

An Argument for a One-Judge/One-Family Approach to Domestic Violence: Lessons Based on New York’s Model

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Introduction

New York has undertaken a unique effort to re-engineer the state court system’s response to domestic violence. After implementing domestic violence criminal courts across the state, starting in 1996 with the Brooklyn Felony Domestic Violence Court, the New York Office for Court Administration and the Center for Court Innovation began planning Integrated Domestic Violence Courts in 2001. Integrated Domestic Violence Courts bring together civil, matrimonial and criminal matters concerning the same family before a single judge. This article reviews the history and implications of this implementation and argues that, based on what we know so far, Integrated Domestic Violence Courts can and do improve the court’s ability to provide individualized justice in domestic violence cases.

Integrated Domestic Violence Courts in New York State

A. What is an IDVC?

In New York, as in most other jurisdictions, litigants with domestic violence cases often end up before multiple different judges in multiple different courthouses.² Simply put, Integrated Domestic Violence Courts streamline the process by bringing together families with overlapping criminal and civil domestic violence cases before a single judge. New York’s Integrated Domestic Violence Courts began with then Chief Judge Judith S. Kaye’s State of the Judiciary Address in 2001. In that speech, Judge Kaye announced the creation of “new courts – based on a One Family-One Judge concept – [which] will allow a single judge, instead of several, to hear related matters... Our goals are both to remove unnecessary burdens for families and to continue... to simplify our court structure so that we can better serve not just a finite number of families in crisis but all New Yorkers.”³

¹ In 2009, Chief Judge Jonathon Lippman appointed Judge Kluger as the Chief of Policy and Planning for New York State Courts. Her office works with judges statewide to develop new strategies to improve the delivery of justice in New York State. Among her responsibilities is oversight of New York’s Problem-Solving Courts. Judge Kluger was appointed to the bench in 1988 and has served as a criminal court judge and acting supreme court justice. Liberty Aldrich is Director of Domestic Violence Programs for the Center for Court Innovation. She provides technical assistance to courts in New York and nationally that are looking to improve their response to cases involving domestic violence, sexual assault and child abuse. Both were involved in the planning and implementation of Integrated Domestic Violence Courts in New York State.

² New York’s court structure may be among the worst in the country, but the vast majority of states have jurisdictional barriers to a fully-integrated one-judge/one family response. For example, in many states, civil protective orders may be coordinated with criminal domestic violence cases, but matrimonial cases are decided elsewhere and may be subject to mandatory mediation.

³ Chief Judge Judith S. Kaye, State of the Judiciary Address, 2001, www.courts.state.ny.us. In order to implement the IDVCs, Judge Kaye and Chief Administrative Judge Jonathon Lippman issued court rules and administrative orders that allow a single judge to hear cases from multiple court jurisdictions.

By the time of Judge Kaye's announcement in 2001, the New York State Court System had had five years of experience with criminal domestic violence courts, beginning in 1996 with the Brooklyn Felony Domestic Violence Court.⁴ The Brooklyn Court accomplished several goals: it specialized the handling of felony domestic violence cases and improved coordination and communication among court stakeholders.⁵ The Brooklyn court was quickly followed by misdemeanor courts in the Bronx, Buffalo, and Suffolk Counties, and a combined felony and misdemeanor court in Westchester. Currently, there are almost 30 criminal domestic violence courts throughout New York, with additional courts planned for the future.

But as Judge Kaye indicated in her speech, despite the achievements of the criminal domestic violence courts, they are not always able to address the reality that "[t]here are striking differences between domestic violence and other criminal behavior. For starters, domestic violence victims often have an ongoing, intimate relationship with the batterer. They may be living together, raising children together, the victim entirely dependent on the batterer for life's essentials."⁶ Because of these interconnected issues, many battered women have cases pending in multiple courts – for example, a civil protection order and custody in family or juvenile court, an assault case in criminal court and a divorce case in another court building all together -- at the same time.⁷ These overlapping jurisdictions can create enormous barriers for victims seeking redress in the court system, lead courts to issue conflicting orders and require service providers to duplicate their efforts.

