and credit score are used interchangeably, but the three have distinct meanings. **Credit** means loans of money (including personal loans between friends) or a debt resulting from a purchase with a promise to pay back. A **credit file** (sometimes call a credit record or history) is the credit information gathered about an individual by credit reporting agencies. **Credit reporting agencies** are companies that collect, store, and summarize credit related information on consumers. A **credit report** is the physical representation of the information from the credit file in the format that is presented to consumers and businesses. **Credit score** is the number determined by a statistical algorithm and given to an individual based on the information on their credit report. Lenders use credit scores as a quick way to assess how likely it is that a person will repay their debts.

## The Basics

### Information in the credit file, ordering reports, and credit report errors

The credit file includes identifying information, detailed information reported by creditors, information from money-related public records, information from collection agencies, identities of individuals or companies that request information from a credit record and whether the inquiry was by a lender, employer, or was a review of the account. (See above sidebar.)

The three large credit reporting agencies (CRAs), Equifax, Transunion, and Experian, are commonly referred to as "the big three." The CRAs each maintain credit files for 200 million consumers and provide information on 1.3 billion consumer credit accounts per month.<sup>5</sup> The incredible volume of incoming credit data creates a lot of room for mistakes in credit reporting. A Federal Trade Commission study found that 20% of consumers have an error in one of their credit reports, 13% contain an error that affects the consumer's

#### Practice Tip

Some information that seems like "general knowledge" about credit reporting is new information for survivors who have had very limited access to credit information/education or who are in extreme poverty. It is important to spend extra time discussing credit reports and explaining that not all financial information is reported to credit reporting agencies. Survivors can be confused when a loan or other financial information doesn't show up on a credit report. For example, if you have a loan from a small company that does not report to credit reporting agencies, it is not included in a credit file and therefore cannot be used as either positive or negative information in the actual credit report. Survivors are sometimes surprised that rent, childcare payments, and title/payday loan payments are usually not included in credit reports. Collection accounts from back rent and other companies are reported on credit reports.

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<sup>5</sup> Consumer Financial Protection Bureau, 2012

credit score, and 5% have an error in their credit reports that can cause them to be denied credit or pay more for it. These errors can make a huge difference for survivors applying for housing and credit (See [CSAJ's National Consumer Assistance Plan Advocacy Brief](#), reviewing a recent settlement with the Big Three due to credit reporting errors and the implications for advocacy).

To monitor credit reports for errors and fraud, consumer advocates pushed for federal legislation making it free for each consumer to receive one credit report from each of the three largest credit reporting agencies (Experian, TransUnion, and Equifax) per year.<sup>6</sup> Consumers are also eligible for a free credit report when they are victims of identity theft, when they are denied credit or have an adverse action due to their credit report (for example, insurance rates increase due to their credit situation, or they are denied employment due to credit). A free credit report is also available for unemployed job seekers and those receiving public assistance benefits. Residents in several states (CO, GA, ME, MA, MD, NJ and VT) can get an additional report under their state laws. While consumers are eligible for one free *credit report* annually from each credit bureau, an individual's *credit score* is not free.

### **Does the survivor I'm working with need a credit score or will a credit report suffice?**

When deciding whether a client needs to obtain a credit score, consider what information the client needs. Does the client want to apply for a mortgage, car loan, or student loan? If so, it would be helpful to pay for a credit score. Note that a score purchased from a credit reporting agency might not be the same score that creditors use, because they often sell an in-house "educational" score or a "VantageScore," which are not the same as FICO scores. In one out of five times, these educational scores are significantly and meaningfully different than FICO scores. About 90% of the credit scores used by creditors are FICO scores.

If the client generally wants to understand their credit looks like, a credit report should give enough information. Be wary of companies that "offer" to provide a credit score for "free" by signing up for credit monitoring services. These services often come with a high, recurring fee for

work that could be done in the process of advocacy. Some credit card companies will provide free credit scores to their customers, and this may be a strategy for getting a score for some clients.

#### **Ordering a credit report and Contacting Credit Bureaus**

[www.annualcreditreport.com](http://www.annualcreditreport.com)

Annual Credit Report Request Service  
PO Box 105281  
Atlanta, GA 30348-5281

Experian  
[www.experian.com](http://www.experian.com)  
1-888-397-3742

TransUnion  
[www.TransUnion.com](http://www.TransUnion.com)  
1-800-916-8800

Equifax  
[www.equifax.com](http://www.equifax.com)

#### **Practice Tip**

Credit scores can be useful tools to evaluate the effectiveness of advocacy efforts. This numeric information helps to measure if the financial advocacy is making a tangible difference in the credit score. By using credit scores in this manner, organizations can include the cost of credit scores in organizational budgets, allowing the organization to pay for survivors obtaining credit scores, as well as an evaluation tool to monitor the impact of their credit advocacy for individual clients and across the agency.

<sup>6</sup> FCRA 15 U.S.C. §1681g

## How are credit scores determined?

Credit scores are generated by mathematical formulas created by creditors. The most well known and most commonly used credit score is the “FICO” (Fair Isaac Company) score. Although companies do not divulge the exact statistical formula, they do share general information about what makes up a credit score. See the figure on the following page regarding FICO’s credit score. What do you notice about the composition of the credit score? What are the most important factors for credit worthiness?

### Practice Tip: Intersectional Considerations

It’s important to think about how survivors’ identities may impact their credit reporting and banking options and decision-making. For example, What if the survivor lives in a neighborhood with few, if any, secure banking options? What if they are in a rural area? What if Gloria is severely skeptical of financial, including, credit institutions because of how she or her family and friends have been treated? How might these factors influence her options and your advocacy in managing and repairing her credit?

## How long do items stay on a credit report?

Credit advocacy with clients requires understanding how long items stay on a credit report because of legal requirements or industry practice. This information helps advocates and survivors make credit action plans to know what information to formally dispute with the credit reporting agencies.

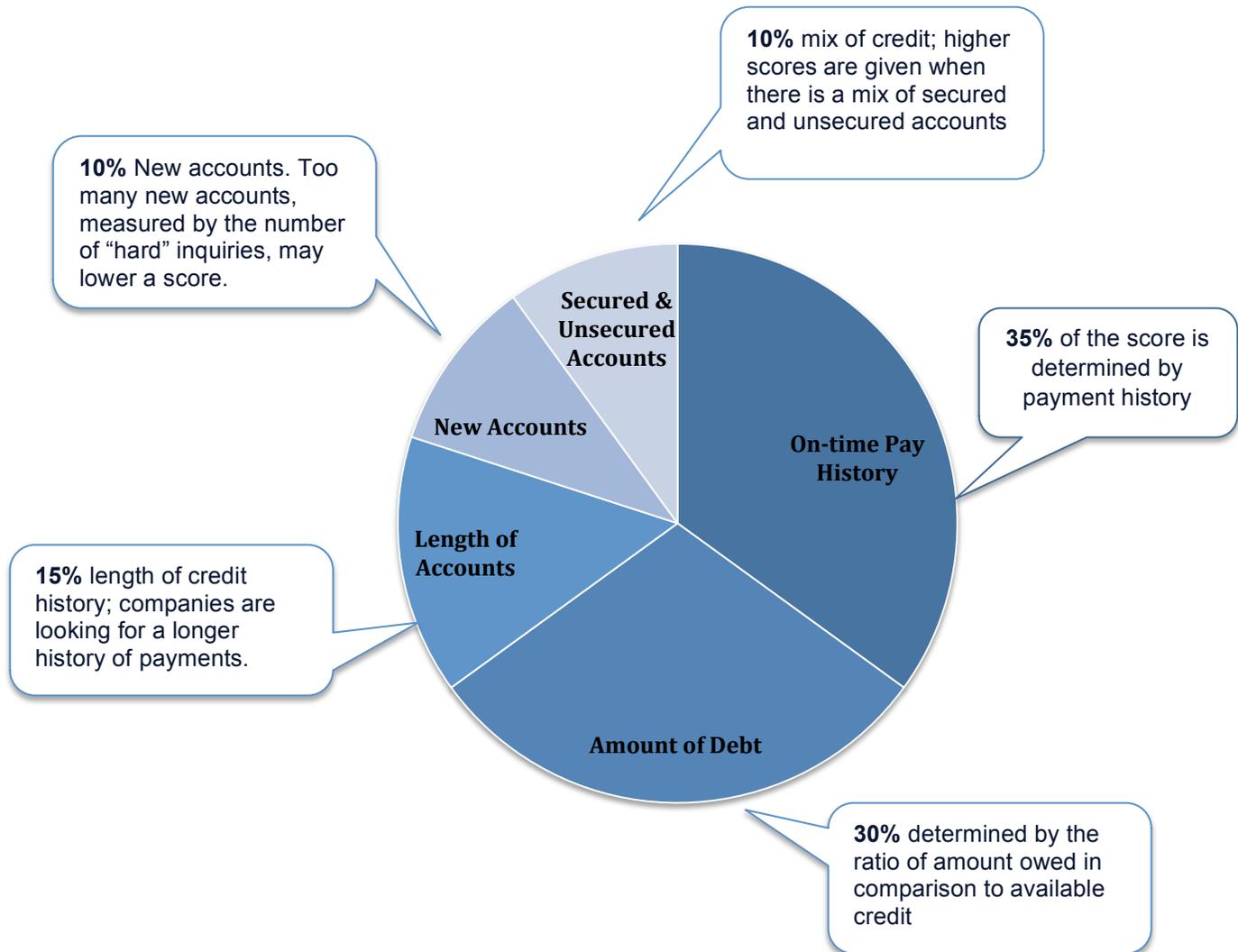
Type of Credit/Debt on Credit Reports	Time Should Remain on Credit Report
Accounts paid as agree	10 years from date of last activity*
Bankruptcy: Chapters 7 and 11	10 years from date filed
Bankruptcy: Chapter 13 (successful – with discharge)	10 years*
Unpaid Tax Liens	10-15 years*
Paid Tax Liens	7 years from date released
Federal Student Loans	Indefinitely for Perkins loans, other student loans, 7 and a half years after the account first became delinquent
Medical Debt	7 years from when the debt first went into default
	Removed from consumer report when paid by insurance; will not go on report until 180 days after bill due date effective 2018 <sup>7</sup>
Collection accounts	7 and a half years after the original debt first became delinquent
Negative items (accounts not paid as agreed)	7 and a half years after the account first became delinquent
Negative items (late payments)	7 and a half years after the FIRST missed payment <sup>8</sup>

\*These limits are industry standards and not under the FCRA. The actual length of time on the report may be indefinite.

<sup>7</sup> See more about medical debt and credit reporting in CSAJ’s Advocacy Brief, [The National Consumer Assistance Plan](#).

<sup>8</sup> Note: Each late payment is NOT a separate negative item with a seven-year period, with the exception of child support payments

## Factors Determining Credit Score



### Think About It:

→ **Payment history:** Did the survivor participate in paying bills? Is their payment history harmed by coerced debt or financial abuse? Does the survivor recognize the account? If it's medical debt, when was it recorded (after 2018, it should not appear until 180 days after bill due date)? Is the survivor included on marital accounts (if married), especially credit card accounts? If the survivor has a credit card, are they "maxing out" the card?

→ **Length of accounts:** Companies are looking for longer accounts that show a longer history of payments. Was the survivor allowed to have their credit card or included in marital accounts? If the survivor was allowed to use the card, i.e. an "authorized user," it should be reported on their credit history. How old is the survivor (younger adults may not have much, if any, credit history)?

→ **Mix of credit:** What different types of credit does the survivor have? Was the survivor allowed on the mortgage or other installment credit? Does the survivor have credit cards (revolving) in their name?

→ **Impact of collection accounts:** Collection accounts have significantly negative effects on credit scores that can damage survivors' economic plans. Does the survivor have any accounts that are going into collections soon? Has the survivor received notices from any lender regarding potential collection activity? Can the survivor contact the company to avoid collections? Can the survivor create an economic plan that prioritizes paying this account while still paying for current economic needs?

## Credit Report Advocacy

### Safety when ordering credit reports

The first step in the credit advocacy process is frequently ordering a credit report; however, this simple step may lead to severe safety problems for survivors in hiding from their abusive partners. Credit reports contain current personal information, and when a consumer orders a credit report, that inquiry, including the location of where the inquiry comes from, shows up on the credit report.

While it is illegal for an individual to pull another person's credit report without their permission, abusive partners and ex-partners frequently ignore this law. If an abusive partner has a survivor's personal information and social security number, they are often able to pull the survivor's credit report illegally. While the website

annualcreditreport.com (the website where consumers can obtain their free annual credit report) asks very challenging security questions, these are questions that can frequently be answered by an intimate partner who has key financial information. Abusive partners can also find current addresses, employment, and places where the survivor is applying for credit by looking at a credit report. Therefore, survivors who are at high risk of stalking from their abusive partner may consider not applying for credit in their local area (for example, a mortgage or personal loan from a local bank).

Talk with survivors about the pros and cons of each strategy and help with advocacy efforts if housing managers or employers refuse to accept credits reports from the survivor.

#### Practice Tips

There are various strategies to protect survivors' privacy when pulling credit reports:

#### “Soft-Pulls” or Third-Party Orders

If a survivor is concerned about stalking but wants to look at a credit report, you could consider partnering with a mortgage company or credit card company in another state to pull (order) the credit report for the survivor. For example, an organization in St. Louis partnered with a national commercial bank that was able to have the credit reports ordered in Seattle and Texas. There also may be opportunities to partner with national financial coaching organizations such as The Financial Clinic. By ordering a credit report in this manner, a client can confuse the abusive partner about where they are living.

**Use Copies:** Survivors can try bringing a recent credit report to a landlord or employer and ask if they will accept this report instead of pulling a new, additional credit report. This eliminates an “inquiry” which could tip off the abusive partner about where the survivor lives or works. Advocates and attorneys can work with the survivor to communicate the need for this with landlords and employers. Other landlords and employers have accepted letters or other information in lieu of a credit report for survivors. If landlords or employers refuse this option, consider the other strategies described here and continue working with the landlord to ensure the credit report is pulled when the survivor is ready to handle any fall-out.

**Use P.O. box or Known Addresses:** Survivors could also use a PO box or an address already known to the abusive partner to decrease safety risks. Many states have address confidentiality programs (for more information see, **Why your client needs to establish a safe mailing address**, in the Debt Chapter of this guidebook.)

**Case Scenario:** *You meet with Gloria and are able to find a mortgage company in another state that will pull Gloria's credit report. When you and Gloria review her credit report, she sees five credit cards in default that she doesn't recognize. The unknown credit cards were opened in her name during her marriage. Three of the credit card accounts are joint accounts, but the other two are only in Gloria's name. Gloria doesn't understand how this could have happened.*

*What do you do next? How does Gloria want to proceed?*

The potential fraud or identity theft we see in Gloria's case is a common and tricky issue for survivors. If identity theft, or the risk of it, is a concern for survivors you work with, see the Identity Theft chapter in this Guidebook

## Reviewing Credit Reports

If a client has not looked at a credit report in some time, it makes the most sense to order credit reports from **all** of the big three CRAs (Transunion, Equifax, Experian) to look for similarities and differences and to ensure that the credit file is accurate.

In an initial credit review with a survivor, look for:

1. Accuracy in name and addresses
2. Accuracy in accounts;
  - a. Does the survivor recognize all of the accounts? Accounts can be confusing at times, so it is helpful to talk through what you see. For example, a student loan may initially be held by one company, but is then sold to another company that the survivor doesn't recognize. This is something to explore further, but does not always mean a partner fraudulently opened an account.

### Practice Tip

After the first year of analyzing all three credit reports, in subsequent years it may make sense for the survivor to order a credit report from a different CRA every four months. For example, order from Transunion in January, Experian in May, and Equifax in September.

- b. Is the account reporting information correct? For example, if there are late payments, does this seem correct to the survivor?
- c. Is any information on the credit report past the time frame permitted to be on the credit report? (For example, a late pay that has been on for eight years or a paid tax lien on for ten years). For more information on the time frame of credit information, see the chart above.

## Disputing inaccurate credit information

When reviewing a survivor's credit report, if you find accounts that the survivor didn't open the account or there are other errors on a credit report, what do you do? For more information on how to help survivors who may be victims of identity theft, see the **Identity Theft** and the **Debt** chapters of this Guidebook)

The Fair Credit Reporting Act (FCRA) states that credit reporting agencies must follow reasonable procedures to assure maximum possible accuracy of the information in the

consumer report.<sup>9</sup> While each credit-reporting agency has a dispute process online, disputing errors in writing creates a clearer paper trail (send dispute certified mail, return receipt requested).

The “big three” credit reporting agencies are required to conduct a “reasonable investigation” of a dispute. Despite this requirement, the credit reporting agencies in that past have been known to conduct very cursory reviews and to defer entirely to the lender or debt collector (the “furnisher”) that reporting the information. Under a settlement with state Attorneys General, they are required to have a trained employee personally investigate any “complicated dispute” which includes identity theft or unknown accounts. In general, even if the lender or debt collector states that the credit report is accurate, the AG agreement requires the credit reporting agencies to conduct an independent review of the documentation in the case. For example, if “America’s Bank” says that Gloria didn’t pay her mortgage in March of 2013, but Gloria says that she did pay the account, the CRAs must conduct a reasonable investigation Gloria’s dispute. If Gloria has documentation of the paid bills, that will be useful for the process. However, documentation is very difficult to obtain for many survivors who often do not have access to past or current financial information. Survivors can attempt to contact the entities directly and ask for statements from the past year, and survivors with cases in court can get information through discovery. Even without documentation, the CRAs are required to investigate claims.

#### **Practice Tip**

It can be helpful to look at the [online dispute forms](#) to create a template for a survivor’s dispute letter. When disputing inaccurate information, be sure to include account numbers, the reason for disagreement, and any other relevant documentation. The National Consumer Law Center has more advice on disputing credit-reporting errors: [See NCLC’s report](#).

After a dispute, CRAs must respond and conduct an investigation in thirty days. Under the AG agreement, consumers involved in disputes can obtain an additional free credit report in the annual period to confirm that the disputed item has been updated on their report.

If a survivor disputes information, but the investigation did not resolve the dispute, the survivor has the right to add a 100-word consumer statement including information about this dispute. This statement is included in the credit file and will be included in on all credit reports. However, it will not help the survivor’s credit score and lenders often ignore it.

In addition to disputing incorrect information with the CRAs, survivors can dispute

#### **Practice Tip**

When discussing this option with survivors, it is helpful to discuss what the survivor wishes to say on the credit report paying attention to their safety. Important questions include: Do you feel safe making statements about fraud on your account? What are the benefits? What may be some challenges? Do you feel safe mentioning challenges with a partner? How could this information impact potential creditors? How concerned is the survivor that the partner will illegally pull the credit report and see the statement? If the partner does see the statement, how does the survivor think the partner will react? Be honest with the survivor about the limited usefulness of this strategy given that it will not help the survivor’s credit score and lenders often ignore it.

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<sup>9</sup> 15 U.S.C. § 1681e(b)

inaccurate data with the creditors or debt collectors (“furnishers” of information) themselves. In the example above, Gloria can dispute the inaccurate data directly with America’s Bank. The dispute letter sent to the furnisher can be in the same format as the credit reporting agency dispute letter. However, there is no ability to enforce this right in court.

### Practice Tip

Be sure to send the letter certified mail, return receipt requested. Be sure to send a carbon copy of any creditor dispute to the CRAs.

There is not a requirement to send the dispute to the furnisher. Under the FCRA, a consumer can dispute only with the credit reporting agencies, which are then tasked with forwarding the dispute with the creditor or debt

collector, as well as conducting their own independent review. The furnisher then must conduct its own investigation. In practice, it often makes sense to send the dispute to all three CRAs as well as the furnisher. If your client’s dispute is unsuccessful, they may wish to send a second dispute, but make sure to include additional information or documentation. Ultimately, your client may be forced to file a lawsuit to get the error fixed. Make sure that they dispute with the credit reporting agencies, as there is no private cause of action under FCRA if the survivor disputes directly with the furnisher. If the furnisher is a debt collector, your client may have other remedies under the Fair Debt Collection Practices Act (please see the Debt and Foreclosure chapter this Guidebook for information). Other federal statutes may apply, such as the Real Estate Settlement Procedures Act for mortgage services or the Fair Credit Billing Act for credit card lenders.

## Credit Report Notifications

For survivors who are dealing with consequences of identity fraud from an abusive partner or identity fraud in general, they have several options to increase their credit safety including a credit statement, extended fraud alert, and a credit freeze. See the Identity Theft chapter in this Guidebook for more on this.

### Credit freeze

A credit freeze allows consumers to restrict access to their credit report but does not require any documentation of identity theft. It is often *the* most effective measure among the credit report notification options described here at preventing future identity theft. A credit freeze allows a consumer's report to be released to existing creditors and debt

#### Practice Tips

→ A credit freeze may be very beneficial to survivors and is the most effective tool at preventing future identity theft, including by the abusive partner. However, it could present extra work for survivors who need access to their credit report for housing, employment or credit. If using a credit freeze, be sure to apply for the credit freeze with all of the three CRAs.

→ Many states also offer the option of freezing minor children’s credit files. This may be useful for survivor’s who are concerned that an abusive partner will use their children’s names or SSN to fraudulently open accounts.

collectors but needs to be “lifted” to open a new account, apply for a job, rent an apartment, or buy insurance. The freeze can be lifted for a certain time period or for a specific company. Credit freezes usually cost money (depending on the state where you live; ranging from \$3-\$10) to establish and to lift. Additionally, the CRAs need time to lift or remove a freeze.

## Consumer fraud alert

Consumers can place an initial fraud alert on their credit file if they are concerned that they have been or are about to be a victim of fraud. This alert allows consumers to flag their account and state that the recipients of report should verify the consumer's identity before issuing credit in his/her name (the consumer can specify this additional verification which could include phone contact).

### Practice Tip

There is no need to file a police report for an initial consumer fraud alert to be placed on an account. The consumer fraud alert is in place for ninety days and can be renewed continually. This strategy may be beneficial for survivors who have experienced identity theft from an abusive partner but who would be at a greater safety risk by reporting the identity theft to the police. However, be cautioned that some creditors looking at electronic credit records may not readily see the consumer fraud alert.

## Extended fraud alert

Consumers who have submitted an identity theft report to the credit reporting agencies can place an extended fraud

alert. This identity theft report could consist of a report filed with their local city or county police department or county sheriff's office. The extended fraud alert has many benefits including:

- Two free credit reports within twelve months from each of the three CRAs (totaling six in the twelve month period).
- Credit reporting companies must take your name off marketing lists for prescreened credit for five years
- Allows consumers who can confirm identity to access credit report
- Free
- Lasts 7 years.

The challenge for many survivors of domestic violence is that filing a police report against an abusive partner or ex-partner regarding the identity theft may put them at greater risk of harm or may not be a strategy they feel safe using due to their interactions or experiences with law enforcement. Discuss these options with survivors and look at safety measures accordingly.

## Cleaning Up Old Collection Accounts

When working with clients to try and increase credit worthiness or to try and clean up some past debts, some clients may consider looking at older (three plus years) collection accounts and trying to negotiate for payment in full or settled account for a lesser amount. Why would companies "settle" for a lesser amount of money? Many collection accounts are considered "old debt" that has been sold to new debt buyers<sup>10</sup>. These debt buyers "buy" old debt for pennies on the dollar. The debt buyers work hard to collect the money initially, but are often anxious to receive any amount of money to cover the debt and

### Think About It

How do you decide with your client whether or not this is a good idea? It is important to ask the survivor what their long, medium, and short-range goals are and how they feel about their credit. It is also important to know the statute of limitations for debt in your state.

<sup>10</sup> For a more detailed description, please see the **Debt** chapter in this Guidebook

may be willing to take much less money to consider the account "settled."

For example, when working with Gloria, you may see that there is a collections account where Gloria appears to be an "authorized user." (Note: Most credit cards are not joint these days but only have authorized users. The primary cardholder is liable for the debt and the authorized user generally is not, except for their charges.). The collections account is four years old, and the balance is \$1200.00. When you ask Gloria about the account, she remembers her partner opening the account and buying a sofa for their home. Gloria's short-term credit goal is to rent an apartment, her medium range goal is to decrease her insurance rates, and her long-term goal is to buy a house.

If the survivor decides to move forward with an attempt at a settlement, the survivor can negotiate to pay less for a "settled" debt. Survivor's contact the collection company and generally offer half of the amount (or less depending on the age of the debt) of the debt to have the debt considered "paid in full."

### Think About It

Gloria could take a number of routes regarding this debt. As Gloria's advocate, your role is to discuss the pros and cons of each option as she makes her decision.

- Gloria may decide that she wants to try and settle this account because it won't be off of her credit report for three more years and she wants to buy a home in several years.
- Or, she may decide not to do anything about the account and wait for it to fall off of her account in three years. Note, however, that even if the debt falls off of her credit report, the creditor may still be able to pursue a lawsuit against her, depending on your state's statute of limitation (see **Debt** chapter for more information).
- Gloria could also decide that she wants to pay the account off in full or set up a payment plan with the company.
- Or, Gloria could decide to wait for a divorce and request in the divorce that her husband takes on this account. It will be important to discuss with Gloria the differences between a divorce decree and a credit card agreement. As a joint holder of this credit card, Gloria is responsible for this debt **even if** a judge rules that Fred should pay this debt as a part of the divorce. If Fred continues to ignore this debt, Gloria still could be held liable for this debt.

### Practice Tip

Be sure to share with survivors that contacting an old creditor can "waken sleeping dragons" and clients may start getting debt collection phone calls and if payment plans or negotiations are made. Also, some creditors consider payments or phone calls the "date of last activity" which restarts the "clock" on the statute of limitations (see **Debt** chapter for more information on debt collection rights).

When deciding about whether or not to settle an account, survivors should know that a "settled" account is not viewed as positively as a full payment but is more favorable than no payment. Also, the amount of money that the company "writes off" is considered a "gift" and is taxable. For example, if Gloria settled the \$1200.00 debt for \$600, which she pays, the company is writing off \$600.00 of that amount. Gloria might receive a tax document

called a 1099 from the company that needs to file as a part of her taxes (the threshold for a 1099 is \$600). If she has problems dealing with the tax debt and is low-income, she should consult a low-income tax clinic.

### Practice Tips

- If the survivor connects with an unhelpful or reluctant customer service employee, encourage the survivor to hang up and try again. Most companies have dozens of collection agents. Making this phone call can be very stressful for survivors. Advocates/Lawyers may want to role-play making the phone call or offer to have the client make the phone call on speakerphone in your office.
- If the collection agent agrees to a lesser amount that the survivor is satisfied with, make sure that the survivor documents the name, badge number, date and time of phone call, and the mailing address of the company. The survivor should also ask for a payoff statement that puts the settlement agreement in writing. The survivor should then send a cashier's check for the amount negotiated that MUST include "for payment in full" and the account number in the memo line of the check and send the check in certified mail-return service requested. After the payment is made, the survivor should ensure that the credit report is updated with the marking "settled in full."
- Some debt collectors may be willing to delete an account in exchange for payment. This is a controversial practice called "pay for deletion." The credit reporting agencies do not like the practice and tell debt collectors it is prohibited. However, nothing in the FCRA requires a furnisher to report an account or keep reporting it. A survivor might want to consider asking a collector to delete an account. They should ask to delete the account if they is paying it and there is some dispute as to her responsibility for it, e.g., the survivor claims they do not owe a credit card debt because they was only an "authorized user" who is not liable for the account.

## Credit Advocacy: Planning for the Future and Rebuilding Credit

As a piece of advocacy, it is helpful to create a credit/debt action plan with survivors. This credit action plan can include a plan for how the survivor will pay off current debts as well as strategies for building credit in the long term.

The credit action plan needs to be jointly developed with the survivor and based on the survivor's credit goals, values, and dreams. In addition to asking about the survivor's credit goals, it is important to understand the survivor's credit values. For example, if a survivor owes money to a relative who is not pestering for repayment, an advocate's inclination may be to create a credit action plan that prioritizes repaying credit card debt first and ignoring the money owed to the relative. However, the survivor may feel very strongly about repaying the relative back first for a number of reasons (for example, the client knows they may need help from the relative in the future, or the survivor knows that the relative really needs the money). Discussing the pros and cons of how the client decides to create their credit action plan without judgment is imperative to the process.

Some survivors use payday loans, or other types of high-interest, short-term loans (for more information, see the Credit Discrimination and Predatory Lending Chapter in this guidebook) to make ends meet or to deal with safety concerns (including avoiding homelessness, repairing cars, paying for uniforms for work, etc.). Repayment of short-term loans should be a part of the credit action plan. The credit action plan should also include the annual percentage rate of the loans, which serve as a piece of how the survivor may prioritize paying back loans. This discussion often includes the use of a free, on-line debt calculator to help the survivor see and understand how paying down loans with the highest APR first would be financially beneficial.

Some communities have unique opportunities for short-term lending including anti-poverty organizations operating credit unions for their clients and lending circles (a group of people who pool money and provide rotating loans to circle members who receive a zero-fee, zero-interest loan). Connect with other anti-poverty resources in your community to

### Practice Tips

→ Discussion about payday lending may also include questions to help understand the survivor's relationship to short-term lending. When has the survivor used short-term lending in the past? Why? How does the survivor feel about short-term lending (what was their experience like? Would they want to use it again)? The conversation may also include alternative strategies to short-term lending (recognizing that some survivors do not have access to traditional banking and may live in communities where resources for financial assistance are depleted).

→ Some clients may want to work on establishing lines of non-traditional credit by asking utility companies, landlords, day care providers, etc. for a letter stating that they have paid on time for at least one year. These letters can be used for survivor's who do not have credit or have a poor credit history as they look for employment or rental housing.

learn what is available for survivors and to explore the types of creative short-term lending strategies your organization could provide.

### Separating accounts from a former partner

A survivor may want to separate accounts from a former partner to move forward financially without that individual. Discuss the safety and financial repercussions of this action with the survivor. For example, ask how the survivor thinks his/her ex-partner will react if they find out that they are canceling credit cards?

Also, since credit scores depend on "a mix of credit" and the "length of accounts" discuss the possible credit impact of closing older accounts. Talk with the client about the pros and cons. For example, their credit score may dip temporarily when they close an older account. Does the client want to apply

for credit in the next few months? If so, they may consider waiting to close the account. If the survivor doesn't close the account, how may the partner continue impact this credit line?

Clients separating accounts should consider:

- Canceling all joint credit cards.
  - Note: Some cardholders require both cardholders to close the account, which can be very difficult issue to deal with.
- Requesting removal from credit card company as an authorized user on credit card accounts where the abusive partner is the primary account owner.
- Canceling all credit cards that are known to the partner
- Reviewing all utility contracts, cell phone contracts, insurance policies, and bank accounts.
- Reviewing/updating all beneficiaries
- Changing credit card companies and banks.
- Reviewing credit report regularly for inaccuracies and improper credit.
- Changing all passwords to information not known to the abusive partner.

It is important to discuss the pros and cons of bankruptcy with the survivor. Many survivors think of bankruptcy only as a last resort, and in the process of exhausting all other options, they may lose funds and assets that could have been protected in bankruptcy. For more information, see the **Bankruptcy** chapter of this guidebook.

## **Rebuilding credit**

Many credit and financial experts suggest that individuals with a poor or moderate credit scores work on rebuilding their credit by using tried and true strategies. However, some of these strategies may lead to financial or safety concerns for survivors. See the *Credit Rebuilding Ideas table* on the next page, which outlines some of the possible financial concerns for survivors, possible safety concerns for survivors, and some of the strategies to reduce the risks of the financial and safety concerns. Can you think of other financial or safety concerns? Do you have additional ideas for strategies? Remember that for some survivors it may be better to stay safe than to rebuild their credit at this time.

## **Changing identities and credit**

For survivors who are desperately seeking safety by changing their identity and getting a new social security number, there are a lot of risks with credit and credit history.

Survivors have to remain vigilant with credit reporting agencies to be sure that they do not use the credit report to merge old and new identities. Survivors must also be thorough and consistent with new credit applications to ensure that only the new identity information is used. This can be challenging because the survivor starting over essentially has no credit history. Consider using the credit building tips above to assist the survivor.

Transgender survivors who are changing their name and gender identity on their passport, birth certificate, and through social security will need to ensure that the credit reporting agencies also get the updated information and make necessary changes in their credit record. For more information, see [Transgender Legal Defense and Education Fund](#).

## **Conclusion**

Because of the importance of credit in the American economy and because abusive partners frequently use credit to limit financially, financially destroy, or monitor survivors, advocates/lawyers need to be proficient in credit advocacy. The credit world changes rapidly and the “credit game” can be challenging for survivors. Advocates/Lawyers who embark on credit advocacy will find that this work increases hope and safety for survivors of domestic violence.

Credit Rebuilding Ideas	Why could this be helpful?	Possible safety or financial concerns	Strategies to reduce safety and financial risks
<b>Pay bills on time</b>	Largest piece of credit score is paying bills on time	May not be able to afford current bills; if survivor decides to pay credit card bill, they may not be able to afford basic necessities (i.e. food, rent).	Work with survivor on cost of living planning (budget); look at community resources; talk with survivor about debt priorities (see debt section of this guidebook).
<b>Secured Credit Cards</b>	Secured credit cards are tied to a bank account that is paid by the consumer. For example, a consumer gets a card and pays \$200.00, which is now the limit on the card. If the consumer uses the card and pays the credit card on time monthly, frequently the card becomes a “regular credit card” and within a year becomes a good line of credit. Many consumers who are ineligible for credit cards due to poor credit can obtain a secure card. Appropriately using a secured credit card is frequently considered the fastest way to increase a credit score.	<p>Some survivors are worried about overusing the card and not being able to pay it back.</p> <p>Some secure credit cards have high annual fees and high APRs.</p> <p>Abusive partner could track location of survivor by address used for credit application</p>	<p>Discuss credit card spending strategies; for example, client could keep a secured credit card on file at your office and use it once a month to buy gas and bring back to you.</p> <p>Search for the best secure credit cards; <a href="http://www.nerdwallet.com/blog/top-credit-cards/nerdwallets-best-secured-credit-cards/">http://www.nerdwallet.com/blog/top-credit-cards/nerdwallets-best-secured-credit-cards/</a>. Talk about keeping balance low enough to pay back in full each month.</p> <p>Use a PO box when applying for credit.</p>
<b>Use a co-signer</b>	A person with a stronger credit record co-signs for a loan.	<p>Concern about the co-signer using power over survivor in negative ways.</p> <p>Fears about not being able to repay and letting down co-signer.</p>	<p>Discuss pros and cons of using a co-signer and the safety of the co-signer.</p> <p>Discuss what will happen between the survivor and the co-signer if they can't pay the debt back.</p>
<b>Obtain a “store” credit card</b>	Store credit cards (for example GAP, Sears, Wal-Mart, etc.) are often easier to obtain than bank credit cards for individuals with a moderate to poor credit history.	<p>Store cards can have high APRs and other fees.</p> <p>Abusive partner could track location of survivor by address used for credit application.</p> <p>Cards can only be used at that specific store and may not be able to help in case of a safety emergency (for example, can't be used to buy a plane ticket, change locks, cash advance, or rent a car).</p>	<p>Look for the best store credit cards with the lowest fees.</p> <p>Use a PO box when applying for credit.</p> <p>Consider choosing a store that sells possible basic needs like food, medicine, or clothing.</p>

## Additional Resources

Additional training materials and resources on credit reporting and repair for survivors can be found on CSAJ's website:

- [Credit Reporting & Repair for Survivors](#) – CSAJ webinar featuring Laura Russell
  - Additional [trainings](#)
- [Credit Checks: An Illegitimate Barrier to Employment for Survivors](#) – CSAJ webinar featuring Demos, a national advocacy group.
- [Building and Repairing Your Credit History: Brochure](#)
- [CSAJ's National Consumer Assistance Plan Advocacy Brief](#)

General sources for pulling credit reports:

- Annual Credit Reports: [www.annualcreditreport.com](http://www.annualcreditreport.com)
- Experian: [www.experian.com](http://www.experian.com)
- TransUnion: [www.TransUnion.com](http://www.TransUnion.com)
- Equifax: [www.equifax.com](http://www.equifax.com)

# Three



## Credit Discrimination & Predatory Lending

By **Katie VonDeLinde**<sup>1</sup>

### Introduction

Credit discrimination occurs when lenders make unfair credit decisions based on an individual's characteristics, and predatory lending is when creditors impose unfair or abusive terms on loans. Credit discrimination and predatory lending can occur across consumer sectors, from credit cards to short-term loans to home mortgages. Due to the impact of domestic violence on survivors' short and long-term financial needs, survivors face heightened risks related to discriminatory and predatory lending. This chapter will review the practice of credit discrimination and predatory lending in the context of safety for survivors, provide legal remedies and advocacy strategies to address predatory debts, create cost of living plans, and strategize around banking and short-term lending options.

### Domestic Violence, Credit Discrimination and Predatory Lending

While credit discrimination and predatory lending are problems for many Americans, survivors of domestic violence face unique risks due to the impact of domestic violence and economic control. Many survivors of domestic violence are in need of financial

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<sup>1</sup> With contributions by The Legal Aid Society and the National Consumer Law Center.

assistance or credit in the short term due to:

- **Physical violence.** Survivors may lose work time or employment due to physical injury.
- **Psychological abuse.** Survivors may experience post-traumatic stress disorder (PTSD) or depression as a result of domestic violence making it difficult to work, pay bills, and be economically safe.
- **Economic abuse.** Abusive partners' denial of access to financial property and destruction of credit makes some survivors financially desperate and unable to rely on more traditional forms of banking.
- **The connection between domestic violence and poverty.** Domestic violence has long and short-term economic impacts that threaten the economic security of survivors. Survivors in poverty are more likely to need money to pay for life's necessities and may be forced to use non-traditional credit services.

Survivors of domestic violence in need of quick access to money are attractive to predatory and discriminatory creditors looking to capitalize on individuals' desperate situations. And, in fact, because many short-term lenders are not associated with credit reporting agencies, they may be a safer financial resource for survivors who are in danger from abusive partners.

Read the two scenarios below for examples of different ways that survivors can be impacted by financial needs that lead to predatory lending.<sup>3</sup> As you read the scenarios, consider: Why would the survivor make that decision? What are the short term and long term consequences of this decision? How would you advocate for the survivor?

See previous **Credit Reporting & Repair** chapter for additional assessment questions that can be helpful in gauging the full extent of a survivor's needs, risks, and concerns around credit.

### Think About It

Payday lenders typically do not report to CRAs (credit reporting agencies) and these loans will not show up on a survivor's credit report<sup>2</sup>, allowing the survivor to get access to money while reducing the possibility that the abusive partner will find out. Also, short-term lenders do not need as much financial documentation (for example, income stubs, bank account information) to provide a loan as a traditional bank or even most non-profit or governmental organizations would need to provide financial assistance. This is reassuring to survivors who face safety risks when trying to locate financial documentation.

However, short-term lenders often mirror the coercive control of abusive partners when fees stack up, interest rates compound, and survivors get trapped in cycles of debt. (See CSAJ's [Debt Trap for Survivors](#)) How do we increase safe loan options for survivors while also working with them to utilize and navigate option that *currently* exist?

## Types of Credit Discrimination & Predatory Lending

**Credit discrimination** occurs when lenders make unfair credit decisions or offers based on an individual's characteristics, including: race, religion, national origin, sex or marital

<sup>2</sup> If the debt remains unpaid and goes to a collection agency, the loan will then appear on the credit report. For more information about debt collection, see Debt Chapter, this guidebook.

<sup>3</sup> Refer to NCLC car loan chapter for further details on Sofia.

## Julia and Sofia's Stories

**Julia** is purchasing a car on her own after leaving an abusive relationship. She's been working on her credit, and her credit score is decent, although she had to close a lot of joint accounts recently due to the separation. At the dealership, the used car salesman is so friendly and such a great listener that Julia finds herself telling him about her abusive situation. She tells him that she desperately needs a car to keep herself and her kids away from her ex-partner, Marcus. She even shares how Marcus used to make fun of her ability to make decisions, how she knows nothing about cars and how nervous she is to be making this transaction by herself. The car salesman comforts her, shows her a car that she falls in love with, and offers her what he says is a great interest rate, at 27% with no down payment, and she could walk away with a payment that was within her reach over five years. Julia is in a hurry to get the car, and signs the papers. Two months later, the car needs an expensive repair that Julia can't afford. She's worried about her safety if she can't get her car in running order. She comes to you for help.

### **Think About It**

Imagine that you are sitting down to meet with Julia. What questions do you have for her? What questions do you have regarding the car purchase? What are your reactions (Feelings? Thoughts? Concerns?) How has Julia's relationship with Marcus impacted the situation? What are some ideas you have about how to move forward with advocacy? How may Julia's history of borrowing money impact her decision to get the car? How may Julia's identity (race, ethnicity, able-bodied, class, etc.) impact her relationship with the car dealership? Or, the loan she was offered?

**Sofia** knows she should ask her grown daughter for some help, some extra money to get by on, but she is so embarrassed and sharing this need with her daughter would force her to tell so much more. Sofia lives with her partner, Jane, who controls all of the money in the home and gives Sofia an allowance, even though Sofia receives a disability check (SSDI) and should have access to her money. Sofia usually gets enough money from Jane, but with her granddaughter's high school graduation coming up, Sofia needs gas money to drive to visit her in rural Illinois. Sofia has never used a bank on her own and doesn't know what to do. She is talking with her neighbor who suggests she goes to a title loan company down the street. Sofia is comforted that Jane won't find out because the title loan company doesn't pull credit reports and the salesperson said she could make it work so that Jane didn't need to show any evidence of income. The Title Loan company allows her to get a \$300.00 loan that she needs to repay in a month. When Sofia returns from the graduation, Jane is upset that Sofia went on the trip alone. Jane is punishing Sofia by refusing to give her any money for the month and Sofia knows she won't be able to repay the title loan company. Sofia calls you for help.

### **Think About It**

What are your reactions to Sofia's situation? (Feelings? Thoughts? Concerns?) How do your own experiences or feelings about payday or title loans impact your reaction? How has Jane's abuse influenced Sofia's situation? How may Sofia's identities (same sex relationship, race, class, ability, gender, sex, etc.) influence her situation?

status, age (as long as you are old enough to enter into a contract), receipt of income from public assistance, familial status, disability or handicap, and alienage. It is illegal for lenders to refuse credit to an individual based on the characteristics listed above, or to discourage individuals from applying for credit, offer credit with less favorable terms than terms offered to someone with similar qualification, or to close an account.

**Predatory lending** is the practice of "imposing unfair and abusive loan terms on borrowers."<sup>5</sup> Predatory lending exists in many sectors including mortgage, car loans, and short-term loans. Predatory lending includes the practice of charging very high interest rates and fees, but can also include not informing consumers of their ability to negotiate interest rates or failing to clearly disclose the terms, fees, and interest rates in a loan.

**Mortgage lending.** Predatory lending in mortgages includes charging excessive or hidden fees to get a *mortgage* (loan to purchase a home or property), *prepayment penalties* (charging additional money to consumers who pay off the loan faster than the loan terms), charging fees for the purchase of unnecessary products as part of the loan, structuring the loan to appear affordable at the outset but that is doomed to fail when payment amounts rise, loan flipping and steering. *Loan flipping* happens when lenders convince borrowers to refinance an existing mortgage, adding fees for the new loan and frequently prepayments on the old loan. *Steering* is the practice of offering higher qualified borrowers *subprime loans* (loans with higher fees and interest rates) even though they could qualify for better loans with better terms.

Steering can occur in other sectors including the car loan business. In Julia's story above, it is likely that she could have qualified for a better loan and could have negotiated the terms of the loan. It appears that the car loan company abused the knowledge that Julia needed the car and that she had not negotiated a loan on her own previously.

**Short-term lending** occurs when small, short-term loans are provided, frequently with high fees and interest rates. Short-term loans are often used by economically

## Key Terms

**Credit discrimination:** When lenders make unfair credit decisions or offers based on an individual's characteristics, including: race, religion, national origin, sex or marital status, age, etc.

**Predatory lending:** The practice of "imposing unfair and abusive loan terms on borrowers."<sup>4</sup>

**Mortgage:** Loan to purchase a home or property.

**Prepayment penalties:** Charging additional money to consumers who pay off the loan faster than the loan terms.

**Loan flipping:** When lenders convince borrowers to refinance an existing mortgage, adding fees for the new loan and frequently prepayments on the old loan.

**Steering:** The practice of offering higher qualified borrowers loans with higher fees and interest rates (subprime loans) even though they could qualify for better loans with better terms.

**Short term lending:** Small, short term loans that frequently have high fees and interest rates.

**Payday loans:** Sometimes called cash advances, payday loans are high-interest loans usually repaid on the borrower's next payday (typically within two weeks).

**Principal:** The amount of money borrowed in a loan.

**Annual percentage rate (APR):** The interest rate for the loan over one year that includes most loan fees.

**Deposit advances:** Lines of credit offered by banking institutions as a feature of existing checking or savings accounts for consumers who have regular electronic deposits.

**Car title loans:** Short-term loans given to borrowers that are secured by a title of a vehicle that the borrower owns free and clear.

**Tax refund anticipation loans (RALs):** Loans given to borrowers based on their expected federal income tax refund and are offered January through April.

<sup>4</sup> FDIC. (2006). Challenges and FDIC Efforts Related to Predatory Lending (Report No. 06-011). Retrieved from: <https://www.fdicig.gov/reports06/06-011.pdf>

<sup>5</sup> FDIC. (2006). Challenges and FDIC Efforts Related to Predatory Lending (Report No. 06-011). Retrieved from: <https://www.fdicig.gov/reports06/06-011.pdf>

challenged individuals initially to “make ends meet” but can at times become a cycle of paying recurring expenses. When lenders are unable to pay back a short-term loan, they are forced to renew the loan creating a long-term cycle of debt.<sup>6,7</sup> This financial desperation can be economically debilitating to borrowers because they end up paying far more in renewal fees than the amount of cash they actually received from the deal. In fact, short-term borrowers are five times more likely to file for bankruptcy than the general population.<sup>8</sup> In the case of title loans, borrowers pledge their cars to secure the loan and can lose them if they don’t repay or renew in a timely way.

Short-term lending companies are concentrated in low-resourced communities. In a sample of payday lenders, the lending businesses concentrated in areas where the annual income ranged from \$10,000-\$40,000 with a median income of \$22,476.<sup>9</sup> In that sample, 18% of the payday borrowers received government assistance or benefit income.

Many states have laws capping the interest rates on payday and title loans and/or the number of renewals. Some states have passed legislation stopping payday lending altogether. Look here for more information about your states’ laws compiled by the [National Conference of State Legislators](#). Federal legislation caps payday creditors to an annual percentage rate of 36% and prohibits the rolling over loans made to active-duty members of the military and their dependents.

**Payday loans** (sometimes called cash advances) are high-interest loans usually repaid on the borrower's next payday, usually within two weeks. The borrower secures the loan with a post-dated check or electronic access to the borrower’s bank account. Payday loans are offered online and at stores around the country. The average *principal* (amount borrowed) is \$374.00 plus the fees; the median fee is \$15.00 per \$100.00 borrowed, and the average *annual percentage rate* (APR) is 400% (APR is the interest rate for the loan over one year that includes most loan fees).<sup>11</sup> Because payday loans are offered as “short term,” generally two weeks, and not regarding how much the interest rate would be annually, borrowers may be misled about the exorbitant annual percentage rates and the impact of the high fees. Instead of offering a periodic interest rate, most payday lenders charge a set fee that is based on the amount borrowed. Much of the payday loan industry profits come from rolled-over loans that add additional fees. For example, if a consumer is unable to pay back the payday loan after two weeks, the borrower is able “roll-over” or extend the loan for two additional weeks, but is charged additional fees.

Much of the payday loan industry profits come from rolled-over loans that add additional fees.

#### Think About It

Let’s consider a common \$300.00 loan calculation. Sofia takes out a \$300 loan with a \$75 fee and pays \$1.15 in interest, totaling \$376.15 she will have to pay back in two weeks. After one month she'll owe \$377.46; after three months, \$382.89.<sup>10</sup> In essence, just for taking out a payday loan, Sofia owes an extra \$76.

<sup>6</sup> Consumer Financial Protection Bureau (CFPB). (2013). Payday loans and deposit advance products. White paper. Retrieved from: <http://www.consumerfinance.gov/data-research/research-reports/white-paper-on-payday-loans-and-deposit-advance-products/>

<sup>7</sup> Montezemolo, Susanna. Center for Responsible Lending: The State of Lending in America and its Impact on US Households: Car Title Lending Abuses and Predatory Practices, (July 11, 2013). <http://www.responsiblelending.org/state-of-lending/car-title-loans/>

<sup>8</sup> Lohrentz, T. (2013). The Net Economic Impact of Payday Lending in the US, Insight Center for Community Economic Development

<sup>9</sup> CFPB, 2013

<sup>10</sup> Calculation and additional examples found here:

[http://pls247.com/system/user\\_files/Documents/TX%20CCCC%20Notice.pdf](http://pls247.com/system/user_files/Documents/TX%20CCCC%20Notice.pdf)

<sup>11</sup> Lohrentz, 2013

For example, if a consumer is unable to pay back the payday loan after two weeks, the borrower is able to "roll-over" or extend the loan for two additional weeks but is charged additional fees. More than 50% of payday loan recipients have defaulted on their loan. A

### Think About It

Sofia cannot pay back the \$300 to the title loan company so requests a rollover. Still unable to pay, she goes to a different payday loan company to pay off the previous company and take out additional cash. If title lender permitted three renewals and imposes a loan fee of \$40 per month, Sofia owes the title lender \$460 at the end of four months. Paying off the title loan with a payday loan removes the threat of losing her car but compounds the cost. For example, a \$460 payday loan costs \$69 per two-week period on average. If Sofia cannot repay the payday loan for four two-week periods, she will owe \$736. The average added cost of a loan held (or rolled-over) for five months could range from \$172 in Colorado to \$701 in Texas.<sup>13</sup> State loan and interest rate regulations matter.

2013 study found that two-thirds of payday borrowers had seven or more short-term loans in a year and were in debt to a payday lending company for 40% of the year.<sup>12</sup>

**Deposit advances** are lines of credit offered by banking institutions as a feature of existing checking or savings accounts for consumers who have regular

electronic deposits. When a deposit advance is requested, money is deposited into the consumer's account and repaid automatically when the next electronic deposit is made. Deposit advance fees are structured as dollars per amount of money advanced. For example, the banking institution may charge \$2.00 in fees for every \$20.00 borrowed. However, because there is no set date for the repayment (because the repayment is based on the next incoming electronic deposit), it is impossible to disclose the loan terms as an annual percentage rate. Borrowers often experience additional fees if they overdraw or have insufficient funds in the account. Bank deposit advances are not considered payday loans in most states and are therefore not subject to payday lending laws that states may have restricting fees or rollover periods.

**Car title loans** are short-term loans given to borrowers that are secured by a title of a vehicle that the borrower owns free and clear. The average title loan is \$1000.00. A title loan is a single-payment loan given on one-month terms with an annual interest rate averaging 300% without a credit check. Car title loans tend to be renewed multiple times. A typical title loan is **oversecured**, meaning that an average borrower receives cash equal to 26% of the cars resale value. However, if the loan is not paid back, the title loan company can repossess the car and keep the entire profit off reselling the car.<sup>14</sup>

**Case Scenario:** *If Sofia borrows \$300.00 and pays back on time in one month, her costs will be \$375.00 plus "add-on" fees (some title loan companies require purchases of "roadside assistance" or other add-ons that increase the price of the loan). Sofia's title loan is oversecured because the cash she borrowed was significantly smaller than her equity in her car.*

<sup>12</sup> Consumer Financial Protection Bureau. Payday Loans and Deposit Advance Products: A White Paper of Initial Findings. (April 24, 2013).

<sup>13</sup> Nerdwallet, citing a report by Pew Charitable Trust: <https://www.nerdwallet.com/blog/loans/personal-loans-less-than-payday-loans/>

<sup>14</sup> Montezemolo, 2013

**Tax refund anticipation loans (RALs)** are loans given to borrowers based on their expected federal income tax refund and are offered January through April. Tax anticipation loans are no longer available through banks but still can be obtained through non-banking financial firms like payday lenders and tax preparers. The effective annual percentage rate for many RALS based on a 10-day loan ranges from 50% to nearly 500%.

**Refund anticipation checks** are different from RALS in that they are temporary bank accounts that a bank opens for a consumer to deposit their tax refund from the IRS directly. For consumers who cannot afford to pay for tax preparation upfront, refund anticipation checks allow you to have your taxes prepared, and then once the tax refund is deposited, the bank takes the tax preparation charge, gives the consumer the remaining refund amount in the form of a check or a prepaid card, and closes the account. Refund anticipation checks come with costs and add-on fees but are not a loan.

## Legal Remedies

### Federal law remedies

Truth in Lending (TILA): was created to guarantee the accurate and meaningful disclosure of the costs of consumer credit. TILA applies to consumer credit transactions (credit obtained primarily for personal, family, or household purposes) that are regularly extended by creditors who charge a finance charge or that are payable by a written agreement in more than four installments. Certain key information must be disclosed in a clear and conspicuous manner, including the APR, the amount financed, the finance charge, and the total of payments.

The APR and finance charge disclosures are the most important required information, and TILA contains detailed rules for determining which fees must be included in the finance charge and reflected in the APR. A violation of these rules entitles the consumer to double the finance charge with a minimum award of \$200 and a maximum award of \$2,000, plus attorney fees and costs. The consumer must bring an affirmative lawsuit within one year of the violation or may raise the violation as a defense to the lender's collection suit without regard to the one-year period.

Military Lending Act (MLA): caps interest rates to active duty military service members and their dependents at 36%. For loans made before October 3, 2016, the MLA effectively banned payday and title loans and restricted tax refund loans. On and after October 3, 2016, the MLA applies to a wider group of non-mortgage loans. Any credit agreement, promissory note, or other contract prohibited by the Act is void and unenforceable from its inception. A person who violates the MLA or regulations is liable for actual damages of not less than \$500 for each violation, punitive damages, costs, and attorney fees.

### State law remedies

Unfair and Deceptive Acts and Practices (UDAP) laws: a fairly wide range of unfair or deceptive lender behavior is prohibited under these state laws, provided that the type of lender or transaction is covered. Examples of prohibited behavior include: disguising a payday loan as a sale-leaseback or other sham and failing to disclose the interest rate and fees; disclosing a fee but failing to treat it as interest under state law; misrepresenting the loan terms. The remedies vary from state to state.

State usury caps: many states limit the maximum interest rate that lenders can charge a consumer in specific types of loans. These types of claims arise most often when a payday or title lender disguises the loan and charges high fees. Remedies for violations vary from state to state, ranging from voiding the loan at its inception to prohibiting the collection of the excess interest. Note that state usury caps may not apply to federally chartered banks or banks chartered in states with a high cap (or no cap).

Fraud or misrepresentation: deceit and lies in the course of making a loan are illegal and may provide significant recovery to a consumer. This type of behavior is illegal in all states.

Licensing laws: in many states, lenders are regulated by licensing laws. These laws typically do not apply to lenders that are banks, however. Where they apply, these laws usually specify the permissible terms of the covered loans and often contain significant penalties for lenders who fail to comply. Where obtaining the license is a precondition to lending, failure to do so may give rise to a usury claim in addition to a violation of the licensing law.

See the **Debt** chapter in this Guidebook for additional detail describing and applying legal remedies.

## Strategies for Survivor Defined Advocacy

### Assessing Credit Discrimination

When beginning advocacy with a survivor surrounding possible credit discrimination or predatory loans, it is helpful to understand the survivor's assessment of the situation before creating an action plan. Because of the complicated experiences and feelings surrounding finances and debt for many survivors, credit advocacy work requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called "intake questions"), are not meant to be prescriptive, and conversations around loans and debt should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Consider asking open-ended, non-judgmental questions about the situation such as:

1. How has the experience with the creditor impacted your financial situation?
  - a. In the short term? In the long term?
2. What else have you tried when you needed money in the short term in the past? What has worked? What hasn't?
3. How has the experience impacted your safety? How has your partner or ex-partner reacted?
4. Ask the survivor, "what do you think could help this situation now?"

**Case Scenario:** *Sofia, in the case above, has worked with a lawyer/advocate for six months to deal with her financial situation. Together, they created a debt action plan, and she paid off her title loan. Sofia and her advocate celebrated and high-fived when she paid off her title loan. The advocate is now concerned because Sofia has missed her last two appointments. The advocate calls Sofia and learns that last month Sofia fell and broke her arm. She was unable to pay for her medications, and her partner wasn't helping her. She used all of her emergency money and still was short. She returned to the title loan company and had a new title loan. She was so embarrassed that she didn't want to share with her advocate.*

*What could the lawyer/advocate have done differently? How should the advocate and Sofia move forward?*

## Creating plans to address predatory debt situations

Based on predatory lending assessment, advocates and lawyers can work with survivors to plan the next best steps for their own life. Because each survivor will have different short- and long-term financial goals, financial obligations, and safety concerns, each plan should be individualized and jointly created with the survivor.

The first step in advocacy is discussing the option of requesting a reduction in fees from a lender. For example, after meeting with her advocate and discussing her car loan, Julia may decide to try and contact the lender to ask for a decrease in the loan amount. What are the pros and cons of this strategy for the survivor? What does the survivor feel comfortable and safe telling the lender? A large, national company may be less likely than a smaller, neighborhood lender in reducing fees. If a lender does agree to reduce fees or extend a due date, make sure to get the agreement in writing.

### Think About It

Advocates should remember that most survivors are in predatory situations because they needed access to money or resources quickly and that predatory lending was the most accessible source of money and possibly the safest. Because of credit discrimination, some survivors may not have equal access to more traditional, less predatory loans.

### Practice Tip

As the survivor is paying off debts, be positive and encouraging but be cautious in how much praise is centered on paying off debts. Survivors may also be fearful of disappointing advocates/lawyers. Therefore, if the survivor takes out another payday or other type of predatory loan, they may not want to tell us. Be clear with survivors that you will support them no matter what.

## Debt action planning

When working with the survivor, it is helpful to create a comprehensive, yet flexible debt action plan (for more, see the Debt chapter of this manual). A debt plan can be simply a written plan on a piece of paper or can be an excel file. The first step in this process is to discuss with the survivor the benefit of paying off debts with the highest APR (or fees) first.

### Think About It

Remember that looking at predatory lenders' fees and APRs can be very frustrating to survivors and they may feel angry, cheated, or defeated. It is important to give survivors space to have feelings regarding the situation and work together to create a plan for moving forward.

### Practice Tip

It is helpful to use a free on-line debt calculator tool (such as <http://money.cnn.com/calculator/pf/debt-free/>) that allows survivor's to see how paying off debts with the highest APR first can be financially beneficial. Breaking down predatory loans into pieces can make the debt feel more manageable and can help give hope to survivors.

## Create financial plans to avoid needing predatory lending in the future

Long-term plans to reduce the need for predatory lending will require creating a cost of living plan to examine what it costs survivor to live. See the sidebar for steps to create an effective [cost of living plan](#).

## Discuss strategies to avoid short-term lending in economic crises

When working with survivors who are trying to avoid short-term lending, it is important to acknowledge that some strategies (including but not limited to relying on abusive partner or family members, selling drugs or other illegal activity, sex for money) may be *less* safe

for the survivor than short-term lending.

### Think About It

Be open about discussing risks and tradeoffs with short-term lending with survivors and avoid using your own judgment to decide what is the safest choice for survivors. Discuss the pros and cons of each financial choice.

An alternative strategy for obtaining money or resources in an economic crisis is using local resources that may help with financial needs. For example, your community may have

utility, rental or housing, or childcare assistance. Keep in mind that financial assistance is scarce, often requires a lot of documentation that may put the survivor at risk from an abusive partner, and may be difficult for the survivor to pursue (limited hours of operation, transportation to the location, etc.). Additionally, survivors who have experienced racism,

homophobia, transphobia, or other discrimination based on their identity, may be concerned about reaching out to a local organization and fear that they will experience discrimination in that setting. Again, just because short-term lending seems like a bad choice for survivors, at times, it may be the best choice out of a lot of bad options.

### Practice Tip

When making referrals to non-profit or governmental organizations for financial assistance, it is helpful for the advocate/lawyer to: understand how this assistance works, know if the assistance is currently available, be familiar with the organization's practices (policies towards LGBTQ people, for example), and provide a specific contact person or help make the connection.

## Discuss alternate banking options

Some survivors may not know about other banking options that are available to them for financial needs and services. Because commercial banks have historically avoided some communities (communities of color, low-income communities) some survivor's may not be aware of banking opportunities or may not trust banking options. It is important to assess

a survivor's relationship to banks.

### Practice Tip

For example, you may ask: Have you ever had experience with a bank before? If so, tell me about it. Do you know if you currently owe any money to any banks? How do you feel about banks? Do you feel like banking is a safe option for you? Why or why not?

If a survivor is interested, it is helpful to explore different banking options. While commercial banks are most accessible regarding locations and variety of services, *credit*

*unions*, which are not-for-profit institutions, generally have lower fees, lower balance requirements, higher annual yield (the amount of interest a consumer receives from a saving account) and lower annual percentage rates for lending. Some credit unions offer

short-term lending services with lower fees than typical payday or deposit lending. Recently, anti-poverty and other non-profits have worked together to create credit unions providing short-term loans with less predatory fees to their clients. It is helpful to be aware of the banking options in your community.

### **Alternative tax filing options**

For survivors who want to file taxes without the additional cost of tax refund anticipation loans, many communities offer Volunteer Income Tax Assistance (VITA) or Tax Counseling for the Elderly (TCE) services free of charge to help low to moderate income and elderly individuals. (For more information on taxes, see the **Tax Advocacy** chapter in this guidebook.)

### **Practice Tip**

Consider some systems advocacy, particularly if your client or many clients are confronting banking roadblocks. You may need to advocate with letters or phone calls to the banking institution requesting reduction in fees, waiving balance requirements, or creating a payment plan to pay off old banking debts preventing new accounts. Building relationships with local banks or credit unions can help establish the understanding and willingness to institute special protections, policies, or be willing to work with you on a case-by-case basis. For issues with a banking institution that are not being resolved, another option is to file a complaint with the Consumer Financial Protection Bureau (CFPB). The CFPB will forward the complaint, and the company has 15 days to respond.

### **CFPB Complaint line information:**

Online: <http://www.consumerfinance.gov/complaint/>  
Phone: (855) 411-2372

### **Practice Tip**

Consider partnering with or bringing VITA/TCE services onsite at your organization for your clients.

## **Creating a Cost of Living Plan**

(see more information [here](#)):

1. Ask survivor to track expenses for a month if possible; or at a minimum a week.
  - Discuss safety implications for tracking expenses and safety plan accordingly
  - Discuss how it may feel psychologically to track expenses and strategies to reduce negative feelings
2. Determine fixed, changing, emergency monthly expenses
3. Determine income including: benefits, child support, informal and formal income
4. If expenses outweigh income reduce expenses
  - Look through tracked expenses exploring for strategies to reduce spending that fit with the survivor's safety and values
  - Most survivors are smart economic planners; they simply don't make enough money to make resources strength
  - Barter for goods and services if possible
1. Increase income
  - What options does the survivor have to increase income? What has worked in the past? What hasn't? Why?
  - Consider increasing education, training, negotiating a raise

## Conclusion

While predatory lending options may come at high financial costs for survivors of domestic violence, they may be the safest alternative for some survivors. Lawyers and advocates should work with survivors to create short, medium, and long-term credit action plans. Open discussion and creative debt action planning are keys to availing survivors of real and flexible options that can adapt to their changing needs and priorities as they seek safety.

## Additional Resources

- Training materials by Katie VonDeLinde and CSAJ:
  - [Survivor-Centered Consumer rights Advocacy](#). (2013).
  - [Budgeting and Debt Prioritization](#). (2013).
- The Payday Lending Debt Trap for Survivors: [Infographics](#)
- CSAJ [comments to CFPB](#) regarding payday, vehicle title, and certain high-cost installment loans
- Center for American Progress: [Predatory Payday Lending: its Effects and How to Stop It](#)
- National Association of Consumer Advocates;  
<http://www.consumeradvocates.org/issues/predatory-lending>

# Four



## Debt, Debt Defense, & Safety Considerations for Survivors

By Diane Johnston<sup>1</sup>

### Introduction

Personal income has not kept up with the cost of living, particularly for people with low and average earnings, forcing more people than ever before to rely on credit to pay even their basic needs. Financial institutions have simultaneously increased interest rates and fees for lower income and higher risk consumers, causing individual debt burdens to grow and very often become unmanageable. While frequently associated with credit cards and loans, any unpaid bill can become a problematic debt. About 35 percent of adults, or 77 million of the 220 million Americans with credit files, show debts in collections.<sup>2</sup> Unpaid debts can result in debt collector harassment, lawsuits, garnished wages, and frozen bank accounts, in addition to negatively impacting a consumer's credit report and score.<sup>3</sup>

For survivors of domestic violence, these consequences can be particularly devastating as they jeopardize the survivor's ability to becoming financially self-sufficient. This chapter will explain different types of debt, how debts are treated differently in family law and consumer law, the laws governing debt collection, defenses to a debt collection lawsuit, and safety considerations when dealing with debt.

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<sup>1</sup> With contributions by Katie VonDeLinde and the National Consumer Law Center.

<sup>2</sup> CONSUMER FINANCIAL PROTECTION BUREAU, ANNUAL REPORT ON THE FAIR DEBT COLLECTION PRACTICES ACT 8 (March 2016), available at [http://files.consumerfinance.gov/f/201603\\_cfpb-fair-debt-collection-practices-act.pdf](http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf).

<sup>3</sup> See **Credit Advocacy for Survivors** chapter for further discussion on credit issues.

## Maria's Story

*Maria is a survivor of domestic violence who finalized her divorce from John over two years ago. She's now in her apartment with her two children, working a minimum wage, part-time job. Funds are extremely tight, and she's struggling to make ends meet. Because her credit was better than John's, during the relationship, they opened all of their credit accounts under her name instead of his. John handled all of the finances for them, so she wasn't always sure of what accounts were being opened or used. She was allowed use of one of their credit cards and John used the others. She learned the full picture of the debt in her name during her divorce proceedings. Per her divorce, John is supposed to be making payments for a portion of the debt directly to their creditors. She believes that he has been complying with this requirement.*

*Maria comes to you because she just had her rent check returned to her due to insufficient funds. She knows that she had enough money in her account, but when she speaks with a representative from her bank, they tell her that her account was frozen pursuant to a court judgment against her. Maria is shocked and confused. This is the first time she's learned that a case had been filed against her.*

### Think About It

What are your reactions? What are Maria's other financial needs that could be affected by the frozen account? Does John still pose a safety or other economic risks? What else do you need to know about Maria to assist your advocacy (from her employment to other relationships, to how her other identities might shape her experiences and available options)?

## Domestic Violence and Debt

Many survivors of domestic violence exit abusive relationships with a high debt load. For some, the process of leaving requires money the survivor doesn't have, and therefore reliance on credit cards or loans to cover these expenses. Many others have also accrued debt through financial abuse. Experienced by an estimated 99 percent of survivors,<sup>4</sup> financial abuse can include intimate partner identity theft,<sup>5</sup> coerced debt,<sup>6</sup> and an unequal distribution of debts and assets between partners during a relationship. Even after a relationship ends, abusive ex-partners can continue financially harming survivors by accruing additional debt in the survivor's name or by refusing to pay debts as ordered in a divorce.

In many domestic violence cases, survivors find out the full extent of their debt burden only after they've left the relationship. Dealing with finances often happens once the survivor has been able to get more basic safety and living needs met. Survivors often have fuzzy recollections of what happened and when especially because of the trauma they've

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<sup>4</sup> Adams, A. E., Sullivan, C. M., Bybee, D., & Greeson, M. R. (2008). Development of the scale of economic abuse. *Violence Against Women*, 14(5), 563–588. <http://doi.org/10.1177/1077801208315529>

<sup>5</sup> See Identity Theft chapter for a more in-depth discussion of this issue.

<sup>6</sup> Coerced debt is a term coined by scholar Angela Littwin to encompass "all non-consensual, credit-related transactions that occur in a violent relationship." Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. R 951, 954 (2012).

experienced and because the information you'll be discussing may be from a long time ago or may have never been entirely clear to the survivor.

You may also have survivors that come to you while they are still in abusive relationships. With these clients, you'll want to assess safety risks carefully. Disputing a debt or taking other action related to credit accounts may agitate or tip off the abusive partner that your client is thinking about the future or preparing to leave. You'll need to assess whether the client's partner will be able to learn about the action taken and whether the partner is likely to retaliate. In some cases, it may make sense for the survivor to wait until leaving the relationship to start addressing these issues.

## Assessing for debt issues

Because of the complicated experiences and feelings surrounding debt for many survivors, debt advocacy work requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called “intake questions”), are not meant to be prescriptive, and conversations around debt should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Attorneys and advocates can set the stage, by discussing general feelings about debt and finances, and reassuring survivors that they are not defined by their debt or financial decision.

When you meet with your client, consider how you can safely pull the survivor's credit report, which you should review along with<sup>7</sup> any debt collection letters received.

Assessment questions could include, but are not limited to:

- Have you ever reviewed your credit report before?
- Have you received any legal papers related to a debt?
- Have you received notice that your wages will be garnished or that your bank account will be frozen?
- Have you had anything of value seized or repossessed?
- Are you receiving phone calls or letters from debt collectors?
  - Are any of those communications threatening or harassing?
- What debts are you aware of?
  - How did you accrue these debts?
  - During your relationship? Before or after?
  - For personal purchases? For your household? For your former partner?
- What were your finances like during the relationship? Who handled the bills?
- Did you have access to shared accounts?
- Do you think your partner has or would ever access your credit report?

Additional assessment questions specific to coerced debt could include:

- Did you ever feel pressure from your partner to make specific financial decisions?
- What do you think would have happened if you had refused?
- What did your partner say or do to convince you?

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<sup>7</sup> See **Credit Reporting & Repair** chapter for more on pulling credit reports safely.

- If you were in front of another person (like a car salesperson, do you think he or she could have suspected what was going on?
- If the transaction involved opening an account (new credit card, loan, other type of account), do you have any of the contracts?
- Did you get any use or benefit from the transaction (use of a car or credit card, for example)?

## The impact of debt

The impacts of debt can be devastating. Dealing with debt collectors, who are often aggressive, may be demeaning, and call incessantly, can be extremely distressing. If your client is sued, the process of going to court is confusing and adds more stress to your client’s life, especially if the survivor is already dealing with court dates for other matters

### Think About It

For many of our clients, talking about and admitting to having a large debt burden is embarrassing or shameful. If the survivor goes to court or does anything to address the debt, they will be required to talk about it; this means they may also be essentially required to talk about their relationship and abuse. For some clients, this may be the first time they are sharing these issues with someone. Dealing with debt collection could mean that your client feels alienated from his or her community or family. Open conversations to prepare survivors for these experiences are critical. How can you help your client through a conversation about finances that makes him or her think back on the abuse? What action is your client considering that might require talking more about the circumstances surrounding the debt, including the relationship history? How might your client’s background or identity further shape how he or she thinks about and is impacted by finances and debt?

related to the abuse – like divorce proceedings, family court cases, and/or a pending criminal case. For survivors like Maria who find out about debts after a default judgment has been entered against them, sudden deprivation of wages or funds in a bank account could be the tipping point that makes it impossible for the survivor to maintain safety, pay rent, or obtain basic necessities. Also, being required to talk about debt related to the abusive relationship can be re-traumatizing for survivors.

