TPOs: A Potential Way to Cure that "Alienation" of Affection by Your Citizen Spouse...

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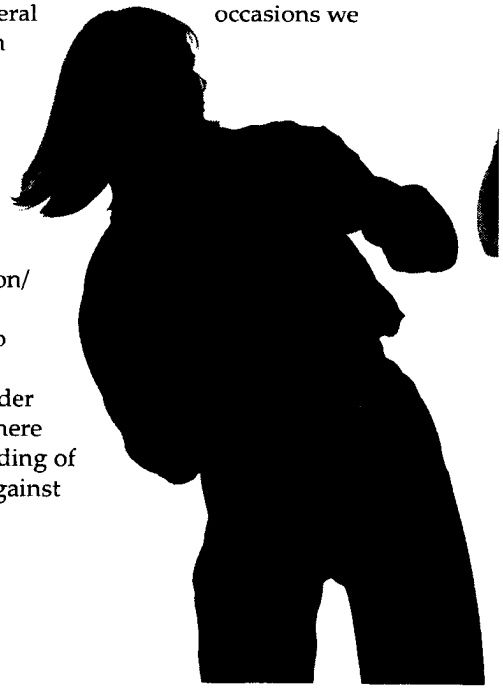
Pursuant to Title V of the VAWA (Violence Against Women Act) of 1994, amended in 2000, federal legislation provides a mechanism for an otherwise illegal immigrant to secure residency status, as well as various state and federal benefits, through seeking and securing a 12-month Temporary Protective Order against their U.S. citizen spouse. The immigrant battered spouse can not only secure an additional two year extension for her conditional residency status, but she may also even petition for permanent residency status, as well as terminate any currently pending INS investigations or deportation proceedings.

The policy behind the legislation is that Congress determined that domestic abuse problems are likely to be exaggerated in marriages where one spouse is not a citizen and the non-citizens' legal status depends on his or her marriage to the abuser because it places full and complete control of the alien spouse's ability to gain legal status in the hands of the citizen or permanent resident. A battered spouse may be deterred from taking action to protect themselves and their children, including filing for a civil protection order, filing criminal charges or calling the police because of the threat or fear of deportation. As a result, many immigrants were trapped and isolated in violent homes. By enacting the VAWA immigration provisions, Congress intended to alleviate such chilling result. 10 Am. U.J. Gender Soc. Pol'y & L. 95, *109.

However, immigrants that become aware of this provision may attempt to abuse what they see as a loophole for them to stay in the United States and keep living the American dream. Such was demonstrated in a recent case of mine where the non-citizen Wife attempted, on five different occasions, in various venues before different judges, to secure a 12 month protective order against my client, who was a naturalized U.S. citizen from Nigeria. As the marriage lasted approximately two years from the date that the immigrant wife migrated from Nigeria to marry my client until she filed for the first TPO, coupled with the fact that it was believed that she was currently the subject of INS investigation due to criminal charges, the Wife presumably sought to abuse this loophole so that she could remain in the United States, where she was currently benefiting from a full scholarship, various medical benefits, WIK benefits, among other benefits. Interestingly, the parties resided together just long enough to produce an American born child.

The Wife was involved in at least two petitions; her petition seeking permanent protective order against the citizen husband spouse and a cross petition from the Husband against the Wife and the Wife's brother. There was also a criminal warrant application hearing scheduled against the Wife for the Wife allegedly striking the Husband with a chair leg causing noticeable injury to the Husband's forearm.

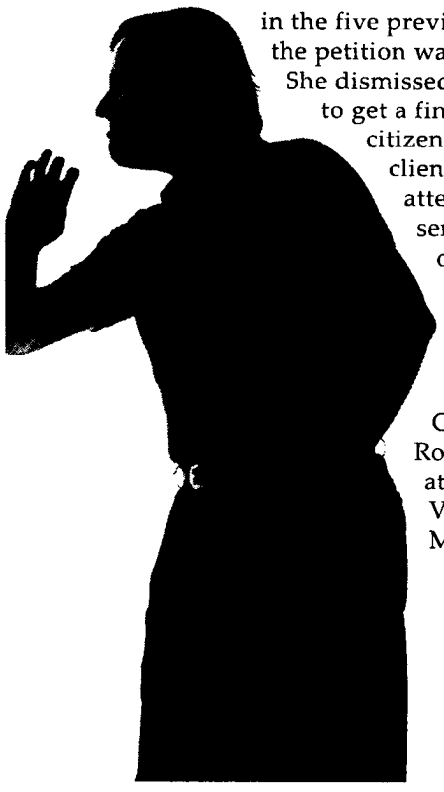
On several occasions we engaged in negotia-t-tions with the Wife's former attorney and then immigration/ divorce attorney, to enter into consent order whereby there was no finding of violence against



