



From “Catch-22” to Equal Justice

**How the lack of representation in court
endangers domestic violence victims**

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By Laurie Duker



Court Watch Montgomery reduces intimate partner violence by ensuring that victims have access to responsive justice and vital services so the violence can be stopped, quickly and permanently.

Court Watch Montgomery’s dedicated volunteers, who spent countless hours collecting data in protective order hearings and inputting data made this report possible. Thanks to Sarah Stephens, Data Manager and Analyst, who made possible the analytic work in this report.

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From “Catch-22” to Equal Justice

How the lack of representation in court endangers domestic violence victims

Domestic violence is a devastating public health problem that results in homicides, assaults and lasting trauma for adult victims and their children. Domestic violence results in significant health care costs and has an adverse impact on our nation’s productivity due to lost days at work. Over 100,000 Montgomery County residents are expected to experience intimate partner violence in their lifetimes.

Protective orders are one of the most effective ways to stop domestic violence when they are paired with a safety plan and are properly enforced. Final protective orders have been shown to lower the risk of contact with abusers, decrease threats with a weapon, and reduce injuries.¹

Nearly half (46%) of victims (petitioners) – and a full 76% of alleged abusers (respondents) – handle their most crucial protective order hearing alone, without a lawyer or advocate. There is extensive debate and controversy about the benefits and perils of a growing self-representation trend and its impact on the courts. Does the absence of lawyers slow things down or speed them up? Does it require judges to “give legal advice,” which is not permitted under ethics rules? Is appearing alone in court a key part of “justice for all” or do self-help materials on court websites encourage a practice that results in poor outcomes? In short, is justice served?

Self-representation in the domestic violence context has both significant benefits and challenges. The lack of a “lawyer barrier” for domestic violence victims is particularly praiseworthy given the financial abuse that virtually always accompanies intimate partner abuse, leaving many victims without access to funds.

But our research shows that many judges have concerns when parties appear in these hearings without representation. These are cases where trauma abounds, tensions run high, and linked criminal or custody issues further complicate matters. These are often messy proceedings, and judges frequently become frustrated when the parties do not know the proper legal steps or lack information on their options.

Intimate partner violence victims who come alone to hearings are far less likely to get justice for a range of reasons, including judges’ reluctance to actively engage with petitioners who represent themselves and the difficulty petitioners have in testifying effectively without preparation or guidance during the hearing from legal counsel. Significant “mismatches” in courtroom support have a significant and under-

studied impact on whether victims get final orders that fully protect them in a way that fully preserves respondent rights.

This report is based on data collected by well-trained Court Watch Montgomery volunteers in 2,954 intimate partner protective order hearings from 2011 to 2018 that resulted in one of three final case outcomes –the victim dropped their protective order petition or a judge granted or denied a final protective order.² See Court Watch’s companion report, “Denied and Dismissed Protective Orders,” released at the same time, for a closer analysis of denied and dismissed petitions.³

The report analyzes the significant impact of self-representation and disproportional support for the two parties in protective order cases on case outcomes and the quality of the final protective orders granted. We highlight opportunities for local and state courts, policymakers, county agencies and nonprofits to ensure that both domestic violence victims and those accused of the abuse have access to justice.

Our key findings:

- The merits of each domestic violence victim’s protective order case should speak for itself in Maryland courts. Our data suggests that that is often not the case.
- 46% of victims appear for their decisive protective order hearing without a lawyer or advocate; judges deny at least twice as many orders (about 21%) in these cases as when the victim has an advocate (3% denials) or lawyer (10% denials).
- Victims without lawyers are almost three times more likely to drop their case before they get final protection.
- Judges guarantee only 11% of victims safe, monitored exchanges of children with the non-custodial parent if the victim comes to court alone, but 29% of victims with advocates obtain this life-saving protection.
- Advocates – who work with victims prior to the writing of the court petition, through any violations of the final protective order – add good value in a County with serious budget constraints. In most cases the data show that advocates make an impact equal to lawyers in helping victims obtain orders and key provisions. They provide many additional services such as danger assessments, safety planning and linkages to services.
- Protective order cases occupy a unique niche; they are civil cases, but they attempt to stop violence that threatens citizens’ most basic rights to freedom and safety. While there is no automatic right to representation, Court Watch recommends that the state of Maryland ensure free assistance (either an advocate or pro-bono lawyer) to every domestic violence victim who desires it but cannot afford such help to ensure full access to justice as victims seek a protective order.

