# AGENTS FOR CHANGE

Volume 14, Issue 2
April, 2004

Agents for Change is a publication of the Battered Women's Legal Advocacy Project, Inc.

1611 Park Ave South
Suite 2
Minneapolis, MN 55404

Phone: 612-343-9842
Toll free: 800-313-2666
Fax: 612-343-0786
Email: staff@bwlap.org
Web: www.bwlap.org

Maria Gloria Fressia,
Nicole A.F. Lindemyer,
Sage Van Voorhis,
Program Managers
Rumna Chowdhury,
Attorney for Contract

## Nonadjudicated Fathers and OFP Hearings

We recently received feedback from an advocate in out-state Minnesota regarding a previous article about non-adjudicated fathers and custody proceedings within the context of OFP hearings. She said that while in a hearing, the Petitioner (mom) pointed out to the judge that if the parents of a child were never married and there is no adjudication of paternity, sole physical and legal custody goes to the biological mother. The judge said to the Respondent's attorney, "What do you have to say to that, she is right." The attorney cited an unpublished Court of Appeals opinion, *Johnson v. Humfeld* (C9-98-2073), in which a non-adjudicated father was granted custody of a child. The advocate reported that the Respondent was granted temporary custody of the children, one of whom was not his biological child.

There are several problems here.

First of all, Minnesota Statute § 480A.08, subd. 3 states that "unpublished opinions of the Court of Appeals are not precedential."

> **PRECEDENT:**
> A case which establishes legal principles to a certain set of facts, coming to a certain conclusion, and which is to be followed from that point on when similar or identical facts are before a court. Precedent form the basis of the theory of *stare decisis* which prevents "reinventing the wheel" and allows citizens to have a reasonable expectation of the legal solutions which apply in a given situation. http://www.duhaime.org/diction.htm
>
> ***STARE DECISIS:***
> A basic principle of the law whereby once a decision (a precedent) on a certain set of facts has been made, the courts will apply that decision in cases which subsequently come before it embodying the same set of facts. A precedent which is binding; must be followed. http://www.duhaime.org/diction.htm

Second, "unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial." Minn. Stat. § 480A.08, subd. 3. The attorney in this case did not provide a copy of this opinion to the Petitioner (who acted as her own counsel in this

*(Continued on page 4)*

**Upcoming Events at BWLAP**

- **April 1-2**—Central Minnesota Conference on Immigration and Domestic Violence in St. Cloud.
- **May 18 & 20**—"Domestic Violence & the Court System" training for City/County attorneys in Minneapolis, sponsored by the U.S. Dept. of Justice.
- **May 31**—Memorial Day, BWLAP closed.
- **June**—Introduction and bio of our newest Program Manger, who starts in April!

# Host a New Laws Training!

New Laws is an annual training held by BWLAP to update advocates and others about laws affecting battered women. While the trainings are geared towards domestic violence advocates, anyone is welcome to attend. The scope of this training ranges from criminal law to family law and government benefits. Each year BWLAP holds the training in 6 locations throughout the state – two in the North, two in the South, one metro and one in central Minnesota. Last year we held trainings in Moorhead, Grand Rapids, Little Falls, Minneapolis, Rochester and Redwood Falls.

We need local agency hosts for the coordination of the training logistics. The host finds a local training site, makes arrangements for food, and supplies information regarding lodging and directions. BWLAP will pay for all the costs. The biggest benefit of hosting the training is you don't have to travel as the training is in your home town! Like last year, the trainings will be held on Monday/Tuesday and Thursday/Friday. We hope to start the training on Thursday, September 9 and train twice each week through Tuesday, September 28.

Another way to provide input for New Laws is to submit ideas and scenarios that you've experienced over the past year that we could use as example exercises or training topics. Potential topics include: immigration, housing issues for battered women, reciprocal OFP, custody issues in OFP proceedings, or state vs. tribal jurisdiction. Please e-mail staff@bwlap.org with your comments or if your agency would like to host a training.

# Immigration Corner

The United States Citizenship and Immigration Service (USCIS) periodically reviews its fee waiver policy. On March 4, 2004 new field guidance was issued, replacing the October 9, 1998 guidance. This guidance will be effective until a final regulation amending the current fee waiver regulations has been published in the Federal Register.

By this new policy the USCIS maintains its discretionary authority to grant fee waivers. However, this new policy implements important change that, with no doubt, will make fee waivers' petitions less likely to be granted.

USCIS Officers will need to follow some directions contained in the new policy, which delineates certain factors to be considered when determining whether the applicant shows enough evidence of her/his "inability to pay" the required fee.