## Starting Principles

### What debts are we talking about?

Almost any money your client owes to someone else can be sent to a debt collection company, reported on his/her credit report,<sup>8</sup> or can result in a debt collection lawsuit against your client and/or your client’s partner. This includes debt owed on credit cards, personal loans, medical bills, utilities, rental arrears, student loans, car loans, a car lease, or any other money owed to another entity.

There are two main types of debt. **Secured debt** is connected to something of value, like a house or a car, and the creditor can take back that asset from your client if he

### Practice Tip

Instead of asking your client if they have any debt, ask about the specific types of accounts, such as credit cards, medical and phone bills. Ask your client if he/she has a balance on the account, if he/she is making the required monthly payment, and if he/she makes these payments on time.

<sup>8</sup> See the **Credit Reporting & Repair** chapter for more information about credit reports.

## Key Terms

**Secured debt:** Debt from a loan that is connected to something of value, like a house or a car, and the creditor can take back that asset if a consumer fails to pay.

**Unsecured debt:** Debt that is not tied to any asset, including but not limited to credit card debt, personal loans, medical bills, and utility debt.

**Lender:** The entity that originates a loan (also called original creditor).

**Servicer:** Hired by lenders to send account statements or bills to the consumer and to collect payments.

**Creditor:** The entity that originates accounts that allow the customer to purchase goods or services on credit, and pay back later.

**Debt buyers:** Companies that purchase defaulted debts in bulk, often for pennies on the dollar.

**Account holders:** The person liable for the account.

**Co-signor or guarantor:** A person who signs a credit application together with the primary account holder, and agrees to be held liable for debt if the primary account holder fails to pay.

**Authorized user:** A person added to an account and granted permission to utilize the credit account, but not as an account holder.

**Service of process:** The delivering of the initial case paperwork to the person being sued.

**Standing:** Whether the plaintiff is the proper party to sue on the debt.

**Statute of limitations:** A time limit set for a creditor to sue for an unpaid debt. It generally starts to run when the first payment is missed.

or she fails to pay. **Unsecured debt** includes every other type of debt that is not tied to any asset, including but not limited to credit card debt, personal loans, medical bills, and utility debt.<sup>9-10</sup>

## Who am I dealing with?

There are a number of players in the debt collection industry, and sometimes it is difficult to determine who you are dealing with. The entity that originates the account is the **lender** or the original creditor. When you take out a loan, whether a personal loan, student loan, car loan, or mortgage, you generally borrow from a lender and receive a lump sum of money, a credit card, or the money lent is forwarded to the car or home seller or educational institution. Lenders often hire a **servicer** to send account statements or bills and to collect payments. Servicers will also negotiate settlements or repayment terms when a borrower defaults, or fails to make payments. **Creditors** are associated with accounts, allowing the customer to purchase goods or services on credit and pay back later. The most common type of revolving credit is a credit card. In this chapter, the term creditor will also be used to encompass lenders and servicers.

When a client fails to make timely payments on an account, creditors may hire a **debt collector**. Similar to a loan servicer, these entities will seek payments from the client or ask the client for the partner's location information. The original creditor still owns the debt, but the debt collector is hired to help collect the money on the creditor's behalf. They are often aggressive, calling frequently and sometimes using illegal practices to intimidate your client into making payments. Creditors may change debt collectors after a few weeks or months, or several times over the life of the debt, creating confusion about who is authorized to actually collect on the debt.

After failing to collect a debt, creditors may sell the debt to **debt-buyers**. Debt buyers are companies that purchase defaulted debts in bulk, often for pennies on the dollar. They become the legal owner of the debt, with the ability to pursue collection on their own and to sue on the debt. These debts are often sold without guarantees as to the accuracy of the amount owed by the consumer and may limit the debt buyer's right to obtain additional basic information about the debt. A 2013 study by the Federal Trade Commission found that less than 50 percent of the debt buyers studied received the name of the original creditor, fewer than 40 percent had information on the account's finance charges and fees, and only 35 percent knew the date of the consumer's alleged

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<sup>9</sup> An important consumer protection for medical debt is that hospital emergency rooms that accept Medicare may not deny life stabilizing and active labor care because of outstanding medical debts. See NCLC, Collection Actions § 9.3.3 (3d Ed. 2014).

<sup>10</sup> NCLC manuals are an excellent resource but may not be available without a subscription. If you need to access this information, contact a consumer attorney in your area.

default – information basic to identifying who is responsible for the account.<sup>11</sup>

**Case Scenario:** *During your intake with Maria, you review her credit report and collection letters she's receiving in the mail to build a picture of her debt burden. On her credit report, she recognizes Discover, Citibank, and Chase, all original creditors, as banks that they had credit cards with. There are several names that she isn't familiar with, but you recognize as debt buyers.<sup>12</sup> Some of these lines list the original creditor, and some don't.*

## What is the difference between joint debt and separate debt?

**Account holders** on credit cards and personal loans are liable for the debt. In consumer law, the named account holder(s) determines whether a debt is joint or separate. A **co-signor** or **guarantor** signs a credit application together with the primary account holder. Just like the primary account holder, the co-signor or guarantor is an account holder and is liable on the account. That means if the primary account holder fails to pay, the financial institution or entity can pursue the co-signor/guarantor for the entire balance of the debt. Similarly, if one of the account holders declares bankruptcy and discharges a particular debt, the other account holder will remain liable for the whole debt.<sup>13</sup> An **authorized user** is added to an account as a person with permission to utilize the credit account, but not as an account holder. This is frequently used between people with familial relationships (intimate partners or parent/child) where one person has better or more established credit than the other. An authorized user may or may not be legally responsible for the debt or even for his or her charges on the account depending on the contract and state and federal law.<sup>14</sup>

### Practice Tip

To determine whether your client is an account holder or an authorized user, look at the original agreement documents (which may not be readily available) the billing statements and/or the client's credit report. The credit report may indicate whether the account is individual, joint, or if the client is an authorized user. Only a few clients will have the credit application and the contract (the documents that establish your client's legal responsibility) and even the original creditor may have difficulty providing those documents if they are more than three years old. The client's representative's bargaining position may be enhanced with a creditor or debt collector who cannot provide those documents. Such bargaining positions include: this debt is not my client's responsibility, to my client cannot pay this debt, to my client can only pay a portion of the debt, and/or to my client can only pay a specific amount per month.

This is unrelated to how debts are determined to be joint or separate in the family law/divorce context. If your client has had a distribution of debts through a divorce action, this does not change his/her standing with creditors.<sup>15</sup> Creditors will still pursue only the named account holders, and in some states, the authorized users for the debt.

<sup>11</sup> FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 44-49 (2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

<sup>12</sup> This website lists many of the common debt buyers you'll see but is not exhaustive: <http://www.debtconnection.com/debtbuyers.asp>. If your client has store cards, these are often through Department Store National Bank (DSNB), Synchrony, or Comenity. If there is a name that you or your client don't recognize, a quick google search can often point you in the right direction.

<sup>13</sup> See Bankruptcy chapter for further discussion.

<sup>14</sup> See NCLC, Collection Actions §§ 5.3.3, 5.3.4, 9.6.

<sup>15</sup> See the Family Law chapter for further discussion on how divorce affects finances.

### Practice Tip

A divorce attorney may be able to prevent this issue from happening by negotiating with opposing counsel or the other party (ex-spouse) to include a provision requiring each party to refinance debt into his/her own name. Many credit cards will allow a new cardholder to transfer a balance from another account for a fee.

**Case Scenario:** *You help Maria to get more information about the frozen bank account, and learn from her credit report and the court docket that Citibank sued her last year. She is distressed to learn about the case and confused about why John was not sued as well. She tells you that she never used the card; it was only John who made purchases on that credit card. Because Maria is the account holder and John was only an authorized user, the creditor sued only Maria for the debt.*

Debt collectors may tell your clients that they can be held liable for their spouse's debt even if they are not an account holder. This is not true in the majority of states that follow **equitable distribution**, and if your client has been told this, he or she likely has a claim for a deceptive or misleading collection practice (see more on these claims below). In **community property** states,<sup>16</sup> both spouses are deemed to equally share all income, assets, and debt acquired during the marriage. This means that both spouses in those states are equally liable for debts, regardless of who is named on the account. Many states have statutes that make spouses responsible for "necessities," like medical care and groceries, provided to their spouse or children.<sup>17</sup> There is some reason to believe that such statutes are seldom used against consumers.<sup>18</sup>

## Communication with Debt Collectors

As mentioned, debt collectors often call frequently, and sometimes use abusive and other unlawful methods to collect a debt. This can be overwhelming and stressful for clients. Federal law, Fair Debt Collection Practices Act (FDCPA), as well as state laws regulate debt collectors.

### The Fair Debt Collection Practices Act (FDCPA)

The FDCPA imposes restrictions on a debt collector's efforts to obtain payment and on where a debt collector can sue a borrower. As a general rule, the FDCPA applies to third-party debt collectors (as opposed to the original lender). The FDCPA establishes general standards of prohibited conduct in order to protect consumers from invasions of privacy, harassment, abuse, false or deceptive representations, and unfair or unconscionable collections methods. The Act also defines and restricts abusive collection actions, such as late night or repetitive phone calls, false threats of legal action or criminal prosecution, and communication with others regarding the debt. The consumer can recover actual damages, statutory damages of up to \$1,000, attorney fees, and costs.

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<sup>16</sup> Only a minority of states observe community property instead of equitable distribution: Alaska (by agreement), Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

<sup>17</sup> See NCLC, Collection Actions §§ 5.3.4.3, 9.6.

<sup>18</sup> See Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CALIF. WESTERN L. R. 351, SSRN id1674918 (1990).

**Case Scenario:** *Maria tells you she has stopped answering her phone unless she recognizes the number because she is getting so many phone calls. She used to answer and try to work something out, but one debt collector told her they would have her arrested and another said they could only accept a payment she couldn't afford. She is afraid of what the debt collectors can do to her and her family and embarrassed that she is in this situation.*

Within five days of initiating contact, the debt collector must send a written notice with the amount of money owed, the name of the original creditor, and what action the client can take if he/she does not believe the debt is valid.

#### **Practice Tip**

If your client believes the debt is invalid, he or she should send a dispute and verification request in writing to the debt collector. Once the debt collector receives it, it must obtain verification of the debt from the creditor and send this proof to the client before resuming any collection activities or starting a lawsuit against the client.

#### **Practice Tip**

If your client is overwhelmed with phone calls and has a small number of creditors, encourage him or her to pick up the phone. Your client should verify who they are, get contact information from the debt collector, and state that he or she doesn't wish to be contacted by phone.

### **Timing and Frequency of Phone Calls**

Debt collectors can only call your client between 8 a.m. and 9 p.m. They are not allowed to call repeatedly and frequently. However, repeated calls are allowed if they go unanswered.

If your client does not want to continue receiving phone calls, he or she can write a **Cease Letter** asking the debt collector to stop. Once received, the debt collector cannot contact the client except to confirm that there will be no further contact, or to inform the client that it intends to take specific action to collect the debt, such as bringing a lawsuit.

### **Who can a debt collector contact?**

Debt Collectors cannot contact your client if he/she is known to be represented by an attorney. If your client informs a debt collector that he or she cannot receive calls at work, they must stop calling there. They *can* contact third parties once to obtain your client's contact information, but they cannot share information about the debt in those calls. If

#### **Practice Tip**

Cease Contact Letters are effective as a hard rule that debt collectors must follow, but sometimes speed up the process in which a creditor files a lawsuit since it is unable to pursue collection over the phone. This may vary regionally and depend on the client's financial position, with judgment proof clients less likely to be sued. Consider whether continued phone calls or a lawsuit in court would be more difficult for your client to handle. If the client seeks freedom from calls, you should counsel your client on how important it is to respond if sued, as people in many states do not get plain language instructions on how to respond to a lawsuit.

your client is legally married, a debt collector *can* speak with your client's spouse about the debt.<sup>19</sup> This may create safety concerns. For example, if it is an account your client is still using, this may allow the abuser to get information about where your client is shopping or spending money if the collector attempts to confirm charges over the phone. If your client has updated their phone number or mailing address to one that the abuser doesn't know, but hasn't responded to communications from the debt collector, the collector may try to confirm with the spouse that this contact information is correct.

### **How else does the Fair Debt Collection Practices Act (FDCPA) protect my client?**

Debt collectors are prohibited from making false or misleading statements, threatening or harassing your client. The debt collector cannot *falsely* claim to represent a governmental agency, to be an attorney or a law firm, or to be employed by a credit bureau. Debt collectors may not falsely claim that your client has committed a crime or will be arrested for not paying the debt, or that the collector will take action only permissible after being awarded a judgment in court.

If a debt collector violates the FDCPA, your client can sue the collector in state or federal court within one year of the violation. Your client can recover their damages plus up to \$1,000 and payment of the client's attorney's fees (see above sidebar describing the FDCPA for more).

#### **Practice Tip**

If your client is still married, or recently divorced, advise him or her not to update a confidential address with any creditors or debt collectors. A debt collector may contact the spouse to verify that the information they have is correct, including the confidential address. Instead, have your client open a P.O. box where he or she can safely receive mail.

#### **Practice Tip**

Encourage your clients to keep a call log documenting their conversations with creditors and/or debt collectors. This log should include the date and time of the call, the name of the collector, name of the collection company, call back phone number, name of the original creditor and current owner of the debt, alleged amount of the debt, estimate of how long the call lasted, and any other notes about what the collector said. Clients should not give information to debt collectors without knowing that the debt collector is legitimate. The client should get the debt collection company's name, address and phone number and check its legitimacy. The original creditor may verify the debt collector or the collector may be licensed by the state or listed on [www.consumerfinance.gov/complaint](http://www.consumerfinance.gov/complaint) without its legitimacy being challenged.

#### **Practice Tip**

In a typical case, your client likely has multiple FDCPA violations, if you can document them. Have your clients keep a call log and retain all documents received from debt collectors and debt collection law firms to build your case.

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<sup>19</sup> 15 U.S.C. §1692c(d) ("For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator").

**Case Scenario:** *Maria tells you she is receiving letters and phone calls from a debt collector regarding an alleged debt to AT&T. Maria doesn't think she ever had an account with AT&T, so she sends a dispute and verification letter to the debt collector via certified mail, return receipt requested. Although she receives the return receipt and so she knows that the debt collector received the letter, she continues to receive phone calls and letters but not a verification of the debt or response to her dispute. In Maria's call log, you see that the debt collector has told her they will be garnishing her wages if she doesn't make a payment within a week, even though they have not yet filed a case against her. Maria also tells you that she receives repeated calls at work, even after she has informed the debt collector not to contact her there. This debt collector has multiple violations of the FDCPA, and Maria can sue the debt collector.*

## Prioritizing Debts

If your client has a budget that allows for payment on debts and would like to do so, review what should take priority. Expenses for essential needs like rent, food, and utilities<sup>20</sup> should always take priority over other debts. If your client has secured debt related to an essential asset, like the home or a car that he/she needs in order to get to work, those debts should also be high on the priority list.

The next tier of priority should be debts that have more serious consequences. The federal government benefits from additional remedies to collect on debts owed to it, like tax debt and student loans. While other creditors must file a lawsuit and take the debtor to court before being able to collect from anyone, the federal government can garnish a person's income, including income that is protected from other creditors like Social Security, or can seize all or a portion of the person's tax refund. Because these options are available only to the government and not to ordinary creditors, governmental debts should take priority over other types of unsecured debt. Furthermore, programs available through the Department of Education and through the Internal Revenue Service mean that your client may end up with a very affordable settlement or payment.

## Affirmative Consumer Litigation Options

In addition to claims brought under the FDCPA, your client may have claims under your state's Unfair and Deceptive Acts and Practices (UDAP) laws or under the Truth in Lending Act (TILA). A consumer lawyer should analyze these claims.

### **Why your client needs to establish a safe mailing address**

While receiving mail from debt collectors and creditors can be stressful, it's important that your client has a safe mailing address so that they can safely pull and monitor their credit and so that they are kept up to date with what is happening on their accounts. Keeping an old address on file with USPS, the Department of Motor Vehicles, and other entities could result in your client being served at an old address, thus never receiving notice of a lawsuit yet not having a service defense. If your client cannot afford a P.O. box, check into your state's Address Confidentiality Program<sup>1</sup> to help her or him establish a safe address.

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<sup>20</sup> Note that a utility service provider (phone, electric, gas, internet) can terminate service for nonpayment, usually without a court proceeding.

## Unfair and Deceptive Acts and Practices (UDAP)

UDAP laws are promulgated by each state, and thus can vary tremendously across the country. All UDAP statutes prohibit some combination of unfair, deception, and/or unconscionable practices in an effort to protect consumers from predatory business practices. All UDAP laws give state agencies authority to enforce the protections provided therein, and most states also give individual consumers the right to seek remedies on their own. Your client may wish to pursue a UDAP claim depending on your state's laws and remedies.<sup>21</sup>

## Truth in Lending Act (TILA)

The federal Truth in Lending Act is primarily about disclosure and ensuring that consumers are given the information they need to make informed financial decisions. Many of TILA's disclosure requirements aim to make credit terms understandable and accessible to consumers so that they will understand the cost of the credit they are seeking. TILA contains provisions pertaining to home mortgages, car loans, and credit cards.

Apart from provisions related to mortgages,<sup>22</sup> some important provisions of TILA include:

The Fair Credit Billing Act (FCBA) provides a process through which consumers can dispute billing errors and unauthorized charges and limits the consumer's liability for these issues. The consumer must send a written dispute within 60 days of learning of the issue, and the creditor then has up to 90 days to investigate and make a determination.

### Practice Tip

When creditors decide that there was no billing error or unauthorized use, they will often issue a short statement informing the consumer of this finding. Request additional information about their investigation to determine if the dispute was properly investigated and resolved.

The Credit Card Accountability Responsibility and Disclosure Act (CARD Act), states that credit card issuers must consider a

consumer's ability to pay before opening a new account or increasing credit limits. They must give consumers a grace period before charging higher interest rates and between issuing a statement and requiring a payment. They must disclose that making only the minimum payment will result in paying higher interest. The CARD Act also limits fees that credit card issuers may charge.

## Defending a Debt Collection Lawsuit

### Initiation of a lawsuit

Generally speaking, your client will not usually benefit from avoiding or refusing service of process. If your client received a court summons signaling a lawsuit against him or her, check for a state bar, law library, or state court website that explains the rules of civil procedure for responding in your state<sup>23</sup> to ensure that your client knows the deadline and

<sup>21</sup> The National Consumer Law Center has more information on each state's UDAP laws, available at <http://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html>.

<sup>22</sup> See the Mortgage & Foreclosure chapter for more on these issues.

<sup>23</sup> Speak with an attorney in your state if possible. The Legal Information Institute at Cornell University Law School maintains links to each state's rules of civil procedure, available at [https://www.law.cornell.edu/wex/table\\_civil\\_procedure](https://www.law.cornell.edu/wex/table_civil_procedure).

method for responding, if they choose to. Also, if possible, speak to a consumer expert to determine the best course of action. In New York, for example, failure to file a written answer with the court's clerk means that the client will not receive notice of the scheduled court appearance, streamlining the process for a creditor to obtain a default judgment.

Most defenses are asserted in your client's answer. In some states, the answer can be in the form of a checklist and the client does not need to elaborate on any given defense in the answer. If your client has been sued, you should try to find her or him an attorney or another resource for legal assistance. Many courthouses and some state court libraries have a "pro se" desk, clerk, or website that can provide basic information to litigants who do not have an attorney.<sup>24</sup>

Few clients can adequately defend themselves against a debt collection suit without a lawyer representing them. Some legal aid and private attorneys represent consumer against debt collectors' lawsuits in some states.

**Practice Tip: Building Partnership for to Enhance Survivors' Consumer Rights.<sup>25</sup>**

Despite the overlap between the work of domestic violence and consumer lawyers, there is an enormous gap in collaboration between the fields. While domestic violence attorneys typically focus on physical protections and family law matters, consumer lawyers focus on longer-term financial, legal issues. Without proper collaboration between family law and consumer law attorneys, domestic violence advocates and attorneys may not account for the economic or consumer law issues that victims could be facing, or that could enhance their options for safety. Similarly, consumer attorneys may not consider the safety and privacy concerns of survivors in their cases, which could pose enormous risks for the survivor. Thus, enhanced capacity of a partnership between domestic violence and consumer lawyers is critical to achieving the joint goals of physical and economic safety. It requires purposeful cross training, networking, and sustained partnership building.

Some strategies for building partnerships between consumer law and domestic violence attorneys include:

- DV advocates/attorneys can assist the survivors in contacting consumer law attorneys (such as the NACA directory) to familiarize them with the survivor's needs and begin conversations around coordinating legal advocacy.
- Develop a process for coordinating legal needs such as: schedule regular "check-in" meetings between family law and consumer lawyers and the survivors; establish a protocol for sharing relevant case information, with the survivor's permission.
- Co-create opportunities to institutionalize partnerships: establish regular meetings to connect the domestic violence and consumer agencies in your area; develop cross-training opportunities; make new contacts (with state consumer bar association or state domestic violence coalition) and cultivate the relationship.

[Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: An Assessment and Resource Tool for Attorneys and Advocates](#)

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<sup>24</sup> See <http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx>

<sup>25</sup> Paraphrased from CSAJ's [Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: An Assessment and Resource Tool for Attorneys and Advocates](#), 2013

## Common debt collection defenses

### Lack of or improper service

The debt collection industry is notorious for problems with **service of process** (the delivering of the initial case paperwork to the person being sued), commonly known as "sewer service." By withholding effective service of process, creditors are able to obtain default judgments without ever notifying the consumer of the lawsuit. The client may also have a defense if service was made but was improper. For example, if the law requires personal service (that the defendant receives the paperwork in person) but the plaintiff only mailed the summons and complaint. Domestic violence survivors are more prone to miss even proper service if they have fled to a shelter, a new apartment, or the home of a friend or family member and have not notified creditors or other entities. See the sidebar on obtaining a safe mailing address for your client to avoid this issue. If service was improper, the court lacks personal jurisdiction, and the client can file a motion to dismiss on that basis.

**Case Scenario:** *A debt collector, LR Credit, sues Maria. The Summons and Complaint are mailed to the address where she lived with John, but she moved about six years ago before filing for divorce. She has since changed her address with USPS and the Department of Motor Vehicles but never updated her address directly with her creditors. This debt was one that Maria was supposed to be responsible for, but she believes her last payment on the underlying debt was over ten years ago.*

*Depending on her state's rules of civil procedure, Maria likely has a service defense. In New York, for example, a Summons and Complaint can be served by mail only if it is also affixed to the door of the defendant's actual place of residence, and this type of service is only permissible after due diligence attempts to serve the defendant in person or via substitute service. Thus, Maria could challenge service both because the Summons and Complaint were sent by mail only and because they were sent to the wrong address. Maria also has a statute of limitations defense under New York law, because consumer debt actions have a maximum statute of limitations of six years. Lastly, Maria should raise the defense of standing, because she is sued by a debt collector and not an original creditor.*

### Standing

If the client does not recognize the entity suing her, or if the entity is a debt buyer, she should assert lack of standing as a defense. This challenges whether the plaintiff is the proper party to sue on the debt. The plaintiff must prove that it is the legal owner of the debt and must provide evidence showing that the debt was legally obtained. If a debt has been sold multiple times, this evidence must include proof of each sale of the debt.

#### **Practice Tip**

You will often first see this evidence in a debt collector plaintiff's Motion for Summary Judgment. Scrutinize these documents carefully. Creditors often include standard credit card agreements without your client's name or account number, or print offs of spreadsheets with account numbers but no names. Check if the documents connect your client to the account number. These documents must be accompanied by an affidavit that lays the proper foundation for admissibility under the business records exception to the hearsay rule. Does the affidavit describe how the writer's job duties provide him or her with personal knowledge of the facts? Are all of the elements for the business records exception established in the affidavit? Is there an affidavit for each sale of the debt, written and signed by someone who works for the entity that sold it?

## Statute of limitations

The statute of limitations sets a time limit for a creditor to sue for an unpaid debt. It generally starts to run when the first payment is missed. However, if the consumer subsequently makes a payment, the statute of limitations will start to run again in many states. Confirm how your state applies the statute of limitations on consumer debts. Note

### **Practice Tip**

Debt buyers sometimes purchase debts after the statute of limitations has already run; these debts are sometimes referred to as "zombie debts." In these cases, collectors will often offer extremely affordable payments, like \$5 a month, in order to pressure your client to make a payment that will re-start the statute of limitations. Clients should resist these offers on old debts, particularly when made outside of court.

that the statute of limitations may differ for a revolving credit account like a credit card, a contract for the sale of goods like a car, or a retail installment agreement.

## Client doesn't owe the debt

Raise this defense if your client is a victim of identity theft<sup>26</sup> or mistaken identity, or if your client simply doesn't owe the debt the plaintiff alleges. Many domestic violence survivors may not recognize they are victims of identity theft when their partner opened or utilized an account in their name without their knowledge or permission. Even if the perpetrator

### **Practice Tip**

If your client is the victim of identity theft or mistaken identity, pull his or her credit report to check if the debt appears there as well. You should help your client dispute this debt by using the Federal Trade Commission's online Identity Theft Affidavit and writing dispute letters to the Credit Reporting Agencies to have these lines removed.

was your client's partner or spouse, it is still identity theft if your client did not apply for, receive, or use the account in question.

## Unfair collection process

Your answer may include a counterclaim for violation of the FDCPA or your state's Unfair and Deceptive Acts and Practices (UDAP) laws. When debt collectors do not obtain default judgments, they may dismiss the case instead of proceeding with insufficient evidence to litigate the case. This is more frequent when the consumer appears in the case, and even more frequent when an attorney appears.<sup>27</sup> Some courts may find this dismissal strategy involves an illegal debt collection practice prohibited by the Fair Debt Collection Practices Act.<sup>28</sup>

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<sup>26</sup> See Identity Theft chapter for a further discussion of intimate partner identity theft.

<sup>27</sup> Findings from a Dallas County study. Mary Spector, *Where the FCRA Meets the FDCPA: The Impact of Unfair Collection Practices on the Credit Report*, 20 Geo. J. on Poverty L. & Pol'y 479, 479 (2012-2013).

<sup>28</sup> See discussion above.

**Case Scenario:** *An original creditor sues Maria for a credit card debt she doesn't recognize. She never applied for, received, or utilized the credit card in question. The original creditor is able to produce account statements showing purchases made on the card, dated around the time that she and John separated (but were still legally married). Maria recognizes the phone number and address as that of her ex-husband. Maria should raise the defense of identity theft since she never authorized John to apply for or use this credit account in her name. Note that the court and/or the creditor may be unwilling to recognize a claim of identity theft without a police report, which can be difficult to obtain. Additionally, Maria may not be comfortable engaging law enforcement, or she may be concerned about potential retaliation from John. Discuss these possibilities with her. Most frequently, the consumer action will not result in a criminal investigation or the involvement of the abusive partner, but you should discuss with your client if that is a possibility in your area.*

## Judgments

Many consumer defendants do not learn of cases against them until after the creditor has obtained a default judgment against them, and the client's wages are subsequently garnished, or his/her bank account is frozen. You likely have several options to vacate a default judgment under state law. One likely option is to challenge service and vacate for lack of personal jurisdiction. To do so, you should review the plaintiff's affidavit of service with your client for discrepancies. For example, check if the affidavit alleges service at the wrong address. If the affidavit claims to have served your client personally, check if the description matches your client's physical description at the time and if it was at a time when your client would have been home. If the affidavit claims to have served another person (substitute service), check if the name and description of the person match anyone with whom your client is familiar.

**Case Scenario:** *Think back to the lawsuit filed by Citibank, which Maria only learned about when her bank account was frozen. You request the case file from the court in which it was filed and review the affidavit of service with her. The affidavit alleges that the process server served the Summons and Complaint on a person of suitable age and discretion at Maria's address. This person is described as a 30-year-old woman. Maria lives with her two young sons, 7 and 9. There is no one else who lived with her or would have had any reason to be in her home at the date and time of alleged service. She doesn't recognize the description of the person allegedly served. Maria's affidavit should describe in detail these reasons why she believes the affidavit of service is false.*

Judgments may also appear in cases where your client had notice but lost the case. In these cases, if it appears that your client asserted defenses, your advocacy strategy may be to try to negotiate a settlement of the judgment at a lower amount. Judgments negatively impact your client's credit score and can often be enforced for many years, depending on your state's laws, so they should be taken seriously. Personal bankruptcy offers important remedies that may help with some types of debts and protect some of the consumer's future income.<sup>29</sup>

## Enforcement

A creditor may enforce its judgment by garnishing (taking) some of the debtor's wages or funds in a bank account, or by seizing or attaching a lien to assets, like a car or home. If

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<sup>29</sup> See the Bankruptcy chapter for more information, and [www.nacba.org](http://www.nacba.org) for information and referrals.

the creditor seeks to garnish wages, the maximum it can obtain under federal law is the lesser of 25 percent of the debtor's disposable earnings for the week, or earnings in excess of the 30 times the federal minimum wage.<sup>30</sup> Disposable earnings are defined as wages remaining after required withholdings.<sup>31</sup> Note that specific debts are excluded from this limitation, including debts for spousal or child support payments and debts for state and federal taxes.<sup>32</sup> Also note, this is the maximum creditors can garnish under federal law, but many states protect higher amounts of income. The federal dollar amount limits are per debtor, not per creditor. Thus, if your client has several creditors seeking to enforce their judgments, the maximum that would be garnished at any one time is 25 percent of disposable earnings.

**Case Scenario:** At time of publication, the federal minimum wage is \$7.25 per hour. Maria currently works a minimum wage job only part-time, averaging 25 hours a week. Sometimes she gets extra hours and works as many as 35 hours per week. On weeks that she works less than 30 hours, earning \$217.50 or less, Citibank is unable to garnish her wages. However, when she works 35 hours, earning \$253.75, Citibank may garnish her wages. They are limited to \$36.25, the difference between her earnings and \$217.50, and cannot garnish a full 25 percent. If she lived in Massachusetts, all of her weekly wages would be exempt up to \$500 in 2016 and \$550 in 2017, and 85% exempt for wages above that level.

Under federal and state law, many types of benefits are exempt from enforcement. Exempt federal benefits include Social Security, Veterans', and Supplemental Security Income benefits.<sup>33</sup> Many states also protect child support payments and state benefits, but this varies by state. Generally, state benefits including public assistance, workers compensation, and unemployment insurance are exempt but check with your state.

If the creditor seeks to enforce its judgment against an asset, the process and impact can differ greatly by state and the asset involved. For a car loan, for example, the creditor can usually repossess the vehicle without suing your client. After that, the creditor may sue your client for the deficiency between the amount owed on the loan and the amount that the vehicle sold for at auction. Another common method of enforcement, as we saw in Maria's case, is to freeze or seize funds from a bank account. While many states offer protections for specific types of funds in a bank account or for specific amounts, even a freeze on an account can have serious consequences if scheduled payments for living necessities are bounced. Each state exempts specific types of property from seizure by creditors, but apart from these exemptions, ordinary creditors may be able to go after the debtor's vehicle, home, and less often household goods.<sup>34</sup> If you discover that your client has a judgment, contact an attorney in your area.

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<sup>30</sup> Consumer Credit Protection Act, 15 USCA § 1673(a).

<sup>31</sup> *Id.* § 1672(b).

<sup>32</sup> *Id.* § 1673(b).

<sup>33</sup> Other protected benefits include Civil Service and Federal Retirement and Disability benefits; Military Annuities and Survivors' Benefits; Student Assistance; Railroad Retirement Benefits; Merchant Seamen Wages; Longshoremen's and Harbor Workers' Death and Disability benefits; Foreign Service Retirement and Disability benefits.

<sup>34</sup> For more on state exemptions, see CAROLYN CARTER & ROBERT J. HOBBS, NATIONAL CONSUMER LAW CENTER, NO FRESH START (2013), available at <https://www.nclc.org/images/pdf/pr-reports/report-no-fresh-start.pdf>.

## Conclusion

Consumer debt issues can be both intimidating and emotionally difficult for clients and can jeopardize their safety as well as their path towards financial self-sufficiency. Many clients may not realize that taking action on their consumer debt can implicate their safety or put them in contact with their abusive partner again; as an advocate, you can help guide your clients through this process and ensure that they understand all of their options before taking any action.

## Additional Resources

- Some legal aid offices and law school clinics provide consumer representation. To find a free attorney in your area, search on [www.lawhelp.org](http://www.lawhelp.org) or [www.lsc.gov](http://www.lsc.gov).
- See sidebar above about partnership building.
- Hundreds of private lawyers who represent consumers against debt collectors for no or low fee are listed at [www.consumeradvocates.org](http://www.consumeradvocates.org). Private attorneys on the NACA list may help or suggest another attorney who handles such cases for a low or no fee.
- A local legal aid program may know of other legal resources available to help consumer defendants without cost to the client.
- Other training materials and resources from CSAJ:
  - [Debt in the Context of Safety: Coerced Debt & Debt Defense for Survivors](#) – CSAJ webinar featuring Adrienne Adams, Angela Littwin, Ariana Linder Mayer, and Matt Schedler
  - [Debt Prioritization and Collection Defense Resources](#) – CSAJ webinar featuring Fred Corbit.
  - [Debt collection agent form letter](#)
  - [Budgeting and Debt Prioritization](#) – training slides featuring CSAJ Expert Advisor, Katie VonDeLinde

# Five



## Identity Theft & Survivors of Domestic Violence

STRATEGIES FOR RESOLUTION & PROTECTION

By Amy Cao

### Introduction

One of the fastest growing white-collar crimes in the country today is identity theft. In 2014, the Bureau of Justice reported an estimated 17.6 million Americans were victims of identity theft.<sup>1</sup> Later that year, identity theft topped the Federal Trade Commission's national ranking list of consumer complaints for the 15th consecutive year, with nearly half a million complaints.<sup>2</sup> Identity theft victims often suffer severe losses, both financially and emotionally. Two-thirds of identity theft victims claim direct financial losses, including substantial out-of-pocket losses by those who had fraudulent new accounts opened in their name.<sup>3</sup> For many, the resulting distress compounds a great burden of emotional strain and anxiety around work and personal relationships. Although government agencies, credit bureaus, and law enforcement have made recent strides in improving identity theft prevention strategies and protocols for resolution, victims can spend months or even years resolving the financial problems that identity theft causes.

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<sup>1</sup> U.S. Dept. of Justice, Bureau of Justice Statistics, Victims of Identity Theft, 2014 (September 2015). Accessed at <http://www.bjs.gov/content/pub/pdf/vit14.pdf>.

<sup>2</sup> "Identity Theft Tops FTC's Consumer Complaint Categories Again in 2014," Federal Trade Commission (FTC) 2014 (February 2015). Accessed at <https://www.ftc.gov/news-events/press-releases/2015/02/identity-theft-tops-ftcs-consumer-complaint-categories-again-2014>.

<sup>3</sup> U.S. Dept. of Justice, Bureau of Justice Statistics, Victims of Identity Theft, 2014 (September 2015). Accessed at <http://www.bjs.gov/content/pub/pdf/vit14.pdf>.

Overwhelmingly, these dubious crimes are conducted remotely and anonymously. Most identity theft victims know nothing about their offender and never discover who is committing the crime.<sup>4</sup>

Personal information now proliferates across the Internet, fueled by large consumer demand to exchange information quickly and easily. Perpetrators appropriating sophisticated security tactics for cyber crime have helped usher in a new reality where data breaches, computer hacking, phishing attempts, and so-called suspicious activities are common threats to an individual's financial security. Close friends, family, or intimate partners can also simply steal one's personal information. Sometimes known as "friendly fraud" or "familiar fraud," identity theft can be an insidious form of intimate partner financial abuse, through which an abusive partner steals a survivor's personal information for his or her gain, and toward the survivor's undoing.

This chapter describes the significance of identity theft and its impact on survivors of domestic violence. It highlights some of the most common identity theft issues survivors face regarding their credit, tax situation, and banking safety. The chapter also discusses strategies, legal remedies, and tips for survivor-centered consumer advocacy essential to both survivors dealing with identity theft and their advocates. The purpose of this chapter is to present common situations and possible solutions without designating a single model, as there is no single sweeping approach to ameliorate the financial consequences survivors endure in the face of identity theft. It is important that these advocacy strategies be read in the context of a survivor's particular situation, heeding all appropriate security considerations to ensure a survivor's safety.

## Survivors are Uniquely Vulnerable

Survivors may come from relationships where their abusive partners exert dominance in different ways, including controlling combined resources by restricting a partner's access to assets, opening credit lines without permission and accruing massive debts, or filing false taxes. With abusive partners having total access to a partner's personal information and financial history, survivors of domestic violence and financial abuse are particularly vulnerable to identity theft. The numbers are significant: 16 percent of survivors are victims of identity theft and, of these, 24 percent report they know the thief as a family member, friend, partner, or spouse.<sup>5</sup>

Financial abuse, or economic abuse, occurs when an abusive partner takes control of or limits access to shared or individual assets or restricts the current or future earning potential of the survivor as a means of exerting power and control.<sup>6</sup> It is a pervasive component of the cycle of physical and emotional intimate partner violence and occurs in 98 percent of abusive relationships.<sup>7</sup>

**Identity theft** is one common tactic of financial abuse that exploits the accessibility of a survivor's personal information. It is defined as the unauthorized procurement of

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<sup>4</sup> Ibid.

<sup>5</sup> Identity Theft: The Aftermath 2009, Identity Theft Resource Center (ITRC), 2010. Accessed at [http://www.idtheftcenter.org/images/surveys\\_studies/Aftermath2009.pdf](http://www.idtheftcenter.org/images/surveys_studies/Aftermath2009.pdf).

<sup>6</sup> NCADV. (2015). Facts about domestic violence and economic abuse. Retrieved from [www.ncadv.org](http://www.ncadv.org).

<sup>7</sup> [https://www.gtcuw.org/\\_asset/yrrnws/2013-Domestic-Violence-Report.pdf](https://www.gtcuw.org/_asset/yrrnws/2013-Domestic-Violence-Report.pdf).

## Key Terms

**Identity theft:** unauthorized procurement of someone's personal or financial information to fraudulently obtain goods or services in the victim's name, or misuse for other fraudulent purposes.

**Credit report:** the physical representation of the information from the credit file in the format that is presented to consumers and businesses. Credit-related information for the credit reports is collected, stored, and summarized by Credit Reporting Agencies (CRAs).

**Police report:** also called an incident report, a police report is a document generated by law enforcement at a local police department or precinct that details a crime or incident of potentially illegal activity. It is often initiated or requested by the victim or witness of a crime, and used to initiate an investigate or provide formal documentation of an incident in court or with insurance companies.

**Affidavit:** a written statement confirmed by oath or affirmation, meaning it is signed by a person swearing the information is true, for use in evidence in court.

**Dispute letter:** a letter written by a consumer to a credit reporting agency challenging an error and providing supporting evidence for the purposes of correcting the error as reflected in one's credit report.

**Tax fraud:** occurs when a filer falsely reports information on a tax return to obtain a larger refund or decrease a tax bill.

**Federal Trade Commission (FTC):** the FTC is a bipartisan federal agency with the dual mission to protect consumers and promote market/business competition. FTC's mission is: to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.

someone's personal or financial information to fraudulently obtain goods or services in the victim's name, or misuse for other fraudulent purposes.<sup>8</sup>

## Devastating consequences

Identity theft not only threatens to re-traumatize and re-victimize those who have survived prolonged physical and emotional abuse -- resolution also poses significant costs. The average identity theft victim spends 60 hours and over \$1,300 resolving new accounts and other frauds.<sup>9</sup> A study by the Federal Trade Commission found that victims who spent more time resolving financial problems relating to their identity theft reported experiencing serious problems with work and family relationships causing severe emotional distress.<sup>10</sup>

Distinct from other forms of financial abuse, survivors often confront identity theft crimes even after they have left their abusive partner. The ramifications are longstanding. In some cases, the theft occurred during the relationship, but the survivor later experiences harassment from debt collectors and lengthy dispute processes. The abusive partner may also continue to commit fraud by opening new credit lines in the survivor's name and running up large debts or taking out loans in the survivor's name with no intention of paying them back. In all cases, these practices effectively sabotage the survivor's credit score. Precarious finances and poor credit foment difficult and confounding barriers for survivors who seek safe transitions into stable employment and housing for themselves and for their families.

### Survivor Identity Theft looks like:

- Opening credit cards in a survivor's name
- Getting a loan in a survivor's name
- Stealing public benefits from a survivor
- Accruing debt in a survivor's name
- Withdrawing funds using a survivor's information
- Forging a spouse's signature on joint tax returns or filing without permission

**Source: Federal Trade Commission**

### Impacts of Misuse:

- Denial of credit and loans
- Denial of public benefits
- Denial of medical care
- Federal tax debt or loss of refund
- Loss/denial of employment
- Wage garnishment
- Harassment by debt collectors
- Lawsuits
- Emotional distress and anxiety
- Time and money spent on resolution

<sup>8</sup> Adapted definition by the U.S. Department of Justice.

<sup>9</sup> <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-identity-theft-program/synovatereport.pdf>.

<sup>10</sup> Ibid.

## Jenna's Story

Survivors like Jenna from New York City have fallen prey to her partner's exploitation of her personal and financial information. Jenna's story illustrates some of the impact identity theft can have on survivors and their personal credit.

*Jenna was victim to an abusive boyfriend named David. David opened eight credit cards in her name over the past six years without her consent or knowledge by setting account preferences to electronic communications after he received the cards in the mail. Jenna was unaware that he had ever even opened accounts in her name until she reviewed her credit report with her financial coach. Jenna's boyfriend would use the cards to finance his drinking habit, his leisure activities, and even his business travel. Even though his employer would fully reimburse him for his business travel, David would only pay the minimum monthly payment on each card, pocketing the rest of the reimbursement into his individual bank accounts. He made sure that her minimums were always paid on time, prompting no correspondence via mail regarding overdue payments or collections that would alert her to the existence of the accounts. Thus the fraud went on for years.*

*Upon executing the safety plan created with her social worker, Jenna left her abusive boyfriend while he was at work. When you meet with her, she has just found out that what should have been a pristine credit file is tarnished with overwhelming debt. With \$60,000 of debt in her name, Jenna's credit limits are maxed out. This has left her with large debts that are exclusively in her name, and a credit file that's considered to be too heavily weighted in debt, paralyzing her ability to use her credit for things she needs. To protect the payment history portion of her accounts, Jenna began paying the minimum payments because David ceased paying them since her departure. But she's not sure how long she can keep it up.*

### Think About It

What are your reactions? What do you want to do? What else do you want to know about Jenna's relationship with David? What else would be helpful to know about Jenna as you discuss options? How does Jenna prioritize her economic and safety needs? What are her goals?

## Combating Identity Theft on a Credit Report: Step-by-Step

**Case Scenario:** *David's abusive control over Jenna's financial situation magnifies the harrowing experience of domestic abuse with the additional trauma of undermining her economic potential. Identity theft as financial abuse can be both overt and hidden. David did not need to rely on physical coercion alone; after all, he was uniquely positioned to know, watch, and wreck his partner's finances. Because they lived together for a number of years, he had easy access to financial documents, bank account numbers, balances, and basic personal identification like Jenna's passport and Social Security number. Although continuing to make monthly credit card payments allows Jenna to maintain a positive payment history, for now, she is not legally responsible for any debts incurred by someone who used her personal information without her explicit permission.<sup>11</sup>*

<sup>11</sup> The Fair Credit Reporting Act (FCRA)

The most common false assumption survivors make is that an identity theft victim is responsible for repaying debts when the identity thief is his or her spouse. This is not true, regardless of whether the identity thief is a spouse or a complete stranger committing the crime over the Internet. Survivors often mistakenly believe that they are accomplices to their abusive partners' crimes because they have not been able to prevent them from opening up fraudulent accounts, or have not reported their unconfirmed suspicions of identity theft to the police. This is not true.

## Assessing identity theft

To assist the conversation about finances and identity theft, a full and open assessment of the survivor's experiences, needs, and priorities is essential. The screening and assessment questions presented here are for issue spotting (often called "intake questions"), are not meant to be prescriptive, and conversations around identity theft should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

The questions below may help you screen for potential identity theft and support the assessment of your client's credit, debt, and financial situation:

- Do you have access to all of your personal documents and financial statements?
- Are you restricted from accessing your documents?
  - If not, does your partner have access to your personal identifying information, documents, or financial statements?
- Do you have a bank account? Is it a joint or individual account?
- Can your partner physically or electronically access your bank account or statements?
- Have you ever seen your credit report? Have you seen it recently?
- Was there anything on it that you did not recognize?
- Do you know or suspect that someone has used your personal information or your children's personal information to obtain credit or other goods?
- Have you ever received calls or letters from debt collectors about accounts that you didn't recognize?
- Have you ever been forced to sign for credit and/or large purchase?
- Have you or your children ever been claimed on a tax return without your permission?
- Has a tax preparer ever told you that the IRS rejected or was unable to accept your tax return?
- Have you ever received letters from the IRS or your State Tax Department stating that you had a problem with your taxes?<sup>12</sup>

Recovering from the fallout of an abusive relationship exacerbates the challenges of identity theft resolution, so it is important for advocates to ensure survivors understand that they are victims of identity theft, the financial harm is not their fault, and that there are some options to undo the damages to their finances. In taking steps toward resolution, survivors and their advocates should carefully assess moves that might put a survivor at greater risk for retaliation from their abusive partner. Resolving identity theft can alert an abusive partner to the action steps a survivor is taking, or even a survivor's whereabouts. Safety should always be considered the highest priority.

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<sup>12</sup> The New York City Domestic Violence Economic Justice Taskforce's Financial Development Subcommittee created all of the screening questions. If you have any questions about the Taskforce, please email Kate Reeves at [kreeves@thefinancialclinic.org](mailto:kreeves@thefinancialclinic.org) or Jana Morace at [jmorace@qls.is-nyc.org](mailto:jmorace@qls.is-nyc.org).

## Pull credit reports

A critical first step in uncovering identity theft is reviewing one's credit report. By asking survivors if they have recently reviewed their credit report, domestic violence service providers and advocates may help survivors start to take control of their financial lives. If the survivor has reviewed their report, the advocate should explain that accounts that the survivor did not willingly open are not their responsibility and should be disputed with the creditor. If the survivor has not recently reviewed their credit report--or has never seen it--the advocate should help the survivor retrieve free annual credit reports online at

### Practice Tip

While accessing an online credit report, the survivor should be mindful of their safety. A cunning identity thief can find ways to obtain someone else's credit report. If the thief is also their abusive partner, and if the survivor is living in a secret location, the survivor should be careful not to reveal their current address and instead use a P.O. box or the address of a trusted friend or family member.

annualcreditreport.com or through the mail from the three main credit bureaus: Equifax, Experian, and Transunion.<sup>13</sup>

See the **Credit Reporting and Repair** chapter of this Guidebook for detailed advocacy strategies on pulling and repairing credit.

## Review credit reports and submit an affidavit

Once the survivor has a credit report in hand, they should review it carefully and mark off any accounts that they do not recognize as their own. Accounts that an abusive partner forced the survivor to open should also be highlighted. Once these items are identified, the survivor should contact the creditor for each account to explain that they are a victim of identity theft. Most creditors will ask a victim of identity theft to complete an affidavit, on which the survivor can describe the circumstances that led to the identity theft. The creditor may ask the identity theft victim to complete an affidavit of his or her own or to submit the Federal Trade Commission's Identity Theft Affidavit Form.<sup>14</sup> To complete the affidavit, the survivor will need a non-relative witness and Section 20 filled out by a law enforcement officer, which can be requested when filing a police report. Depending on the creditor, this form may also require notarization.

### File a Police Report: Checklist

- Photo Identification
- Credit Report
- Related bank statements
- Affidavit
- FTC Memo
- Advocate letter
- Ask for a detective or a Domestic Violence Officer on-site if there is one

### Obtain a police report

Of the 68 percent of identity theft victims who contacted a credit bureau to remove fraudulent accounts, 18 percent provided a police report.<sup>15</sup> Although it is not a requirement, it is highly recommended that

<sup>13</sup> Under the Fair and Accurate Credit Transactions Act (FACTA) passed as an amendment to the Fair Credit Reporting Act (FCRA), each of the three credit reporting agencies must provide, upon request, a free credit report every twelve months to every consumer. These reports can be pulled from annualcreditreport.com. If the survivor cannot pull a credit report from annualcreditreport.com, they should mail away for hard copy reports. Follow this link for the mail-in form and instructions: <https://www.consumer.ftc.gov/articles/pdf-0093-annual-report-request-form.pdf>.

<sup>14</sup> The ID Theft Affidavit is a model form that can be used to report information to many creditors and reporting agencies and simplifies the process of alerting companies where a new account was opened in an identity theft victim's name. All major credit issuers, retailers, banks, and other financial institutions accept this form. For a copy of the ID Theft Affidavit, follow this link: <https://www.consumer.ftc.gov/articles/pdf-0094-identity-theft-affidavit.pdf>.

<sup>15</sup> <http://www.bjs.gov/content/pub/pdf/vit14.pdf>

victims of identity theft obtain a police report to document the identity theft. In fact, some creditors may delay removing fraudulent accounts from a victim's credit report if it is not accompanied by a police report. These can be obtained at a local police department, or precinct in the vicinity of where the identity theft took place.

For survivors who decide to get a police report, there are some important documents to bring and things to remember. In addition to taking the affidavit and fraud investigation documents to the precinct, the survivor should also bring their credit report and any statements they have from the credit card companies. Attending police officers may want to review the affidavit before following through with the report. If survivors reach this step, advocates should help make sure the police officer completes the portion near the end--section 20--that is designated for law enforcement. Filing a police report to document identity theft can be a daunting task. Advocates should do their best to empower survivors to be assertive and advocate for themselves at the police station. If the police are unwilling to cooperate, survivors can show them the FTC's Memo to Law Enforcement.<sup>17</sup> If a survivor is still unable to file a police report, they should explain the circumstances in the affidavit before submitting their documents to the Federal Trade Commission, to each creditor affected, and to the three credit bureaus.

Advocates should make sure that survivors document dates, police officer names, badge numbers, jurisdiction and any relevant case number in the event changes are made as their case funnels through the judicial system. It is worth noting that by submitting an affidavit and police report, the survivor is alerting authorities to a crime that could lead to criminal charges. If a survivor is living with the abusive

### **Think About It**

For survivors, this step may be challenging for several reasons, including unfamiliarity, distrust, or aversion to law enforcement. The Bureau of Justice Statistics reports that less than 10 percent of identity theft victims report their incident to the police. Among them, 26 percent believed it was not important enough to be reported to law enforcement, and 21 percent did not know how to file a report.<sup>16</sup> Survivors can fill out an FTC report with or without a police report.

### **Practice Tip**

How would you talk and decide with Jenna whether filing a police report is a good idea? For survivors concerned about filing a police report, or for survivors who would be at a greater safety risk by reporting the identity theft to the police, consider other strategies in credit repair. For example, setting up consumer fraud alerts or credit freezes may be an option for survivors still with abusive partners. Additionally, together with Jenna, weigh the benefits and tradeoffs of filing the FTC Affidavit with and without a police report. See the Credit Reporting and Repair chapter of this Guidebook for additional strategies to account for the particular safety risks in credit repair and involving the police.

### **Practice Tip**

Organization should keep track of police officers, departments, or precincts that are unhelpful or poorly treat survivors looking to address identify theft. Organizational leaders and advocates can schedule meetings and do other systems advocacy, demonstrating the extent of barriers in accessing police reports quickly, safely, and in ways that do not re-traumatize survivors.

<sup>16</sup> Ibid.

<sup>17</sup> <https://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0088-ftc-memo-law-enforcement.pdf>

partner or believes they might be in danger of retaliation, he or she should take additional precautions. Talk with Jenna about the possible outcomes. How would David react if he found out she went to the police? What would happen if he was charged?

## Remove or dispute fraudulent accounts

Sending these documents should trigger the credit bureaus to open a dispute and remove the fraudulent accounts from her credit file; and the creditors to relieve the identity theft victim of any responsibility paying debts associated with fraudulent accounts. Further, fraudulent accounts should be removed from a credit report altogether. If the creditor does not remove fraudulent information immediately, survivors and their advocates should write a credit report dispute letter to the consumer reporting agency demanding that the

### Practice Tip

Survivors should immediately stop making payment on debt or accounts that are not theirs and once they submit a dispute letter. While survivors may want to maintain good payment history, continuing to make payments on a fraudulent account might cause a problem when trying to get it removed in the future. The fraudulent account and any negative payment history that ensues should be removed from their report altogether after the dispute.

account(s) be removed (See **Credit Reporting and Repair** chapter).

Survivors and their advocates should check that each item disputed as fraudulent is made abundantly clear in the dispute letter and the attached credit report.

### Think About It

When taking these steps, survivors should be aware of any consequences that they might suffer if an abusive partner is still using a card or line of credit. Discuss with Jenna, for example, how David might react if a credit card is declined or he learns an account is frozen?

Restate the circumstances already documented in the affidavit and request that all errors are corrected. Dispute letters should also include copies police reports and photo ID, and sent via certified mail, "return receipt requested," to track its delivery.<sup>18</sup> Credit reporting agencies have 30 to 45 days to investigate disputed trade lines and confirm the amended results in writing and will issue a free, updated copy of the credit report.<sup>19</sup>

### Practice Tip

After submitting the dispute letters, advocates should help survivors evaluate whether it would be necessary to put a fraud alert or a security freeze on the survivor's credit file. See the **Credit Reporting & Repair** chapter for details on putting these in place.

<sup>18</sup> The Federal Trade Commission (FTC) has a sample dispute letter that should serve as a helpful guide for writing effective letters. It is available online at <https://www.consumer.ftc.gov/articles/0384-sample-letter-disputing-errors-your-credit-report>.

<sup>19</sup> The FTC declares that a free credit report issued by a reporting agency to reflect changes resulted by a dispute does not count as the consumer's annual free report. Upon request, the credit reporting agency must send notices of these corrections to anyone who has pulled the report in the past six months. Additionally, a corrected copy of the report may be sent to anyone who received a copy during the past two years for employment purposes.

## Add a personal statement

While undergoing the process of reporting fraud to creditors, survivors may still need to make purchases on credit. Credit checks are also common for applying for jobs or housing. Therefore, a survivor may want to consider adding a free personal statement to their credit report to explain their extenuating circumstances more thoroughly and provide a human element to bare data on their report that does not reflect an accurate credit history.

For victims of identity theft, particularly survivors, personal statements provide an opportunity to disclose any pending or ongoing disputes to demonstrate awareness and initiative. Personal statements are not necessary, but they express proactivity and a survivor's education about their consumer rights, which make them less vulnerable to debt collectors.

### Practice Tip

When it comes to writing personal statements, advocates can help survivors craft them. Some tips include: keeping them concise, under 100 words, and presenting specific details regarding dates and other supporting information to support the survivor's case. Personal statements, when written effectively, could help distance a survivor from their compromised accounts and trade lines.

## Safe Banking for Survivors

Abusive partners may exert control over household finances as a means to intimidate. Controlling combined assets may manifest as restricting bank account access, forcing a survivor to write bad checks or over-drafting accounts. In the most extreme situations, abusive partners demand survivors to deposit wages, refunds, and other income into bank accounts that they cannot access. In addition to reviewing their credit report, survivors should also review their bank account statements to detect any fraud or misuse.

**Case Scenario:** *Brendan has two children and receives public assistance. His abusive partner went to a major commercial bank and opened up an account for their youngest child using Brendan's name and Social Security number. His abusive partner deposited enough funds into the account to force public assistance to close Brendan's benefits case and then withdrew all of the funds leaving a negative balance in the account. Because the account has a negative balance, Brendan cannot close it. He is working with an advocate to rectify these issues, but in the meantime, Brendan has no income or resources to support his family.*

With nearly 30 percent of Americans unbanked or underbanked, there has been increasing recognition that financial security depends on financial access.<sup>20</sup> Without secure banking, survivors pay hefty transaction fees for check cashing, prepaid debit cards, or other banking substitutes. Survivors in shelters often report large sums of money kept in their rooms stolen, particularly during the tax season. Bank accounts provide a reliable and safe place to receive paychecks, pay bills, and begin savings.

<sup>20</sup> 2013 FDIC National Survey of Unbanked and Underbanked Households  
<https://www.fdic.gov/householdsurvey/2013report.pdf>

## Closing joint accounts

Some survivors and identity theft victims have joint bank accounts with their abusive partners. This is extremely dangerous as it gives the abusive partner unfettered access to the survivor's finances. Especially after a survivor has fled, access to a joint account allows an abusive partner to monitor transaction statements to track down survivors who are living in secret locations. Authorized access to this sensitive information makes it easier for an abusive partner to commit identity theft and harder for the identity theft victim to prove the crime.

Some banks require both account holders to give permission to close a joint account. Survivors holding joint accounts with their non-spouse abusive partners should withdraw

### Think About It

What do you think Jenna should do in this situation? How might David react? Now, what should Brendan do? How might Brendan's strategies and safety risks be different than Jenna's?

all monies from the account and close the account immediately to minimize their culpability for the abusive partner's financial actions.

If a survivor has a joint account with an abusive partner and is married, they should

consult a family law attorney to determine their rights and obligations for accessing shared funds (See **Family Law** chapter in this Guidebook).

Like in Brendan's situation, abusive partners often overdraw accounts, leaving survivors penniless and the accounts in poor standing in ChexSystems. ChexSystems, a check verification service and consumer credit reporting agency reports on a consumer's deposit account usage, explicitly indicating negative usage indicators such as check overdrafts, unsettled balances, depositing fraudulent checks, or suspicious account handling. The resulting "poor standing" designation precludes survivors from closing down current accounts and prevents them from opening new ones. On the other hand, unilaterally withdrawing funds from a joint bank account and closing it could anger an abusive partner

### Practice Tip

If it is too dangerous for the survivor to withdraw money and close the account, consider the option, weighing the benefits, of opening an individual account at a separate financial institution.

and put a survivor in danger. As with all other aspects of working with survivors of domestic violence, safety should be of paramount concern.

## Securing existing accounts

When an abusive partner has access to a survivor's personal and financial information, including their Social Security number, abusive partners may still be able to attain access to personal bank accounts. To protect their assets, survivors should immediately change ATM pins, mailing address and passwords to any existing bank accounts, even if they are the sole account holders. For some, it may be wise to withdraw all individual funds, close the account, and open an account at another bank.

## Opening a new account

Whether a survivor is living with an abusive partner or has left the relationship, it is important to establish a safe place to keep money in case of an emergency. If a survivor is concerned about the security of an existing account or would like to begin saving independently, they should consider opening up their own bank account to ensure that

their abusive partner cannot access their funds. What are alternative, safe banking options for Jenna?

To protect limited resources, minimize financial transaction costs, safely obtain any benefits assistance, deposit a tax refund, or simply to better manage spending, reliable banking services are essential.

Consumers without secure bank accounts spend approximately \$600 each year on expensive

fringe financial services including check cashers, pawnshops, and payday lenders. For survivors who have not had any prior experience with banking, it is essential for advocates to discuss banking options and their alternatives.

### Think About It

Place matters in banking. What if Jenna lives in a dense, urban, but resource poor neighborhood with few or no banking institutions? What if she lives in a rural area, far from bank branches? What is she's in a shelter or homeless and cannot provide a physical address? What might some alternative options be? How can you help plan with her ways to access banks, given her community context?

## Common barriers to banking

Establishing and maintaining a secure bank account for survivors is a critical piece of becoming financially secure, yet there exist many barriers that prevent survivors from easily opening up or securing existing bank accounts. For instance, survivors living in shelters are often denied bank accounts because they are unable to provide a physical address. In fact, one shelter director indicated that over 90 percent of its residents are unable to open bank accounts either because the survivor was unable to provide appropriate documents or a physical address.

Federal regulations require all financial institutions to establish their own Customer Identification Programs (CIP). At a minimum, a bank's CIP must collect proof of identity, mailing address, Social Security number or Individual Tax Identification Number (ITIN), and physical residential address from all who apply to open a bank account.<sup>22</sup> Passed as part of the USA Patriot Act, the requirement was implemented to prevent terrorists from holding contraband funds in the United States.

Unfortunately, the practical

implication of these rules also thwarts survivors of domestic violence from opening much-needed bank accounts. In most cities, domestic violence shelters are in confidential locations to maintain the safety of all its residents and staff. As a result, shelter residents are asked to not disclose their physical addresses to any person or institution--for their own best interest. (See the **Debt** chapter in this Guidebook for ways to establish confidential addresses.)

### Practice Tip

Alternative addresses to consider are those of an employer, relative, friend, post office box, or the shelter business address if the other party consents. Advocates can support survivors by writing advocacy letters on behalf of survivors that explain that under the federal regulations that require banks to develop Customer Information Programs (31 C.F.R. 103.121), banks may use the "business street address of next of kin or of another contact individual" for customers who do not have a physical address. See the sample document in the appendix for a template.<sup>21</sup>

<sup>21</sup> See Documenting Physical Address to Open Bank Account Letter Template in appendix

<sup>22</sup> See 31. CFR 103.121. "Customer Identification Programs for Banks, Savings Associations, Credit Unions, and Certain Non-Federally Regulated Banks."

## Banking advocacy

Since each bank has its own CIP federal compliance guidelines, the physical residential address requirement varies. Therefore, there are opportunities for survivors and their advocates to confer with individual bank branch managers and local credit unions to determine if alternative addresses would suffice.

### **Systems Tip: Develop a Relationship with a Local Bank**

Establishing a friendly rapport with a local bank branch may help survivors tremendously. One shelter reports that it built a relationship with a local bank that developed streamlined procedures so that shelter residents could more easily open up accounts. The bank has even come to the shelter to present on safe, affordable banking options for residents.

Another common barrier is a lack of documents necessary to open an account because they have been lost, stolen or made inaccessible. Replacing these documents will prove invaluable, not only for getting started with a new bank account, but also to secure a job and public benefits. See the tip sheet in the appendix for a list of requirements and contact information for various agencies to contact to replace lost documents.<sup>23</sup>

## Tax Fraud is a Form of Identity Theft

Tax fraud occurs when a filer falsely reports information on a tax return in order to obtain a larger refund or decrease a tax bill. Knowing a sizeable tax refund or dispersed tax debt burden may be issued if the abusive partner claims a survivor and/or their dependents on their taxes, abusive partners misuse survivors' personal information without their explicit permission. Abusive partners also often commit tax fraud when they claim children who do not live with them and who they do not financially support, but who live with and are supported by survivors.

Tax fraud is common in financially abusive relationships where one partner has control over financial information and income records. Tax fraud is also a form of identity theft. The Financial Clinic, a non-profit organization that works to build the financial security of working poor Americans, found that 15 percent of survivors and/or their children in New York City had been claimed on someone else's tax return without their knowledge or consent. Advocates and service providers should ask survivors whether they have

### **Practice Tip**

Survivors should attempt to obtain copies of Social Security cards, birth certificates, school records and medical records that confirm their identities, the relationships between the household members and that the survivor is the head of the household. Survivors should also consider procuring a PIN number from the IRS, which can protect their identity at tax time. The PIN number can help survivors avoid being repeated victims of tax fraud and allow them instead to access the tax credits and benefits that they rightfully earned as workers, caretakers, and parents. Creating separate PIN numbers for children will further protect a family's tax refund from being stolen from abusive partners and other unscrupulous actors.

previously filed their taxes and whether they prepared the taxes themselves. Advocates should also inquire about whether survivors have received notices from the Internal Revenue Service (IRS) or their state tax department.

<sup>23</sup> See How to Replace Lost Documents

A notice could signal that the survivor's return has been flagged for an audit, or reveal that the survivor has a tax debt. See the **Tax Advocacy** chapter of this Guidebook for a comprehensive list of screening and assessment questions related to tax fraud and other tax concerns. Advocates can support victims of tax fraud by helping them contact the IRS and Treasury Department to report any instances of tax identity theft, and assist them in providing the documents needed to secure any tax credits they are due.

Advocates should also encourage survivors to file their taxes every year at the beginning of each tax season. Filing early can prevent an abusive partner from fraudulently filing for the survivor and claiming their dependents. Additionally, filing every year allows the IRS to keep a record of the fraud, which serves as added proof for the survivor's case in obtaining proper credits or absolving them of their abusive partner's tax liabilities. If survivors have not filed their taxes recently, they are eligible to back file for the last three years. Advocates should refer survivors to a Volunteer Income Tax Assistance (VITA) site to back file their taxes for free.<sup>24</sup>

See the **Tax Advocacy** chapter of this Guidebook for strategies on determining filing status, filing income taxes, and tips for undocumented and cash-only earners.

## Survivor Protection Against Identity Theft

One of the most valuable first steps in building a survivor's financial security is helping them understand their rights. Caught up in tangled financial predicaments, survivors often make financial decisions based on false assumptions and misinformation, especially regarding liabilities that the abusive partner incurred through identity theft.

### Know your rights

Survivors dealing with identity theft often face complex legal issues. Resolving these issues can empower survivors to rebuild their lives. Advocates can help assess a survivor's needs and discuss possible routes for legal assistance that can help along the way to identity theft recovery. Survivors and advocates should be informed about these legal strategies, but note that the following is not a comprehensive guide to legal provisions and is not intended to provide legal advice or the complete statutory provisions. For specific legal questions, survivors and their advocates should arrange for advice from legal counsel (See also the **Tax Advocacy** chapter in this Guidebook).

Tax liability: If a survivor's signature was forged or obtained by coercion, the return is not valid. If a survivor signed a joint tax return under duress, there is substantiation for identity theft. To prove duress, a survivor must show that, at the moment the return was signed, they were unable to resist the demands of the abusive partner to sign the return, and that they would not have signed the return otherwise.

Innocent spouse relief: A survivor whose federal tax return was incurred without their knowledge, through identity theft or coercion, can eliminate their tax liability by applying for innocent spouse relief. To qualify, a filer must show that when they signed a joint tax return, they were unaware or had no reason to know that an

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<sup>24</sup> Many, but not all, VITA programs have the capacity to help customers with tax filings for previous years. It is best to contact a VITA site directly to ask if they have volunteers that can help with tax filings for previous years. For a list of VITA sites in your community, consult the IRS website: <http://irs.treasury.gov/freetaxprep/>.

understated tax existed and that it would be inequitable to hold identity theft victim liable for the unpaid tax. **Keep in mind:** Innocent spouse relief is a powerful remedy that the IRS invokes sparingly. It is difficult for any filer, especially survivors of domestic violence, to prove the elements required for innocent spouse relief. The most challenging part is showing that the filer had "no knowledge or reason to know" that an understated tax existed.

Premium tax credit: New procedures announced by the IRS Notice 2104-23 allow eligible taxpayers to claim the Sec. 36B premium tax credit even when married filing separately.<sup>25</sup> The IRS has rightly recognized that many abused spouses do not meet the six-month separation requirements, particularly survivors who recently fled their abusive spouses and sought emergency shelter. Under new regulations, a married survivor and taxpayer may file a return as "Married Filing Separately" and take the premium tax credit (PTC) if the filer is living apart from their spouse when filing and is unable to file a joint return because the filer is a survivor of domestic violence or spousal abandonment.<sup>26</sup> A survivor claiming PTC must also declare on the tax return that she or he meets these criteria by checking the box on Form 8692.

Address confidentiality program: Executive Law § 108 establishes an Address Confidentiality Program (ACP) that allows survivors of domestic violence to apply for a substitute address through the Office of the Secretary of State. Approved applicants can use this address to receive mail, apply for licenses, apply for banking products, access benefits, register to vote and create records at local and state government agencies -- all while keeping their actual address undisclosed. Through the program, mail is received by the Secretary of State and is immediately forwarded to the address specified by the participating survivor.

Specific ACP guidelines differ by state, but they are all intended to issue additional protections to survivors of domestic violence who fear for their own and their children's safety and are designed to comply with bank customer identification programs (CIPs).<sup>27</sup> The Financial Crime Enforcement Network (FinCEN) provides a guidance memo regarding the use of ACPs in acquiring bank accounts.<sup>28</sup> The guidance explicitly permits financial institutions to accept addresses from an ACP as part of verifying a customer's identity and thus CIP compliant. Survivors and their advocates can provide the guidance memo to financial institutions to confirm that accepting an address from an ACP will keep the institutions in accordance with federal regulation.

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<sup>25</sup> Notice 2014-23 Eligibility for Premium Tax Credit for Victims of Domestic Abuse, accessible at <https://www.irs.gov/pub/irs-drop/n-14-23.pdf>.

<sup>26</sup> This exception for the PTC is limited to "victim[s] of domestic abuse or spousal abandonment." The IRS defines domestic abuse as "physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently. All the facts and circumstances are considered in determining whether an individual is abused, including the effects of alcohol or drug abuse by the victim's spouse. Depending on the facts and circumstances, abuse of an individual's child or other family member living in the household may constitute an abuse of the individual. Full text accessible online at <https://www.irs.gov/pub/irs-pdf/i8962.pdf>.

<sup>27</sup> The Office of the Secretary of State has the authority to designate state, local, or nonprofit agencies that provide counseling, referral, shelter, or other specialized services to survivors and assist them with applying to the program. A compendium of state and local laws regarding housing for domestic violence survivors, including relevant ACP laws is made available by the National Housing Law Project and is accessible at <http://nhlp.org/files/CombinedD-HousingStateLawCompendium.pdf>.

<sup>28</sup> US Department of Treasury, Financial Crimes Enforcement Network, "Ruling on Customer Identification Program Rule -- Address Confidentiality Programs," Nov. 3, 2009. The guidance memo can be accessed at [https://www.fincen.gov/statutes\\_regs/guidance/pdf/fin-2009-r003.pdf](https://www.fincen.gov/statutes_regs/guidance/pdf/fin-2009-r003.pdf).

Fraud Alert or Security Freeze: When a survivor suspects they are at risk for identity theft impacting their credit, the two main options for immediate redress are either a fraud alert or a security freeze. See the **Credit Reporting & Repair** chapter of this Guidebook for details on setting up these protections.

## Safety and Prevention

The consequences of identity theft create entrenched financial insecurity that frequently compels survivors to stay in dangerous relationships or drive them to return to abusive partners for financial dependency. Survivors and their advocates should consider taking necessary precautions to defend themselves against identity theft. However, before taking action towards prevention, credit resolution, bank account closures, alleviating unlawful tax burdens, or any legal process, it is important to consider each individual's situation and plan around their particular safety concerns.

### Guard your digits

It is important that survivors reclaim their personal identification information to utilize as the bearings for their independence, including employment, tax preparation, housing, or credit to buy the things they need. Personal information also includes contact information which could be used to track down survivors and could put them perhaps at greater risk if found. Shred important documents before throwing them away. Keep account numbers, checkbooks and passwords protected in a safe place and changed regularly.

