

ARGUMENT
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

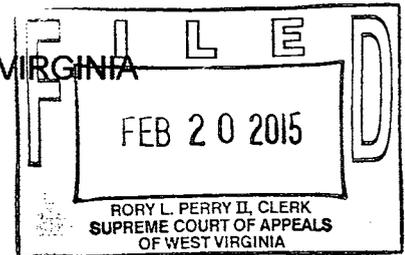
DAVID J. RIFFLE,

Respondent Below, Petitioner,

vs.

SHIRLEY I. MILLER,

Petitioner Below, Respondent.



Docket No. 14-0042

BRIEF OF *AMICI CURIAE* LEGAL AID OF WEST VIRGINIA and
WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE

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ARGUMENT

I. INTRODUCTION

Amici urge upon this Court extreme caution in the use of mutual orders, particularly in any case involving “domestic violence” as defined in the federal Violence Against Women Act.¹ In discussing this area of law, amici propose a three tier organization of the types of orders family courts use to address problematic behavior.

The most protective tier is for family court proceedings involving our state’s domestic violence protection order statute, W. Va. Code 48-27-101 *et seq.* That statute has an express prohibition on mutual “protection” orders unless certain preconditions

¹ A note on confusing terminologies. Unfortunately, different statutes affecting the issues in this case have differing definitions for the same terms.

For example, “Domestic Violence” as defined in the West Virginia “Prevention and Treatment of Domestic Violence Act (W. Va. Code 48-27-101 *et seq.*) has a narrower meaning than “Domestic Violence” as defined in the federal Violence Against Women Act (VAWA) at 42 U.S.C. 13925(8). Thus VAWA applies to a broader range of behaviors than those defined at W. Va. Code 48-27-202.

The term “Protection Order” as defined in VAWA [at 42 U.S.C. 13925(24) and repeated at 18 U.S.C. 2266] purposefully has a very broad reach. The term would cover “protective orders” issued under the DVP statute (W. Va. Code 48-27-101 *et seq.*); and also temporary orders “enjoining abuse, emergency protective order” issued in a divorce case under W. Va. Code 48-5-509; and also “Injunctive relief or protective orders” issued in a divorce case pursuant to W. Va. Code 48-5-608; and even a very limited ‘no contact’ order issued under the inherent power of a court

Further, there is no inherent conceptual distinction between the terms “injunctive orders” or “restraining orders” or “protection orders,” all of which are used almost interchangeably in cases and statutes.

For purposes of clarity, amici in this Brief propose a three-tier organization of family court orders under discussion. At the highest, most protective tier, we will use the term “Article 27 protection orders.” See Section IV.A. below.

For the second tier, family court matters involving abusive or coercive behavior but not invoking Article 27 relief, we will use the term “broader protection orders.” See Section IV.B. below.

For the third and lowest tier, family court matters not involving any Domestic Violence, we will use the term “non-DV conflict prevention orders.” See Section IV.C. below.

are met. See W. Va. Code 48-27-507. When Article 27 remedies are invoked in other family law proceedings, amici believe the prohibition of Section 48-27-507 applies.

In a second tier are family court proceedings involving domestic violence as defined in VAWA, but not invoking the remedies of the West Virginia Domestic Violence Protection statute (W. Va. Code 48-27-101 *et seq.*). Federal law strongly disfavors mutual restraining orders in these cases (including even seemingly simple 'no-contact' orders). To assure that such orders can receive Full Faith and Credit in other jurisdictions, and to avoid jeopardizing millions of dollars of federal VAWA funds currently received by local police, prosecutors and court systems in West Virginia, mutual "broader protection orders"² in cases involving domestic violence should be issued only when the conditions of 42 U.S.C. 3796hh(c)(1)(C) are met.³

The third tier applies to family court proceedings not involving any form of domestic violence, where federal VAWA provisions may not be implicated. Amici believe that mutual "non-DV conflict prevention orders"⁴ are also disfavored by West Virginia law. Due Process principles require notice in advance of hearing that a restraining order is a possible issue in the case. Longstanding law protecting against waiver of rights must assure that mutual orders are not entered by "consent" in the absence of a showing of full, informed, knowing and voluntary agreement.⁵

² See footnote 1 for explanation of amici's use of this term.

³ See discussion in Section IV.B below, at pages 19-256

⁴ See footnote 1 for explanation of amici's use of this term.

⁵ See discussion in Section IV.C. below. at pages 26-27

II. STATEMENT OF INTEREST OF AMICI CURIAE

The following organizations respectfully submit this brief as *Amici Curiae* in opposition to the petitioner herein David Riffle, and urge the Court to affirm the decision below.

Legal Aid of West Virginia (LAWV) is a West Virginia law firm, organized as a non-profit, 501(c)(3) tax exempt corporation. Currently employing 50 attorneys (full and part time) in 12 offices across the state of West Virginia, the mission of LAWV is to “advocate for low-income, vulnerable West Virginians, seek equal access to justice, and create system change in order to improve client safety, health, housing, income and access to resources.”⁶ LAWV receives federal and state funding to serve a range of civil legal needs of low income persons, including domestic violence survivors.⁷ In addition, another major component of LAWV funding is targeted specifically to the legal needs of victims of domestic violence regardless of income or gender.⁸

⁶ Quoted from “Our Mission,” set forth on the LAWV web site at <http://www.lawv.net/about/mission>.

⁷ LAWV receives a mix of federal and state public funds, supplemented with various grants, contracts, and charitable donations. The largest single revenue source is from the federal Legal Services Corporation, which promulgates income guidelines each year based on 125% of the federal poverty guidelines. For the 2014 guidelines see 79 Fed. Reg. 8863 (Feb. 14, 2014).

LAWV also receives other grants which do not impose an income qualification test. These provide services to several different target populations, including victims of domestic violence, behavioral health consumers, and residents (and their family members) of long term care facilities.

⁸ These include a direct grant from the US Department of Justice Office on Violence Against Women, to work in partnership with the statewide network of domestic violence shelters; state funding directed through the statewide network of domestic violence shelters to obtain legal representation for victims of domestic violence; and local United Way grants to assist DV victims.

LAWV handles an average of 1,776 cases per year in West Virginia involving domestic violence.⁹ Of these, 591 are Domestic Violence Protection Order cases (under WV Code 48-27-101 et.seq.), of which some two-thirds end with court decisions.¹⁰ Another 1,079 cases per year are other Family Law matters in which domestic violence has been identified as a factor. The remaining 106 cases per year are not Family Law matters, but legal problems such as evictions, unemployment claims, consumer debt problems, and others which may have been caused by or related to domestic violence.

