

Evidence that can be used to prove domestic violence in a civil case

The Missouri dissolution statute provides that, “If the court finds that domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, has occurred, the court shall make specific findings of fact to show that the custody or visitation arrangement ordered by the court best protects the child and the parent or other family or household member who is the victim of domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, from any further harm” [see subsection 452.375.13, RSMo]. The dissolution statute further provides that, “If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law” [see subsection 452.375.2(6), RSMo].

In a recent decision, the Missouri Supreme Court clarified that if evidence of domestic violence is presented to the trial court in a child custody dispute within the context of a dissolution of marriage, then the court is required to make a finding as to whether there was domestic violence [see *Mund v. Mund*, 7 S.W.3d 401 (Mo.banc 1999)]. And, if the trial court finds there is domestic violence, then it must make the findings of fact to show how the custody arrangement best protects the child and victim. If the court finds a pattern of domestic violence, but grants custody to the abusive party, it must make findings of fact and conclusions of law justifying that decision in relation to all of the statutory factors the court is required to consider in granting custody. The *Mund* decision specifically adopts the analysis and standard articulated in *Gant v. Gant*, 892 S.W.2d 342 (Mo.App. W.D. 1995), and the *Mund* decision specifically rejects the case of *Kinder v. Kinder*, 922 S.W.2d 398 (Mo.App. W.D. 1996), which required “irrefuted evidence” of domestic violence before the court is required to make findings and conclusions.

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A survivor of domestic violence involved in a custody case must present convincing evidence. It is important for an attorney representing a battered woman to introduce substantial, reliable, authoritative and corroborative evidence that domestic violence has occurred and that the opposing party was the primary aggressor.

As a result of the *Mund* ruling, trial courts in Missouri no longer should require “irrefuted evidence” of domestic violence. However, two recent appellate cases have eroded the holding in *Mund*, and the rulings seem to retreat to the “irrefuted evidence” standard [see *Winslow v. Winslow*, 14 S.W.3rd 690 (Mo.App. E.D. 2000) and *Bedwell v. Bedwell*, WD 58187 (April 10, 2001)]. Therefore, a survivor of domestic violence involved in a custody case must present convincing evidence of domestic violence for the court to find that there was domestic violence. The stronger that evidence is, the more likely that custody will be awarded to the survivor and not the abusive party. Thus, it is important for an attorney representing a battered woman to introduce substantial, reliable, authoritative and corroborated evidence that domestic violence has occurred and that the opposing party was the primary aggressor. It is best if at least some of the evidence emanates from a source that would be difficult for the trial court to ignore. Of course, counsel for a battered woman probably will have her testify to the abuse, but attorneys should be sure that her testimony is corroborated by other evidence.

The definition of domestic violence for custody and dissolution purposes is articulated in *Gant* as that found in subsection 452.400.1, RSMo, which states that, “in considering whether to grant visitation rights to a spouse found to have committed domestic violence, the court shall consider the parent’s history of infliction, or tendency to inflict physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault on other persons. . . .” The appellate court in *Gant* went on to say that this definition is consistent with that found in the Adult Abuse Act, Chapter 455, RSMo [*Gant, supra* at 345]. The act defines domestic violence as “attempting to cause or causing bodily injury to a family or household member, or placing a family or household member by threat of force in fear of imminent physical harm” [see section 455.200(2), RSMo]. The *Mund* decision clarified the meaning of the word “history,” ruling that the trial court must consider “any and all instances of past harm or attempted harm by either parent.”

Despite the clarification by the Missouri Supreme Court in *Mund* as to the meaning of the word “history,” appellate courts previously have found that two incidents might not constitute the requisite pattern of abuse [see *Hamilton v. Hamilton*, 886 S.W.2d 711, 715 (Mo.App. W.D. 1994), where the court found that two incidents during a 20-year marriage, in themselves, did not constitute a pattern of domestic violence]. Therefore, evidence of a pattern of domestic violence should be established by evidence of multiple incidents of abuse, if possible, along with evidence of the opposing party asserting power over the battered woman and exhibiting controlling behaviors, such as isolating her, verbally abusing her, threatening her, and being overly jealous and possessive. Evidence of power and control probably is most effective after the presentation of expert testi-

mony about the dynamics of domestic violence because these behaviors often are a part of those dynamics.