### Just opt out!

For many people, banks and credit card companies pull "soft" inquiries dozens of times per year to screen them for credit card offers. They use this information to send unsolicited credit card offers to those with sufficient credit. This becomes a risk for identity theft because anyone could accept an offer as long as they have access to a survivor's Social Security number. Especially if a survivor wants to decrease the amount of mailings they receive to reduce their paper trail or because they lack permanent housing, they should simply opt out. To discontinue unwanted credit inquiries and offers, visit [optoutprescreen.com](http://optoutprescreen.com) or call 1-888-5OPT-OUT.

## Conclusion

The pervasion of identity theft as an increased consumer risk makes it ever critical to identify risks and impose effective prevention strategies. Because it can thwart survivors from obtaining safe housing, securing gainful employment, and establishing financial security, survivors should begin addressing the harmful effects of identity theft as soon as it is detected. Building financial security is critical for anyone who is fleeing an abusive partner or contemplating leaving an abusive relationship. Advocates at domestic violence service organizations may help survivors take concrete steps to redress identity theft while making the survivor more financially secure along the way.

Laying the groundwork for a new financial landscape can be difficult, but the support of strong advocates can arm survivors with the tools to protect their credit and finances in the future. It will also help them break the cycle of violence and financial control once and for all so that they can strive for their goals and personal priorities again.

## Additional Resources

- CSAJ webinar, [Identity Theft in the Context of Domestic Violence](#)
- [Identity Theft and Police Reports](#), The Financial Clinic
  - More resources from the Financial Clinic
    - Resources for the [Domestic Violence Field](#) (particular focus on New York City)
    - Resources on [Financial Security](#)
- The American Bar Association, [Identity Theft: A Low-Income Issue](#)

# Six



## Navigating Student Loan Solutions for Survivors

By Persis Yu<sup>1</sup>

### Introduction

Many survivors find themselves dealing with student loan debt. Currently, in the United States, roughly 43 million people owe more than \$1.3 trillion on their student loans. This makes student loan debt the second largest source of debt in the United States, just behind mortgages. Unfortunately, federal data show that more than one in four of these borrowers are delinquent or in default on their federal student loans.

There are extraordinary penalties for borrowers who go into default, and survivors of domestic violence may face particular challenges in repaying their loans and further risks to safety and future economic security once in default or when trying to resolve student loan issues. Thus, helping a survivor avoid default or get out of default may be important to their financial security.

This chapter will provide an overview of the student loan system, summarize student loan problems domestic violence survivors may face, and outline factors and steps advocates should consider when guiding clients to the right solution to access, protect, and repay student loans.

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<sup>1</sup> NCLC intern, Jessica Park, provided substantial work and contributions to this chapter.

## Anne's Story

Consider Anne's story as you think about the connection between abuse and student loans.

*Anne took out a subsidized and an unsubsidized Stafford Loan and a Perkins loan to support her undergraduate education, but dropped out after one year of school when she became pregnant by her then-boyfriend, Ben. They are now married. Ben's abuse started shortly after the birth of their first child. He is their sole source of income, and they now have four children to support. Since leaving school, Anne has not been able to obtain a job due to Ben's abuse and her need to care for the children. After a recent physical assault by Ben, Anne fled to a shelter with her children. While helping her kids adjust she has also begun seeking employment.*

*Since her student loans came due for repayment, Anne has not been able to make consistent payments. Though she is not exactly sure when she made her last payments, Anne does not believe she is in default yet. Ben controls the finances, makes all the tax filings, keeps records of Anne's personal information (social security number, etc.), and has prevented Anne's access to such information in the past. Anne is unfamiliar with her financial or tax information and does not know how to access that information readily. She comes to you, hoping for help in getting a handle on all her finances. To make ends meet, she knows she may need to return to school in the future and so is worried about how to pay for her current loans.*

### Think About It

How are the student loans affecting Anne's financial situation right now? What are her financial priorities to keep her and her children safe? What are her financial goals? What else do you want to know about her and her relationship with Ben to assist your advocacy? Are there any cultural considerations you need to know more about to assist your advocacy?

## Domestic Violence and Student Loan Debt

Student loan debt is one of the largest sources of debt in the U.S. Survivors face unique risks of default, as well as challenges in resolving, paying off, and/or accessing new student loans.

Survivors trying to resolve student loan issues may face unique difficulties because of their abusive partners or because of their vulnerability as survivors. For example, survivors may have trouble accessing income-driven repayment plans not only due to lack of information about the plans, but also due to difficulty obtaining personal information, income information, or necessary documentation from or because of an abusive partner. Partners may also take out loans in survivors' name without their knowledge; when this happens, the survivor may not even know about the loans until they are in default. Survivors who have defaulted on their student loans face further financial hardship because the lender may seek repayment through involuntary collection.

Additionally, survivors may face extra challenges in repaying their loans. Survivors may be targets of predatory for-profit schools that recruit individuals who are vulnerable, unemployed, and/or low-income and that leave students with heavy debts and little improvement in economic mobility. A survivor who did not complete school may have

extra difficulty in repaying these loans without a degree. A survivor may also be unable to repay these loans because the abusive partner withholds financial support and any income must pay for necessities (e.g. housing, food, supporting children).

Survivors may also find that they need to go back to school to support themselves and/or their families, or to escape a dangerous situation. However, borrowers in default on federal student loans are ineligible for federal financial aid, so survivors who want to go back to school may need help avoiding or getting out of default.

In-depth screening questions are provided later in this chapter to help determine the available solutions for a student loan borrower. However, before determining the solution, it is important to find out how the debt is currently impacting the survivor. For example, if the survivor is currently making payments, it is helpful to know whether those payments are affordable. If the survivor is not making payments, have there been any consequences such as harassing phone calls or garnished wages? Finally, what is the survivor's long-term goal? It might be to go back to school. If the borrower is the victim of identity theft, it might be to eliminate the loan. Or the borrower's main goal may be to resolve credit reporting problems caused by a defaulted student loan. The solution will vary depending on the borrower's goal.

**Case Scenario:** *In Anne's circumstance, we see that she wants to get her finances in order, and that she has missed several payments but is not yet experiencing the consequences of default. This may mean that her payments are unaffordable. Anne also indicated that she might go back to school. Therefore, Anne's goal both short term and long term is likely to stay out of default and make repayment affordable.*

## The impact of student loan debt

The impact of student loan debt cuts across many domains of a survivor's financial and physical well-being. In a recent study, employment instability (reduced hours, changing jobs, trouble finding a job) lasted up to three years after an abusive relationship ended. Advancing educational attainment is often key to securing jobs or promotion that can provide for a family. Having a delinquent or defaulted loan can severely limit the options available to survivors. For example, borrowers in default are not eligible for federal financial aid, and are often targeted for predatory, high-cost lending.

Also, defaulted loans can impact a survivor's credit history. A negative credit history can make a survivor's life more difficult in many ways, negatively impacting applications for an apartment, car, or even a job (see **Debt** and **Credit Reporting & Repair** chapters in this Guidebook).

In the face of economic abuse and other debts, student loan debt presents a tough challenge to survivors' long-term options, with profound implications for their economic security and continued safety.

## Key Terms and Concepts

### Types of loans

Student loan law is riddled with terminology, and it is important to understand the basics. There are a number of types of federal student loans, which, with the exception of Perkins loans, may be either a Direct or FFEL loan. As the name indicates, a **Direct Loan** is a

federal loan in which the federal government directly provides the funds. Direct loans can take the form of a **Stafford**, **Direct PLUS**, or **Direct Consolidation** loan.

Stafford loans are available to undergraduate and graduate students and are subsidized or unsubsidized. Subsidized Stafford loans are awarded based on financial need, and borrowers are not charged interest before the repayment period begins. Unsubsidized Stafford loans are not awarded based on need, and interest is charged at the time the loan is disbursed. PLUS loans can be Parent or Grad PLUS loans, but the student must first be determined to be eligible for a Stafford loan. Parent PLUS loans allow parents to borrow for dependent undergraduate children, while grad PLUS loans allow graduate or professional students to borrow. In both cases, a credit check must be completed, and the borrower cannot have adverse credit history. A consolidation loan is created when a borrower consolidates all, some, or one of their existing student loans. Consolidation loans will be discussed later in the chapter.

One type of student loan, the **FFEL loan**, is no longer offered, but many borrowers took them out in the past and are still repaying them. With FFEL loans, the federal government guaranteed the loan but did not directly provide funding for the loan. Instead, the funds came from a non-governmental financial institution. FFEL loans also took the form of a Stafford, PLUS, or consolidation loan.

A **Perkins loan** is originated and serviced by the participating school, but the federal government provides money to the school to help fund the loans.

## Repayment options

Federal loan borrowers have many different repayment options as well as routes to postpone payment temporarily. **Income-driven repayment plans** are useful options for borrowers to reduce unsustainable monthly payments. These plans calculate monthly payments based on income and family size and forgive any outstanding balances after 20 to 25 years of repayment. There are several different income-driven repayment plans, often referred to by their acronyms: **IBR** (Income-Based Repayment), **PAYE** (Pay As You Earn), **REPAYE** (Revised Pay As You Earn), and **ICR** (Income-Contingent Repayment). Each has different terms and eligibility requirements, as discussed below.

**Forbearance** and **deferment** are options allowing a borrower to postpone or reduce monthly payments. When a subsidized loan is in a deferment, the borrower is not charged interest.

Generally, the most complete remedy a borrower can obtain on a student loan is **discharge** or **loan cancellation**, which

## Key Terms

**Direct Loan:** A loan in which the federal government directly provides the funds. Common forms of direct loans are a Stafford, Direct PLUS, or Direct Consolidation loan.

**FFEL loan:** Loans that the federal government guaranteed but did not directly provide funding for the loan. They are no longer offered, but many borrowers took them out in the past and are still repaying them.

**Income-driven repayment plans:** Loan repayment plans that calculate monthly payments based on income and family size and forgive any outstanding balances after 20 to 25 years of repayment. Common plans include: IBR (Income-Based Repayment), PAYE (Pay As You Earn), REPAYE (Revised Pay As You Earn), and ICR (Income-Contingent Repayment).

**Forbearance and deferment:** Postponing or reducing monthly payments on a loan. When a subsidized loan is in a deferment, the borrower is not charged interest.

**Discharge or loan cancellation:** When the outstanding principal and interest amounts of loans are forgiven, and in some cases allows for refunds of amounts already paid by the borrower.

**Private student loans:** Loans made by banks and other financial institutions without federal guaranty.

**Loan holder or lender:** The entity or person holding the promissory note and has the right to collect on the loan.

**Loan servicer:** The company responsible for collecting payments, responding to customer inquiries, and performing administrative tasks to maintain the loan on behalf of the lender.

**Guaranty agencies:** State or private agencies that administer the federal guaranteed loan program.

**Debt collector:** A third party who pursues a borrower in an attempt to collect on a defaulted loan.

**Delinquent or in default:** When a borrower has missed payments on a student loan.

**Collection:** Methods to collect past due (delinquent) payments on loans, and may include involuntary methods such as seizing tax refunds, garnishing wages, and offsetting social security benefits, to recover unpaid loan amounts.

**Consolidation:** The process by which federal student loans can be combined or converted into a Direct Consolidation loan.

**Rehabilitation:** Taking a loan out of default by making nine on-time payments in agreed-upon amounts within ten consecutive months.

forgives outstanding principal and interest amounts and in some cases allows for refunds of amounts already paid by the borrower. The federal loan program includes several statutory loan cancellation programs, but it is difficult to qualify for a loan discharge.

In contrast to federal student loans, **private student loans** are ones made by banks and other financial institutions without federal guaranty. As previously mentioned, private loans provide fewer protections and are not required to provide income-driven repayment plans, deferments, or discharges.

Borrowers will need to know the different entities responsible for their loans. The **loan holder** or **lender** is the entity or person holding the promissory note and has the right to collect on the loan. A **loan servicer** is a company responsible for collecting payments, responding to customer inquiries, and performing administrative tasks to maintain the loan on behalf of the lender. **Guaranty agencies** are state or private agencies that administer the federal guaranteed loan program. A **debt collector** is a third party who pursues a borrower in an attempt to collect on a defaulted loan.

## Key Legal Concepts

Student loan law can seem complicated, but understanding some of the key legal concepts can help advocates familiarize themselves with the system and better advise clients.

### Loan type and related protections

Figuring out the type(s) of student loan(s) the survivor has is the most important piece of information to obtain. Student loans for higher education can come in the form of federal or private loans, but federal loans are the most common. The most common types of federal loans are Stafford loans (which may be either subsidized or unsubsidized), PLUS loans (grad and parent), Perkins loans, and consolidation loans. Except for Perkins loans, these loans can be Direct Loans (made directly by the federal government) or Federal Family Education Loan (“FFEL”) Program loans (made by private lenders but guaranteed by the federal government). FFEL origination was eliminated as of July 1, 2010, but FFEL regulations continue to apply to outstanding FFEL loans many of which are still serviced and held by FFEL lenders or guaranty agencies. Private loans are often made by banks or other financial institutions without financial backing by the federal government, and often require a co-signer.

**Joint Consolidation Loans** were created when married borrowers consolidated their loans with their spouses’ loans, leaving both spouses jointly and severally liable for repayment of the total. The ability to jointly consolidate loans was eliminated in July 2006, but some borrowers still have joint consolidation loans. These loans pose special difficulties for domestic violence survivors because both spouses must cooperate to obtain relief—even if they have divorced and maintain separate finances and tax filings. For example, borrowers may repay joint consolidation loans under income-driven repayment plans, but both spouses must qualify for and request the same plan. Further, the loan servicer will determine eligibility and monthly payment amounts based on both spouses’ combined income and eligible federal loans—again, even if they have divorced. A survivor who successfully discharges the portion of the joint consolidation loan they incurred for their education will still be liable for the remaining balance, incurred by a spouse. Unfortunately, there is no way to split a joint consolidation loan, but the [Department of Education](#) has encouraged borrowers facing domestic violence issues to contact the FSA Ombudsman to explore options in confidence.

**Federal loans** come with important protections for borrowers, including programs to repay the loans based on a percentage of the borrower's income, programs allowing the borrower to delay payment temporarily, and, in limited circumstances, programs to discharge the loans. These protections are crucial and generally make federal loans safer for borrowers than private loans. Unfortunately, federal loans are hard to escape. If a borrower defaults, the government may then utilize extraordinary powers to collect. The options for a federal loan borrower who is unable to repay differ based on both the type of loans and whether it is in default.

Since private loans are not subject to the rules governing federal loans, private loans provide fewer protections to borrowers. Additionally, private loans may have higher interest rates than federal loans, and the rates may be variable. Financially distressed borrowers are generally at the mercy of the creditor, and private lenders are generally inflexible in accommodating borrowers. Private lenders do not have the same range of collection tools as the government and will usually hire third-party debt collectors to pressure borrowers for repayment.

### Loan status and consequences of default

A key to understanding the borrower's options is to know the status of the loans. As will be discussed in this chapter, survivors in good standing on their loans should consider various repayment options. If a borrower has missed payments on a student loan, the loan may be either **delinquent** or in **default**. A borrower is delinquent after missing the scheduled loan payments by the stipulated due dates. Once the borrower is delinquent for a certain period of time, the loan will be in default, and the entire loan balance becomes due at that time. For most federal loans, the period between delinquency and default is 270 days. For private loans, default will be determined by the terms of the promissory note.

Becoming delinquent on a student loan will negatively impact the borrower's credit history. Defaulting on a federal loan, however, has more serious consequences, and avoiding or getting out of default should be a top priority. Once a borrower defaults on a federal loan, the loan will likely be transferred to a private debt collection agency, at which point the borrower may be subjected to aggressive and sometimes illegal collection tactics. The government is also able to use involuntary **collection** methods, such as seizing tax refunds, garnishing wages, and offsetting social security benefits, to recover unpaid loan amounts. Furthermore, the borrower is ineligible for additional financial aid while in default, which is a problem for borrowers who need financial aid to continue their education. As will be discussed in further detail, some borrowers may be eligible to get out of default and into an affordable repayment plan.

## Understanding the Client's Situation

Though many student loan borrowers face similar issues, it is important to take an individualized approach to understanding the client's situation to find the best solution that weighs both physical and economic safety risks.

The National Student Loan Data System ("NSDLS") is a database run by the US Department of Education compiling data from schools and various loan programs and can help identify what kind of federal loan a borrower has. Borrowers can access their federal student loan information online at [www.nslds.ed.gov/](http://www.nslds.ed.gov/).

## Assessing student loan debt

Because of the complicated experiences and feelings surrounding debt for many survivors, advocacy to address student loan debt requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called, intake questions), are not meant to be prescriptive, and conversations around student loans should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

The following information can help guide interactions with the survivor:

- Do you know what kind of loan(s) you have (and use the National Student Loan Data System (NSLDS) to confirm)?  
**Note:** The difference between federal and private loans is not always clear because the same lender may make both kinds of loans. Since the NSLDS only lists federal loans, determining that a loan is listed in the NSLDS is a way of verifying that it is a federal loan. The borrower's promissory note will also state the federal loan program under which the loan was extended if it is a federal loan.
- What is the status of your loans (e.g., current, delinquent, default, in forbearance or deferment)? If the loan is a federal loan, the NSLDS will show its current status.
- How much do you still owe? What are the monthly payments? Do you remember the date of the last payment?
- [If the survivor is married] Do or did you and your spouse file taxes jointly or separately? Who controls the household finances, tax filings, etc.?
- What is your current income, family size, and financial ability?
- Has the lender tried to seek repayment from you?
- Where and when did you go to school? Did you finish or have problems with the school?
- Are you trying to go back to school? Would you need more loans to do so? If so, then avoiding or getting out of default is critical.
- Have you ever filed for bankruptcy?
- Are you a veteran or have a disability?

### Practice Tip

For survivors who have changed their name, especially those who have not engaged with their loans since being in school, many loan documents will be in the name used when the survivor was in school. Depending on the reason for the name change, this can be a sensitive issue for survivors.

Because private loans operate on the terms of their individual promissory notes, some of these general considerations may not be relevant, and advocates should closely read the loan agreement to determine next steps. Private loans will not show up on the borrower's NSLDS report. Though there is no official database of private loans, many will appear on the borrower's credit report.

**Case Scenario:** *For Anne, because she is not certain of the status of her loan, reviewing the NSLDS report will be critical. It will also ensure that she knows about all of the federal loans in her name. Assuming that the NSLDS report confirms that her loans are not yet in default, it will help determine approximately how much time she has to resolve the loan situation.*

## Remedies and Solutions for Federal Loans

### Loan discharge or cancellation

Regardless of whether the borrower is in default, loan discharge should be considered first because it is the best option and provides the most complete remedy for borrowers. The primary discharge programs are related to school closure and certain school conduct, disability or death, profession, or repayment plan. School-related discharges are available in some limited circumstances, such as if the borrower was unable to complete an

educational program because the school closed, or if the school falsely certified the borrower's eligibility for federal aid.

#### Practice Tip

The Department of Education maintains a detailed online chart of discharge programs on the Federal Student Aid [website](#). For more information on loan discharge, see the [Federal Student Loan Cancellation](#) page on NCLC's Student Loan Borrower Assistance site.

The National Consumer Law Center ("NCLC") established the Student Loan Borrower Assistance Project, a free online resource for information about student loan borrower rights and relief. The Project is not associated with the federal government.

Additionally, a borrower may be able to raise a borrower defense to repayment premised on misconduct by the school that harmed the borrower—for example, if the school breached a contract with the borrower, or misrepresented job placement rates and the borrower relied on those placement rates when deciding to attend. A successful

borrower defense may result in full or partial cancellation of the loan. As of this writing, the Department of Education is developing new rules governing borrower defenses, so this area is in flux. For more information, see the [borrower defense page](#) on NCLC's Student Loan Borrower Assistance site.

Applying for a federal loan discharge or borrower defense is free, and application forms are available through the Department of Education website or the borrower's loan servicer.

#### Practice Tip

The borrower may also consider seeking a discharge through bankruptcy. Declaring bankruptcy can protect borrower against collection actions on all debt for a period of time, but bankruptcy can have additional costs and remain part of the borrower's credit history. Furthermore, discharging student loans through bankruptcy is much more difficult than discharging other debt. For more information on discharging loans under bankruptcy, see Chapter 11 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015). Also, see the Bankruptcy chapter in this Guidebook.

### Pre-default repayment

If the client is not yet in default, the next step is to consider pre-default repayment options, including income-driven repayment plans, which are often a desirable alternative to standard, graduated, or extended repayment plans for borrowers facing difficulty with their payments. Borrowers may also want to consider forbearance or deferment.

## Standard, graduated, and extended repayment plans

Under the standard repayment plan, monthly payments will be the same amount for each installment period and will only change if there is a variable interest rate. Standard plans carry the highest monthly payments, and generally, borrowers must pay within five to ten years. Borrowers who do not select a different repayment plan within the allotted time period will be automatically assigned the standard repayment plan. Under the graduated repayment plan, monthly payments start out low and increase over the course of the repayment period. For most borrowers, income-driven repayment plans are a safer option because they base payments on actual income, rather than an expectation of reliable raises, and they reduce payments if income drops. The extended repayment plan applies to borrowers with a loan exceeding \$30,000. Under this plan, the borrower may repay on either a fixed or graduated scale for longer than ten years, but no more than 30 years.

### Practice Tip

Beware of “Student Loan Relief” companies. Predatory companies have targeted borrowers, particularly low-income and vulnerable borrowers, by claiming to provide a service to aid borrowers in applying for reduced loan payments. These companies often charge excessive fees and may falsely hold themselves out to be authorized agents of the federal government. Applying for reduced loan payments on a federal student loan is free, and can be done online using the Department of Education’s website or with help from the borrower’s loan servicer. Similarly, applying for a federal loan discharge is free. Be wary of any company your client may have paid to aid in applying for relief.

## Income-driven repayment plans

In order to stay out of default while also being able to afford her monthly payments, Anne will want to explore one of the income-driven repayment plans. Income-driven repayment plans calculate the borrower’s monthly loan repayment using income and family size. Though lower payments under income-driven repayment plans mean borrowers may take longer to pay off loans, this is preferable to the consequences of default. There are currently four main income-driven repayment options: Income Based Repayment (“IBR”), Pay As You Earn (“PAYE”), Revised Pay As You Earn (“REPAYE”) and Income Contingent Repayment (“ICR”) plans.

### Income-Driven Repayment Plan

The Department of Education’s income-driven repayment plan selection form includes the option to place the borrower on the plan with the lowest monthly payment of the income-driven plans for which the borrower qualifies.

IBR, PAYE, and REPAYE are the three newest and most generous plans for borrowers. All three plans calculate payments at 10 or 15 percent of the borrower’s discretionary income. (See table below.) For these repayment plans, discretionary income is defined as adjusted gross income in excess of 150 percent of the poverty guidelines. After 20 or 25 years of repayment, any remaining balance will be forgiven. (These forgiven amounts are currently treated as taxable income.) Under each of the three plans, the borrower’s calculated monthly payment will be \$0 if the borrower’s adjusted gross income is below 150 percent of the poverty guideline. Since Anne is not currently working and does not appear to have any taxable income, she is like to qualify for a zero dollar monthly payment. This means that although she will not be making payments on her loans, her

Failure to pay will not be considered default, and she will accrue time in the repayment plan that will count towards forgiveness.

Subtle differences may influence which of these three plans is likely to be best for a given borrower. For more details on the comparison of REPAYE, PAYE, and IBR, see § 3.3.3.9 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015).

Plan	Repayment Calculation
<b>Pre-July 2014 IBR</b>	Lesser of 15% of discretionary income or monthly payments the borrower would have made under the standard repayment plan as of the date the borrower entered plan
<b>PAYE</b>	Lesser of 10% of discretionary income or monthly payments the borrower would have made under the standard repayment plan as of the date the borrower entered plan
<b>REPAYE</b>	10% of discretionary income

ICR plans are primarily useful for borrowers who had parent PLUS loans and consolidated them into Direct consolidation loans. Monthly payments on ICR are usually higher than the other income-driven repayment plans. Balances are forgiven after 25 years of repayment.

**Practice Tip**

It is important for survivors, especially those who are in a shelter or otherwise in an unstable housing situation, to understand these consequences and to have a plan in place to ensure that they can receive their loan notices. In some circumstances, a survivor's inability to receive loan notices may mean that an income-driven repayment plan is not a viable option.

Eligibility for income-driven repayment plans varies and is based on (i) the type of loan, (ii) when the loan was originated, and (iii) whether the borrower has partial financial hardship. Importantly, parent PLUS loans are not eligible for any of these plans. A summary chart created by the Institute for College Access and Success to help borrowers understand the various income-driven repayment plans is available [online](#).

For all income-driven repayment plans, borrowers must annually recertify their income and family size so the monthly payment amount can be readjusted as necessary each year. Borrowers may also request their loan servicer to recalculate the monthly

payment amount at any time based on a loss of income or increase in family size. Failing to recertify on time annually may lead to negative consequences, including an abrupt increase in monthly payments and capitalization of accrued interest.

Borrowers may apply for income-driven repayment plans on the StudentLoans.gov website or by sending in a paper form that can be obtained from the borrower's loan servicer. Unfortunately, applying for an income-driven repayment plan can be complicated for survivors, especially for survivors like Anne who do not have access to important financial documents. Survivors who are separated from their spouses or file taxes separately should take note of some differences in the repayment

**Public Comments to U.S. Department of Education on Student Loans for Married Borrowers**

CSAJ and NCLC partnered to provide comments to the U.S. Department of Education (DOE) regarding married survivors' experiences with student loan debt when the DOE was formulating the REPAYE plan. This resulted in the exception for survivors to continue filing taxes as "married filing separately" and qualify for the income-based repayment plan. See the [comments here](#).

plans. For married borrowers who file taxes separately from their spouses, under IBR and PAYE, only the borrower's own individual income is be considered. REPAYE generally considers both the borrower's and spouse's income and eligible student

debt, although the Department of Education allows individualized treatment for borrowers who certify that they are either separated from their spouses or are unable to reasonably access their spouses' income information—a common circumstance in domestic violence situations. A borrower whose sole source of income is public assistance can certify that they have no taxable income and will have a \$0 monthly payment.

For more detailed information on the various income-driven repayment plans and how to apply, please see Chapter 3 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015), or go to NCLC's [Student Loan Borrower Assistance](#) site. The Department of Education also maintains helpful information about federal student loan repayment options, including on the Student Loans.gov website and in a [February 2016 FAQ](#).

### Postponement options

As in Anne's case, a borrower who is not yet in default may also consider postponing repayment as an alternative to a repayment plan. Deferments or forbearances are postponement options, and both carry qualification requirements and different implications for accruing interest.

Deferments, which allow the borrower to postpone loan repayments, are available in limited circumstances. The grounds for deferment that are most likely to be relevant to survivors are that the borrower is currently in school, is unemployed, or faces economic hardship. Deferment is an option only for borrowers not yet in default. Deferment can be particularly useful because interest will not accrue on subsidized loans or Perkins loans during the deferment period. However, interest will still accrue on all other federal loans.

#### Practice Tip

When discussing the repayment options, note the implications of the survivor's tax filing and discuss the option of certifying the survivor's separation or inability to obtain information. For more on tax filing status and tax related issues, see the Tax Advocacy chapter in this Guidebook.

#### Repayment Estimator

The Department of Education [online repayment estimator](#) is a tool allowing borrowers to estimate their monthly payments under different payment plans using their FSA ID (or estimates of their loan balances and rates) and income.

#### Federal Student Aid Identification

Borrowers must use their Federal Student Aid ("FSA") ID to access the Department of Education's FSA online systems, including NSLDS and online applications for income-driven repayment plans and loan consolidation. Borrowers can create or recover their [FSA ID online](#).

#### Practice Tip

Advocates should be aware that borrowers may be steered into a deferment or forbearance. These can be administratively easier for servicers to complete. On the surface, a deferment or forbearance may seem more relevant to the borrower's circumstances. For example, Anne may be tempted to apply for an economic hardship forbearance or an unemployment forbearance. But in many cases, an income-driven repayment plan will be more favorable, especially in the long term. For low-income borrowers, monthly payments may be \$0, and thus will provide the same benefit as a deferment or forbearance, while also allowing the borrower to accrue time towards the 20 or 25 year forgiveness period.

If Anne was to apply and qualify for deferments, her subsidized and Perkins loans would not accrue interest, but her unsubsidized loan would.

Each deferment can be granted for up to six months, and the borrower must reapply to extend the deferment after the deferment period expires. Deferments generally carry maximum time limits. For example, a borrower may not obtain more than three years' worth of economic hardship deferments. The borrower may reach out to the loan servicer to obtain a deferment form or access most of the [forms on NCLC's Student Loan Borrower Assistance](#).

If Anne does not qualify for deferment, she may need to consider forbearance instead. During forbearance, interest will continue to accrue on all loans. Similar to deferment, forbearance is a method of postponing payment, but can also be a means of gaining an extension on payments or making smaller payments. For borrowers not yet in default, forbearance can delay going into default. Forbearance is also available to borrowers even if the 270-day default threshold has been passed, as long as the loan has not been transferred to a guaranty agency or collector. A borrower who was on an income-driven repayment plan but did not recertify in time may be able to obtain a forbearance that will prevent the loan from going into default during the gap while the monthly payment is

recalculated based on the late recertification. A forbearance can also be backdated to cure a delinquency.

#### Practice Tip

Forbearance is a tool for borrowers to postpone or reduce payments if financial distress is not likely to last long. What did your financial evaluation with Anne reveal about her short and long-term economic situation? Does she anticipate needing a short-term reprieve or are other expenses, debts, or bills going to take priority for the foreseeable future? For more information on repayment postponement options, please see Chapter 4 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015).

#### Getting out of default

Assume Anne is not eligible for loan discharge, and she is unable to resolve her student loan issues. More than 270 days pass from Anne's last payment, and she is now in default. The next step is to consider Anne's options to get out of default—specifically, **consolidation** or **rehabilitation**. Once Anne is out of default, she may access the various repayment plan options discussed above.

**Consolidation** is the process by which federal student loans can be combined or converted into a Direct Consolidation loan. The newly

consolidated loan is considered a new loan and offers a fresh start by getting the borrower out of default. Importantly, to be eligible for consolidation, the borrower must have at least one outstanding FFEL or Direct loan. The borrower must also elect to either (a) make three consecutive reasonable and affordable payments (which will be based on the borrower's total financial circumstances), or (b) agree to select an income-driven repayment plan for repayment of the new consolidation loan. Most borrowers will select an income-driven repayment plan and will thus be eligible for a prompt consolidation. If the

loans the borrower wishes to consolidate are subject to judgment or wage garnishment, the judgment or garnishment must be vacated or lifted, respectively, before the borrower can pursue consolidation.

#### Practice Tip

Most forms are available in both English and Spanish. However, Consolidation applications are currently only available in English.

A borrower can also **rehabilitate** a loan out of default by making nine on-time payments in agreed-upon amounts within ten consecutive months. The

borrower will generally need to provide income information to the loan holder to determine the payment amount, generally set at 15 percent of discretionary income (the pre-2014 IBR formula), subject to a minimum payment of \$5 per month. If the payment amount using the 15 percent formula is not affordable, borrowers can request that the amount be based upon their income and expenses. However, the borrowers should be aware that the monthly payment amount after getting out of default will likely be 10 or 15 percent of discretionary income. Notably, loans rehabilitated on or after August 14, 2008, cannot be rehabilitated again. Therefore, before choosing rehabilitation, the borrower should ensure that the repayment plan after getting out of default will be affordable. As with consolidation, loans that are subject to a judgment are not eligible to be rehabilitated.

Consolidation and rehabilitation both offer benefits and drawbacks that borrowers should carefully weigh in light of their circumstances. Consolidation tends to be a faster and more reliable means of getting out of default than rehabilitation.

However, some borrowers will be ineligible to consolidate out of default, for example, if they have already consolidated all of their federal loans into a Direct Consolidation loan. Some borrowers may prefer rehabilitation because, unlike consolidation, rehabilitation removes the loan default from the borrower's credit history (though it does not remove missed payments or other negative history associated with the defaulted loans). A [comparison of rehabilitation and consolidation](#) can be found on the Student Loan Borrower Assistance website.

#### Think About It

If a borrower's wages are being garnished while also making monthly payments on that same loan under a loan rehabilitation agreement, the loan holder must continue collecting the loan by garnishment until the borrower makes five qualifying payments under the rehabilitation agreement. If Anne is experiencing a wage garnishment but also wants to rehabilitate her loans. After the garnishment, she may not be able to afford to pay 15 percent of her discretionary income. To resolve this problem, Anne can request that her rehabilitation payment be based upon her income and expenses. This calculation would consider the garnishment in the calculation of her expenses.

**Case Scenario:** *What does Anne's credit report look like? Is she concerned about improving her credit score (i.e. for housing or employment purposes)? What are her other financial goals? Rehabilitation might be slightly better for her credit score, but consolidation may get her out of default and set her payments at an affordable level more quickly. Which is more important for Anne's current situation? Is anything likely to tip the scales? Weigh all these questions and walk through each option when helping Anne decide if either of these options is workable. And see the Credit Reporting and Repair chapter in this Guidebook for a holistic look at prioritizing debts and repairing credit for survivors.*

Additionally, borrowers with parent PLUS loans should be careful when consolidating because if the borrower consolidates a parent PLUS loan with other federal student loans, the PLUS loan "taints" the entire consolidation loan and renders it ineligible for IBR, PAYE, or REPAYE.

With both consolidation and rehabilitation, collection fees may be added to the principal balance. However, loans held by the government may not be charged collection fees for rehabilitation. For more information on consolidation and rehabilitation, see Chapter 7 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015) and NCLC's [Student Loan Borrower Assistance site](#).

## Collections

As previously mentioned, the federal government has extraordinary powers to collect on student loans. For example, the government may use administrative wage garnishment or seize tax refunds to collect defaulted federal student loans. Borrowers can challenge these collection actions, but timing is critical. Borrowers should check all notices to determine whether it is possible to request a hearing in time to prevent a collection action. Borrowers can request a hearing at any time, but if the request is made after the deadline on the notice, the collection action will occur until the resolution of the hearing. A borrower who does not have any money or property that can be legally taken to pay the debt is collection-proof. However, the federal government has such extraordinary collection powers—including interception of tax refunds and offset of certain government benefits—that it is rare for a student loan debtor to be completely collection-proof.

### Practice Tip

Note, there is no statute of limitations on the government collecting on defaulted federal loans. Therefore, even if a client is collection-proof, circumstances could change so that they may not be collection proof in the future. If Anne receives a notice indicating that her tax refund is subject to offset, she may be tempted to ignore this notice because Ben claimed the kids on his return and she is not expecting a refund this year. However, next year, she is expecting to work and have custody of the kids and will likely have a sizable refund that includes the Earned Income Tax Credit. The notice for tax offsets applies to future tax years as well, so ignoring the notice will jeopardize that future refund.

The federal government and FFEL loan guarantee agencies rely heavily on private collection agencies, which may also employ more “traditional” collection efforts, including making collection calls and sending collection letters. The involvement of private collection agencies may confuse borrowers as to who to contact regarding their loans and has also been found to foster abusive debt collection practices. Information about which private collection agency is collecting on a federal student loan can be obtained from the Department of Education’s Default Resolution Group (“DRG”) for loans held by the Department or, for FFEL loans, the guaranty agency identified on NSLDS. Borrowers can find contact information for DRG or their guaranty agency on the NSLDS report. When seeking to get out of default on a loan being collected by a private collection agency, borrowers or their advocates will generally need to deal with that agency to enter a rehabilitation agreement. If consolidating out of default, borrowers can apply directly [online](#).

For more information on the collection process, the major collection players, possible defenses to student loan collection lawsuits, and possible fair debt collection claims, see Chapters 8, 9, 12, and 13 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015). Also, see the Debt chapter of this Guidebook for additional debt collection and defense strategies.

## Private Loans

Private loans can go into default as soon as a borrower misses a payment. The borrower should check what, if any, default conditions and grace periods are specified in the loan contract. Options for the borrower will differ based on the terms of the loan agreement. For example, some lenders may offer forbearance, deferment, or discharge options.

However, borrowers should be aware that private lenders may charge fees if the borrower calls upon any such option.

## Additional and Unique Considerations for Survivors

Domestic violence survivors may face unique complications when trying to address student loan issues. Because abusive partners may have controlled the finances and tax filings, survivors may have limited understanding or knowledge of income information. This can impede or slow the process for a survivor trying to apply for available remedies. Survivors may also face real barriers to accessing documentation or information. A

survivor who is still married to the abusive partner and files taxes jointly may encounter difficulty getting spousal information or signatures for income-driven repayment plan applications or accessing money for payments.

### Practice Tips

- If the borrower is in default, the next step is to try and negotiate with the lender, unless the borrower has a legal claim or defense against the lender or entity collecting on the loan.
- Private loans may not be consolidated into a Direct Consolidation loan.
- The borrower may have claims or defenses against the lender or collector, including claims that the statute of limitations has expired, the entity collecting on the loan has no authority to do so, or the lender is liable for school misconduct. Importantly, making a payment on a loan will reset the statute of limitations in many states.
- If a private collection agency is used, borrowers may have claims under the Fair Debt Collections Practices Act.
- For more on private student loan relief, see Chapter 12 in National Consumer Law Center, [Student Loan Law](#) (5<sup>th</sup> ed. 2015). The Consumer Financial Protection Bureau also provides a [student loan assistance tool](#) to help guide analysis of private loans.

**Case Scenario:** *In Anne's situation, she may also believe the only way to access important documentation and information is to go back home where Ben is, thus exposing herself to harm. Anne may avoid these problems by accessing loan documents online, electronically importing tax information into income-driven repayment application forms, certifying if she is unable to access Ben's financial information reasonably, and recertifying electronically. Given that Ben also has been handling her student loan accounts for many years, he may have sufficient information to hack into her online accounts and may be able to see Anne's application with her current contact information. Borrowers should always assess the risks of putting their current address on any document.*

A survivor experiencing housing instability may also have issues receiving critical information or notifications. Since all the income-driven repayment plans, deferments, and forbearances need to be annually renewed or recertified, it is important for the survivor to stay in contact with the lender. For federal loans, the survivor should contact the loan servicer with updated address information and should consider signing up for electronic communications if appropriate. Some survivors may opt to have their mail sent to friends and family. See the Debt chapter in this Guidebook for tips on setting up confidential mailing addresses for survivors.

Survivors who are in repayment or are delinquent should work hard to stay out of default. Survivors in default, however, need to be realistic about their capacity, especially if they are collection-proof. While there are many options available to borrowers, many of the

affordable repayment plans require a borrower to be proactive for several years in order to stay in good standing on the loan. Failing to follow through can result in re-defaulting. Unfortunately, re-defaulting can be worse than staying in default because consolidation and rehabilitation are only available one time.

For more referral resources, see NCLC's Student Loan Borrower Assistance [referral page](#) or reference the [contact list](#) maintained by the Department of Education for various service centers. If the client has difficulty understanding English, language assistance services for public information can be reached by emailing [Ed.Language.Assistance@ed.gov](mailto:Ed.Language.Assistance@ed.gov) or by calling 1-800-872-5327.

## Conclusion

Because the student loan system can be difficult to understand and navigate, student loan issues can become another burden and keep survivors from moving forward. By helping survivors understand and address the situation, advocates can help survivors tackle the problem and move on.

## Additional Resources

- National Consumer Law Center, Student Loan Law (5<sup>th</sup> ed. 2015), updated available online at [www.library.nclc.org](http://www.library.nclc.org)
- National Consumer Law Center, Student Loan Borrower Assistance (<http://www.studentloanborrowerassistance.org/>)
- Center for Survivor Agency and Justice, [Public Comments to U.S. Department of Education on Student Loans for Married Borrowers](#) (<https://csaj.org/library/view/testimony-to-u.s.-department-of-education-on-student-loans-for-married-borr>)
- Consumer Financial Protection Bureau, Repay Student Debt (<http://www.consumerfinance.gov/paying-for-college/repay-student-debt>)
- U.S. Department of Education, Federal Student Aid, Glossary ([https://studentaid.ed.gov/sa/glossary#Federal\\_Student\\_Aid\\_Programs](https://studentaid.ed.gov/sa/glossary#Federal_Student_Aid_Programs))
- U. S. Department of Education, Federal Student Aid, *Income-Driven Repayment Plans: Questions and Answers*, February 2016 (<https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment-q-and-a.pdf>)
- U.S. Department of Education, National Student Loan Data System, (<https://www.nslds.ed.gov/>)
- U.S. Department of Education, Repayment Estimator (<https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action>)
- U.S. Department of Education, Consumer Advocate FAQs (<http://ifap.ed.gov/eannouncements/attachments/ConsumerAdvocateFAQs.pdf>)
- U.S. Department of Education, Federal Student Aid ([www.studentloans.gov](http://www.studentloans.gov))
- The Institute for College Access and Success, Summary of Income-Driven Repayment [Plans](#) ([http://ticas.org/sites/default/files/pub\\_files/existing\\_idr\\_options.pdf](http://ticas.org/sites/default/files/pub_files/existing_idr_options.pdf))

# Seven



## Bankruptcy & Alternatives for Survivors

**By Karen Merrill Tjapkes & Sarah Boiling Mancini**

### Introduction

Filing bankruptcy may allow an individual to obtain relief from all or most of their debts. It can be a powerful tool for a person who is overwhelmed by debt and attempting to restructure or reduce their financial obligations. This ability to reduce or restructure debt can be especially important for survivors of domestic violence, who may have debt problems arising from or exacerbated by the violence they have experienced.

This chapter will cover the basics of bankruptcy, the differences between Chapter 7 and Chapter 13 bankruptcy, important timing considerations, and alternatives to bankruptcy. We also explore ways to protect a survivor's privacy and safety in bankruptcy and issues that may arise when a survivor is a creditor in a former partner's bankruptcy case.

## Padma's Story

Padma's story below highlights the circumstances that may lead a survivor to consider filing for bankruptcy and how bankruptcy might help.

*Padmasari is a 41-year-old woman from India. She was forced by her now ex-husband to move with him to the United States. He was abusive when she first married him, and he continued to be abusive after they moved to the US, including forbidding her from having contact with the outside world. In noticeably broken English, she contacts you because she is about to be evicted from her apartment due to inability to pay the rent.*

*She obtained a divorce from her abusive ex-husband about a year ago, after her neighbors called the police during the last physical assault. Although her ex-husband was ordered by the domestic relations court to pay their joint credit card bills and to pay child support to her, he has not paid anything. Instead, he has threatened that if she doesn't pay the credit card bills herself, he will take the children away from her. Even though she has secured a full-time job, while raising her two children, she still cannot always make ends meet.*

*Because her ex-husband will not pay the credit card bills, creditors have sued Padma. The creditors are garnishing her wages and threatening to seize other property as well. Padma is losing so much of her weekly paycheck that she cannot afford to pay her rent. Her landlord has said that she must pay up or move out by the end of the month. If she doesn't, he will take her to court. Padma is desperately worried that she will become homeless and that the court will allow her ex-husband to take custody of their children.*

### Think About It

Now that you know a little about Padma's situation, you start to think about questions you will need to explore with her to determine if bankruptcy could help her address these problems. What are her top priorities? What is her perspective about bankruptcy as an option, in light of her culture, beliefs, and life experiences? What impact might bankruptcy have on her safety and what risks might her ex-husband pose if she decided to file bankruptcy?

## Domestic Violence and Bankruptcy

Unfortunately, and all too often, survivors of domestic violence may find themselves saddled with debt as they attempt to establish a life separate from their abusive partners. Survivors who stay in the relationship might also be dealing with burdensome debt problems. Survivors can incur debt in myriad ways during a relationship (e.g. coerced debt or other economic abuse, medical debt from injury – see earlier **Credit Reporting & Repair** and **Debt** chapters in this Guidebook) and in seeking safety or leaving (e.g. using credit for relocating, legal fees). Survivors can also incur debts in the short and long-term due to reduced income or failure of an abusive partner to pay child support or joint debts.

Survivors face unique circumstances that might lead to filing bankruptcy. A substudy within the Consumer Bankruptcy Project, the leading national study of consumer bankruptcies, found that among partnered women filing bankruptcy, 17.8% (or nearly 1 in

5) reported experiencing domestic violence within a year before filing bankruptcy.<sup>1</sup> Some of the debt may be itself abuse—using debt as a means of exercising abusive control—a concept termed “coercive debt.”<sup>2</sup>

There are often limited ways to deal with these debts. The domestic relations court may allocate payment responsibility between spouses, but the domestic relations court is unable to amend or modify the underlying contract with the creditor, and thus cannot force the creditor to accept this allocation of responsibility.<sup>3</sup> This means the survivor can, and probably will, be sued if the debt remains unpaid even if the domestic relations court orders that it is the ex’s responsibility to pay. While the survivor may have defenses especially if it is a situation of coerced debt that may rise to the level of fraud or identity theft (See both **Debt, Identity Theft**, and **Family Law** chapters in this Guidebook), often the survivor may end up with a judgment against them.

If a survivor is then subject to collection that puts their wages and assets at risk, they may very well find that their independent financial life will begin to fall apart. Wage garnishment can lead to an inability to pay rent or the mortgage, putting them at risk of homelessness. The risk of homelessness may result in threats of removing the children from their custody.

Because of the inability of the domestic relations court to adequately address these collection situations, and because of the potentially catastrophic consequences of doing nothing, many survivors may find that bankruptcy may be the last and best option to preserve their family and housing stability. This chapter is intended to provide an overview of the bankruptcy process, the advantages and disadvantages of filing bankruptcy, and special considerations that are an important part of helping a survivor making the decision to file, and filing, a bankruptcy petition.

## Assessing bankruptcy as an option

Because of the complicated experiences and feelings surrounding finances and debt for many survivors, advocacy to address bankruptcy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called “intake questions”), are not meant to be prescriptive, and conversations around a survivor’s financial situation and bankruptcy should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Here are some initial screening questions that may prove helpful in working with a survivor of intimate partner violence to evaluate bankruptcy as an option:

- How much debt do you have, and what kinds of debt? (Such as mortgage, car loan, credit cards, medical debt, payday loans, car title loans, student loans, or tax debts?)
- Have you been able to maintain minimum payments on your debts?
- Are your creditors threatening to take action against you? What measures, and when?

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<sup>1</sup> Professor Angela Littwin, the co-principal investigator on the Consumer Bankruptcy Project IV, discusses these findings in *Coerced Debt: the Role of Consumer Credit in Domestic Violence*, Vol. 100, pp 1-74.

<sup>2</sup> A For more information about coerced debt, see CSAJ’s [webinar](https://csaj.org/calendar/view/149/) featuring Angela Littwin and Adrienne Adams: Debt in the Context of Safety: Coerced Debt and Debt Defense: <https://csaj.org/calendar/view/149/>

<sup>3</sup> See Chapter 12, Addressing Barriers for Domestic Violence Survivors in Civil Court.

- What kind of income and assets do you have that might be at risk if a creditor obtains a judgment against you?
- Have you made large payments to any single creditor? Have you given money to any friends or family members in the last year?
- Have you ever filed bankruptcy before? If so, when?

## The impact of bankruptcy

Bankruptcy is ultimately about a fresh start for a debtor, and there are many important things that filing bankruptcy can do for a survivor. The most important benefit of bankruptcy is eliminating the legal obligation to pay most (and sometimes all) of their debts by entry of the **bankruptcy discharge**. Even before the discharge is entered, under a legal concept called the **automatic stay**, the filing of bankruptcy will stop all collection efforts including halting foreclosure, repossession, or wage garnishment. The automatic stay can also prevent the termination of utility service or require that utilities be reconnected. Filing bankruptcy may discharge amounts due for the overpayment of certain governmental benefits, such as an overpayment of Social Security, as long as there was not fraud involved. In some cases, filing bankruptcy may even force the return of property or wages that have been seized by a creditor. Indeed, bankruptcy presents a powerful tool that should be considered for survivors in financial distress.

## Limits of bankruptcy

There are some things, however, that bankruptcy cannot do or does not do easily. Bankruptcy cannot eliminate all the rights of "secured" creditors. For example, while filing bankruptcy can stop the mortgage bank from foreclosing or the car financing company from repossessing the car temporarily, the secured creditor can seek permission from the bankruptcy court to proceed against the collateral, unless the debtor can bring the loan current. In a Chapter 13 bankruptcy, discussed below, the bankruptcy plan may provide the opportunity to get the loan caught up. And, the debtor may at least discharge any deficiency even if the collateral is sold. Additionally, if a landlord has already obtained a judgment for possession against a survivor and they do not meet the special requirements set out in the bankruptcy code, then the bankruptcy usually will not prevent the landlord from moving forward with the eviction.

**Case Scenario:** *In talking with Padma, you learn that her landlord is threatening to file for eviction at the end of the month unless she can pay up by then, which she says she can't do. You explain that if she wants to try to stay in her apartment, and use the bankruptcy to stop the eviction, she would need to file before he obtains a judgment against her in an eviction case. This will be an important timing consideration if she decides to file for bankruptcy.*

## Key Terms

**Bankruptcy discharge:** the order from the court saying that certain debts are wiped out and may no longer be collected from the debtor.

**Automatic stay:** the injunction that takes effect immediately upon filing of a bankruptcy case that prevents any actions to collect a debt or take the debtor's property – including stopping a foreclosure, repossession, or garnishment in its tracks.

**Adversary proceeding:** A separate court case within the bankruptcy case.

**Chapter 7 bankruptcy:** The debtor asks the court to discharge their debts without undertaking a formal payment plan or reorganization of the survivor's financial affairs. Debtors must pass an income based "means test."

**Chapter 13 bankruptcy:** A form of bankruptcy most often filed when a debtor is attempting to make payment arrangements so they can keep property, for example, if the debtor wants to bring their mortgage payments current so that they can keep the house.

**Debt management plan:** in which the debtor pays one monthly payment that gets distributed among the existing creditors, who often waive interest or late fees as part of the plan.

**Debt settlement company:** These companies collect payments from the debtor over time and hold the money in an account, then attempt to negotiate short payoffs with creditors in one-time lump sum payments.

**Loan modification:** This typically means bringing the mortgage current and reducing the monthly payment to an affordable level.

**Judgment proof:** A term to describe debtors who do not have any income that is subject to collection by creditors.

**Meeting of creditors.** A meeting where the bankruptcy trustee is there to ask questions of the debtor under oath, to ensure that all information has been truthfully and completely disclosed in the case. Creditors are allowed to attend but rarely do.

**Proof of claim:** A form that lets the bankruptcy court know how much is owed to that creditor and the nature of the debt.

**Priority Debts:** Certain debts that get paid before other creditors, and are not dischargeable in the bankruptcy.

**Domestic support obligations:** Child support and alimony. These obligations are both priority debts and nondischargeable in bankruptcy.

There are also certain debts that are treated differently and often cannot be discharged, including child support or spousal support/alimony (the bankruptcy code calls these “domestic support obligations”), criminal fines, debts that were incurred due to fraud, most student loans,<sup>4</sup> and some taxes.<sup>5</sup> Often, whether one of these debts is dischargeable will be determined in an **adversary proceeding**, which is a separate court case within the bankruptcy case.

**Case Scenario:** *In Padma’s situation, you are able to determine that all of her debts would be dischargeable in bankruptcy. She explains to you that aside from her rent, she owes \$2,500 to Discover Card, which is now garnishing her paycheck, \$3,700 to Citibank, \$300 in medical bills, and \$250 to Sprint for an old cell phone that has now been disconnected. There was also a car that she and her ex-husband bought together that was repossessed a few months before their divorce, and after selling it, the creditor claimed that \$2,300 was still owed. After assessing her situation, you can see that Padma, by filing bankruptcy, would be able to discharge her unsecured debt and stop the garnishment of her wages so that she could afford to catch up on the rent. You learn that Padma is hesitant about the idea of filing bankruptcy, in part because of her religious beliefs. She tells you that debt is very problematic for her as a Hindu. However, she wants to consider bankruptcy as an option, because she is struggling to pay her bills and the fear of losing her children is her biggest concern. You explain that you know this is a difficult decision, that you are going to advise Padma about things she would need to know before filing bankruptcy, and that she can then make a decision about next steps in light of all of her options and priorities.*

## Filing for Bankruptcy

Consumers usually file either a Chapter 7 (liquidation) or Chapter 13 (payment plan) bankruptcy. There is also a special bankruptcy process for family farmers and fishermen (Chapter 12) or for business reorganization (Chapter 11). To obtain relief under any Chapter of the bankruptcy code, consumers must first complete a pre-filing credit counseling course within 180 days before filing bankruptcy, and they must complete a financial management course after filing to receive the discharge order. Some bankruptcy attorneys typically use a particular counseling agency for their clients; otherwise, the survivor can find a list of approved agencies online.<sup>6</sup> Consumers must also file substantial financial disclosures with the bankruptcy court in support of their petition for bankruptcy.

There are fees for filing bankruptcy. The costs include the price of the credit counseling and financial management courses (which range from \$15 to \$50, although some providers will waive the fee for lower income debtors). There is also a filing fee of \$335 for a 7 case and \$310 for a Chapter 13 (these fees are adjusted periodically, so it is wise to double check your local bankruptcy court's website). The bankruptcy court has the discretion to waive a Chapter 7 filing fee for debtors under 150% of the poverty level; the bankruptcy court may also permit a debtor to pay the filing fee in

### Practice Tip

You might consider setting up an emergency fund to help pay the Chapter 13 filing fee for survivors who are unable to pay it, or partnering with other community organizations that can help with this kind of emergency expense.

<sup>4</sup> See Guidebook Chapter 6 regarding Student Loans.

<sup>5</sup> See Guidebook Chapter 9 regarding Income Taxes.

<sup>6</sup> Approved credit counselors by state may be found here: <https://www.justice.gov/ust/list-credit-counseling-agencies-approved-pursuant-11-usc-111>. Many of these agencies will waive fees for low-income individuals, upon request.

installments. No fee waiver is permitted for a Chapter 13 filing, but the filing fee may be either paid in installments or as a part of the Chapter 13 plan to pay creditors.

There may also be attorney's fees if the survivor retains an attorney to represent them. It is highly recommended that a survivor considering filing for bankruptcy do so with the help of an attorney. Survivors may want to contact local legal services programs to see if they are eligible for assistance or contact several attorneys to compare fees and services.

#### Practice Tip

It is a good idea to become aware of any free legal services providers in your area that might be willing to represent survivors in bankruptcy cases, to partner with these organizations. Or, especially if you don't have access to a free legal services program close by, it might be possible to partner with a private bankruptcy firm that can handle a certain number of cases for free, or "pro bono."

Survivors should be cautious of national bankruptcy firms who may not have local attorneys available for in-person consultations. Additionally, some may look to bankruptcy preparers as an affordable alternative; however, bankruptcy preparers are not attorneys, are usually not well qualified to assist with the preparation, and are not permitted

to give individualized legal advice, which can lead to complications. The potential pitfalls for a debtor filing bankruptcy "pro se," without an attorney, are substantial, and can result in a debtor being denied a discharge or failing to obtain relief that might have been available.

#### Practice Tip

Abusive partners will sometimes threaten to force a survivor into bankruptcy, often to maintain control over the survivor's finances or to scare them into staying. The survivor should be counseled that the abusive partner cannot make good on this threat—*only the survivor* can file bankruptcy if and when they choose to. While there is a process for involuntary bankruptcies, this applies mainly to business debtors; it is very rarely if ever possible to use that process to force a consumer into bankruptcy. Survivors should be encouraged to make their decision about whether to file for bankruptcy, knowing that an abusive partner cannot legally file a bankruptcy case on the survivor's behalf without consent.

After the bankruptcy case is filed, the debtor will have to attend a meeting of creditors. This usually involves meeting with the bankruptcy court trustee, an individual who represents the interests of the creditor in the bankruptcy, to review the financial disclosures. While other creditors may attend, this rarely occurs. If there are disagreements within the bankruptcy case, such as whether a debt is dischargeable or whether a piece of property can be protected, then there may also be an adversary proceeding within the bankruptcy case to litigate those questions.

The next section discusses the differences between the two kinds of bankruptcy cases most commonly filed by individual consumers, Chapter 7 and Chapter 13 bankruptcies.

## Chapter 7 Bankruptcy

In a bankruptcy filed under this Chapter, the debtor asks the court to discharge their debts without undertaking a formal payment plan or reorganization of their financial affairs. In order to prove eligibility for a Chapter 7 bankruptcy, the debtor must provide their income information for the household for six months before filing and show that they are below a certain income level. The survivor can also show that they have expenses that make it unlikely they will be able to repay any significant portion of their debts; this is

called the “means test.” If the debtor does not “pass” the means test, they may be required to file a Chapter 13 payment plan bankruptcy instead of Chapter 7. However, any debtor who is below the median income for a household of their size in their state will automatically pass the means test, and will, therefore, be able to choose between filing under Chapter 7 or Chapter 13.

#### **Think About It**

Because average household income over the six months before filing is used for the calculation, if the survivor has recently split from their abusive partner, they may need to consider whether they will have to include their abusive partner’s income in the means test, whether they will have access to that information and, if required to include the income, whether this will change the result of the means test.

The debtor will also have to disclose all of their assets to the bankruptcy court. Understandably, this can be an intimidating and uncomfortable conversation for many survivors, particularly if they feel (or were made to feel) ashamed or responsible for their debt. They may have additional worries that the bankruptcy court will take their property, or may have been threatened with such by their abusive partner. However, debtors are often allowed to keep most if not all of their property in the bankruptcy process. The law establishes exemptions, and if the property the debtor owns is under the dollar amounts allowed by those exemptions, then the debtor may retain the property. If the value of the debtor’s property exceeds the amount the survivor is entitled to exempt, then the bankruptcy court may require that some of the property be sold so the value can be used to pay something to the creditors. There are exemptions under the federal bankruptcy law and also under state law; some states require the debtor to use state law exemptions, and others give the debtor a choice between the state or the federal exemptions. Most debtors who file under Chapter 7 are able to keep all of their property, but ensuring that no property will be lost is an important reason to file bankruptcy with the help of an attorney, rather than filing unrepresented.

#### **Practice Tip**

Many people feel overwhelmed, guilty, and scared about the very idea of filing bankruptcy. It is a good idea to remind the survivor that the bankruptcy and their debt are not “them.” It may be helpful to describe the bankruptcy process and what is involved so that you can address some fears promptly and directly.

## Chapter 13 Bankruptcy

A Chapter 13 bankruptcy is most often filed when a debtor is attempting to make payment arrangements so they can keep property, for example, if the debtor wants to bring their mortgage payments current so that they can keep the house. In a Chapter 13 case, the debtor is required to file a proposed payment plan with the bankruptcy court that outlines how much they will pay and how those payments are to be distributed. The payment plan is usually three to five years long.

Some debts may be modified in a Chapter 13 bankruptcy. For example, sometimes the interest rate or amount of a car loan can be adjusted, and unsecured creditors will often receive a small fraction of what is owed, with the remaining balance being discharged. If a debtor

#### **Think About It**

It is important to note that under the bankruptcy code, the bankruptcy court cannot modify the terms of a first mortgage secured only by the debtor’s primary residence. This means that the debtor will not be able to adjust the interest rate or payment amount of that mortgage, and so they need to be able to afford to pay the usual monthly payment to maintain the mortgage as well as an additional amount to cure the past due balance if they want to keep the home in bankruptcy.

has more than one mortgage loan, sometimes a second mortgage may be modified, depending on the value of the house and the amount owed on the priority mortgage.

Unfortunately, this may make Chapter 13 unaffordable for some survivors, and they may need to consider other options to keep their home, such as a mortgage loan modification.<sup>7</sup>

After consideration of the debtor's financial disclosures and proposed payment plan, including whether any creditors or the bankruptcy trustee object to the plan, the bankruptcy court will determine whether to confirm the plan. If the plan is confirmed and the debtor makes the payments as required by the plan, then the debtor's remaining debts will be discharged at the end of the plan.

**Case Scenario:** *Based on what you know of Padma's situation, how would you advise her about her options? What other information do you need in considering bankruptcy under either Chapter 7 or Chapter 13? Padma informs you that she is up to date on her car payment, and she believes she can quickly catch up on her rent if the garnishment is stopped. Her debts are mostly unsecured debts, and she does not own any property beyond the amount she can claim as exempt under state law, so she would not lose any property in a Chapter 7 case. You advise Padma that it sounds like a Chapter 7 bankruptcy would fit her needs; although she could decide to file under Chapter 13, and should discuss both options with a bankruptcy attorney.*

## Deciding Whether and When to File a Bankruptcy Case

Deciding if and when to file a bankruptcy case can be a very difficult decision, with many different factors that a survivor and advocate must take into consideration.

The first step should be a thorough review of the survivor's financial position. This should include a review of the survivor's income and expenses, their debts, the nature of the debts (for example whether they are tax debts or other debts that may not be dischargeable), and the property they own.

The advocate should help the survivor determine whether their property or income is subject to collection efforts by creditors or if there are ways to make other arrangements to protect the survivor's financial interests. This information is necessary to evaluate whether bankruptcy will give the survivor the hoped for relief despite any disadvantages.

The next step is to consider the timing of the bankruptcy. For example, is there an emergency situation that requires the survivor to file quickly, such as stopping a foreclosure? It may also be necessary to file quickly if the survivor is seeking to recover property that was seized by a creditor, such as the seizure of funds from a bank account. Indeed, if a creditor has taken either wages or money from the debtor's bank account through a garnishment within the 90 days before a bankruptcy is filed, the debtor should usually be able to recover that money.

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<sup>7</sup> See Guidebook Chapter 8 regarding Mortgage Foreclosure for more information regarding mortgage foreclosure and possible options to avoid foreclosure.

In other situations, where the survivor is not yet financially stable and may incur additional, unavoidable debt, and there is no pressing reason to file soon, the survivor may want to delay filing until they are unlikely to keep building debt. For example, if a survivor is without health insurance and knows they need to have a major surgery, they might consider waiting to file bankruptcy until after they recover from the surgery and anticipate they are finished incurring additional debt. This is important because any debts incurred after the bankruptcy petition is filed (even the very next day) will not be included in the bankruptcy discharge. Another timing issue is that if the survivor has made large payments to some creditors (including repaying a debt to a friend or family member), they may want to delay filing so that the bankruptcy trustee does not attempt to recover those payments.

**Case Scenario:** *Padma shares with you that another reason that she is scared about eviction is because she is scheduled for a minor surgical procedure and she will be physically unable to move her belongings for several weeks after the surgery. You will need to learn more about Padma's medical insurance situation, whether she is going to incur debts related to this surgery as well as when she would be medically able to participate in the required steps for filing bankruptcy. How would this information affect your advice regarding timing the bankruptcy filing, should Padma decide to proceed with filing?*

Another factor to consider in the timing of a bankruptcy filing is how it will impact other pending legal proceedings. For example:

Many survivors are going to worry about what their financial situation will look like coming out of bankruptcy and whether the perceived negatives are worth the benefits. First, by comparing the survivor's assets to the allowed exemptions in their state, the advocate can properly address the survivor's concerns regarding whether they can keep their house or their car if they file bankruptcy.

#### **Think About It**

If a survivor is still in the midst of a divorce proceeding and files for bankruptcy, they will need to seek relief from the automatic stay before the family law court can equitably divide marital property.

If a survivor is not a citizen and perhaps has a pending immigration case, such as seeking protection under the Violence Against Women Act or proceedings to adjust their immigration status, a survivor should take care to consult with an immigration attorney regarding how the bankruptcy proceedings will affect their immigration matter. While a bankruptcy filing itself should not be grounds for denying a request to adjust status, other matters raised in the bankruptcy petition, such as payment of taxes, may be important to the immigration proceeding.

Second, some survivors may be worried about the impact filing bankruptcy will have on their credit score, especially as credit scores are now so often considered in non-credit contexts. Unfortunately, there is no clear answer to this question. Many survivors with high debt loads and judgments against them may already have a credit score that is so low that bankruptcy will not make a significant difference. Alternatively, although a bankruptcy can stay on a credit report for ten years, a survivor who files bankruptcy may be able to rehabilitate their credit now that they can afford to pay their bills going forward. See the **Credit Reporting & Repair** chapter in this Guidebook.

Lastly, survivors will be able to get credit in the future if they can show that they are now paying their bills and any subsequent debts incurred after the bankruptcy have been paid promptly.

### Practice Tip

Many credit offers after filing bankruptcy are likely to come with high costs and high-interest rates; advocates should counsel survivors about such credit offers that might derail the survivor's financial recovery after bankruptcy. Discuss strategies for using credit wisely after bankruptcy (for more information, see the **Credit Reporting & Repair** chapter of this guidebook). It may be wisest to avoid using credit for a period of time after the bankruptcy, by saving up cash for necessary purchases. Getting a credit card, even a secured credit card, and using it carefully (paying off the balance each month), may be a way to help rebuild one's credit history after bankruptcy.

## Alternatives to Bankruptcy

Sometimes a survivor may have other options to deal with their financial strain outside of bankruptcy, such as settling with creditors or making payment arrangements. It is important to counsel the survivor about those alternatives as part of the consideration of whether bankruptcy is the best available option.

If a former partner is failing to comply with an order to pay child support or spousal support, the survivor may explore enforcement of the court order through a contempt action, seek to have the support payments deducted from the partner's wages (if employed), or pursue other assets for collection. However, this will not help unless the former partner has income or assets that can be reached.

### Practice Tip

You discuss with Padma what her ex's reaction to a contempt charge might be. Will he retaliate in some way? It will be important to help Padma weigh the potential safety implications of this possible course of action.

Another alternative to filing bankruptcy is to attempt to set up a payment plan with one or more creditors (See the Credit Reporting & Repair chapter of this Guidebook). If the survivor can make some (even minimal) payment on the debt, it may be possible to delay the creditor seeking a judgment or garnishment.

Sometimes debtors will enter into a **debt management plan**, in which the debtor pays one monthly payment that gets distributed among the existing creditors, who often waive interest or late fees as part of the plan. However, such plans only work if the monthly payment is affordable. Survivors should be cautious if they decide to hire a debt management company, as many will charge high fees, taking money that could be used to pay the debts.

A similar option (though often more risky, and sometimes abusive) is working with a **debt settlement company**. These companies collect payments from the debtor over time and hold the money in an account,

**Case Scenario:** *You talk with Padma about the pros and cons of bankruptcy. She is concerned about impacting her credit score, but at this moment it is more important for her to gain relief from the garnishment, which is making it impossible for her to afford her rent. On the question of when to file, Padma explains that she does not expect to incur any new debt soon. Moreover, it is urgent for her to stop the garnishment of her wages, and she may be able to recover the money that has been garnished within the past 90 days, so it would be in Padma's best interest to file bankruptcy as soon as possible.*

then attempt to negotiate short payoffs with creditors in one-time lump sum payments. Again, many of these companies will charge large fees that they usually take before paying any creditors; it may take a long time for the survivor to build up enough of a balance to have funds with which to negotiate. These companies tell consumers not to make any payments directly to their creditors in the interim – which can lead to consumers getting sued by those creditors.

If a survivor is concerned about saving a home from foreclosure, there are often other options that may be preferable to bankruptcy. For example, the survivor can apply for a **loan modification** by submitting proof of income (disclosing child support payments as part of household income is optional) to the mortgage company and explaining the hardship that caused them to fall behind on the payments. A mortgage modification, if approved, typically means bringing the loan current and reducing the monthly payment to an affordable level (see the Foreclosure chapter in this Guidebook for more).

Finally, some survivors who are concerned about debt may not have any income that is subject to collection by creditors. These debtors are referred to as **judgment proof**. Although creditors may still seek a judgment, if the debtor’s only income is Social Security, workers compensation, or some other protected source (including most pensions), the creditors will not be able to garnish their income. A survivor whose income is all protected from collection may not need to file bankruptcy. Sending creditors a letter asking them to cease communication regarding the debt may be an alternative way to end harassing phone calls. Under the Fair Debt Collection Practices Act, creditors must comply with this kind of stop-contact request from a consumer (also see the **Debt** chapter in this Guidebook).

## Protecting the Survivor’s Privacy and Safety

If the survivor decides that filing bankruptcy is the best alternative to deal with their financial situation, the survivor and their bankruptcy attorney may need to request accommodations from the court to ensure that their privacy and safety are protected. For example, the debtor typically must list their name and address on the bankruptcy petition, which is publicly filed and searchable by other parties. If revealing their address puts the survivor at “undue risk of unlawful injury,” however, they can ask the court to excuse them from listing their address on publicly filed documents. See 11 U.S.C. 107(c).

## Acting as a Creditor in a Former Partner’s Bankruptcy

Sometimes a survivor may need to take steps to protect their rights when their former partner files for bankruptcy. The survivor is a creditor in their former partner’s bankruptcy case if they have a right to receive any payment from the partner, such as child support, alimony, marital property, or damages in a personal injury case or another lawsuit. As a creditor, a survivor has the right, although not the obligation, to participate in the partner’s bankruptcy case.

One way that creditors can participate in the bankruptcy is by filing what is called a **proof of claim**. This is a form that lets the bankruptcy court know how much is owed to that creditor and the nature of the debt. Some debts get special treatment in bankruptcy

## **An Analysis of Padma's Situation**

*Padma is concerned about eviction because she does not have enough money to pay her rent. The main reason she is behind on her rent is because creditors are garnishing her wages. Although her ex-husband is supposed to be paying those debts, the domestic relations court is unable to amend the underlying credit contracts, and so Padma remains financially liable for the debts as to the creditors. While she may have the option to seek some relief in the domestic relations court, that relief may not be granted fast enough and may be quite dependent on her ex-husband's ability to pay.*

*Additionally, Padma's situation is time sensitive. Her landlord has threatened eviction but has not filed a court case at this time. The bankruptcy code gives special consideration to landlords who already have a judgment for possession of the property—and the bankruptcy's automatic stay will often not stop eviction in those circumstances--so it may be important to file bankruptcy quickly if there are no other appropriate options for Padma.*

*It will be important to review with Padma the advantages and disadvantages to filing bankruptcy, and whether there are circumstances weighing against bankruptcy despite the need to prevent an eviction. Also, Padma is very worried that her financial circumstances will lead to the removal of her children. Therefore, it will be important to counsel her as to the appropriate state laws concerning custody to assure her that failure to pay debts or filing bankruptcy, by itself, is not a sufficient basis for a judge to change custody.*

*Additionally, it will be vital to evaluate whether Padma needs and has a sufficient safety plan in place. Padma is in the best position to predict how her ex-husband will react to a bankruptcy filing: will he be mad that she is discharging debts he will likely now have to pay? Will he attempt to change custody? Will he retaliate in a manner that will place her in danger? If she needs to maintain a confidential address, then her bankruptcy attorney will need to bring this up with the bankruptcy court.*

*Bankruptcy may provide Padma with valuable relief from her debts and help her to maintain her stability, but these issues will have to be addressed in helping her make the decision whether filing bankruptcy is the right choice.*

because they are **priority** debts (meaning they get paid before other creditors) or are not dischargeable in the bankruptcy. Child support and alimony, which are called **domestic support obligations** in bankruptcy vocabulary, are both priority debts and nondischargeable in bankruptcy. Therefore, if a former partner files bankruptcy and owes

### **Practice Tip**

If the survivor chooses to participate in a partner's bankruptcy case, one way to do this is to file a proof of claim stating the amount that is owed as of the date of the bankruptcy filing indicating that the debt is a priority debt. This way, the survivor can get paid from any assets of the partner's bankruptcy estate. Also, if the partner files under Chapter 13, the court will not be able to confirm the Chapter 13 plan unless the domestic support obligation will be paid in full through the plan. If a survivor has questions about how or whether to participate in the bankruptcy, it is a good idea to consult with an experienced bankruptcy attorney.

the survivor either child support or alimony, these obligations will not be wiped out by the bankruptcy discharge. Also, as priority debts, the survivor is entitled to get paid before certain other general unsecured creditors, like credit cards.