Finally, LAWV also handles an average of about 2,500 Family Law cases a year in which domestic violence has not been identified as a component. The vast majority of these involve only advice or brief service, not involving in-court representation. Just under 300 Family Law cases per year are handled with substantial representation when no domestic violence component has been identified.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a membership, statewide non-profit organization committed to ending personal and institutional violence in the lives of women, children, and men.¹¹ WVCADV member programs provide safe space and direct services for victims of domestic violence. In Fiscal Year 2013 domestic violence programs provided services to 16,452 women, children and men in West Virginia. In addition, the Coalition Statewide Office

⁹ All statistics are averages of the years 2012-2014.

¹⁰ Either granting, denying, or dismissing the petition.

¹¹ See the WVCADV web site at: <http://www.wvcadv.org/>

coordinates a strong network of shared resources that support policy analysis and social change work. These efforts provide options for service providers and communities to respond meaningfully to the needs of victims. Prevention strategies include ongoing and consistent efforts to educate the public about available services, domestic violence provisions of the law, alternatives to aggression, and healthy relationships.

Amicus WVCADV and its 14 member programs, with amicus Legal Aid of West Virginia, are partner recipients of a shared "Civil Legal Assistance For Victims" funding grant from the US Department of Justice Office on Violence Against Women.¹² The two organizations cooperate to provide cross-organizational legal and advocacy response teams, that provide legal and advocacy services to victims of domestic violence throughout the state. These teams are the only source for free, comprehensive legal and advocacy services to victims of domestic violence in West Virginia.

III. PROBLEMS CONCERNING MUTUAL ORDERS OF ANY TYPE

Amici believe there are significant concerns arising from use of mutual orders. Mutual orders can undermine efforts to address the problem of domestic abuse,¹³ and often raise Due Process constitutional issues.¹⁴ Finally, permitting mutual orders to be entered in cases involving domestic violence may jeopardize literally millions of dollars of federal funding under the Violence Against Women Act currently being received by

¹² Hereafter referred to as "OVW". Authorized by 42 U.S.C. 3796gg-6, part of the federal Violence Against Women Act. See also information at footnote 8 above.

¹³ See discussion in section III.A. below, at pages 6-10.

¹⁴ See discussion in section III.B. below, at pages 10-12.

police, prosecutors, court systems, and others in West Virginia.¹⁵

A. Policy Concerns Regarding Mutual Orders in the Context of Domestic Violence

As Justice Workman described in her separate opinion in *Pearson v. Pearson*, 200 W. Va. 139, 488 S.E.2d 414, 428 (1997), the “common but very bad practice” of Family Courts issuing mutual protective and restraining orders is an important issue “in the larger domestic violence arena.”

As noted in her opinion, the National Council of Juvenile and Family Court Judges, in its Model Code on Domestic and Family Violence, commented that mutual orders “undermine the safeguards” contemplated by protection order statutes. They “minimize a perpetrator’s exposure to sanctions for violation of an order.” “Often police refuse to enforce mutual orders.” Police called to the scene of a domestic disturbance, upon learning that a mutual order has been issued, “may arrest both parties, further victimizing the real victim.”¹⁶ *Pearson v. Pearson*, *id.* at 428.

The American Bar Association has promulgated “Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in

¹⁵ See discussion in section III.C. below, at pages 12-16.

¹⁶ The “arrest everybody” response is easier for law enforcement than seeking to determine which one (or both) may have been acting “primarily as an aggressor” and not “primarily in self-defense.” *Cf.* 42 U.S.C. 3796hh(C)(1)(c). Unfortunately, the mutual order too often is also a similarly easy “out” for a judges confronted with messy facts.

In one case handled by amicus LAWV, local police made a “dual arrest” despite clear evidence the survivor was defending herself. Had the magistrate, prosecutor and defense attorney not listened to her LAWV lawyer, the lawfully-present battered immigrant would have been deported and would probably never again have seen her five-year-old son. Now, this client is a naturalized U.S. citizen with shared parenting of her son.

Civil Protection Order Cases.”¹⁷ Those Standards note that “Mutual orders are generally discouraged because they often serve to further embolden the perpetrator to abuse and discourage the victim from seeking legal assistance. Mutual orders lack a finding of the predominant aggressor, and frequently lead to unfair mutual arrest in any future incident of abuse.” *Id.* at page 9.

The concept of the “high conflict divorce case”¹⁸ can reinforce the misconception that the victim is at least partly to blame for the abuse.¹⁹ This misconception is based on the incorrect assumption²⁰ that acrimony and conflict between the parties during the marriage and separation is the product of inappropriate behavior *by both parties*, rather than the product of the abuser’s behavior.²¹

¹⁷ Available on line at:
http://www.americanbar.org/groups/domestic_violence/standards-of-practice.html

¹⁸ See generally, Clare Dalton, Judge Susan Carbon, and Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 *Juv. & Fam. Ct. J.* 11, 17-20 (2003), explaining the difference between cases that involve high conflict between two parties from those that involve one party’s abusive and controlling conduct towards the other party.

¹⁹ Amici have assisted numerous clients who have been inappropriately ordered to attend “high conflict” classes. There, survivors are forced to interact with their abusers week after week, or face sanctions from the court. This practice has at times put the survivor and others in the class at risk, as a number of the domestic violence perpetrators lose control of their behavior and must be escorted from the class.

²⁰ In some cases, of course, the “assumption” may be accurate. The problem lies in acting upon an assumption, instead of determining the facts of the case.

²¹ See Lundy Bancroft & Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002), at 5-28 and 130-132; Peter Jaffe, Claire V. Crooks, & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes* (2002), *Juv. & Fam. Ct. J.* at 57-59 (Fall 2003).

The belief that both parties are to blame in domestic violence cases often leads to the issuance of a mutual order. But where only one party has been the primary aggressor, while the other has been acting primarily in self-defense, the issuance of a mutual order implies that the victim is somehow to blame for a share of the violence. Although victims sometimes fight back or seek to defend themselves, that does not make domestic violence mutual.²² The proper inquiry should be whether a party has acted "primarily as an aggressor" or "primarily in self-defense." Cf. 42 U.S.C. 3796hh(c)(1)(C).

The issuance of a mutual order against a victim who has not engaged in abusive conduct inappropriately stigmatizes the victim. A blameless victim who agrees to a mutual order may be barred from certain kinds of future employment opportunities by virtue of having a restraining or protective order against her. A mutual order enables the perpetrator to justify bad conduct by claiming (to self as well as to court) "the other party is as much at fault as I am." This fails to hold the true perpetrator accountable, and empowers the wrong-doer's belief that the abusive conduct is "merely" a justifiable response to provocation. The mutual order encourages others to blame the victim rather than sanction the perpetrator. It rewards and enables the perpetrator to deny full responsibility for abusive conduct. See Joan Zorza, *What Is Wrong With Mutual Orders of Protection?*, *Domestic Violence Rep.*, June-July 1999, at 67; Bancroft & Silverman, *supra* at 130-135.