Attorney availability for petitioners and respondents in Montgomery County

Parties in civil cases such as protective orders have no automatic right to an attorney if they cannot afford one, unlike defendants in criminal cases. Maryland's [House of Ruth](#) provides pro bono representation to many petitioners and [DVS Legal Services](#) coordinates additional pro bono or low-bono counsel for a small number of petitioners.

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number of low and moderate-income people representing themselves in a wide range of types of cases across the country has increased in recent decades. (Graecen, 2015 and Kernic, 2015).

Maryland courts, the Legal Services Corporation, and many non-profit organizations provide extensive information online about the protective order process which are available to both parties.

Why do so many parties represent themselves in protective order hearings?

The most frequent reason given by people who do not have a lawyer is that they cannot afford one, followed by the desire not to bear the expense, followed by their belief that their case is simple enough to handle on their own. Most parties attend protective order hearings alone because they have no realistic alternative. (Graecen, 2014).

What's the role of victim advocates?

Emotional trauma, traumatic brain injury and post-traumatic stress disorder (PTSD) -- all common consequences of sustained domestic violence --exacerbate many victims' attempts to navigate an already complicated protective order process.

Advocates are not usually active participants in the protective order hearing itself but do stand next to the victim to provide emotional support and serve as a physical barrier between the abuser and victim, thus blocking any inappropriate looks or gestures made by the respondent directed at the victim. When victims are less agitated or traumatized, they can present their information and evidence more coherently. Advocates ask to address the court rarely, if there is important information not reflected in the petition that the victim has not presented in testimony.

The advocate's presence at the table, is usually an indicator of significant support prior to the hearing that directly impacts the quality of the written petition to the court and the victim's preparation for testimony. Advocates help explain the petition form, the types of information the court needs, and the

court process itself. Advocates assess victim safety (using the Danger Assessment tool developed at Johns Hopkins) and with the victim create a practical, concrete safety plan. (Campbell, 2009).

Advocates also help victims avoid interactions with their ex-partner before and after court sessions, when many victims are not fully protected from assault, harassment or intimidation.

Montgomery County district and circuit courts provide office space to advocates, to pro-bono legal programs such as House of Ruth, or to both. Courts generally recognize that court-based victim advocates can handle many functions that some court personnel would prefer not to handle due to judicial ethics concerns, such as educating the victim about options and services.

Respondents

Respondents also face a confusing court process when they appear alone. Legal jargon is often used. Respondents are often asked to decide quickly whether they will consent to the protective order being entered or whether they wish to have a hearing, without fully understanding the implications of either path. Important decisions, such as whether the respondent will be required to vacate the home, are commonly decided without the respondent having a lawyer to help the respondent make their case.

Self-representation in a domestic violence context: the judicial dilemma

The same basic legal rules and procedures apply even when there are no lawyers in the courtroom. Still, self-representing parties cannot be expected to perform as lawyers and judges should not require parties to attempt to fill that role.

At least one Montgomery County District Court judge routinely made the victim and abuser cross-examine each other, despite the parties' clear lack of knowledge about the rules of evidence or appropriate objections. One courtroom monitor noted that "you can almost see the parties reaching into their memories of television courtroom dramas to pull out words or actions that they then attempt to put to good use." This cross-examination process appeared to lengthen hearings significantly.

The practice of requiring petitioners and respondents to cross-examine each other when they appear alone at a hearing is particularly harmful in a

"Neither the petitioner nor respondent had a lawyer or advocate. The judge told the parties to directly question each other about any pertinent issues, setting up what was, for the victim, an unexpected and traumatic interaction with the abuser.

The victim cried during the process, but the judge completely ignored it.

At one point the judge told the respondent in a somewhat angry tone 'You could have subpoenaed the police officer!' The respondent, clearly frustrated, replied, 'I didn't know that!'"

Court Watch monitor notes, April 2019

domestic violence context. Most domestic violence abusers exert enormous psychological and emotional coercive control that makes every interaction intimidating for the victim. It is not unusual for victims to cry during hearings when required to directly question or reply to their assailant.