If the former partner is filing bankruptcy under Chapter 7 and has no assets above the amount that can be claimed as exempt, there may be no funds available

to distribute to creditors. This is known as a **no asset** case. In such cases, filing a proof of claim is not necessary because money will not be distributed to the creditors in any event.

Another way a survivor may participate in the bankruptcy is by attending the **meeting of creditors**. Creditors do not typically attend the meeting, and the bankruptcy trustee is there to ask questions of the debtor under oath, to ensure that all information has been truthfully and completely disclosed in the case.

However, as a creditor, the survivor has the right to attend the meeting, listen to the trustee's questions and the debtor's answers, and then ask any additional questions relevant to the bankruptcy case. This could help the survivor get more information about, and flag for the trustee, any assets they might be aware of that the debtor has failed to disclose.

The money that a former partner owes to the survivor under a property settlement agreement, unlike a domestic support obligation, may be discharged in the partner's bankruptcy. Also, a civil judgment against the abusive partner for personal injury or the like may also be discharged in bankruptcy. But criminal fines and restitution are not discharged. If the survivor receives notice that the former partner is attempting to get the court to order that a certain debt is dischargeable, it is important for the survivor to seek legal advice and file an answer. Alternatively, if the survivor believes that their former partner is attempting to discharge a debt owed to them that they believe should not be discharged, they can file papers to request that the bankruptcy court make a determination that those debts are not dischargeable.

A former partner's bankruptcy filing may also raise concern over debts that were jointly owed by both parties. The abusive partner's liability on the debt may be discharged in the bankruptcy, leaving the survivor as the only remaining debtor and potentially facing more pressure from the creditor to pay. However, the debtor's legal obligation to make payments directly to a third party and hold the former spouse harmless from those debts may be a nondischargeable support obligation. The abusive partner would remain liable on that debt, although the survivor will also still be liable unless they file for bankruptcy (remember, the family court order cannot remove the survivor's

#### **Practice Tip**

If the survivor is uncertain whether the partner has assets that could be made available for payment to his creditors, it may be best to go ahead and file a proof of claim even in a no asset case. The survivor can also look at the bankruptcy documents filed by the former partner (online or at the bankruptcy clerk's office) to see whether the partner has accurately listed any assets he may own. Assets, including real estate, cars, potential legal claims, cash, and any other thing of value, should be disclosed by the debtor in Schedule A/B.

#### **Think About It**

There is no requirement that the survivor attends the meeting of creditors if it would be dangerous or unpleasant; in fact, most creditors do not appear. It is a good idea to discuss whether the survivor is comfortable seeing and confronting an abusive partner in this meeting. Are there any safety considerations to talk through in making this decision? The survivor may still file a proof of claim even if they do not attend the meeting of creditors.

#### **Practice Tip**

Evaluate with the survivor whether they need to file additional court pleadings, such as an adversary proceedings, to assert the nondischargeability of such a debt when a partner files bankruptcy.

obligation on the contract). Sometimes additional complications will arise when the abusive partner and the survivor are jointly obligated on a mortgage loan. If the mortgage is in default and the survivor is trying to work out a loan modification or repayment plan, these efforts may be interrupted if the abusive partner files for bankruptcy. However, the survivor should be able to explain to the mortgage creditor that they can still communicate with them regarding the loan. If the creditor requests it, a survivor could agree to a consent order in the bankruptcy court making it clear that the mortgage company may talk with them about the loan (this may be referred to as an order modifying the **co-debtor stay**, and would only come up in a Chapter 13 case).

The abusive partner's bankruptcy filing may show up on the survivor's credit. If this happens, the survivor has the right to dispute it and have their credit report corrected. For more information on how to dispute inaccurate information in a credit report, see the Credit Reporting and Repair chapter in this Guidebook.

## Conclusion

Survivors who are overwhelmed by debt, and facing housing and family instability as a result, may want to consider filing bankruptcy as an option for a financial fresh start. With individualized advice and planning, survivors can decide whether they should pursue the protections of the bankruptcy code.

## Additional Resources

- National Consumer Law Center, Consumer Bankruptcy Law and Practice (11<sup>th</sup> Ed. 2016).
- National Consumer Law Center, Bankruptcy materials, including pro bono training materials, available at <http://www.nclc.org/issues/bankruptcy.html>.

# Eight



## Foreclosure Defense for Survivors

PROCESS, DEFENSES & ALTERNATIVES

**By Karen Merrill Tjapkes & Sarah Bolling Mancini**

### Introduction

Foreclosure is the means by which a mortgage creditor takes the property securing the mortgage loan when a borrower is not able to make the payments. In recent years, a significant percent of homeowners have struggled to make their mortgage payments at one time or another and faced the risk of foreclosure. Survivors of domestic violence who own a home and have separated from an abusive partner face particular risks due to the reduction in household income, job insecurity, and grappling with other debts or financial needs that typically follow a separation. More often than not, a recently separated survivor will be attempting to make ends meet with reduced monthly income, which may cause them to fall behind on mortgage payments. Avoiding foreclosure involves specific challenges when a survivor remains in a home that was (fully or partly) owned by an abusive partner who has now left, especially if the abusive partner was the sole borrower on the mortgage. Survivors who are still in the home with an abusive partner may also be struggling to make a mortgage payment if the household is under financial strain.

This chapter covers the players involved in the mortgage market, how foreclosures take place, and the critical information advocates need to advise a survivor about options to avoid foreclosure. We will also address different foreclosure avoidance, or "loss mitigation," options, issues that arise when the survivor is not the original borrower on the loan, and ways that the family law court can help keep foreclosure at bay.

## Patricia's Story

Patricia's story is intended to demonstrate the way a survivor might deal with the risk of foreclosure.

*Patricia, a 39-year-old woman, has a mobility disability. After an attack by her ex-husband, she was hospitalized and later diagnosed with partial paralysis. She now uses a wheelchair.*

*After the attack, Patricia left and filed for divorce. The Court awarded Patricia the house, but the divorce process was financially exhausting. Even though she has a full-time job at a call center, she can no longer rely on her ex-husband for transportation, running errands, or assisting with her health needs, so now much of her income is consumed by these new expenses. She relies solely on her personal employment income, which is much less than the joint income they once had as a married couple. To make matters worse, her ex is not paying the child support he was ordered to pay for their two children. Patricia hasn't been able to make mortgage payments in months and is getting letters that say that her loan is about to be referred for foreclosure.*

*Patricia has tried to ask her mortgage company for help or a way to get caught up on the payments, but they have been giving her the run-around and won't tell her anything. The last time she called, they told Patricia that they couldn't talk with her without her ex-husband's permission because he was the only borrower on the loan. Patricia comes to you confused and scared at the prospect of losing her home. She tells you that she knows that when they bought the house ten years ago, she went to the closing and had to sign certain documents. Patricia's name is on the deed, along with her ex-husband's name. "No one is telling me anything. What if they take my home?" she asks you.*

*As you try to help Patricia calm herself, you make a note of the issues you need to unpack to advise her. How far behind is the mortgage? How long is the foreclosure timeline in your state? Is her income alone enough to afford a loan modification on the mortgage? And is it safe for Patricia to stay in the house? These are a few of the facts you will need to explore as you help Patricia decide on her next steps.*

### Think About It

How do you plan on accommodating Patricia's disability in meeting with her and asking her to provide information and documents? How might Patricia's disability influence her feelings about keeping her home? When communicating with her, how can you use proper language etiquette to ensure that she is comfortable and that you are not perpetuating harmful stereotypes or re-enforcing outdated attitudes?

## Foreclosure and Domestic Violence

Unfortunately, often domestic violence and foreclosure go hand in hand. The domestic violence may initiate the foreclosure problem as the abusive partner cuts off financial support, the division into two households may dramatically reduce the income available to make the mortgage payments, or other debts created by the abusive partner may come into the light. Conversely, a pending foreclosure may escalate an abusive situation with this additional, significant financial stressor.

The intersection of foreclosure and domestic violence brings additional issues to the forefront: is there a way to require the abusive partner to make payments? Is there a way

to make the situation affordable for the survivor to sustain the mortgage on their own? Is there a way for the survivor to communicate with a mortgage servicer that insists they must have the abusive partner's cooperation and consent?

## Assessing foreclosure options

Because of the complicated experiences and feelings surrounding homeownership for many survivors, foreclosure advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called "intake questions"), are not meant to be prescriptive, and conversations around foreclosure should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Foreclosures additionally present the problem of long-term, protracted financial negotiation, dissolution of assets, strain on changing income, communication and cooperation with an abusive partner, each posing unique privacy and safety risks. To begin a discussion with survivors about their housing and foreclosure concerns, some screening questions may include, but are not limited to:

- What is your goal – to stay in the home or to transition safely to another housing option? What factors are important to you in making that decision?
- What concerns do you have about safety and stability that might impact your decision about whether to stay in the house?
- What is your current monthly income? Is there any way to increase your income, such as by enforcing a child support order?
- Are you facing a permanent reduction in income or a temporary hardship?
- What information do you have about the mortgage, such as monthly payment amount and how far behind the payments are?
- What have been the most recent communications from the mortgage servicer?

## The impact of foreclosure

Maintaining stable housing is extremely critical for survivors of domestic violence recovering from trauma and abuse. For survivors who own a home, the risk of foreclosure jeopardizes their financial wellbeing as well as their ability to stay in a neighborhood where they may have networks of support, a job, and their children's school. Finding affordable housing after a foreclosure can be tremendously difficult due to the impact on a survivor's credit. Therefore, it can make a huge difference when an advocate helps a survivor find options to avoid foreclosure and obtain an affordable mortgage payment.

## Key Legal Concepts and Players

### What are the key legal concepts involved in foreclosure?

An individual obtaining a mortgage loan to buy a home or refinance their existing loan signs two critical documents for the financing: a **note** and a **mortgage** (or **deed of trust**). A **note** is a borrower's legally binding written promise to repay a debt to a lender by a certain date and under certain terms. A **mortgage** (or deed of trust—the term and precise nature of the transaction may vary depending on state law) gives an interest in a property to secure an obligation, usually the repayment of a loan evidenced by a note. Many times,

the mortgage or deed of trust imposes other responsibilities on the homeowner, in addition to making payments on the note, such as paying real estate taxes and maintaining homeowner's insurance.

If the party giving the mortgage, **the mortgagor**, defaults on the obligation, then the party given the interest, **the mortgagee**, can proceed with foreclosure. **Foreclosure** is the process by which a mortgagee forces the sale of the property because of a default, usually a failure to make payments but it may also be an inability to perform other requirements. Depending on the state law, the foreclosure process can require judicial action or be a non-judicial sale by advertisement without any significant court oversight. In states that use a deed of trust, the sale may be conducted by a trustee.

Homeowners who are having problems paying their mortgage loan may want to try to have their loan modified to lower their payment or sell the house through a short sale to avoid foreclosure. These options to avoid foreclosure are often referred to as **loss mitigation** because they mitigate the potential loss to the mortgage investor from a foreclosure.

## Who are the players in a mortgage foreclosure situation?

Survivors may find there are multiple people or entities involved in their mortgage loan—some they may be very familiar with, others they may not. It is important to get familiar with the different players to best understand the survivor's legal position and options moving forward. For example, in Patricia's story above, she knows she signed documents with Bank of America, but then a few years ago she started getting monthly statements from Nationstar Mortgage. How can you help her begin sorting out who is who and what is their role?

Most individuals begin the mortgage loan process by taking a loan from a financial institution, the **originating lender**. Some individuals may work directly with the originating lender to set up the mortgage loan; other times individuals work with a mortgage broker who chooses the originating lender (often based upon the loan terms and the commissions offered to the mortgage broker). While the originating lender may loan the initial funds, rarely does the homeowner repay the originating lender. Instead, the originating lender nearly always sells the mortgage loan to an **investor**.<sup>1</sup> The investor may be one of the two mortgage giants, Freddie Mac or Fannie Mae, or (as was commonplace during the subprime mortgage explosion in the 2000's) the loan may be sold to a trustee as a part of a securitization process. Many of these mortgage transfers are tracked through a computer database known as the Mortgage Electronic Registration System, or MERS. In many states, MERS is appointed as the "nominee" or the mortgagee and may pursue foreclosure in its own name. Homeowners have some access to the MERS database and can use it to learn more about their mortgage loan if they have a MERS mortgage.<sup>2</sup>

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<sup>1</sup> Federal law requires that the homeowner be notified when their mortgage loan is sold to a new investor. See 15 U.S.C. § 1641(g).

<sup>2</sup> MERS Servicer ID website, available at: <https://www.mers-servicerid.org/sis/index.jsp>.

## Key Terms

**Note:** A borrower's legally binding written promise to repay a debt to a lender by a certain date and under certain terms.

**Mortgage:** Gives an interest in a property to secure an obligation, usually the repayment of a loan evidenced by a note (also called a deed of trust).

**The mortgagor:** The party giving the mortgage.

**The mortgagee:** The party given the interest.

**Foreclosure:** The process by which a mortgagee forces the sale of the property because of a default, usually a failure to make payments.

**Originating lender:** The entity providing the loan (usually a financial institution).

**Mortgage servicer:** The financial institution to whom the homeowner makes their payments and with whom the homeowner communicates, especially if there are problems with payments.

**Investor:** The entity to whom the originating lender sold the mortgage loan to. The investor may be the mortgage giants, Freddie Mac or Fannie Mae, or the loan may be sold to a trustee as a part of a securitization process.

**Mortgage insurance:** Different than homeowner insurance, it is designed to cover any shortfall if there is a default and foreclosure of the loan.

**Judicial foreclosure:** A lawsuit must be filed to initiate a foreclosure.

**Non-judicial foreclosure:** States where a foreclosure can occur without court oversight. In those states, the mortgage or deed of trust will contain a power of sale clause that permits a non-judicial foreclosure.

**Successor in interest:** Someone who became the owner of a home after a transfer, such as a divorce or death.

The player that all homeowners know is their **mortgage servicer**—this is the financial institution to whom the homeowner makes their payments and with whom the homeowner communicates, especially if there are problems with payments. Often, the mortgage servicer does not own the mortgage loan but collects the payments on behalf of that owner, which may be Fannie Mae, Freddie Mac, a private trust or another bank. Servicers include large national banks as well as non-bank financial institutions.

#### Practice Tip

Homeowners may find that their mortgage servicer will change throughout their repayment term. Under federal law, mortgage servicers are supposed to notify the homeowner regarding such a servicing transfer, including providing information regarding where to make payments.<sup>3</sup> Talk with survivors about whether they have received these notices, or if they haven't, the servicer's name and contact information should be on the monthly mortgage statement. For survivors who have been denied basic information about the mortgage loan by an abusive partner, and may not have access to the mortgage statements or other letters about the mortgage, they should be able to ask the servicer for basic information by phone if they at least know the servicer's name.<sup>4</sup>

Some mortgage loans may also have **mortgage insurance**. Distinct from homeowner's insurance (which most homeowners will also have), mortgage insurance is designed to cover any shortfall if there is a default and foreclosure of the loan. The most popular mortgage insurance program is through the Federal Housing Administration, FHA, (run by the Department of Housing and Urban Development, HUD)<sup>5</sup>; other government programs include VA insurance program and the direct and guaranteed mortgage loan programs through the United States Department of Agriculture. There is also private mortgage insurance, often identified as PMI for short. It is important to identify if there is mortgage insurance involved in the mortgage loan as the insurance program may have its own requirements and guidelines for servicing, loss mitigation, and foreclosure.

**Case Scenario:** In researching Patricia's situation, you can help her identify the players in her mortgage loan transaction. You learn that she has been making her monthly payments to Nationstar Mortgage – that is her mortgage servicer. The FHA and the VA do not insure her loan. However, you find out that Fannie Mae owns the loan.<sup>6</sup>

## Foreclosure Basics

### What is foreclosure and how does a foreclosure happen?

As discussed above, foreclosure is the process by which a mortgagee (creditor) forces the sale of the property because of a default, usually a failure to make payments, although it may also be a failure to perform other obligations. Depending on the state law, the foreclosure process can require **judicial action** or allow a **nonjudicial sale** process.

<sup>3</sup> See 12 U.S.C. § 2605(b)-(d); 12 C.F.R. § 1024.33 (b) and (c).

<sup>4</sup> This should be the case if the survivor is a borrower on the mortgage loan. If the survivor is not an original borrower on the loan, communicating with the servicer may prove difficult. We discuss strategies for dealing with this problem later in this chapter.

<sup>5</sup> The HUD FHA insurance program includes both traditional mortgages as well as a special product for senior citizens, the Home Equity Conversion Mortgage (HECM) program, commonly referred to as a "reverse mortgage."

<sup>6</sup> Fannie Mae and Freddie Mac both have websites that a homeowner can use to find out if Fannie or Freddie (respectively) owns their loan: <https://www.knowyouroptions.com/loanlookup> and <https://www3.freddie.com/loanlookup/>.

In states that require foreclosure be by judicial action, a lawsuit must be filed. The investor or current owner of the mortgage loan usually files the lawsuit, although some states allow the mortgage servicer or MERS to file the court action. If the court finds that the mortgage loan is in default, the court will enter a judgment for the amount owed plus the court costs and, often, attorneys' fees. The court will then order that the house be sold, and the proceeds of the sale will be applied to the judgment amount. If there is still a balance due, some states will permit a deficiency judgment to be entered against the individual and some will not.

In non-judicial foreclosure states, a foreclosure can occur without court oversight. In those states, the mortgage or deed of trust will contain a power of sale clause that permits a non-judicial foreclosure. Some states use a trustee to handle the sale process; in other states, the foreclosure attorneys conduct the foreclosure sale. In these states, the lender may be required to record a notice of default or mail a notice to the borrower before conducting the sale. If the homeowner does not cure the default, then the trustee or foreclosure attorneys may initiate the sale of the home; in most states, this requires the

publication of notices advertising the sale and a public auction where the home is sold to the highest bidder. It is common for the servicer or owner of the mortgage to be the highest (and only) bidder and end up with the house. If the sale of the house does not satisfy the amount owed, the lender may or may not be able to seek a deficiency against the borrower, depending on state law.

Most states, whether the foreclosure process is judicial or non-judicial, require an eviction action after the foreclosure whereby the foreclosure sale purchaser evicts the person(s) residing in the home. In some states, the eviction may not take place until the end of a redemption period, during which the homeowner can try to buy back the house by tendering the full loan amount. The eviction process and timeline will vary depending on state law; the process is the same as that used to evict a tenant since the former owner is now a tenant without a lease.

### Practice Tips

→ Because there are such stark differences in the foreclosure process from state to state, it is important that domestic violence advocates learn the foreclosure process in their own area. To do so, you should check with a local attorney who practices in this area of law or consult the National Consumer Law Center's *Foreclosures and Mortgage Servicing* manual, which contains the citations to every state's foreclosure statute.<sup>7</sup> Attorneys with expertise in foreclosure matters may be found at local legal services offices or by using the attorney search function at the National Association of Consumer Advocates website, [www.consumeradvocate.org](http://www.consumeradvocate.org).

→ If the survivor knows a foreclosure will take place and intends to move out rather than fighting to save the home, the survivor may want to sign a lease for an apartment before the foreclosure is completed. The survivor may also want to negotiate a move-out agreement (sometimes called a "cash for keys" agreement) in order to prevent an eviction lawsuit from being filed. Foreclosure and eviction are typically reported on the borrower's credit report, and can make finding a new apartment more difficult.<sup>8</sup>

## What is the critical information advocates and survivors need to understand the options in a mortgage foreclosure situation?

One of the most important things that an advocate can help a survivor do is gather the information necessary to assess the options. Some of the information may be difficult to

<sup>7</sup> National Consumer Law Center, *Foreclosures and Mortgage Servicing* (5th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

<sup>8</sup> See Chapter 2 on credit reporting.

access, especially if the abusive partner is controlling the situation. However, there may be some tools that the survivor can use to help gather that information.

First, the survivor will need to gather information regarding the mortgage loan itself. This information is found in the following documents:

- the original documents from when they first took out the mortgage loan, sometimes called the closing packet;
- current monthly statements; and
- any other notices from the mortgage servicer.

#### Practice Tip

Some of this information, such as the mortgage itself, may be available from the local land records office. It may also be possible to contact the title office that helped process or “close” the loan to see if they still have copies of documents available.

The survivor will also need to know the amount of the monthly payment, how much is owed if the loan is in default, and whether the loan has been referred to foreclosure. The monthly mortgage statement should contain most of this information. This is important because once a mortgage is at least 120 days past due, the lender may begin the foreclosure process.<sup>9</sup>

If the survivor does not have this information, they can send the mortgage servicer a “**request for information.**” Under federal law, the mortgage servicer is required to acknowledge a request for information within five days and provide a full response within 30 business days.<sup>10</sup> The period may be lengthened by an additional 15 days in some situations, but a request only for the identity of the loan owner be answered within ten business days. However, if the survivor did not sign the note, they may be unable to access information about the loan through a request for information, at least initially. We discuss this later in the chapter.

Second, it is important to gather the information regarding the survivor’s current financial status. This should include evaluating their current sources of income, potential changes in income, and expenses.

#### Practice Tip

It is important to work with the survivor to evaluate their full financial situation. Due to the social value placed on homeownership, many homeowners perceive losing or giving up a home as a failure. It’s important to explain to the survivor that they are not their foreclosure, that they have options after a foreclosure, and it’s important to discuss what their other financial priorities are and how they may influence choices about their home.

*How might you get a complete picture of Patricia’s expenses and ability to sustain the home? If letting the house go appears the best option to you, how can you frame that conversation? What concerns does Patricia have that are important to acknowledge and consider?*

With this information, the survivor can begin to review the various options and begin to formulate a plan for how to proceed. Some questions to consider include:

- Does the survivor want to remain in the house?

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<sup>9</sup> 12 C.F.R. § 1024.41(f)

<sup>10</sup> 12 C.F.R. § 1024.36

- Does the survivor feel they can remain in the house safely?
- What is survivor's short-term as well as long-term financial capacity to afford the home (the mortgage loan as well as other costs of homeownership and utilities)?
- What other options are available to prevent foreclosure?
- What other housing options are available?

Reviewed below are many of the options for preventing the foreclosure of a mortgage loan.

**Case Scenario:** *In the example above, Patricia has some information from the mail she has received but is having difficulty getting everything she needs. A request for information could be a useful tool to try to gather more information for her. Additionally, she has identified that she had a significant decrease in income after her separation and divorce. It will be useful to review her income and expenses to determine where adjustments can be made to free up income for her housing payments. Most importantly, Patricia needs to know that you understand and empathize with her fear of losing the home, but you want her to know her rights and be able to review her options. This may include providing the timeline for foreclosure and a realistic assessment of whether saving the home is a possibility or whether Patricia needs to look at other options such as a transition into other housing.*

## Alternatives to Foreclosure

### **What is loss mitigation, what are the loss mitigation options, and how does that process work?**

Loss mitigation is the process by which a mortgage servicer (often using the guidelines established by and with the approval of the investor and/or insurer of the loan) reviews a mortgage loan for possible options to avoid a foreclosure, thereby mitigating the loss to the mortgage investor. There are several loss mitigation options available to homeowners, and federal law sets forth a process that nearly all mortgage servicers must follow regarding how the servicer must handle a request for assistance with a mortgage loan.

There are loss mitigation options that allow a homeowner to keep the home and loss mitigation options that require the homeowner to leave the home, but still avoid foreclosure. Avoiding foreclosure may be important to some homeowners, especially those who are concerned about their credit score and ability to get a new mortgage loan in the future.

In evaluating loss mitigation options, the mortgage company will want to evaluate the survivor's "hardship," or reason why the homeowner fell behind or is about to fall behind on their payments. Additionally, the mortgage company will want to know whether the hardship is a short term or long term hardship. For example, one short-term hardship would be a pregnancy where a homeowner is off work for several months but will be able to return to their prior income. A long-term hardship, for example, would include when a homeowner becomes disabled and is unable to return to full-time work or has permanently lost a spouse's income due to divorce or separation.

Loss mitigation options vary somewhat depending on the type of loan and the players involved, for example, if Fannie Mae or Freddie Mac owns the loan or if there is FHA insurance. Fannie Mae, Freddie Mac, and FHA have their servicing and loss mitigation instructions easily available on their web pages. Possible options include the following:

Forbearance: Allows for a suspension or reduction of payments for a set period so the homeowner may recover from a short-term crisis. The delinquent amount is not forgiven, so the borrower must make arrangements to become current on the mortgage loan when the forbearance ends (usually after 6 or 12 months), often through a repayment plan or a loan modification.

Repayment plan: The amount that the homeowner is delinquent is spread out over a set period of time (usually 3-12 months) and added to the regular monthly payment. This may be a good option for someone who suffered a temporary loss or reduction in income, but whose income has now reached a level where they can afford the regular payment plus a little extra.

Loan modification: Involves adjusting the terms of the note so that the borrower will start fresh, typically by adding the missed payments to the balance owed on the loan, and usually making the monthly payment more affordable. Adjustments may include lowering the interest rate or reamortizing the loan over a longer period, such as a new 30 or 40 years from the date of the modification. Most loan modification programs seek to target a modified mortgage payment somewhere between 31% and 40% of the borrower's gross monthly income. Loan modification evaluations also typically consider whether the investor will lose more money by foreclosing or by offering the loan modification; if the modification is financially beneficial to the investor, it should be offered.

Short sale: Option to sell the home for less than the amount owed on the mortgage loan with the approval of the mortgage service and other parties. This is most likely to be available if the home is "underwater," meaning the borrower owes more than the house is worth.

Deed in lieu of foreclosure:

The homeowner executes a deed conveying the home to the mortgage lender or servicer without a foreclosure sale. When sustained efforts to market the property for sale or short sale have failed, this option is the last resort. Typically the home is worth less than the amount owed on the mortgage, and again, it will be important to ensure that the lender is waiving any deficiency (and to get advice about the tax consequences).

**Practice Tip**

It is important in a short sale or deed in lieu to make sure that the lender is waiving the deficiency (the difference between the sale price and the amount owed) and advise the survivor that this may have income tax consequences, and they should seek advice from a tax professional.

State hardest hit funds program: The federal government designated eighteen states (and the District of Columbia) as "hardest hit" by the foreclosure and unemployment crises. Survivors in these states may be able to qualify for special assistance from their state Hardest Hit Funds program, particularly if they have experienced a hardship arising from job loss, divorce, medical problem, or disability. These programs may provide temporary payment assistance, money to bring the loan current, or a large payment to reduce the principal balance on the loan.<sup>11</sup> Most Hardest Hit Fund programs are set to expire in 2020.

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<sup>11</sup> For a map of the states designated as hardest hit, and links to each state's program, check out this website: <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx>.

**Case Scenario:** *In Patricia's situation, she has likely experienced a longer-term decrease in income due to the separation and divorce. You explain all the options but determine together that a forbearance or repayment plan are unlikely to be appropriate options for her. Instead, you discuss ways to help evaluate her budget to see whether she can afford the mortgage loan with a modified payment amount. There are on-line calculators that she can use to try to check her eligibility for a loan modification, such as [www.checkmynpv.com](http://www.checkmynpv.com). The terms of a possible loan modification will depend on whether Fannie Mae or Freddie Mac own the loan, whether the loan is insured by the FHA or the VA, or whether any other modification program applies to the loan. For Patricia, since you know Fannie Mae owns her loan, you help her research Fannie Mae's current loan modification rules to see how much the servicer might be able to reduce her payment. You also talk with Patricia about researching whether the state Hardest Hit Fund program can offer assistance based on her disability or the divorce. If Patricia is unable to afford a mortgage payment even with a modification or has decided keeping the home is not the best option for her, she can look at selling the home (with a short sale if necessary). Her timeline for these options—and how quickly she must pursue them—will depend on where she is in the foreclosure process and how quickly a foreclosure sale can occur under state law.*

To apply for a loss mitigation option such as a loan modification, the homeowner must submit a financial packet for review to the servicer. Often, the homeowner can begin the process with a telephone call to the mortgage servicer, who will then send the necessary application and a list of required documents.

#### Practice Tips

→ The required documents to submit in the financial packet will typically include proof of income, bank account statements, and a hardship letter outlining the reasons why the homeowner is having financial difficulty with the mortgage payments.

→ When you are helping a homeowner apply for a loan modification to reduce the principal and interest payment on the mortgage, it is a good idea to help the homeowner investigate whether the portion of the payment going to pay property taxes and homeowner's insurance (called the “**escrow payment**,” because these monthly amounts are held in escrow until costs come due once a year) can be reduced. For example, does the survivor need to apply for the basic property tax **homestead exemption** (allowed for an owner-occupant) or a special property tax exemption? For example, because Patricia has a disability, she may qualify for an additional exemption for elderly homeowners or homeowners with disabilities in some states. Or, can the survivor find cheaper homeowner's insurance? If the escrow payment can be reduced, it will help with the overall affordability of the mortgage.

Federal regulations promulgated by the Consumer Financial Protection Bureau (CFPB) under the Real Estate Settlement Procedures Act (RESPA) outline the process by which mortgage servicers must process loss mitigation requests. When a mortgage loan becomes past due, the mortgage servicer must make a good faith effort to establish contact with the borrower and inform the borrower of their loss mitigation options.<sup>12</sup> The servicer must also send a written notice to the borrower with the servicer's contact information, information regarding loss mitigation options, and HUD approved housing counselor information for assistance.<sup>13</sup>

If a borrower submits a loss mitigation application, and if the packet is submitted more than 45 days before a foreclosure sale, the

<sup>12</sup> 12 C.F.R. § 1024.39(a)

<sup>13</sup> 12 C.F.R. § 1024.39(b).

servicer must review the packet within five business days and either notify the borrower that the packet is complete or inform the borrower what information is required to complete the application.<sup>15</sup> Once the application is complete, if the complete application is submitted at least 37 days before a foreclosure sale, then the servicer must evaluate the application for all available loss mitigation options and provide a written decision to the borrower within 30 days of the date the complete application was received by the servicer.<sup>16</sup> Importantly, if the application is submitted and completed more than 37 days before the foreclosure sale, the mortgage servicer may not proceed with the sale until they have fully evaluated the loss mitigation application for all options.<sup>17</sup>

Depending on when the complete application was received, the borrower may have the option to appeal a denial for a loss mitigation option.<sup>18</sup>

#### **Practice Tip**

Make sure to explain to survivors that although federal regulations appear to require a quick consideration process, the reality is that most mortgage servicers take far longer to evaluate a loss mitigation request. Supporting documents "expire" after a certain number of days and will need to be updated on a regular basis. Survivors may want to consider contacting a HUD-certified housing counselor to assist them with this process as it can be quite overwhelming for a homeowner to handle themselves.<sup>14</sup>

#### **Practice Tip**

In their attempts to find qualified assistance, survivors should be wary of private companies offering to help. While some of these companies may be legitimate, many are scams that will just take the homeowner's money without providing any actual assistance. Even those companies that may be helpful will charge a fee, which a survivor, who is already in financial distress, can ill afford to spend. Because there is a network of free housing counselors available in most areas, survivors do not need to hire a private company to assist them in most situations.

**Case Scenario:** *Patricia tells you that she has received solicitations by mail from companies who claim they can "guarantee" a loan modification and "stop foreclosure in its tracks." She tells you that when she called one of these companies, HomeSaverUSA, they told her that for \$3,000, they would get her a loan modification. You talk with Patricia about the fact that no company can honestly "guarantee" any particular outcome when seeking a loan modification, and explain that she can get help applying for a modification for free from a HUD-certified housing counselor. Patricia decides she will not call HomeSaverUSA back.*

<sup>14</sup> Homeowners can find certified, non-profit housing counselors through HUD at <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>.

<sup>15</sup> 12 C.F.R. § 1024.41(b).

<sup>16</sup> 12 C.F.R. § 1024.41(c).

<sup>17</sup> 12 C.F.R. § 1024.41(g).

<sup>18</sup> 12 C.F.R. § 1024.41(c) and (e).

## Assuming the Mortgage: Issues in Loan Servicer Communication

### What do you do if the mortgage servicer won't talk to the survivor without the abusive partner's permission because they claim the survivor is not the borrower?

In assisting survivors of domestic violence, you may come across quite a few survivors who are living in the home and have (or likely will) become the sole owner of the home through a divorce decree, property settlement agreement, or separation agreement, but who were not the original borrower on the mortgage loan. It is possible that the ex-spouse was the only borrower on the note, even if the survivor jointly owned the home and had to sign certain documents at closing. This can lead to a very difficult situation where the mortgage servicer refuses to let the survivor apply for a loan modification or refuses even to provide any information about the mortgage.<sup>19</sup>

In general, if a survivor needs a modification to make the mortgage payment affordable, they will likely need to "assume" the debt. An **assumption** is a legal agreement by which someone takes on personal liability and becomes obligated on the debt. By assuming the loan, the survivor steps into the shoes of the borrower, and should then be entitled to loan information and modification options, just like the original borrower. The question, then, is whether a survivor can assume the mortgage.

Most survivors in this situation will have acquired their ownership interest in the home because of a transfer. That transfer of the home could have been effectuated through a quitclaim deed signed by the ex-spouse or through a divorce decree or separation agreement awarding the house to the survivor. Even if a survivor owned a half-interest in the home since it was purchased, they may have received a transfer of the other one-half interest through a divorce decree.

Most mortgage contracts are drafted to restrict transfers; they contain a clause called a "due-on-sale" or "due-on-transfer" clause that says that if the borrower transfers the home without the lender's approval, the lender may accelerate the loan and foreclose. Due-on-sale clauses allow the servicer to accelerate the mortgage loan, and then to foreclose, after an unauthorized transfer. In 1982 Congress passed the Garn-St Germain Act, which preempted state laws limiting the enforcement of due-on-sale clauses, but also carved out important exceptions for certain kinds of transfers. If a transfer falls within a Garn-St Germain exception, the mortgagee may **not** enforce the due-on-sale clause.<sup>20</sup> Successors who receive an interest through this kind of transfer are sometimes referred to as Garn-exempt or Garn-protected transferees.

Garn-St. Germain carves out several kinds of protected transfers wherein a creditor may not enforce a due-on-sale clause, including:

- a transfer to a relative resulting from the death of a borrower;
- a transfer to a spouse or child of the borrower; or
- a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property.<sup>21</sup>

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<sup>19</sup> See [Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce](#), by Sarah Bolling Mancini and Alys Cohen, *Pepperdine Law Review*, Vol 43: 2, February 2016. Additional background on these issues is available here: <https://www.nclc.org/other-webinars/saving-the-family-home-after-death-or-divorce.html>; <http://www.nclc.org/issues/snapshots-of-struggle.html>.

<sup>20</sup> 12 U.S.C. § 1701j-3(d).

<sup>21</sup> 12 U.S.C. § 1701j-3(d)(3), (5), (6), (7).

Because the due-on-sale clause is the only mechanism a servicer has to block an assumption of the mortgage by a new owner, servicers must allow a survivor to assume the loan if he or she falls within one of the Garn exceptions, even if there is an otherwise valid due-on-sale clause in the loan contract.<sup>22</sup> Without an enforceable due-on-sale clause, contracts are freely assumable and assignable under state contract law.<sup>23</sup>

#### Practice Tip

Unfortunately, many servicers do not understand this and tell people who have become the owners of the home through a divorce that they cannot assume the mortgage if the payments are in default, or that they cannot assume the mortgage unless they meet creditworthiness standards. So how do you deal with this problem?

The first step is usually to provide the servicer with the appropriate documentation proving that your client is a **successor in interest**—someone who became the owner of a home through a Garn-exempt transfer – and ask the servicer to communicate with your client regarding the loan and available loss mitigation.<sup>24</sup>

If the borrower has died, a survivor can point to a regulation issued by CFPB under RESPA, which took effect January 10, 2014. Under this regulation, servicers are required to have policies and procedures reasonably designed to "[u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower concerning the property secured by the deceased borrower's mortgage loan."<sup>25</sup> The CFPB issued a helpful bulletin clarifying how servicers

#### Practice Tip

Although this regulation and the compliance bulletin do not explicitly apply after a divorce or separation, it may be helpful to point to these sources to explain that the servicer can and should communicate with the survivor.

## New Regulations Effective 2018 Protect Non-Borrower Homeowners

The CFPB issued new a regulation under RESPA in August 2016, which will take effect on April 19, 2018, giving much broader protections to successors in interest.<sup>1</sup> This regulation requires servicers to communicate with all successors covered by the Garn-St Germain Act and allows a potential successor to send a request for information for the purpose of asking how to prove his or her successor status. The regulation requires servicers to respond to this kind of request in the manner required for other “requests for information,” discussed above. In addition, once it has been confirmed that a homeowner is a successor protected by the Garn-St Germain Act, the new rule makes the confirmed successor a borrower under RESPA, meaning that all of the protections of RESPA discussed in the prior section – the right to send requests for information and notices of error, specific loss mitigation procedures and timelines, and restrictions on foreclosing when a complete loan modification application has been submitted – now apply.

<sup>22</sup> See, e.g., Fannie Mae, Single Family Servicing Guide § 408.02 (Jan. 31, 2003) (“Generally, the servicer must process these exempt transactions without reviewing or approving the terms of the transfer.”).

<sup>23</sup> See Restatement 2<sup>nd</sup> of Contracts § 323 Comment a (“The assent of the obligor is not ordinarily necessary to make an assignment valid.”); *Brush v. Wells Fargo Bank, N.A.*, 911 F.Supp.2d 445, 460 (S.D. Tex. 2012) (finding daughter, who inherited property from her father, had right to assume the mortgage despite existence of due-on-sale clause); *Olson v. Etheridge*, 686 N.E.2d 563 (Ill. 1997) (contracting parties can modify who has primary responsibility for payment of a debt, without reference to the wishes of the creditor of that debt); *Andrews v. Holloway*, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) (holding that lender’s consent to assumption was not required where mortgage contract provided it was binding on the borrower’s “assigns”).

<sup>24</sup> If the transfer to your client did not fall within one of the Garn-St Germain protected transfer categories, you still may be able to obtain a loan modification. Particularly if the loan is governed by Fannie Mae or Freddie Mac rules, there is an argument that Fannie and Freddie allow for a simultaneous loan modification and assumption after any “exempt transaction,” which includes some transfers beyond those covered by Garn-St Germain. See Fannie Mae Servicing Guide § D1-4.1-02, Freddie Mac Servicing Guide Ch. 60.5.

<sup>25</sup> 12 C.F.R. § 1024.38(b)(i)(vi).

should comply with the regulation.<sup>26</sup>

Also, if Fannie Mae or Freddie Mac owns the loan or if the loan is FHA insured, there are specific rules that require the servicer to evaluate a successor in interest for a simultaneous loan modification and assumption.<sup>27</sup> If you find out that the survivor's loan falls into one of these categories, it is important to cite to the appropriate guidebook and, if necessary, to escalate the case to Fannie, Freddie, or the FHA National Servicing Center.<sup>28</sup>

### Practice Tips

Here are a few practice tips for helping a survivor who was not the original borrower on the mortgage loan:

- Send the servicer a letter explaining that the survivor became the owner of a home through a transfer covered by the Garn-St. Germain Act. Attach proof of the survivor's ownership of the house, such as a divorce decree or legal separation agreement conveying the house to your client<sup>29</sup> or a quitclaim deed from the borrower to your client.
- You can opt to send this letter and proof of ownership before sending a loan modification application or along with the loan modification package. As always, keep a copy of what you send and proof that the documents were received.
- If the loan is owned by Fannie Mae or Freddie Mac or insured by the FHA, cite to the appropriate handbook or guidance requiring the servicer to evaluate the survivor for a simultaneous modification and assumption.

**Case Scenario:** *Since Fannie Mae owns Patricia's mortgage, you draft a letter explaining to the servicer, Nationstar, that it is required to consider her application for a simultaneous loan modification and assumption. You attach the divorce decree and an application for a loan modification with all required supporting documents. When Nationstar still refuses to process the application, you help Patricia contact the Fannie Mae escalations department. Fannie Mae intervenes, and Nationstar agrees to review the application. Patricia tells you that she finally feels she is making progress towards saving her home.*

## Safety Planning and Privacy Concerns

While working with a survivor, it is especially important to develop an appropriate safety plan and address privacy concerns. The mortgage foreclosure context is no different, and these factors need to be addressed with the survivor.

<sup>26</sup> CFPB Bulletin 2013-12 (October 15, 2013).

<sup>27</sup> See Fannie Mae Lender Letter LL-2013-04, Fannie Mae Servicing Guide Announcement SVC-2013-17; Fannie Mae Single Family Servicing Guide § D1-4.1-02; Freddie Mac Bulletin 2013-3 (Feb. 15, 2013); Freddie Mac Single Family Servicing Guide § 9207.2; FHA Servicing Handbook Handbook Section III. A. 2. j. ii (B) (4) (search for "non-borrowers who acquired title through an exempted transfer").

<sup>28</sup> To escalate a wrongful denial by a servicer, you can contact [resource\\_center@fanniemae.com](mailto:resource_center@fanniemae.com), [FMBH@freddiemac.com](mailto:FMBH@freddiemac.com), or for FHA loans, call the National Servicing Center at 1-877-622-8525.

<sup>29</sup> Remember that if the divorce decree or separation agreement does not clearly award ownership of the house, you will likely also need a quitclaim deed signed by the non-resident ex-spouse.

First, it is important to partner with the survivor to know the abusive partner and identify potential risks, especially the potential for retaliation. The survivor is the expert in gauging how the abusive ex may react to their intentions regarding the home and foreclosure. For example, how will the ex react to a request to assist with the loss mitigation process; will they be willing to sign required documents? Some abusive former partners may place conditions on their participation in the loss mitigation process, such as requiring in-person meetings that may place the survivor at risk.

Second, plans for how to proceed with the foreclosure and potential loss mitigation options should be based upon that risk assessment. In some cases, the safety risks may be so great that the survivor should not attempt to keep the home because they need to keep their location secret. In those situations, and other situations where keeping the home is not appropriate or possible, advocates should discuss with the survivor that it is ok to leave the house and that a foreclosure may be preferable to a course of action that may compromise their safety.

**Case Scenario:** *At one point, Nationstar demands that Patricia gets a form signed by her ex-husband consenting for Nationstar to pull his credit report in connection with Patricia's application for a loan modification. You talk with Patricia about whether it would be safe for her to communicate with her ex and ask him to sign the form. She tells you she is very concerned about how he would react to this request, based on his heated reaction the last time they talked about the mortgage. You discuss with Patricia the option to push back on Nationstar's request since she has already provided the bank with a copy of the divorce decree giving her sole ownership of the house. Finally, Nationstar is convinced that Patricia's ex-husband does not have to sign any documents for the modification.*

It is also important to remember that, while financial institutions do have obligations to protect personal information, this obligation may not stop the disclosure of the survivor's information. This is especially true if the abusive partner is also on the mortgage loan. Accordingly, if the survivor has concerns regarding the release of their information they may want to weigh the benefits of loss mitigation versus the potential risks.

## Using the Family Court Proceeding to Address Mortgage Foreclosure

It may be possible to use the family court to better position survivors in the mortgage foreclosure context, especially to address some of the roadblocks that the abusive partner may attempt to construct for the survivor.

### Family court strategies for keeping the property

Possible family court strategies for keeping the property may include:

- Obtain orders requiring the payment of child support and/or alimony, to increase the survivor's financial resources to make payments or use as a base for loss mitigation options.
- Consider requiring the family court to order mortgage payments by the abusive partner as a part of or in lieu of spousal support if that is appropriate for the circumstance. Among other factors, the motivation to preserve the asset and a credit history may be more effective than the motivation to pay support.

- See if the court will provide that the survivor remain in the home and pay the mortgage (perhaps with a modification) for several years until the children are adults and/or real estate markets improve to allow a more profitable sale. It may be appropriate to require the abusive partner to assist with maintaining the payments.
- While some states permit the transfer of real property by a judgment or decree or divorce, the title insurance and mortgage industries do not always recognize the transfer. Many mortgage servicers will require this to work with the survivor but not the abusive partner for loss mitigation purposes. Accordingly, it is always best to have a deed signed when there is a property transfer in a domestic relations case.

Also, see the **Family Law** chapter of this Guidebook for strategies to enhance economic security or provide financial relief through family law cases.

## Family law strategies for selling the property

Possible strategies to review for selling the property or permitting the foreclosure to go through may include:

- Requesting a court order to permit the sale of the property without the abusive partner's consent or involvement, if he will not cooperate with the survivor to sell the property.
- If the sale or foreclosure does not pay the balance due on the mortgage, using the family court to allocate responsibility for the deficiency. Whether the abusive partner was cooperative with efforts to modify the loan or sell the house may be a factor the family court judge can consider in deciding how to allocate the responsibility for the deficiency.<sup>30</sup> To the extent the survivor is required to pay something, then work with the survivor to develop strategies for how the deficiency will be paid.

## Other strategies

There are also other creative strategies that advocates may consider to use the family court proceedings to assist the survivor with the mortgage loan and possible foreclosure. These options may include:

- **Motion for Joinder of Third Parties.** In some states, the family court may be willing to assert jurisdiction over the property and make determinations that would then bind third parties related to the property.<sup>31</sup>
- **Consolidation of foreclosure proceedings and divorce proceedings.** In states where foreclosures are judicial, it may be possible to request that the cases be consolidated. This may allow the family court to be informed by the foreclosure court

**Case Scenario:** *In Patricia's situation, she may need to try to reopen her divorce case to accomplish her goals. If the divorce decree does not clearly award the house to her, she may need to request that the divorce decree be amended, if possible, to resolve the ownership situation. She may need to request that the judge order her ex-husband to cooperate with her efforts to discuss the situation with the mortgage company, submit documentation for loss mitigation, or cooperate with efforts to sell the property. If her ex-husband refuses to cooperate with the court's orders, Patricia may want to consider moving forward with requesting that the court hold her ex-husband in contempt and award her appropriate relief. Discuss with Patricia her safety plan in relation to these possible courses of action, so that she can assess whether pursuing these options fits with her priorities and goals.*

<sup>30</sup> See e.g. *Lawson v. Lawson*, 228 S.W.3d 18 (Ky Ct. App. 2007) (assigning deficiency after mortgage foreclosure to husband where his own misconduct caused him to cease making payments); *Porath v. Porath*, 855 N.E.2d 511 (Oh. Ct. App. 2006) (finding equal distribution of assets inequitable where wife thwarted husband's attempts to avoid foreclosure of marital home); *In re Marriage of Cook*, 453 N.E.2d 1357 (Ill. App. Ct. 1983) (awarding substantial marital assets to wife where husband failed to keep up the mortgage payments on the family home).

<sup>31</sup> See e.g. *Glade v Glade*, 45 Cal. Repr. 2d 695 (Cal. Ct. App. 1995) (family law court acquired jurisdiction over community property in the hands of third parties and could properly order their joinder).

and vice versa and make better decisions regarding the disposition of the property.<sup>32</sup>

- **Motions to compel signatures or other cooperation with the mortgage servicer and loss mitigation process.** May be considered at times when the mortgage servicer is requiring the abusive partner to cooperate with the process, such as providing documentation or sign applications. Additionally, may be necessary to have such an order to move forward with the sale of a property if the abusive partner refuses to participate in the sale process. The survivor may consider a motion requiring the abusive partner to sign an authorization allowing the mortgage servicer to release information to the survivor if efforts to require the mortgage servicer to do so without the authorization have failed.

## Conclusion

All too often, survivors of domestic violence must grapple with the risk of foreclosure, either while living with abusive partner under financial strain or after leaving, while attempting to save a home with a reduced household income. Advocates can help survivors feel empowered to address the problem, rather than shutting down when faced with the prospect of a foreclosure. With the tools discussed in this chapter, advocates and survivors can work together to find alternatives to foreclosure, understand the legal protections available, and make a plan that protects the survivor's safety and pursues their goals.

## Additional Resources

- National Consumer Law Center, *Foreclosures and Mortgage Servicing* (5th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).
- [“Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce,”](#) by Sarah Bolling Mancini and Alys Cohen, *Pepperdine Law Review*, Vol 43: 2, February 2016 available at [pepperdinelawreview.com/wp-content/uploads/.../CohenMancini\\_Final-no-ICR.pdf](http://pepperdinelawreview.com/wp-content/uploads/.../CohenMancini_Final-no-ICR.pdf).
- Additional background successors in interest: <https://www.nclc.org/other-webinars/saving-the-family-home-after-death-or-divorce.html>; <http://www.nclc.org/issues/snapshots-of-struggle.html>.
- <http://www.nclc.org/issues/foreclosures-and-mortgages.html>
- Find certified, HUD-certified nonprofit housing counselors at <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>.
- <http://www.consumerfinance.gov/mortgagehelp/>
- For information about state Hardest Hit Funds Programs: <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx>.
- CSAJ webinar featuring Karen Tjapkes, [Domestic Violence in Foreclosure: The Foreclosure Process, Defenses & Alternatives for Survivors](#)
- [CSAJ Comments to CFPB on Amendments to the 2013 Mortgage Rules](#)

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<sup>32</sup> *In re Marriage of Schweihs*, 584 N.E.2d 472 (Ill. App. Ct. 1991); *In re Marriage of Elliott*, 638 N.E.2d 1172 (Ill. App. Ct. 1994).

# Nine



## Tax Advocacy for Survivors

By Jamie Andree

### Introduction

Survivors of domestic violence frequently have tax problems.<sup>1</sup> These problems may be obvious: the survivor is receiving collection notices from IRS and/or is having funds taken to pay an existing tax debt. Some tax problems are subtler. For example, a survivor may be unaware of or unable to take advantage of tax benefits, such as the Earned Income Tax Credit, which were specifically designed to help low to moderate income workers make ends meet. Many, but not all, of the tax problems faced by survivors, are directly related to abuse.

The purpose of this chapter is threefold. First, it provides basic tax information that can be used by survivors to identify and make important tax-related decisions. Second, it identifies some of the most common tax problems faced by survivors and discusses possible solutions to those problems. Finally, it informs survivors how they can obtain tax help. Topics addressed in this chapter include the issues related to filing tax returns, tax benefits related to children, IRS audits, innocent spouse relief, IRS collection, and finding tax help.

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<sup>1</sup> This chapter will focus on the federal income tax issues faced by survivors, which means those issues that involve IRS. Some states do not have a state income tax. Those that do have a state income tax have rules and procedures that differ significantly from one another and are, therefore, beyond the scope of this chapter. However, advocates should keep in mind that some survivors have state tax problems that are often as economically devastating as federal tax problems.

## Leah's Story

Leah's story, described below, highlights some of the tax problems that survivors face.

*Leah grew up in a small town and married John in 2001 shortly after finishing high school. They separated in June 2013. They have two children who were born in 2005 and 2007. John was self-employed in construction. Leah worked as a receptionist in an office. John was extremely controlling of Leah in all aspects of their lives including the family finances. He demanded that all her income be turned over to him. He doled out money for groceries and other necessities as he determined they were needed. He was secretive about his own income, so Leah had no idea what he earned or even when or where he was working. John controlled whom Leah could see, where she could go, and when. He tolerated no dissent or questioning and would attack her verbally and physically whenever he felt challenged. Leah did not question John about anything, including money.*

*During their marriage, John and Leah filed joint tax returns using a tax preparer that John selected. Leah handed over each year's W2 to John. She did not participate any further in the preparation of the return until it was completed. Until 2007, John would show Leah the second page of the completed return and have her sign it. He never gave her an opportunity to review the entire return before or after signing, and Leah was afraid to ask to see it. She never knew whether tax was owed or whether John received refunds. Starting in 2007, their returns were filed electronically. After that, Leah was never presented with a tax return to sign although she believed joint returns were being filed. Leah was so focused on merely surviving life with John and protecting their children from his abuse that she didn't even consider asking him about tax returns.*

*Starting in 2010, Leah noticed that she and John were receiving mail from IRS, but she did not know what was inside the envelopes. She was afraid to ask.*

*In early 2013, a coworker noticed bruises on Leah's arms. After years of concealing abuse, Leah connected with an agency that served survivors. By late 2013, she and her children were living in transitional housing, and Leah had obtained a legal aid lawyer and filed for divorce. In March 2014, she went to a VITA site and had her 2013 tax return prepared for free. She was delighted to learn that she was due a large refund – over \$3,000 – because her income was low, her children lived with her, and she was eligible for the Earned Income Tax Credit. The refund would enable her to buy a car and purchase other items she and her children badly needed.*

*Unfortunately, Leah never received the refund. IRS kept it and applied it to a 2008 tax debt owed jointly by Leah and John. After calling IRS, Leah learned that she and John were both liable for over \$25,000 in federal income tax stemming from John's misreporting of his income and deductions on joint tax returns they had filed from 2008 through 2012. Not only was Leah unable to obtain refunds until the debt was paid in full, but IRS was threatening to levy her wages and her tiny bank account.*

*To make matters worse, Leah then received a letter from IRS stating that IRS was auditing her 2013 tax return. The letter said she had 30 days to provide proof to IRS that she was related to her own children and that she had lived with them in 2013. It also asked for proof of her marital status. Leah had no idea where she would obtain this proof. She had been unable to take important papers with her when she and her children left John.*

*In addition to the problems with IRS, Leah's divorce attorney told her that John's lawyer was demanding that John be granted the right to claim both of their children as dependents on his future tax returns.*

## Federal Tax and Economic Security for Survivors

Congress has chosen to use the tax system to deliver a range of benefits to taxpayers. Unfortunately, for a number of reasons related to abuse and to the complexity of the tax rules, survivors may often miss out on receiving these very important tax benefits. Access to tax benefits can substantially improve a survivor's economic stability and security. Even a refund composed entirely of tax withheld from a survivor's paycheck can be a great help. The primary tax benefits generally associated with claiming children on a tax return are the dependent exemption, the Child Tax Credit, the Additional Child Tax Credit, the Child and Dependent Care Credit, and the Earned Income Tax Credit (EITC.) The EITC alone can be worth over \$6,000 to a survivor with three or more qualifying children. The 2013 tax return that was prepared for Leah at a VITA site showed that she was eligible for a refund of \$3,815, more than half of which resulted from claiming the EITC and the Additional Child Tax Credit, but all of which was taken by IRS to repay her joint tax debt with John.

In addition to losing out on tax benefits, survivors may find themselves saddled with tax debt, often resulting from the action of an abusive spouse. For example, a survivor may not know that a joint tax return was prepared incorrectly or that a return was not filed at all, resulting in a cascade of collateral consequences. Leah was unaware that John misstated his income and business expenses on their joint return for five years. Tax problems that go unaddressed can severely undermine a survivor's economic stability and security. IRS employs a number of collection strategies that may impair survivors' ability to provide for themselves or their families. IRS can and will levy (garnish) a tax debtor's wages, Social Security benefits, and other income, will levy on bank and retirement accounts, and will retain refunds to apply to existing tax debts. Just as Leah was taking steps toward economic stability, she found herself facing IRS collection action as well as the loss of her badly needed refund. Also, a record of tax debts, even those that have been paid, can impair a survivor's credit for years.

Finally, for survivors who earn income but are not treated as employees, the failure to file tax returns may impact their economic stability and security far into the future. These survivors, and others who work informally and are paid in cash, do not get credit with the Social Security Administration for the work they have done unless they file tax returns and report this income. As a result, they may not be eligible for Social Security retirement or disability benefits, or the amount they receive may be less than their employment history would warrant.

### **Long term impact of tax issues facing survivors**

As noted above, there are immediate as well as long-term impacts from the tax issues survivors face. As in Leah's situation, missing out on important tax benefits and refunds restrict survivors' access to financial resources needed for safety; Leah had planned to buy a car and cover some basic needs for her children with the refund that was taken by IRS and applied to the joint tax liability. Many survivors use tax refunds for transportation, relocating or securing housing, covering legal fees, or getting a leg-up on other basic needs.

In the long term, tax debt can damage survivors' credit, restricting access to housing, employment, utilities, and other basic needs. Failure to file tax returns can also threaten future income such as retirement and disability benefits. The tax system was designed to deliver a range of benefits to low and moderate income taxpayers, yet survivors often miss out on these benefits while grappling with the consequences of tax issues generated by abusive partners.

## Where Tax Issues Start: Filing a Tax Return

The tax return is the starting point for understanding tax issues faced by survivors. All potential taxpayers face a range of questions and choices related to the filing of a tax return,<sup>2</sup> the answers to which may have profound financial implications for the individual and the individual's family.

Some of the most significant questions and choices related to filing a tax return may include:

- Am I required by law to file a tax return?
- Even if I am not required to file, are there reasons that I should file a tax return?
- Are there any reasons not to file a tax return?
- What filing status may I and should I use?
- If I am married, must I file a joint tax return with my spouse?
- What information do I need to file a return and where can I get it if I don't have it?
- Who is going to prepare my tax return?

Survivors who are married or who have been married face issues related to the filing of a tax return, including:

- Whether to file a joint return with a spouse to whom they are currently married;
- Whether to file a joint return with a spouse from whom they are divorced or divorcing, but to whom they were married at the end of the tax year.

### Who is required to file a tax return?

IRS rules establish who is required, based on the amount of their income and other factors, to file a tax return. Those rules can be found on the IRS website which is located at [www.irs.gov](http://www.irs.gov), [IRS Publication 501](#). The rules for determining who has to file a tax return can be confusing. They are particularly challenging for individuals who are unfamiliar with the American tax system and for certain groups, such as married people who live together but file separately.

In general, the rules are based on the taxpayer's filing status, age (under 65 or age 65 and older), and amount of income. For example, for tax year 2015, a single taxpayer under age 65 who does not qualify for any filing status other than single would be required to file a tax return if the taxpayer's gross income was at least \$10,300.<sup>3</sup> There are also special filing requirement rules for people who can be claimed as dependents by someone else. People with annual net income of at least \$400.00 from self-employment are required to file a tax return.

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<sup>2</sup> Many survivors have not had the opportunity to make their own decisions or participate in the decision-making process related to filing a tax return. This issue will be discussed later in this chapter.

<sup>3</sup> Taxpayers generally receive "information returns" – W2s and 1099s – which tell them how much income they have received from the issuer of the return during the tax year and which contain other important information such as the amount of tax withheld, if any.

### Key Terms

**Tax return:** A tax return is a form you submit to IRS stating your income and certain personal circumstances from the past year. This form is used to assess how much tax, if any; you owe or whether you are due a refund.

**Refund:** A refund is money owed to you, generally because more tax has been withheld or paid than you actually owe. Certain tax credits may also create or increase your refund. A refund is also referred to as an "overpayment" of tax.

**Credit:** A tax credit is reported on your tax return. Credits are deducted from the tax you would otherwise owe. Some credits are "refundable" meaning that they can also result in a refund or increase the size of your refund. Some of the common credits<sup>1</sup> are the Earned Income Tax Credit (EITC), the Premium Tax Credit (PTC), and the Child Tax Credit (CTC.)

**Deduction:** A tax deduction is reported on your tax return. It reduces the amount of income that is taxed and, generally, the amount of tax you owe.

**Exemption:** A tax exemption is an amount that is deducted from your income to reduce the amount of income that is taxed. Generally, you can claim an exemption for yourself. You may also be able to claim exemptions for your spouse or dependents if they qualify under IRS's rules.

**Filing status:** Filing status is a category that is based on a number of factors including your marital status. Everyone who files a tax return must select the appropriate "filing status." There are five filing statuses: single, married filing jointly, married filing separately, head of household and qualifying widow(er) with dependent child. Each filing status has its own requirements, advantages, and disadvantages.

## Key Terms (cont.)

**Joint and several liability:** When married taxpayers file a tax return, each spouse is jointly and severally liable for the full amount of tax shown on the return or as adjusted by IRS. This means that each spouse is responsible for paying the full amount of the tax even if only one spouse had all or most of the income or took some action that led to tax being owed, such as failing to report income or misreporting deductions. IRS is free to collect the entire amount or any part of what is owed from either taxpayer.

**Innocent spouse relief:** A taxpayer who has filed a joint return with their spouse and who owes tax as a result of that return can ask IRS to grant “innocent spouse relief.” If granted, the taxpayer is not responsible for some or all of the tax that results from the joint tax return.

**Injured spouse relief:** A taxpayer who has filed a joint return with a spouse can request injured spouse relief when the taxpayer’s share of the resulting refund has been or will be taken to pay for the spouse’s past due tax, child support, student loan, or other debt. If granted injured spouse relief, the taxpayer will get their share of the joint refund instead of having it applied to repay the spouse’s separate debt.

**Tax audit:** An examination by IRS of a taxpayer’s accounts, documents, and other information to determine the correctness of a tax return filed by the taxpayer.

Taxpayers who have a filing obligation but who fail to file or who file after the due date of the return may be subject to penalties. A taxpayer who files late but is due a refund is not penalized for filing

after the due date. However, a taxpayer can only obtain the refund if the taxpayer files the return within three years of its due date. In limited circumstances, a taxpayer may be granted additional time to claim a tax refund if the taxpayer provides a statement from a physician documenting that the taxpayer was unable to manage their financial affairs due to a mental or physical disability.

A “failure to file” penalty, which applies when a taxpayer files a return after its due date, is normally 5% of the unpaid taxes due for each month or part of a month that a return is late. The maximum failure to file penalty is 25% of the unpaid tax. There is also a failure to pay penalty applicable when payment is not made by the return’s due date. The failure to file penalty is greater than the failure to pay penalty, so survivors who cannot afford to pay the amount due should still file their returns by the due date.

Some taxpayers who would not otherwise have a filing obligation are, nevertheless, required to file tax returns. Starting with tax year 2014, taxpayers who have signed up for marketplace health insurance (“Obamacare”) and for whom the Advance Premium Tax Credit (APTC) was paid directly to their health insurer are required to file tax returns, even if they do not otherwise have a tax filing obligation. Those taxpayers must reconcile the amount of APTC that was paid on their behalf with the APTC that they were actually entitled to have paid. IRS Form 8962 is used to reconcile the amount of APTC that was received; it is filled out and attached to the tax return that is filed for that year. A survivor who received the benefit of the APTC and who fails to file a tax return reconciling the APTC that was received, will not qualify for the APTC or other cost-sharing reductions to help pay for Marketplace health insurance in future years. Taxpayers who are not exempt from the health insurance requirement and do not have health insurance for themselves and/or their dependents are required to pay a penalty called the Individual Shared Responsibility Payment (ISRP.) The ISRP is reported on the taxpayer’s tax return. The amount of the ISRP is based on the taxpayer’s income and the number of uninsured individuals.

### Practice Tip

The IRS website has an “interactive interview” program that a survivor or a survivor and advocate together can use to determine if the survivor has a filing requirement. To locate that interactive interview, go to [www.irs.gov](http://www.irs.gov), click on “Filing” and then click on “Do you need to file a return?” An individual using the interactive interview program is not asked to provide identifying information.

**Case Scenario:** *In Leah’s case, if she continues to claim her two children as dependents, starting with tax year 2014, she is required to report whether they (and she) had or were exempt from having “minimum essential coverage.” An ISRP is charged for each non-exempt individual without coverage.*

## Other reasons to file a tax return

Survivors who have not gotten the APTC and/or do not have enough income to be required to file a tax return may still have a number of good reasons for filing a tax return. These include:

- Obtaining a refund of tax withheld from income.
- Obtaining a refundable tax credit such as the Earned Income Tax Credit.
- Applying for financial aid to attend school.
- Reducing the odds of being the victim of tax-related identity theft since people who fail to file tax returns are more likely than others to be the victim of this type of ID theft. When survivors file their own tax returns, it reduces the odds that their name and Social Security number will be used by their abusive partner to file a false joint return.
- Improving immigration status. For example, lawful permanent residents who wish to become citizens will have to provide proof of filing all required tax returns.
- Filing bankruptcy as the trustee will want to see copies of recent years' tax returns.
- Applying for a loan.

### Tax Returns and Privacy

Some survivors worry that filing a tax return will increase the likelihood that their abusive partner will be able to locate them. Fortunately, a provision in the federal tax law, Internal Revenue Code §6103, provides that all tax return information, including the filer's address, is kept confidential from anyone who did not file the tax return. There are some exceptions to the confidentiality rules including individuals or entities specifically designated by the survivor who filed the return, state tax departments, law enforcement agencies, and other similar entities. In cases where survivors have filed joint tax returns, the other taxpayer can get information contained on the original return as well as copies of subsequent correspondence from IRS. Survivors can use IRS Form 8822 to notify IRS of a change in mailing address.

## Filing status

A survivor who decides to file a tax return must deal with the issue of selecting a filing status. There are five filing statuses, each with its own requirements. They are:

- Single
- Married Filing Jointly
- Married Filing Separately
- Head of Household
- Qualifying Widow(er) with Dependent Child

### Practice Tip

Survivors who were married at the end of the tax year<sup>4</sup> face the biggest challenge in determining what filing status to use. It is critical to remember that married spouses, including those who are divorcing, are not required to file a joint tax return.

The qualifications for each filing status are contained in [IRS Publication 501](#). In addition, IRS has an interactive assistant on its website that survivors can use to determine which filing status applies to them and, if more than one would apply, which would lead to the lowest tax.

<sup>4</sup> Marital status is determined as of December 31, the last day of the tax year for which the return is being filed. Thus, a survivor's marital status on December 31, 2016, must be considered in determining which filing status the survivor can use when filing a 2016 tax return in 2017.

Married taxpayers can choose one of the following statuses:

- (1) married filing jointly,
- (2) married filing separately, or
- (3) head of household.

Note that a taxpayer who is still married on the last day of the tax year may not file as single. **The chart below sets out some of the requirements, benefits, and disadvantages to selecting one of the three filing statuses that may be available to married survivors.**

The filing status you choose can also impact things like the amount of income that is taxable, credits that are available, and the amount of tax owed. Many couples choose to file joint returns because doing so may result in a lower tax liability or a bigger refund. Spouses may choose to file a joint return even if they do not live together.

## Assessing tax issues

Each survivor's experience is unique. Advocates assisting with tax issues must keep this in mind and respect the complexity of the survivor's experience and feelings. The assessment questions presented below can help a survivor decide whether to file a joint tax return with their spouse. However, conversations about tax should not be limited to these questions. These questions can be part of a broader assessment with the attorney/advocate relying on the survivor's insights and priorities. For a fuller description of a *survivor-centered approach* to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Advocates can help survivors assess the wisdom of filing a joint return by discussing issues raised by the following questions:

- Is your spouse secretive about financial information?
- Do you have access to the household bank account and other financial records?
- Does your spouse control the household financial decisions?
- Are you and your spouse current in filing required tax returns?
- Do you or your spouse owe tax for past years? If so, do you know why?
- Have you ever received a notice of tax due from the IRS?
- Do you have a history of filing joint returns with your spouse?
- Did you participate in preparing and filing joint returns with your spouse?
- Did you have a chance to review joint tax returns filed with your spouse?
- Do you trust your spouse to report income, deductions, and other information accurately?

### Practice Tip

Survivors of abuse often conclude that filing a joint tax return with their abusive spouse is unwise. If the abusive partner has a history of not paying taxes, is dishonest, and/or is secretive about financial matters, it may be a good idea for a survivor to file a separate return. However, some survivors, like Leah, may be in a position where it is dangerous to refuse to file a joint return. Some questions to help determine the best strategy for the survivor can include: How do you think that John will react if you file separately? What are some strategies that may make that decision safer?

Filing status is important for several reasons. When married spouses file a joint return, both spouses are responsible for the entire amount of tax due (which is called "joint and several liability") even if only one spouse had income or even if one spouse put mistaken or false information on the tax return. Leah is jointly and severally liable with John for the entire amount of tax due from

## Considerations for Selecting a Filing Status

	Married Filing Jointly	Married Filing Separately	Head of Household
<b>Requirements</b>	Parties must be married (do <b>not</b> need to be living together)	Parties must be married (but whether they live together or apart is immaterial.)	Filer must (1) Provide the principal place of abode for any dependents; (2) Provide more than half of the annual support for the household [e.g. rent, insurance, utilities, food consumed on the premises] and (3) Be considered “unmarried” which includes a married taxpayer who lived apart from their spouse for the last 6 months of the tax year.
<b>Benefits</b>	<p>May be eligible for:</p> <ul style="list-style-type: none"> <li>- Earned Income Tax Credit and Child and Dependent Care Credit</li> <li>- Student loan interest deduction and other deductions and credits related to education.</li> </ul> <p>If the filer lived with their spouse at any point during the year, married filing jointly allows them to exclude more Social Security income from taxation.</p>	A taxpayer who selects married filing separately is only liable for their tax debt for that tax year. They are not responsible for their spouse’s tax debt.	<ul style="list-style-type: none"> <li>- Although taxpayer is fully liable for any tax arising from the return, they avoid liability that might have been imposed had they filed jointly with a spouse who misstated income or other return items.</li> <li>- Allows a higher standard deduction than married filing separately.</li> <li>- Permits eligibility for the Earned Income Tax Credit.</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>- Joint filers are jointly and severally liable for tax arising from the return. Even if only one spouse had income, both are liable for any resulting tax liability whether it appears on an original return or results from a later exam by IRS.</li> <li>- IRS may pursue one or both taxpayers to recover tax owed as the result of a joint return.</li> <li>- IRS may offset [take] the entire refund to pay towards one spouse’s prior tax or other debt [including child support, student loan, etc]. There is a remedy for this – file a request for <b>Injured Spouse Relief</b> using IRS form 8379.</li> </ul>	<p>Not eligible for:</p> <ul style="list-style-type: none"> <li>- Earned Income Tax Credit</li> <li>- Student loan interest deduction and other deductions and credits related to education.</li> <li>- Child and Dependent Care Credit</li> </ul>	IRS may audit the taxpayer’s return and require the taxpayer to prove that all of the requirements for filing as head of household are met.
<b>Safety Concerns</b>	Filing jointly with an abusive spouse generally requires communication with that spouse and sharing information that may raise safety concerns for survivors. Even seeking <b>Innocent Spouse Relief (discussed below)</b> which is relief from joint and several liability from tax owed on a jointly-filed return, raises safety issues as IRS will notify the abusive spouse that relief has been sought and will give that spouse an opportunity to respond.	Filing separately does not require communication with or sharing information with one’s spouse.	Filing as head of household does not require communication with or sharing information with one’s spouse.

their joint returns even though only John made errors in reporting his income and deductions. The filing status you choose can also impact things like the amount of income that is taxable, credits that are available, and the amount of tax owed. Many couples choose to file joint returns because doing so may result in a lower tax liability or a bigger refund. Spouses may choose to file a joint return even if they do not live together.

Taxpayers who choose a particular filing status may, within certain time limits, change to a different filing status after filing the return. A taxpayer who files a joint return has until the return's actual due date [usually April 15] to amend and file married filing separately or head of household. That is a very limited opportunity to switch from married filing jointly to another filing status. By contrast, taxpayers who file separately generally have three years from the return's due date to amend the returns and file married filing jointly.