Outside the narrow confines of a DVP proceeding under W. Va. Code 48-27-101

²² Lundy Bancroft & Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002), at 4.

et seq., mutual orders are problematic, as they can provide a false sense of security for the victim. Particularly victims who are not represented by counsel²³ may fail to understand that a mutual restraining order will not be enforced by police²⁴; that violation of a mutual restraining order is not necessarily a crime²⁵; and that enforcement depends upon return to the family court at some unknown future date, likely weeks or even months after an episode of abuse may have occurred.

Finally, mutual restraining orders issued when only one party has engaged in abusive conduct further endanger victims. The abuser may instigate further abuse or threats, then “muddy the waters” by claiming it all resulted from some action on the part of the victim. The victim may be reluctant to call for law enforcement assistance, for fear of being blamed. Law enforcement authorities do not take mutual orders as seriously as orders directed against a single offender. The inappropriate mutual restraining order can become an instrument of control through which the offending party can continue to dominate the true victim.²⁶ Amici have seen these patterns far too

²³ According to the Supreme Court Administrative Office “Pro Se Litigants Report” for 2013 (the most recent year available), over 37% of litigants in divorce cases were unrepresented by counsel. In some counties the majority of all family court litigants are pro se. For all Family Court cases in 2013, there were over 28,000 *pro se* litigants.

²⁴ Unless the conduct is itself criminal, such as an assault or battery.

²⁵ Unless the conduct is itself criminal, such as an assault or battery.

²⁶ An example is a 2013-14 case handled by amicus LAWV. The abuser was a serial offender who had been previously incarcerated a total of over five years for beating multiple women; the victim had gathered her courage to separate after several prior severe beatings. The family court heard dueling DVPO filings from separate incidents, and granted both. The abuser then filed five criminal contempt of DVPO charges over a couple of months.

many times to dismiss them as aberrations.

In sum, the experience of amici is that the concerns expressed about the use of mutual restraining orders are real, and all too frequent. We have seen too many victims (particularly unrepresented ones) shunted from the DVP case to the “let’s just all agree we’ll do a mutual no contact order in the custody case and we won’t have to argue about this,” without fully understanding what that means. This Court should end the possibility of negotiations that extort agreement to mutual orders, by ending the “common but very bad practice” of mutual orders in cases involving domestic violence or abuse.

B. Due Process Concerns

The issuance of mutual restraining orders can raise significant Due Process concerns. The context in which this most frequently occurs is that one party files a pleading seeking an order of protection from violence or abuse.²⁷ The opposing party may file no responsive pleading, thus making no allegation against the petitioner and not asking for a protective order against the petitioner. But at hearing, the responding party claims abuse, or threats, or annoying contact by the petitioner, and requests a mutual order. Sometimes the court *sua sponte* may inject the mutual order possibility because “I don’t see any reason why it hurts anything ... we’re just trying to be fair

All were eventually dismissed. But the local housing authority read of the arrests in the newspaper, and moved to evict the victim. The shelter advocate and an LAWV lawyer prevented the eviction, saving the victim and her daughters (one of whom is severely disabled), from homelessness.

²⁷ This may begin in a domestic violence protective order proceeding under WV Code 48-27-101 et seq, or in a divorce action, or in an action for custodial allocation between unmarried parents.

about this and saying that neither party should have anything to do with the other."²⁸

Courts have recognized that Due Process protections may be violated when a restraining order is entered against one who has been given no prior notice of the issue. See *Deacon v. Landers*, 587 N.E.2d 395, 68 Oh. App. 3d 26 (1990) ["a 'full hearing' embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of an opposing party and to meet them"]; *Baker v. Baker*, 904 P.2d 616, (Ok. Ct. App. 1995) ["the mother was denied her constitutional right to be put on notice that, at the scheduled hearing, she would be subjected to allegations of domestic abuse, and have her rights affected by judicial process"]; As the *Baker* court had previously stated:

The right to be heard is of little value unless a party is apprised of rights which may be affected by judicial process. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action. Lack of notice constitutes a jurisdictional infirmity.

Bailey v. Campbell, 862 P.2d 461, 469 (Okla. 1991).

West Virginia Rule of Civil Procedure 65(a)(1) requires notice of any request for a preliminary injunction. Without notice, such an injunction is void: "no preliminary injunction shall issue without notice to the adverse party. A preliminary injunction which is ordered without notice to the adverse party is void. Notice necessarily implies that the opposing party be provided a fair opportunity to oppose the application and to prepare for such opposition." *State ex rel. E. I. duPont de Nemours & Co. v. Hill*, 214 W. Va.

²⁸ Quote from *Deacon v. Landers*, 587 N.E.2d 395, 68 Oh. App. 3d 26, 31 (1990).

760, 768, 591 S.E.2d 318, 326, 2003 W. Va. LEXIS 163, 20-21 (W. Va. 2003). This means that a court cannot decide in the course of a hearing to issue a protective order or a restraining order injunction against a party without giving that party notice and an opportunity to be heard and an opportunity to defend against such injunction.

C. Violence Against Women Act (VAWA) Concerns Implicated By Mutual Orders

All of the above concerns have been recognized by Congress, in the original 1994 passage of the Violence Against Women Act (VAWA), as well as several subsequent re-authorizations and amendments.²⁹ Mutual protective orders are discouraged by VAWA.

1) VAWA Full Faith and Credit Provisions

First, Congress sought to make protection orders more effective by assuring that

²⁹ "Since its passage in 1994, VAWA has been modified and reauthorized several times. In 2000, Congress reauthorized the programs under VAWA, enhanced federal domestic violence and stalking penalties, added protections for abused foreign nationals, and created programs for elderly and disabled women. In 2005, Congress again reauthorized VAWA. In addition to reauthorizing the programs under VAWA, the legislation enhanced penalties for repeat stalking offenders; added additional protections for battered and/or trafficked foreign nationals; created programs for sexual assault victims and American Indian victims of domestic violence and related crimes; and created programs designed to improve the public health response to domestic violence. In February 2013, Congress passed legislation (Violence Against Women Reauthorization Act of 2013; P.L. 113-4) that reauthorized most of the programs under VAWA."

