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**Where the lines cross**

# To Plead or Not to Plead

## Domestic assaults and unforeseen consequences

by Scott A. Surovell

**T**he fact pattern involving Steve and Sherry may seem far-fetched, but in the context of domestic violence, it is not uncommon in either the variety of problems or the complexities of the relationships involved. It presents many questions, choices, and challenges for parties and their counsel in the case, and while an initial decision to take a small legal step may at first seem insignificant, some actions can turn into snowball capable of obliterating anything in its path. When making decisions in domestic violence prosecutions, counsel needs to be mindful that these proceedings can have consequences far beyond the immediate impacts in the criminal and visitation proceedings.

### **Ascertaining objectives**

The first question that any attorney facing these problems from either side is what are the client's objectives? This may seem like an easy question, but clients are not always the most rational actors after having been on the giving or receiving end of a physical confrontation with their spouse.

The emotional response of a victim spouse can range from dejection and feelings of responsibility for the confrontation to outright rage, anger and a desire for retribution. The response of the aggressor spouse can range from guilt and complete submission, to defiance, outrage, and continued anger from having third parties such as the police, the Courts, and attorneys involved in the separation of the family.

Sherry's situation is further complicated by overlaying bipolar mood disorder onto the "normal" reactions to this situation. Many individuals with bipolar mood disorder can lead perfectly normal lives provided that they properly medicate. However, such individuals also have a propensity to not follow their medication

regimes and manic states can result in very faulty perceptions of reality. Sherry's counsel should inquire into the status of Sherry's condition, whether Sherry is accepting and realistic about her illness, and make an independent assessment as to whether it is under control.

Counsel for both Sherry and Steve need to debrief them as to what occurred factually and take stock of their relative emotional states and how that might color their perception and recollection. It is only then their counsel can have a clear discussion about the client's situation and their short, medium, and long term goals regarding their relationship with their spouse. Once those objectives are ascertained, then counsel can begin to craft a strategy to maximize the possibility of achieving those objectives.

Additionally, counsel for both parties need to be extremely mindful of the family's tolerance for legal expenses. Steve and Sherry clearly are of modest means and the hypothetical presented in this situation has the potential to put many attorneys' children through college with the various opportunities for conflict that run throughout. Counsel need to pick and choose their battles carefully and doing so requires making thoughtful choices with the short, medium and long-term in mind.

### **Do these parties want to continue this marriage?**

To a rational observer, this may not appear to be a healthy relationship for either Steve, Sherry or the four children orbiting their turmoil. However, it is not unusual for both the husband and wife to view this situation as acceptable or not unusual and to want to maintain their relationship.

It is not unusual at all for abuse victims to reconcile with abusers in the face of protective orders, bond restrictions, or pending

litigation. It is also not unusual to see protective order or domestic assault litigants in court for their second or third (or fifth) rounds of protective orders and domestic assault charges. Part of Sherry's counsel's challenge is to anticipate the possibility that she may feel an emotional need to reconcile and talk that through with her before any actions are taken. Steve's counsel may also want to anticipate a reconciliation and advise Steve of the risks attendant to protective order violations.

In the hypothetical, it is not clear whether Steve has been physically aggressive before the described incident, but given that he has "a violent temper," this kind of incident probably has occurred previously. Counsel who handle volumes of domestic assaults frequently come across victims involved in long-term abusive relationships who irrationally blame themselves for "bringing on" a situation, and often feel a compulsion to do whatever possible to assuage their spouse's anger "for the sake of their children" even post separation, and achieving their objectives can involve shooting at a moving target. While none of us signed up to be self-esteem coaches or psychologists when going to law school, an effective counsel and advocate, must also be capable of distinguishing long-term chronic abusive situations from isolated incidents, and guiding such clients towards realization that long-term abusive situations are not healthy.

On the other hand, an aggressor such as Steve frequently feels justified in his or her actions, pins the blame on their spouse, is willing to do "whatever it takes" to justify their actions in Court, and frequently feels that the system is responsible for destroying their marriage. Steve's attorney needs to carefully analyze Steve's position taking into account his anger issues, and if reconciliation is being discussed, to counsel as to whether continued cohabitation with Sherry is in the best interests of him or his children.

### **The Protective Order**

Steve's counsel's initial decision should be whether to appeal the Protective Order entered against Steve to the Circuit Court. If an abuse finding is finalized, it could create significant consequences for Steve's employment, his exposure in a custody and visitation case, and in an equitable distribution proceeding (discussed more fully below) due to the quasi-criminal nature of protective orders. Steve's objective would likely be to get it dismissed without any finding for these and other reasons.