Even under a judge's supervision, making victims question their assailant and be questioned by them is needlessly traumatic. As an alternative, many judges simply read the petition, asked questions of the petitioner, then asked the respondent about their version of events and decided the case.

How *can* judges apply Maryland's protective order law when parties aren't represented?

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justice – in this case protection from violence – most petitioners need to know things they currently don't know. Judges don't want to directly inform petitioners; but they won't make time for advocates to inform them either.

Judges have also voiced concern that it may be viewed as biased for them to suggest that a victim who appears alone at court and wants to drop their case take a very short break in the hearing to discuss their options with a victim advocate before making a potentially dangerous decision that could be unnecessary once they understand their range of options. This virtually guarantees that many victims who don't have a lawyer or advocate (46% of all victims) may unnecessarily return to dangerous partners unprotected and at high risk for re-abuse.

Judges also only rarely ask the petitioner appearing alone if they need or are requesting Emergency Family Maintenance (EFM) because they view even asking the question as "giving legal advice." Only one judge regularly announces the availability of EFM in an opening introduction un-related to any specific case. Petitioners appearing alone often don't know they can receive money or are too intimidated to bring it up themselves.

Judges and court staff can assist petitioners and respondents who appear alone without violating their ethical obligations. Fair and unbiased doesn't have to mean disengaged or passive.

A benchbook for judges in California working with self-represented parties has identified common sense best practices including:

- Frame the subject matter of the hearing in easy to understand language;
- Explain and guide the process that will be followed;
- Elicit needed information from the litigants by moving back and forth between the parties;
- Paraphrase;
- Give litigants an opportunity to be heard while constraining the scope and length of their presentations;

- Summarize the terms of the order; and
- Anticipate and resolve issues that may come up with compliance.

The same practices are effective when there is a mismatch between representation, i.e. one party has a lawyer and the other does not or has an advocate. (Judicial Council of California, 2019).

In Montgomery County cases from 2011-2018, judges overall, provided slightly more information when petitioners were alone. However, judges were also more likely to be impatient in such cases. Judges were impatient in 42 out of 66 cases (64% of the time) when the petitioner was alone.

Support for victims and respondents during hearings:

From 2011-2018, a full 46% of domestic violence victims faced a judge alone in their final hearing on their protective order. Another 35% had lawyers with them, and 19% had an advocate from the County’s Health and Human Services Department with them at the table. (See Chart 1).

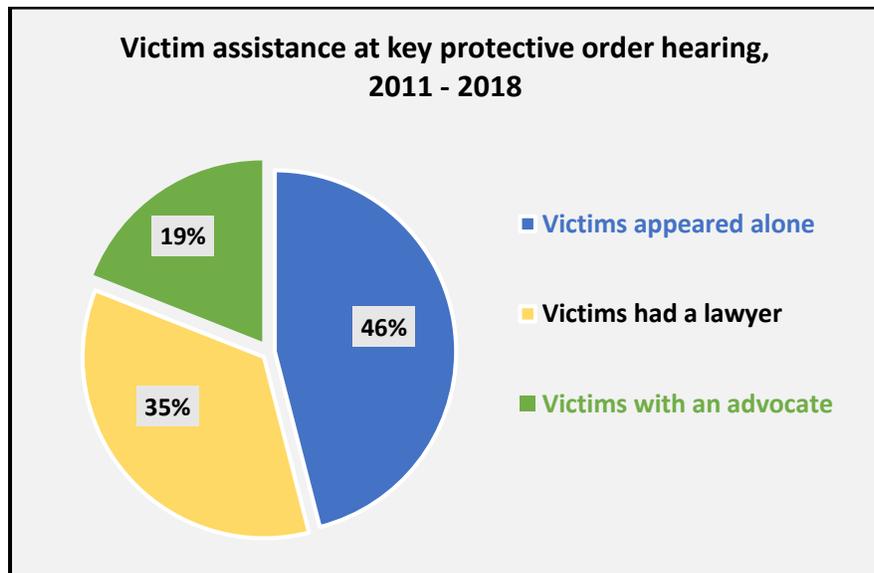


Chart 1. A full 46% of petitioners (1,362) presented their case to the judge alone.