"The Violence Against Women Act: Overview, Legislation, and Federal Funding," Congressional Research Service 7-5700, "Summary," (March 6, 2014), available on line at: <https://fas.org/sgp/crs/misc/R42499.pdf>

appropriate protection orders would receive Full Faith and Credit in other states. In West Virginia, where a majority of citizens live in counties bordering another state, interstate enforcement of protection orders often is critical.³⁰

The VAWA statute, at 42 U.S.C. 2265, established “federal guarantees of interstate enforcement of state issued protection orders through full-faith and credit provisions.... This provision required courts in any jurisdiction to honor and enforce orders issued by courts in other jurisdictions, even if the same order could not be issued in their jurisdiction.” Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 *Hastings Women’s L.J.* 433, 442 (Summer 2013).

However, Full Faith and Credit is explicitly denied to mutual protection orders unless clear pre-conditions are met. A protection order issued against a person is not entitled to Full Faith and Credit unless the other party has “filed a written pleading for protection against abuse” and the court made “specific findings that each party was entitled to such an order.” 42 U.S.C. 2265(c). Issuing mutual orders when only one party has sought protection would mean that those orders are not accorded Full Faith and Credit.

2) Eligibility To Receive VAWA Funding

Second, the VAWA legislation has a powerful financial incentive for states to avoid mutual orders in certain cases. The Violence Against Women Act makes funds

³⁰ As of the 2010 Census, the total population of West Virginia was 1,852,994. There are 29 West Virginia counties that border one or more other states. In those counties, there are 1,014,790 residents, or nearly 55% of the state's population.

available to states, including West Virginia,³¹ pursuant to 42 U.S.C. 3796hh, to address the problems of “domestic violence, dating violence, sexual assault, and stalking.”³² To be eligible to receive these funds, the VAWA statute requires states to certify that:

their laws, policies, or practices prohibit issuance of *mutual restraining orders of protection* except in cases where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.”

42 U.S.C. 3796hh(c)(1)(C) [emphasis added]. The term “Protection Order” is defined very broadly by VAWA to include:

any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or *contact or communication with or physical proximity to*, another person.

42 U.S.C. 13925(24) [emphasis added]; see also 42 U.S.C. 2266(5).

³¹ In 2014, at least five VAWA grants totaling \$2,619,584 were awarded by the U.S. Department of Justice's Office on Violence Against Women (OVW) to West Virginia applicants. The two largest of these were awarded to WV state government recipients, namely the WV Department of Health and Human Resources (\$899,989, Grant to Encourage Arrests) and local county prosecutors' offices and police departments (\$1,227,682, “STOP Team” Grant, administered and distributed by the WV Division of Justice and Community Services).

³² Each of those terms is defined in VAWA, at 42 U.S.C. 13925. “Domestic violence” is defined at 42 U.S.C. 13925(8); “Dating Violence” at 42 U.S.C. 13925(10); “Sexual Assault” at 42 U.S.C. 13925(29); and “Stalking” at 42 U.S.C. 13925(30).

Note that the provisions of the federal Gun Control Act, prohibiting possession of firearms while under a protection order, are far narrower and more limited than these VAWA definitions. See 18 U.S.C. 922(g)(8). An order to restrain “contact or communication” would not invoke the firearms prohibition, even if arising in a case involving “domestic violence,” unless it also specifically found that the person represented “a credible threat to the physical safety” of the victim or specifically prohibited use of physical force reasonably expected to cause bodily injury.” 18 U.S.C. 922(g)(8)(C). But such orders would jeopardize VAWA funding awarded to West Virginia police, prosecutors, and others.

Reading the VAWA definition literally, “any ... restraining order ... for the purpose of preventing ... contact or communication with or physical proximity to ... another person” is a Protection Order under the VAWA definition. Issuance of such orders without the limitations set forth in 42 U.S.C. 3796hh could jeopardize VAWA grant funding now utilized by law enforcement agencies and prosecutors throughout the state of West Virginia.

Amici interpret the VAWA statute as a broader whole, to incorporate the statutory purpose to address “domestic violence, dating violence, sexual assault, and stalking” as a limiting term for the 42 U.S.C. 3796hh certification requirement. We believe that VAWA funding would not be jeopardized if mutual orders were issued in cases that do not involve “domestic violence, dating violence, sexual assault, and stalking,” as those terms are defined by VAWA.³³ But amici also conclude that, to assure continued receipt of VAWA funding, West Virginia must be able to certify that in any case involving “domestic violence, dating violence, sexual assault, and stalking,” mutual restraining orders of protection are not issued unless the stringent conditions of 42 U.S.C. 3796hh(c)(1)(C) are met.

³³ At the time of submission of this amici brief, the West Virginia legislature is considering legislation that would “exempt mutual orders enjoining certain contact between parties to a domestic relations action from the prohibition against mutual protective orders.” Engrossed Com. Sub. For S.B. 430, first sentence. The last provision in that Bill clarifies the intent of the legislature “that orders issued pursuant to this section are to enjoin behavior which is not of sufficient severity to implicate the provisions of the federal Gun Control Act.” See proposed ¶ 51-2A-2a(e). Because the Gun Control Act provisions are narrower than the VAWA provisions, amici believe that this ‘intent of the legislature’ provision would not be sufficient by itself to permit the State to make the certification required to continue receiving VAWA funding for police, prosecutors, and court systems. See footnote 32, *supra*, for further explanation of the difference between the Gun Control Act provision and the VAWA provisions.

IV. PROTECTION ORDERS UNDER WEST VIRGINIA LAW

Amici suggest there are three “tiers” of protection orders available in Family Courts in West Virginia. In the highest and most protective tier, “Article 27 protection orders”³⁴ are issued on authority of and in conformity to W. Va. Code 48-27-101 *et seq.*, the Domestic Violence Protection statute.³⁵ In those Article 27 proceedings, express statutory provisions limit the use of mutual orders³⁶

In the middle tier, “broader protection orders”³⁷ may be issued in cases involving “abuse”³⁸ but for which Article 27 proceedings are not invoked. In this tier, amici believe the policy concerns, Due Process concerns, and VAWA considerations discussed above require limitations on the use of mutual “broader protection orders.”³⁹

At the lowest tier, in Family Court cases not involving “Domestic Violence, Dating Violence, Sexual Assault or Stalking,” as those terms are defined in VAWA, courts have more leeway regarding what amici term “non-DV conflict prevention orders.”⁴⁰ In this tier amici believe that the policy concerns and Due Process concerns still support a cautious approach to the use of mutual orders, but also believe that mutual orders in

³⁴ See footnote 1 for explanation of this terminology.

³⁵ Sometimes referred to herein as “Article 27” proceedings.

³⁶ See discussion below, in Section IV.A. of this Brief, at pages 17-19.

³⁷ See footnote 1 for explanation of this terminology.

³⁸ See W. Va. Code 48-5-608(a).

³⁹ See discussion below, in Section IV.B of this Brief, at pages 19-26.