One advantage of pressing a defense of the protective order proceeding is that it serves as an efficient means of fully locking in the "victim's" story on the record and under oath if there is a parallel criminal proceeding, and in the current fact pattern, Steve's worst case scenario on the protective order would not get much worse than existing protective order.

Additionally, subjecting a victim to cross examination on a single incident multiple times (e.g., potentially two protective order hearings, two criminal hearings, and pendente lite and final custody and equitable distribution hearings) times frequently results in inconsistencies which can be ultimately leveraged into credibility problems at some point of the process. Also, Sherry may grow weary of having to recount the incident or finance the litigation expense and be willing to compromise her position into compromising the Protective Order either through a pendente lite order or dropping the matter altogether.

From Sherry's point of view, the enhanced remedies for protective order violations would likely give her peace of mind if she still fears Steve's temper and will also help ensure her role as primary custodian of the children. Her counsel should press to keep the order in place. It can create substantial leverage.

### **Should Sherry bring criminal charges?**

Sherry's counsel needs to carefully discuss with Sherry whether it is in she and the children's best interests to bring criminal charges in this situation. There are many questions wrapped up in this inquiry.

### **Should Sherry jeopardize Steve's employment and activities?**

First, a criminal conviction could severely impact Steve's employment and future employability which can have impacts on Steve's ability to provide support to Sherry and the children in both the short, medium and long term. Steve is a security guard. His employer would be very likely to fire him given his duties and he would likely be foreclosed from further employment as a security guard. Additionally, given the scrutiny given to the Boy Scouts of America over the years, a criminal conviction (or a protective order) could create issues regarding Steve's continued role as a Boy Scout leader for the parties' 12- and 8-year-old sons.

Employers frequently fire and/or refuse to hire individuals with a documented history of violence when the employment environment involves personal interaction with large numbers people or children. Additionally, misdemeanor convictions can have implications for security clearances which are not uncommon in Virginia's military and government contractor-rich environment. Sherry needs to carefully consider whether she wants to place that in jeopardy.

### **Can a crime be proven?**

Next, there is a question as to whether a crime can even be proven and whether it is even worth running this gauntlet. There are two acts which potentially bring Steve into the criminal arena. The first is kicking the door and the second is his "lunge" at Sherry.

Assault and battery and domestic assault are under separate code sections and which contain material differences. The General Assembly has also elected to create a statutory procedure authorizing a Court to continue a domestic assault and battery charge for a period of time to be dismissed upon receiving a guilty plea or making a finding of guilt, and the accused meeting certain conditions.<sup>1</sup> However, unlike §18.2-57 of the Code of Virginia, the domestic assault and battery section, §18.2-57.1 of the Code of Virginia, does not criminalize a simple assault upon a family or household member.<sup>2</sup>

In this fact pattern, it is not clear at all whether Steve knew that Sherry was immediately behind the door when he kicked it. Therefore, his kicking of the door would not constitute an assault and battery if he lacked any intent to do bodily harm to Sherry by kicking the door.<sup>3</sup> However, Steve's "lunge" at Sherry could constitute a technical simple assault (and no battery) under §18.2-57.

If the offense was charged as a domestic assault and battery §18.2-57.2 (which is very likely), a simple assault would not be sufficient to violate §18.2-57.2 and it could result in a not guilty finding. If a charge were actually brought under §18.2-57, then Steve could have some exposure to a conviction and because suspended imposition of sentence is not available under §18.2-57.3 for a simple assault charge, the resulting conviction could have lasting employment consequences.

Sherry and her counsel also need to consider whether bringing a criminal charge this far after the incident, would be worthwhile. Many judges have an intuitively negative reaction to the delayed filing of assault and battery charges because they appear calculated and less spontaneous. If charges were not brought in Steve and Sherry's situation within a few days, they tend to get stale very quickly.

Also, from a criminal point of view, the biggest shortcoming of a criminal prosecution in this case may be an evidentiary one. Criminal prosecutions such as this one commonly rise and fall on corroboration. Provided that no children testify (discussed below) and that Sherry confirms that Steve did not know she was immediately behind the door, the only testimony to the "lunge" would likely be Sherry's and there would likely be no corroboration of the "lunge." Sherry could easily invest much time, energy, and money into a losing prosecution. Also, the emotional consequences of an acquittal - the relative emotional boosts the outcome provides to the winner and loser - can unwittingly alter the momentum of divorce litigation and can significantly alter settlement dynamics.