As in all cases involving domestic violence, it is important to show that the survivor was injured and afraid. Oftentimes, in adult abuse cases, the petitioner will not be granted an Order of Protection unless she testifies that she is afraid of the respondent.

The existence of domestic violence is just one of the factors that the court must consider when making a custody decision. Two other important factors embody the public policy of the state to ensure that children have frequent and meaningful contact with both parents after the dissolution. These factors are:

- ▶ “The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child” [see subsection 452.375.2(2), RSMo], and
- ▶ “Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent” [see subsection 452.375.2(4), RSMo].

Witnessing domestic violence is harmful to children. In addition, a child is much more likely to be abused by the perpetrator of violence against his or her mother than by a parent who is not abusive. This increased risk to the child is often important in and of itself in making a custody determination, and expert testimony about this should be presented to the court. In addition, the increased risk might form the basis for the mother’s decision to restrict the abusive parent’s access to the child. While this might be a legitimate response by the mother, the courts have and will consider it when making custody determinations in light of the factors outlined previously. Women have lost custody of children at least partially because of their denial of access, which occurred in the *Mund* case at the trial level. Therefore, counsel for a battered woman in a custody dispute should offer evidence that will justify the mother’s restricting the abusive parent’s access to the child.

Determining the primary aggressor in a pattern of domestic violence can be crucial to a battered woman’s custody case. Some cases have found “mutual domestic violence” if it appears that the woman has harmed the man. There is substantial research to show that women sometimes fight back. A man with scratches and torn clothing can indicate that the woman tried to defend herself and that she was not the aggressor. Counsel for a battered woman should consider proffering expert testimony to support the argument that the man’s injuries are consistent with the woman acting in self-defense.

Finally, a battered woman might be questioned about her decision to stay in a relationship, even if she has been abused. There is significant research about women being at higher risk for injury and death when they

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leave. A woman might have legitimate reasons for not leaving, including safety, lack of resources and no place to go. These reasons should be explored, and testimony should be elicited on this issue. Failing to explore this issue can leave the impression that the situation was not that bad.

Types of evidence that can be presented at trial to prove domestic violence

JUDICIAL FINDINGS OF DOMESTIC VIOLENCE

This finding can occur both civilly and criminally. A civil finding can occur as a result of the issuance of an Order of Protection. However, a Consent Order of Protection will not contain this finding, so if a finding is likely to be important in the future, a Consent Order of Protection probably should be avoided. A criminal finding can include a conviction or plea for a domestic violence-related crime. Such a crime is likely to be an assault, with the abuser as the defendant and the battered woman as the victim/witness. These findings can be admitted into evidence by introducing a certified copy of the court order through a witness, such as a clerk, who can authenticate the document. However, the court might consider the document self-authenticating and receive it into evidence through judicial notice.

WITNESSES TO ASSAULTS OR INJURIES WHO ARE NOT FRIENDS OR RELATIVES OF THE BATTERED WOMAN

A witness can be a police officer, doctor or stranger, but the testimony is more reliable if that person has no relationship with the battered woman. If the witness is testifying as an expert, she or he will have to be qualified as such before being allowed to testify.

PHOTOGRAPHS OF INJURIES

Photographs are admissible as demonstrative evidence if they are properly authenticated and relevant by reason of their tendency to prove or disprove some material fact or because they illustrate or corroborate the testimony of witnesses [see *23 Mo. Prac. Evid.* (Schroeder) section 1103.1 (1992)]. Photographs generally are offered into evidence in conjunction with testimony. Be sure that someone can properly authenticate the photographs. Authentication occurs when the witness through which the photographs are introduced testifies that they were taken at or near the time of the injury, and that they are a fair and accurate representation of the way the person looked at the time. The person taking the picture need not be the one to authenticate the photos; it can be anyone who is familiar with the subject and who is competent to testify from personal observation.