Victims with children in common with their abuser were slightly more likely to have legal counsel (39% compared to 35% of all victims). Victims who appeared to have experienced the most severe abuse (injuries, strangulation or use of a weapon) were slightly more likely to have an advocate or lawyer (51%) than to be alone. **A full 44% of particularly high-risk victims faced judges all alone in court for their key hearing.**

As Chart 2 shows, from 2011-2018, only 24% of respondents had lawyers with them in the key (last) protective order hearing, leaving a full 76% of respondents to face the judge alone. Respondents only had advocates when the abuser filed against the victim in retribution.

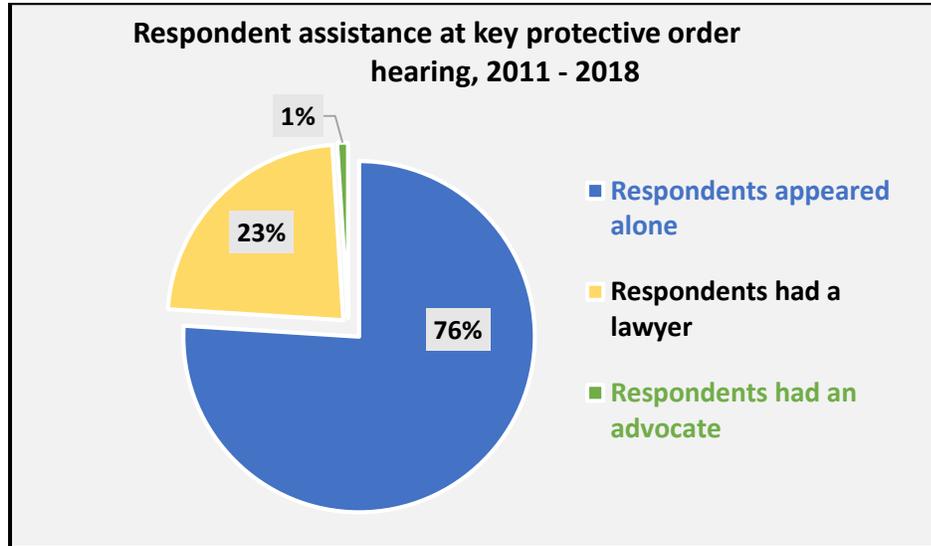


Chart 2.

Has available support for victims and respondents changed over the years?

As Charts 3 and 4 show, although the percentage of victims and respondents with support has varied in the years from 2011 – 2108.

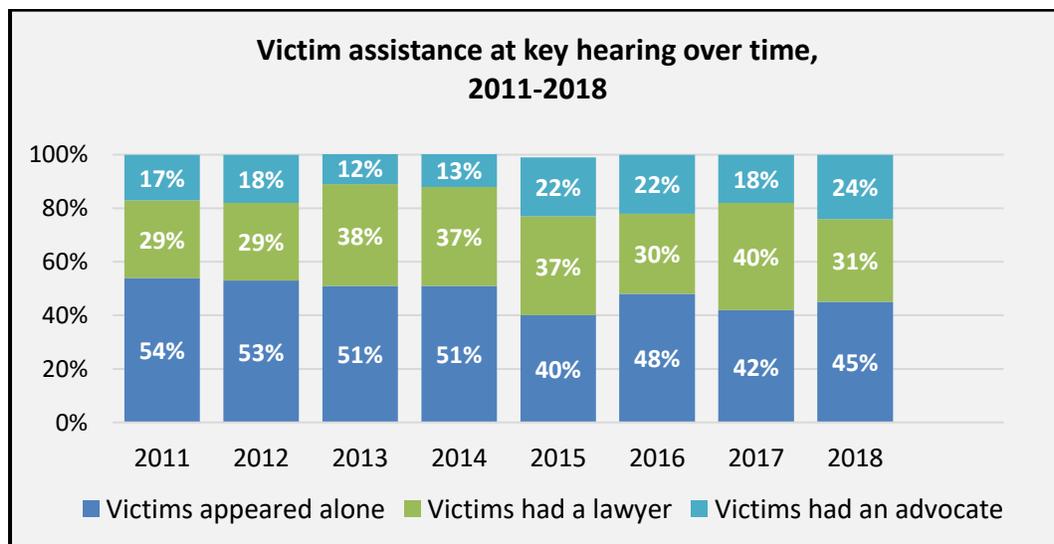


Chart 3. Fewer victims appear to be going to court hearings alone over time, and more victims appear to be using victim advocates.