## Information needed to file a tax return

The first step toward filing a tax return is the collection of information needed to prepare the return. All taxpayers must collect income information for all income they received during the tax year. Employers are required to send each of their employees an IRS Form W2 that reports annual income and the amount of tax that was withheld. Independent contractors may receive IRS Form 1099-Misc from businesses that have paid them at least \$600.00 during the tax year. Other common sources of income that result in the issuance of a 1099 (or a W2) are Social Security benefits, unemployment benefits, and VA benefits, interest, dividends, pensions, canceled debts, state and local tax refunds, and gambling winnings.

**Case Scenario:** *John prevented Leah from participating in the preparation and filing of their joint tax returns, and she was not allowed to review the returns before they were filed. Leah was understandably fearful of asking about taxes or other financial matters. She left without being able to take important tax information with her. Requesting access to information could pose continued safety risks to her and her children. John continues to try to control access to certain tax benefits through his lawyer. Assessing Leah's knowledge of John's potential reactions is critical when determining how to gather the necessary documentation for filing.*

### Think About It

For a number of reasons, many survivors do not have access to the documents needed to prepare a tax return. Documents may have been destroyed or taken by the abusive partner. Other survivors, like Leah, lose access to documents when relocating to escape abuse, or it may pose a safety risk for a survivor to search for needed documentation. Reconstructing tax information is often possible but may be time-consuming and/or require payment for replacement documents.

Employers and other payers will often furnish replacement W2s and 1099s. IRS can provide survivors with free Wage and Income Transcripts. These are transcripts of all W2s, 1099s, and other income-related information documents. However, IRS Wage and Income Transcripts for the most recent tax year are generally not available in full until the middle of the following tax year, although partial information may be available. Unfortunately, IRS does not include state and local tax withholding on its Wage and Income Transcripts. Taxpayers will have to get that information from the entity that issued the original W2 because many state departments of revenue are unable to provide it.

Other information needed to file a tax return includes:

- Personal information such as the date of birth and Social Security number of the taxpayer and each person the taxpayer will claim as a dependent.
- Records of the taxpayer's and family members' health insurance coverage including records of employer-provided coverage or premiums paid and type of coverage for private coverage to show that all had and maintained minimum essential coverage. Taxpayers who are exempt from coverage should retain certificates of exemption received from the Marketplace or other documentation needed to support an exemption claimed on the return. As noted above, taxpayers who claim the Premium Tax Credit are required to reconcile the amount of the Advance PTC paid to their health insurer with the amount that they were actually entitled to receive.
- Taxpayers who are paid in cash should collect documentation of all payments. Useful forms of documentation of cash income can include records of bank deposits, receipts, job contracts, and ledger books.

## The Invalid Tax Return

Sometimes a survivor will discover, often after getting a notice of tax due from IRS, that a joint return has been filed by their abusive partner, without the survivor's knowledge or consent. Fortunately, there are remedies available to the survivor. These remedies involve persuading IRS that the joint return was a not a valid return. The determination of whether

### Practice Tip

A survivor can treat the situation as a form of identity theft and use IRS procedures for resolving cases of identity theft.<sup>5</sup> Or the survivor can raise the invalidity of a purported joint tax return with the IRS unit responsible for resolving claims for Innocent Spouse relief, even though, as discussed below, Innocent Spouse relief is only available to taxpayers who have actually filed joint tax returns.

a joint return is valid is based on the facts and circumstances surrounding the filing of the return. There are many factors to consider when determining whether a joint return is a valid return.

### Duress

A tax return signed under duress or coercion does not constitute a valid tax return. It is up to the taxpayer to establish the existence of duress; if successful, they will not be responsible for the tax shown on the return or later imposed by IRS.

A tax return signed under duress

To show the return was signed under duress, the taxpayer must show that they were unable to resist their spouse's demands and that they would not have signed but for such constraint on their will. IRS will consider the following as possible indicators of coercion:

### Practice Tip

A survivor who disputes the validity of a joint return should file their own tax return in that year, even if they had no income for that year. By filing their own tax return, they are showing they did not intend to file a joint return with their abusive partner. If the taxpayer learns of the invalid return prior to its due date, the taxpayer has the right to file their own return using a different filing status than married filing jointly without having to establish the invalidity of the originally filed joint return.

<sup>5</sup> The IRS website contains information and procedures for victims of tax-related identity theft. At a minimum, the identity theft victim should complete and submit IRS Form 14039 according to the instructions.

- Physical, sexual or emotional abuse;
- Financial exploitation;
- Threatened or actual harm to children;
- A threat of separation from the children.
- Threats related to immigration status;
- Isolation from family and friends;
- Surveillance;
- Shaming;
- Control over access to necessities.

It is possible that Leah may be able to convince IRS that the joint returns with John were invalid because she signed them under duress. The determination of whether a return was the result of duress is made initially by the Cincinnati Centralized Innocent Spouse Operation which also makes the determination of whether a survivor is entitled to innocent spouse relief, discussed later in this chapter. Duress is defined more narrowly than abuse and, unlike abuse, is determined at the moment that return was signed. Particularly where multiple years of returns are involved, survivors face an uphill challenge asserting duress. An experienced tax professional can help survivors like Leah determine whether to pursue invalidating returns based on duress is the best strategy.

## Forgery

A forged signature does not give rise to a valid decision to file a joint return. The burden is on the taxpayer to prove forgery and no intent to file. If the return was forged, IRS will determine if there was tacit consent, i.e. implied or understood consent. IRS will look to the following as indication of tacit consent:

- Lack of reason to refuse a joint return;
- History of filing jointly;
- Absence of objections;
- Delivery of tax information to spouse;
- Whether the joint return provided advantages to both spouses.

## Challenging an invalid return

In addition to raising the invalidity of a joint return through IRS Identity Theft procedures and/or IRS Innocent Spouse Relief procedures, there is another avenue available to survivors who are receiving collection notices from IRS but who have not had the opportunity to contest the validity of their tax debt. Taxpayers who are facing the levy (garnishment) of property, such as wages, Social Security benefits, and bank accounts, have the right to pre-levy Collection Due Process hearing before the IRS Office of Appeals. These appeal hearings generally take place by telephone unless a taxpayer specifically requests a face-to-face hearing. Although the purpose of the Collection Due Process hearing is to give the taxpayer an opportunity to get into an IRS collection alternative instead of the levy, the Appeals Office will consider underlying liability issues if the taxpayer has not had the opportunity to previously contest the tax debt.

### Think About It

There are a number of situations in which a survivor would not have had the opportunity to contest a tax debt. Abusive partners deny some survivors access to mail and survivors never see notices from IRS containing proposed assessments. A survivor escaping abuse may not have had a reliable address at which to receive mail. Sometimes IRS continues to send mail to the address shared by the survivor and abusive partner even after the survivor has provided IRS with a new address.

## Tax Benefits Related to Children

Survivors, particularly those with earnings, can receive a significant economic benefit if they are able to claim their children for some or all of these tax benefits. Unfortunately, many survivors lose out on these benefits. The reasons are complex and may involve a range of factors including being unrepresented in family law court proceedings, being represented by counsel with insufficient knowledge of child-related tax benefits, or because abuse has made it difficult or impossible for survivors to take advantage of these benefits. Even after escaping abuse, Leah is now facing John’s demands for future tax benefits. For many survivors, especially those without representation, demands like these are, themselves, a form of intimidation and/or abuse.

In order to access these tax benefits, a taxpayer must claim them on a tax return. The rules for claiming tax benefits related to children are found in IRS Publications 501, 503, 972, and 596, all of which can be obtained on the IRS website. The rules are complex, and the criteria for claiming the benefits vary among the different benefits.

### Think About It

Basic eligibility for some of these benefits generally goes to the “custodial” parent. However, IRS is not bound by a state court’s determination of which parent is the custodial parent. IRS considers the custodial parent to be the parent with whom the child has spent the most nights in the past year. If the child has spent the same number of nights with each parent, the parent with the highest adjusted gross income (AGI) is the custodial parent.

The primary child-related benefits are:

Tax Credit/Exemption	Benefit to Taxpayer	Transferable to Non-Custodial Parent?
Dependent Exemption <sup>6</sup>	Reduces income that is subject to tax. For tax year 2016, a taxpayer can deduct \$4,050 for each exemption claimed.	Yes. The release entitles the non-custodial parent to also claim the child tax credit and puts the child into the non-custodial parent’s household for the Affordable Care Act.
Child Tax Credit	Reduces the amount of tax that the taxpayer would otherwise be required to pay.	Yes. The credit goes to the parent claiming the dependent exemption for the child.
Additional Child Tax Credit	Reduces tax. If the tax is reduced to zero, the ACTC may create or increase the taxpayer’s refund as it is a “refundable credit.” <sup>7</sup>	Yes. The credit goes to the parent claiming the dependent exemption for the child.
Earned Income Tax Credit	Reduces tax & refundable.	No.
Dependent Care Credit	Reduces tax.	No.
Premium Tax Credit	Reduces tax & refundable.	

<sup>6</sup> IRC §152, IRS Publication 501

<sup>7</sup> Refundable in this context means that the taxpayer may receive money back from the IRS after their tax is reduced to zero.

The parent who claims the child as a dependent is responsible for ensuring that the child has minimum essential health coverage under the Affordable Care Act (ACA). If the child does not have minimum essential health coverage and is not exempt, the parent will incur a penalty called the Individual Shared Responsibility Penalty (ISRP). The ISRP appears as an additional tax on the parent's tax return. The parent who claims the child has the benefit of including the child in household size calculations for determining how much Premium Tax Credit the household qualifies for; the PTC helps pay for coverage under marketplace health plans.

#### **Practice Tip**

Many survivors, like Leah, will face demands from the spouse they are divorcing to be granted the child-related tax benefits. Attorneys who represent survivors facing these choices should provide calculations to the survivors showing what these child-related benefits are worth.

#### **Think About It**

For example, a survivor whose sole income is SSI and who does not intend to enter or return to the workforce may decide that the child-related tax benefits are worth little or nothing compared to other benefits, such as child support or divisions of property, that are being negotiated in the divorce case. Another survivor may discover that the tax benefits associated with the children are actually worth far more than the amount of child support the survivor is likely to receive from the other parent. Each survivor's situation is unique, and survivors' priorities will differ. What survivors will likely share is the need for detailed, accurate information upon which to make informed decisions.

## The Race To File The Tax Return

When parents are separated, both may want and attempt to claim the same child as a dependent or as a qualifying child for the EITC. This occurs even after a divorce court has awarded child-related tax benefits to one of the parents. As noted above, IRS is not bound by a state divorce court's decision concerning which parent may claim a child because IRS has its own rules that determine which parent is eligible to claim a child.

After one parent has filed a return claiming a child, the second parent will be unable to file electronically a tax return claiming the same child. The second parent can still file a paper tax return by mail claiming that child. According to IRS, it takes six to eight weeks to process a paper tax return, which is why many taxpayers choose to "e-file" their tax returns. A taxpayer who has e-filed a return should receive a refund within 21 days and will often receive it much sooner.

Depending upon how close in time IRS receives two returns claiming the same child or children, IRS may review both before processing, may process one instead of the other, or may process both and then audit one or both.

#### **Practice Tip**

If a survivor fears that the other parent has filed first, the survivor can still try to file electronically. Sometimes the other parent has not filed first but has threatened to or lied about filing. The survivor will be unable to e-file a return and will have to file a paper return if the other parent has actually filed a tax return claiming the same child.

IRS has “tie-breaker” rules, which apply to determine which parent may claim a child for the dependent exemption and the EITC when both parents meet the basic criteria for claiming the same child. The credit is given to the parent with whom the child has resided the longest during the year. If a child resided with both

### Practice Tip

Family law attorneys should try to avoid custody orders that split physical custody of children 50-50. When custody is split equally, neither parent has the child greater than half the year, so neither may claim the Earned Income Tax Credit (EITC). The EITC can provide a substantial cash benefit to an eligible working parent; care should be taken to ensure that this source of funds is not inadvertently lost as the result of decisions made in the family law case.

parents an equal amount of time, then the Earned Income Tax Credit goes to the parent with the highest adjusted gross income.

## IRS Audit (Examination)

An audit is an examination by IRS of a taxpayer’s accounts, documents, and other information to determine the correctness of a tax return filed by the taxpayer.

Most audits are done by correspondence, which means that IRS sends the taxpayer a letter requesting documentation of certain items on the taxpayer’s return. Leah received such a letter from IRS after she filed her 2013 tax return. IRS was requesting that she

### Think About It

Survivors, particularly those who have recently left their abusive partner, are often asked to provide proof that they are related to the children they are claiming as well as proof of the children’s ages<sup>8</sup>, that those children lived with them for more than half the tax year, and that the survivor did not reside with their spouse during the last six months of the tax year.

document that she was entitled to claim her children as dependents and that she qualified for the CTC, ACTC, and the EITC which made up most of her refund. IRS was also requesting documentation that she qualified to choose the filing status Head of Household, which required her to prove, among other things, that she and John had lived apart for the last six

months of 2013. The letter Leah received from IRS contained examples of the type of paperwork IRS expected her to provide as documentation.

### Practice Tip

A taxpayer has 30 days to provide the requested documentation to IRS. The taxpayer can request an extension of time to provide the documents. Documents must be mailed or faxed to the IRS examination unit that issued the audit notice. Each document submitted should have the taxpayer’s Social Security number on each page.

Many taxpayers have great difficulty locating documents to prove they are entitled to use Head of Household filing status and/or that they can claim their children as dependents as well as claim certain child tax credits. Survivors, in particular, may have difficulty if they do not have access to

records. Survivors who have moved frequently or recently and/or who may, due to abuse, have been unable to hang on to important paperwork, may not have access to the proof requested by IRS.

Below are examples of the type of documents that are most likely to persuade IRS that the taxpayer was entitled to claim a child or to use the head of household filing status:

<sup>8</sup> Eligibility to claim children for certain tax benefits, such as the EITC, is based, in part, upon the age of the child.

- Divorce or legal separation decrees.
- Leases that cover the tax year under audit and that list the residents and the address of the premises.
- School and day care records that list the child's name and address and dates of attendance.
- Dated medical records that list the child's name and address.
- Postmarked envelopes that are addressed to the child.
- Dated welfare department records listing the child's name and address.
- Court records listing the names of the child and the parents in adoption, paternity, and other actions.
- Birth certificates and other records documenting relationships.

In the past, IRS generally did not audit a taxpayer's return until after the refund had been issued. A taxpayer who was unable to provide the required documentation would end up owing some or all of the refund amount to IRS, in addition to interest and possible penalties. Now, it is more common for IRS to freeze the portion of the refund that is composed of refundable tax credits, such as the EITC, until the audit is complete. Unfortunately, IRS will often take many months to issue an audit decision after receiving a taxpayer's documents. Because many survivors depend upon prompt receipt of their full tax refund in order to make ends meet, this delay can cause significant hardship.

#### **Practice Tip**

Advocates may be able to assist survivors in collecting documents. Letters from shelters where survivors and their children have stayed, written on shelter letterhead, may be helpful. IRS will also accept letters on official letterhead from schools, places of worship, landlords, and medical, day care, or social services providers that show names, common addresses, and dates.

IRS audits can be concluded in three ways:

1. IRS can issue a no change letter indicating that because the taxpayer has substantiated all of the items that were being reviewed, IRS has accepted the return as filed.
2. An audit may conclude with an agreement where IRS proposes changes and the taxpayer agrees with those changes. In that case, the taxpayer will be asked to sign the exam report or a form.
3. If the taxpayer does not agree with the changes, IRS will generally issue a Notice of Deficiency, which gives the taxpayer 90 days to file a petition in the U.S. Tax Court. The U.S. Tax Court's website, [www.ustaxcourt.gov](http://www.ustaxcourt.gov), contains information, including forms and a video, which can be used by a self-represented taxpayer to initiate a challenge to an IRS decision in court.

#### **Practice Tip**

There are steps that survivors can take in advance of an audit to improve their chance of getting through an audit without any adverse changes to their tax return. The most important step is to make sure that the records of agencies and other entities that provide services to or work with survivors and their families reflect the correct address of the survivor and any children or other dependents that the survivor may claim on a tax return. Too often taxpayers are unable to document that their dependents live with them because they have failed to provide corrected or updated addresses to schools, welfare agencies, and medical providers.

Survivors and other taxpayers are usually best served by having legal representation during an IRS audit. Options for free representation are discussed at the end of this chapter.

## Innocent Spouse Relief

Many married taxpayers are not aware that they are not legally required to file a joint tax return with their spouse. Filing a joint tax return is often financially advantageous for the couple. However, spouses who file a joint tax return are “jointly and severally liable” for any tax shown on the return, or for any tax, penalty, and interest later assessed by IRS. That means that each spouse is individually liable for the entire tax, penalty, and interest even if only one of the spouses earned all of the income or only one of the spouses made errors that caused additional tax to be assessed. IRS does not distinguish between the spouses when attempting to collect tax arising from a joint return. While IRS has a variety of collection tools at its disposal, including levying wages, benefits, and bank accounts, the most common collection tool is to take refunds that would otherwise be due a taxpayer in the future and apply those refunds to a prior year’s tax debt.

**Case Scenario:** *This is precisely what happened to Leah when she filed her own tax return for tax year 2013. IRS took her refund and applied it to a joint tax debt that arose because John misstated his income and deductions on joint tax returns filed while they were living together. IRS is also threatening Leah with further collection action, including levy of her wages and bank accounts. Many survivors are not in a position to obtain advice about whether to file a joint return with their abusive partner, nor are they safely able to decline to file a joint return. Consequently, like Leah, they may find themselves in debt to IRS for thousands of dollars without having done anything to cause the debt or having had any way to avoid it.*

IRS offers survivors and other taxpayers the opportunity to request “innocent spouse relief<sup>9</sup>” which, if granted, can relieve the survivor from some or all of the joint tax debt. Survivors who believe, taking into account all of the facts and circumstances, that only their spouse (or ex-spouse) should be held responsible for all or part of the tax should request relief from the tax, including penalties and interest.

There are four different types of relief available. Although “innocent spouse relief” is technically a term for one type of relief from joint and several liability, it is also the term that many people use to describe all four kinds. People who are not tax professionals have a difficult time understanding the differences between the types of relief. The four types of relief are:

1. **Innocent spouse relief.** It is only available when the joint tax return understated the amount of tax due. To qualify, you must show that when you signed the return you did not know and had no reason to know that the tax return understated the amount of tax due. Taking into account all of the facts and

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<sup>9</sup> Technically, taxpayers who request what is commonly called innocent spouse relief are seeking relief from joint and several liability under Internal Revenue Code §6015(b), (c) or (f) for tax arising from a joint tax return. While the criteria and types of relief available under each of the subsections differ, those differences are beyond the scope of this chapter.

circumstances, it would be unfair to hold you liable for the full amount of tax due. This type of relief must be requested within two years of the date that IRS took its first collection action against you.

2. **Separation of liability relief.** It is only available when the joint tax return understated the amount of tax due. It is only available when the requesting spouse is divorced from, legally separated, or has lived apart from the other spouse for at least 12 months before requesting relief. It is also available if the other spouse is deceased. IRS can separate spouses' liability for the understated amount so that each spouse is responsible for only the amount of tax that would have been theirs, had the spouses filed joint returns. This type of relief must be requested within two years of the date that IRS took its first collection action against you. Taxpayers granted this type of relief are not entitled to a refund of any amounts paid toward the tax liability from which relief has been sought.
3. **Equitable relief.** It is available when the tax return understated the amount of tax due as well as when the amount was correctly stated, but the total tax due has not been paid (known as an understatement.) It is only available when the taxpayer is not entitled to Innocent Spouse Relief or Separation of Liability Relief described above. It requires IRS to take into account all relevant facts and circumstances in deciding whether to grant relief. A list of factors is discussed below.
4. **Relief from liability for tax attributable to an item of community income.** There are special rules for spouses living in the nine community property states. An overview of the rules related to seeking innocent spouse relief in community property states is contained in the instructions to IRS Form 8857, available on the IRS website.

IRS has issued guidelines<sup>10</sup> for how it will handle equitable relief in innocent spouse claims, including a list of non-exclusive factors that it will take into account when resolving claims. **These factors are described in the chart on the following page.**

#### Practice Tip

While IRS is not bound by a divorce court's decision that the abusive partner is solely responsible for paying the parties' joint tax debt, it is still important that attorneys representing survivors in family court ask the judge to hold the abusive partner solely responsible for the debt. As noted below, IRS will consider such a provision in a divorce decree or separation agreement to be a factor favoring granting the survivor innocent spouse relief.

Requests for innocent spouse relief are most often made on IRS Form 8857 and are sent, along with any attachments or letters of explanation to the IRS Cincinnati Centralized Innocent Spouse Operation. Because of the complexity of the rules governing innocent spouse relief, survivors are well-advised to obtain assistance from an experienced tax professional to prepare their request. In general, a taxpayer should request innocent spouse relief as soon as it is apparent that this kind of relief from a joint tax liability is needed.

#### Practice Tip

Many survivors have no idea why their joint tax return has resulted in tax liability. Like Leah, they have been denied access to information about household finances by their abusive partners and have not been permitted to review returns before signing them. It is vitally important for a survivor to find out the source of the tax liability before submitting a request for innocent spouse relief. Some information can be gained by requesting account transcripts for the tax years in issue directly from IRS. In addition, formal requests made to IRS by the survivor under the Freedom of Information Act for the relevant IRS file can yield vital information, particularly where the liability is the result of an audit of the joint tax return.

<sup>10</sup> Rev Proc. 2013-34

## Summary of IRS Considerations when Resolving Innocent Spouse Relief Claims

Factor	Question	Favorability of Granting Relief
<b>Marital status</b>	What is the requesting spouse's current marital status?	If, at the time innocent spouse relief is sought, the requesting spouse is widowed, divorced, legally separated, or living apart for at least 12 months from the other spouse, this factor favors granting relief.
<b>Economic Hardship</b>	Would paying the tax cause the requesting spouse economic hardship?	Economic hardship is presumed for those taxpayers whose household income is below 250% of the federal poverty guidelines. The existence of economic hardship favors granting relief.
<b>Knowledge of Tax Understatement</b>	If the tax debt is due to an understatement of tax on the return, did the requesting spouse know or have reason to know of the item giving rise to the understatement?	Typically, the item would be unreported income or an incorrect deduction. If the requesting spouse did not know or have reason to know, this factor favors granting relief.
<b>Knowledge of Failure to Pay</b>	If the tax debt is due to a failure to pay, did the requesting spouse know or have reason to know at the time the return was filed that the other spouse would not pay the tax due?	If the requesting spouse did not know or have reason to know, this factor favors granting relief.
<b>Violence/Abuse</b>	Was the requesting spouse a victim of abuse?	If abuse is present, it changes how IRS will view other factors including the knowledge factors. The non-requesting spouse's alcohol and drug abuse can be considered abuse of the requesting spouse. Abuse of the requesting spouse's child is considered as part of the abuse determination.
<b>Tax Law Compliance</b>	Has the requesting spouse complied with the tax laws in the years since the joint returns were filed?	If so, this factor favors granting relief.
<b>Legal Obligation to Pay</b>	Who has the legal obligation to pay the tax?	If a divorce or separation agreement places sole responsibility for paying the tax on the non-requesting spouse, this factor favors granting relief (see Practice Tip below).
<b>Benefits</b>	Did the requesting spouse receive a significant benefit from the unpaid tax or from the deficiency?	If yes, this factor will favor denying relief. A significant benefit must be a benefit beyond normal support.
<b>Mental/Physical Health Status</b>	Does the requesting spouse have any mental or physical health issues?	If yes, this factor favors granting relief.

By law, when IRS receives a request for innocent spouse relief, it must contact the requesting taxpayer's spouse or former spouse. There are no exceptions, even for survivors of abuse. Thus, if Leah requests innocent spouse relief from the tax debts arising from the joint returns with John, IRS will notify John that she has filed Form 8857 and will allow him to participate in the process. IRS will not disclose personal information (current name, address, telephone number, employer, income, assets) to the spouse. Other information that is given to IRS may be shared with the other spouse, but the requesting spouse can black-out information that they do not want to be disclosed.

It usually takes IRS at least six months, and often much longer, to

make a preliminary determination on a request for innocent spouse relief. During the time a request for innocent spouse relief is pending, IRS will take no collection action against the requesting spouse. Thus, if Leah requests innocent spouse relief, IRS will stop taking her tax refunds and will not levy her income or bank account during the entire time it is considering her request for relief.

#### **Think About It**

For many survivors, the prospect of IRS notifying the abusive spouse or ex-spouse that innocent spouse relief has been requested raises significant safety issues. Some survivors may choose to delay requesting innocent spouse relief until safety concerns are alleviated. Others may decide to forego requesting innocent spouse relief. For some survivors who choose not to pursue innocent spouse relief at all, there may be IRS collection alternatives available to them under which little or no payment on the joint tax debt will have to be made.

Once IRS has reviewed the request for relief and given the other spouse the opportunity to participate, it will issue a preliminary decision, a copy of which will be sent to each spouse. If neither appeals, IRS will issue a final determination. A survivor may appeal an unfavorable decision to Tax Court. A survivor can also file a case in Tax Court requesting innocent spouse relief if IRS has not issued a final determination notice within six months of receiving a request for relief on Form 8857.

IRS denies thousands of claims for innocent spouse relief each year, frequently because the taxpayer requesting relief has failed to provide sufficient information or has not responded to requests for additional information. Most of those denied relief do not file timely petitions in the U.S. Tax Court.<sup>11</sup> Fortunately, IRS now has a reconsideration process. The requesting spouse is required to submit additional information beyond what was submitted initially.

## Dealing With IRS Collections

Not all of the tax issues faced by survivors are related to abuse. It is not unusual for survivors to have, for example, filed their own individual tax returns showing a balance due. There are many reasons why taxpayers file returns with a balance due. They may have had insufficient tax withheld from earnings or, if self-employed, failed to make estimated tax payments. A debt, such as a student loan, may have been canceled during the tax year, which many people would not recognize as an event with tax consequences. Or they may have made a withdrawal from a retirement account, unaware of the 10% tax penalty on most withdrawals before age 59 ½. Some taxpayers make errors on their tax returns, which are later identified and corrected by IRS, resulting in a tax debt.

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<sup>11</sup> A taxpayer denied innocent spouse relief has only 90 days from the date of the final determination to file an appeal in Tax Court.

IRS begins its collection efforts by sending the taxpayer a notice of tax due followed by bills with increasingly urgent requests for payment. If the taxpayer does not pay or set up

#### **Practice Tip**

Prior to taking other property of the taxpayer, such as wages, savings, or Social Security benefits, IRS will give the taxpayer the opportunity to request a Collection Due Process (CDP) hearing. The purpose of the CDP hearing is to offer the taxpayer an opportunity to enter into a collection alternative that is not as invasive as or as likely to cause economic hardship as a levy. A survivor can also request that Innocent Spouse Relief be considered as part of the CDP hearing.

an installment agreement, the case will move to collections. IRS can take a taxpayer's state or federal tax refund to apply to an existing tax debt.

IRS will take no collection action during the time a timely request for a CDP hearing is pending. IRS will issue a Notice of Determination at the conclusion of the CDP hearing process. A survivor who is not satisfied with the Notice of

Determination has 30 days from the mailing date of the Notice to file a petition in U.S. Tax Court appealing the determination. No collection action will occur while the Tax Court case is pending.

Many survivors fail to request a timely Collection Due Process hearing. Fortunately, IRS will always consider a taxpayer's request for a collection alternative even while collection action is being taken. The alternatives to levy include:

- **Being placed in currently not collectible status.** IRS will take no collection action, other than keeping a taxpayer's refunds to pay down the tax debt, if a taxpayer shows that paying the tax will cause economic hardship. The taxpayer will be required to furnish IRS with information about the household's income, assets, and expenses. If all of the taxpayer's income is needed to meet allowable expenses, and the taxpayer has no assets from which the tax can be readily paid, IRS will place the taxpayer in currently not collectible status. The taxpayer can generally stay in currently not collectible status until there has been a significant increase in the taxpayer's income (see Practice Tip below).
- **Entering into an installment agreement.** An installment agreement is a monthly payment plan with IRS. The taxpayer's refunds will be taken while the taxpayer is making installment agreement payments, which will speed up the rate at which the tax is paid. Installment agreements can be set up online, by telephone or by sending IRS Form 9465. IRS will not take collection action against a taxpayer while a request for an installment agreement is pending or once the agreement is in effect.
- **Negotiating settlement of a tax debt through the offer in compromise program.** IRS will often settle a taxpayers' tax debt for significantly less than is actually owed. The most common type of offer in compromise is based on "doubt as to collectability." IRS uses a formula, based on the taxpayer's income, assets, and allowable expenses, to calculate the amount required to settle the tax debt. IRS will take a taxpayer's refund and apply it to the underlying tax debt for any year in which an offer in compromise is pending before IRS, up to and including the year in which IRS accepts the offer. Offers must be submitted to IRS according to the instructions and using the forms contained in IRS Form 656-B.

**Practice Tip**

In cases where keeping a survivor's refund to pay toward an outstanding tax liability would, itself, cause economic hardship, the survivor can request IRS to issue all or part of the refund despite the existence of the outstanding liability. IRS is most likely to grant these requests when funds are needed to prevent an economic catastrophe such as eviction from the family home, disconnection of critical utilities, loss of a job due to inability to pay for childcare, and repossession of a car needed for employment. In these cases, survivors should obtain documentation of the hardship and seek help from the Taxpayer Advocate Service (discussed below) as soon as possible before filing the tax return for the needed refund. Unfortunately, this option is not available when a refund is taken because an accepted offer in compromise was pending.

Some tax debts can be discharged in bankruptcy. Survivors interested in this remedy should consult with a bankruptcy attorney who has experience dealing with tax debt.

## Finding Tax Help

### **VITA programs: Tax preparation assistance**

IRS's Volunteer Income Tax Assistance (VITA) program uses IRS-certified volunteers to provide free tax return preparation assistance to people who generally make no more than \$54,000/year, persons with disabilities, and limited English-speaking taxpayers. The Tax Counseling for the Elderly (TCE) program also uses IRS-certified volunteers to provide free tax preparation help to all taxpayers, particularly those who are age 60 and over. Generally, VITA and TCE services are only available during the traditional tax-filing season – from the end of January until April 15. There is a VITA/TCE locator tool on the IRS website. Free tax return preparation assistance is difficult, if not impossible, to find, once tax-filing season has ended. However, IRS provides on its website a program called Free File to enable low to moderate income taxpayers to file their tax returns electronically for free using taxpayer-friendly commercial software. Similarly, United Way offers taxpayers with annual income under \$62,000 the ability to use a program called My Free Taxes to file their tax returns electronically for free using easy to follow commercial tax software. My Free Taxes is found at [www.unitedway.org/myfreetaxes/](http://www.unitedway.org/myfreetaxes/) AARP offers similar online assistance.

### **Low Income Taxpayer Clinics (LITCs)**

LITCs are organizations that receive a matching grant from IRS to provide representation, education and outreach to low-income taxpayers and taxpayers with limited English proficiency. LITCs represent individuals in disputes with IRS. They handle a wide range of matters, including but not limited to IRS audits, collection matters, appeals to Tax Court, tax-related identity theft problems, and requests for innocent spouse relief. LTC services are free or of nominal cost to eligible individuals. Taxpayers can find contact information for LITCs in their state by visiting the IRS website. Many LITCs are located in legal services offices where survivors may receive other types of legal help in addition to tax help. Most LITCs use staff attorneys and/or CPAs and pro bono professionals to provide representation to their low-income clients.

## Taxpayer Advocate Service (TAS)

TAS is an independent organization within IRS that will provide free help to taxpayers to resolve problems with IRS. To qualify for help, a taxpayer must be experiencing economic harm or significant cost (including fees to hire a representative), have experienced a delay of more than 30 days to resolve their tax problem, or have not received a response or resolution of their problem by the date promised by IRS. There is at least one TAS office in each state. A taxpayer needing help can locate the nearest TAS office using the search function on the IRS website. TAS routinely helps taxpayers with a wide range of problems including those involving identity theft and collection activity causing economic hardship.

## Building partnerships with tax professionals

Many tax professionals – lawyers, CPAs and enrolled agents – have never been asked to do pro bono work. They rarely encounter low-income clients and may have no idea of the extent of the tax problems faced by low-income taxpayers, including survivors. Consequently, they are unaware of how much help they could be in resolving survivors' tax problems. See CSAJ's report, [Building Partnership for Economic Justice: A Report on Innovative Pilot Sites](#), for experiences and insights from one LITC from Indiana Legal Services in their efforts to build and enhance partnerships.

## Conclusion

While the tax system is designed to deliver a range of benefits to taxpayers, and provide economic security for low-income taxpayers, survivors often have complex tax histories or miss out on these vital benefits. By addressing tax debt and preventing future tax issues, advocates and attorneys can help unleash the benefits tax can provide in survivors' options for safety. Understanding how tax fit within survivors' broader needs and developing partnerships between advocates, family law attorneys, and tax experts in your community are essential.

## Additional Resources

- CSAJ's webinar featuring Jamie Andree, [Federal Tax Advocacy for Survivors: What Attorneys Need to Know](#)
- CSAJ's training featuring Susan Morgenstern and Susan Mitchell, [Tax Advocacy for Survivors in the Context of Military Life](#)
- CSAJ's Tax Advocacy Briefs: Dealing with Tax Debt & What Survivors Need to Know About Filing Status (available in CSAJ's [Resource Library](#))
- Indiana Legal Services, Inc. Low Income Taxpayer Clinic: [Website and resources](#)

# Ten



## Financial Issues in Family Law:

PROTECTION ORDERS, CHILD & SPOUSAL SUPPORT,  
AND DISTRIBUTION OF ASSETS & DEBTS

By **Laura A. Russell**<sup>1</sup>

### Introduction

Divorcing your partner is not easy. In a divorce, you have to come to terms with not only the dissolution of a marriage and relationship, but you have to divide assets, debts, and decide custody and support. Even divorces where the parties are amicable still leave them emotionally drained, and financially strapped. When children are involved, the issues of support become more complex.

Domestic violence survivors face these same issues but often they are exacerbated by abusive partners who continue to abuse during the divorce process. Partners will withhold support, refuse to pay debts that were accumulated during the marriage, fail to pay mortgages and hide assets and income. In many abusive relationships, survivors did not have any assets in their name during the marriage, only debts. This makes leaving and divorcing more difficult.

This chapter will cover the issues survivors face when seeking a divorce and offer legal strategies as applied to a case scenario, Jane. These issues include protective orders,<sup>2</sup> custody, child support, spousal support (alimony) and distribution of assets and debts in divorce.

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<sup>1</sup> With contributions by Alameda Regional Office of Bay Area Legal Aid in Oakland, CA.

<sup>2</sup> See the chapter, **Using the Civil Protection Order as a Tool for Economic Justice**, for a detailed discussion.

## Jane's Story

*Jane is a thirty-six-year-old with two children and a dog. She and her husband Christian married ten years ago. Christian has a good job as a superintendent of an apartment complex. She worked before the marriage for a customer call center, but after the birth of her first child, it was impossible for her to continue at her job. Christian refused to assist with childcare, and her salary was little compared to the cost of childcare. Eventually, when her child was four months old, she quit. She has not been employed outside of the house since then, and her child is now nine years old. Her second child, a girl, was born two years later and is now seven years old. Both children are in school full-time.*

*During this time, Jane has endured physical abuse from Christian, and increasingly more emotional and financial abuse over the years. He has strangled her until she lost consciousness, he has punched her in the stomach while she was pregnant, he has humiliated her in front of family and friends, and, now, he is openly having an affair. Jane is afraid of Christian. She has called DV hotlines in the past but has not taken the next step. She does not know anything about the family's finances and is scared to leave. She thinks he will get custody because she has no money. She does not know where she will go and she has no skills. Also, her credit is poor, as all the family debt is in her name. They own a house, but the deed is in her husband's name only.*

*She comes to your office distraught. She says she wants to leave her husband. She is done, and she wants out. Last night, she called the police after they fought about his affair. By fighting, Jane describes a scene of him throwing her on the bed and placing a pillow over her nose and mouth until she almost passed out. He then punched her in the mouth and did not stop until her eldest started screaming for "Daddy to stop." She has decided she cannot take it anymore and she is done with his cheating. He was arrested, and he is out of the house, for now.*

### Think About It

What do you think Jane is worried about? What might be some of her concerns? What are your reactions to her situation? What do you want to do? What other information do you need from her? What do you think Jane wants to do? What might be some competing priorities?

## Family Law, Debt, and Domestic Violence

### How do family law issues manifest or complicate for survivors?

When seeking help or leaving an abusive partner when they are married, divorce may seem the logical choice but divorces are complicated and final. In fact, divorce is one of the most traumatic events in one's life, whether there is DV or not. And, it is one of the most financially devastating events in one's life. You cannot go back after a divorce and seek more money. Clients must realize that they will not get all they seek and that their lives will change. They have to be ready for that.

A survivor must be able to assist the attorney in finding assets and income. However, many times survivors do not know the answers to these questions. As in Jane's situation,

survivors may have unknown debt in their name, not know much about the household finances, not be able to afford costs of living on their own (particularly if they have children), may not be able to afford the divorce process, or may be fearful of engaging with an abusive partner through the process.<sup>3</sup>

Furthermore, research shows that most survivors do not receive sufficient spousal or child support needed to offset financial losses,<sup>4</sup> the process and court system may be complex and time-consuming to navigate (see **Court Barriers** chapter in this Guidebook), and many survivors report poor treatment by judges. Taken together, there are real barriers to access and secure family law remedies to address both safety and economic security concerns of survivors. These barriers and the experiences and priorities of survivors are therefore critical to establishing a trusting relationship and securing the outcomes survivors' desire for themselves and their children.

Contested divorces (divorces where parties are not in agreement on all the issues) are also one of the hardest legal matters to obtain free representation. Clients can be on waiting lists, or not be able to obtain free attorneys. Legal fees in a divorce can skyrocket quickly. This does not include the lost wages, court time, and other fees (such as experts) that can be part of a divorce. Divorce attorneys charge hourly, and divorces can take hundreds of hours to complete.

#### **Think About It**

Divorce is a complex issue. In some cultures, religions, and area barriers are in place that make divorce looked upon as a failure, usually of the woman, and divorce is not appropriate under any circumstance, making it even more complex. When discussing options with a client, strive to understand what cultural and religious barriers they will face. Ask them what is best for them when attempting to overcome these barriers and seek a divorce. If appropriate, find culturally or religious groups like the client to assist in this process.

Furthermore, immigration status plays an important role in divorce. Many survivors of domestic violence may have options to assist them to become lawful permanent residents (green card holders). Some of these options may be unfamiliar for the client, so they may be wary of filing divorce. Plus, just entering a courthouse for a person without immigration status may be traumatizing.

It is best to discuss all these issues with your client before making the next choice. And remember, sometimes the best course of action may be inaction.

## Assessing Family Law Needs

As you talk and begin to understand Jane's situation, you realize that though his cheating is of paramount importance to her, there are bigger legal issues. Because of the complicated experiences and feelings surrounding relationships, economics, and taking legal action for many survivors, advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called, intake questions), are not meant to be prescriptive, and

<sup>3</sup> Some survivors know a lot about the household finances. This chapter was *not* written with them in mind, but rather for survivors who know little or have not had access to their finances. Refer to the screening questions on the following page for assistance determining this.

<sup>4</sup> Ver Steegh, N. (2003). Yes, no, and maybe: Informed decision-making about divorce mediation in the presence of domestic violence. *William & Mary Journal of Women and the Law*, 9, 145–206. Retrieved from: [source](#)

conversations around family law options, including child support and divorce, should not be limited to these questions. For a fuller description of a survivor-centered *approach* to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Some screening questions to help get a fuller sense of survivors' safety and financial needs include, but are not limited to:

- What do you want for right now? For the future?
- Describe the first incident of abuse, the last and the worst. Does your spouse still pose a risk to your safety? In what ways?
- When you think about divorce, how do you feel? What are your reactions?
- What is your spouse's income?
- What do the two of you own, either separately or together (including car, home, property, bank accounts, retirement accounts, anything else)?
- What do the two of you owe either separately or together (including credit cards, personal loans, mortgages, car loans, retirement loans, medical debt, student loans)?
- What do you need right now to survive financially? What are your other financial priorities (e.g. job, housing, childcare, other)?

This is the conundrum that every family law attorney faces. Survivors often come fearful of their partner and wanting to leave, but the choice is not easy and the process exhaustive. Their safety is paramount, and while divorce often appears like the best solution, they are often not ready for a divorce, have many other competing priorities, and may not have access to the information required to ease the process.

**Case Scenario:** *Jane has trouble answering your questions and does not know much about how the business of her marriage is conducted. She is not sure what she wants, and she cannot give you enough information for her to know if she can support herself and the kids alone. She agrees to go home, think about it and look through some financial stuff. He is out of the house, so she can do this safely. When you see Jane next, it's after a criminal court appearance, and the prosecutor is considering dropping the case. Jane is distraught. She does not want him back in the house and is scared of what he might do, but she just got a notice that the mortgage has not been paid. She cannot be homeless with her children. She needs money. She asks you how she can get it?*

## Assessment questions

Addressing survivors' needs and options in family law requires open and full assessment. In addition to the questions above, it's important to discuss with the survivor: their readiness for the realities of the divorce process, their goals and how they prioritize them, as well as preparing them for the process (See the **Introductory** chapter of this guidebook for a fuller approach to assessment). Some questions to guide this discussion, include:

- Are you ready to see your abusive partner in court?
- Are you ready for the worst that your abusive partner will say about you (alcoholism, drugs, child abuse, lazy, etc.)?

- Are you employed full-time or able to seek full-time employment? Will your job be flexible with you through this process (i.e. attending court dates)? Is your salary enough to support you and any children?
- Court processes can take a year or more. Once you start, it will not be to your advantage to stop. Are you ready?
- Your attorney may never find all the hidden income or assets of your marriage, and compromises often need to be made. What's your reaction to that? What, if anything, do you need to feel prepared for the divorce process?
- What do you want now? In five years?
- Discovering property in other states (or other countries) can be impossible. Do you know of any property/assets not in the state you are in right now?
- How might your partner react to court or divorce proceedings? Are you concerned for your safety?

You must consider the survivor's safety paramount. Continuing to check in on these questions and others as the process develops is critical.

### **Practice Tip**

In Jane's case, though looking through financial records at home (like getting her tax returns) would really help you build her divorce case, asking her to obtain information she has not previously been privy to, may 1) come as a shock to her if there are substantial financial concerns, and, importantly, 2) could jeopardize her safety if Christian finds out she has been going through financial documents.

To the first point, the role of the advocate is crucial. Someone who can assist the client through this process, discuss what is being told to them and explain the process from a non-legal perspective is important. Someone for the client to talk to, not his or her attorney, will help the client fully understand what is happening. What else could you do to help prepare Jane for the shock and manage any trauma?

To help with the second concern, help Jane think of ways to safely view or access financial documents. For example, Jane may be able to take pictures of documents, get names of banks and account holders, without taking a document that will be missed. Don't open an envelope that will be noticed, but take a picture of the front. As long as the name of the financial institution is known, an attorney can search for the asset.

## Family Law Options

### **Restraining order (order of protection)**

In Jane's case, the last incident of domestic violence should, in most states, give her the ability to go to court and obtain a restraining order. With this order, Christian will not be able to come near her, and this could extend to the children and family pet.

Consider with survivors how a restraining order might help. Weigh their perceptions of safety, future risk of violence, options for economic relief, and available resources for the process.

**Case Scenario:** You discuss and weigh the options in a protective order with Jane.

- Jane may feel safer knowing that her husband cannot just enter the home.
- Also, she can ask that certain bills be paid in the restraining order. Some orders allow for the payment of the mortgage, spousal support, and/or child support. Also, in one state, a restraining order will allow Jane to get any financial or legal documents taken from her returned.
- Unfortunately, restraining orders are usually only based on physical abuse. Therefore, if Jane has only encountered emotional or financial abuse, it is rare that a state will issue a restraining order.
- If your client has not suffered physical abuse, you should consult a family law practitioner before filing for a restraining order. If your client files and then loses the case, this could enrage the abusive partner and place the survivor in more danger.

For more here, see the **Using Civil Protection Orders as a Tool for Economic Justice** chapter in this Guidebook.

## Key Terms

**Restraining order:** A restraining order (also known as a protective order or order of protection) is a court order that requires the abusive partner to stay away from the survivor. The protection can include staying away from one's home, work and school. It can include children, and in some states, pets.

**Public assistance:** Public assistance is a general term for all benefits offered by the government. These benefits vary from state to state but may include cash assistance, housing subsidies (rental payments), food stamps or other food assistance (such as WIC and AFDC), and other help for utilities. Also, though not public assistance, Medicaid can assist when there is no other health insurance option.

**Spousal support:** Also called alimony, and maintenance. It is support given to an ex-spouse (or a spouse during the divorce or separation) to assist the lower income spouse with expenses and is usually based on the needs of the parties. Some areas use a formula to determine this support.

**Child support:** Child support is financial support, based on a formula, which uses incomes of the parties, paid by the non-custodial parent to the custodial parent until the child is either 18 or 21, depending on the state.

**Uncontested divorce:** A divorce is the process of legally dissolving a marriage. An uncontested divorce means that all the issues between the parties have been resolved before going to court, and there will be few, if any, court appearances.

**Contested divorce:** A contested divorce is where any issues between the parties cannot be resolved, including: restraining order, the grounds of the divorce, custody, child support, other child-related expenses, medical insurance for the other party and/or the children, spousal support, and distribution of assets and debts.

**Equitable distribution:** The legal term for how property and debts of the parties are divided in a divorce when you are not in a community property state. The term "equitable" does not mean equal and is usually a term that is defined by the state where the divorce occurs. What is considered property and debts of the parties vary from state to state.

**Community property state:** These states (described below) are states where any property and debts acquired during the marriage are distributed equally. As with equitable distribution, what is considered property and debts acquired during the marriage vary within community property states.

**Jurisdiction:** This is the state that has the right to determine the divorce. It is usually the state where the parties live or have lived recently. The laws on where a divorce can be started vary from state to state.

## Public assistance

Determining whether to seek public assistance when also considering divorce can be complicated. Consider the following questions as you work with survivors in this decision:

Question	Application to Jane
<b>Does the survivor have too many assets or even too much income to go on public assistance?</b>	In Jane's case, this may be risky. If she had a full-time job or other assets she may not qualify. Plus, some states will place a lien on your property so they can recoup the money paid to someone on public assistance. That lien will be a debt in the divorce that will have to be dealt with.
<b>Is public assistance or child or spousal support through divorce the better option?</b>	Jane also must choose. She cannot be on public assistance and obtain child or spousal support. And if Jane is on public assistance, she will lose her right to seek alimony. A careful analysis is needed to determine which is the better financial option. For most clients whose abusive partner earns a median income, public assistance is not the answer. Also, once a divorce ends, you usually cannot go back and ask for alimony (or spousal support).
<b>What property or assets could the survivor be awarded in divorce?</b>	Property distributed during a divorce will also affect this. Is it possible or likely that Jane will be awarded the house in the divorce? If she or other survivors obtain too much property in a divorce, public assistance will deny her further benefits.

### Practice Tip

Review the amounts Jane might obtain during a divorce. If they are higher than public assistance, then, financially, divorce may be the better option. Also, one must consider how likely the abusive partner is to pay any awards that are ordered. If Christian was self-employed, getting court ordered support may be difficult, and the money may come in haphazard. These are all issues that a client must consider when deciding next steps.

## Spousal support

Spousal support is also called alimony, and maintenance. It is support given to an ex-spouse (or a spouse during the divorce). It is given to assist the lower income spouse with expenses or to (in theory) maintain a similar standard of living as during the marriage and is usually based on the needs of the parties, determined (generally) by: need, ability to pay, whether domestic violence exists. Spousal support can end after a set period of time (usually based on the length of the marriage), or upon the remarriage of the payee. The parties must have differing incomes or usually no support is awarded. In most cases, spousal support is taxable to the payee as income and the payor may deduct it from their taxable income (See the **Tax Advocacy** chapter in this Guidebook). Spousal support may continue until the death of the payee in rare circumstances. Something to discuss with survivors is that taking one income and dividing between two households will usually mean that the standard of living will go down. In the vast majority of cases, the standard of living of the lower earning spouse is usually the standard of living that decreases after a divorce.

Filing for spousal support usually triggers the abusive partner to file for divorce. It's important to make survivors aware that this may force them into a divorce that they

cannot control the timing of. Spousal support is not consistent state by state. In many places, it is not consistent among counties. Survivors will have to file in the county she

resides in, but depending on many factors, they may not get enough money to pay their bills.

### Practice Tip

If Jane wants to file for spousal support, she should know what her husband earns, and bring proof. She should have copies of all the household bills and know exactly how much she needs to pay them. Most states do not have a formula for what she will get, the amount she will get is based on what she needs, what he earns, and what she can prove. Some states use a formula for spousal support, which is based on the incomes of the parties.

### Child support

The non-custodial parent pays child support to the

custodial parent. In most states determining custody does not rely on which parent earns more, as the money is for the children. Child support is based on a formula, which is usually a percentage of the non-custodial parent's income. Child support continues until the child is either 18 or 21, depending on what state you are in. Child support is not taxable to the payee and not deductible to the payor. Child support is paid the custodial parent almost always.

Similarly to spousal support, child support is very structured and filing for this usually triggers the abusive partner to file for custody. It is a percentage of income of the non-custodial parent and also varies depending on the number of children. Some states also vary the amount on the time the non-custodial parent is ordered to spend with the child, whether they actually do or not. Child support is regulated. There are enforcement mechanisms, such as the ability to intercept tax returns and gambling winnings to pay back support. Support can come directly out of one's paycheck.

**Case Scenario:** *If Jane's husband does not have a job where taxes come out of his salary (such as a job based on commission or "off the books" or he is self-employed), then child support (and spousal support) will be difficult to get, as there is no mechanism for interception. Furthermore, proving one's income will be problematic. Be sure to discuss the implications of filing for child support as well as Christian's likelihood of complying with court orders.*

*Also, if Jane's husband is self-employed and did not accurately report his income, there will be other concerns. If Jane signed those tax returns, she could be liable for underreporting; the Court may report the tax fraud to the IRS (rare); and the Court may decide that if she signed them, they are valid and she will be held to this income, no matter how low it is. See **the Tax Advocacy** chapter in this Guidebook for more on filing concerns and the potential to claim Innocent Spouse Relief.*

### Practice Tip

The largest issue in a divorce is always proof. The attorney/client team must prove to the Court (Judge) that the income/assets/debts exist and what they are. Having the client say the other party makes X salary is rarely enough. The client must show documentation (tax returns, paid bills, 1099s, W-2s, bank accounts, etc.) to prove that what they are saying is true. It's important to discuss with survivors the difference between the proof (evidence) courts will require versus our general sense of proof (honesty, descriptions, etc.). We all feel that if what we say is true, it should be believed by the Court. This is not the case. From the outset of your interactions with survivors, discuss the meaning of proof and help set and reflect on the survivors' expectations of the Court (they be too high or too low based on the evidence you are able to gather together).

Jane should be aware of these issues when she is deciding her next steps. If she needs money for food and shelter immediately and her abusive partner is self-employed, she will have problems collecting and may need to consider public assistance until she is more financially stable.

## Child custody

For survivors with children, custody is generally the most important issue. Many clients have been told that they will lose custody because they do not have any money, or are here without immigration status. Neither argument is completely true. Custody determinations are made using a variety of factors, many of which fall into a category called “best interests of the child”. In this, the courts look at all factors that involve the child, such as who has been the primary caretaker, who will make sure the child will have a good relationship with the other parent, who can emotionally support the child and care for the child, and many other factors that vary from state to state.

As with other issues, child custody also has financial implications. It goes without saying that raising a child is very expensive, but the parent who does not obtain custody will usually have to pay child support, a portion of child related expenses (such as medical, sports and other extra-curricular activities). Some parents will express an interest in custody so they can either use it for leverage in a divorce, or to continue to control the other parent after the divorce is over.

Many survivors are confused when a parent who has expressed very little interest in child rearing suddenly seeks custody. Though there are many times when the motive is good, there are other times when they seek custody because of financial, or control reasons. As an advocate, one should prepare their client for this.

**Case Scenario:** *In Jane’s case, after Christian was excluded from the house, he did not attempt to see the children, and just filed for divorce. During the divorce, he barely saw the children and Jane is devastated because he is an absent father. Jane begs you to “get him to see the children” but he is not interested.*

## Divorce

A divorce is the final step. A divorce can be either contested or uncontested. An uncontested divorce means that all the issues between the parties have been resolved, and there will be few, if any, court appearances. The process will be quicker than a contested divorce. A contested divorce is where any issues between the parties cannot be resolved.

These issues can include:  
restraining order, the grounds of the divorce, custody, child support, other child-related expenses, medical insurance for the other party and/or the children, spousal support, distribution of assets and debts.

### Think About It

Divorces can take a long time. In one state, a divorce may take up to six years. In other states, divorces can take anywhere from months to years. How can you prepare Jane for this? In what ways can you meet her changing needs throughout the process? What barriers and challenges can you anticipate together?

If Jane opts to begin a divorce, all the above issues (restraining order, custody, and support) can be dealt with. Assets and the debts of the marriage will all be divided. Finally, they will have to decide on the grounds of the divorce. The divorce is the longest process and the most intensive. Once a divorce is done, it is considered final (you can only get remarried). It is difficult to undo a divorce, or even modify some of its terms. Divorce is also the most costly option, as items may have to be appraised, documents produced and attorneys paid. There are few legal services options for clients who want divorces and have assets. States allow for the “wealthier” spouse to pay legal fees for the “poorer” spouse, but those fees are never enough to cover the entire matter. Divorces can take years to litigate, and parties can be emotionally as well as financially drained by the end. The client has to be ready for a divorce if they want to start one. Once started, it is near impossible to stop.

### Think About It

Given these four options (restraining order, custody, support, and divorce), what should Jane do? What might she feel as you review the pros and cons of each option? What other information do you need to help her make the best decision? What can you offer to help her make a decision?

### Practice Tip

Help survivors document what they do know about their finances, assets, and debt. Suggest that Jane writes a list of every asset, and debt they, Christian or the both of them have. Write a list of all the bills the survivor about and try to figure out how much money they typically spent in a month.

You can also pull a survivor’s credit report to get a sense of debt. Get an authorization to pull the survivor’s three credit reports. (Note: never give your client’s current address to a CRA if she is at a confidential location. Even giving your address may tip the abusive partner off, as he can Google your address and see it is a legal service. Use their old address when asked.) See the **Credit Reporting & Repair** as well as **Debt** chapters in this Guidebook for strategies regarding safety and pulling credit reports or managing debts.

## Divorce Law and Legal Strategies

**Case Scenario:** *Jane comes back to your office in a few weeks with a piece of paper. She is not sure what it is, but someone handed it to her a week ago. You look at it. It is the beginning of a divorce, started by her husband. It is the summons, and you know you have a limited time to answer it. You have a long conversation with Jane. She was not ready for this. She thought he would go to counseling and they could make it work. She is devastated, and not prepared. You discuss with her the procedures and tell her if she does not answer, she may lose everything.*

*She agrees she needs to fight the divorce. You sign a retainer with her, and you are now her divorce attorney. She is still upset, so you gather as little information from her as you need to file a response to the divorce and set a meeting in a week. At the next meeting, she has done some homework obtaining financial documents and statements (but not all) and you have credit reports.*

## Mapping the relationship

As you begin talking with survivors about the divorce and painting a picture of their joint financial lives, assets, and debts, you must question everything. Survivors are kept in the dark about finances on purpose. If Jane shows you a mortgage statement in her name, she must own property. If she says no, it is not because she is lying. It is because she does not know. She has been systemically kept out of all financial decisions in the marriage. She has been conditioned not to ask, or there will be consequences. She has signed documents without reading them or seeing them. She may even know that the abusive partner signed her name, but was not able to do anything about it.

The most important document, which is a blueprint of the business of the marriage, is the **asset, debt and income statement**,

which is usually filed early in the case. This document is a snapshot of all the assets, expenses, and the parties' income. The higher earner spouse will often use this document to claim they lived above their means, and the entire marriage is just debt. The lower earner will try to show that both parties can live separate on this income and survive.

### Think About It

Keep in mind that survivors may only know bits and pieces. They might say: "I once saw \$5000 in a box. Can I have half?" "My house must be worth \$400,000 because my sister's house sold for that in another city." "I keep getting these letters and calls saying I owe money. I just hang up, but could I?" "I want \$500 a month in alimony because my friend got that." They will likely have no idea what they need to live on or could get from the soon to be ex. You will have to guide survivors through the process.

**Case Scenario:** *Once you meet with Jane again, you are able to begin to review this document with her. During the review, you go over the issues in her case that relate to finances and start to give her a picture of what she might get. You begin to go over the items that will be at issue in Jane's divorce: house, car, retirement assets, debts, alimony and child support. Though grounds are still open, they will not be at issue. The restraining order and custody were finalized before she was served, so they are not at issue either.*

There are several basic concepts in divorce law, and they vary from state to state. Here, we discuss the characterization and division of property and grounds for divorce.

## Property

Most states adhere to the idea of marital property and separate property. Property acquired during the marriage, regardless of whose name it is in is marital and subject to distribution in a divorce. Property acquired before the marriage, or with funds that were created before the marriage is separate. There are many states where this rule creates a blurry line and proving what is marital or separate can take time. There are other states (few states) that believe that once you are married all property is community. These are community property states. Though this concept varies on the length of marriage, the idea is that everything owned is community property and able to be distributed.

## Considerations for Community Property States

The characterization of property (whether it is community or separate) is essential in these states. It determines everything. Equitable distribution is pivotal. Separate property can be confirmed in a dissolution, but the court has no authority or jurisdiction over a person's separate property except in limited circumstances. Community property assets and debts are divided equally at dissolution (divorce).

For example, in California, a community property state, any assets acquired or debts incurred before marriage or after separation are generally considered separate property/debts. There are exceptions to this general rule, for example: inheritances or gifts received during marriage are separate. Also, these are presumptions that can be rebutted. For example, if a gift was received during the marriage it is presumed separate. However, if one party can prove that the gift was meant for the benefit of the community, it might be held to be community property. Things get very complicated when other factors come into play. For example, a house is purchased prior to marriage by one spouse, but improvements are made, or mortgage is paid down by community funds (income earned by either party during the marriage). Or a car is bought before marriage, but title is transferred to the other spouse during the marriage. Or, where one spouse continues to occupy the other spouse's separate property or the parties' community property after separation and during the divorce proceedings, then there are reimbursements and charges owed to the community. The rules and exceptions go on, so it's important to work with a family law attorney in your state.<sup>5</sup>

Nine states have a community property system: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin. Puerto Rico is also a community property jurisdiction, and Alaska has an optional system.<sup>6</sup>

### Divorce grounds

Every state has a no-fault ground, which means that no party was at fault for the divorce. In some states, grounds do not have any input in deciding distribution of property. In others, some grounds can be part of the distribution process.

#### **Practice Tip**

When determining grounds, as well as other matters of the divorce, it is important to discuss with Jane how Christian might react. Does he still pose a safety risk to her? Does he have access to the children? If she were to use other grounds for the divorce, how might Christian react? After talking with Jane, she feels that the best ground to use is a no-fault ground. She wants to keep things calm and not risk angering Christian, and the grounds do not have any influence on any other issues in her divorce, so the no-fault ground is best for her. Plus, she does not want to testify again about the violence, which could be required if using a fault ground (such as the abuse or adultery).

## Discussing the assets

### The house

**Case Scenario:** *Jane and Christian own a house. It was purchased during the marriage, about five years ago. The house means everything to her. It is this address that allows her children to go to school in district that both she and the children like. It means that she no longer has to move when a lease expires, and it means that she has "made it." She wants to keep the house.*

<sup>5</sup> Thanks to Brenda Star Adams and colleagues at the Alameda County Regional Office of the Bay Area Legal Aid in Oakland, CA.

<sup>6</sup> IRS, [https://www.irs.gov/irm/part25/irm\\_25-018-001.html](https://www.irs.gov/irm/part25/irm_25-018-001.html)

Keeping the house requires much analysis on your part. First, who actually owns the house? This means whose name is on the deed (Houses and condominiums have deeds. Other items that people may consider homes or real property may not be considered as such by that law. For example, co-operative apartments and mobile homes may not be considered real property in your state. This term is important, as real property has more protections against loss than other forms of property). The owner of the property is usually recorded in a registry. Some registries are in the town that is the seat of the county, some are at the courthouse, and others can be on-line.

**Case Scenario:** *If Jane went on public assistance, some states might place a lien on the house in the amount of the award. These liens should be dealt with in the divorce, as it is a marital debt.*

Second, who is liable under the mortgage? That means who signed the Note (the legal document binding someone to pay back the mortgage). The mortgage itself comes with many other questions.

**Case Scenario:** When Jane brings you the house documents, there is a letter from a lender stating that the mortgage has not been paid in several months. Apparently, when Christian was excluded from the house, he failed to pay the mortgage, insurance, and property taxes (this may be one bill, or many). As you begin to explain this to Jane, she gets distressed. She needs to stay in the house. How could he do this? Does he not care about the children, she asks.

Finally, the largest question is, can the survivor afford the house? In Jane's case, this is an analysis of what her income will look like post-divorce. So, what can she expect to earn? What will she be getting in support? What are the actual expenses of the house (factoring in utilities and repairs)? This discussion is often the hardest. As an advocate, you want Jane to have what she desires and feels she needs. But, as an advocate, you know that getting her the house in the divorce may require sacrifices, and worse, sacrifices she may make to keep a house she cannot afford and will lose soon anyway. Also, Jane needs to consider

#### **Practice Tip**

In some states the foreclosure process (the legal process by which a lender can take your real property from you), is nonjudicial. This means that the lender does not have to go to court. This process is faster for the lender and leaves the homeowner with limited recourse. If the mortgage is 60 days behind or more, you should consult with a foreclosure defense attorney immediately or risk Jane losing her home. See the **Foreclosure** chapter in this Guidebook for more.

whether it is more expensive or cheaper to rent a comparable home in this area.

The house is usually the largest asset the couple has. In most states, it is awarded to the custodial parent. How the award is structured can vary. For example:

- The custodial parent and children may live in the house until the youngest child reaches a certain age and then the house is sold. How the proceeds are divided (equally, some reimbursement to the one side for expenses, some percentage is given to one side only) vary from state to state.
- The house may be sold, but the proceeds used to buy another house, which will then be divided when the youngest child reaches a certain age.
- The house may be sold upon the divorce, and the proceeds divided equitably.
- One party may pay the other party for their share of the house at the time of the divorce.

- The custodial parent may live in the house until the youngest turns a certain age, and then must leave without any compensation.

When deciding how the house will be settled in the divorce, there are certain issues to take into consideration:

- Who is liable for the mortgage? Can one party be certain that it will be paid timely (or this will affect their credit score)?
- If the owner of the property is not the same as the person liable for the mortgage, will this affect the mortgage? Most mortgages have clauses that if the property ownership is transferred, the lender can start a foreclosure process. Clients should be aware of these pitfalls.
- How will major repairs be paid? Will there be reimbursement?
- How much is the house actually worth? (Equity in a home should take into account the amount of debt (mortgage) to be paid and the cost to sell the house (transfer taxes, realtor commissions).

**Case Scenario:** *In the end, Jane feels with a full-time job, and child and spousal support, she can afford to live in the house until her youngest finishes college. This is important to her, as she does not want to uproot the children. You decided to file for immediate relief in the divorce and ask that the entire past due amount on the mortgage be paid immediately. You have spoken to a foreclosure defense attorney, and in your state, the process is judicial, and this lender has not started anything. So, Jane has time. She is relieved. But, you worry that the Court will not order Christian to pay the mortgage. Jane, on your advice, starts searching for all past mortgage payments. From the documents, you find that prior to the filing of the restraining order, Christian not only paid all the bills timely, but they had additional monies to travel to the country of Jane's birth with the children at least annually. This will help the Court understand that Christian is failing to pay the mortgage out of spite, you hope.*

When the home is not owned, but rented, the division of the rental apartment may also come with pitfalls. Attorneys should determine who is on the lease, and what requirements, if any; the landlord (or the rental program, or both) may have to assign the lease to another party. Also, if the apartment rent is below market due to a program, rule or statute, some states may consider this an asset and require it be distributed, meaning a party may have to pay the other spouse for the right to keep the apartment. In general, though, many states prefer to have the custodial parent stay in the marital home until the youngest child reaches maturity.

### Bank accounts

**Case Scenario:** *Jane has seen Christian write checks, and received one for support. It is from Chase bank. During the marriage, she had no idea what accounts they had, but she knows he paid many items by check or debit card. You ask Jane what banks are near her residence, and Christian's job. Recognizing that many people bank at a place of convenience, you feel Chase and any bank around these areas might be a good place to start looking for accounts.*

Bank accounts, whether checking, savings, money markets or any other form of liquid cash, are divided during a divorce. Many states (including community property states) will divide them equally, taking into accounts any money that was in the account before the marriage, or placed into the account after the start of the divorce. The key factor is to find out what accounts exist, and how much was in them at the time of the divorce. Also, if a significant amount of money was drained just prior to the divorce, this could be important.

In many states, when a party fails to provide necessary evidence, the attorney can subpoena certain information.

**Case Scenario:** In Jane’s case, Christian refuses to give any information about his bank accounts. You have the one check from Chase, but nothing else. Jane says that there is a Bank of America across from Christian’s job, so you serve them a subpoena for information. You find a Christian had checking and a saving account with Bank of America. These accounts also show Christian’s income, and his side income from tips and extra work around the building he works for. With this information, you can consider asking for more support, as the income he stated is not accurate. You also now know that the income he reported (and Jane signed) on the tax returns is not accurate.

### Think About It

If you discover hidden accounts or assets, how should you use the funds? For example, they could be used to meet immediate needs, like the unpaid mortgage payments in Jane’s case, or the survivor may be entitled to half the assets in the divorce. Consider with the survivor, which might be more beneficial now and in the long term. In Jane’s case, you decide to ask for a restraint on these accounts, as Jane will be entitled to half of these accounts, and do not want them to be diminished during this process. Many states will not allow the assets (in this case bank accounts) to be distributed until the divorce is over. So, this money will just sit in the account and cannot be used.

### Income tax returns

Income tax returns (federal and state) can be a great source of proof and hardship in a divorce. Though this is discussed in the **Tax Advocacy** chapter of this Guidebook, there are a few items to be reminded of: alimony, inaccurate tax returns, and tax debt.

First, alimony is taxable to the person receiving it and a tax deduction to the one paying it. This is not the case in child support, which is not taxable.

Second, inaccurate tax returns, as in Jane’s case, can have consequences with the IRS as well as the survivors’ ability to dispute the tax return in court (it may be evidence against the survivor).

Finally, if the survivor earned income that went unreported – even if they thought their partner had reported it, or if they did not know they needed to file a return – they may be liable past taxes.

In a divorce, owed income taxes are a debt, and the divorce should decide who has to pay that debt. Also, the children are a deduction on one’s taxes. Once they are divorced, they must file taxes separately, and who is able to claim the children often becomes an issue (known as the “race to file first”). The IRS is very clear that the person who is the custodial parent gets to claim the children, but sometimes the parties can decide differently. The IRS accepts this, but certain paperwork has to be completed. Also, claiming the children could affect one’s Earned Income Tax Credit amount, so be certain that Jane knows what she is doing when she allows Christian to claim one child, or two, on his taxes post-divorce. See the **Tax Advocacy** chapter for more details and options with these issues.

## Automobiles

Cars (boats, motor homes, and other modes of transport) are also divided in a divorce. The concern for these items includes: What lien, if any, is on the item? Who is liable for this lien? And how is it going to be paid? In handling a divorce, the attorney should tally these items up in a sort-of balance sheet, determining what each party owes the other. This allows the attorney to keep track of what each party owns and owes, and what each is entitled to.

**Case Scenario:** *In our case, Jane uses the family car to bring the children to after school activities. The car is registered in Christian's name, and there is a lien on the car in Jane's name. Christian has paid all the bills associated with the car. The car is expensive, as Christian felt it was a sense of status to drive a "nice" car. Jane would prefer a more reliable, inexpensive car.*

*Using Kelly Blue Book (kbb.com), it is determined the car has a value of \$38,000. The lien that remains on the car is \$22,000. Therefore, if Jane keeps the car, she owes Christian half of the value or \$8,000, as the car was purchased with marital monies and during the marriage. She also has to continue paying the lien. Jane does not want the car, but the car is titled to Christian so he must sign the car over to a new owner. Christian agrees to sell it and divide the proceeds in the divorce. This will give Jane the cash to buy a more reliable, less expensive car, and Christian can buy a car of his choice.*

## Retirement accounts

Most states consider retirement accounts to be marital property. Therefore, they are divided in a divorce. When deciding what to do with retirement account, consider the following: Whether this is the only retirement money a spouse has; the earning potential of the spouse; the age of the spouse. Retirement accounts could include defined contribution plans (a 401(k)) and defined benefit plans. The 401(k) is similar to a bank account, as the value in it, if all earned during the marriage, is just divided equally in most states. Defined benefit plans, like pensions, are rarer. These plans are usually only found when a spouse works for the government or a union and typically detail what percentage of the employee's salary will be paid for life, or other benefits. It is important to consider the value of the retirement accounts, how the survivor could benefit (and what the tradeoffs are), and how it would be divided.

**Case Scenario:** *In Jane's case, Christian has both a 401(k) (which is a defined contribution plan) and a defined benefit plan. The defined benefit plan states that when Christian retires he will receive a percentage of his salary for life. Jane could use the money in the 401(k) now, but if she takes it out, she faces a severe tax penalty. The defined benefit plan is difficult to determine in value, and it must be divided by a Domestic Relations Order, which is expensive. Jane could let Christian keep his retirement accounts, in exchange for another asset (possibly the house), but then she may have nothing when she needs to retire.*

These are all important options to weigh, with good questions; the correct answer to any of them lies with Jane. Only she will know what is best for her. This is where you, as the attorney, just keep the balance sheet running, and after her decision, work for the best trade off with another asset, if that is her choice.

**Case Scenario:** *In the end, Jane takes her share of the defined benefit plan and lets Christian keep the 401(k) in exchange for an equal additional share of the bank accounts. This gives her the liquid cash she needs now, while she is job-hunting, and also means she does not have to have an attorney do another Domestic Relations Order, which can be expensive.*

### Other assets

Though we have discussed some of the major assets of clients, there are many others. For example, dividing the household furniture, any business owned or operated during the marriage, second homes or owned rental properties and so on. The list of assets that one owns can go on. The most important rules are this:

- Someone in your state has already dealt with this issue. Ask around and find out how it is handled in your state.
- Everything can be decided and divided in a divorce, from the family pet to the wedding ring. So, whatever your client or the other side has, it is an issue in the case. So, remember, ask your client about every asset.
- Whatever your client wants in the divorce, so does their spouse. This could range from the family pet (who they never fed or walked) to the necklace that they gave the spouse and forgot existed until the spouse wore it to court. So, explain to your client that regardless if the asset was not meaningful, it is an asset and able to be divided in the divorce.