TAPE RECORDINGS OF TELEPHONE MESSAGES OR CONVERSATIONS CONTAINING THREATS

Tape recordings of telephone messages or conversations generally are admissible upon a sufficient showing of trustworthiness of the reproduction and identification of the voice of the person alleged to have been the speaker. The foundation elements for admissibility are contained in *State v. Spica*, 389 S.W.2d 35, 44 (Mo. 1965). These include:

- ▶ a showing that the recording device was capable of taking testimony,
- ▶ a showing that the operator of the device was competent,
- ▶ establishment of the authenticity and correctness of the recording,
- ▶ a showing that changes, additions or deletions have not been made,
- ▶ a showing of the manner of the preservation of the recording
- ▶ identification of the speakers, and
- ▶ a showing that the testimony elicited was voluntarily made without any kind of inducement [see 1 *Missouri Evidence*, section 9.3 (The Missouri Bar, 4th ed. 1993)].

A Missouri statute prohibits the recording of conversations in some instances. However, there is an exception in the statute, which provides that if the person recording the conversation is a party to that conversation, the recording is legal in most instances [see section 542.402, RSMo]. Counsel advising a client about the legality of recording conversations should check both the state and federal law regarding wiretapping. The federal law can be found at 18 U.S.C. sections 2510-2520.

WRITINGS CONTAINING THREATS

Private writings can be introduced into evidence if authenticated by any witness with knowledge that the writing is what it is claimed to be. Proof may come from a person who is familiar with the signature or handwriting. However, the mere fact that the letter purports to be written and signed by a particular person and received by the addressee is not sufficient. There must be proof that the purported sender in fact executed it or proof of the sender's handwriting or authority [see *Catron v. Catron*, 492 S.W.2d 172, 173-4 (Mo.App. 1973) cited in 23 *Mo. Prac. Evid.*, *supra* at section 901.1.]

Proof of a writing may be made by the testimony of a lay witness who has been shown to be sufficiently familiar with the writing of the person whose handwriting is in dispute to be able to form and express an opinion as to the genuineness of the disputed writing or signature. The extent of the lay witness' knowledge and his interest, if any, in the outcome of the case, are admissible to affect the weight to be given the witness' testimony but do not affect its admissibility [see *Klaus v. Zimmerman*, 174 S.W.2d 365, 368-69 (Mo.App. 1943) cited in 23 *Mo. Prac. Evid.*, *supra* at section 901.2]. The identity of the author of the letter also can be proved through circumstantial evidence [see *State v. Copeland*, 928 S.W.2d 828, 846 (Mo.banc

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An attorney cannot pick and choose which parts of the record or testimony she or he wants admitted. Therefore, counsel should carefully review the records and information from witnesses before it is proffered to see if any potentially harmful evidence exists.

1996) where the identity was established through the content of the letter, cited in *23 Mo. Prac. Evid., supra* at section 901.2 Supp.].

POLICE REPORTS

Police reports can be admitted into evidence in two ways. The first is the business records exception to the hearsay rule [see *State v. Jordan*, 664 S.W.2d 668, 672 (Mo.App. E.D. 1984)]. However, the entries made must be based on the entrant's personal knowledge or on information received from persons who had a business "duty to transmit it to the entrant." The statute that governs admission of business records is known as the Uniform Business Records as Evidence Act [see sections 490.660-490.692, RSMo]. To get a business record into evidence, the custodian of records or the individual who created the record (the police officer) must be subpoenaed, or the record can be introduced through affidavit of the custodian in accordance with the procedure delineated in the statute [see *23 Mo. Prac. Evid., supra* at section 803(6).1].

Even if the police report is admissible, not all portions of the report might be admitted. Only those portions to which the police officer could have testified had he or she been present may be admitted through the police report. For example, if the police report contains a statement that a victim made, it only can be admitted with the report if it falls within an exception to the hearsay rule. If the victim's statement is an excited utterance, this is an exception to the hearsay rule, and the statement probably will be admitted with the police report.

The second way that police reports also can be admitted into evidence is under the public records exception to the hearsay rule. Again, the reports must be based on the author's own investigation and knowledge, and made pursuant to a duty imposed by law [see *23 Mo. Prac. Evid., supra* at section 803(8).1].