New York's Integrated Domestic Violence Courts answer these concerns by bringing together not just civil protection order and criminal proceedings, but a wide array of civil issues that domestic violence victims may face, including divorce, custody, visitation, and child support.⁸ While New York already had a specialized family court authorized by state law, it is a court of limited jurisdiction and does not hear criminal or divorce proceedings. Leveraging the national movement towards Unified Family Courts, New York set about to create a holistic unified court focused solely on the issue of domestic violence.⁹ This important distinction allows judges to maintain their attention on the particular issues that surround domestic violence and helps ensure that services – such as mediation – that may be the centerpiece of other family court reform efforts are not used inappropriately in domestic violence cases.

B: Initial Concerns

⁴ For a full history of the planning of the Brooklyn Felony DV Court, see, "Planning A Domestic Violence Court: The New York State Experience," www.courtinnovation.org

⁵ Newmark, Rempel, et. all, "Specialized Felony Domestic Violence Court: Lessons on the Implementation and Impacts from the Kings County Experience," Urban Institute, October 2001

⁶ Judith S. Kaye, State of the Judiciary Address, 2001, www.courts.state.ny.us

⁷ In New York, the Supreme Court hears divorce matters, Family Court hears civil protective order, custody, visitation and child support petitions as well as child protective proceedings. The criminal courts hear criminal cases, including those involving domestic violence.

⁸ The limits of the IDVs jurisdiction are flexible. Many sites include child protective matters involving the same family; several sites have experimented with including housing cases as well as other non-domestic violence criminal cases pending against one of the litigants that the judge feels are related to the case. Each jurisdiction's jurisdiction is defined in an administrative order of the Chief Administrative Judge of the State of New York.

⁹ Carolyn Schwarz, "Unified Family Courts: A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems," 42 Fam.Ct.Rev.304.

Our offices -- the New York State Office of Court Administration, the central administrative body of the courts, and the Center for Court Innovation, a non-profit think tank -- worked together to establish twelve key model court components of the Integrated Domestic Violence Courts.¹⁰ The promulgation of these components and the establishment of a special office to oversee the planning of these courts was intended to ensure that the IDV Courts fixed some of the problems that have consistently plagued the court's ability to respond effectively to domestic violence and that the courts enhanced both offender accountability and victim safety.¹¹

Before putting together the first IDVC, Office for Court Administration and Center for Court Innovation planners held initial discussions with domestic violence advocates and other stakeholders. The goal of these meetings was to discuss the new court model, air concerns and generate ideas about how to implement it.

Although there was considerable interest and excitement about the idea, each interest group had its own concerns, based largely on its role within the system. Prosecutors expressed concern that putting civil and criminal cases before a single judge would lead to "horse trading" and dilute the criminal process. They were concerned, for example, that a defendant would offer to drop a custody petition in return for the victim's agreement to "drop" the criminal case. Advocates who specialized in the family court were concerned that the IDVCs would undermine New York's hard-fought 1994 reform that allowed victims to proceed in either the civil and criminal court systems or both.¹² Some advocates felt that victims would feel unduly pressured to participate in the criminal court proceeding if it was being heard by the same judge hearing their family court case. Other advocates felt that the IDVCs would discourage women from seeking protection in the family court because their batterers might think that they had encouraged a criminal court prosecution.

Many civil attorneys expressed a concern that pro se litigants would be even more confused in an IDVC than in a traditional court and have an even greater need for representation. Attorneys who specialized in handling divorce cases tended to focus on the possibility that the court's decisions concerning the distribution of assets could be improperly influenced by hearing the criminal assault cases. Defense attorneys meanwhile were concerned that defendants, especially those unrepresented in the civil matter, might sacrifice their criminal rights during civil proceedings or unwittingly make statements against their interest.