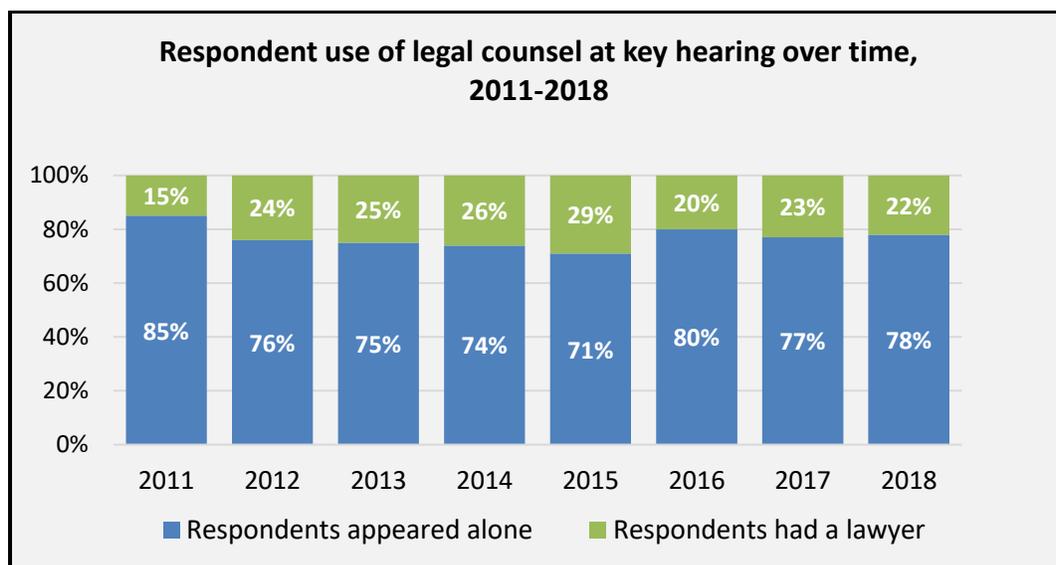


Chart 4. Although more respondents were represented by lawyers in hearings in 2018 than in past years, the great majority of respondents (76%) still are not represented in their key hearing.

Disparities in support between parties

In about half of the decisive hearings where final outcomes were decided there was a mismatch between the support on one side and the other. These disparities could lead to significant differences in final outcomes. (See Table 1).

Boxes highlighted in orange (46% of cases) show combinations of representation that could place one party at a disadvantage. The two gray boxes describe the only two scenarios in which the parties are on completely equal footing in terms of support (54%).

	Petitioner alone	Petitioner w/ advocate	Petitioner w/ lawyer
Respondent alone	39% of all protective order cases	16% of all protective order cases	20% of all protective order cases
Respondent w/ lawyer	7% of all protective order cases	3% of all protective order cases	15% of all protective order cases

Table 1. Final outcomes of the almost 3,000 cases in the study were determined in a hearing with one of six combinations of support for the parties involved.

Disparities in Outcomes

The merits of each domestic violence victim’s protective order case should speak for itself in Maryland courts. Our data suggest that this is not the case.

Victims’ likelihood of obtaining a final protective order:

	Petitioner alone	Petitioner with advocate	Petitioner with lawyer
Respondent alone	57%	81%	84%
Respondent with lawyer	29%	54%	52%

Victims’ likelihood of dropping their case

	Petitioner alone	Petitioner with advocate	Petitioner with lawyer
Respondent alone	21%	13%	9%
Respondent with lawyer	46%	25%	34%

Victims’ likelihood of having a judge deny their order

	Petitioner alone	Petitioner with advocate	Petitioner with lawyer
Respondent alone	21%	3%	10%
Respondent with lawyer	25%	20%	14%

Tables 2-4.

An extraordinary 46% of victims who didn't have support dropped their cases when their ex-partner obtained a lawyer. Although victims don't have to discuss the case with the respondent's lawyer many victims don't know that, make the mistake of engaging with the lawyer, and are heavily persuaded to drop their much-needed petitions for legal protection.

Disparities in Quality of Final Orders

Judges are more likely to ask some important questions when petitioner is alone

Judges appear to change some aspects of their approach to protective order cases when the parties appear alone. Overall, judges increased the rate at which they solicited certain types of information.