## Handling Debts in the Divorce

There are a variety of debts, such as credit cards, medical debts, personal loans, and utilities. As we discussed throughout this Guidebook, debts and how they are dealt with outside of a divorce vary. In a divorce in most states, including community property states, debts are divided either equally or according to incomes (pro-rata). Debt distribution circles around the issues of:

- When was the debt created?
- Why was the debt created?
- Did the debt go to the partnership of the marriage?

Though states handle these issues differently, the key issue is whether the debt helped the family. The medical debt, of which the services were a necessary, should be discussed in light of the fact that Christian failed not only to place the youngest child on his insurance but also to follow up.

In the end, the debts, just as the assets, will be divided in some equitable fashion, and if settling, can be placed on the balance sheet to determine the final amounts each owes the other. Just remember, as stated in the **Debt** chapter of this Guidebook, regardless of how debts are distributed in a divorce, and who is required to pay them in a divorce, the creditor can (and will) sue the person whose name is on the debt (and therefore liable for it in consumer matters) and will ignore the distribution as decided in the divorce.

## Settling the Divorce

Most divorces end by settlement. Divorce trials are rare. Settlements allow your clients to decide what is best for them, and what is most important to them. The balance sheet discussed in this chapter is critical. Divorce goes hand in hand with finances. Even the

**Case Scenario:** *At the beginning of this process, Jane gave you a copy of her credit report. You have gone over it with Jane, and though some of the debts she recognizes, others she does not. You have subpoenaed those debts and realize that Christian opened credit cards in Jane's name, and Jane knew nothing about them.*

*The credit cards in Jane's name, that she knows about, were spent on food and clothing for the family when Christian would not give her access to any money. There is also a medical debt, as Christian failed to add the youngest child to his medical insurance and the child had to go to the hospital for a broken arm. Christian has never taken care of this bill, even though his insurance should cover it.*

*There are credit cards that Jane knows nothing about. Even so, looking at the statements, they seemed to be used for marital expenses (car repairs, restaurants, and trips with the family). There are some suspicious purchases, so Jane goes through every statement line by line to determine what can be arguable not marital debt.*

*Jane also used the credit cards for expenses after Christian was removed from the house and refused to give her money, or pay the utilities.*

*The credit cards that Jane was aware of are marital. The ones she was not aware of, come with many issues. You could argue they are fully marital (minus the expenses that are questionable) or argue that Jane did not consent to the purchases. Both of these arguments may be valid in your state.*

*Christian may also not be liable for the expenses that were placed on the credit cards after the divorce was commenced. This will depend on your state, and on issues of what other income was available, if any, to pay these bills.*

children can, at times, come down to money (child support, tax deductions). Remembering what your client wants, owes and owns is important in settling a case. Knowing that a case is about finances and not any moral judgments is also important.

## Conclusion

Divorce ranks up there with death of a close family member as the most traumatic event in a person's life. Domestic violence only makes the trauma and stress worse. No matter what happens, advocates and attorneys must support their clients, allay their fears, and attempt to finalize the case in a way that supports them into the future. Clients will not see vindication in a divorce. What they will see, hopefully, is a financial way out, an ability to not only survive but also succeed financially and create a better, more peaceful way of life than they had before.

## Additional Resources

- Isc.gov (list of legal services agencies)
- Womenslaw.org
- Lawhelp.org
- CSAJ training materials and resources:
  - [Accessing Economic Justice for Survivors in Family Law Cases](#)
  - [Individual Advocacy and Legal Rights in Consumer Issues](#)

# Eleven



## The Civil Protection Order as a Tool for Economic Justice

By Erika Sussman

### Introduction

Civil protection orders provide survivors of domestic violence with a tool for accessing safety and economic justice. Unlike *criminal justice remedies*, for which the state wields control over initiation and pursuit of the case, civil protection orders were intended to provide battered women with control over whether and how to initiate the case, the specific relief requested, and enforcement of the relief. **Civil protection orders** are injunctive in nature, and include provisions that order perpetrators of domestic violence to refrain from or engage in certain proscribed acts for a period of time. Though greatly underutilized, civil protection order codes include provisions that enable survivors to pursue economic relief, including access to material resources. The statutory intent of civil protection order statutes is, simply put, safety. Virtually every state protection order statute emerged from legislative history or contains comments that indicate a legislative purpose to promote future safety or prevent violence.

To access and wield the economic relief available in civil protection orders, this chapter reviews the types of economic relief available in protection order statutes and offers practical strategies for advocates and attorneys, from assessment through enforcement.

## Sally's Story

Sally met her husband, Rob, in her homeland, Sierra Leone. He was a US citizen, visiting for the summer. She enjoyed introducing him to local food and customs and he told her all about his life in the US and how she would make his life complete. They fell in love, got married, and Sally left with Rob to make a new life in the United States. When they moved to the US, Rob tightly controlled who Sally interacted with and when she could leave their home. He didn't want her to connect with new neighbors or attend any community events. Sally was feeling restless and begged Rob to allow her to get a job, and she started working at the local supermarket. Sally liked her job and co-workers, but it seemed that the more comfortable Sally felt in her new home, the angrier Rob became. His control grew and Rob physically, sexually and financially abused Sally.

About six months ago, after coming home late from work, Rob pushed Sally into their bedroom, and locked the door. With a knife, he slashed all of her clothes hanging in her closet, and then, holding the knife to her face, demanded that she have sex with him.

Last week, jealous of a friendship that she developed with a neighbor, Rob called Sally a whore and punched her repeatedly in the face, with one punch landing on her eye. The following morning, she went to the hospital and had to have surgery. She will require follow-up treatment and she currently has cloudy vision out of one eye, which may or may not improve. She is terrified of Rob and doesn't know what he will do next, but she is also worried that an order of protection may make things worse. She is coming to see you to find out what safety measures are included in an order of protection and if that getting an order is the safest way forward for her.

*With Sally sitting across from you, what questions do you have for her?*

## Civil Protection Orders: Physical and Economic Security

Safety for survivors of domestic violence requires economic security. Domestic violence impoverishes survivors and exposes them to increased risk of violence.<sup>1</sup> Survivors may incur direct economic harms resulting from the abuse, including medical damages, property destruction, theft, and lost wages.<sup>2</sup> Survivors may also incur enormous preventive costs in an attempt to minimize the abusive partner's access to them and to establish a

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<sup>1</sup> See Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. OF WOMEN AND THE L. 2, 339-97, 340 (2014), (finding that, "financial instability is one of the greatest reasons why, after gaining freedom, a woman who experiences battering has limited choices and may ultimately acquiesce to her partner's attempts to reconcile."); Lauren B. Cattaneo & Lisa A. Goodman, *Risk factors for reabuse in intimate partner violence: A cross-disciplinary critical review*, *Trauma, Violence, & Abuse*, 6(2), 141-175 (2005), (finding that research has long substantiated the link between domestic violence and economic insecurity); New Destiny Housing, *Out in the cold: Housing cuts leave domestic violence survivors with no place to go (A HousingLink Report)*. New York, NY, 1-29 (2012), (finding that, 31% of families entering homeless shelters cite domestic violence as the main reason, and 80% exit emergency shelter without a safe, affordable, and permanent place to go.)

<sup>2</sup> See Maureen Sheeran & Emilie Meyer, *Civil Protection Orders: A Guide for Improving Practice*, 1, (2010) (Finding that "[d]omestic violence costs the nation an estimated \$5 to \$10 billion annually in direct medical and mental health care services and lost productivity.) Centers for Disease Control and Prevention. (2015). Intimate partner violence: Consequences. Retrieved January 12, 2016, from <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (Finding that recent estimates on the national economic cost of domestic violence exceeds \$6.2 billion annually, increased healthcare costs can persist for 15 years, and survivors lose the equivalent of 32,000 full-time jobs.)

free and independent life. Such costs of future safety may include housing, health insurance, childcare, transportation, clothing, utilities, and tuition.<sup>3</sup> Indeed, access to economic resources is the most likely predictor of whether a survivor will be able to permanently separate from their abusive partner.<sup>4</sup>

Thus, in order for civil protection order statutes to achieve their legislative mandate, courts must honor requests for economic justice.<sup>5</sup> Specific statutory provisions offer direct authority for obtaining economic relief, while “catch all” provisions offer expansive, creative mechanisms for obtaining monetary payments or access to resources required for short- and long-term economic security.

### Short-term relief with long-term impact

Civil protection orders are the “most commonly used legal remedy for survivors”<sup>6</sup> and , are, by design, survivor initiated and driven.<sup>7</sup> If guided by strategies that balance both physical and economic safety risks (see the Introductory chapter of this Guidebook), civil protection orders may offer tools that restore survivors for past economic damages and provide prospective relief necessary for future safety and independence. For example, in program evaluations, survivors who were satisfied with the civil protection order process and talked with someone about additional safety planning, reported better living situations.<sup>8</sup> The potential long-term impacts of engaging in a survivor-centered protection order process include offering survivors an avenue to initiate engagement with legal system, providing them access to expertise largely unavailable without cost, and potentially increasing the likelihood of future engagement in the legal system with increased satisfaction and perceptions of safety.

## The Landscape of Economic Relief in Protective Order Statutes

Advocates for survivors should be aware of their state’s civil protection order statute’s economic relief provisions. There are several common categories of relief that are specifically provided for by state civil protection order statutes. At the same time, general

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<sup>3</sup> See Barbara J. Hart & Erika A. Sussman, *Civil Tort Suits and Economic Justice for Battered Women*, 4(3) THE VICTIM ADVOCATE, at 3-4 (Spring 2004).

<sup>4</sup> See Judy L. Postmus, Sara-Beth Plummer & Amanda M. Stylianous, *Measuring Economic Abuse in the Lives of Survivors: Revising the Scale of Economic Abuse*, 22 VIOLENCE AGAINST WOMEN 6, 692-703, 693 (2016) (finding that, “women who are forced to become economically dependent on their partner are at greater risk of being further abused and are less likely to leave the relationship.”). See also, Adrienne E. Adams, Cris M. Sullivan, Deborah Bybee and Megan R. Greeson, *Development of the scale of economic abuse*, Violence Against Women, 14(5), 563–588 (2008) (finding that survivors who report experiencing some form of economic abuse also report restricted access to needed resources. For example, 81% of survivors who experienced economic abuse reported “having trouble with [their] credit rating,” and 51% also reported more trouble accessing needed resources, like getting a phone); Center for Survivor Agency and Justice, *Debt in the Context of Safety, Coerced Debt & Debt Defense for Survivors*, Youtube (April 29, 2016)—<https://youtu.be/gb1Vc5B-aCU> (finding from a survey of 1717 women accessing the National Domestic Violence Hotline that women who experienced coerced debt were 2.3 time more likely to “stay longer than they wanted in a relationship...because of financial concerns.”).

<sup>5</sup> See Melanie M. Hughes & Lisa D. Brush, *The price of protection: A trajectory analysis of civil remedies for abuse and women’s earnings*, American Sociological Review, 80(1), 140–165, (2015) (finding that low-income survivors seeking an order of protection lose \$1018 in the year after petitioning, and they never recoup these losses.)

<sup>6</sup> Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, Journal of Gender, Social Policy & the Law, 11(2), 499-521 (2003).

<sup>7</sup> Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?* Cardozo Law Review, 29(4), 1487-1551 (2008).

<sup>8</sup> See Institute for Law and Justice, *National Evaluation of the Legal Assistance for Victims Program*. No. 208612 (2005). *But see*, Civil Court Barriers chapter in this Guidebook (finding that individual characteristics of courts, judges, and application of the process can limit the survivor-driven process as well as impact outcomes for survivors).

“catch all” provisions offer a mechanism for accessing economic relief that is not specifically prescribed.

## Specific types of economic relief

Most civil protection order statutes include specific provisions that provide direct authority for orders of monetary payment, access to material resources, or injunctive relief designed to facilitate the survivors’ economic well being. Some common examples of specific provisions include housing access and payments, compensatory losses, punitive damages, support payments and more.

### Restitution for medical expenses, property damages, and other compensatory losses

Many state civil protection order statutes enable courts to grant restitution for costs stemming directly from the respondent’s abuse of the survivor. Many state civil protection order statutes specifically authorize payment and/or reimbursement for medical costs resulting from the abuse. Medical expenses may be physical or psychological in nature, and they may include an emergency hospital visit as well as follow-up medical visits related to the abuse. Similarly, courts in many states are authorized to award reimbursement and/or payment for property damages resulting from the respondent’s abuse. Frequently, statutes authorize a list of compensatory losses, including attorney’s fees, shelter, and lost wages.<sup>9</sup>

**Case Scenario:** *Over the course of their marriage, Rob routinely stole Sally’s paychecks and deposited them in a checking account, which was solely in his name. Two weeks ago, Sally discovered a bill from a credit card company on the kitchen counter. She never applied for a credit card, but the bill was addressed to her and it had her social security number on it. When she contacted the credit card company, she learned that the card was in her name, Rob was an authorized user on the account, and more than \$2,000 had been charged to the account. Sally’s employment authorization expired two months ago; she’d been relying upon Rob to renew it and she has no idea if he has or not. He will not show.*

### Housing access and payments

Survivors of domestic violence cite the need for housing as a substantial obstacle to their safety.<sup>10</sup> Civil protection order statutes provide housing

<sup>9</sup> See, e.g., 10 DEL. C., §1045(a)(7) (“compensation for losses suffered as a direct result of domestic violence committed by the respondent, including medical, dental, and counseling expenses, loss of earnings or other support, cost of repair or replacement of real or personal property damaged or taken, moving or other travel expenses and litigation costs, including attorney’s fees”).

<sup>10</sup> See Violence Against Women Act of 2005, sec. 601; U.S. Conference of Mayors/Sodexo Survey on Hunger and Homelessness, 2005. See also Lisa Olsen, Chiquita Rollins & Kris Billhardt, *The Intersection of Domestic Violence and Homelessness*, (2013) 1-12, 7 (finding that “since emergency shelter stays were time-limited, many survivors returned to an abusive home, traveled from shelter to shelter, or relied on unstable housing with friends or relatives.”).

## Key Terms

**Civil protection order:** A civil legal remedy that is injunctive in nature and that includes provisions that order perpetrators of domestic violence to refrain from or engage in certain proscribed acts for a period of time. The statutory purpose of a civil protection order is to promote future safety or prevent violence.

**Relief provisions:** Categories of relief that are specifically (or sometimes generally) provided for by state civil protection order legal statutes. These can include restitution, vacating residences or property, debt burdens, support payments, stay-away or no-contact orders. Other state statutes describe relief in more general “catch-all” provisions.

**Bifurcation:** Separating the liability phase from the damages phase of the civil protector order case.

**Litigate liability:** Request the Court to determine whether the abusive partner is liable for economic and other specific damages.

**Status hearing:** A meeting mandated by the Court that takes place after the case where the survivor can present the proper evidence and the court can order the amount and specific method of payment at that time.

**Evidence of liability:** Physical evidence of economic harms generated by abuse that are presented by attorneys to the Court (i.e. photos of physical injuries or property damage, destroyed clothing, broken furniture, and medical records).

**Evidence of damages amount:** Evidence or proof presented to the Court for the amount of damages for which the abusive partner is liable (i.e. medical bills, receipts for property purchases, or repair receipts).

**Testimonial evidence:** When the survivor tells narratives or experiences to the Court to illustrate the nexus between the violence and the need for economic relief.

**Civil contempt action:** When an abusive partner fails to comply with the economic relief provisions of a civil protection order, a survivor may choose to report this to the Court with intent of encouraging compliance with the order.

access in a variety of different ways.<sup>11</sup> Many protection order statutes specifically authorize orders to vacate a previously shared residence. Several states enable courts to issue vacate orders regardless of ownership of the residence. For example, the Alaska statute authorizes the court to “remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence.”<sup>12</sup> Other statutes limit the scope of “vacate provisions” to circumstances in which the property is jointly owned, leased or rented. For example, the District of Columbia statute authorizes the court to order the abusive partner to vacate the residence if the residence is “marital property, jointly owned, leased, or rented” or the petitioner individually owns, leases or rents<sup>13</sup> Still other statutes limit “vacate orders” to circumstances in which the survivor individually owns, leases, or rents the previously shared residence.<sup>14</sup>

An order to vacate a residence may not offer adequate assistance if a survivor lacks the monetary resources to pay for the rent or mortgage. Therefore, many state statutes explicitly direct the abusive partner to make rent or mortgage payments.<sup>15</sup> Other statutory provisions order the abusive partner to provide “suitable alternative housing” to the victim and their children.<sup>16</sup> Protection order statutes may condition these types of relief upon marital status or having a child-in-common (i.e., a duty to support). For example, Missouri’s protection order statute provides explicit authority for the court to order the respondent to “pay the petitioner’s rent at a residence other than the one previously shared by the parties if the respondent is found to have a duty to support . . . and the petitioner requests alternative housing.”<sup>17</sup> However, many statutes do not require a “duty to support,” other than that stemming from the economic justice needs related to the abuse.

**Case Scenario:** *Sally wants to move out of the apartment she shares with Rob. Instead of having Rob move out, Sally wants to start fresh with a new place to stay because Rob is friends with the building manager. She also wants to leave behind the terrible memories of abuse associated with the apartment. However, Sally feels stuck because she doesn’t want to break the lease and she is worried that she won’t be able to afford an apartment on her own. Rob’s salary as a government employee is four times her salary. Sally knows it would just be easier to ask Rob to leave, but she doesn’t think she can stand living in the apartment any longer.*

### Property use, transfer, and protection

Civil protection orders in many states contain specific provisions that grant the survivor the temporary use of a vehicle or other personal property. For example, Georgia’s civil protection order statute enables the court to “provide for possession of personal property of the parties.”<sup>18</sup> Statutes may condition temporary possession of a vehicle upon ownership or alternative means of transportation. For example, the Alabama protection order statute allows the court to grant temporary possession of a vehicle “if the plaintiff

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<sup>11</sup> Indeed, the District of Columbia Court of Appeals affirmed the courts’ power to order abusive partners to vacate their home in *Robinson v. Robinson*, 886 A.2d 78 (DC Ct. App. 2005). Finding it inadequate for the respondent to vacate the marital home but live right next door, the court held that the broad remedial purposes of the civil protection order act allowed “safety concerns to trump property rights.” *Id.* at 86.

<sup>12</sup> ALASKA STAT. § 18.66.100(c)(3).

<sup>13</sup> D.C. CODE ANN. §16-1005(c)(4).

<sup>14</sup> See, e.g. KAN. STAT. ANN. § 60-3107(d) ; MD. CODE ANN., FAM. LAW § 4- 506(d)(4) ; N.H. REV. STAT. ANN. § 173-B:5 ; OHIO REV. CODE ANN. § 3113.31(E)(1)(b).

<sup>15</sup> See, e.g., IND. CODE § 34-26-5-9(c)(3)(b); NEV. REV. STAT. § 33.030(2)(b)(2).

<sup>16</sup> See, e.g., 23 PA. CONS. STAT. § 6108(a)(2).

<sup>17</sup> MO. REV. STAT. § 455.050(3)(6).

<sup>18</sup> GA. CODE ANN. § 19-13-4(a)(8).

has no other means of transportation of his or her own and the defendant either has control of more than one vehicle or has alternate means of transportation.”<sup>19</sup> In contrast, Alaska specifically authorizes a protection order that grants survivors “possession and use of a vehicle and other essential personal items, regardless of ownership of the items.”<sup>20</sup>

Some statutory provisions aim to protect property from damage or misappropriation by the abusive partner. For example, the Illinois statute authorizes an order that “forbids the respondent from taking, transferring, encumbering, concealing, damaging, or otherwise disposing of any real or personal property.”<sup>21</sup>

Many state statutes provide for the exchange of personal property between the parties. Several include provisions that order the police to accompany the victim or the abusive partner to retrieve his or her belongings from a shared residence.<sup>22</sup> By explicitly addressing the details of the exchange in the order—identifying specific items, the date, time, and method of transfer—courts are able to assist battered women in ensuring that the property transfer actually takes place and that it occurs without further incident.

### Liens, debts due, and other economic burdens

Many statutes offer an opportunity to address routine financial obligations that continue through the duration of the protection order. For example, California authorizes “the payment of any liens or encumbrances coming due during the period the order is in effect.”<sup>23</sup> Minnesota specifically grants “the continuance of all currently available insurance coverage without change in coverage or beneficiary designation.”<sup>24</sup>

### Support payments

The majority of state protection order statutes offer specific authority for ordering the abusive partner to pay temporary child support for children-in-common or to pay temporary spousal support where the parties are married. For example, the Pennsylvania statute allows an order “directing the defendant to pay financial support to those persons the defendant has a duty to support.”<sup>25</sup> The New Jersey statute provides that “compensatory losses shall include, but not be limited to, loss of earnings or other support, including child or spousal support.”<sup>26</sup> A New Jersey court recognized the connection between domestic violence and the need for support in *Mugan v. Mugan* where it held “when a defendant’s violent acts result in his removal from the marital residence and bar contact with his wife, this may well cause the loss of the funds necessary to maintain himself and the house. Such consequences are as direct as removal.”<sup>27</sup> The *Mugan* court added a policy justification for the provision of support, stating that survivors of domestic violence should not be discouraged from attempting to separate from their abusive partners by a threat of financial distress.<sup>28</sup>

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<sup>19</sup> ALA. CODE § 30-5-7(c)(6).

<sup>20</sup> ALASKA STAT §18.66.100 (c)(10).

<sup>21</sup> ILL. COMP. STAT. § 5/112A-14(b)(11).

<sup>22</sup> See, e.g., KAN. STAT. ANN. § 60-3107(a)(8) (“making provision for the possession of personal property of the parties and ordering a law enforcement officer to assist in securing possession of that property, if necessary”); OR. REV. STAT. §107.718 (1)(d) (“That a peace officer accompany the party who is leaving or has left the parties’ residence to remove essential personal effects of the party”).

<sup>23</sup> CAL. FAMILY CODE § 6324.

<sup>24</sup> MINN. STAT. § 518B.01(6)(a)(12).

<sup>25</sup> 23 PA. CONS. STAT. § 6108(a)(5).

<sup>26</sup> N.J. STAT. ANN. §2C:25-29(b)(4).

<sup>27</sup> 555 A.2d 2, 3 (N.J. Super Ct. App. Div. 1989).

<sup>28</sup> *Id.*; See also, *Powell v. Powell*, 547 A.2d 973 (1988) (holding that the catch-all provision of the District of Columbia civil protection order statute authorized an award of child support).

## Stay away and no contact provisions

Virtually every state civil protection order statute contains “stay away” and “no contact” provisions. Though typically associated with physical protection from abuse, “stay away” and “no contact” orders also can have a direct impact on a survivor’s economic security. For example, an order to stay away from a survivor’s place of employment may mean the difference between employment and unemployment.<sup>29</sup> An abusive partner who stalks a survivor at work may cause them to lose their job—due to an employer’s unlawful decision to fire them or due to the survivor’s fear of abuse and resulting inability to go to their workplace. Similarly, stay away orders restricting the abusive partner from the survivor’s home may enable them to remain in their home, and thus avoid the costs of relocation, or may prevent eviction based upon the abusive partner’s conduct, which, though generally unlawful, is commonly faced by survivors of domestic violence.<sup>30</sup> Simply put, stay away and no contact provisions offer a means of restricting the abusive partner’s ability to inflict substantial economic costs in the future.

## Punitive damages and compensation for pain and suffering

The New Jersey protection order statute offers extraordinarily comprehensive economic relief for survivors of domestic violence. In addition to a wide array of financial measures found in various other state civil protection order statutes, the New Jersey statute specifically authorizes “compensation for pain and suffering” and “[w]here appropriate, punitive damages.”<sup>31</sup> In *Sielski v. Sielski*, the court awarded \$6,000 in punitive damages to the survivor, after the court found that the abusive partner had acted viciously and sadistically when he yanked her out of bed by her hair, slapped her about the face and neck, attempted to push her face in the toilet, yanked at her pubic hair, threw cold water at her, violently broke a lamp and cut the phone connection so that the plaintiff could not summon assistance.<sup>32</sup>

The court held “it cannot be argued that torture such as reported here is not an evil-minded act warranting both the protection of the Prevention of Domestic Violence Act of 1990 and punitive damages.”<sup>33</sup> Thus, the New Jersey court held that punitive damages were warranted where the respondent perpetrated cruel acts of domestic violence.

## **Catch-all relief provisions**

Catch-all provisions enable survivors to recoup economic damages that resulted from the abusive partner’s violence and/or that cover the costs of future safety and independent living. The specific language of catch-all provisions varies from state to state, but is consistently equitable in nature.<sup>34</sup> Courts have interpreted statutory catch-all provisions to authorize creative and particularized remedies that are needed to prevent future abuse. In

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<sup>29</sup> See generally, Wendy R. Weiser and Deborah A. Widiss, *Employment Protection for Domestic Violence Victims*, CLEARINGHOUSE REV., 3-11 (May– June 2004).

<sup>30</sup> See generally, Wendy R. Wiesel and Geoff Boehm, *Housing Discrimination Against Victims of Domestic Violence*, CLEARINGHOUSE REV., 708-718 (March-April 2002).

<sup>31</sup> N.J. STAT. ANN. § 2C:25-29(b)(4).

<sup>32</sup> *Sielski v. Sielski*, 604 A.2d 206, 207 (N.J. Super. Ct. Ch. Div. 1992).

<sup>33</sup> *Id.* at 210.

<sup>34</sup> See, e.g., D.C. CODE ANN. §16-1005(c)(11) (“Directs the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter”); N.C. CODE § 50B-3(a)(13) (“Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child”); 23 PA. CONS. STAT. § 6108(a)(10) (“granting any other appropriate relief sought by the plaintiff”).

its Civil Protection Order Study, the National Institute of Justice found that the majority of jurisdictions “explicitly grant judges the latitude to grant any constitutionally defensible relief that is warranted.”<sup>35</sup>

Moreover, appellate case law supports the use of catch-all provisions for awards of monetary relief. In *Powell v. Powell*, the District of Columbia Court of Appeals held that the court had the authority to grant monetary relief in a civil protection order proceeding, even though such relief was not specifically provided for in the civil protection order statute.<sup>36</sup> The DC statute’s catchall provision enabled the court to award relief “appropriate to the effective resolution of the matter.”<sup>37</sup> The survivor argued that, because their financial dependency on their husband was a major factor in the perpetuation of violence in the family, the only effective means of stopping the abuse and protecting them in the future was for the abusive partner to vacate the home and make it financially and physically secure. The court looked to the legislative history of the domestic violence statute and

concluded that the statute was to be read expansively.<sup>38</sup> In light of that expansive reading and remedial purpose, the court held that the intent of the catch-all provision was to enable courts to grant individualized solutions, tailored to meet the safety needs of each case.<sup>39</sup>

### Practice Tip

Advocates for survivors should use catch-all provisions creatively and opportunistically in order to access monetary payments and resources specifically tailored to meet the individual safety and restoration needs of survivors. For example, in the scenario here, an advocate can use the catch-all provision to ask that the court order Rob to furnish Sally with the required paperwork to reapply for her employment authorization.

**Case Scenario:** *Now that you are familiar with the remedies available to survivors by way of a civil protection order, how might you use this information to help Sally? What else do you need to know from Sally?*

## Practical Strategies for Accessing Economic Relief

### Using Survivor Centered Advocacy In Civil Protective Orders: Wearing Our “Economic Justice Glasses”

- Client interview
- Client counseling
- Drafting petitions
- Court testimony and evidence
- Arguments before the court
- Modification hearings
- Enforcement

Despite the clear link between economic security and safety, judges are often reluctant to grant economic relief in civil protection orders.

Therefore, advocates for survivors must carefully assess, advocate, and fully litigate the economic issues before the court.

### Intake and assessment

Advocates for survivors should consider economic security at the initial stages of the civil protection

order process. They can explore the universe of potential economic relief in two steps:

- **First, identify the prior economic harms.** Consider each individual instance of

<sup>35</sup> Peter Finn and Sarah Colson, National Inst. of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 33 (1990).

<sup>36</sup> See *Powell*, 547 A.2d 973.

<sup>37</sup> D.C. CODE ANN. §16-1005(c)(11).

<sup>38</sup> See *Powell*, 547 A.2d at 974-75.

<sup>39</sup> See *id.*

physical and sexual violence in order to identify the direct economic damages including property damage, medical damages, lost wages, etc. Also consider the economic abuses perpetrated against the survivor, including identity theft, stolen money, credit card fraud, etc.

- **Second, consider the costs of future safety.** Brainstorm relief tailored to meet the cost of safe and independent living, including things like housing, transportation, child care, health care, food, clothing, tuition, etc. Advocates will need to demonstrate that these future costs are critical to survivor’s safety, and are therefore required to meet the statutory purpose of the civil protection order.

The following chart is meant to help attorneys and advocates craft intake and assessment questions and facilitate conversations that capture survivors’ holistic needs.

Questions for Survivor Interviewing & Counseling when Considering Civil Protection Orders		
Activity	Task	Sources & Questions to Guide Discussion
<b>Identify Potential Economic Relief</b>	Identify Prior Economic Harms	<ul style="list-style-type: none"> <li>Physical and Sexual Violence (and their economic impact, such as medical expenses)</li> <li>Economic Abuse (for example, identity theft)</li> </ul>
	Identify Costs of Future Safety	<ul style="list-style-type: none"> <li>Housing, transportation, child care, health care/insurance, food, clothing, credit, tuition</li> </ul>
<b>Tailoring Solutions</b>	Identify strategies to increase likelihood that the abuser will pay	<ul style="list-style-type: none"> <li>How would this request for money and access to resources impact the survivor’s own risk assessment?</li> <li>How might we structure the provision to increase safety?</li> </ul>
	Consider how economic relief in POs might impact eligibility for other economic resources and/or future cases	<ul style="list-style-type: none"> <li>Is it worth it at all?</li> <li>How might we structure the timing, amount and method of payment to increase the likelihood of payment?</li> </ul>

### Think About It

What is the universe of possible forms of economic civil protection order relief available to Sally?

Previous economic harms include: damage to her work clothes, stolen paychecks, lost wages resulting from his abuse, fraudulently accrued credit card debt, and medical costs for treatment of her eye injury resulting from Rob’s physical abuse.

The costs future cost of safety for Sally might include: relocation costs associated with moving out of the apartment she shares with Rob, monthly rent, transportation costs, food costs, as well as access to the immigration documents needed to renew her employment authorization so that she can have a source of income.

## Deciding whether to pursue a protection order

In light of the potential economic protection order relief, advocates and survivors should consider additional economic impacts: likelihood of the partner to pay, implications for other economic resources (like public benefits), safety risks and priorities as defined by the survivors.

Consider the actual benefits of economic relief in protection orders. How likely is the abusive partner to pay monetary relief or provide the material resources ordered by the court? Does the abusive partner have the income, assets, or other resources to pay or satisfy the sought after relief?<sup>40</sup> How can the economic wherewithal of the abusive partner be most quickly and fully accessed? Given those possibilities and constraints, what

### Practice Tip

At the same time advocates consider the abusive partner's ability and likelihood to pay, they should also work with survivors to consider how receipt of economic relief in protection order proceedings might impact eligibility for other economic resources including public benefits and victims' compensation funds. Lawyers should examine the *res judicata* impact that civil protection order litigation may have on subsequent cases (e.g., family law, tort, personal injury) to determine which legal course of action is most advantageous.

specific terms are most likely to result in payment in this case?

The decision to pursue economic relief must be grounded in the survivor's own risk assessment.<sup>41</sup>

Advocates should work with survivors to explore various economic options that

might address prior harms and future economic costs. While the civil protection order may provide powerful tools for economic justice, such requests have the potential to trigger retaliatory violence by the abusive partner against the survivor.<sup>42</sup> Therefore, assessment must engage the survivor in carefully considering how economic orders are likely to impact their safety.

### Think About It

How is Sally assessing her own risk? What is the universe of options available for her protection beyond civil protection order remedies? What are the benefits and tradeoffs of economic relief available through a civil protection order?

Both economic risks and physical safety risks must be analyzed, with an eye toward crafting solutions that provide access to economic security while minimizing safety risks.

<sup>40</sup> Note that "inability to perform" is a defense to a civil contempt action. See *Smith v. Smith*, 427 A.2d 928, 932 (D.C. 1981). This is discussed below in the section related to Civil Contempt Actions.

<sup>41</sup> See generally, JILL DAVIES, *SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES* (1998); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 *CARDOZO L. REV.* 1487, note 12, 1537-38 (2008) (noting that seeking a protection order can increase a woman's danger when the batterer perceives the action as a loss of power and escalates the violence, and identifying the importance of case evaluation, risk assessment, and safety planning).

<sup>42</sup> See Desmond Ellis & Walter S. DeKeseredy, *Marital Status and Woman Abuse: The DAD Model*, 19 *INT'L J. OF SOCIOLOGY OF THE FAMILY* 67-87 (1989) (finding that "post separation abuse" correlates with women's assertion of independence); JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 80-81 (Claire Renzetti, ed., Northeastern University Press 1999) (finding that eighty percent of women interviewed indicated that their partners made threats or attempts at physically forcing them to return to the relationship); See generally Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection orders*, 72 *OHIO STATE L. J.* 303-77, 335 (2011) (finding that a woman's "decision to stay in a relationship is often a rational choice to prevent her abuser from carrying out his threats against her and her children if she attempts to leave."

In some instances, survivors may decide that the risk of physical abuse or retaliation (or the risk of accessing the justice system) outweighs the potential economic benefit, or that other options outside of the protection order system involve a lower risk of retaliatory abuse. Only the survivor can determine whether and what type of economic relief is desirable in their particular circumstance.

### Strategies to promote safety

The desirability of a request for economic relief will depend entirely upon a survivor's own assessment. That said, the following are strategies that may (or may not) minimize the risks for physical harm:

Survivors may feel that bifurcating the civil protection order proceeding – separating the liability phase from the damages phase of the case – will minimize risk, keeping the court's order of a particular payment plan for a later date.

A survivor may wish to include payment methods that minimize contact with them and their children or other family members. They might consider requesting that the court order the abusive partner to send his payments to the court, or that the court withhold monetary payments from his wages as is often done with child support awards.

Survivors may wish to request that the court order monetary payments in installments, as opposed to one lump sum. Such smaller amounts may seem less threatening to an abusive partner and may therefore be less likely to spur retaliation.

A survivor may decide to pursue some types of economic relief, based upon their knowledge of the abusive partner, while refraining from seeking others. Advocates can assist survivors in this complex strategizing by offering alternative sources of economic relief to compliment those forms of economic relief that they obtain through the civil protection order process (e.g. victims compensation funds).

### Strategies to promote enforceability

As with all civil protection order provisions, economic relief provisions should be crafted with specificity with regard to the method and amount of payment in order to maximize the likelihood of enforceability. Advocates should request that the court include specific details about the property to be exchanged, the prohibited or required actions of the abusive partner and/or the monetary amounts, the dates on which monetary payments are to be paid or actions to be carried out, and the specific methods for doing so. Smaller installments (as opposed to one lump sum) should be requested where the amount is more than the abusive partner's income and assets can bear. For items that are

#### Practice Tips Summary: Promoting Safety

- Bifurcate court proceedings
- Build-in payment provisions that minimize contact with Petitioner and children
- Request smaller installments

#### Practice Tips Summary: Enforceability

Request courts to specify:

- Property to be exchanged
- Actions/prohibitions of abusive partner
- Monetary amounts
- Dates of payment/action
- Other specifics

#### Think About It

Going back to the scenario, what types of measures could Sally request to promote her safety? She could ask that the court order Rob to pay restitution for her hospital bills in monthly installments. She could also ask that the court order Rob to make payments directly to the court in order to minimize contact and the opportunity for him to commit acts of violence in the future.

non-monetary in nature, such as property, advocates should ask the court to include in its order a list and description of the various items to avoid future dispute.

### Practice Tips Summary: Damages Amount Unknown

- Litigate liability and specific damages separately
- Request a status hearing
- Request court order to pay bills as available
- File a motion to modify the civil protection order

### Strategies to access relief when the damages amount is unknown

Because civil protection order hearings are expedited proceedings, survivors often do not know the cost of economic damages at the time of the hearing. For example, a survivor who sought medical treatment may not have received the bill specifying the amount at the time of the hearing. Such

timing issues need not preclude survivors from pursuing economic justice for their losses. Under these circumstances, the survivor can ask the court to *litigate liability* (i.e., whether the abusive partner is liable), but leave the amount of damages for a status hearing at a later date. The survivor may request that the court order the respondent to appear at a *status hearing* specifying the date and time within the civil protection order itself. Then, at the status hearing, the survivor can present the proper evidence and the court can order the amount and specific method of payment at that time.

Alternatively, if the court is unwilling to set a status hearing date or if the survivor wishes to avoid having to appear for future hearing dates, an advocate may request that the court order the abusive partner to pay the medical bills once they become available. Typically,

the survivor or their advocate will need to forward the bills to the abusive partner. Note that such a strategy, though necessary under certain circumstances, is open to manipulation by the abusive partner and is more difficult to enforce than a specific amount of damages ordered by the court.

**Case Scenario:** *You will recall that Sally's eye injury was extensive and she was told that she would require follow-up treatment. To access the relief needed to cover the future medical costs of follow-up treatment, Sally could request that the court order Rob to appear at a status hearing several months from the date of the initial proceeding. If the court is unwilling to do that, Sally can ask that the court order Rob to pay future bills as they become available (requiring that Sally forward the bills to Rob's address). If, at the time of the initial hearing, Sally did not know that she would require follow-up, but discovered that she did after the hearing date, then she could file a motion to modify the original order.*

If the survivor discovers an economic injury that was unknown at the time of the initial hearing (e.g., medical conditions subsequently discovered), or if the damages are more extensive than prescribed by the original order (e.g., follow-up medical visits are required), the survivor may file a motion to modify the civil protection order, arguing that the newly discovered damages constitute "good cause" or a "change in circumstances" that justify a modification.<sup>43</sup>

<sup>43</sup> Most jurisdictions require that one of these two standards be met prior to issuing a modification or extension of a civil protection order. See e.g., D.C. CODE ANN. § 16-1005(d) ("modify the order for good cause shown"); MO. REV. STAT. § 455.060(1) ("showing a change in circumstances sufficient to warrant the modification").

## Proving up the case

Even sympathetic judges who wish to read their protection order statutes broadly and award remedial economic relief cannot do so unless advocates present the courts with the evidence and legal arguments to do so.

### Physical evidence

Evidence of Liability: Advocates should, where possible, present the court with physical evidence of economic harms, or **evidence of liability**. Evidence of economic harms resulting from physical abuse might include photos of physical injuries or property damage, destroyed clothing, broken furniture, and medical records. Evidence of harms resulting from economic abuse might include forged checks, credit card bills, or credit reports.

Evidence of Damages Amount: After proving liability, advocates for survivors need to offer evidence to prove the amount of damages for which the abusive partner is liable, or **evidence of damages amount**. Evidence of the costs of prior economic harms might include medical bills, receipts for property purchases, or repair receipts. Evidence of the costs of future safety might include a residential lease, a childcare bill, an automobile lease or monthly bus pass, or a utility bill.

### Testimonial evidence

Survivors must present testimony in court to illustrate the nexus between the violence and the need for economic relief. While judges may readily see the need for a stay away or no contact order, they may need some assistance in understanding how economic relief is critical to this survivor's short and long-term safety. The survivor may be best positioned to articulate the need for economic relief in their life, through their **testimony**. For example, a survivor might testify, "My boyfriend has terrorized me and my daughter with his abuse for the past five years. I need the court to order financial relief to provide us with the resources to remain separate from him and to live free of his violence." Testimony should be specific, not only about the need for the relief, but also about how the particular request—amount, timing, method of payment or access—are tailored to meet this survivor's individual economic and physical safety needs.

#### **Practice Tip: Testimonial Evidence**

Illustrating the Link between the Violence & the Economic Costs

- Direct Example: "His attack caused me to incur \$500 worth of medical treatment."
- Indirect harms: "Without replacement of my suit, I cannot go on a job interview."
- Future harms: "The damage to my door leaves me open to future attacks by the Respondent."

## Arguments

As stated above, the overarching aim in arguing for economic relief is to articulate the nexus between the economic relief requested and the legislative purpose of the civil protection order statute—safety. Articulate the nexus between economic relief and safety by using social science, for example, to educate judges on the importance of economic independence for survivors in general and demonstrate how economic relief will impact this survivor’s life in particular. Below are some pointers for advocates arguing for economic relief in civil protection orders:

Legal and Factual Circumstances	Strategy
<b>If your state civil protection order statute</b> does contain <b>explicit provisions that specifically authorize the type of economic relief sought:</b>	Rely upon that statutory provision
<b>If your state civil protection order statute</b> does not <b>specifically provide for the relief requested:</b>	Use catch-all provisions ( <i>See Powell</i> )
<b>Use the legislative history and purpose of the statute to support requests for liberal relief individually tailored to prevent future violence and achieve safe:</b>	Draw upon state’s legislative history and case law interpreting that history to support arguments for economic relief <sup>1</sup>
<b>If the court is reluctant to offer economic relief, because they believe that such relief can more properly be obtained in family law proceedings or through tort actions:</b>	Explain how short-term economic relief is essential to the survivor’s short-term safety; without it, the survivor may not be able to separate or to remain separated from the abusive partner. Such a result would be at odds with the goal of the civil protection order statute. Moreover, in instances where the survivor and the abusive partner are not married, the civil protection order case may be the only venue for economic justice.
<b>To enhance enforcement:</b>	Request that the court include specificity in its award of economic relief.
<b>Emphasize how the requests make sense by:</b>	Explaining how the particular requests—amounts, items, timing, and method—“make sense” in light of the survivor’s larger safety plan.
<b>Submit a trial memo that:</b>	Outlines the above and that provides the court with authority – statutory law, case law, and social science related to economic requirements for survivor safety—to support the court’s award.
<b>To make the record, for use in the event of an appeal:</b>	Request that the court make written findings of economic harm and articulate the legal basis for awarding economic relief.

## Enforcement advocacy

Civil protection orders are not self-implementing. Obtaining the court's order is only part of the process. For civil protection orders (or any order) to be effective following their issuance, advocates and survivors must take various steps to facilitate the abusive partner's compliance.

### Third parties

Survivors should consider whether to enlist third parties as allies in the enforcement of the economic terms of a protection order.

**Example 1:** *Rob used Sally's personal information to open a credit card in her name, listed himself as an authorized user, and accrued more than \$2,000 in debt.. As her advocate, you might consider drafting a protection order that directs Rob to pay Sally for the \$2,000 worth of credit card debt. You might then use the civil protection order as a tool for advocating with the credit card company to either waive the debt or to develop a lenient payment plan that coincides with the terms of the protection order.*

**Example 2:** *Rob's abuse has caused trouble for Sally at her job. Consider drafting a provision in the protection order that directs Rob to stay away from Sally's place of employment. Provided that she feels safe in doing so, Sally might share a copy of her protection order with her employer so that she can aid in enforcing that stay*

### The abusive partner

Advocates for survivors should consider taking various steps to enforce the economic terms of protection orders. If the abusive partner fails to make a payment, the survivor's attorney might write a letter to the abusive partner or (if he is represented) to his or her attorney to remind him or her of the specific terms of the court order and to document non-compliance.

### Civil contempt proceedings

When an abusive partner fails to comply with the economic relief provisions of a civil protection order, a survivor may choose to file a civil contempt action against him.<sup>44</sup> While **criminal contempt actions** punish the violator for past disobedience, civil contempt actions are intended to encourage compliance with the order and will generally be more efficacious where economic relief is needed.<sup>45</sup> Survivors will need to present evidence of the abusive partner's knowledge of the order as well as evidence of the abusive partner's non-compliance.<sup>46</sup> In instances where monetary payments were to be directed to the courthouse, the survivor might provide official copies from the court financial office to prove his failure to pay. Similarly, where payments were to be made directly to a creditor, the survivor might offer an official business record from that institution to prove non-

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<sup>44</sup> See, Domestic Violence Practice and Procedure, at § 4:35.

<sup>45</sup> See, e.g., D.C. CODE ANN. § 11-944(a).

<sup>46</sup> See, e.g., *D.D. v. M.T.*, 550 A.2d 37, 43 (D.C. App. 1988); Unlike criminal contempt actions, evidence of the contemnor's intent is irrelevant to a finding of civil contempt. See *Bolden v. Bolden*, 376 A.2d 430, 432-33 (D.C. App. 1977) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)).

payment. Also, advocates should be prepared to respond to the abusive partner's justifications or defenses for non-compliance, based upon an "inability to pay."<sup>47</sup> Employer statements, tax returns, and other documentary evidence of the abusive partner's income and assets can be used to rebut such arguments.

## Conclusion

There is no safety without economic justice. Economic security is vital to the short and long term safety of survivors. If advocates are to address the needs of survivors, we must expand our definitions of safety to include economic security. Civil protection order statutes are intended to provide survivors with a mechanism that meets their particular safety needs. As our definitions of safety expand to include economic justice, so too must our vision of civil protection orders. We must engage survivors in creatively brainstorming and assessing the economic protection order possibilities. By employing expansive thinking and integrating physical and economic risks, advocates can assist battered women in accessing economic relief in civil protection orders in a manner that more fully achieves the statutory purpose and more comprehensively meets survivors' needs.

## Additional Resources

- [Reducing Barriers to Safety: Securing Economic Relief Through Protection Orders, webinar recording & webinar training slides](#)
- [Representing Survivors Experience Trauma and Other Mental Health Challenges](#), by Mary Seighman, Erika Sussman & Olga Trujillo (2012)
- [Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault, and Stalking in Civil Protection Order Cases](#), The American Bar Association (with contributions by Erika Sussman) (2007)
- [The Civil Protection Order as a Tool for Economic Justice](#), by Erika Sussman (2006)
- [Civil Tort Suits & Economic Justice for Battered Women](#), by Barbara Hart & Erika Sussman (2004)

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<sup>47</sup> Defenses to civil contempt include: inability to pay and substantial compliance. See D.D., 550 A.2d at 43; *Smith v. Smith*, 427 A.2d 928, 932 (D.C. 1989). Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1, 52 (1994) (explaining monetary dependence as external factor in preventing woman from leaving abusive relationship); See *State v. Felton*, 329 N.W.2d 161, 163 (Wis. 1983) (recounting that the defendant testified that she returned to her abusive husband because she was experiencing financial problems); Lisae C. Jordan, Secure Safety First, 27 FAM. ADVOC. 10, Spring 2005.

# Twelve



## Addressing Barriers for Domestic Violence Survivors in Civil Court

**By Jenna Smith & Nida Abbasi**

### Introduction

Civil Court seems like a logical place for survivors to resolve economic issues. There are legal avenues through which a survivor can seek spousal and/or child support, divide assets equally, and receive compensation for harm. However, while courts offer legal remedies, they also present distinct challenges and costs. Survivors' lack of access to resources, their proximity to the courthouse, and language and cultural barriers can make court a daunting and intimidating place. Abusive partners can take advantage of the court system to continue harassment through litigation and further exacerbate the costs associated with seeking legal remedies.

This chapter will outline the barriers survivors face in accessing and receiving justice through the civil court system in three main sections: Access to Justice, Justice Thwarted, and Exploiting Court Barriers. It will offer concrete and innovative steps that advocates and attorneys can take to alleviate the economic impact on survivors, collaborate with courts, and implement systemic change to enhance survivors' access to justice.

## Esther's Story

Read Esther's story and consider the questions you might ask her if she was your client.

*Esther is an undocumented Haitian immigrant living in the United States with her boyfriend, a U.S. citizen, and their two young children who were both born in the U.S. Esther works a part-time, minimum wage job. Her boyfriend has a steady higher-paying job and controls the finances. They both reside in a small town with minimal resources.*

*Esther and her boyfriend have been together for nearly a decade, and during that time he has become increasingly violent towards her. Fearing for her life, she has taken her children and fled to a local shelter. She is seeking protection from the court system, but she is terrified. In addition to fearing for her physical safety and worrying about how she and her kids will make ends meet, Esther feels intimidated by the court system.*

### Think About It

Why do you think Esther is fearful of the civil court system? What concerns might be on her mind? Think about other survivors you've worked with; what specific challenges have they encountered in the court system? How can this inform Esther's situation? How might her case be different? How might access to justice issues, be they economic, geographic, cultural, or systemic, have an impact on Esther?

## Assessing Access to Justice

A full and open assessment of your local court practices, your agency's relationship with court, as well as Esther's needs and priorities will have important implications in her experience with the court. Esther's experience with the court system—positive or negative—will largely depend on the court in her community. The mechanisms courts have to identify and respond to domestic violence will vary from place to place. While it may be difficult to enact change from outside the court system, there are strategies that you can use to engage court staff on economic issues affecting survivors like Esther.

Reflect on the agency where you work and assess your relationship with the court:<sup>1</sup>

- What is your agency's relationship like with the local court? Are there judges with whom you have a positive relationship?
- Do you collaborate with the court and its actors to learn what challenges they face and work with them to problem solve?
- Do you participate in stakeholder meetings to discuss policies and procedures and communicate with other agencies in the field, such as batterer intervention programs, culturally-specific organizations, or supervised visitation providers?
- Do you know what kind of training on domestic violence the court has received? Have you asked the court in what areas they need further training? Could you provide it?<sup>2</sup>

<sup>1</sup> For more on organizational self-assessment and partnership building strategies see CSAJ's Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: An Assessment and Resource Tool: <https://csaj.org/library/view/building-partnerships-to-enhance-consumer-rights-for-domestic-violence-surv>

<sup>2</sup> Check the Center for Court Innovation's website for a forthcoming needs assessment toolkit for courts.

Now, when assessing Esther’s needs and experiences with civil court, lean on the practical, safety, and cultural considerations that she prioritizes. Because many survivors have complicated experiences and feelings surrounding legal systems, advocacy requires an open, honest, and sensitive assessment. For a fuller description of a survivor-centered *approach* to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11). The screening and assessment questions presented here are for issue-spotting and not meant to be prescriptive (often referred to as “intake questions”). Conversations surrounding survivors’ needs and interactions with the court need not be limited to these questions. Rather, intake questions may be integrated into a broader assessment process, with the attorney and/or advocate relying on the survivor’s understanding of their own experience and be driven by the survivor’s priorities.

#### Safety considerations:

- What safety risks does the abusive partner pose? How might they react to court involvement and legal actions taken by the survivor?

#### Practical considerations:

- Does the survivor have a car or means to get to court? If not, can they use public transportation? Can they afford to use public transportation?
- Are there children involved? Who will care for them during the survivor’s court appearances? Can the survivor afford child care or is there a friend or family member they trust to watch them?

#### Cultural considerations:

- Are there cultural differences that may present challenges for the survivor? Might there be communication issues as a result of language barriers? If so, what sorts of interpretation services are available at the courthouse?

## Access to Justice: Barriers and Costs of Legal Services

The mere act of separating from an abusive partner or seeking safety is well documented as enormously costly. In fact, domestic violence survivors lose close to 13.6 million days of productivity each year, which includes things like childcare, household work, and employment.<sup>3</sup> This has a variety of causes, but court involvement is undoubtedly a contributing factor. For survivors, particularly low-income survivors, where they live matters, and the financial impact of court and attorney fees can be devastating. Courts often fail to meet basic needs or provide culturally appropriate services, resulting in profound economic harm and increasing survivors’ risk of continued violence.

### Poverty and legal resources

**Case Scenario:** *Esther cannot find a pro bono lawyer to take her case. She contacts a private family law attorney in her town, but his rates are far more than she can afford to pay.*

For survivors without financial means who are seeking a divorce and/or child-related relief, litigation can prove particularly expensive and even financially debilitating (see

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<sup>3</sup> “Supporting Survivors: The Economic Benefits of Providing Civil Legal Assistance to Survivors of Domestic Violence,” *Institute for Policy Integrity*: July 2015.

**Family Law** chapter in this Guidebook). Many low-income survivors like Esther struggle to secure low-cost or free representation. Litigants may try to hire a private attorney, but the cost for private family law attorneys are generally high, making firms reluctant to retain low-income clients.<sup>4</sup> Private attorneys also charge fees for the paperwork associated with litigation, such as subpoenas, depositions, discovery, and filing fees. Some attorneys may even exploit indigent clients by exhausting retainer fees through frivolous filings. The high cost of legal representation means that litigants frequently represent themselves. While self-representation lowers costs, it can also lead to serious financial consequences such as inadequate child support orders, unfair division of property, and the concealment of

### Practice Tip

Legal services and advocacy groups can provide on-site support, set up help desks or offices at or close to the courthouse, and provide 24/7 domestic violence hotlines so that survivors can easily access services. In many jurisdictions, family justice centers, often situated right by courthouses, provide a “one-stop shop” for domestic violence survivors to access legal support, housing and financial assistance, social services, and counseling. Courts can also offer and display information on social services, including options for mental health or substance abuse counseling, referrals to advocates and shelters, information on supervised visitation services, and opportunities for job training.

In New York City, Legal Information for Families Today or LIFT provides resources, legal advice, and access to attorneys in the family courthouses of all five boroughs of the city. Access to online multimedia tools can also provide a wealth of information and support. Through kiosk, web-based systems, instructional videos, and culturally-responsive guides that use accessible and **plain language**, courts can offer litigants immediate access to tools to better understand and litigate their case. Simply making wifi internet available to litigants can increase access to needed resources. Some courts also set up programs that offer **self-represented** survivors with comprehensive brief services or consultations with attorneys.

### Key Terms

**Access to justice:** The ability of individuals to obtain fair and swift outcomes regardless of socio-economic status; centers around eliminating barriers that prevent individuals and groups from exercising their rights within justice systems.

**Economic coercion:** Compelling an individual to behave in an involuntary way by exploiting his/her financial dependence, especially through intimidation, threats, and pressure.

**Fee waivers:** Litigants living below the poverty threshold and/or on public assistance often qualify to have court filing costs waived by the Clerk’s Office; per the Violence Against Women Act (VAWA), courts are not permitted to charge petitioners fees for filing an order of protection.

**Guardian Ad Litem (GAL):** Appointed by the judge in cases involving parties who cannot represent their own rights. In custody cases, GALs represent the best interests of the children in order to protect their rights.

**LGBTQ:** Lesbian, gay, bisexual, transgender, queer or questioning.

**Litigation:** The process of taking or contesting legal action, either in criminal or civil court.

**Plain language:** Writing that is clear, simple, and easy to understand. It avoids large words and complex terms so that people with wide-ranging reading and cognition levels can understand it.

**Procedural justice:** Refers to the fairness of justice and the interpersonal treatment of litigants, survivors, and defendants; the theory that litigants who are treated fairly by the court process will be more likely to accept the outcome and comply with the decision.

**Public benefits:** Government assistance for low-income individuals, such as Medicaid, Supplemental Nutrition Assistance Program or “SNAP” (also known as food stamps), WIC (a special supplemental nutrition program for women, infants, and children), child care, and housing assistance.

**Pro bono:** Legal work done for free, often for low-income clients who cannot afford to pay.

**Violence Against Women Act (VAWA):** U.S. federal law that allows survivors to file civil suits against abusive partners and facilitates compensation to survivors who have suffered financially from violent crimes.

**Safe exchange:** The transfer of child(ren) between parents by a neutral third party who ensures that there is no contact between the parents.

**Self-represented litigants/Pro Se:** Individuals who advocate on their own behalf in court rather than being represented by an attorney; also known as pro se litigants.

**Supervised visitation:** Visits between a non-custodial parent and their child(ren) in the presence of a third party who observes the visit and ensures the safety of the child(ren). Supervisors are neutral but may intervene to preserve the safety of the child(ren).

<sup>4</sup> Supporting Survivors: The Economic Benefits of Providing Civil Legal Assistance to Survivors of Domestic Violence pg. 19

assets.<sup>5</sup> In domestic violence cases, a lack of legal representation may prevent survivors from obtaining orders of protection and other legal remedies. Not only is this dangerous for the survivor, but it also prevents them from obtaining financial support through the order of protection. These issues are intensified if one party has control over the finances or earns a significantly higher income.

## Geographic access

**Case Scenario:** *Esther's advocate tells her that a free legal clinic is being offered at the local library for domestic violence survivors, but Esther is afraid of what her neighbors will say if they see her there.*

Consider the difference of an urban versus a rural location. Rural communities have fewer lawyers and advocates; courts and resources may also be spread out. In fact, 20 percent of the American population lives in rural areas, yet only two percent of small law practices are located in rural parts of the U.S.<sup>6</sup> Limited public transportation options in rural communities often means that a survivor of domestic violence needs access to a car and money for gas in order to meet with an attorney. In small communities, social isolation poses another problem to survivors who may not know where and how to access available resources. Rural survivors are more likely to have fewer financial resources, earning only 16 percent of those who live in urban areas.<sup>7</sup> Survivors may also fear that accessing the services could be discovered by other members of their community, which could threaten social ties or lead to future violence by abusive partners if they find out.

While urban communities generally have a greater availability of resources, they also serve a larger population, resulting in advocates and attorneys with higher caseloads. The higher cost of living in urban areas often forces low-income residents to live far from downtown and from the main lines of public transportation. This lengthens commuting times and costs. Limited public transportation times, reduced service schedules, and ticket prices all have a negative impact. A survivor who has to travel a great distance to meet with a lawyer or who expends considerable time and money trying to secure one is already confronting a serious economic barrier to accessing the court system before ever entering a courtroom.

### Practice Tip

Organizations across the country have crafted innovative responses to address these access to justice issues. Some communities have mobile legal services that travel to remote, hard-to-reach communities to provide legal advice and assistance to domestic violence survivors. Service providers can also hold “Know Your Rights” workshops to encourage underserved groups to access the civil and criminal justice system and provide them with resources and support for doing so.

**Case Scenario:** *After talking with Esther about her concerns, her advocate contacts the director of the legal clinic, explaining that many of the survivors she works with are hesitant to access resources publicly in the small community. Together, they plan a workshop at the shelter for the survivors.*

<sup>5</sup> Hough, Bonnie. “Self-Represented Litigants in Family Law: the Response of California’s Courts” (2010). *The Circuit*. Paper 52. Engler, Russell. “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed” (2009). *Fordham Urban Law Journal*, 37:1.

<sup>6</sup> Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D.L. Rev. 466, 467 (2014).

<sup>7</sup> “In Focus: Sexual Violence,” *Wider Opportunities for Women. Economic Security for Survivors Project*: 2015.

## Access to basic resources

### Transportation

**Case Scenario:** *Esther does not own a car and lives far from public transportation. On days she has to appear in court, she wakes up extra early and walks with her small children one mile to the nearest bus stop. It takes a bus transfer and nearly two hours before they reach the courthouse.*

The physical act of reaching the courthouse alone can be challenging for survivors. Public transportation may be costly in terms of time and money, or it may simply be nonexistent. For survivors without access to a car, arranging transportation through a friend or family member can be unreliable if those plans fall through, especially at the last minute. For those who own cars, the cost of gas and parking can compromise a survivor's economic

#### **Practice Tip**

In urban communities where the cost of transportation is a hardship for indigent survivors, programs may provide metro or bus fare. Some rural communities have looked into using Uber and other shared-driving services to fill public transportation gaps. What systems advocacy could enhance survivors' access to affordable transportation in your community?

stability, especially in households living paycheck to paycheck. For survivors who relocate post-relationship, for safety reasons, or otherwise, they incur the financial and social costs of moving—potentially sacrificing job and educational options, changing their children's schools, finding new employment, and losing their social support network of family and friends.

### Child care

**Case Scenario:** *By the time Esther and her children arrive at the courthouse, they are exhausted. She does not want to bring her children with her, but she cannot afford to pay for child care for the entire day. With the rest of her family in Haiti, Esther has no additional support. Court also interferes with her job, and her boss is losing patience with her frequent absences.*

Child care is a major issue for survivors who have to make court appearances. Professional child care, be it daycare or hiring a babysitter, is expensive. Low-income parents may be forced to rely on family, friends, or even the abusive partner to care for the

#### **Practice Tip**

Courts can build relationships with local **supervised visitation and safe exchange centers** to provide free, on-site child care options for domestic violence survivors. This ensures that survivors can attend to their case while children are safely cared for in a child-appropriate environment without exposing them to further emotional trauma in the courtroom.

children. Many courts do not permit children in the courtroom, despite the often lengthy case process with long wait times and multiple hearings. Bringing children into the courtroom can be disruptive or expose them to emotional distress. Children who are old enough to attend school can pose a logistical challenge during school breaks or closure, or if they are sick, necessitating parents to scramble to find child care. Domestic violence survivors report losing 5.6 million days of child care and other domestic work each year, equaling a combined cost of \$204.2 million.<sup>8</sup>

<sup>8</sup> "Supporting Survivors: The Economic Benefits of Providing Civil Legal Assistance to Survivors of Domestic Violence," *Institute for Policy Integrity*: July 2015.

## Employment and income

**Case Scenario:** *Esther's boyfriend calls her at work and leaves her threatening messages. He tells her that she will be deported and that she will never get custody of their children. He controls all of their savings and credit cards and refuses to give Esther any money. The frequent phone calls have angered her boss, who is threatening to suspend her from work without pay until they stop.*

Research shows that domestic violence has a direct impact on survivors' employment. In fact, survivors lose a combined total of eight million days of paid work every year, which is equal to roughly 32,000 full-time jobs and \$1.34 billion.<sup>9</sup> It is estimated that survivors of intimate partner rape, a form of domestic violence, lose an average of 8.1 days of paid work per year.<sup>10</sup> Furthermore, 21 to 60 percent of survivors report losing their job for reasons relating to domestic violence.<sup>11</sup>

For survivors who are employed, receiving time off to appear in court can be difficult. Low-income survivors are far more likely to have minimum-wage and part-time jobs that don't offer vacation, sick, or personal days. Each time survivors have to appear in court, they are sacrificing their wages for the day. Repeated requests to miss work may also affect the way an employer views survivors as employees, making them appear unmotivated or unreliable. Moreover, part-time jobs often mean infrequent and unreliable hours, in which survivors receive their work schedules with only a couple of days notice. Their job may also require that they be "on-call" in the event that they are needed at work.<sup>12</sup> Because of this, survivors may be confronted with the difficult choice of appearing in court or maintaining their job. Court involvement can also take a massive emotional toll, as survivors are forced to face their abusive partners, which may distract them from their work, lower their productivity, and jeopardize their continued employment. Low-income survivors may work temporary jobs or change jobs frequently. As recent hires, there is even less likelihood that their bosses will be understanding and permit work absences.

### **Practice Tip**

Advocacy organizations can include programming on job skills and financial literacy, linking with groups in the community who already provide workshops. To help with the emotional toll that appearing in court takes on survivors, advocates can work with courts to train their security staff on domestic violence dynamics. Dedicated court officers and separate and secure waiting rooms help to make survivors feel comfortable and safe.

## **Cultural considerations**

**Case Scenario:** *Esther speaks French fluently and knows enough basic English to get by in day-to-day life. After receiving a letter in the mail about a petition her boyfriend filed with legal words she didn't recognize, Esther goes to the courthouse to find out more information. She tries to ask the clerks about the petition, but she doesn't understand their explanation and is too embarrassed to ask again.*

<sup>9</sup> "Supporting Survivors: The Economic Benefits of Providing Civil Legal Assistance to Survivors of Domestic Violence," *Institute for Policy Integrity*: July 2015.

<sup>10</sup> "In Focus: Sexual Violence," *Wider Opportunities for Women. Economic Security for Survivors Project*: 2015.

<sup>11</sup> "Exploring the Impact of Domestic Violence on Domestic Relations," *New York Law Journal*: July 27, 2015.

<sup>12</sup> Kantor, Jodi, "Working Anything But 9 to 5," *New York Times*: August 13, 2014.

## Poverty on All Sides: Economic Implications for Indigent Abusive Partners

It comes as no surprise that economic challenges in the court system are not unique to survivors alone and are experienced by abusive partners as well. While abusive partners may manipulate the system through failure to appear or over-litigation of survivors, they may also face similar economic hardships, which in turn, can affect the economic security of survivors and their children. Indigent abusive partners who lose wages or employment as a result of court appearances and who accrue debt due to court fees are unable to pay spousal or child support, which can be financially debilitating for survivors.

Studies around procedural justice show that courts that are strict with abusive partners, but treat them fairly and with respect, experience increased rates of compliance. To lessen the financial impact on abusive partners, courts can re-think how they impose fees and look to innovative programs around the country. One example, the Kings County Parent Support Program in Brooklyn, New York, works with noncustodial parents who are struggling with meeting their child support obligations by linking them with employment agencies, job skills development, vocational training, transportation assistance, family life skills, and a whole host of other services. As long as participants meet the court's obligations, which are monitored through routine compliance hearings, they avoid court-imposed legal penalties.

This model can be replicated to ensure that abusive partners meet their spousal and child support payments to survivors and their children.

Economic factors that impede access to justice may be further complicated when the survivors seeking assistance are immigrants, have limited English proficiency, identify as LGBTQ, or belong to other underserved groups. Survivors who are non-citizens or undocumented immigrants may fear the risk of deportation while accessing the court system. The abusive partner can actively exploit this fear by threatening to expose or compromise the survivor's legal status. Furthermore, immigrant clients may encounter attorneys or other professionals who contract to provide immigration services and subsequently fail to fulfill their duties, leaving the client vulnerable and less financially secure.

For survivors with limited English proficiency, the lack of quality interpreters in the court system poses a serious problem and directly impacts access to justice.<sup>13</sup> Survivors may also face ignorance among court staff related to their ethnicity, culture, or religion. LGBTQ

### Practice Tips

Properly identifying the specific language a survivor speaks will make it easier when securing an interpreter. Strategies to assist survivors with limited English proficiency can occur on multiple levels:

- To aid limited English proficient survivors, advocates, attorneys, and courts can create "I Speak" brochures that list the phrase, "I speak \_\_\_\_\_," in a multitude of languages.
- Advocates and attorneys can ensure that survivors are linked to qualified interpreters by asking about an interpreter's certification, professional experience, and familiarity with domestic violence dynamics and legal terms.
- Programs can work to improve their own cultural diversity by hiring bilingual staff and translating forms and brochures into other languages.
- Consider partnering with immigration legal services, other immigration organizations, or faith-based services. Similarly, discuss strategies for co-locating immigration legal services at the court, referring survivors to reputable immigration agencies, or creating linkages between pro and low bono immigration, family law, and domestic violence legal assistance.
- Establish protocols for coordinating cases with immigration attorneys, family law attorneys, and advocates. This will ensure that attorneys and professionals working with survivors on family law and domestic violence cases can more holistically represent survivors' needs.

<sup>13</sup> "Effective Court Communication: Assessing the Need for Language Access Services for Limited English Proficient Litigants in Domestic Violence, Sexual Assault, Dating Violence, and Stalking Cases." National Center for State Courts, Center for Court Innovation, 2015.

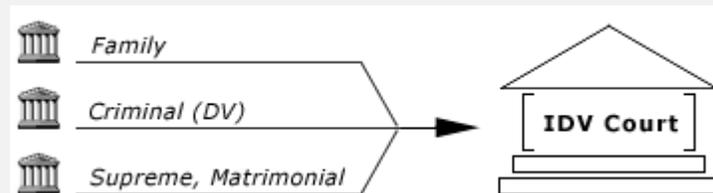
survivors, for instance, may confront a civil court that only recognizes and understands domestic violence as a crime between a man and a woman. Across underserved communities, the experience of an unfair criminal justice system can create a pervasive and deep-seated distrust of the courts. It is important to note that survivors are often members of more than one of these groups and that the obstacles confronting them may be numerous and complex.

### **Integrated Domestic Violence Court Models<sup>14</sup>**

While domestic violence survivors face many barriers to safety and independence, a complex court process should not be one of them. Domestic violence cases may involve criminal, family, and matrimonial matters, often forcing litigants to go before multiple judges and causing delays and confusion. For indigent survivors, these complications can create additional financial hardship by causing absences from work, compromising child care, impeding the payment of financial support, and other issues.

The Integrated Domestic Violence Court Model responds to those concerns by applying a “one family—one judge” rule. By having one judge handle all criminal domestic violence cases and family-related issues, such as custody, visitation, civil protection orders, and matrimonial actions, survivors are less likely to face lengthy delays and inconsistencies in their case. Furthermore, the judge is better positioned to rule on financial matters, such as child support, marital support, and division of property.

Integrated Domestic Violence Courts intend to hold abusive partners to a higher level of accountability by concentrating responsibility for defendant oversight in the hands of a single judge who can monitor compliance with court orders and program mandates. Also, victim services are on-site, helping domestic violence survivors navigate job opportunities, public benefits, housing, and providing counseling services. Through the Integrated Domestic Violence (IDV) Courts, victims may be better equipped to achieve safety and economic stability.



For more information on the IDV Court model:

[http://www.courtinnovation.org/sites/default/files/documents/IDV\\_FACT\\_SHEET.pdf](http://www.courtinnovation.org/sites/default/files/documents/IDV_FACT_SHEET.pdf)

## **Justice Thwarted: Barriers in Court Structure and Administration**

One-size-fits-all approaches to court fees, court schedules, and other administrative issues are detrimental to the outcomes of justice for survivors' experiences in court. These structural barriers often increase costs incurred by survivors, lengthen cases, and create more opportunities for continued harassment from abusive partners.

<sup>14</sup> "Domestic Violence Court," Center for Court Innovation. <[www.courtinnovation.org/project/domestic-violence-courts](http://www.courtinnovation.org/project/domestic-violence-courts)>.

## Court fees and costs

**Case Scenario:** *Throughout their relationship, Esther's boyfriend decided how their money was spent without consulting her. He did not put her name on their bank accounts so she cannot access them. He also confiscated her paycheck so that she was dependent on him for money.*

The court system imposes fees and incidental costs that can exacerbate a survivor's financial situation. Under VAWA, domestic violence survivors in all 50 states can file for an order of protection without paying any filing fees.<sup>15</sup> However, a case may require that parties participate in mandatory programs like parenting classes or supervised visitation that cost money. If survivors are unable to pay, the court may drop the case or use their

non-compliance as a deciding factor in determining a custody arrangement that awards joint or sole custody to the abusive parent. In custody cases, the court often appoints a Guardian ad Litem ("GAL") to represent the interests of the children. GALs typically charge a separate fee, which can confuse parties and contribute to a lack of adequate understanding of court fees. Furthermore, during the trial, litigants may need to elicit testimony from expert witnesses or participate in psychological and mental evaluations, which often delay the case and increase expenses. To complicate matters, expert witnesses may not be fully qualified or trained to testify on domestic violence matters, which can lead to dangerous outcomes for survivors and their families.

These economic issues are not only limited to indigent survivors. When the indigent party is the

### Practice Tip

Courts can consider implementing fee waivers and payment plans to make costs more manageable for indigent survivors. Court staff should offer information on VAWA compensation and other state-specific compensation programs targeting victims of crime. Judges may consider the litigants' current income as well as their past financial circumstances when deciding how to split attorney fees and additional costs among parties. They can also consider imposing attorney fees on the higher earner or splitting fees more equitably.