### **Does Sherry want to run the gauntlet?**

Given what is at stake for Steve, he also could defend himself very aggressively. Counsel for Steve should consider issuing subpoenas for Sherry's medical records. Before this year's repeal of §20-124.3:1, this was a back door way to get into a

spouse's mental health records which were formerly very difficult to obtain when visitation was at issue. The examination of these records could create significant problems for Sherry in the custody litigation depending upon their content, and the emotional drain associated with undergoing repeated intense cross-examinations regarding the incident and her psychiatric history would be troublesome.

### **Will the children run the gauntlet?**

There is also a question as to whether any of the children may be asked to testify. In this situation, the 15-year-old may have witnessed the incident. Having a child testify in the criminal context on behalf of one parent against another parent can be very destructive of their relationship with that parent. Sherry and Steve's counsel should discuss this in depth before either chooses to put this child on the stand.

### **Is a suspended imposition of sentence a good idea?**

From Sherry's point of view, if Steve were to plead guilty to domestic assault and receive a suspended imposition of sentence under §18.2-57.3 with conditions involving anger management, uniform good behavior, and no further abuse, that would be an acceptable outcome. However, a stipulation of guilt or finding of guilt can still be a problem for Steve's employment. Moreover, a guilty finding completely forecloses any possibility for expungement which can also affect Steve's future employability.<sup>4</sup>

### **Will the incident impact the divorce?**

The effects of a domestic assault in the family law arena can be unpredictable. As was discussed above, a protective order, conviction, or even a suspended imposition of sentence can affect a spouse's employment or future employment. This can impact support, custody, and visitation.

### **Will the incident impact support?**

In *Edwards v. Lowry*, 232 Va. 110, 348 S.E.2d 259 (1986), the Supreme Court of Virginia has squarely held that a parent's termination from employment due to a criminal conviction is a voluntary act or voluntary unemployment purposes of imputing income to the parent at their former salary.<sup>5</sup> Therefore, Steve's counsel cannot assume that if Steve is terminated from his job as a security guard due to the protective order or a conviction, that Steve's child support obligation will be calculated using a reduced income.

Sherry should be advised by counsel that although Steve's support obligations may be calculated using his former income, his actual lack of income could still result in non-payment which means increased litigation expenses and her having to go without expected support until Steve is able to find alternate employment at a comparable income.

She ought to consider these factors before pressing either criminal charges or a protective order when nearly the same relief can be ordered pursuant to §20-103 of the Code without the quasi-criminal consequences of a protective order.

Additionally, although spousal support would likely not be a factor in this case given the child support is payable for three children, all counsel also need to be mindful that the existence of a fault ground (such as cruelty) and “the factors and circumstances which contributed to the dissolution of the marriage” are going to be factors in a court’s decision to award or refuse spousal support,<sup>6</sup> and a protective order or domestic assault conviction can always corroborate an attempt to leverage those factors in favor of the victim spouse. This is also discussed more fully below regarding equitable distribution.

### **Will the incident impact custody and visitation?**

Section 20-124.3, makes special provision for the consideration of domestic assault in visitation disputes.

6. The propensity of each parent to actively support the child’s contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child . . .
9. Any history of family abuse as that term is defined in §16.1-228. If the court finds such a history, the court may disregard the factors in subdivision 6. . . .<sup>7</sup>

Both the protective order and domestic assault conviction can establish “family abuse” as defined in §16.1-228. Therefore, either charge can become material factors in custody and visitation proceedings.

There are different ways these allegations factor into custody and visitation proceedings. In Steve and Sherry’s situation, there do not seem to be any allegations that any abuse was ever directed towards any of the children. Therefore, most judges would likely give it reduced weight, but any parent with an anger problem, especially one resulting in some amount of violence, can present a risk to children and most courts will carefully weigh a parent’s propensity for anger and violence in a custody and visitation decision.

At a minimum, Steve’s counsel should strongly consider having Steve enroll in anger management counseling or more extensive psychotherapy. Sherry’s counsel should press to obtain a court order requiring it in any divorce proceedings if it is not part of any disposition on any criminal charges or as part of a protective order.