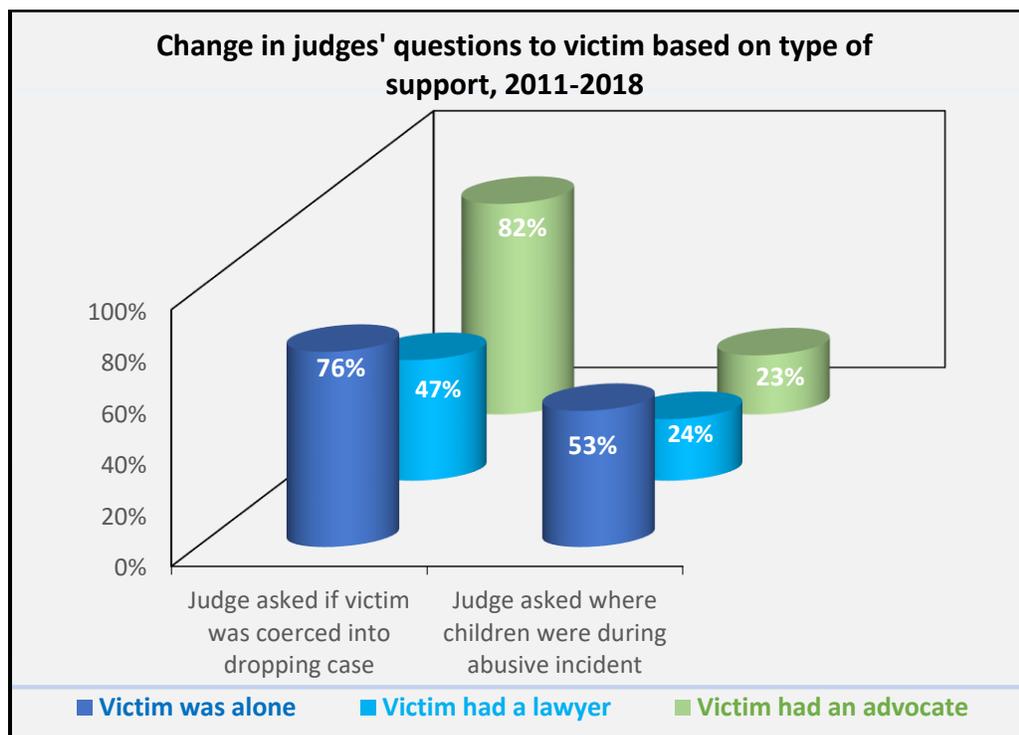


Chart 5.

When petitioners told the judge they were dropping their case, judges were more likely to question the petitioner about whether they had been coerced into making that decision if the petitioner were alone or with an advocate than when a lawyer was present, as shown in Chart 5. Judges were also more likely to ask about the whereabouts of any children in the home when the abuse occurred, presumably seeking information that otherwise might be more likely to be elicited by a lawyer or suggested by an advocate.