⁴⁰ See footnote 1 for explanation of this terminology.

this non-DV tier would not jeopardize VAWA funding.⁴¹

A. Highest Tier - Article 27 Protection Orders

Mutual orders are recognized by the DVP statute, Article 27 of Chapter 48. The use of mutual orders is “prohibited” unless “both parties have filed a petition ... and have proven the allegations of domestic violence.” W. Va. Code 48-27-507. If mutual orders are issued, “the court shall enter a separate order for each petition filed.” W. Va. Code 48-27-507. In the experience of amici this statutory limitation is followed in DVP proceedings, and has generally avoided the adverse consequences of mutual protective orders. Victims may choose to file a DVP action, seeking the most protective relief possible with whatever consequences may attend, with assurance that an inappropriate mutual order will not emerge.

The DVP statute is also clear that “during the pendency of a divorce action, a person may file for and be granted relief provided by this article,” under certain conditions and limitations. W. Va. Code 48-27-401(a). Temporary Article 27 relief may be granted, either as part of a temporary order in the divorce case or as part of a separate order. W. Va. Code 48-5-509(c). “Any” order entered by a divorce court to protect a party from abuse may also grant Article 27 relief “if the party seeking the relief has established the grounds for that relief as required by the provisions of said article.” W. Va. Code 48-5-608(b). At the time of a final order of divorce, a 180-day protective order pursuant to Article 27 may be granted, either as part of the final divorce order or

⁴¹ See discussion below, in Section IV.C of this Brief, at pages 26-27.

as a separate order. W. Va. Code 48-5-608(c).⁴²

All orders entered pursuant to W. Va. Sub-sections 608(b) or 608(c) “shall be issued on the domestic violence protective order form” and are to be placed “on the national domestic violence registry and the statewide domestic violence database....” Rule 9a, WV Rules for Domestic Violence Civil Proceedings. Because they are based upon the Article 27 definitions of “domestic violence or abuse,” they must be issued as separate orders, on forms promulgated by this Court, and invoke firearms possession restrictions.

Outside the divorce context, numerous other provisions refer to and incorporate Article 27 criteria. Family Courts are to probe behind agreed parenting plans if there is “credible information that ... domestic violence as defined by [48-27-202] has occurred,” and to order “appropriate protective measures.” W. Va. Code 48-9-201(b). If a court determines a parent has committed domestic violence as defined at W. Va. Code 48-27-202, the court may impose limits including “restraints on the parent from communication with or proximity to the other parent or the child.” W. Va. Code 48-9-209(b)(4). The “limiting factors” set forth in W. Va. Code 48-9-209 (including domestic violence) are to be considered in any permanent parenting plan. W. Va. Code 48-9-207a)(6). Any proposed parenting plan “shall state ... any restraining orders against either parent to prevent domestic violence or family violence.” W. Va. Code 48-9-205(a)(6).

Where the Legislature has incorporated Article 27 criteria into divorce and

⁴² Sub-section 608(c) also permits the court to extend the order for more than 180 days, “for whatever period the court deems necessary,” upon specified conditions.

custody proceedings, it has also incorporated the Article 27 restrictions on use of mutual protection orders. Those Article 27 restrictions on use of mutual protection orders fully satisfy all criteria of the federal Gun Control Act, and all criteria of the Violence Against Women Act and its funding eligibility criteria.

B. Middle Tier - "Broader Protection Orders" Involving Domestic Violence But Not Invoking Article 27 Remedies

West Virginia Code sections 48-5-509(a) and 48-5-608(a) separately authorize temporary and permanent "injunctive relief or protective orders" without regard to Article 27 criteria. The statute is explicit that relief under 48-5-608(a) may be ordered "whether or not there are grounds for relief under subsection (c) and whether or not an order is entered pursuant to such subsection." W. Va. Code 48-5-608(a). The relief available under §608(a) is substantially more limited than that in Article 27 proceedings.⁴³ Relief in 608(a) orders does not include limitation on possession of firearms, as 48-27-502(b) requires in Article 27. Violations of 608(a) orders are not punishable by criminal sanction.⁴⁴ Orders issued pursuant to 608(a) are not entered on the domestic violence registry. Rule 9a, WV Rules for Domestic Violence Civil Proceedings.

⁴³ Mandatory relief under 48-5-608(a) enjoins only three behaviors: "molesting or interfering with the other," or "otherwise imposing any restraint on the personal liberty of the other," or "interfering with the custodial or visitation rights of the other."

Permissive relief enjoins only four behaviors: "entering the school, business or place of employment of the other for the purpose of molesting or harassing the other;" or "entering or being present in the immediate environs of the residence of the petitioner;" or "contacting the other, in person or by telephone, for the purpose of harassment or threats;" or "harassing or verbally abusing the other." W. Va. Code 48-5-608(a).

⁴⁴ Knowing willful violation of orders under 608(b) or 608(c) may be a misdemeanor. W. Va. Code 48-27-903(a)(1)(C). There is no crime for violation of a 608(a) order.

Similar broader authority is found in other provisions addressing non-divorce custodial disputes. Section 48-9-102 states as an objective to facilitate “security from exposure to physical or emotional harm.” Family Courts are to probe behind agreed parenting plans if there is “credible information that ... domestic violence as defined by [48-27-202] has occurred,” and to order “appropriate protective measures.” W. Va. Code 48-9-201(b). Family Courts may include “restraining orders, if applicable” in custodial allocation case temporary orders. W. Va. Code 48-9-203(b)(5).

Finally, this Court has previously noted “inherent general equity powers to issue restraining orders upon a proper evidentiary showing,” *Pearson v. Pearson*, 488 S.E.2d 414, 424 at fn. 10 (1997).⁴⁵

In exercising this broader protective authority, the Family Courts routinely have addressed conduct that does not meet the Article 27 statutory definition of “domestic violence or abuse.” It is important to recognize that the Article 27 definition of “domestic violence” is quite narrow. Article 27 authorizes potentially broad and powerful relief, so the Legislature chose to limit its application to only the most dangerous forms of abusive behavior. Only conduct that involves actual or threatened “physical harm;” or constitutes “sexual assault or sexual abuse;” or constitutes “holding, confining, detaining or abducting” is sufficient to invoke Article 27 remedies.⁴⁶

⁴⁵ The *Pearson* Court “reserve[d] for another day the matter of issuance of a restraining order in a divorce proceeding, under the general equity powers of a court, when there has been no proof of statutory abuse, but the conduct of the parties during the proceedings indicate a need for a restraining order.” *Id.* at footnote 10.