Some of these concerns highlight the debate over how much the State -- rather than victims themselves -- should dictate the official response to domestic violence. Prosecutors and other state actors argue that the State has an independent interest in responding to domestic violence, regardless of the victim's wishes. Advocates and others express concern that this authoritarian response at its worst replicates the behavior of the batterer and misses an opportunity to empower women to do what they believe is best in their particular circumstances. What

¹⁰ These include 1) Jurisdiction, 2) Planning, 3) Case Identification and Screening, 4) Legal Representation, 5) Judicial Monitoring and Accountability, 6) Judicial and Non-Judicial Training, 7) Technology, 8) Courthouse Safety, 9) Case Integrity and Confidentiality, 10) Domestic Violence Services, 11) Community Resources, 12) Evaluation. See www.courts.state.ny.us.

¹¹ Judge Kluger was appointed by then Chief Administrative Judge Jonathon Lippman as the Deputy Chief Administrative Judge for Court Operations and Planning in 2003.

¹² New York Family Court Act, Section 812.

happens if you bring the State and the victim to both argue before the same judge? Would one side always win?

How does this play out in practice? Have the concerns outlined above become a reality? If not, why not? It is helpful to consider a hypothetical case example, based on observation of typical cases in the IDVCs, before returning to that discussion.

C. A Typical IDVC case

An IDVC judge will be hearing both criminal and civil proceedings concerning the same family.¹³ They are scheduled on the same day but they are calendared sequentially. Assume that the criminal case – a misdemeanor assault charge against the father for pushing the mother against the wall while the children were present in the household -- is called first: the prosecuting attorney expresses the State's view and asks that the terms and conditions of bond prohibit any contact with the victim or children. The defense counsel responds and states that, on the contrary, the order should not prevent visitation between the defendant and the children. Let's assume that the IDV Judge orders full stay away conditions as a condition of bond, but states that she will recall the criminal case to schedule the next hearing date on the criminal case after she hears the civil case.

Next, the court hears the civil custody case. The bailiff calls the family court case number. The prosecutor steps to the back of the court. The mother/victim is the petitioner and is seeking full custody. Although she was in the back of the courtroom during the criminal proceeding, she did not participate in that part of the hearing. She now comes forward and stands with her attorney at the petitioner's table. The father is now at the respondent's table and is represented by the same defense attorney. Let us suppose the mother feels strongly, after consulting with her advocate, that the father should have supervised visits with the children and asks the court to order the father to attend alcohol treatment. The Court has assigned an attorney for the child on the custody proceeding who has spoken with the 11 and 12 year old children. The Court hears from the mother about the history of his relationship with the children and his alcoholism. The Court also learns about the history of domestic violence. The father and the attorney for the child join in the application that the father be granted supervised access. Based on this additional information, the Court decides to recall the criminal court case prior to issuing orders in the family court. The Court gets good dates for all parties to return. The mother/petitioner steps away from the petitioner's table and sits back in the courtroom.

The Court at this point recalls the criminal court case and, before selecting one of the acceptable dates for the criminal case, asks the state's attorney/assistant prosecutor if the State will agree to modify the terms and conditions of bond to allow supervised contact between the children and the defendant and that he be ordered to attend an alcohol treatment program also as a condition of his release. The prosecutor will frequently modify his or her request based on the additional

¹³ New York law provides for criminal protective orders under CPL 530.12 and Family Court Act 812. Although many states do not issue protection orders solely on criminal complaints, they frequently issue bond conditions that have the same effect as a protective order. There are many other variations. In Illinois and Texas, for example, prosecutors may bring civil protective order proceedings on behalf of the victims in the criminal court. Those orders can also be sought directly by the victim in civil proceedings.

information that he or she learned during the family court proceeding. The Court will at this point modify the original terms and conditions of bail to allow supervised contact. The Court will recall the family court case and issue a consistent protective order including supervised visitation and a mandated alcohol treatment program, explain the terms to the mother/petitioner, and put the case on for the same date.

Under this scenario, the State has had the opportunity to learn more about the petitioner's wishes and the Court has made consistent orders that directly reflect the wishes of the victim. In this way, the Court takes advantage of having access to more information without compromising the integrity of each case.¹⁴

D. IDVCs Promote a Consideration of Violence in Context while Maintaining Due Process

The hypothetical provides an illustration of how IDVC judges can make decisions that are more specifically tailored to the case in front of them. In a traditional criminal court, or even a criminal court hearing the civil protective order, it is unlikely that the Judge would have had access to as much information concerning the litigants' custody/visitation order. As a consequence, many criminal courts routinely continue provisions directing the defendant to stay away from the petitioner without understanding the context and consequences of that decision.