Key remedies: keeping victims and their children safe during visitation

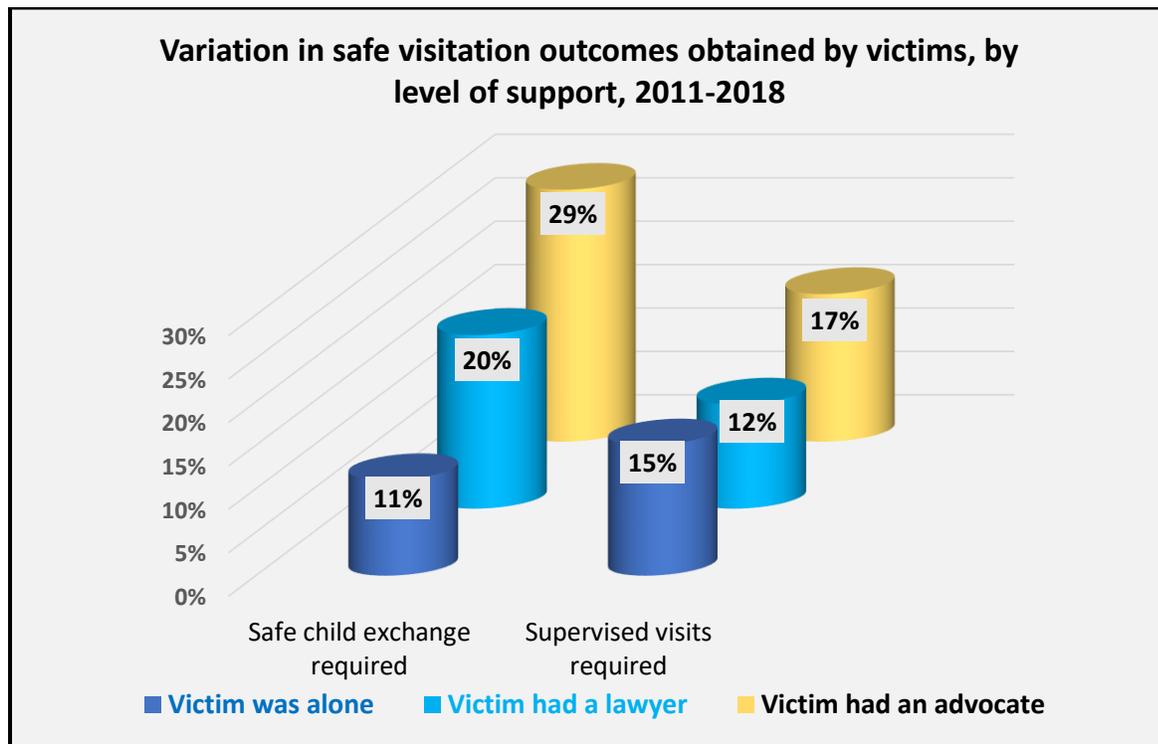


Chart 6. Petitioners with either an advocate or lawyer were about twice as likely to have the judge require a supervised exchange of the children at a facility such as the Safe Passage Center or an exchange by a third party known to both parents. Child exchanges are often flashpoints for re-abuse, as abusive intimate partners try to use the children to regain lost control.

Emergency Funds

Judges have the power to require respondents to immediately start making monthly payments to the victim and children for a year while financial issues can be worked out in lengthy child support, divorce or custody cases. Among the most common reasons that domestic violence victims return to their abuser or hesitate to flee the violence is a lack of funds to adequately house themselves and/or their children.

Petitioners who faced the judge alone were at a distinct disadvantage in terms of obtaining needed funds from the respondent. Victims who have not met with an advocate or lawyer may well not even know they have a right to emergency funds under Maryland law if the respondent is working. Petitioners who talked to the judge alone had less than half the chance of obtaining needed funds as a petitioner with an advocate or lawyer.

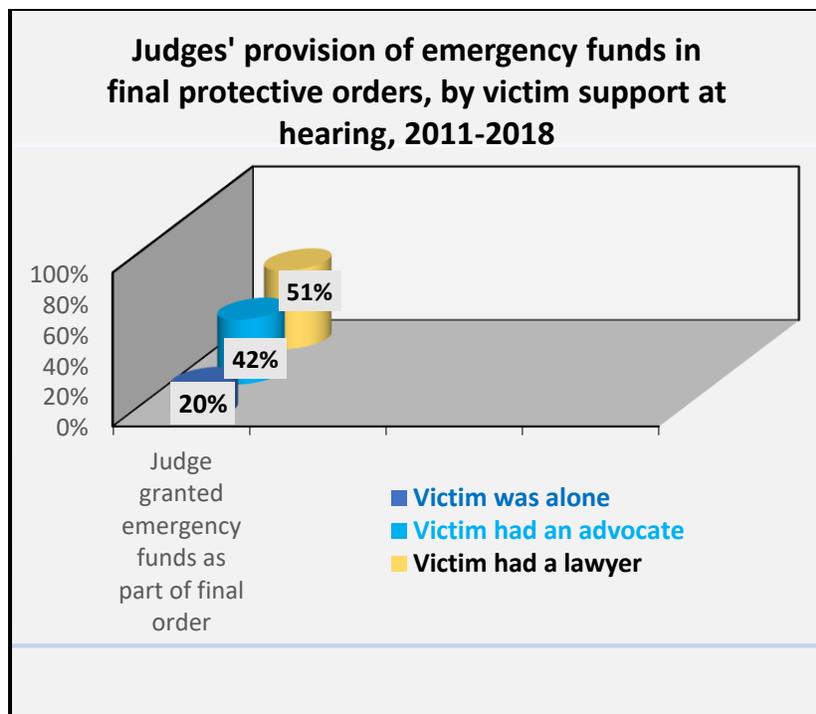


Chart 10.