### Harnessing the Power of Workforce Development: One Court's Innovative Collaboration

In DeKalb County, Georgia, the domestic violence court identified an all-too-common problem: the court was mandating that abusive partners attend batterer intervention programs to help prevent further abuse of victims. However, the programs charged a fee that many indigent abusive partners could not afford. Rather than set up a system in which abusive partners were certain to fail because of their inability to pay and intent on making sure that abusive partners were receiving the services designed to improve compliance and increase victim safety, the court came up with a solution. It worked with the local workforce development program and began mandating that individuals who couldn't pay for services, link up with workforce development. It instituted compliance reviews and assigned compliance officers to ensure that abusive partners were sending out their resumes, attending workshops and trainings, and satisfying the workforce development program requirements. The program communicated abusive partners' attendance through a form it regularly submitted to the court. By connecting abusive partners to workforce development and ensuring that they gained access to meaningful employment, the court ultimately solved a recurring problem and improved the rates at which abusive partners received batterer intervention services. This, in turn, increased victim safety and improved economic stability for the children in these families.

This model can be easily replicated in communities across the country. Federal workforce development programs exist in nearly every region of the country, and it is simply a matter of courts seeking out their assistance and working together.

<sup>15</sup> The Violence Against Women Act of 1994, 42 U.S.C. § 3796gg-5(a)(1); 42 U.S.C. § 3796hh-5(1)(D).

abusive partner, the court may decide that the survivor has to pay spousal or child support and cover the legal fees, seriously affecting a survivor's financial security. Beyond the economic consequences, this can take a devastating emotional toll on survivors who are forced to pay the person who abused them.

## Court schedules and administration barriers

**Case Scenario:** *Esther and her children arrive at court on her scheduled date promptly at 8 am, but they wait for hours before her case is called. Before she can even speak to the judge, her case is postponed due to a clerical error.*

If a survivor decides to seek an order of protection, divorce, or child-related relief, the legal process is often lengthy and inflexible. Even a simple legal matter can lead to multiple court dates. Clients may not be informed that their presence is not always needed for status dates. Like Esther, clients who have an early morning court appearance may not have their case called until later in the day. Further, judges and attorneys will often change court dates at the last minute without consulting or informing clients, who may have already set their work and child care schedules.<sup>16</sup> Errors on behalf of the court or judicial system (such as not having the right files, not listing the case on the docket, or lack of service) can force a case to be rescheduled.

Other problems plaguing courts that can negatively affect survivors are large caseloads that overwhelm domestic violence dockets; a lack of resources and funds; insufficient, overburdened, and undertrained staff; and courts that have been consolidated in response to the economic recession. While these factors are common to all courts, they can manifest in a

particularly negative experience for survivors in which they feel that the system is unsympathetic and unresponsive to their needs. In fact, these specific barriers may undermine procedural justice and discourage survivors from pursuing their case and seeking court remedies in the future.

### Practice Tip

To help survivors, attorneys can appear on their behalf, reducing the number of times survivors need to come to court. Advocates and attorneys can continue to build their relationship with the court system, encouraging conversation and discussion of more systemic overhauls. Some court systems, like those in Montana and Nevada, have established tribal courts and local tribunals to reduce the need for survivors to travel to them. Other courts offer remote access options that allow survivors to appear via video in the courtroom. In order to reduce bureaucratic errors, courts can carefully schedule the docket to flag domestic violence cases and ensure that they are heard first. Depending on feasibility, a court can also structure its calendar outside of the standard 9-5 work hours.

## Exploiting Court Barriers: Litigation Abuse

**Case Scenario:** *Esther's boyfriend works full-time as a restaurant manager. With his steady income and control of the finances, he is able to hire a lawyer. The lawyer files various motions and petitions against Esther every week and reschedules court dates at the last minute, making it difficult for her to keep track of the case.*

<sup>16</sup> Inefficient scheduling is a challenge that persists in many courthouses, as evidenced by numerous process evaluations and site visits performed by the Center for Court Innovation. See: <http://www.courtinnovation.org/research/new-york-state%E2%80%99s-integrated-domestic-violence-court-model-results-four-recent-studies>

After survivors leave an abusive relationship, their former partners often escalate the abuse and will even use the legal process to continue to threaten and intimidate survivors.<sup>17</sup> Through litigation abuse, abusive partners manipulate the survivor's ability to obtain legal, social, and economic remedies. Abusive partners often seek court adjournments as a tactic to continue harassment, knowingly wasting the survivor's time, increasing their transportation and child care costs, and placing their employment status at risk. They attempt to frustrate and inconvenience survivors to the extent to which they drop the case.

Like Esther's ex-boyfriend, the abusive partner and/or his attorney may file frivolous motions to overwhelm the survivor and force her to appear in court repeatedly. Compared to life at home, the abusive partner may behave much differently in court and during court-mandated services, such as batterer intervention programs and supervised visitation. The abusive partner may also downplay the abuse or fabricate lies about the survivor in order to undermine his or her credibility. Finally, the survivor must also combat bias in the legal system. Without training on domestic violence and trauma, court staff may be suspicious towards a survivor's nervous mannerisms or spotty memory.

### Practice Tip

Attorneys and advocates can work with court administration and judicial staff to take steps to prevent or mitigate litigation abuse towards domestic violence survivors. Courts can mandate training for all staff on domestic violence dynamics, risk assessment, and recognizing the strategies abusive partners use to manipulate the judicial system to inflict additional damage on survivors. Collaboration with local domestic violence programs can offer vital training to courts. In New York, for cases in which there is suspected litigation abuse, judges can mandate that litigants secure court permission before being able to re-file a case. Other courts demand that litigants demonstrate a material change in circumstances to reopen and change custody orders.

## Conclusion: Working Together to Make a Difference

All of the strategies outlined throughout this chapter are meant to aid attorneys and advocates in meeting the economic needs of their clients. Some of these strategies can be implemented without court involvement, but the most effective solutions involve active court participation. Collaboration is key to achieving this kind of systemic change.

### Strategies for Court and Stakeholder Collaboration

1. Identify a "key champion" in the court system who can lead the charge to enact change on economic issues.  
**Having the support of a judge can be especially helpful in gaining the buy-in of other stakeholders.**
2. Schedule regular stakeholder meetings during which obstacles and potential solutions are discussed. Include a diverse group of stakeholders in these meetings. Invite judges, court administrators, court clerks, domestic violence advocates (including those that serve elder, disabled, deaf, and culturally-specific communities),

<sup>17</sup> Zeoli, A.M., Rivera, E.A., Sullivan, C.M., and Kubiak, S. "Post-Separation Abuse of Women and their Children: Boundary-setting and Family Court Utilization among Victimized Mothers." J Fam Violence, 2013 Aug 1, 28(6), 547-560.

defense attorneys, prosecutors, civil legal service providers, supervised visitation staff, and workforce development staff.

**Understanding each other's roles and responsibilities will help to identify barriers and possible solutions. Having each agency host a planning meeting and having stakeholders give a brief description of their roles, responsibilities, and resources, will foster team-building and information-sharing.**

3. Conduct a needs assessment by soliciting feedback from litigants to learn about the economic challenges they have confronted.  
**Create a written survey for litigants or convene a group of litigant survivors to share their experiences. Write a report documenting the feedback to be shared internally.**
4. Convene ongoing training to educate lawyers, advocates, and court professionals alike on domestic violence dynamics and underlying economic stressors.  
**Identify learning objectives by talking to stakeholders about what training they would find useful.**
5. Encourage victim service organizations to include economic empowerment programming for survivors, such as job skills and financial literacy training.  
**Suggest that they contact the federal workforce development program in their area for resources and referrals.**
6. Consider a holistic approach to the domestic violence court docket, including models that consolidate and streamline civil and criminal cases in order to reduce confusion and time spent in court. **See: Integrated Domestic Violence Courts.**
7. Talk to other jurisdictions who have made similar changes and/or visit their courts. These issues are complex, and many parts of the country are grappling with them.  
**Linking with your peers will help you discover strategies and programs that have been tried and tested, helping you to avoid reinventing the wheel.**

For more information and free assistance on any of these strategies:  
<http://www.courtinnovation.org/domestic-violence-technical-assistance>

## Additional Resources

- [“Effective Court Communication: Assessing the Need for Language Access Services for Limited English Proficient Litigants in Domestic Violence, Sexual Assault, Dating Violence, and Stalking Cases.”](#) National Center for State Courts, Center for Court Innovation, 2015.
- ["Integrated Domestic Violence Courts: Key Principles."](#) Center for Court Innovation.

# Thirteen



## Protections for Survivors Accessing & Maintaining Housing

By **Karlo Ng**

### Introduction

Domestic violence survivors and their children face a number of serious housing problems related to the acts of violence committed against them. In enacting the Violence Against Women Act of 2005, Congress recognized that families were being discriminated against, denied access to, and even evicted from housing because of their status as survivors of domestic violence.<sup>1</sup> The Fair Housing Act (FHA) also protects survivors facing discrimination in accessing or maintaining housing. Furthermore, due to economic limitations, survivors may be particularly vulnerable to sexual harassment and assault by landlords, property managers, and their employees. This chapter covers the housing protections available to survivors under federal, state, and local laws, and other resources that may be used to preserve survivors' housing rights.<sup>2</sup>

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<sup>1</sup> See *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, § 41402, 119 Stat. 2960, 3041-49 (2006).

<sup>2</sup> For more information on the rights of survivors seeking to access and maintain housing, see NHLP, MAINTAINING SAFE AND STABLE HOUSING FOR DOMESTIC VIOLENCE SURVIVORS (2012), available at <http://www.nhlp.org/files/NHLP%20Domestic%20Violence%20and%20Housing%20Manual%202.pdf>

## Rose's Story

*For five years, Rose lived with her son, Mark, in an apartment unit that was subsidized by a Section 8 Housing Choice Voucher. One night, Rose noticed Mark was acting strange and suspected that he might have been on drugs. Later that evening, Mark choked and physically attacked Rose. She escaped and ran to a neighbor's unit to ask for help and to use the phone to call the police. The police arrested the son, and Rose was taken to the hospital.*

*Currently, the son is in custody and Rose first comes to you to decide whether to file a restraining order against her son. Mark is involved in a local gang and Rose fears that seeking a restraining order will lead to more violence from Mark or his gang members.*

*Today, Rose tells you that her landlord just sent her and Mark a 60-day termination notice indicating that they had violated the lease by disturbing the peace and by using drugs in the unit. Rose states that she did not know her son had or was using drugs. She also explains that she no longer feels safe in her unit and would like to use the Section 8 voucher elsewhere.*

## Domestic Violence and Housing Rights

Legal services providers have reported hundreds of cases where tenants were evicted because of acts of domestic violence committed against them.<sup>3</sup> Defending survivors' rights to maintain rental housing is particularly crucial because women living in rental housing experience domestic violence at three times the rate of women who own their homes.<sup>4</sup> As seen in Rose's story above, many survivors face housing instability as a result of abuse. Landlords often evict entire households because of incidents related to domestic violence, regardless of whether the household members are survivors or perpetrators. Also, abusive partners may control the lease and withhold information from survivors, leaving them with poor rental histories or facing eviction. Survivors may also be held responsible for property damage caused by the abusive partner. Effects of abuse also linger in survivors' access to future housing: they are often denied housing on the basis of negative tenancy, credit or criminal history that is related to the acts of abuse.<sup>5</sup>

Furthermore, survivors face violence from actors within the housing system: survivors are particularly vulnerable to sexual harassment and assault by landlords, property managers, and their employees. A survey of rape crisis centers and legal services providers found that 58% had received at least one report from a tenant who was sexually assaulted by a landlord, property manager, or property owner.<sup>6</sup> Taking the effects of abuse on housing instability and the risk of violence when accessing housing together, it is no surprise that

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<sup>3</sup> National Law Center on Homelessness & Poverty & National Network to End Domestic Violence, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country* (Feb. 2007).

<sup>4</sup> Bureau of Justice Statistics, *Intimate Partner Violence in the United States* (Dec. 19, 2007).

<sup>5</sup> See, e.g., Title VIII Conciliation Agreement between Hope (Complainant) and Valencia Village Partners, Ltd., et al., FHEO Case No. 04-11-0574-8 (Apr. 4, 2014), available at <http://nhlp.org/files/Hope-v-Valencia-Village-Conciliation-Agreement.pdf> (domestic violence survivor settled with property management company for allegedly denying her housing for refusing to provide Social Security numbers of minor children for safety reasons). See also NHLP, *Domestic Violence Survivor Settles with Property Managers after Being Denied Housing*, 44 HOUS. L. BULL. 85, 85-86 (Apr./May 2014) (summarizing background and terms of conciliation agreement) (Companion Website).

<sup>6</sup> Theresa Keeley, *Landlord Sexual Assault and Rape of Tenants: Survey Findings and Advocacy Approaches*, 40 CLEARINGHOUSE REV. 441 (2006).

39% of U.S. cities reported that domestic violence was “a primary cause of homelessness” in their cities.<sup>7</sup> In a number of studies, homeless women have reported that domestic violence was a cause of their homelessness.<sup>8</sup>

## Assessing housing concerns

Housing advocacy on behalf of survivors is critical given the link between domestic violence and homelessness. Because survivors face risks of violence from partners, as well as from housing system actors, and must navigate a complicated housing industry, full and open assessment of survivors' needs is critical to identifying advocacy strategies to remedy housing instability issues.

The screening and assessment questions presented here are for issue spotting (often called “intake questions”), are not meant to be prescriptive, and conversations around housing should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Some key screening questions to consider with survivors include, but are not limited to:

- Does the survivor feel safe in their current home?
- Does the survivor need access to an emergency shelter?
- If the survivor wants to move, where would the survivor feel safe moving?
- Does the survivor need access to affordable housing?
- If the survivor already has a housing subsidy, has the survivor contacted the appropriate entities, such as a public housing authority, to ensure that the survivor does not lose the assistance because of the abuse?
- Is the survivor’s landlord trying to evict them because of incidents related to domestic violence?
- Is the landlord or property staff committing the acts of abuse?

## The impact of housing instability

As noted above, housing instability stems from and has implications for many other economic and safety issues facing survivors, including:

- A leading cause of homelessness among women and families is domestic violence.
- Housing discrimination by landlords and owners against survivors because of the abuse committed against them significantly contributes to the obstacles survivors face in accessing and maintaining housing.
- The risk of housing instability and lack of affordable housing options can force survivors to remain in abusive relationships.
- Evictions and displacement can lead to economic insecurity as survivors and their families are relocated and risk losing their jobs and their support networks.
- Evictions increase the risk of long-term housing insecurity as prospective landlords deny survivors who have poor rental histories.
- Formal evictions appear in credit histories and reports, which can lower survivors’

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<sup>7</sup> U.S. Conference of Mayors & Sodexo, Inc., *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities* 64 (2007).

<sup>8</sup> See, e.g., Rebekah Levin et al., *Center for Impact Research, Pathways to and from Homelessness: Women and Children in Chicago Shelters* 3 (2004); Wilder Research Center, *Overview of Homelessness in Minnesota 2006*, at 16 (2007); *Downtown Women’s Action Coalition, Many Struggles, Few Options: Findings & Recommendations from the 2004 Downtown Women’s Needs Assessment* 3, 26 (2005); Wilder Research Center, *Homeless Adults and their Children in Fargo, North Dakota and Moorhead, Minnesota: Regional Survey of Persons without Permanent Shelter* 4 (2007); *The Institute for Children and Poverty, The Hidden Migration: Why New York City Shelters Are Overflowing With Families* (2002).

credit scores and impact their ability to acquire employment and loans.

## The Violence Against Women Act: Rights & Protections

The **Violence Against Women Reauthorization Act of 2013 (VAWA 2013)** protects the rights of applicants and tenants in certain federally subsidized housing programs who are survivors of domestic violence, dating violence, sexual assault, or stalking.<sup>9</sup> **VAWA 2013's** housing provisions prohibit survivors from being evicted or denied housing assistance based on acts of violence committed against them.

### What federal housing programs does VAWA 2013 apply to?

VAWA 2013 covers the following federal housing programs (“covered housing programs”) listed by the federal agency in charge of administering the programs:

- Department of Housing and Urban Development (HUD)
  - Public housing;
  - Section 8 Housing Choice Voucher program;
  - Section 8 project-based housing;
  - Section 202 housing for the elderly;
  - Section 811 housing for people with disabilities;
  - Section 236 multifamily rental housing;
  - Section 221(d)(3) Below Market Interest Rate (BMIR) housing;
  - HOME;
  - Housing Trust Fund;
  - Housing Opportunities for People with Aids (HOPWA); and
  - McKinney-Vento Act homeless assistance programs.
- Department of Agriculture
  - Rural Development (RD) multifamily housing programs.
    - Section 515 rural rental housing;
    - Section 514 and 516 Farm Labor housing;
    - Section 533 Housing Preservation Grant Program; and
    - Section 538 multifamily rental housing.
- Department of Treasury
  - Low-Income Housing Tax Credit program (LIHTC)<sup>10</sup>

<sup>9</sup> See 42 U.S.C.A. §§ 14043e-11, 1437d note (West 2017). For a summary of VAWA 2013's key housing protections, see NHLP's article, “VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards,” available at [http://nhlp.org/files/VAWA-2013-Bulletin-Article-Jan-2014-updated\\_1.pdf](http://nhlp.org/files/VAWA-2013-Bulletin-Article-Jan-2014-updated_1.pdf)

<sup>10</sup> 42 U.S.C.A. § 14043e-11(a)(3) (West 2017); 24 C.F.R. 5.2003 (definition of “covered housing program” for HUD programs). NHLP has a four-part webinar series that provides a basic overview of each of these federal housing programs. To access the series, please go to <http://nhlp.org/node/1484/> (see webinars held on Nov. 20, 2013, Feb. 27, 2014, Mar. 20, 2014, and May 8, 2014).

### Key Terms

**Affiliated individual:** Under VAWA 2013 – the survivor's spouse, parent, sibling, child; an individual to whom that survivor stands in loco parentis; and anyone living in the survivor's household.

**Fair Housing Act:** A federal law enacted in 1968 (and amended in 1974 and 1988) providing the HUD Secretary with fair housing enforcement and investigation responsibilities. It prohibits discrimination in all facets of the home buying and rental process on the basis of race, color, national origin, religion, sex, familial status, or disability.

**Lease bifurcation (as defined by the Violence Against Women Act):** To evict, remove, or terminate housing assistance to any individual who is a tenant or lawful occupant of the housing and who engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an affiliated individual or other individual, without evicting, removing, terminating assistance to, or otherwise penalizing a survivor of such criminal activity who is also a tenant or lawful occupant of the housing.

**Portability:** When an individual or family moves with a Section 8 Housing Choice Voucher outside of the jurisdiction of the issuing public housing authority.

**Public Housing Authority/Agency (PHA):** Any state, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of low-income housing under the U.S. Housing Act of 1937.

**U.S. Department of Housing and Urban Development (HUD):** Established in 1965, HUD's mission is to increase homeownership, support community development, and increase access to affordable housing free from discrimination.

**The Violence Against Women Act (VAWA):** A federal law that is the cornerstone of the nation's response to domestic and sexual violence. Signed into law in 1994, VAWA was reauthorized in 2000, 2005, and 2013. Housing protections for survivors were included for the first time in the 2005 reauthorization and were expanded in VAWA 2013.

VAWA does not cover tenants living in private housing without any type of rental subsidy. If a tenant is not participating in a housing program covered by VAWA, then advocates still should consider whether the tenant may be protected by fair housing laws, as well as other state and local laws that provide protections for survivors in housing. (See discussions below.)

## Who does VAWA 2013 protect?

VAWA protects any individual who is or has been a survivor of actual or threatened domestic violence, dating violence, sexual assault, or stalking, and is living in, or seeking admission to, any of the covered housing programs.<sup>11</sup> VAWA 2013 applies to survivors of all gender identities and LGBT individuals. Therefore, male survivors and survivors in same-sex relationships can assert VAWA’s protections.<sup>12</sup>

Under VAWA, the definitions of domestic violence, dating violence, sexual assault, and stalking are as follows:

- “Domestic violence” includes violence committed by a current or former spouse or intimate partner of the victim; a person with whom the victim shares a child; a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner; or a person similarly situated to a spouse of the victim under state law. VAWA also covers any person who is protected by a state’s family violence laws.<sup>13</sup>
- “Dating violence” is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is based on factors such as its length, type, and frequency of interaction.<sup>14</sup>
- “Sexual assault” means any nonconsensual sexual act proscribed by federal, tribal, or State law, including when the victim lacks the capacity to consent.<sup>15</sup>

### Practice Tip

Because VAWA’s definition of “domestic violence” includes family violence covered under state and local laws, VAWA can cover non-intimate partner violence. For example, if the state family violence laws include violence between roommates, parents and children, grandparents and grandchildren, or siblings, then these forms of abuse are also covered by VAWA. In the survivor scenario above, if Rose lived in a jurisdiction where the family violence laws covered violence between parents and children, then the abuse Mark committed against her would be considered “domestic violence” under VAWA, and VAWA protections would apply to Rose. To be certain of the categories of abuse covered, advocates should check their state and local family violence laws.

<sup>11</sup> See generally 42 U.S.C.A. § 14043e-11 (West 2017).

<sup>12</sup> *Id.*

<sup>13</sup> 42 U.S.C.A. § 13925(a)(8) (West 2017).

<sup>14</sup> *Id.* § 13925(a)(10).

<sup>15</sup> *Id.* § 13925(a)(29).

- "Stalking" is defined as engaging in the course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or suffer substantial emotional distress.<sup>16</sup>

## Who must comply with the law?

**Public housing authorities (PHAs)** and owners and managers of housing programs covered by VAWA must comply with the law.<sup>17</sup>

**Case Scenario:** *In Rose's scenario, both the **public housing authority (PHA)** that gave Rose the voucher as well as the private landlord that receives the subsidy payment from the **PHA** must adhere to **VAWA's** requirements.*

## What are housing providers' general obligations?

A housing provider covered by VAWA cannot refuse to admit, evict, or terminate housing assistance because a person is or has been a survivor of domestic violence, dating violence, sexual assault, or stalking.<sup>18</sup> Additionally, actual or threatened criminal activity directly relating to the abuse is not grounds for terminating assistance, tenancy, or occupancy rights of the survivor.<sup>19</sup> Furthermore, an abusive partner's acts of abuse cannot be considered a "serious or repeated" lease violation, or "good cause" for evicting or terminating assistance to the survivor.<sup>20</sup>

Therefore, **PHAs** and owners should not, for example, use unfavorable landlord-tenant histories based on incidents of abuse committed against the applicant now seeking housing assistance. However, few housing providers will explicitly deny a survivor housing on the basis that the person is or has been a survivor of domestic violence, dating violence, sexual assault, or stalking.

### Think About It

Survivors are most often denied housing on the basis of negative tenancy, credit or criminal history that is related to the acts of abuse (See **Credit, Debt, and Criminal Records** chapters in this Guidebook for more).<sup>21</sup> For example, many PHAs have policies of denying admission to applicants who have previously been evicted from federally subsidized housing. Therefore, a survivor who was previously evicted from public housing due to damages caused by the abusive partner may be denied admission to federally subsidized housing if the survivor reapplies at the same PHA or applies at another PHA.<sup>22</sup>

<sup>16</sup> *Id.* § 13925(a)(30).

<sup>17</sup> See generally 42 U.S.C.A. § 14043e-11 (West 2017).

<sup>18</sup> See *id.* § 14043e-11(b)(1), (b)(2).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Title VIII Conciliation Agreement between Hope (Complainant) and Valencia Village Partners, Ltd., et al., FHEO Case No. 04-11-0574-8 (Apr. 4, 2014), available at <http://nhlp.org/files/Hope-v-Valencia-Village-Conciliation-Agreement.pdf> (domestic violence survivor settled with property management company for allegedly denying her housing for refusing to provide Social Security numbers of minor children for safety reasons). See also NHLP, *Domestic Violence Survivor Settles with Property Managers after Being Denied Housing*, 44 HOUS. L. BULL. 85, 85-86 (Apr./May 2014) (summarizing background and terms of conciliation agreement) (Companion Website).

<sup>22</sup> For arguments on why survivors should not be evicted or terminated from a federal housing subsidy program because of the damage that an abuser caused to her unit, see NHLP, *Questions Corner*, 43 HOUS. L. BULL. 155, 168 (Aug. 2013).

VAWA does not explicitly address denials of housing based on negative tenancy, credit or criminal history that can be traced back to acts of abuse committed against the applicant. Advocates working with survivors who have been denied housing because of such history should still challenge the denial.<sup>24</sup> Advocates can argue that denying a survivor housing based on such negative history is equivalent to denying them housing on the basis that the survivor has been a victim of abuse, and that the denial, therefore, violates VAWA.

#### **Practice Tip**

Advocates should explain to housing providers the link between the abuse and poor credit, tenancy or criminal history, and why many survivors have such poor history. In making this argument, advocates can cite VAWA language directly. For instance, VAWA's findings section notes that "[b]ecause abusers frequently manipulate finances in an effort to control their partners, survivors often lack steady income, credit history, landlord references, and a current address, all of which are necessary to obtain long-term permanent housing."<sup>23</sup>

**Case Scenario:** *Assume for a moment that Rose does not challenge the landlord's eviction, leaves her current unit quickly because she fears for her safety, and attempts to use her Section 8 voucher in an apartment across town. When the prospective landlord contacts Rose's former landlords as part of the background check, he discovers that the most recent landlord had evicted her for disturbing the peace and for using drugs in the unit. The prospective landlord denies Rose's application because of this eviction. In this situation, Rose should challenge the denial arguing that it is a violation of VAWA because the adverse housing decision is based on domestic violence committed against her. Rose should also gather and present to the prospective landlord documentation showing that her prior eviction was related to domestic violence, such as a restraining order issued against her son, statements from neighbors, or letters from service providers, including domestic violence caseworkers and counselors. If Rose is not successful in challenging the denial, then she should seek assistance from her local legal aid office.*

#### **Practice Tip**

Advocates should also note that HUD has explicitly advised PHAs to inquire into whether domestic violence was a factor in poor rental history.<sup>25</sup>

## **What are the limitations to housing providers' obligations?**

There are important limitations on VAWA's protections against evictions and subsidy terminations. First, VAWA does not restrict a housing provider's authority to evict or terminate assistance to a tenant, if the housing provider can demonstrate an "actual and imminent threat" to other tenants or employees at the property, and either the tenant is not evicted, or their assistance is not terminated.<sup>26</sup> In other words, evictions still may proceed in rare situations where the housing provider shows that an individual's tenancy

<sup>23</sup> 42 U.S.C.A § 14043e(10) (West 2017).

<sup>24</sup> For an in-depth discussion of this topic, see NHLP, ASSISTING SURVIVORS OF DOMESTIC VIOLENCE IN APPLYING FOR HOUSING (2010), available at <http://www.nhlp.org/node/1428>

<sup>25</sup> HUD PUBLIC HOUSING OCCUPANCY GUIDEBOOK, 218 (June 2003).

<sup>26</sup> 42 U.S.C.A. § 14043e-11(b)(3)(C)(iii) (West 2017).

presents an actual and imminent threat to other tenants or employees, despite their status as a covered survivor.

HUD regulations state that an actual and imminent threat consists of a physical danger that is real, would occur within an immediate timeframe, and could result in death or serious bodily harm.<sup>27</sup> The factors to be considered in determining the existence of an actual and imminent threat include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the length of time before the potential harm will occur.<sup>28</sup> Additionally, eviction or termination of a survivor's

### Practice Tip

HUD has clearly indicated that the “actual and imminent threat” exception must be used as an absolute last resort by landlords. Survivors and advocates who encounter a landlord using this exception should make sure that the landlord can show all three elements required of “actual and imminent threat” and that no alternative action to eviction is possible to reduce or eliminate the threat.

assistance under the actual and imminent threat provision should occur “only when there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to, transferring the survivor to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat.”<sup>29</sup> In addition, “[r]estrictions predicated on public safety cannot be based on stereotypes, but must be tailored to particularized concerns about individual residents.”<sup>30</sup>

**Case Scenario:** *In our survivor story, the landlord is attempting to evict Rose allegedly because the household violated the lease by disturbing the peace and because of drug use in the unit. The landlord could argue that the alleged violations, and, in particular, the drug use by the household member, were not premised on domestic violence. Rose will need to demonstrate the link between the abuse and the alleged lease violations. Specifically, Rose will need to show that the domestic violence was the reason for the disturbance and the perpetrator was the one who allegedly used drugs. Therefore, as the survivor, Rose should not be evicted for acts of the perpetrator and the domestic violence committed against her. In addition, to bolster her argument that she should not be evicted, Rose should contend that she has been a tenant in good-standing for the five years before the domestic violence incident.*

### Think About It

In another example, a survivor may know that their abusive spouse has failed to report all of his income as required by the PHA, but may fear retaliation if the survivor confronts him and asks him to report the income. If the family later faces eviction for the failure to report the income, then the survivor will need to demonstrate the link between the abuse and their failure to report to avoid any argument by the PHA that the program violation was not premised on acts of abuse.

<sup>27</sup> 24 C.F.R. § 5.2003 (2017) (definition of “actual and imminent threat”).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 5.2005(d)(4).

<sup>30</sup> *Id.*

Another limitation on VAWA's protections is that the law does not protect survivors if the acts for which they are being evicted are unrelated to domestic violence, dating violence, sexual assault, or stalking.<sup>31</sup> A circumstance that may be disputed is whether the conduct for which the survivor is being evicted is in fact related to acts of violence committed against her.

Additionally, in determining whether to evict a tenant, a housing provider may not hold a survivor of domestic violence, dating violence, sexual assault, or stalking to a more demanding standard than other tenants.<sup>32</sup> Therefore, if a survivor can demonstrate that other tenants were not evicted or terminated from assistance based on violations similar to the ones for which the survivor is being penalized, then the survivor may be able to argue that they are being held to a more demanding standard in violation of VAWA.

## Remedies for Survivors

### Lease bifurcation and family break-up

VAWA establishes a right for a PHA or landlord to bifurcate a lease, or to evict the offender while allowing the survivor to remain in occupancy.<sup>33</sup> VAWA further protects any tenants remaining in the housing as a result of the **lease bifurcation**. Specifically, if the removed offender was the only tenant eligible for the housing assistance, then any remaining tenant can establish eligibility for the assistance. If no tenant can establish such eligibility, then the PHA or owner must provide the tenant reasonable time (as determined by the respective federal agency) to find new housing or to establish eligibility under another covered housing program.<sup>34</sup>

Importantly, HUD regulations implementing VAWA 2013 provide additional protections for survivors who experience family breakup due to violence in situations involving Section 8 voucher assistance. If a family break-up occurs because of domestic violence, dating violence, or stalking, then "the PHA *must* ensure that the victim retains assistance" (emphasis added).<sup>35</sup> In determining who should get the Section 8 voucher, the PHA can consider certain factors, including

- (1) whether the assistance should remain with family members in the original assisted unit;
- (2) the interest of minor children, ill, elderly, or disabled family members;
- (3) whether family members are forced to leave the unit as a result of actual or threatened domestic violence, dating violence, or stalking;

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<sup>31</sup> 42 U.S.C.A. § 14043e-11(b)(3)(C)(ii) (West 2017); *see also* Jennings v. Hous. Auth. of Baltimore City, 2015 WL 1085574 (D. Md. Mar. 10, 2015) (housing authority appropriately terminated survivor's voucher because the decision was based on criminal activity of survivor's son that was unrelated to domestic violence); Hammond v. Akron Hous. Auth., 2011 WL 2175801, at \*4 (Ohio Ct. App. June 1, 2011) (VAWA was not violated where the court found no evidence that incidents of domestic violence prompted PHA to investigate whether an unauthorized occupant lived with voucher holder).

<sup>32</sup> 42 U.S.C.A. § 14043e-11(b)(3)(C)(ii) (West 2017).

<sup>33</sup> *Id.* § 14043e-11(b)(3)(B)(i); 24 C.F.R. § 5.2009(b)(2) (2017) (*establishing that remaining household members generally have 90 days from the date of lease bifurcation or end of the lease to establish eligibility for a covered housing program or find alternative housing*).

<sup>34</sup> 42 U.S.C.A. § 14043e-11(b)(3)(B)(ii) (West 2017).

<sup>35</sup> 24 C.F.R. § 982.315(a)(2) (2017). *See also* DEPT. OF VETERAN AFFAIRS, VETERANS HEALTH ADMINISTRATION HANDBOOK 1162.05, HUD-DEPT. OF VETERANS AFFAIRS SUPPORTED HOUSING (VASH) PROGRAM, Sec. 28 (Sep. 14, 2011), *available at* file:///C:/Users/NHLP3/Downloads/1162\_05HK9-15-2011.pdf (when a veteran loses their Veterans Affairs Supported Housing (VASH) voucher for committing domestic violence, dating violence, or stalking against a household member, the survivor must continue to be assisted by the PHA and must either be given a Housing Choice Voucher, if one is available, or continue to use the VASH voucher).

- (4) whether any of the family members are receiving protection as victims, and whether the abusive partner is still in the household; and  
(5) other factors specified by the PHA.<sup>36</sup>

**Case Scenario:** *Using our survivor story, since Rose has experienced a family break-up because of domestic violence, she can request in a demand letter that the PHA transfer the Section 8 voucher to her name only and remove the abusive partner's name from the voucher by making such a request in writing to the PHA. In addition to the request, the letter should quote the regulatory language that "the PHA must ensure that the victim retains assistance," and discuss the above factors by explaining how they weigh her favor.*

**See sample letters at the end of this chapter.**

## Portability

As part of VAWA, survivors with Section 8 Housing Choice Vouchers maintain the right to port themselves and their families to a new jurisdiction, even if they have left their former rental unit in violation of the lease.<sup>37</sup> Therefore, if a survivor were forced to break their lease and move elsewhere to escape their abusive partner, and they failed to seek the PHA's approval before moving, then they can still exercise their right to use their voucher in another jurisdiction. Additionally, HUD's VAWA regulations state that PHA policies restricting the timing or frequency of **portability** moves do not apply if a family needs to relocate due to domestic violence, dating violence, or stalking.<sup>38</sup> Therefore, survivors are exempt from PHA policies that restrict portability for one year for families that are new to the PHA's jurisdiction, or that prohibit voucher tenants from moving if they already have moved at least once during the past 12 months.<sup>39</sup>

**Case Scenario:** *In our survivor story, Rose would be able to **port** with her Section 8 voucher to another jurisdiction even if she is terminating her lease so long as the **port** is due to the abuse and is necessary to protect health and safety. Rose should also check her state and local laws to see if there are early lease termination laws that provide additional protections for survivors who break their leases because of the abuse committed against them.*

## Emergency transfers

VAWA requires that each federal agency in charge of administering the covered housing programs adopt a model emergency transfer plan to be used by PHAs and owners. The transfer plan must allow the survivor to transfer to another available and safe unit assisted under a covered program, if (1) the tenant expressly requests the transfer and (2) either the tenant reasonably believes that, if they remain in the unit, they are threatened with imminent harm from further violence, or the tenant is a victim of sexual assault that

<sup>36</sup> 24 C.F.R. § 982.315(b) (2017).

<sup>37</sup> 42 U.S.C.A. § 1437f(r)(5) (West 2017); 24 C.F.R. §§ 982.353(b), 982.354(b)(4) & (c)(2)(iii) (2017); HUD, Housing Choice Voucher (HCV) Family Moves with Continued Assistance, Family Briefing, and Voucher Term's Suspension, PIH 2016-09 (HA) (June 6, 2016). Because VAWA 2013 did not amend the portability provision, the statute also did not extend its coverage to survivors of sexual assault. However, because this oversight clearly violates an important purpose of VAWA 2013's housing provisions—to provide protections to sexual assault survivors, advocates should ensure that this protection is implemented by the federal agencies.

<sup>38</sup> 24 C.F.R. § 982.354(b)(4) & (c)(2)(iii) (2017).

<sup>39</sup> See NHLP, *Survivors Have Rights and Protections to Move with a Voucher* (Apr. 2017), available at <http://nhlp.org/files/2016%20DV%20and%20Portability%20Packet%204.1.16.pdf>

occurred on the premises within 90 days of the transfer request. Also, the transfer plan must incorporate reasonable confidentiality measures to ensure that the PHA or owner does not disclose the location of the new unit to the abusive partner.<sup>40</sup>

In 2016, HUD issued a model emergency transfer policy as part of the agency's proposed rule implementing VAWA 2013.<sup>41</sup> In 2017, the Rural Housing Service/Rural Development (RD) reissued as emergency transfer plan.<sup>42</sup>

### What documentation is required to claim VAWA protections?

If a survivor wants to assert their VAWA rights, then a PHA or owner can apply VAWA to a survivor based solely on the survivor's statement or other evidence.<sup>46</sup> The PHA or owner can also ask in writing for proof of domestic violence, dating violence, sexual assault, or stalking.<sup>47</sup> A housing provider may request documentation when the survivor raises their VAWA rights to challenge a denial of housing, an eviction, a subsidy termination, or a denial of a request to move. After a housing provider has requested documentation in writing, a survivor must be given at least 14 business days to respond.<sup>48</sup> If the survivor does not provide the documentation within 14 business days, then the housing provider may bring proceedings to terminate the survivor's tenancy or assistance.<sup>49</sup> However, housing providers can extend the 14-day deadline at their discretion, and advocates should encourage them to do so where the survivor can show good cause for an extension.<sup>50</sup>

In 2016, only HUD's Office of Public and Indian Housing has issued a self-certification form under VAWA 2013, Form HUD-5382.<sup>51</sup> The form requests the name of the survivor, the name of the perpetrator, the date on which the incident occurred, and a brief description of the incident. The survivor does not need to provide the perpetrator's name if the survivor does not know the abusive partner's name or doing so would not be safe for the survivor.<sup>52</sup> Also, the survivor must sign the form and certify that

#### Practice Tip

In practice, most housing providers will request that the survivor provide documentation regarding the abuse. Therefore, advocates and survivors must make sure that the housing provider makes this request in writing and provides at least 14 days to produce this documentation.

There are three types of documentation the survivor can provide in response to the housing provider's request:

- 1) a self-certification form approved by the appropriate federal agency;<sup>43</sup>
- 2) a statement from a qualified third party;<sup>44</sup> or
- 3) a police, court, or administrative record.<sup>45</sup>

<sup>40</sup> 42 U.S.C.A. § 14043e-11(e) (West 2017).

<sup>41</sup> HUD, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. 80,724, Appendix B (Nov. 16, 2016), available at <https://portal.hud.gov/hudportal/documents/huddoc?id=VAWA-ApdixB-EmerTransPlan.docx>

<sup>42</sup> USDA, RD AN No. 4814 (1944-N), Implementation of 42 U.S.C. 14043e-11 of the Violence Against Women Reauthorization Act in Rural Development's Multi-Family Housing Programs, Attachment A (Jan. 18, 2017).

<sup>43</sup> *Id.* § 14043e-11(c)(3)(A).

<sup>44</sup> *Id.* § 14043e-11(c)(3)(B).

<sup>45</sup> *Id.* § 14043e-11(c)(3)(C).

<sup>46</sup> 42 U.S.C.A. §§ 14043e-11(c)(3)(D), (c)(5) (West 2017).

<sup>47</sup> *Id.* § 14043e-11(c)(1).

<sup>48</sup> *Id.* § 14043e-11(c)(2)(A).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 14043e-11(c)(2)(B).

<sup>51</sup> HUD, Form HUD-5382, Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking, and Alternate Documentation (exp. June 30, 2017), available at <https://portal.hud.gov/hudportal/documents/huddoc?id=5382.docx>.

<sup>52</sup> *Id.*

the information is true and correct. Submitting false information on the form is grounds for termination of assistance or eviction.<sup>53</sup>

Instead of the self-certification form, the survivor can provide either a statement from a qualified third party, or a police, court or administrative record.<sup>54</sup> Documentation from a qualified third party must be signed by the survivor and a victim service provider, an attorney, a medical professional, or a mental health professional.<sup>55</sup> The third party must attest under penalty of perjury to their belief that the survivor has experienced an incident of abuse that meets the grounds for protection under the statute.<sup>56</sup> VAWA's housing provisions do not define what constitutes a police, court, or administrative record. Examples of documents that should satisfy the documentation requirement include a restraining order, a police report, a criminal complaint or conviction, or records from a custody hearing.

Often, the safest and quickest documentation option for a survivor is [HUD's VAWA self-certification form](#). However, a common area of confusion under VAWA is whether a housing provider may request that a survivor provide multiple forms of documentation, or that a survivor provide a particular type of documentation. For example, housing providers have required those survivors who use HUD's VAWA self-certification form also supply a police report, court order, or third-party verification to corroborate the abuse.

#### **Think About It**

Many survivors are often reluctant to contact the police or seek a restraining order for fear of escalating violence from their abusive partners since these actions require that the perpetrators be notified. Furthermore, in emergency circumstances where survivors are fleeing to escape abuse, many survivors do not have the time and resources to obtain court orders or third-party verification. For instance, depending on where the survivor flees to, they might not have access to medical professionals or domestic violence caseworkers to get third-party documentation.

Survivors of color and immigrant survivors are often reluctant to contact the authorities due to their cultural aversion to involving outsiders in family matters or prior negative experiences with the police and the justice systems in their native countries. It is important to be aware of these obstacles and to be able to explain to these survivors that they can use alternative forms of documentation, such as the self-certification form or third-party verification, to claim VAWA housing protections.

Importantly, HUD has made clear that VAWA allows the survivor to self-certify, and that housing providers must accept this form of documentation if this is what the survivor chooses to use.<sup>57</sup> HUD has also stated that survivors cannot be required to provide its certification form. Rather, survivors have the authority to decide what type of documentation they will provide, whether it is a statement from a qualified third party, a

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<sup>53</sup> *Id.*

<sup>54</sup> 42 U.S.C.A. §§ 14043e-11(c)(3)(B)-(C) (West 2017).

<sup>55</sup> *Id.* § 14043e-11(c)(3)(B)(i).

<sup>56</sup> *Id.* § 14043e-11(c)(3)(B)(ii).

<sup>57</sup> HUD, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. 80,724, 80,741, 80,764 (Nov. 16, 2016).

**Case Scenario:** *In our survivor story, Rose is afraid to seek a restraining order because she is afraid of continued or escalating violence from Mark or his gang. Therefore, to claim VAWA protections, she can choose to use a police report, third-party verification, or complete the self-certification form HUD 5382. What does she feel most comfortable with? How can you help her decide which is the safest and most expedient route for her?*

police, court, or administrative record, or the self-certification form.<sup>58</sup> Additionally, an individual requesting VAWA's protections cannot be required to provide third-party documentation.<sup>59</sup> Survivors do not have to contact authorities, such as police, or initiate legal proceedings against a perpetrator to qualify for VAWA protections.<sup>60</sup> Finally, HUD has indicated that housing providers must not evaluate the truthfulness of allegations of abuse.<sup>61</sup>

Documentation may be critical in cases where a housing provider has difficulty determining which household member is the survivor and which is the perpetrator. VAWA indicates that, in cases where a housing provider receives documents from two members of a household, each claiming to be a survivor and naming the other household member as the perpetrator, the PHA or owner may require an applicant or tenant to submit third-party documentation.<sup>62</sup> If any questions remain regarding which household member is the survivor, then "a PHA grievance hearing, informal hearing or informal review could be an appropriate venue to pursue fact-finding and make a determination."<sup>63</sup>

### What confidentiality obligation do housing providers have?

Under VAWA, housing providers are prohibited from disclosing any information a survivor provides to document incidents of domestic violence, dating violence, sexual assault, or stalking.<sup>64</sup> This includes communications to the abusive partner regarding the survivor's present or future whereabouts that would compromise their safety. Additionally, housing providers may not enter the information into any shared database or provide it to another entity.<sup>65</sup> Employees of a PHA, owner, or management agent are prohibited from having access to information regarding the violence unless they are specifically and explicitly authorized to access this information because it is necessary to their work.<sup>66</sup> However, a housing provider is permitted to disclose the information if it chooses to evict the abusive partner based on the acts of domestic violence, dating violence, sexual assault, or stalking.<sup>67</sup> Certification information may also be disclosed if the survivor requests disclosure in writing, or if disclosure is otherwise required by law.<sup>68</sup>

#### Practice Tip

Advocates should request that the housing provider contact the survivor first, before taking steps to evict the abusive partner, so that the survivor can plan for their safety.

<sup>58</sup> *Id.* at 80,763.

<sup>59</sup> *Id.* at 80,762.

<sup>60</sup> *Id.* at 80,731.

<sup>61</sup> *Id.* at 80,764.

<sup>62</sup> 42 U.S.C.A. § 14043e-11(c)(7) (West 2016).

<sup>63</sup> HUD Programs: Violence Against Women Act Conforming Amendments, 75 Fed. Reg. at 66,253; see also *Badri v. Mobile Hous. Bd.*, 2011 WL 3665340 (S.D. Ala. Aug. 22, 2011) (in voucher termination involving conflicting claims of domestic violence, voucher holder should be given an opportunity to confront and cross-examine witnesses).

<sup>64</sup> 42 U.S.C.A. § 14043e-11(c)(4) (West 2016).

<sup>65</sup> *Id.*

<sup>66</sup> 24 C.F.R. § 5.2007(b)(4)(ii) (2016).

<sup>67</sup> See 42 U.S.C.A. § 14043e-11(c)(4) (West 2016).

<sup>68</sup> *Id.*

## What other obligation do housing providers have?

### *Notice of VAWA Protections and Language Access.*

VAWA 2013 requires covered housing providers to use HUD's VAWA 2013 housing rights ("[HUD notice](#)"), which includes the right to confidentiality, for all applicants and tenants.<sup>69</sup> Specifically, PHAs and owners must provide the [HUD notice](#) accompanied by the agency-approved, self-certification form, such as [Form HUD-5382](#), to applicants and tenants at three critical junctures:

- 1) at the time an applicant is denied residency;
- 2) at the time an individual is admitted; and
- 3) with any notification of eviction or termination of assistance.<sup>70</sup>

In addition, HUD has stated that the agency will translate the [HUD notice](#) and [self-certification form](#) into multiple languages to be consistent with HUD guidance concerning language access for individuals with limited-English proficiency.<sup>71</sup>

#### **Think About It**

If Rose were limited-English proficient (LEP) and primarily spoke Spanish, then she might face additional barriers in communicating and working with her landlord. Many housing providers that receive HUD subsidies do not provide translations of important documents, including eviction notices, to tenants who are LEP. Failure to provide translations of these vital documents can constitute a violation of federal law.

Advocates should work with LEP survivors to make sure that landlords are providing the appropriate legally required language access to them.

For more information on the federal housing rights of LEP survivors, see [NHLP's information packet](#).

## The Fair Housing Act

The federal **Fair Housing Act ("FHA")** is a cornerstone of federal civil rights legislation. The **FHA** prohibits housing providers from taking certain actions based on an applicant's or tenant's race, color, religion, sex, national origin, familial status, or disability.<sup>72</sup> The actions that landlords are prohibited from taking based on a person's membership in a protected class include:

- Refusing to rent or sell a dwelling.
- Setting different terms, conditions, or privileges for sale or rental of a dwelling.
- Providing different housing services or facilities.
- Falsely representing that a dwelling is not available for rent or sale.
- Advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, disability, familial status, or any other characteristic protected under the FHA.

<sup>69</sup> *Id.* § 14043e-11(d)(1); HUD, Notice of Occupancy Rights under the Violence Against Women Act (exp. June 30, 2017), available at <https://portal.hud.gov/hudportal/documents/huddoc?id=VAWA-ApdixA-NoticeOcRight.docx>

<sup>70</sup> *Id.* § 14043e-11(d).

<sup>71</sup> *Id.* § 14043e-11(d)(2)(D); HUD, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, 81 Fed. Reg. 80,724, 80,725, 80,770, 80, 797 (Nov. 16, 2016).

<sup>72</sup> See generally 42 U.S.C.A § 3604 *et seq.* (West 2017)

- Refuse to make a “reasonable accommodation” to rules, policies, practices, or services for an individual with a disability.<sup>73</sup>
- Coerce, intimidate, threaten, or interfere with any person exercising their rights under fair housing laws.<sup>74</sup>

Despite not being explicitly mentioned in the statute as a protected class, survivors of domestic violence are covered by the FHA because statistics show that survivors are overwhelmingly women.<sup>75</sup> Discrimination against survivors is almost always discrimination against women. Therefore, HUD, the agency that Congress has charged to implement and enforce the FHA, has said that “domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act.”<sup>76</sup> HUD has further indicated that survivors’ FHA claims “may also involve other protected classes, in particular race or national origin.”<sup>77</sup> Therefore, survivors who experience housing discrimination may have viable FHA claims on the basis of race or national origin as well.<sup>78</sup> HUD has provided examples of landlord actions that could give rise to FHA claims under theories of gender discrimination liability. For example, a situation involving a landlord who refuses to admit domestic violence survivors based on a stereotype that abused women always reconcile with their abusive partners can constitute direct evidence of sex discrimination.<sup>79</sup>

Survivors have challenged denials of housing or evictions related to domestic violence by using sex discrimination theories.<sup>80</sup> These theories can be used defensively, such as to defend a survivor against a pending eviction, or affirmatively, such as to file an administrative complaint or lawsuit seeking reinstatement of housing, monetary damages, or a policy change by the housing providers. For example, a survivor sued a housing provider under the FHA for failing to rent to them because the survivor would not provide the Social Security numbers of their minor children, fearing that the abusive partner would use the numbers to track their location.<sup>81</sup> The survivor subsequently entered into a settlement agreement with the housing provider.<sup>82</sup> In other cases, survivors and HUD have

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<sup>73</sup> *Id.* § 3604.

<sup>74</sup> *Id.* § 3617.

<sup>75</sup> For a detailed discussion on protections for victims of domestic violence under the FHA, see Chapter 4 of NHELP’S MAINTAINING SAFE AND STABLE HOUSING FOR DOMESTIC VIOLENCE SURVIVORS (2012), <http://www.nhlp.org/files/NHLP%20Domestic%20Violence%20and%20Housing%20Manual%202.pdf>.

<sup>76</sup> Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD Office of Fair Housing and Equal Opportunity (FHEO), to FHEO Office Directors and Regional Directors (Feb. 9, 2011).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., *Dickinson v. Zanesville Metro. Hous. Auth.*, 975 F.Supp. 2d 863 (S.D. Ohio 2013); *Bouley v. Young-Sabourin*, 394 F.Supp. 2d 675 (D. Vt. 2005); *Meister v. Kan. City Hous. Auth.*, 2011 WL 765887 (D. Kan. Feb. 25, 2011); *Charge of Discrimination, HUD v. CBM Group, Inc.*, HUDALJ 10-99-0538-8 (2001). See also Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD Office of Fair Housing and Equal Opportunity (FHEO), to FHEO Office Directors and Regional Directors, at 6-9 (summarizing cases) (Feb. 9, 2011).

<sup>81</sup> See Title VIII Conciliation Agreement between Hope (Complainant) and Valencia Village Partners, Ltd., et al., FHEO Case No. 04-110574-8 (Apr. 4, 2014) (Companion Website); see also NHELP, *Domestic Violence Survivor Settles with Property Managers after Being Denied Housing*, 44 HOUS. L.BULL. 85, 85-86 (Apr./May 2014) (summarizing background and terms of the conciliation agreement).

<sup>82</sup> *Id.*

used VAWA and the FHA to challenge municipalities' nuisance ordinances that penalized survivors for making too many calls to the police within a specific timeframe.<sup>83</sup>

## Sexual harassment in housing

With affordable housing becoming more and more difficult to find, landlords hold a significant amount of power over the terms and conditions of the rental relationship. Survivors, in particular, are susceptible to abuses by landlords and staff because of the additional hurdles they face in the housing market. Many survivor-tenants must pick between acquiescing to the demands of their landlords or homelessness. Due to this power imbalance between landlords and tenants, many tenants are subjected to sexual harassment by landlords and their agents, such as property management staff, maintenance workers, and janitors. Sexual harassment takes various forms. Examples of such harassment include requesting sexual favors in exchange for rent, making sexually derogatory comments, touching the tenant without their consent, and constantly leering and staring at the tenant.

### Think About It

Survivors of domestic violence are particularly vulnerable to sexual harassment because they often have no place else to go due to income limitations, lack of credit history, or poor rental history. Many sexual harassment cases involve tenants living in subsidized or affordable housing who cannot pay market rates for housing and must choose between being harassed or being homeless. In several cases, landlords and their agents have targeted single, low-income mothers for sexual harassment, since these tenants are less likely to report incidents of harassment.<sup>84</sup>

Courts have held that the FHA prohibits sexual harassment in housing.<sup>85</sup> Persons who may bring a claim for sexual harassment in housing include the harassed tenant, persons who lived with the tenant and were injured by the tenant's eviction or threatened eviction, and

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<sup>83</sup> See, e.g., *Markham v. City of Surprise, Release and Settlement Agreement* (Mar. 21, 2016), available at <https://www.aclu.org/legal-document/nancy-markham-v-city-surprise-settlement-agreement-mar-21-2016> (requiring City to repeal challenged nuisance ordinance provisions, to agree not to enact another policy penalizing crime victims, monetary payment to survivor, and attorneys' fees to be determined by court); Title VIII Conciliation Agreement between HUD and City of Berlin, New Hampshire, Case No. 01-15-0017-8 (Jan. 2015), available at <http://nhlp.org/files/City-of-Berlin.pdf> (requiring City to amend nuisance ordinance, which mandated landlords to evict tenants cited three or more times for "disorderly behavior", to exempt incidents where the resident is domestic violence survivor); Title VIII and Section 109 Conciliation Agreement between HUD FHEO and Municipality of Norristown, Case Nos. 03-13-0277-8 and 03-13-0277-9 (Sep. 2014), available at <https://www.aclu.org/legal-document/hud-v-norristown-hud-conciliation-agreement>. See also EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, *The Cost of Being "Crime Free"- Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (Aug. 2013); Matthew Desmond & Nichol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 *Am. Soc. Rev.* 117 (2013); Pa. Coal. Against Domestic Violence, *Addressing Discriminatory Housing Barriers for Victims of Domestic Violence: A Toolkit for Advocates* (2013).

<sup>84</sup> See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Obtains Record \$1.1 Million Verdict in Sexual Harassment Case Against Landlord in Kansas City, Missouri (May 13, 2004) (noting that most of the victims in a sexual harassment case were lower-income, single women who had limited opportunities to seek other housing); Press Release, Fair Hous. Advocates Ass'n, Jury Awards \$31,452 in Sexual Harassment Case (May 14, 2002) (noting that a single mother delayed reporting incidents of sexual harassment because she did not want to risk homelessness).

<sup>85</sup> 42 U.S.C.A. § 3604(b) (West 2017); *Shellhammer v. Lewallen*, 1 Fair Hous.-Fair Lending Rep. 15,472 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985). The FHA does not explicitly prohibit sexual harassment in housing, but it does prohibit discrimination on the basis of sex in the rental of housing.

fair housing organizations. Fair housing laws protect both men and women against sexual harassment, including same-sex sexual harassment.<sup>86</sup>

Individuals who may be held liable for sexual harassment include the perpetrator of the harassment and, in certain circumstances, the perpetrator's employer. If an employee were serving as an agent of an owner or manager when the sexual harassment occurred, the owner or manager could be held liable for the acts of an employee, such as a maintenance worker, janitor, or leasing agent “regardless of whether the person knew or should have known” about the discriminatory act.<sup>87</sup> HUD has indicated that housing providers could be liable under the Fair Housing Act if they fail to “take prompt action to correct and end” sexual harassment committed by tenants against other tenants.<sup>88</sup>

For more information about the legal theories that tenants have used to challenge sexual harassment in housing, see Chapter 4 of [NHLP's \*Maintaining Safe and Stable Housing for Domestic Violence Survivors\*](#).<sup>89</sup>

## State and Local Protections

It is critical for advocates to examine their state and local laws to determine whether they provide any additional protections for survivors. For example, state and local fair housing laws may provide broader and more comprehensive coverage than the federal Fair Housing Act. The most common types of local housing safeguards for survivors include laws that (1) provide an eviction defense where the landlord tries to evict the victim due to the abuse, including a crime or lease violation committed by the perpetrator at the rental unit; (2) permit early lease termination without further obligation to pay rent where tenants provide landlords with documentation of domestic violence; (3) require landlords to change locks where tenants have provided documentation of domestic violence; (4) obligate the abusive partner to pay for or provide housing for survivors; and (5) offer address or documentation confidentiality for survivors. For more information, see [NHLP's \*Housing Rights of Domestic Violence Survivors: A State and Local Law Compendium\*](#).<sup>90</sup>

## Conclusion

Advocates may need to use a variety of creative strategies and arguments to assist survivors who are facing evictions, subsidy terminations, or other adverse housing actions due to domestic violence committed against them. VAWA, the Fair Housing Act, and related state and local laws are useful tools in helping survivors access and maintain housing. Furthermore, advocates can significantly aid survivors by helping them gather documentation of domestic violence, identifying potential witnesses who can speak in

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<sup>86</sup> HUD, Questions and Answers on Sexual Harassment under the Fair Housing Act (Nov. 17, 2008), at 3, available at <http://www.hud.gov/content/releases/q-and-a-111708.pdf>

<sup>87</sup> See HUD, Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sep. 14, 2016); *Glover v. Jones*, 522 F. Supp. 2d 496, 506-07 (W.D.N.Y. 2007); *Boswell v. Gumbaytay*, 2009 WL 1515872 (M.D. Ala. June 1, 2009).

<sup>88</sup> See HUD, Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054 (Sep. 14, 2016). *But see* *Francis v. Kings Park Manor, Inc.*, 91 F.Supp.3d 420 (E.D.N.Y. 2015).

<sup>89</sup> NHLP, MAINTAINING SAFE AND STABLE HOUSING FOR DOMESTIC VIOLENCE SURVIVORS (2012), available at <http://www.nhlp.org/files/NHLP%20Domestic%20Violence%20and%20Housing%20Manual%202.pdf>

<sup>90</sup> NHLP, HOUSING RIGHTS OF DOMESTIC VIOLENCE SURVIVORS: A STATE AND LOCAL LAW COMPENDIUM (2015), available at <http://nhlp.org/files/CombinedD-HousingStateLawCompendium.pdf>

support of the survivor, and working with the housing provider to resolve the matter informally.

## Additional Resources

- National Housing Law Project's Domestic and Sexual Violence Project website at <http://nhlp.org/ovwgrantees>
- NHLP, *Housing Rights of Domestic Violence Survivors: A State and Local Law Compendium* (2015)
- NHLP, *Maintaining Safe and Stable Housing for Domestic Violence Survivors: A Manual for Attorneys and Advocates* (2012)
- NHLP, *Assisting Survivors of Domestic Violence in Applying for Housing* (2010)
- NHLP, *VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards* (Jan. 2014)
- NHLP, *Survivors Have Rights and Protections to Move with a Voucher* (2016)
- NHLP, *Federal Housing Rights of Survivors with Limited English Proficiency: An Information Packet* (Sept. 2015)
- NHLP, *Domestic Violence Survivors with Criminal Records: What You Should Know Why Applying for Federally Subsidized Housing* (2013) (in English and Spanish)
- Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD Office of Fair Housing and Equal Opportunity (FHEO), to FHEO Office Directors and Regional Directors (Feb. 9, 2011)
- ACLU, *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*
- Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law, *The Cost of Being "Crime Free"- Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances* (Aug. 2013)
- Matthew Desmond & Nichol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 Am. Soc. Rev. 117 (2013)
- Pa. Coal. Against Domestic Violence, *Addressing Discriminatory Housing Barriers for Victims of Domestic Violence: A Toolkit for Advocates* (2013)
- HUD, *Public Housing Occupancy Guidebook*, Chapter 19 (June 2003)

## Sample Letter One



September 19, 2007

LA, Leasing Officer  
Housing Authority  
Leased Housing Division

RE:

Section 8 Participant  
Family Break - Up - Request that Voucher be Put in \_\_\_\_\_'s Name

Dear Ms. A:

This office represents the above - noted \_\_\_\_\_ regarding her family's Section 8 voucher. Enclosed find a release which will permit you to speak with me about her case.

\_\_\_\_\_ and \_\_\_\_\_ are participants the Section 8 program administered by the Boston Housing Authority (BHA) and are currently leased up at \_\_\_\_\_. While \_\_\_\_\_ may be the head of household, throughout the family's participation in the Section 8 program, \_\_\_\_\_ and the two children have been listed on the voucher and the lease and their income has been counted towards household income for rent calculation purposes.

For many years Ms. \_\_\_\_\_ has been the victim of emotional abuse and physical abuse from \_\_\_\_\_. He has choked her causing her to black out, threatened her, and in one incident grabbed the phone from her when she attempted to call the police. He has made constant calls to her at work, visited her at work against her wishes and threatened to speak to her supervisors and embarrass her. In April 2007 she was forced to get a 209A order preventing him to stay away from her work place. However, Mr. \_\_\_\_\_ continued to call and text messages to her and threaten her.

In May 2007 Mr. \_\_\_\_\_ voluntarily vacated the premises. Ms. \_\_\_\_\_ does not know where he is residing. . However, he has continued to call her, sent her text messages. She remains afraid of him.

Since leaving the household \_\_\_\_\_ has contributed nothing towards household income and Ms. \_\_\_\_\_ has been managing, with difficulty to pay the full rent herself

The family has broken up.

This letter is a request on Ms. \_\_\_\_\_' behalf, that she be made head of household on the voucher and that \_\_\_\_\_' name be removed. She also requests that the family's portion of the rent be

recalculated based upon her income alone, deleting that of Mr .

Pursuant to the BHA's Section 8 Administrative Plan section 11.7 (Family Break - Up Policy) where a family breaks up the Section 8 voucher does not necessarily remain with the head of household. Any adult assuming responsibility for one or more minor family members could retain the voucher. Where, as here, no court has determined which family member retains the voucher, the BHA makes this determination considering the following factors:

- a. The interests of any minor children;
  - b. The interests of any ill, Elderly or Disable Persons who are family members;
  - c. Whether family members fled the unit because of actual or threatened violence by a spouse or other member of the Household. (The BHA will take this factor into consideration regardless of whether the individuals leaving the unit are the victims or the perpetrators);
  - d. Whether the assistance should remain with family members remaining in the original assisted unit or those who have fled or left the unit;
  - e. The amount of time since the Household members were added to the Family Composition. The BHA will consider this factor, on a case by case basis, the circumstances surrounding a Household Member's being added or not having been added to the Household.
- Sec. 11.7.2

Under the above criteria, Ms. should retain the voucher. She is the victim of violence from . She has custody of the children and she is remaining in the assisted unit.

The BHA Family Break - Up Policy also provides at sec. 11. 7.7 that when a family breaks up and there is a change in household composition, the BHA should recalculate the family's rent share to reflect the current family composition.

Mr. may have contacted you earlier about the family break - up and attempted to obtain a new voucher for himself alone. Ms. has received nothing from the BHA but Mr. has tried to get her to sign some document. Should this be the case, I trust the BHA will not give the voucher to Mr. alone ( and put Ms. at risk of eviction should subsidy payments to her landlord cease) until the issue is settled before the BHA after the process provided in the Family Break - Up Policy

Can you please contact me at [] to discuss transferring the Section 8 Voucher to Ms. and making her Head of Household on the voucher and also recalculating rental share to reflect the current household income - ie. her income alone.

Finally, we would like to make an appointment to view the file.

Very truly yours,

## Sample Letter Two

### CENTRAL JERSEY LEGAL SERVICES, INC.

Union County Division

Paul V. Mullin, Esq.  
Executive Director  
Janice Chapin, Esq.  
Deputy Director  
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Rebecca Greene, Esq.  
Stephen V. St. Hilaire, Esq.  
Luis Franco, Esq.  
Eilleen Ingram-Willis, Esq.  
Carol Matula, Esq.  
Susan McCue, Esq.  
Stelio Papadopoulos, Esq.  
Eileen L. Linarducci, Esq.  
Janet H. Molnar, Esq.

October 3, 2008

Ms. Deborah Heinz  
State of New Jersey  
Department of Community Affairs  
101 S. Broad St.  
P.O. Box 800  
Trenton, N.J. 08625

RE: Request for Remedies: Section 8 Voucher Program & HPP  
Ms. M.M.

Dear Ms. Heinz:

This is an urgent situation. Imminent eviction of a family is in process. Our office represents Ms. M. M. who resides with her three (3) children at ..., N.J. She had been living there with her husband, Mr. A. M., who is an unemployed Social Security recipient of SSD. She was living with her husband, Mr. A.M., and these children at the above address for about five years under the HUD Section 8 voucher program with DCA. Mr. M. was then, and is now, a recipient of SSD from the Social Security Administration. During the period of his residence with the family—he left sometime in April 2008—DCA considered Mr. M. “head of household”, although, during the five years that the couple lived in the apartment they both would go to the DCA each year and execute the income recertification forms.

Ms. M. came to our office in the last few days with a summons and complaint for non-payment of the contract rent on the above apartment of \$967 a month from June 2008 (partial rent) through October 2008: totals about \$4,420. The trial date is October 9, 2008.

Mr. M. for many months had been verbally abusing our client and in April 2008, he decided to contact DCA and request that it issue a “Request for Tenancy Form” for him to leave the present apartment and move-in by himself into a new apartment at ..., N.J. When he was in the act of requesting that DCA cooperate with him, Ms. M. contacted Mrs. X at the DCA office in Elizabeth, N.J. and asked DCA to give her to continue her Section 8 status notwithstanding Mr. M’s notice to DCA that he wanted to take the Section 8 status with him to a new address. Ms. M. states that Ms. X told her that DCA could do nothing about her husband’s request because he was the head of household under DCA’s records and he was disabled.

The problem is that DCA gave the Section 8 voucher to the husband when he vacated in May 2008 and now our client is facing a summary dispossession action for the contract rent on the apartment. It appears that the HAP contract was terminated for the May and/or June 2008 rent because DCA started to pay a new landlord a HAP payment for Mr. M. starting in May or June 2008 at [second address], N.J.

On May 20, 2008, our client obtained a TRO DV order against the husband. The order states that the husband is prohibited from returning to the scene of the violence (the apartment) and he was barred from "the residence of the plaintiff." The order further stated that the defendant was "granted exclusive possession of ...the residence."



Serving Mercer, Middlesex and Union Counties



## Sample Letter Two

On May 29, 2008, our client obtained a final DV restraining order that states that the defendant was barred from the residence of the plaintiff and that the plaintiff was "granted exclusive possession of the residence" and the apartment's address is expressly stated. Ms. M. brought this final DV order to DCA's Elizabeth, N.J. office but the intake receptionist refused to take it and said Ms. M. could leave the police report, which she did.

Our client only receives \$560 a month from the husband for herself and the three children which is from the husband's Social Security Disability. She faces imminent homelessness without the receipt of Section 8 status in the future and without immediate help to pay back rent from DCA's Homelessness Prevention Program.

Our office has reviewed client's rights under the federal Violence Against Womens' Act (VAWA), 42 U.S.C. 1437f(o)(D)ii through vi., the attached HUD regulation, 24 CFR §982.315(a) and (b), and DCA's attached "Housing Choice Voucher Program Administrative Plan" (July 2008). See definition in the latter of "applicant break-up" (p. 1-2), "Family Break-up" (p. 1-4 to 1-5) and "Violence Against Women Act", pp. 7-13 through 7-15.

HUD regulation 24 CFR §982.315(b), sets forth certain criteria that PHAs, such as DCA, need to follow in the establishment of their Section 8 Administrative Plans. These include assessing factors when a family break-up occurs, such as: whether the assistance should remain with the family members remaining in the original assisted unit, the interest of minor children, and whether family members are or have faced actual or threatened physical violence against a spouse; as well as "other factors specified" in the PHA Section 8 Administrative Plan. DCA's Administrative Plan, under the definition of "Family Break-up" (p. 1-4 to 1-5) and "Violence Against Women Act", pp. 7-13 through 7-15, has embodied the HUD regulatory standards but it has not followed them in this case.

It would appear that DCA has not properly exercised its discretion under the HUD regulation and DCA's Administrative Plan in that when DCA interviewed Ms. M. in April 2008, it did not place sufficient weight on her needs and those of her children in deciding to award the Section 8 voucher to her husband at the time of the family break-up. Therefore, Ms. M. requests the following remedies:

- Ms. M. requests an immediate administrative hearing on this. Part of the hearing should establish whether Mr. M. committed fraud, 24 CFR §982.551-553, in the representations he made to DCA in his request for a Request for Tenancy Form. (For this, it is requested that I have access to the DCA file for discovery.) See DCA's Administrative Plan, at p. 7-12, which states that DCA must determine whether Mr. M. was "eligible" for the issuance of a new Voucher. It is submitted that his eligibility had to be based on the factors found in the HUD regulation and the DCA Administrative Plan found under the definition of "family break-up" at pp. 1-4 and 1-5. Ms. M. is without a realistic remedy against Mr. M. under the State Domestic Violence Act, N.J.S.A. 2C:25-29(b)(2), to require him to pay for alternative housing at a contract rent because of Mr. M.'s income is Social Security Disability. Rather, Ms. M. depends on the need to obtain Section 8 eligibility from DCA.
- In addition, it is requested that DCA consider invoking that part of its Section 8 Administrative Plan—see definition of "Applicant break-up", pp. 1-2 and 1-3—which permits DCA to open its waiting list for former members of an applicant family that breaks-up. That provision gives the regional supervisor on a case-by-case basis the ability to give consideration "to former members of an applicant family who retain custody of the children...and to actual or threatened physical violence against the former members by a spouse..."
- In addition, because DCA did not properly assess the situation adequately when it issued the Section 8 voucher to Mr. M., rather than deciding that Ms. M. would retain the Section 8 status in her present apartment, it is appropriate that DCA utilize its Homeless Prevention Program in issuing back rent so that Ms. M. can avoid the entry of a Judgment for Possession at the eviction trial date which is scheduled for October 9, 2008.

It is hoped that this matter can be resolved informally. If not, kindly consider this a request for an administrative hearing under DCA's Section 8 Administrative Plan.

Very truly yours,

# Fourteen



## Workplace Discrimination & Termination

EMPLOYMENT RIGHTS & PROTECTIONS FOR SURVIVORS

By Lisalyn R. Jacobs

### Introduction

Domestic violence and sexual violence and harassment can put a survivor's livelihood at risk whether the violence occurs within or outside of the workplace. In fact, violence and harassment are simultaneously prevalent yet underreported workplace occurrences. Survivors of harassment and/or violence can face challenges in their workplace due to their abusive partners' actions, whether the perpetrator is an intimate partner, a co-worker, or a business customer with whom they are not intimate. Whether having to work side-by-side with the perpetrator knowing that their job hangs in the balance, or facing termination due to an abusive partner who calls or stalks him/her at work frequently, the survivor can come to be viewed by the employer as a liability regardless of their valued contributions at work, or the fact that they are not the source of the difficulty. Often, relatively uncomplicated accommodations could make the workplace and the survivor safer and more productive.

When violence arises *within* the workplace, a person may be sexually harassed or assaulted at work only to find that upon reporting it to management, the claim is dismissed as inconsequential. When violence *follows* a person to the workplace, survivors may be treated like they are the source of the problem when it is the abusive partner perpetrating harassment and violence (some of whom also work alongside the survivor). Finally, the employer may sanction the survivor for being late, or taking leave to see a counselor or attend court hearings while the co-worker/abusive partner may not suffer any

repercussions despite the fact that abusive partners often use employer resources (computers, phones, other employees) to check up on, or harass the survivor.