⁴⁶ W. Va. Code 48-27-202 defines five behaviors:
(1) Attempting to cause or intentionally, knowingly or recklessly causing *physical harm* to another with or without dangerous or deadly weapons;

The consensus of social science literature has for decades used the term “domestic violence or abuse” in a much broader way than the West Virginia DVP statute.⁴⁷ Reflecting that consensus, the “West Virginia Domestic Violence Benchbook,” published in 2012, describes “domestic violence” as follows:

Domestic violence is a pattern of coercive behavior that a person uses to maintain power and control over an intimate partner or a family or household member. Acts of domestic violence include emotional and psychological abuse, as well as physical violence. Since domestic violence involves a pattern of behaviors between people in an intimate or family relationship, acts of domestic violence are typically repetitive over an extended period of time. Domestic violence is often described as learned behavior that an abuser uses to control a victim. ... For this reason, domestic violence should not be attributed to or excused by an abuser's anger, stress, alcohol or substance abuse, or the actions of the victim. Rather, an abuser uses domestic violence as a strategy to dominate a victim and to gain the victim's compliance.

West Virginia Benchbook For Domestic Violence Proceedings (2012), Chapter 1.A., at pages 1-1 to 1-2 (footnotes omitted).

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- (2) Placing another in reasonable apprehension of *physical harm*;
 - (3) Creating fear of *physical harm* by harassment, stalking, psychological abuse or threatening acts;
 - (4) Committing either *sexual assault or sexual abuse* as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code; and
 - (5) *Holding, confining, detaining or abducting* another person against that person's will.

W. Va. Code 48-27-202 [italicized emphases added]

⁴⁷ See generally, Clare Dalton & Elizabeth M. Schneider, *Battered Women and the Law* (2001), Chapter 2 A. Abusive Relationships, at 56-74; D. Kelly Wiesberg, *Domestic Violence Legal and Social Reality* (2012), Chapter II. B. Dynamics of Abusive Relationships, at 36-46; and Nancy K. D. Lemon, *Domestic Violence Law, Fourth Ed.* (2014), Chapter 2. B. Dynamics of Domestic Violence Relationships, 40-51. In each of these legal textbooks, the authors, within the cited sections, summarize the broadly held consensus that domestic violence involves a pattern of coercive control over time, effectuated through a range of tactics that include emotional abuse, isolation, economic abuse, intimidation, and threats, as well as actual violence.

Family courts often address forms of coercive behavior which pose risks to the safety and well-being of a party, but which do not fit within the narrow DVP statute definition of “domestic violence or abuse.” For example, “willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress,” is a crime if committed against a person with whom one has had or seeks a personal relationship. W. Va. Code 61-2-9a(g)(1). But that conduct would not be a basis for DVP statute relief unless it ALSO “created a fear of physical harm.” W. Va. Code 48-27-202. There are many forms of abusive, manipulative, controlling behavior which nevertheless do not create “fear of physical harm,” or constitute sexual assault or abuse, or constitute ‘holding, confining, detaining. Coercive control by torrents of verbal abuse or degrading and demeaning insults which do not threaten physical harm would not be actionable under the DVP statute. Telephone harassment, that doesn’t create a reasonable fear of physical harm, would not support DVP statutory relief.

The Violence Against Women Act also covers a wider range of coercive behaviors than West Virginia’s Article 27 definition. For example, the VAWA definition of “Stalking” includes conduct that would cause a reasonable person to “(A) fear for his or her safety ... or (B) suffer substantial emotional distress.” 42 U.S.C. 13925(30) [emphasis added].⁴⁸ “Substantial emotional distress” would not be sufficient to invoke Article 27 remedies under the West Virginia statute. VAWA contemplates that courts will issue protective orders controlling such behavior, and discourages the use of

⁴⁸ And, as noted previously, is sufficient to establish the West Virginia crime of Stalking. W. Va. Code §61-2-9a.

mutual protection orders in such circumstances.

As previously mentioned, these middle tier “broader protection orders” are not placed on the domestic violence registry, and do not invoke the firearms possession restrictions of a full Article 27 protection order. Rule 9a, WV Rules for Domestic Violence Civil Proceedings. The statute is clear that 608(a) orders may be issued regardless of whether “there are grounds for relief” under Article 27. W. Va. Code 48-5-608(a). And there are valid reasons that even a victim of core Article 27 domestic violence may choose to seek a lesser form of relief than Article 27.

As one example, the offender may hold a job that will be lost if a full Article 27 were entered.⁴⁹ That job, at least for the time being, may be the sole source of income and support for the victim or for the children. Amici currently have a case pending where the opponent has a very high-paying job for a tech firm that will fire him if a DVPO is entered. That victim may be better served by entry of a middle tier order.

As another example, the victim may understand better than anyone else that entry of an order with findings of domestic violence, or that would remove the abuser's firearms, may trigger even more dangerous behavior by this particular perpetrator. Studies document that the time of separation is a particularly high-risk period for victims.⁵⁰ “Because a victim's move to separate signals an impending loss of control, a

⁴⁹ For example, employment as a private security officer working at mine properties or commercial buildings; law enforcement officers; or regional jail officers. Amici have seen many cases involving all these types of parties.

⁵⁰ Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1092 (2003).

perpetrator often escalates tactics to exert abusive power and control and may punish the victim through threats, other acts of violence, or child abduction. Not only are victims who separate from perpetrators of domestic violence significantly more likely to be abused, they are also at an increased risk for intimate partner homicide.⁵¹ One of amicus LAWV's clients became a murder-suicide victim killed three weeks after completion of her divorce. In such situations an informed victim may well be making the smart choice to opt for a lower level of protection with a consequent lower level of risk.

As another example, the evidentiary requirements of an Article 27 proceeding sometimes pose difficult hurdles for victims. Domestic abuse typically happens when no one else is present, so there are no other witnesses. The abuse may not have left any physical marks. In the classic "he said - she said" contest, the court may decline to grant a protective order. The abuser then emerges from the courtroom feeling all the more immune and powerful, feeling "justified" by the court ruling, while the victim leaves feeling even more hopeless and helpless. The choice to obtain "some" protection by a lesser alternative, while avoiding the risk of a losing court outcome that would only worsen the victim's fate, may be the smart choice.

Finally, victims at times are so defeated mentally and emotionally that they present very poorly in court. Others may have mental health or substance abuse issues (perhaps stemming from the abuse) which become the primary focus of the

⁵¹ National Council of Juvenile and Family Court Judges, *Civil Protection Orders: A Guide For Improving Practice* (2010) at pages 1 - 2 [internal citations omitted]. Available online at: http://www.ncjfcj.org/sites/default/files/cpo_guide.pdf

proceedings, while the domestic violence is minimized.⁵² Batterers often present as confident and articulate. Their skewed world view⁵³ permits them to lie well and with impunity. Often, the victim correctly perceives greater danger in leaving the situation or is wholly financially dependent upon the batterer. To that end, more options rather than fewer is better. A simple no-contact order is sometimes the best tool for the task.