In addition, depending on his overall strategy and objectives, Steve’s counsel should immediately begin to locate numerous witnesses who can rebut any allegation that he has a non-violent temperament. Individuals who have interacted with him at work, in the Boy Scouts, or as a Little League coach could be excellent witnesses as to his abilities with children rebut any assertion that there is any risk of violence to the parties’ children.

From the hypothetical, it is not clear that Sherry is also necessarily a capable parent. To the extent that the children continue to struggle in her care, Steve could potentially seek primary custody of the children. If Steve were to show that Sherry’s bipolar disorder was affecting her ability to care for the children, a Court could very well find primary custody with Steve to be in their children’s best interests.

### **Will the incident impact equitable distribution?**

Some counsel, especially those with little experience with family law, sometimes express concern that a protective order finding or a domestic assault conviction may affect equitable distribution. From a strict legal point of view, this is unlikely in this hypothetical. Section 20-107.3(E)(5) provides that the Court may consider a cruelty finding in connection with an equitable distribution hearing. However, to establish cruelty, a litigant needs to establish successive acts of abuse.<sup>8</sup>

It is generally held that a single act of physical cruelty does not constitute ground for divorce, unless it is so severe and atrocious as to endanger life, or unless the act indicates an intention to do serious bodily harm or causes reasonable apprehension of serious danger in the future, or the precedent or attendant circumstances show that the acts are likely to be repeated.<sup>9</sup>

In the current hypothetical, there does not appear to be any allegation of long-standing abuse. Steve’s counsel needs to vet Steve about any possible history of abuse in ascertaining risk of a cruelty finding.

However, although not constituting cruelty, this incident in this case a court could give the incident some weight as part of the “circumstances and factors which contributed to the dissolution of the marriage.”<sup>10</sup> Additionally, if the incident were to result in Steve’s termination from employment, it significantly enhances Steve’s exposure at equitable distribution. There are many cases affirming a trial courts making disproportionate equitable distribution awards when one party’s misdeeds have adversely affect the economics of the marriage.<sup>11</sup> Steve’s counsel should advise him of these possibilities before making a final decision as to challenging the protective order or any criminal charges.

### Alternate Equitable Distribution - Will Your Client Get Sued?

Finally, one should always keep in mind that a stipulation as to abuse or guilt, or guilty and nolo contendere pleas are admissible in a civil suit as an admission of liability by statute.<sup>12</sup> In 2006, there was a Fairfax County verdict for \$551,000 when a woman sued her ex-husband for an assault that occurred in their home.<sup>13</sup> Counsel should not assume that civil exposure only exists in car accidents.

### Conclusion

Incidents of domestic assault can have wide-ranging implications. What may seem like an insignificant decision to stipulate to a protective order or stipulate to guilt for a suspended imposition of sentence conclusively establishes that one person was an aggressor. Such a finding can result in employment consequences and can significantly affect custody, visitation, spousal support, child support, and equitable distribution by confirming and buttressing abuse allegations. Counsel needs to go into a domestic assault with a clear appreciation for all of these consequences so that a client can make their decisions on as an informed a basis as possible.



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### Endnotes

1. Va. Code Ann. §18.2-57.3 (Michie 2007).
2. See Va. Code Ann. §18.2-57 (Michie 2007).
3. The Virginia Model Jury Instructions define an assault as "an overt act intended to do bodily harm to another together with the present ability to cause such harm." Va. Model Jury Instructions, No. 37.350 (Michie 2007). His causing damage to the door would also not be problematic assuming that the house is titled in his name (one can destroy one's own property).
4. *Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (2004) (holding that expungement not authorized for deferred finding of guilt).
5. See *Edwards v. Lowry*, 232 Va. 110, 113, 348 S.E.2d 259, 261 (1986).
6. Va. Code §20-107.1(E) (Michie 2007).
7. Va. Code Ann. §20-124.3 (Michie 2007).
8. *Sollie v. Sollie*, 202 Va. 855, 120 S.E.2d 281 (1961).
9. *De Mott v. De Mott*, 198 Va. 22, 92 S.E.2d 342 (1956).
10. Va. Code Ann. §20-107.3(E)(6) (Michie 2007).
11. *Aster v. Gross*, 7 Va. App. 1, 371 S.E.2d 833 (1988).
12. Va. Code Ann. §8.01-418 (Michie 2007).
13. *Deborah Martin v. Joseph Lofgren*, Fairfax County Circuit Court (Aug. 19, 2006).