either party. We simply asked that the Wife agree to go into counseling. The Wife staunchly refused each time to enter into any consent order whereby the doctor citizen husband would not have a finding of abuse against him. She also would not consider any consent order that referenced her own abusive conduct. This backfired to the point that the Fulton Magistrate Court found that the wife had struck the husband and, at the conclusion of the warrant application hearing, the Wife found herself charged with simple battery. That case resulted in the Wife being placed on probation. Thus, in her zeal for a protective order against the citizen husband, the Wife put herself in jeopardy as to her application for residency.

The Wife continued to pursue her efforts to obtain a finding of abuse in the Superior Court of Fulton County, both in status conferences and in a full two day trial. Both the judicial officer and superior court judge carefully discussed the problem with both the parties and counsel at the status and pre-trial conferences. The final judgment and decree also set forth the entire facts and circumstances as to the various allegations of both of the parties and the court's findings as to the allegations of violence made by the Wife against the Husband and the allegations of poor parenting made by the Husband against the Wife. The court awarded joint legal custody. The Wife was awarded primary physical custody with very generous parenting time for the Husband.

Not satisfied, the Wife sought another petition for a temporary protective order in the Fulton County Magistrate Court, again alleging the same conduct as she had set forth in the prior year of petitions. The immigration/divorce attorney accompanied her to the hearing as a friend, but not as an attorney. The presiding magistrate found that the various allegations raised in the new petition were predicated on the same factual transaction that had been dealt with in the five previous hearings, and that the petition was barred by res judicata. She dismissed the Wife's sixth attempt to get a finding of abuse against the citizen Husband. Luckily for my client, the Judge had recently attended two judicial seminars where this issue of allegations of violence made in attempts to gain residency was one of the topics.



According to Gwinnett County Magistrate Judge Robert Mitchum, there are attempts to abuse the V.A.W.A. provision. Judge Mitchum explained:

"If a non-U.S. resident applies for a Domestic Relations Temporary Protective Order, there are issues above and beyond normal property, money and child issues that need to be determined. If the alleged offending spouse is the sponsor for the petitioner's U.S. permanent residency application, the Respondent can simplify their case by withdrawing sponsorship of the residency application and (potentially) have the petitioner deported. It isn't quite that easy, but the respondent routinely makes the threat to control the situation or the petitioner. It is particularly acute if a child is born in the U.S., because that child will be a U.S. Citizen either because the respondent was already a citizen, or, if not, solely because the child was born in the U.S. If the petitioner is deported before a divorce can be had, the child does not get deported. A superior court judge hearing this type of case has the option to order the respondent to take steps to deliver to the petitioner all documents they need to continue their application themselves, i.e. birth certificate, application documents, reference letters, employment records, passport, child's documents, and any other document that the petitioner needs to go on with their residency application by themselves. In addition, the respondent can be ordered to refrain from doing any acts that will hamper the petitioner in their efforts to become permanent residents. I believe that victims of domestic abuse can apply for permanent residency on their own, providing evidence of the abuse, whether there is a pending sponsored application or not. Sometimes we can tell that the whole point behind the TPO petition is to get a leg up on the residency application process." ***FLR***

Our thanks to Judge Robert Mitchum for his assistance with this article. Mitchum graduated Notre Dame in 1972 and is a graduate of the (outstanding) class of 1979 Emory Law School. He was a Commander, U.S. Navy, is on the Faculty at the National Judicial College at the University of Nevada-Reno, and serves as a Magistrate in the Gwinnett County Magistrate Court as of 1987. Mitchum is married to attorney Gloria Mitchum. They have been married 36 years and have three children: Leah, a Lieutenant in the Navy JAG Corps, Phillip, working in Washington, D.C., and Bobby, a graduate student attending UGA.

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