For all these reasons, amici urge this Court to assure the availability of middle tier “broader protection orders” with less drastic remedies than pure Article 27 relief. Whether by specific statutory authorization such as W. Va. Code 48-5-608(a), or by “inherent equity power” of the court, we believe it is good for victims to have more choices rather than fewer. We believe family courts can be creative in using this latitude to craft remedies that fit the individual case. Even where victims could pursue Article 27 relief, they should not be limited to that option.

The great problem for victims, that amici observe in actual practice with middle tier relief, is that family courts too readily morph the middle tier “broader protection order” into a mutual orders. This is particularly true of the so-called “simple no-contact order,” which if issued in a case involving VAWA Domestic Violence still is subject to the VAWA limitations. Far too often the “price” of offender concessions⁵⁴ is the demand

⁵² Both amici have had innumerable cases illustrating this premise.

⁵³ Sometimes reaching true psychopathic levels.

⁵⁴ Which can be about financial terms, parenting time, or entry of a middle tier “broader protection order.”

for a mutual order.⁵⁵ Or the court *sua sponte* imposes a mutual order.⁵⁶ In short, the problem with middle tier relief is NOT that it is less protective than Article 27 relief, but that it is too often granted only as part of a mutual order. Middle tier relief should be frequently utilized, but against only the offending party.

As discussed above,⁵⁷ mutual orders in this context may violate Due Process concerns, and violate the 42 U.S.C. 3796hh(c)(1)(C) certification requirement for West Virginia to receive VAWA funding. This Court can end the negotiating extortion, and the Due Process and VAWA problems, by imposing clear restrictions on the use of mutual orders in this middle tier of relief. If mutual orders (with all of their possible adverse effects) are not available except after evidentiary inquiry to the nature of the case, most of the incentives for mutual orders will be eliminated.

C. Lowest Tier - Family Court Proceedings Not Subject To VAWA Conditions

Finally, at the lowest tier, are the cases that do not involve “Domestic Violence, Dating Violence, Sexual Assault or Stalking” as those terms are defined by the Violence Against Women Act. Thus the VAWA funding eligibility condition does not apply.

These cases likely present the lowest risk of dangerous and violent conduct. Amici have indeed encountered the litigants who cannot see each other across their child’s athletic field without hissing some insulting remarks, but who nevertheless have

⁵⁵ Again, in the experience of amici, often simply because it enables the offender to self-justify and believe that the victim is at least partly to blame for the perpetrator’s abusive conduct.

⁵⁶ Perhaps because issuing a mutual order avoids the necessity of hearing evidence and making decisions, thus relieving the crowded docket.

⁵⁷ See Section III.B of this Brief, at pages 10-12.

no history of either actual or threatened violence or coercive control or manipulation.

Even in this sphere, however, amici counsel caution in the use of mutual orders. While mutual “non-DV conflict prevention orders” in these cases may be appropriate for parties who share relatively equal responsibility for the problem behaviors, we believe the best practice is for courts to first determine whether equal shared responsibility is the fact of the case. If that is not the case, and only one party is the primary cause of the problems, then amici believe that only the problem actor should be restrained. That was the essence of the Circuit Court’s conclusion below, that W. Va. Code 608(a) permits entry of protective orders only where allegations of abuse have been proven by the party seeking protection. App. Rec. A08.

V. APPLICATION OF THESE PRINCIPLES TO THE CASE BEFORE THE COURT

At the outset, amici note that the case now before the Court is a perfect illustration of the too-ready willingness of family courts to enter mutual orders without inquiry to the underlying circumstances. Unfortunately the record of the case before the Court has significant gaps and omissions.⁵⁸ Based upon the limited information

⁵⁸ For example, the petition for domestic violence protection order is not included in the Appendix Record, nor is the record of the October 9, 2012 DVPO hearing at which agreement was reached to dismiss the DVP proceeding and use a mutual restraining order in the divorce case.

A temporary hearing in the divorce matter was held on October 19, 2012, after which a temporary order was entered on November 15, 2012. No record of that hearing is included in the Appendix Record; the November 15, 2012 Temporary Order itself is not included in the Appendix Record.

The final divorce hearing was extremely limited, lasting only 17 minutes. There was no testimony by either party describing any conduct supporting a need for a restraining order, and only a one sentence affirmation by the petitioner husband that he agreed to a mutual restraining order.

On August 6, 2013 the Family Court conducted a hearing on petitioner ex-husband’s motion to hold ex-wife in contempt. No record of that hearing is included in the

available in the Appendix Record, amici reach the following assessments.

First, there does not appear to have been any conduct, by either party, rising to the level of Article 27 “domestic violence.” There is no indication in the available record of allegations of physical harm, reasonable apprehension of physical harm,⁵⁹ harassment or stalking which created fear of physical harm, sexual assault or abuse, or “holding, confining, detaining.” See W. Va. Code 48-27-202 “Domestic Violence Defined.” On the available record,⁶⁰ no Article 27 protection order could have been entered either in a pure DVP proceeding or by Section 48-5-608(b) or 608(c) invocation of Article 27 remedies.

Second, as to the respondent ex-wife, it is not possible to determine on this record whether her behavior was or was not part of a larger ‘pattern of coercive control’ which would meet a broader social science conception of domestic abuse.⁶¹ She was alleged to have committed financial misdeeds against the petitioner, see App. Rec. A88, and she acknowledged attempts to contact him even after being ordered to cease. See App. Rec. A84. But amici believe the limited information in the record is not

Appendix Record. The order resulting from that hearing, App. Rec. AA52, does not clearly set forth what precise conduct the Court found to constitute contempt.

⁵⁹ At the September 27, 2013 appeal hearing with the Circuit Court, petitioner ex-husband’s counsel did suggest a “threat of physical abuse. He [Riffle] found a knife that she had next to the bedside and he was concerned about that.” App. Rec. A89. After learning that this occurred well after the time the respondent ex-wife had departed the home, the Circuit Judge seemed to conclude this was not sufficient to establish domestic violence. Without more information, amici would agree.

⁶⁰ Again, the record of the DVP proceeding, and whatever information it may have provided, is not included in the Appendix Record for the present case.

⁶¹ See discussion at pages 21-22, *supra*, for explanation of this conception.

sufficient to conclude there was a 'pattern of coercive control.'

Third, as to the petitioner ex-husband, the record contains no allegation whatsoever of any conduct which would have supported issuance of a restraining order against him.