Does putting criminal and family cases before the same judge present a more complete history and provide the state with more tools to respond? Or does it put too much information in front of a single arbiter and compromise a defendant's right to a fair trial by bringing in irrelevant considerations? What structures and services can courts put in place to make sure that the IDV model actually works?

In order to protect the criminal defendant's rights, the IDVC judges consider the merits of each case separately and decide each on the evidence presented only in that case. The IDVCs call each docket individually and sequentially and the judges decide each case according to the standard of proof required in that proceeding. Observers often ask whether the judges are actually able to decide each case individually. How is it possible to ignore evidence that is presented in another proceeding? While it may seem difficult, judges are asked to do this every day: to exclude consideration of evidence that has been shown to be inadmissible or hear related cases but make findings based only on the case presented to them. The IDVC is no different. IDVC Judges need to justify their decisions on appeal based only on the record in that particular proceeding. In practice, for example, IDVC Judges frequently grant civil protective orders, under a preponderance of the evidence standard, while dismissing the criminal court case, which requires proof beyond a reasonable doubt. And defense attorneys who regularly practice in the IDVCs have had some of their initial concerns abated.¹⁵

There are four key factors that allow the IDVCs to pull off this balancing act:

¹⁴ Or as in *Hector G. v. Josefina P.*, Supreme Court of New York, Bronx County, 2 Misc. 3d 801; 771 NYS 2d. 316 (2003), the Court can take judicial notice of information contained in another case giving notice to both parties and making it clearly part of the record.

¹⁵ Jamie Burke, Brooklyn Defenders Services, Presentation to St. John's Law School, Forum on Integrated Domestic Violence Courts, Feb. 24, 2009. Interview with William Madonna, Bronx Assigned Counsel, July, 2003. On file at the Center for Court Innovation.

Planning: Before implementing an IDVC, each of the stakeholders must be given an opportunity to express concerns and develop guidelines concerning their participation and information sharing protocols. Additionally, court clerks and technology systems must be harmonized so that cases can be effectively scheduled to minimize the burden on the litigants.

Training: The judge, court staff, prosecutors, defense counsel and civil attorneys all receive training in domestic violence and the IDV model. In New York, the Office of Policy and Planning and each individual court hosts several training programs a year that focus on topics such as women who use force, victim safety, or cultural competency.

Case integrity: Criminal and civil court cases have different burdens of proof, they are entitled to different levels of confidentiality, and they have different goals. Perhaps most critically, they have different moving parties: the State in the criminal case and the victim in the civil case. These roles must remain clear. The burden of the criminal court proceeding must not fall solely on the victim – it is the State’s case against the defendant, not hers. Similarly, she may choose to proceed in the civil context regardless of the State assessment of her case. IDVCs cannot successfully navigate these tricky waters if the cases are merged or the lines are blurred.

Victim advocacy: IDVCs must coordinate with victim service providers on both the development and implementation of the court. IDVCs can provide a streamlined forum for advocates who no longer have to separately respond to the criminal and civil aspects of the court case. They can more effectively advocate for their client’s position in both proceedings.

These components are critical to developing any integrated court-based response to domestic violence cases.

Conclusion

Why Integrated Domestic Violence Courts?

By allowing criminal domestic cases to be heard in context, the IDVC model provides a possible answer to one of the important debates taking place within the domestic violence movement: how much decision-making authority should the victim have within the criminal case? Should the state punish acts of domestic violence regardless of the victim’s wishes in order to express the community’s decision that this violence is wrong? Should she be “allowed” to ask for continued contact with the defendant? How should judges evaluate those requests?