While final outcomes in each case are an important measure of the impact of legal counsel or advocacy assistance, they may not tell the entire story. Although victims accompanied by lawyers were granted orders 70% of the time (compared with 77% of victims with advocates), lawyers may have been able to negotiate higher quality orders in some instances, for instance higher rates of EFM.

Conclusion and Recommendations

The clash between self-representation in protective order hearings and judges' perceptions of their roles endanger domestic violence victims. Protective order outcomes based on access to legal or advocate services are unfair to both parties and call into question the fairness of our judicial system.

Action is needed on multiple fronts.

Facilitate vigorous judicial exploration of effective and fair accommodations for parties without representation

Today 46% of petitioners and 76% of respondents represent themselves in protective order hearings in at least one county in Maryland. We urge the Chief Judge of the District Courts, The Honorable John Morrissey, to take a leadership role in working with all District Court judges in Maryland to explore, discuss, and build consensus around specific steps the judiciary can take to ensure better access to justice by constructively accommodating petitioners and respondents who represent themselves in protective order hearings. Accommodation for those who cannot afford lawyers is entirely possible while maintaining neutrality and judicial ethics. We observe judges accomplishing this regularly.

The Domestic Violence Subcommittee of the Maryland Judicial Conference might consider developing trainings and/or materials for judges that facilitate the use of best practices when hearing from unrepresented petitioners and respondents.

Increase representation by both advocates and lawyers and reduce disparities between parties

Helping victims obtain protective orders is a wise investment. Study after study show protective orders are highly effective (with safety plans) at reducing the frequency and severity of violence. They prevent a good deal of expensive injury, lost work time, trauma and the draining of police and court resources.

Cost-effective victim advocates, while providing different services than legal counsel, are clearly dramatically improving victim case outcomes and the quality of critical parts of victim protective orders that are central to the safety of not only victims but any children in common, specifically visitation services and emergency funds. Initiate partner violence victims who file for protective orders in Commissioner Stations nights and weekends deserve advocate support at that early and critical juncture.

More funds are needed from disparate local, state and national government and foundation donors to increase the proportion of petitioners and respondents who are represented. Additional funds should be targeted to the provision of both advocates and lawyers reduce the disparities in representation between protective order parties. Additional self-help and legal services resources for respondents are needed.

Educate victims of intimate partner violence that they are not obligated to speak with the respondent's lawyer when they do not have counsel.

Agency and non-profit service providers throughout Maryland, as well as the courts, might consider re-doubling efforts to educate petitioners early in the process that they have no obligation to speak with the respondents' lawyer when they have no representation. Sample polite but firm messages and a low-literacy explanation in multiple languages may be valuable, since a full 46% of petitioners drop their cases when they do not have representation and the respondent does.

Footnotes

1. See Goldfarb, 2007, Logan and Walker, 2008 and Logan and Walker, 2010.
Maryland's protective order law is imperfect but overall quite strong. Judges in the state have the power to ban abusers from having any type of contact with victims for one year and can require abusers to vacate a joint home and stay away from locations such as the workplace or school. Judges can order abusers who are working to provide needed emergency funds that enable the victim to maintain the status quo for themselves and any children in common while the victim constructs an independent and safe life. Judges may also put conditions and limitations on the types of visits a respondent may have, such as requiring monitored exchanges or supervised visitation to reduce further violence.
2. Data was collected by pairs of carefully trained observers in Silver Spring and Rockville District Courts on random mornings from Monday through Friday. This dataset only includes cases in which the petitioner appeared in court.
3. See companion report, "Denied and Dismissed Protective Order Petitions in Montgomery County, Maryland." (2019).

Rates and numbers in the companion report may differ from those used in this report, as they analyze different years of data. This report analyzes data from 2011-2018, while the companion report analyzes data from only the last four years, 2015-2018.

Furthermore, this report excludes the many cases that are dropped by victims when the petitioner simply doesn't appear in court, except in the rare case that an advocate or lawyer was present and did advocate for the missing petitioner.

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