HOSPITAL RECORDS

Hospitals are a business within the meaning of the Uniform Business Records as Evidence Act, and therefore their records are admissible as business records [see *Allen v. St. Louis Public Service Co.*, 285 S.W.2d 663, 666 (Mo. 1956)]. Again, parts of the record might be inadmissible on grounds of hearsay. Hearsay statements in a hospital record pertaining to the manner of injury that make no reference to the diagnosis and treatment of the patient are not admissible [see *State v. Thrasher*, 654 S.W.2d 142, 144 (Mo.App. E.D. 1983)] unless they are admissible under some other exception to the hearsay rule. For example, statements that are made close in time to the assaultive event while the patient is in distress might be considered excited utterances. References to a patient's medical history might

be received along with the remainder of the record if they were “necessary to observation, diagnosis and treatment and essential to the examination and care of the patient” [see *State v. White*, 633 S.W.2d 173, 176 (Mo.App. W.D. 1982) and *23 Mo. Prac. Evid.*, *supra* at section 803(6).1].

TESTIMONY OF A BATTERED WOMAN

This testimony can be powerful, but it also must be comprehensive, covering those areas that are troublesome in case law. The witness should testify to as many physically abusive events as she can, as well as other threatening and controlling behaviors on the part of the opposing party. This will create a history of abuse and pattern of abuse required under the statute and case law. The witness also should testify that she sustained injuries, and, ideally, that she sought treatment for those injuries of which there are medical records or photographs. If she did not seek treatment, there should be evidence adduced on that issue. The witness also should testify that she was afraid. If she did not seek an Order of Protection, call the police or leave, or if she restricted access to the children, she should testify to explain her reasons. If she injured the opposing party, she should testify about the injuries and that they were inflicted in self-defense.

RECEIPT OF SERVICES FROM DOMESTIC VIOLENCE PROGRAMS

Any evidence from a domestic violence service provider about a particular battered woman can be offered only with her consent. Also, once testimony or evidence is provided about a certain issue, it might open the door to other evidence being available to the court that could be harmful to the woman. Counsel might want to enter evidence about injury, but once the records on that question are made available, information in the record about drug use by the woman, for example, might become available should opposing counsel choose to introduce it. An attorney cannot pick and choose which parts of the record or testimony she or he wants admitted. Therefore, counsel should carefully review the records and information from witnesses before it is proffered to see if any potentially harmful evidence exists.

In addition, several federal and state grants prohibit the release of information about victims of crime; releasing such information without a service recipient’s consent could jeopardize continued funding for the domestic violence program. While it is true that this prohibition can be overridden with the consent of a battered woman, it is not a good practice to systematically release records because the service provider’s argument about records being confidential will not be as persuasive in the future.

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EXPERT TESTIMONY THROUGH EXPERT WITNESSES

Judges might not know about the dynamics of domestic violence. This can lead them to overlook obvious clues and patterns that indicate domestic violence is present and the identity of the primary aggressor. Judges can be educated about the dynamics during the trial with expert testimony. This evidence can assist them in making a just decision in the case.

According to The Missouri Bar's Continuing Legal Education publication on evidence, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, a witness qualified as an expert on that subject, by knowledge, skill, experience, training, or education, may testify thereto" [see 1 *Missouri Evidence*, Chapter 6 (The Missouri Bar, 4th Ed 1993)]. An expert, if allowed by the court, can testify about the dynamics of domestic violence to put the experience of the battered woman in context for the judge. Instead of controlling behaviors being irrelevant, the judge will understand that they are part of the pattern of abuse. A person qualified as an expert can testify in the form of an opinion if it will assist the trier of fact. For example, a doctor can testify that marks and bruises resulted from physical abuse [see *K.S. v. M.N.W.*, 713 S.W.2d 858, 864-65 (Mo.App. W.D. 1986) wherein a doctor so testified in a child abuse case].

Researchers or practitioners, such as psychologists, have been used in custody cases to testify to a variety of issues, including whether domestic violence is present. Courts in other states have recognized victim advocates as expert witnesses. This might be a less expensive alternative to a professional expert, but the testimony might not be given as much weight.

EVIDENCE OF THE OPPOSING PARTY'S PROPENSITY TO BE VIOLENT

The court will be more likely to believe the opposing party was abusive if he has a prior history of violent conduct. In a civil trial, counsel might have less trouble admitting such evidence because the court might be less rigid about the relevance of the evidence. Possible evidence could be records of prior convictions, prior violent incidents and prior Orders of Protection.

TESTIMONY BY WITNESSES WHO ARE RELATED TO THE BATTERED WOMAN

These witnesses are probably the least reliable in the eyes of the court because they are potentially biased. However, they can be used to corroborate the testimony of other witnesses regarding the assaultive and controlling behavior of the opposing party.