Many commentators have chosen sides in this debate between “victim autonomy” and “zero tolerance.”¹⁶ There are legitimate arguments on both sides. The State has an important role to play in upholding the idea that domestic assault is a crime and should be punished as such. But clearly domestic violence is not like other crimes and real people in real situations should have

¹⁶ See e.g. Hanna, Cheryl, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,” 109 Harvard L. Rev 1849 (1996); Epstein, Deborah, “Procedural Justice: Tempering the State’s Response to Domestic Violence,” 43 William & Mary L.Rev. 1843, (2002); Wills, Donna, “Domestic Violence: The Case for Vigorous Prosecution,” 7 UCLA Women’s Law Journal 173 (1997).

space to argue that a one-size fits all criminal justice response is not appropriate. And we don't want victims to feel burdened by an unnecessarily heavy-handed response. For example, a full stay away protective order may do more harm than good in particular situations. As the above example shows, judges in integrated domestic violence courts, without merging the cases, may be better able to see the whole complicated picture – to hold perpetrators accountable and to listen directly to battered women's concerns, to focus both on single incidents and to look for larger patterns.

Why should the Court have a role in assuring this balance? If there is to be flexibility in the State response to domestic violence cases, where should that discretion be located? It used to be with the police who chose whether or not to arrest. Some have argued that we should eliminate mandatory arrest polices in an effort to put discretion back in their hands.¹⁷ While the evidence on the effects of mandatory arrest is mixed there continue to be good reasons to maintain a pro-arrest policy.¹⁸ With or without such a policy, too little may be known at the moment of arrest to make an informed decision and imminent safety considerations often take precedence. But clearly it doesn't make sense to flood the criminal justice system with cases that do not need criminal justice intervention.

Should discretion then be placed with the prosecutors? Of course. Prosecutors generally do exercise discretion – even in States with no drop polices – and will continue to exercise their professional judgment about whether or not to proceed with the criminal case. But prosecutors generally base their decisions on a limited set of facts and with a specific set of objectives. Additionally, prosecutors all too often have minimal contact with the victim/complaining witness both because of their heavy dockets and because of the reluctance of many victims to get involved with a system that they perceive as alien or hostile.¹⁹ Prosecutors, therefore, may not be in the best position to argue for the victim's wishes.

So even with continued discretion in the prosecutor's office, there is still a need to fill in more of the complicated realities on individual cases and to hear directly from the victim.²⁰ IDVCs make that possible. While courts, of course, depend on the arguments made by counsel and judges are not perfect arbiters, judges hearing multiple cases involving a particular family are most likely to hear and see a full picture of the particular case before them – and they have the unique advantage of hearing directly from both the State and the victim. With this information, they are in the best position to design a tailored response for that particular case.

Because, as Barbara Hart, a noted legal expert on domestic violence issues, has said, “there is no profile of a battered woman witness that fits all or even most battered women,” no singular rule concerning the State's response to domestic violence will ever be appropriate in all circumstances. In order to offer the most opportunities for differential responses that take into account women's differently situated circumstances, all “sides” must be represented – including

¹⁷ Welch, Donna, “Mandatory Arrest of Domestic Violence Abusers: Panacea or Perpetuation of Abuse?” 43 DePaul L.Rev. 1133 (1994).

¹⁸ See e.g., Emily Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy.” 6 Wisconsin Law Review 1658, 2004.

¹⁹ Mills, Linda G., *Violent Partners: A Breakthrough Plan for Ending the Cycle of Abuse*, Basic Books, p. 199-203

²⁰ This is especially important in order to reduce disproportionate impact of the criminal justice system on battered women defendants, immigrants and people of color.

both the prosecutor and the victim. In integrated courts, we can come closest to overcoming a limited focus on a battered woman's "particular legal circumstance" and, instead, broaden the vision to include "the interrelated webs of inequality: the woman's role within the family, her responsibility for children, her economic circumstances."²¹

Domestic violence is not neat. It spills over any boundaries ascribed to it. It is appropriate that the most well-established definition of domestic violence is the most flexible: the ubiquitous domestic violence wheel catalogues each of the different types of violence and can be adapted to any context.²² Legal definitions of domestic violence cannot be so flexible, especially in the criminal law. Because of the conflict, the State continues to struggle with how to respond to domestic violence in a way that is both forceful and subtle, taking context in consideration. The IDVCs can be a step forward in that direction.

²¹ Schnieder, Elizabeth, p. 230

²² See www.mincava.org