The upshot for the survivor is often the threat of economic upheaval: frequent late arrivals, or calling in sick at the 11<sup>th</sup> hour may make them appear unreliable to their employers; they may want to separate from the abusive partner, but cannot do so if they lose their job, and with it a source of childcare, or second salary contributing to rent, or other monthly expenses. Additionally, a survivor might fear the consequences of disclosing the abuse to an employer, including fear of additional violence directed against them or other family members.

This chapter explores the various ways violence manifests in the workplace. We then describe key legal protections available for survivors experiencing discrimination due to domestic violence as well as sexual harassment or assault within the workplace. We also review legal and non-legal advocacy strategies to protect survivors' employment and safety. As employment law and advocacy could merit an entire guidebook, extensive resources are available and referenced at the end of this chapter.

## **Domestic violence and employment**

As described in the stories above, violence may follow a survivor into the workplace or it can manifest from within the workplace itself. Some survivors may be experiencing abuse from an intimate partner as well as hostility or violence from employers, colleagues or customers in the workplace. How employers respond to domestic and sexual violence and harassment and create a work environment of non-violence are equally critical. If employers are clear in their policies, set expectations that the workplace will be free of bias, harassment and/or violence, are also clear about what protections will be available to those who are victimized, and what sanctions will occur if employees engage in harassment or violent behavior, not only are employee perpetrators more likely to be deterred, but survivors of violence will be more likely to disclose their concerns. The result for all is improved workplace safety and productivity. Conversely, if employers do not set a tone indicating that survivors will be helped and perpetrators held accountable, the workplace atmosphere may be poisoned as a result, with harassment allowed to flourish and survivors afraid to come forward for fear of reprisals.

## **Assessing survivors' workplace concerns**

Advocates and attorneys working with survivors can open dialogue about the risks of violence in the workplace, as well as workplace response. Explaining the prevalence of domestic violence and workplace discrimination may help give assurances to a survivor that they are not alone. Additionally, facilitating an open and judgment-free assessment of survivors' experiences are critical to understanding their needs, priorities, and goals, and can help advocates and attorneys work with survivors to determine appropriate and available strategies.

For a fuller description of a survivor-centered *approach* to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11). The screening and assessment questions presented here are for issue spotting (often called intake questions), are not meant to be prescriptive, and conversations around workplace rights and protections should not be limited to these questions.

## Ana's & Marie's Stories

The scenarios below help illustrate the different ways in which violence *arises within* the workplace or *follows a survivor there*.

**Ana's Story:** *Ana was relieved to finally find a job as a server in her neighborhood after working at a restaurant across the city. She was determined to make this job work, since she wanted to avoid the hour commute she had to deal with in the past. Plus, the tips were great. She was well-liked by her customers and seemed to get along with the other servers. She was worried about Evan, however. He was always making sexist jokes and looking to see if she'd laugh. He called her a prude for asking him to stop, and then he began commenting on her clothes and her body. He said she should feel lucky for the attention and he repeatedly asked her to go out with him after work, but Ana always declined.*

*On a particularly busy weekend night, Evan called her into the walk-in freezer saying he needed help picking up some food. Ana rolled her eyes and went in, only to have Evan pin her against the wall and grope her saying, "If you won't go out with me on your own, I'll have to get a piece of you when I can." Ana twisted away, tried to regain her composure, and continued with her shift.*

*She wanted and needed to keep her job, but she was terrified of being on shifts with Evan. Ana decided to report the assault to her supervisor, but when she made the report, her supervisor laughed it off saying, "That's just Evan. You've got to figure out how to deal with him quietly and keep this inside the restaurant. Don't make me have to choose between the two of you, and don't go filing any complaints. I have several applications from qualified candidates just waiting to take your job."*

### Think About It

What do you think Ana should do? What else do you need to know about her situation? Does she have other concerns that might play a role in her options at work?

**Marie's Story:** *In another case, Marie, was stalked by her ex-husband. Marie is a 15-year veteran teacher at a Catholic school in San Diego, mother of four children, and recently divorced from her abusive husband. He has repeatedly showed up at her new apartment, which did not go unnoticed by her landlord. More recently, he has also begun calling her at work, harassing the office personnel at the school when they answered the phone, and threatening to come to the school and to get her fired.*

*With the help of a local domestic violence program, she obtained an order of protection prohibiting her ex-husband from making contact with her. After getting the order of protection, Marie met with the principal of the school to tell her about the terms of the order of protection and to ask the principal to call the police if Marie's ex-husband showed up at the school. The principal was surprised to hear about the abuse and asked Marie to share more details the abuse that had taken place during their marriage. Marie had kept this information to herself previously, but felt obliged to tell the principal about the years of physical, emotional, and economic abuse she endured.*

*The next week, Marie's worst nightmare came true. Her ex-husband showed up at the school, barging into the front office and loudly screaming about how he was going to, "get that bitch." The principal called the police, Marie was able to escape out the back door, and the school went on lock down. That afternoon, the principal called Marie at home and told her that due to safety concerns and the perpetrator's lengthy history of domestic violence, the school decided to terminate Marie and to bar her 4 children from continuing to attend the school. Despite having left her abusive partner, gotten a protection order and informed her employer, Marie lost her job and her children lost their school due to the perpetrator's actions.*

### Think About It

How is Marie's situation different than Ana's? Are there any similarities? Does her ex-husband continue to pose a threat to her physical safety? What does she want to do? What are her economic priorities right now? Her future goals?

Some assessment questions could include, but are not limited to:<sup>1</sup>

#### At home

- Do you feel safe at home?
- Has an abusive party made threats against the safety of your pets, property, or other family members?
- Has your intimate partner offered to provide childcare, or a ride to work, then repeatedly taken back that offer and/or failed to show up at the last minute?
- Has your intimate partner ruined your plans for transportation or childcare making it impossible for you to work?
- Has your intimate partner kept you awake, hidden your keys, destroyed uniforms or other work property or hit you in places that would be visible to the public in order to prevent you from going in to work?
- Has the abusive or harassing behavior gotten worse over time? Does it escalate for particular reasons (e.g. you are leaving town on a work trip)?
- Does your intimate partner own a gun?
- Has s/he ever threatened harm to you, him/herself or others with a gun?

#### At work

- Do you feel safe at work?
- Have you been threatened or harassed at work? Has anyone made unwanted sexual advances toward you? Or did you ever feel like you could not refuse sexual or inappropriate behavior from someone at work?
- Have you disclosed your situation to anyone at work? If so, were they a co-worker, supervisor, etc.?
- If you have disclosed to a supervisor, how did they respond?
- Has anyone at work suggested that they would withhold your pay for any reason unrelated to your work performance (e.g. unless you complied with sexual violence or harassment or if you complained about either one)?
- Has anyone at work threatened that they will find you outside of work?
- Has an intimate partner threatened to follow you to work?
- Has an intimate partner placed harassing phone calls or texts to you or others in the workplace?
- Does your workplace offer any training to staff and management regarding domestic violence and workplace assault, or have a policy on how such incidents will be handled if the person involved is the survivor of violence? The perpetrator of violence?

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<sup>1</sup> This is neither an exhaustive or necessary list of questions or safeguards but merely items to consider. Each individual case will have its own requirements. For example, if abuse occurs only at work, it may not be as important to develop coded language for phone calls to the survivor's home. That said, it is always best to consult the survivor.

### **Workplace Safety Considerations For Attorneys/Advocates**

It is important to set up survivor safety mechanisms in your workplace and to explain to survivors what these are and what purpose they serve. For example, if the abusive party is self-represented and approaches your office, it may be appropriate to request law enforcement to be present outside (although this should be discussed with a survivor beforehand). It is important to keep the survivor's work and home addresses confidential. Ensuring that office staff will not reveal sensitive information such as last names or addresses is paramount. If the survivor lives with the abusive partner, an advocate should always ask if the survivor is safe to talk freely during phone calls. Developing some form of coded messages to indicate that a survivor is not safe to speak freely, or needs help could make a substantial difference.

Importantly, if the survivor no longer wishes to continue with representation, verify that it was not due to coercion from the abusive person and remind the survivor that they should not feel embarrassed to resume contact with you should they choose to reengage.

### **Impact of workplace discrimination**

Frequently a survivor may be confronted by multiple challenges that impact their employment. Imagine the impact of a survivor's ability to show up and be productive at work while contending with the following:

- As in Marie's situation, a perpetrator has committed or threatened violence in a survivor's apartment or rented home, the survivor could be at risk of eviction (see the Housing chapter in this Guidebook);
- If the perpetrator has successfully argued in court that the domestic violence is "mutual," and obtained a protection order against the survivor;
- If the survivor also has a criminal record as a result of being coerced into criminal activities by the perpetrator (see the Criminal Records and Employment Rights chapter in this Guidebook).
- They might also have credit or debt issues that could restrict other employment options. For example, if the perpetrator maxed out credit cards, or otherwise accumulated debt for which the survivor was jointly responsible then refused to pay the debt.
- If the survivor decides to leave a perpetrator, they might lose access to a source of transportation or childcare. Similarly, if they or their dependents were being carried on the perpetrator's health insurance, they could lose access to these benefits.
- If they are simultaneously dealing with hostility, harassment, or violence from a co-worker or supervisor at work.

#### **Think About It**

What are other important factors to consider when addressing Ana and Marie's workplace issues? Why are they important? What do you need to know more about to enhance your advocacy?

## Key Terms

**Advocacy** is the broad act of attempting to influence policy. It may take the form of lobbying, public demonstrations, or filing legal documents in support of and in furtherance of a survivor's goals.<sup>2</sup>

**Accommodation** involves requesting a change of work conditions in order to fully or partially resolve a workplace concern, e.g. requesting a different shift than a harassing co-worker, or requesting to be moved to a different floor, or a different part of the work facility.

**Economic abuse** "involves behaviors that control an intimate partner's ability to acquire, use, and maintain economic resources, thus threatening his/her economic security and potential for self-sufficiency."<sup>3</sup> It can take many forms including preventing someone from attending school, controlling their finances, threatening to or actually terminating employment, or withholding access to cash, checking, or credit accounts.<sup>4</sup>

**Workplace harassment** is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), gender identity (under Title IX), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where enduring the offensive conduct becomes a condition of continued employment, or the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.<sup>5</sup>

**Victim blaming** is when the survivor of abuse is viewed as partially or fully responsible for the abuse that befell them. It marginalizes the survivor and may discourage reporting abuse for fear of being blamed for the abuse.

There are two types of **sexual harassment**:

- **Quid pro quo harassment:** Literally means, "this for that." This requires that submission to or rejection of harassment be used as the basis in employment decisions.<sup>6</sup> In Ana's case, had her employer offered to put Evan on another shift, or discipline him only if she submitted to his sexual advances, the employer would have been engaging in quid pro quo sexual harassment.
- **Hostile workplace:** When a workplace is difficult to work in because of negative behaviors, a hostile environment may exist, and may violate the civil rights law, Title VII. Proving that discrimination occurred based on sex may establish a valid Title VII claim. Sexual advances can create a hostile workplace, but must be unwelcome in order to establish a claim of a hostile workplace based upon sexual harassment.<sup>7</sup> To determine whether or not sexual advances or other behaviors are welcome, the EEOC considers the totality of the circumstances.<sup>8</sup> Whether there was an unreasonable interference with one's work performance is a central inquiry.

**Title VII** is a key employment discrimination statute that bars treating someone differently on the basis of sex, gender or gender identity. It also covers sexual harassment and sexual violence. It covers discrimination in the hiring and firing of employees as well as during employment.

**Title IX** requires educational institutions (pre-K -12 and higher ed.) that are recipients of federal funding to ensure access to an educational environment that is free of bias, harassment or violence on the basis of sex. Thus, if someone experiences workplace harassment, or violence at a federally funded educational institution, e.g. a work study student, a teacher's assistant, or school staff, including teachers and professors, they might be able to file a complaint with either the academic institution, or the state or federal departments of education, depending on the nature of the complaint.

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<sup>2</sup> The Center for Effective Government's nonprofit advocacy FAQ.

<sup>3</sup> Adams, Sullivan, Bybee, Greeson, Development of the Scale of Economic Abuse, 14(5) Violence Against Women Journal 563 (2008).

<sup>4</sup> Organizing for Economic Empowerment of Battered Women: Women's Savings Accounts

<sup>5</sup> The U.S. Equal Employment Opportunity Commission. <https://www.eeoc.gov/laws/types/harassment.cfm>.

<sup>6</sup> 29 C.F.R § 1604.11(a)(2)

<sup>7</sup> 29 C.F.R § 1604.11 (a) (1)

<sup>8</sup> 29 C.F.R. § 1604.11(b)

## Addressing Workplace Discrimination: The Basics

### Requesting accommodations

Both Ana's and Marie's situations might have been resolved by implementing some relatively simple accommodations. That is, their employers might have been able to make some changes in the workplace to improve their safety and resolve the harassment, stalking and violence.

Seeking an accommodation requires disclosure of the domestic/sexual violence situation to the employer. This involves something of a trade-off between privacy and job and personal security. Accommodations are more likely to be granted before the survivor comes to be viewed as a complicating factor in the workplace, e.g. accumulates significant numbers of late arrivals, or absences relating to the violence. This suggests that where possible, a survivor should make a confidential disclosure to the employer or supervisor sooner, rather than later, if they feel comfortable doing so. While it is possible to request an accommodation because of, "personal reasons," if the abusive partner escalates their threatening behavior, whether calling, showing up, etc. and alerts the employer to the situation first, the survivor will not be viewed as sympathetically as would be possible if they made the disclosure first.

**Case Scenario:** *In Marie's case, most schools have safety protocols in place owing to recent incidents nationwide involving guns. After Marie disclosed her situation to her principal, s/he could have circulated a picture to any staff who would be responsible for permitting people to enter the building, and, if applicable, any security personnel, with instructions that despite the fact that his children attended the school, a protection order was in place, and that the police department should be contacted if he attempted to enter the building whether or not he was accompanying them. (Note: Any approach the school decided to undertake should be discussed with Marie in advance). Additionally, the principal and Marie could have discussed the possibility of transferring her to a different school, so that the abusive ex-spouse would not know where to find her. Workplace episodes are relatively prevalent because an abusive spouse knows where to find the survivor during the workday. To the extent that the survivor can telework or work at a location unknown to the perpetrator, the chance of additional workplace problems occurring is greatly reduced.*

### More formal approaches

Discrimination against survivors constitutes a **hostile workplace** when it interferes with a survivor's ability to perform his or her employment duties. In Ana's situation, because she made her lack of interest in Evan's attention reasonably clear – asking him to stop, and turning down his date requests – his behavior is likely contributing to the existence of hostile workplace. Creating a workplace that is intimidating or offensive (or refusing – as a manager – to remediate it) would be evidence of this. While conduct is evaluated using a "reasonable person" standard, consideration is given to the survivor's perspective. That many people may consider some acts to be inoffensive does not excuse a potentially

#### **Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking.**

This guide from the EEOC, includes examples of:

- Situations involving domestic/sexual violence and stalking in the workplace that may violate Title VII or the Americans with Disabilities Act;
- Harassment that is severe enough to constitute, a "hostile workplace;"
- Examples of retaliation that are prohibited by Title VII.

[https://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm)

hostile environment if from a survivor’s perspective it rises to a level of hostility. For instance, an environment that is not hostile to Ana’s co-worker, Jean, who tells Evan off and is not harassed further, may nevertheless (in the opinion of the court, or EEOC) be found to be hostile to Ana if she continues to be harassed despite making clear that the behavior is unwanted and/or if she notifies her employer who then fails to intervene. Additionally, the harassment does not have to be physical in nature. Over time, verbal commentary of a sexual, demeaning or other nature can constitute a hostile workplace.

**Practice Tip**

Consider Ana’s options.

She could request that she and Evan be scheduled on different shifts, or that either of them be transferred to another restaurant, if such option existed. Additionally, she could:

- 1) tell her employer nothing, and choose to call in sick or use vacation time, if she is injured or requires medical care or counseling, or needs to go to court to seek a protection order;
- 2) file a police report concerning the assault and not disclose this information to her employer; and
- 3) do any of the above while disclosing the harassment and assault to her employer.

**Note:** In 2013, the Supreme Court weakened sexual harassment law in the case, Vance v. Ball State University<sup>9</sup>, in which, addressing harassment by a supervisor, they narrowed the definition of supervisor to include only, those who have the

ability to make “significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

The frequent repeating of the comments, and the nature and severity of the harassment/assaults will aid Ana and her advocate in demonstrating that the behavior was ongoing and unwelcome, both factors that a state Human Rights Commission or Equal Employment Opportunity Commission investigator would look at (including whether others in the workplace were being similarly harassed by Evan or others) to determine whether she had stated a complaint that they could act upon. Ana would also have an actionable complaint if one or more customers were frequently harassing her, and her employer was aware of this, yet took no action to stop it. She would also have a complaint if the employer was in any way facilitating the harassment, e.g. helping the perpetrator by making sure s/he had opportunities to be alone with the victim.

Should Ana wish to file a state or federal complaint, it’s in her interest to let her employer know of the harassment for several reasons:

**Think About It**

How could you help Ana prepare for filing the complaint? For talking with her employer? What else do you need to know?

- 1) Her employer might put a stop to it, and/or assign Ana and Evan to different shifts;
- 2) It is important that Ana be able to demonstrate that her employer (i.e. someone in a position of authority, like a supervisor) was aware of the harassment; and
- 3) Should the employer choose to do nothing, or as

suggested in Ana’s story, leave her to work it out herself, or threaten adverse employment action, this can provide further evidence for Ana’s potential hostile workplace claim.

<sup>9</sup> 133 S. Ct. 2434 (2013).

Additionally, if the employer is aware of the harassment, or violence and does nothing, Ana may be able to make out a case of constructive discharge (where the employer's creation or tolerating of a hostile workplace leaves an employee with little recourse except to quit).

## Filing discrimination claims with the Equal Employment Opportunity Commission (EEOC)

A survivor may file a charge of discrimination or harassment with the EEOC. S/he has 180 days from the time of discrimination or the last incident of harassment (or longer, depending on state law) file a complaint.<sup>10</sup> Depending on the jurisdiction, the survivor might also be able to file a complaint with a state, or city human rights agency (e.g. in Washington, D.C., New York City, or the states of Minnesota or New York). In Ana's story, where a supervisor held a survivor's employment over her head if she reported abuse, the employer would be liable for violating Title VII.

The employer is liable for harassment committed by people it has control over (including contractors or customers) if the employer knew or should have known about the harassment and failed to take appropriate corrective action. Remedies for a finding of discrimination can include, reinstatement (if the survivor was fired), back pay, or damages.<sup>11</sup> Additionally, if the survivor lives in a jurisdiction where employers are barred from discriminating against survivors of domestic or sexual violence, the employer may be held accountable for taking adverse actions against the survivor. These actions could include a restaurant manager giving a server less or less favorable hours compared to the abusive party, demoting or firing them, or even threatening to do any of these things.<sup>12</sup>

## Eligibility for leave

The survivor might also need time off to attend a court hearing – re: a civil protection order, a criminal case filed against the abusive partner, to get counseling or to heal from any injuries. There are several different types of leave that might be available:

- ***Paid leave*** – Employers may permit employees to accrue leave (sick leave and/or vacation time), which might be available for use under these circumstances. Recently, a number of states and cities have passed paid leave or paid “sick and safe days,” laws permitting employees to accrue a certain amount of paid leave every pay period.
- ***“Court leave”*** – some states have laws that prevent employers from taking adverse action against employees who need to take time off to attend court proceedings. These laws vary widely, but generally do not require that employers pay employees for time taken off in this manner.
- ***Family Medical Leave Act (FMLA) Leave*** – FMLA provides 12 weeks of unpaid leave to anyone who has a “serious health condition,” that requires continuing medical treatment and who has been incapacitated for 3 or more days. While some domestic or sexual violence incidents may rise to this level, many do not.

## Leaving employment

States vary on the availability of protections against termination due to being a survivor of domestic violence. The EEOC makes clear that Title VII and the American Disabilities Act

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<sup>10</sup> The U.S. Equal Employment Opportunity Commission. <https://www.eeoc.gov/employees/timeliness.cfm>.

<sup>11</sup> Additional information on the EEOC complaint process, including mediation, investigation and the issuance of a “right to sue,” letter can be found here: <https://www.eeoc.gov/employees/process.cfm>

<sup>12</sup> Helpful materials, including information on state statutes that bar discrimination against survivors, draft letters to employers, how to challenge a firing or apply for unemployment benefits can be found here: <http://www.legalmomentum.org/know-your-rights>

(ADA) do not prohibit discrimination due to one's status as a survivor (abuse survivors are not a protected class), but it provides guidelines as to when conduct against a survivor may rise to the level of triggering Title VII or the ADA.<sup>13</sup>

**Case Scenario:** California, where Marie worked has strong anti-discrimination provisions barring the firing of survivors, however, Marie's employer was a Catholic church, and as such, was able to successfully argue that because she taught religious classes, and Title VII's protections do not extend to employees conducting religion related functions, that their choice to dismiss her was protected by the 1<sup>st</sup> Amendment.

## Unemployment insurance

In general, unemployment insurance (UI) is not available to individuals who quit their jobs, however, if they can demonstrate that the reason for their departure qualifies for the "good cause," exception-- e.g. they have to relocate because their spouse has taken a job that requires that they relocate—the application for UI may be approved.

Many states have included leaving employment because of reasons connected to domestic/sexual violence among their good cause exceptions. Similarly, many locales make UI available if the person being subjected to the violence is an immediate family member with whom the employee resides (e.g. a parent or child).<sup>14</sup> More than 40 states and U.S. territories have passed laws regarding the availability of unemployment insurance, but in some states, a labor agency (where application for UI must be made) will permit survivors to apply despite the fact that no statute makes it available. The state of Georgia does neither of these, but there is relevant recent case law that can be used to argue for making UI available.

Ultimately, eligibility for UI will turn on a number of factors beyond a survivor's experience of domestic or sexual violence or stalking, including but not limited to how long they have worked.<sup>15</sup> If the survivor is found to be generally eligible for UI, the relevant state labor department will then address the question of whether, given the specific facts of the survivor's situation, their decision to leave employment qualifies under the state's "good cause," provisions. While state requirements vary, it may be helpful to provide some

### Practice Tip

Always apply for UI, and in states where it's not available by statute, indicate that leaving a job because of violence constitutes, "good cause," for quitting. Even if the application is initially denied, always file an appeal and make sure to do so within the statutorily prescribed number of days.

evidence of the domestic/sexual violence beyond the survivor's story, e.g. a medical or police report, or a statement from a service provider or clergy member. The state labor agency will contact the employer to verify the reasons for the survivor's separation from

employment. They can agree or disagree with the assertions made in the survivor's application. These will be taken into account by the state labor agency, but is one of many factors that will be considered.

<sup>13</sup> Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking.  
[https://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm).

<sup>14</sup> Information about the process for applying for unemployment insurance can be found here:  
<http://www.legalmomentum.org/resources/how-claim-unemployment-benefits> Information about which states make unemployment insurance available to survivors can be found here:

<http://www.legalmomentum.org/resources/employment-rights-victims-domestic-or-sexual-violence>

<sup>15</sup> See generally, <http://www.aboutunemployment.org/eligibility-length/>

Thus, both Ana and Marie should apply for unemployment insurance. Both appear to qualify, though both employers may oppose their applications (because Ana disclosed the workplace harassment after being warned against doing so, or because Marie's employer contends that her departure did not constitute "good cause.").

## Advocacy Strategies

A survivor's decision to leave a job and apply for unemployment is generally a last resort. This means that you and your client should exhaust all other avenues first.

In addition to providing general advocacy and education to local employers, try to work with your client on sitting down with the employer to discuss options for safety. Conversely, if your client is an "at will," employee in a state that does not have employment protections for survivors – and in all instances, actually – it will be helpful to work with them on safety planning (including a plan to accumulate some savings in case s/he needs to escape the abusive situation sooner than anticipated).

Finally, as indicated previously, any action undertaken on the client's behalf, however well-intentioned by you or his/her employer, must be undertaken with the survivor's knowledge and consent. For example, an employer's decision to terminate a survivor's abusive partner who also works for the employer can have significant ramifications for the survivor, whether for their economic stability or their welfare, or the welfare of others with whom they reside. They should be informed of such a decision and given the opportunity to do safety planning prior to their partner being given notice.

### Practice Tips

There are things that advocates can do to raise the issues of sexual and domestic violence and the workplace before they have to do so on a client's behalf.

- Ask to be added to the agenda at a meeting of your local chamber of commerce, and go talk to them from the perspective of wanting to inform them about the services that you provide to community members, and the opportunity they have to safeguard their businesses and employees by proactively implementing workplace policies. This serves the dual purpose of encouraging employers to think about the issue before it becomes *their* issue, and introducing you and your work to them before you are sitting across the table from them with a client.
- Similarly, plan a workplace violence education campaign. Identify and offer education and sexual harassment training to major employers in your area (i.e. corporations, healthcare, education). Providing proactive education and advocacy with employers to adopt or change workplace policies around violence can help foster work cultures that a) do not tolerate violence, or b) make it safer for survivors' to disclose.
- Implement a workplace violence policy in your workplace. The ability to explain the value of such policies to other employers is bolstered when you can say that you have one in place.

The website: [www.workplacesrespond.org](http://www.workplacesrespond.org) has a wealth of information, including model policies, information about workplace accommodation and links to state law guides, etc.

## Final Considerations

Workplace violence is a challenge, both for survivors of violence who want desperately to be productive contributors in their jobs so as to benefit from the financial stability that provides, and for employers who may neither be aware of the simple measures they could take to make the workplace safer and more productive, nor be convinced that solving these issues is more cost effective and productive than either ignoring them or firing the survivor. The workplace is also very challenging to an abusive partner. Work provides a survivor both economic independence and time away from an abusive partner, both of which lessen a survivor's reliance on them: the last thing the abusive partner wants.

As a lawyer or advocate, your challenge will be to help your client navigate thorny issues of disclosure to their employer, the varied terrain of state protections available to them, and to always be responsive to the survivor's goals. Another challenge is to identify systems or policy change opportunities to protect and enhance employment options for survivors (e.g. raising the minimum wage, expanding workplace benefits). The simultaneous projects of navigating the employment landscape and transforming it are critical to enhancing survivors' economic stability and long-term safety.

For varied reasons, many survivors choose to stay connected to their abusive partners. In all events, helping a client to stay safe and to have a plan for how to leave a relationship if that becomes necessary, along with helping them to maintain stable employment should be your paramount goals. Hopefully, the considerations raised in these and other chapters will provide you with the tools to do so.

## Additional Resources

Workplace issues facing survivors are vast, and remedies vary. We offer the following resources to assist your advocacy on behalf of survivors as well as with employers, to understand your state employment law, and to provide quick access to model policies and research to support your work.

### Advocacy guides

- ABA Commission on Domestic Violence, Employment Law & Domestic Violence: A Practitioner's Guide:  
[http://www.americanbar.org/content/dam/aba/migrated/domesticviolence/PublicDocuments/ABA\\_CDV\\_Employ.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domesticviolence/PublicDocuments/ABA_CDV_Employ.authcheckdam.pdf)
- Workplaces Respond to Domestic & Sexual Violence, Advocates guide:  
<http://www.workplacesrespond.org/implement/guide-for-advocates>
- Brochure for advocates on helping survivors in NYC:  
<https://www.legalmomentum.org/resources/helping-survivors-domestic-violence-sexual-assault-and-stalking-new-york-city>
- Sample Know Your Rights Brochure for survivors (NYC):  
<https://www.legalmomentum.org/resources/new-york-city-know-your-rights-pamphlet>

### Employer resources

- ABA's Model Workplace Policy on Domestic & Sexual Violence:  
[http://www.americanbar.org/groups/domestic\\_violence/policyandlegislation/model-workplace-dsv-policy.html](http://www.americanbar.org/groups/domestic_violence/policyandlegislation/model-workplace-dsv-policy.html)

- Corporate Alliance to End Partner Violence: [www.caepv.org](http://www.caepv.org)
- Legal Momentum’s “This Workplace Is a DV-Free Zone” Campaign: <https://www.legalmomentum.org/blog/legal-momentum-launches-its-workplace-dv-free-zone-campaign>
- Workplaces Respond to Domestic & Sexual Violence: Model Workplace Policy <http://www.workplacesrespond.org/learn/model-policy>
- Workplaces Respond: Workplaces Toolkit: <http://www.workplacesrespond.org/implement/workplace-toolkit>

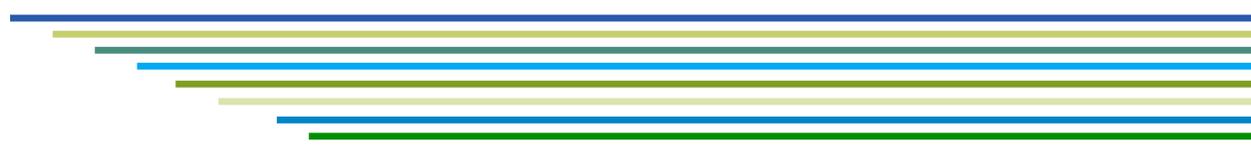
### **State law guides:**

- ABA Commission on Domestic & Sexual Violence Statutory Summary Charts: [http://www.americanbar.org/groups/domestic\\_violence/resources/statutory\\_summary\\_charts.html](http://www.americanbar.org/groups/domestic_violence/resources/statutory_summary_charts.html)
- Legal Momentum State Law Guides: <https://www.legalmomentum.org/materials/publications-resources?combine=&tid%5B%5D=89>
- Legal Momentum State Law Guide on Employment Rights for Survivors: <https://www.legalmomentum.org/resources/state-law-guide-employment-rights-victims-domestic-or-sexual-violence>

### **Other resources:**

- Research compilation from Workplaces Respond: <http://www.workplacesrespond.org/sites/default/files/imce/Workplace%20Research%20>
- Organizations that can help: <http://www.workplacesrespond.org/sites/default/files/imce/Organizational%20Resources%2011.13.pdf>
- Comprehensive workplace programs: <http://www.workplacesrespond.org/implement/comprehensive-response-program>

# Fifteen



## Criminal Records & Employment Rights for Survivors

By Erika Sussman<sup>1, 2</sup>

### Introduction

Many survivors of domestic violence find themselves with criminal records. Often this is due to coerced criminal acts, experienced at the hands of their partner. Sometimes, this is a result of a misguided criminal justice system response to their partner's abuse (for example, a dual arrest). Whatever the reason, survivors who have a criminal record face enormous challenges in accessing employment and economic security, which exposes them to increased risk of physical violence. This chapter aims to help advocates and attorneys better understand the employment rights of survivors who have criminal records and to offer tips and resources to survivors as they prepare for the job application and interview process, attend job interviews, and respond to a decision by a prospective employer.

### Domestic Violence and Criminal Records

While the criminal justice system is touted as a source of *protection* for survivors, it often presents survivors with negative experiences and dangerous outcomes. Survivors often must contend with the consequences of their abusive partners' experience with the

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<sup>1</sup> With critical contributions by Beth Johnson, Director of Legal Programs, and Nikki Donnelly, Criminal Records Fellow, with Cabrini Green Legal Aid

<sup>2</sup> This chapter is updated from 2013 tools on employment rights for survivors with criminal records: see the [Tool for Advocates](#) and the [Tool for Survivors](#)

## Ardenia's Story

*Ardenia is a 39-year-old, African-American woman. She met her partner Andre when they were both in high school. At the beginning of their relationship, Andre was very affectionate and caring. About a year or so after they started dating, Andre began complaining that Ardenia was not spending enough time with him. Andre often harassed Ardenia when she chose to go to class over hanging out with him. Ardenia was frustrated with Andre, but she thought that once she graduated she would have more time to spend with Andre and the problem would be solved. Unfortunately, the emotional abuse did not stop after graduation.*

*Not long after Ardenia graduated, she became pregnant and gave birth to her daughter Kayla, and Ardenia and Andre decided to move in together. Soon after, Andre became physically abusive. Now, Ardenia cares for their daughter, while working as a customer service representative and fitting in a couple of classes at dental hygiene school, and she often has to take-on a double shift or second job. Although Andre works part-time at a temp agency, he has been unable to secure full-time employment.*

*Over the years, Ardenia has called the police at least a dozen times. Several times, when the police have responded to these calls, Ardenia was arrested, despite the fact that Andre initiated the violence. On the occasions when Andre has been arrested and charged, Ardenia has not shown-up at court to testify. Ardenia is reluctant to testify against Andre out of fear that he will retaliate against her and her daughter. Ardenia also fears that, if Andre is criminally prosecuted, he will be unable to contribute to their household financially. Although Ardenia is the primary financial provider of the household, she relies on Andre's income to supplement her earnings.*

*Last weekend, Ardenia was arrested when the neighbors called the cops following Andre's assault. Ardenia and Andre had recently moved to a new neighborhood because they could no longer afford the rent. Ardenia's job was too far from their new home, so for the last several weeks Ardenia has been looking for a new job. Ardenia has been unsuccessful in finding new employment. Since Ardenia has been unemployed, the physical abuse she has been experiencing has escalated. Last weekend Ardenia came home late after a long day of trying to find a job. Upset about her late arrival and still no job prospects, "Andre lost it," she told you. While trying to defend herself, Ardenia hit Andre, causing his nose to bleed. The neighbors called the cops, and both Ardenia and Andre were arrested. She asks you, "How am I supposed to find a job? And what do I do about Andre?"*

### Think About It

What else do you need to know about Ardenia? What else do you want to know about the most recent arrest and her criminal record? What risks does Andre pose to Ardenia's safety? What are some of your reactions and ideas for moving forward?

criminal justice system. Many times, survivors are coerced or forced into criminal activity (fraud, drug use, prostitution) by their abusive partners for financial gain or as a method of control. Even if the abuser is the only one involved in criminal activity, it is common for the survivor to be arrested instead of or along with their partner. This is more likely to be the case for immigrant survivors, LGBTQ survivors, and survivors of color. Indeed, research shows that African American women are disproportionately impacted by so-called neutral criminal justice policies. They are more frequently the subject of dual arrests and are more likely to be prosecuted as a result of intimate partner violence. And, African American women are disproportionately impacted by seemingly neutral child protection policies (specifically, they are more likely to have their children removed when domestic violence is involved).<sup>3</sup>

Many times, survivors are mistakenly identified as the abuser by the police in response to calls about domestic violence, which can lead to their arrest and possible conviction. This problem is exacerbated by the tendency of abusers to file false allegations of abuse against the survivor, making the survivor appear to be the aggressor. Often the survivor's acts of self-defense are misidentified by law enforcement as unprovoked attacks.

Trauma caused by domestic violence can also result in survivors participating in acts that constitute criminal activity. Survivors may begin abusing drugs or alcohol, or may participate in other behaviors to cope with their abuse. The combination of the criminalization of symptoms of trauma, along with inadequate mental health resources and substance abuse treatment, almost guarantees that these coping mechanisms will result in the arrest or incarceration of survivors. In a 2009 study conducted by the Criminal Justice Authority of Women in the Illinois Department of Corrections, 77% of the women surveyed reported being abused by intimate partners.<sup>4</sup>

## **Intake assessment for survivors with criminal histories**

Because of complicated experiences and feelings for many survivors surrounding the criminal justice system and their experience with it, tax advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called “intake questions”), are not meant to be prescriptive, and conversations around criminal histories should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

To wade into this discussion, consider the following screening questions (these are not all required nor should your conversations be limited by these questions):

1. Do you have a copy of your state police criminal history report or FBI criminal history report?
2. Have you ever been taken to a police station?
  - A. If so, what county were you in at the time?
  - B. Did you go to court? Where was court located?
  - C. If you went to court, do you remember pleading guilty to a crime or receiving a sentence? If so, what was the sentence you received?

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<sup>3</sup> Bent-Goodley, T. B. (2007). Health disparities and violence against women: why and how cultural and societal influences matter. *Trauma, Violence & Abuse*, 8(2), 90–104. <http://doi.org/10.1177/1524838007301160>

<sup>4</sup> Bostwick, Lindsey (2009). Prior Victimization of Incarcerated Women in Illinois. Illinois Criminal Justice Information Authority. [http://www.jrsa.org/events/conference/presentations-09/Lindsay\\_Bostwick.pdf](http://www.jrsa.org/events/conference/presentations-09/Lindsay_Bostwick.pdf).

3. Have you ever received a summons to come to court?
  - A. If so, where was the court you were summoned to?
  - B. If you went to court, do you remember pleading guilty to a crime or receiving a sentence? If so, what was the sentence you received?
4. Have you ever been denied employment because of your criminal records?
  - A. If so, how did you know it was because of your criminal record?
  - B. Has a potential employer ever provided you a copy of your criminal background check?
5. Have you ever been denied housing because of your criminal record?
  - A. If so, how did you know it was because of your criminal records?
6. What type of employment are you seeking?
7. What are your long-term employment or education goals?

## The impact of criminal records

A criminal record has long-term implications for survivors' economic security and physical safety: employers and landlords rely on criminal records to make hiring and rental decisions, court fines and court fees can accumulate, re-entry models are few and rarely tailored for survivors (particularly survivors with children), and probation and other restrictions can constrain survivors' options for long-term stability. Therefore, it is essential that advocates understand how a criminal record impacts a survivor's housing and employment access, consumer rights, and options for safety.

## Key Terms & Concepts: Criminal Arrests Versus Criminal Convictions

An **arrest** means that an individual was taken into police custody and held for some period of time. Once someone is arrested, whether or not they are charged, they have a criminal record. An arrest alone is not a finding that an individual did anything unlawful. Once an arrest takes place, the person is brought to the police station for the booking process. If the prosecutor determines that there is probable cause that they committed the crime, they are charged with the crime. Just because someone is arrested does not mean that they are charged with a crime.

A **conviction**, on the other hand, follows a guilty plea or a court's finding of guilt for a crime. Someone can be convicted of a crime, but not serve jail time. The sentence for a conviction varies from state-to-state but can include: probation, a fine, community service, conditional or absolute discharge jail time. A **discharge** is a type of sentence for which there is no punishment. An **absolute discharge** is unconditional: the defendant is not punished, and the case is over. In some jurisdictions, an absolute discharge means there is no conviction even though the court found that the defendant is guilty. A **conditional discharge** is a sentence where the defendant is not punished, as long as they comply with

For example, a “conditional discharge” in Illinois *is* a conviction. Supervision *is not*. Probation *is* a conviction in most states, while a “qualified” probation *is not*. It all depends on how a state defines a sentence.

certain conditions. After these conditions are met, the discharge becomes absolute. If the conditions are not met, the defendant is re-sentenced. Every state differs on what type of sentence is considered a conviction.

Also, a person can be found guilty but not convicted, if they receive a deferred sentence.

A **deferred** sentence refers to a postponed or delayed sentence. In a deferred sentence, the court gives a defendant an opportunity to complete a probationary period before sentencing. If the defendant completes probation, the court will review the defendant's file and may dismiss the charges against him/her. If, however, the defendant does not follow all of the terms and conditions of probation the court may enter the conviction and sentence the defendant accordingly. Depending on the jurisdiction, a person may or may not have a permanent record of the crime on their criminal record after a successful completion of the probationary period and subsequent dismissal of the charges.

#### Practice Tip

This varies by jurisdiction. If a survivor with whom you work is uncertain about whether their criminal history includes a conviction, they should consult with a qualified attorney in their state with expertise in criminal records. The hardest parts are (1) knowing what is on a person's record and (2) understanding what the record means.

***Case Scenario:** Before you find out whether or not Ardenia was convicted and what exactly she was convicted of, what information do you need from her? What questions come to mind?*

*After talking with Ardenia, you find that she was arrested and convicted of criminal damage to property four years ago and that she has several domestic battery arrests that resulted in the charges being dismissed. You begin to discuss the steps Ardenia must take to seal her criminal record.*

## Key Terms

**Arrest:** When an individual is taken into police custody and held for some period of time.

**Conviction:** The court's finding of guilt for a crime, or follows a guilty plea for a crime.

**Discharge:** A type of sentence where there is no punishment.

**Absolute discharge:** The defendant is not punished, and the case is over unconditionally.

**Conditional discharge:** A sentence where the defendant is not punished, as long as they comply with certain conditions set by the court.

**Deferred sentence:** When the court gives a defendant an opportunity to complete a probationary period before sentencing.

**Criminal record:** A record of a person's criminal history, generally used by potential employers, lenders etc. to assess his or her trustworthiness. The information varies by state and jurisdiction, but in most cases it lists all non-expunged criminal offences and may also include traffic offences such as speeding and drunk driving.<sup>5</sup>

**Record of arrest and prosecution:** Commonly known as a RAP sheet, is a report of the history of arrests based on an individual's fingerprints.

**Expungement:** Also called "sealing of arrests." While meanings vary by state, they are remedies whereby a court sets aside a conviction or arrest so the information is no longer publically accessible.

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<sup>5</sup> Definition retrieved from: [https://en.wikipedia.org/wiki/Criminal\\_record](https://en.wikipedia.org/wiki/Criminal_record)

## Employment Rights

The Equal Employment Opportunity Commission has interpreted Title VII of the Civil Rights Act to prohibit employment policies that exclude individuals *on the basis of their criminal conviction records*. An employer may only exclude an applicant based on a criminal conviction if there is a **“business necessity.”**<sup>6</sup> To show that there is a business necessity, the employer must demonstrate that three factors were taken into consideration in the hiring decision:

- (1) the nature and gravity of the offense,
- (2) the timeframe since the conviction, and
- (3) the nature of the job that the applicant is seeking.

### Think About It: Is it Legal for an Employer to Consider an Applicant’s Criminal Record?

This Varies by State Law:

- A total of 24 states have adopted various “ban the box” policies.<sup>7</sup>
  - Nine states and the District of Columbia—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have removed the conviction history question from job applications for public and private employers, banning all employers from inquiring about a prospective employees criminal history until later in the hiring process.
  - 13 states – California, Delaware, Georgia, Louisiana, Maryland, Missouri, Nebraska, New York, Ohio, Oklahoma, Tennessee, Virginia, Wisconsin – prohibit public employers (including city and county employers in some states) from inquiring about conviction history from job applicants, but not private employers. Missouri extends this to occupational licensing agencies as well.
  - 11 states<sup>8</sup> – Florida, Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas – prohibit both public employers and occupational licensing agencies from considering arrests, but allow private employers to consider arrests that did not lead to a conviction.
  - Hawaii and the District of Columbia are the only states that also limit the use of background checks until after conditional offers have been made.
- The remaining 26 states allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction. However, many major cities in 13 of these states – Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Michigan, Nevada, North Carolina, Pennsylvania, Texas and Washington – have adopted policies and laws that extend employment protections to job applicants or limit the use of criminal records in employment decisions.

<sup>6</sup> National Employment Law Project & Community Legal Services of Philadelphia, “Highlights of EEOC’s New Criminal Record Guidance,” April 26, 2012, visit: <http://www.nelp.org/page/-/SCLP/2012/EEOCHighlights.pdf?nocdn=1>

<sup>7</sup> See state map tool summarizing state polices: <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>; also see: Rodriguez, M.N. & Avery, B. of National Employment Law Project, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions,” December 2016, visit: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>;

<sup>8</sup> See the National Employment Law Project factsheet: <http://www.nelp.org/publication/the-consideration-of-criminal-records-in-occupational-licensing/>; also see state report cards on occupational licensing agencies and criminal records: <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>

Employers should consider *individual circumstances* by examining the following factors: employment history, rehabilitation, and age at the time of the conviction. The process should include three steps:

- (1) employer notification to the applicant that he/she may be rejected based on the criminal record,
- (2) opportunity for applicant to respond, and
- (3) employer consideration of applicant's response.

**Preparing to Apply for Jobs**  
If you are working with a survivor who has a criminal record, there are several things that you can do as their advocate that can optimize their chances of obtaining employment.

#### **Practice Tip**

If the survivor you are working with is a member of a protected class, as defined by Title VII of the Civil Rights Act, (based on race, sex, ethnicity) and you believe that she may have been discriminated against based on their criminal record without a business necessity, you should begin to assess whether she has a legal claim under Title VII of the Civil Rights Act. One of the things organizations can do is help prepare the applicant's response – preparing a “mitigation” packet to highlight the three factors (race, sex, ethnicity).

### **Assist the survivor in obtaining a copy of their criminal record**

Job applicants are best equipped to apply for jobs when they have a clear understanding of their own criminal record. It is important to review a criminal record for two reasons. First, once the survivor is familiar with their criminal record, she can learn about what their rights are as a job applicant. Second, criminal records can often be inaccurate. Only by checking them can job seekers correct errors and enhance their job prospects.

**Case Scenario:** *In Ardenia's case, she has one criminal conviction for criminal damage to property that can be sealed. Once her record is sealed, her criminal history will only be accessible to law enforcement. Employers (other than law enforcement) will not have access to Ardenia's misdemeanor conviction information. When asked whether she has been convicted of a crime by a potential employer, Ardenia has the legal right to answer “no” once her record has been sealed.*

#### **Practice Tip: Obtaining Criminal Records**

To obtain a copy of a State criminal record, visit [www.hirenetwork.org/clearinghouse](http://www.hirenetwork.org/clearinghouse), then click on the state and scroll down to “criminal repository.”

To receive a copy of an FBI record, the survivor will need to send a signed written request that includes:

- Full name,
- Date of birth,
- Place of birth,
- A full set of fingerprints (including ten rolled and four plain fingerprint impressions), and
- A certified check or money order for \$18, payable to “Treasury of the United States” to:  
US Department of Justice  
Federal Bureau of Investigation Information Services Division  
Attention SCU, Mod. D-2  
1000 Custer Hollow Road  
Clarksburg, WV 26306.

The process for obtaining a set of fingerprints varies from jurisdiction to jurisdiction, but usually fingerprints can be obtained at a police station for a fee. Contact your local police department to learn more about the process, so you may assist survivors as the need arises.

A **Record of Arrest and Prosecution**, commonly known as a RAP sheet, is a report of the history of arrests based on an individual's fingerprints. Each state has its own central repository that maintains the arrest and disposition (outcome) information for cases handled in its own state. The Federal Bureau of Investigation (FBI) also maintains all information collected from state, federal, immigration, and military cases/crimes. However, FBI records are often incomplete, as states are not required to forward information to the federal government, and they are frequently inaccurate as well.<sup>9</sup> Therefore, if the survivor was arrested in more than one state, it is often good to get both the state and the FBI record for a complete understanding of their criminal record.

## Review the survivor's RAP sheet with them

Be sure to familiarize yourself with the following information about the criminal record: arrest dates; the arresting agency; arrest charges; court docket or indictment numbers; and, most importantly, the "disposition" or outcome of each of the cases (for example, did it result in a conviction or was it dismissed?); the specific offense the survivor was convicted of, if convicted; and the sentence for any conviction. Criminal background checks often misstate the disposition or outcome of the case. Therefore, assisting the survivor in verifying the disposition of each case through the court records will be critical.

### Practice Tip: Cleaning Up a RAP Sheet

To learn more about the process for cleaning up RAP sheets in your state, go to <http://www.hirenetwork.org/clearinghouse>, then click on your state and scroll down to the section on "Criminal Record Repository." Note: Contacting the Repository can be confusing. Your assistance and guidance in determining the correct process for addressing inaccuracies in your state will be helpful to the survivor.

### Work with the survivor to clean-up their RAP sheet

If, after obtaining and reviewing the RAP sheet, the survivor determines that there are inaccuracies, you can help them take steps to correct them. Often, RAP sheets contain mistakes, such as listing arrests without explaining the outcome. This is particularly problematic when the

charges were dismissed or the defendant was found not guilty of the crime. For example, if Ardenia's criminal background check showed that she had been arrested for domestic battery, without showing that the case had been dismissed, it could prevent Ardenia from obtaining employment. Domestic violence survivors often find that protection orders mistakenly appear on a RAP sheet, even when they were issued on their own behalf against their abusive partner.

### Practice Tip

If the survivor finds mistakes on their RAP sheet, she should contact the original agency that submitted the information to the FBI or the criminal history repository in the state where the criminal record was made in order to find out how to change, correct, or update information as soon as possible.

<sup>9</sup> US Department of Justice Office of the Attorney General, The Attorney General's Report on Criminal History Background Checks (June 2006) at 3, available at [www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf)

## Having Prior Convictions or Arrests Expunged or Sealed

Expungement and sealing have different meanings in every state. Essentially, they are remedies whereby a court sets aside a conviction or arrest so the information is no longer publically accessible.

States can only expunge or seal state convictions. Local authorities cannot do anything about a federal conviction; only the President of the United States can issue a pardon for those. Attorneys should familiarize themselves with their state's specific expungement and sealing requirements and learn about the process to apply.

### Practice Tip

If a conviction is expunged or sealed, and it is an individual's only conviction or arrest, then in most states a job applicant can honestly tell employers that she does not have a criminal record.

Between 2009 and 2014 thirty-one states and the District of Columbia enacted legislation that allows for or expands expungement or sealing of an arrest (where there was not a conviction); these states include:<sup>10</sup>

Alabama	Louisiana	Ohio
Arkansas	Maryland	Oklahoma
California	Massachusetts	Oregon
Colorado	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
District of Columbia	Missouri	Tennessee
Georgia	Nevada	Texas
Hawaii	New Hampshire	Utah
Illinois	New Jersey	Washington
Indiana	New York	Wyoming
Iowa	North Carolina	

### Expungement & Sealing of Arrests or Convictions

- To learn about the process for sealing an arrest in your state, go to [Road Blocks to Re-entry](#) for strategies, state law summaries, and model laws.
- To find whether your state allows for expungement or sealing of a prior conviction and the process, go [here](#),

### Practice Tip

Systems Advocacy to Address Criminal Record Barriers  
There are innovative initiatives happening across the country to limit employers reliance on criminal records checks and to enable individuals to expunge prior criminal records. Think about how these models can be tailored to meet survivors' safety and employment needs. Imagine innovative models that might enhance access to employment for survivors who have criminal records.

<sup>10</sup> See Vera Institute's infographic on legislative reforms to address the collateral consequences of criminal records: [https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy\\_downloads/states-rethink-collateral-consequences-infographic-v4.jpg](https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-infographic-v4.jpg)

## Certificates of rehabilitation or waivers

Even if expungement or sealing remedies are not options for a particular survivor, you may offer other avenues to enhance their job prospects. Some states allow individuals with criminal records to obtain a “certificate of rehabilitation” or “certificate of recovery.” Definitions and application of these certificates vary greatly by state; see your state law. At this time, up to fifteen states and the District of Columbia<sup>11</sup> provide for certificates of rehabilitation or recovery: Arkansas, Arizona, California, Connecticut, Georgia, Illinois, Nevada, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee and Vermont. A Certificate can usually remove what are called “statutory bars” to employment or occupational licenses. This means that, instead of automatically being disqualified for a particular job or license due to a conviction, the job applicant has the right to be considered for the position on an individual basis. Advocates should familiarize themselves with the process of applying for a certificate of rehabilitation in their state. Certain fields, such as healthcare or the financial industry, may have their own waiver process in place to remove statutory barriers. This also varies from state-to-state but can provide relief, even when a person cannot expunge or seal their record. For example, in Illinois, Ardenia’s conviction for criminal damage to property does not require that she obtain a waiver to work as an unlicensed healthcare worker. However, had Ardenia been convicted of domestic battery, she would be required to obtain a healthcare waiver from the Illinois Department of Health, in order to work in any healthcare facility.

## Preparing to Apply for Jobs

**Case Scenario:** *Assuming that Ardenia’s most recent arrest did not lead to a conviction, what questions must you consider before strategizing with her? It is important for example to consider the state in which Ardenia is seeking employment—does this state have laws that make it illegal for an employer to ask a job applicant about arrests that did not lead to convictions? If the state allows employers to ask about, consider and make hiring decisions based on arrests that never led to a conviction, can you have that arrest expunged or sealed in your state?*

*If Ardenia has never been convicted of a crime, ask her if she has ever been denied employment because of her dismissed cases. For example, in Illinois, it is illegal to deny someone employment because of dismissed criminal cases. If Ardenia says she has been denied employment because of her dismissed cases, you should inquire as to whether she has any documentation from the potential employer that explicitly states that her dismissed cases are the reason for the denial. In Illinois, Ardenia is eligible to expunge her case dismissals, and those arrests will no longer be accessible to employers.*

Once you have taken steps to help the survivor position themselves in the most favorable light possible, you can then prepare them for the job interview and application process.

### **Job interview: What to do if a survivor is asked about their arrest record?**

The answer to this question depends entirely upon the state (and sometimes the locality)

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<sup>11</sup> This depends on definition and application of certificates of rehabilitation/recovery; see your state law. For example, The Legal Action Network summarizes six state laws that create “certificates of rehabilitation”, here: [http://lac.org/toolkits/certificates/summary\\_state\\_laws.htm](http://lac.org/toolkits/certificates/summary_state_laws.htm); The Vera Institute reports 10 states (9 unique states) that passed criminal justice reforms that included “certificates of recovery” between 2009-2014, found here: <https://www.vera.org/publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014>; also see LEGISLATING FORGIVENESS: A STUDY OF POST-CONVICTION CERTIFICATES AS POLICY TO ADDRESS THE EMPLOYMENT CONSEQUENCES OF A CONVICTION, 25 B.U. Pub. Int. L.J. 1

in which the survivor is seeking employment.<sup>12</sup>

- A total of 24 states have adopted various “ban the box” policies.<sup>13</sup>
  - Nine states and the District of Columbia—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—have removed the conviction history question from job applications for public and private employers, banning all employers from inquiring about a prospective employees criminal history until later in the hiring process.
  - 13 states – California, Delaware, Georgia, Louisiana, Maryland, Missouri, Nebraska, New York, Ohio, Oklahoma, Tennessee, Virginia, Wisconsin – prohibit public employers (including city and county employers in some states) from inquiring about conviction history from job applicants, but not private employers. Missouri extends this to occupational licensing agencies as well.
  - 11 states<sup>14</sup> – Florida, Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas – prohibit both public employers and occupational licensing agencies from considering arrests, but allow private employers to consider arrests that did not lead to a conviction.
  - Hawaii and the District of Columbia are the only states that also limit the use of background checks until after conditional offers have been made.
- The remaining 26 states allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction. However, many major cities in 13 of these states – Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Michigan, Nevada, North Carolina, Pennsylvania, Texas and Washington – have adopted policies and laws that extend employment protections to job applicants or limit the use of criminal records in employment decisions.

If your state has a law that **prohibits** employers from asking about prior arrests (these states are listed above), job interviewers should not ask whether the applicant has “ever been arrested.” If an employer asks this question anyway, the applicant has the right to refuse to answer. However, this is likely to raise the employer’s suspicion and the survivor may not get the job as a result.

- *If the survivor has arrests, but none resulted in a conviction*

The survivor can answer no.

- *If the survivor has arrests that did result in a conviction*

The survivor’s answer will depend on your state laws. If

**Note:** Regardless of the applicant’s answer, if a potential employer runs a criminal background check, they will obtain the information.

<sup>12</sup> Legal Action Center, *After Prison: Roadblocks to Re-Entry: A Report on State Legal Barriers Facing People With Criminal Records*, visit: <http://lac.org/roadblocks-to-reentry/index.php>. The Legal Action Center provides a menu for you to access legal rights in your particular state. Go to: [www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4](http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=4).

<sup>13</sup> See state map tool summarizing state policies: <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>; also see: Rodriguez, M.N. & Avery, B. of National Employment Law Project, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions,” December 2016, visit: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>;

<sup>14</sup> See the National Employment Law Project factsheet: <http://www.nelp.org/publication/the-consideration-of-criminal-records-in-occupational-licensing/>; also see state report cards on occupational licensing agencies and criminal records: <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>

your state does not have laws prohibiting asking about arrests (see above), then the survivor is required to disclose. Untruthful responses to this question can result in refusal to hire or the decision to fire.

- *If the survivor's arrest resulted in a conviction that was then sealed*

The law is less clear about whether a survivor can answer no to this question. It will depend greatly upon the specific wording of your state's laws. Attorneys should help the survivor to anticipate this type of situation and plan for their response.

**Case Scenario:** *Assuming now that Ardenia's arrest **did** lead to a conviction, what questions must you consider before strategizing with her? Does it make a difference whether Ardenia was convicted of a felony or a misdemeanor? Additionally, does your state provide for certificates of rehabilitation that would give Ardenia the right to be considered for the position on an individual basis? If your state does provide of certificates of rehabilitation, what steps can Ardenia take to help prove her rehabilitation?*

*If Ardenia was convicted of crime, it is important to find out what she was convicted of and whether the conviction was for a misdemeanor or felony. These distinctions could impact her ability to obtain employment. Depending on what Ardenia was convicted of, she may or may not be eligible to seal her record. In Illinois, most misdemeanor convictions and a few felony convictions can be sealed. If Ardenia's conviction cannot be sealed, she may require a certificate of rehabilitation for certain types of employment.*

*For example, if Ardenia has a felony drug conviction, she is statutorily barred from work in public schools under the Illinois School Code. To overcome this statutory barrier, Ardenia must ask the Presiding Judge in the district in which she was convicted for a certificate of rehabilitation. Evidence that Ardenia could show the Judge to prove she has been rehabilitated could include: evidence that Ardenia has advanced her education or is currently enrolled in an educational program; proof of prior or current employment, or participation in a workforce development program; proof of sobriety, or completion of a drug or alcohol treatment program; evidence of her involvement in a community organization or church; letters of support from family members or friends; or anything that demonstrates that Ardenia has made positive changes in her life since her last contact with law enforcement.*

## **Job interview: What to do if a survivor is asked about their conviction record?**

Job applicants should answer questions about prior convictions truthfully. But, before answering, they should be sure to respond only to the specific question asked. Below are some examples:

- *Have you ever been convicted of a crime?*

If an interviewer only asks about convictions, the applicant does not need to reveal prior arrests that did not result in a conviction. Convictions generally include felonies, misdemeanors, or violations that are not sealed.

- *Have you been convicted of a crime in the past seven years?*

If an employer asks whether the applicant has been convicted of a crime in the past seven years, and their conviction took place more than seven years ago, she can answer no.

### **Practice Tip**

If the survivor's criminal record requires that she answer yes to one of the questions, think with them ahead of time about whether it would be beneficial to share the context of the conviction. Was the conviction related to the domestic violence she suffered? If so, partner with them to consider the risks and benefits of sharing that information with a potential employer. While some employers may see the abusive context as a justification for prior criminal conduct, others may (consciously or subconsciously) disfavor individuals who are victims of domestic violence. If the benefits of sharing the context of the abuse seem worthwhile, be sure to brainstorm strategies that are likely to mitigate the possible risks.

- *Have you ever been convicted of a felony?*

If the survivor has violations or misdemeanor convictions on their record but no felonies, she can honestly answer no to a question focused only upon felonies.

### **Gather evidence of “rehabilitation”**

A job applicant can provide information to persuade a potential employer to hire them despite their criminal record. Evidence of “rehabilitation” aims to show the potential employer that the applicant has taken steps to improve their life, since their last conviction. If, after thinking together, you and Ardenia feel that mentioning the domestic violence and coercion she’s experienced is “too risky,” you write a letter to potential employers detailing Ardenia’s involvement in support group, therapy, the effort she’s continued to put into taking dental hygiene classes, and her involvement with Kayla’s new school.

### **Practice Tip: Re-presenting Survivors**

Note that, where the survivor’s criminal conduct was coerced or she was wrongly convicted, this legal language may feel condescending. Acknowledge that with the survivor, and enlist them in the practical task of evidencing the agentic (even heroic) steps that she has taken to better their life and that of their children, despite the risks of abuse. By shifting the narrative, you may persuade an employer to not only overlook their criminal record but actually to value their resilience, resourcefulness, and strength—all important qualities for an employee.

Or, you and Ardenia talk for a while about the job and the employer, trying to assess whether the employer would be sympathetic to Ardenia’s plight. You recall that previous domestic violence survivors have worked there before and had a good experience. (Or insert other indicia of organizational readiness, e.g. the employer is an agency that works with trauma survivors, the boss has had a personal experience with domestic violence, etc.). So, you draft a letter that highlights the long history of abuse, explains the arrest (i.e. self defense, Andre’s false reporting), and then details the many ways in which she

### **Affirmative Actions Proving Rehabilitation**

- ❖ Attended school for at least sixth months, are now in school, and have a positive school record;
- ❖ Participated in a job-training program
- ❖ Has been employed for at least six months with a positive record;
- ❖ Completed or currently involved in counseling or other social service programs to deal with the problem that led to a criminal justice outcome;
- ❖ Received a Certificate of Relief from Disabilities or Certificate of Good Conduct. As mentioned earlier, if a state law says that applicants cannot work in a field due to a prior conviction, these certificates can remove an absolute bar to hiring for the position by allowing employers to consider the certificates as evidence of rehabilitation;
- ❖ Parole or Probation Officer recommendation (negative drug tests, compliance with requirements, character);
- ❖ Community involvement (example: letter from clergy); or
- ❖ Volunteer work for a school, non-profit, or other community groups (example: letter saying she has made a contribution and is dedicated).<sup>1</sup>

has worked to obtain economic and physical safety for herself and Kayla, pursuing an education, taking dental hygiene classes, advocating for Kayla at school, and now seeking alternative housing and legal protection against Andre's future abuse. You further highlight how this job will provide Ardenia with an opportunity to gain greater economic stability and safety.

## Employers use of consumer & credit report information to obtain criminal record information

Employers are permitted to use consumer report information for a criminal background check, as long as they comply with the federal Fair Credit Reporting Act<sup>15</sup> (FCRA) and state laws. While the FCRA is intended to promote accuracy, fairness, and privacy of information in the files of consumer reporting agencies (CRA),<sup>16</sup> criminal information can still contain inaccuracies.

### Practice Tip

The Fair Credit and Reporting Act requires that employers give notice and get permission from the job applicant before they request information from a CRA.<sup>17</sup> The employer must obtain written authorization from the job candidate. Standard notification language that appears on an application for employment is not acceptable. See the Credit Reporting & Repair and Debt chapters in this Guidebook for more details.

To obtain a background check, most private employers use companies that provide professional background screening services and/or commercial databases with collected criminal records. These private data providers and screening services are considered CRAs under the FCRA.

The FCRA provides the following protections:

- Any employer who uses information from a consumer-reporting agency (CRA) to deny employment must inform the job applicant and provide the name, address and phone number of the CRA that provided the consumer report.
- A CRA must give the information contained in an individual file upon request to that

individual and also provide a list of everyone who has requested it recently. There is no charge for the report if an employer has taken action against the individual because of information supplied by the CRA and if the request occurs within 60 days of receiving notice of the action.

- If a file contains inaccurate information, the CRA must investigate the item(s) in question and provide a written report of the investigation to the individual and a copy of an amended report if the investigation results in any change. If no change is made to the disputed item, the person may submit a statement for their file.
- Inaccurate information must be corrected or deleted within 30 days of being disputed.
- If an item is disputed at the source (to the creditor or criminal record repository), the source may not report the information to a CRA without including a notice of dispute.

<sup>15</sup> Legal Action Center, *How to Gather Evidence of Rehabilitation*, visit: [http://lac.org/doc\\_library/lac/publications/How%20to%20Gather%20Evidence%20of%20Rehabilitation%207-06.pdf](http://lac.org/doc_library/lac/publications/How%20to%20Gather%20Evidence%20of%20Rehabilitation%207-06.pdf)

<sup>16</sup> See 15 U.S.C. §§1681 et seq.

<sup>17</sup> A consumer reporting agency (CRA) is a person who, for monetary compensation, regularly engages in the practice of investigating and evaluating information to provide reports to employers for the purpose of evaluating an individual for employment, promotion, assignment or retention as an employee.

- CRAs may not produce consumer reports that contain adverse information (including arrests that did not lead to conviction) more than seven years old with the following exceptions:
  - Bankruptcies may be reported for ten years;
  - Convictions may be reported without any time limitation; and
  - There is no limitation on reporting adverse information older than seven years if the individual's annual salary is \$75,000 or more.
- Access to a file is limited to people with a need recognized by the FCRA. This includes employers.

## Discrimination in employment

**Case Scenario:** *Ardenia applied for a job as an office assistant at Kayla's school where the specific job requirements have nothing to do with her conviction. However, Ardenia was not hired. She suspects that the employer did not hire her because of her criminal record. How might you counsel Ardenia in this situation? What information do you need before you can give her advice? What steps can you begin to take in order to determine why Ardenia was denied employment?*

Ask reason for denial: If a survivor suspects that a prospective employer did not hire them because of their criminal record, she might consider asking the employer for his/her reason for denying them the job. Some states explicitly provide that right.

Request criminal background report: If she is unable to confirm that the employer did, in fact, deny employment based on their criminal record, she can request a copy of the criminal background report upon which the employer relied. Once she's obtained the report, it can be examined for inaccuracies. It will be up to the survivor if this is a process she will want your assistance on, but you can offer while letting them know that nothing in the record will affect their services with your program or be entered into your files.

Dispute inaccuracies: If she finds inaccuracies, she may start a dispute process with the criminal background check company. The contact information can be found on the criminal background report itself.

Assess legality of decision: If she finds that the employer based his/her job decision upon an accurate criminal report, you can help them figure out if the decision was unlawful. It is illegal for an employer to, as a matter of policy, refuse employment to all individuals with criminal records. Employers must make individualized employment decisions using considerations that are related to the particular job requirements. *If the conviction is not related to the job requirements and/or significant time has passed since the conviction, then the employer should not consider the conviction in making employment decisions.*

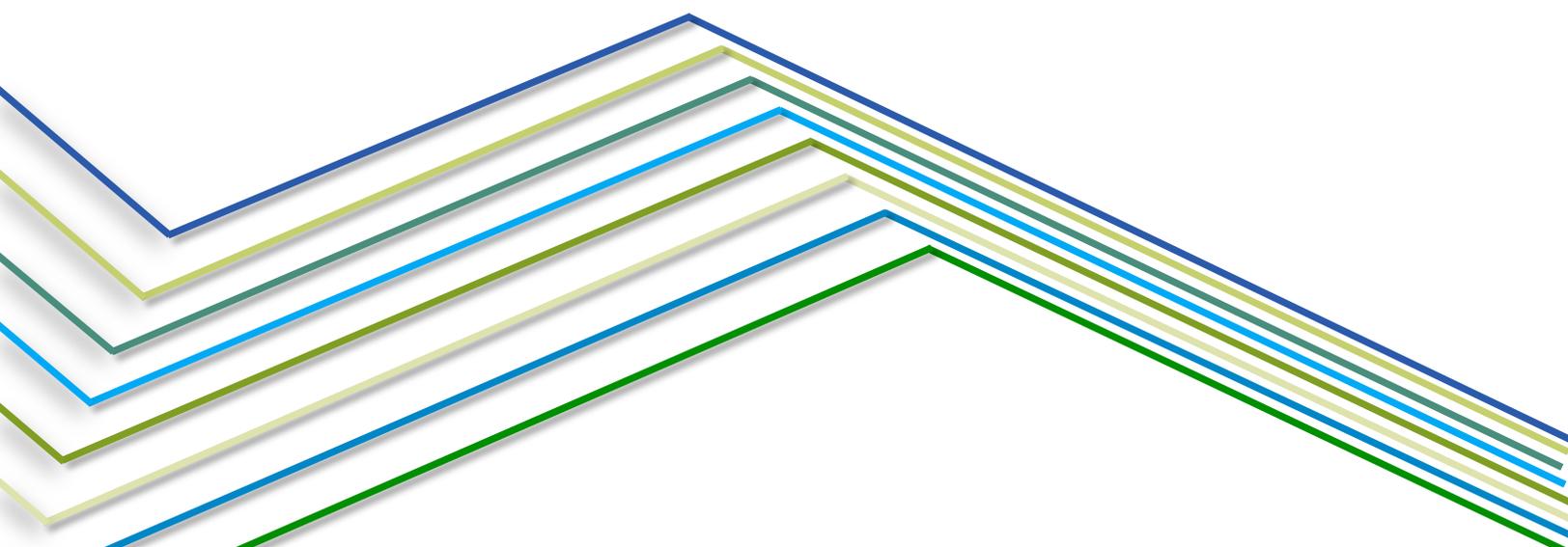
File complaint with EEOC: The Equal Employment Opportunity Commission (EEOC) is the federal agency that investigates charges of employment discrimination. The survivor will need to file a charge with the EEOC and the state Human Rights Commission before she can sue the employer in court for discrimination. You can help advise them on whether she has a case of employment discrimination. See the Workplace Discrimination chapter in this Guidebook for more here.

## Conclusion

For many reasons, survivors may find themselves with a criminal record. A criminal record poses barriers to employment, housing, education, public assistance, and other resources necessary for long-term safety and stability. Advocates should partner with survivors, advocate with employers, and implement innovative models that address survivors' safety and employment needs and enhance their access to opportunities for economic security and physical safety.

## Additional Resources

- State Law Guides
  - National Employment Law Project (2016), Ban the Box State & Local Law Guide: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>
  - Legal Action Center (2009), Roadblocks to Reentry State Law Search Tool: <http://lac.org/roadblocks-to-reentry/main.php?view=law>
  - Vera Institute for Justice (2014), Collateral Consequences Reform Legislation Report (including expungement, certificates of relief, and innovative reforms for discrete collateral consequences): <https://www.vera.org/publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014>
- For Survivors:
  - The Legal Action Network created a booklet for people with criminal records: Lowering Criminal Record Barriers: Certificates of Relief/Good Conduct and Record Sealing: [http://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers\\_rev3.pdf](http://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers_rev3.pdf)
  - CSAJ's 2009 tool for survivors: [Criminal Records & Employment Rights: A Tool for Survivors of Domestic Violence](#)
- For Programs and Advocates
  - [Equal Employment Opportunity Commission](#)
    - Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (2012): [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)
  - Reentry Resources from the National Clearinghouse for the Defense of Battered Women: [http://www.ncdbw.org/reentry\\_resources.htm](http://www.ncdbw.org/reentry_resources.htm)
    - Reentry Webinar Series: [http://www.ncdbw.org/reentry\\_recordings.htm](http://www.ncdbw.org/reentry_recordings.htm)
  - Start your own initiative: Fair Chance/Ban the Box Toolkit from the National Employment Law Project (2015): <http://www.nelp.org/content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf>
  - Michigan Coalition Against Domestic & Sexual Violence: Best Practice Toolkit for Working with Domestic Violence Survivors with Criminal Histories (2011): [http://www.mcdsv.org/projects/Toolkit/Files/Best\\_Practice\\_Toolkit\\_Entire\\_Document.pdf](http://www.mcdsv.org/projects/Toolkit/Files/Best_Practice_Toolkit_Entire_Document.pdf)
    - Open Doors Project: Innovative demonstration project to enhance advocacy for survivors with criminal histories, or who's abusive partners have criminal histories: <http://www.mcdsv.org/about-us/our-work/open-doors-project.html>



# GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR  
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



**CENTER FOR SURVIVOR  
AGENCY & JUSTICE**

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This project is supported by Grant No. 2014-TA-AX-K023 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in the publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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