Therefore, amici believe the case before the Court would best fit in the lowest tier, for cases not involving involve "Domestic Violence, Dating Violence, Sexual Assault or Stalking" as those terms are defined by the Violence Against Women Act. If the Family Court had made a finding to that effect, then a mutual order would not have transgressed the federal VAWA restrictions on mutual protection orders.⁶²

Aside from the federal VAWA analysis, the issue presented by the case before the Court is whether *West Virginia* law permits the entry of a restraining order "without specific findings of abuse by either spouse," as the Circuit Court phrased it. App. Rec. A08. The Circuit Court correctly noted that W. Va. Code 48-5-608(a) permits relief "when allegations of abuse have been proved."

Petitioner Riffle's principal argument on appeal is that the requirement of proof of allegations of abuse was met by the on-the-record recited consent of the parties, without any description of any independent basis for entry of a restraining order. Thus consent would amount to a waiver of the right to be protected from restraining orders in the absence of findings of abuse,. *Cf. Siggelkow v. State*, 731 P.2d 57 (Alaska 1987)

⁶² Before granting the mutual order, the Family Court Judge noted during the divorce hearing that "neither party has requested a restraining order against the other." Time signature 11:09:50. If this case were subject to VAWA analysis, that fact would heighten the likelihood of problems, under both 42 U.S.C. 3796hh(c)(1)(C) and 18 U.S.C. 2265(c). Both of those provisions restrict mutual orders unless, *inter alia*, there were written pleadings on behalf of each party requesting protective relief.

(permitting entry of restraining order pursuant to “inherent equitable powers of the court,” *id.* at 61, but only “where an independent basis exists for the order); and *Cooper v. Cooper*, 144 P.3d 451, 459 (Alaska 2006) (requiring an “independent basis for the order against each party”).

If “consent” is to be a sufficient basis for entry of restraining orders, amici urge this Court to require some showing of full, knowing, voluntary and informed consent. Agreement to entry of a property settlement in a divorce case must be shown to be “fair and reasonable, and not obtained by fraud, duress or other unconscionable conduct by one of the parties.” W. Va. Code 48-6-201. Surely agreement to entry of an injunctive order restricting the person’s Liberty interest in freedom of movement and association should be protected by equivalent assurances.⁶³

West Virginia law is clear that, in general, waivers of rights are not favored. To establish waiver, there must be “voluntary intention to relinquish.” *Hoffman v. Wheeling Svgs & Loan Ass’n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950). “The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.” *Id.* at 133 W. Va. 694, 713, 57 S.E.2d 725, 735. “A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights. [citation omitted].” *Id.* at 133 W. Va. 694, 713, 57 S.E.2d 725, 735.

⁶³ Waiver of the substantive and procedural protections which guard a fundamental right is unambiguously disfavored by our courts, which must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389 (1937); *Hodges v. Easton*, 106 U.S. 408 (1882); *Ohio Bell Telephone Co. v. Public Utilities Comm’n*, 301 U. S. 292 (1937); *Johnson v. Zerbst*, 304 U.S. 458 (1938). Courts should never presume acquiescence in the loss of fundamental rights. *Id.*

This Court summarized in *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998) the law against any presumption of waiver:

[T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right. See also *Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 118, 35 S.E.2d 865, 868 (1945) ("Waiver is the voluntary relinquishment of a known right." (citation omitted)). This intentional relinquishment, or waiver, may be expressed or implied. *Ara*, 387 S.E.2d at 323 ("Waiver may be established by express conduct or impliedly, through inconsistent actions." (citing *Creteau v. Phoenix Assurance Co.*, 202 Va. 641, 119 S.E.2d 336, 339 (1961))). However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) ("A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights." (Citation omitted)). Furthermore, "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id.* (citing *Hamilton v. Republic Cas. Co.*, 102 W. Va. 32, 135 S.E. 259 [(1926)]). See also *Mundy v. Arcuri*, 165 W. Va. 128, 131, 267 S.E.2d 454, 457 (1980) ("One who asserts waiver . . . has the burden of proving it." (Citations omitted)); 19 *Michie's Jurisprudence Waiver* § 5 at 678 (1991) ("The burden of proof is on the one asserting a waiver.").

Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998).

There is nothing in the present record establishing adequately informed consent by Mr. Riffle to entry of a restraining order against himself. While he affirmed his lawyer's leading question that he understood such an order would be issued, Jan 14, 2013 divorce hearing at 11:00:35, there was no showing of any independent basis supporting a restraining order. Amici believe the courts owe a higher duty to litigants to assure that protections are not waived without full understanding.

VI. CONCLUSION

Amici urge this Court to hold that mutual orders in any case involving domestic violence should be emphatically discouraged.

In any proceeding invoking W. Va. Code 48-27-101 *et. seq.*, the provisions of 48-27-507 are clear. Mutual "Article 27 protection orders" may be entered only under the statutorily defined conditions. This is true whether the case is a pure Article 27 proceeding, or a family court matter invoking the remedies of Article 27.

In family court proceedings involving domestic violence but not invoking Article 27 remedies, mutual "broader protection orders" are strongly discouraged by federal law. Amici believe that any ruling permitting entry of mutual "broader protection orders," in cases involving VAWA-defined domestic violence, must require compliance with the conditions stated in 42 U.S.C. 3796hh(c)(1)(C). Otherwise millions of federal dollars now coming to West Virginia police, prosecutors and court systems would be jeopardized. Requiring compliance with the requirements of 42 U.S.C. 3796hh(c)(1)(C), in VAWA defined domestic violence cases where Article 27 relief is not invoked, will avoid those concerns.

Finally, in family court proceedings not involving any form of domestic violence, where federal VAWA provisions may not be implicated, amici believe that mutual "non-DV conflict prevention orders" nevertheless are disfavored by West Virginia law. Due Process principles must give litigants adequate notice in advance of hearing of the possibility of a restraining order against that litigant, in order to provide informed opportunity to oppose entry of such a restraining order. Longstanding law protecting against waiver of rights without full knowing voluntary agreement should assure that

such a requirement is not waived in the absence of full, informed consent.

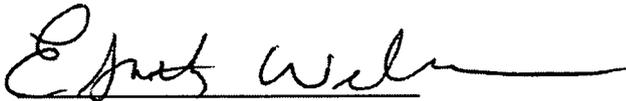
Respectfully submitted,

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CERTIFICATE OF SERVICE

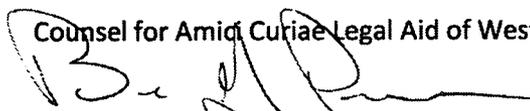
We hereby certify that on this the 20th day of February, 2015, Amici Curiae Legal Aid of West Virginia and West Virginia Coalition Against Domestic Violence served a true copy of the foregoing "Brief of Amici Curiae Legal Aid of West Virginia and West Virginia Coalition Against Domestic Violence" upon all Counsel and Parties of Record, via U.S. Mail, postage prepaid and addressed as follows:

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