The new policy states that in all fee waiver requests applicants are required to demonstrate an "inability to pay". In determining that inability USCIS Officers may consider the following situations and criteria regarding the applicant:

- Whether the individual has demonstrated that within the last 180 days, she/he qualified for or received any kind of public benefit such as, Food Stamps, Medicaid, Supplemental Security Income, Temporary Assistance of Needy Families, etc.
- Whether the individual has demonstrated that her/his household income is at or below the poverty level contained in the most recent poverty guidelines re-

*(Continued on page 6)*

# OFP Case Update: *White v. White*

On March 30, 2004 the Court of Appeals of Minnesota released its opinion in the case *White v. White* (No. A03-848, 2004 WL 614589).* In this case, Michele White sought an OFP against her husband Matthew White. The parties had separated several months prior to the OFP hearing. Based on her affidavit and petition for OFP, the court granted Ms. White an Ex Parte OFP and set a hearing date on the petition. Mr. White was served with this order and petition. The day before the hearing, Mr. White filed a petition for his own OFP against Ms. White. The Hennepin County District Court issued a reciprocal Ex Parte OFP and set a hearing at the same time as Ms. White's hearing, the next day. However, Ms. White was never served with Mr. White's Ex Parte OFP or petition.

At the hearing, Ms. White's attorney stated that she had never been served, and Mr. White's attorney acknowledged that this was correct. The Hennepin County court correctly decided that as Ms. White was never served, it did not have jurisdiction over Mr. White's order against her. Ms. White did not agree to the issuance of an OFP against herself. After consulting with his attorney, Mr. White did agree to the issuance of an OFP against himself. However, when the parties received the final copy of the order, it was a reciprocal OFP, with a finding that "[t]he parties agree to the issuance of Reciprocal Order for Protection." Ms. White's attorney contacted Mr. White's attorney to correct this mistake, but Mr. White's attorney refused to stipulate to a correction. Ms. White appealed, on the basis that she had never been served and never agreed to the issuance of a reciprocal order.

On appeal, the Court of Appeals determined "[n]othing in the file provides a basis for the issuance of a domestic-abuse order against Michele White." While the Court of Appeals could not determine the exact cause of the mistake leading to the issuance of a reciprocal order, it did determine that the record did not support the issuance of an OFP against Ms. White, therefore it reversed Mr. White's OFP against her. The Court of Appeals remanded the case to the district court for corrected findings and an amended order. Ms. White also seeks bad faith attorneys' fees for alleged misconduct by Mr. White's attorney.

While *White* does not set any new rule of law, it does support existing case law prohibiting courts from issuing mutual restraining orders when one party was not properly served. It also provides a prime example of an administrative mistake blown out of proportion. In OFP practice in some counties it is not an uncommon phenomenon for the terms of the final written order issued to not match the agreement or findings made in court. This type of problem should be brought to the court's attention and immediately remedied, if possible. This is not the type of case that should need to go to the Court of Appeals for correction.

Has this type of mistake happened in your county? BWLAP is tracking these errors as one way that battered women's access to the justice system is denied. Email us at staff@bwlap.org with your story.

* Please note *White v. White* is an UNPUBLISHED opinion.

CHECK OUT OUR WEBSITE!
WWW.BWLAP.ORG

*(Continued from page 1)*
*pro se* proceeding) 48 hours beforehand. He should have known better. Furthermore, the court should not have allowed the attorney to cite this case, nor should the court have given this case any weight in its decision.

***PRO SE:***
Latin: in one's personal behalf.

You might be asking yourself why the Court of Appeals did not publish this case. Minnesota law sets up a strict standard for publishing opinions. "The Court of Appeals may publish only those decisions that:

(1) establish a new rule of law;

(2) overrule a previous Court of Appeals' decision not reviewed by the Supreme Court;

(3) provide important procedural guidelines in interpreting statutes or administrative rules;

(4) involve a significant legal issue; or

(5) would significantly aid in the administration of justice."

Minn. Stat. § 480A.08, subd. 3. The *Johnson v. Humfeld* decision did not do any of these things, therefore, it was not published. The Court of Appeals did not intend to establish the holding of *Johnson* as a new rule of law.

**HOLDING:**
1) n. any ruling or decision of a court. http://dictionary.law.com/

*Johnson* had a specific set of facts and the holding applied **only** to Mr. Johnson and Ms. Humfeld. It involved a Wisconsin Statement of Paternity, which is similar to Minnesota's Recognition of Parentage but differs in one significant respect: under Wisconsin law, it is considered equivalent to an adjudication of a man's paternity.

Minnesota law imposes a specific procedure for determining paternity. Minn. Stat. § 257.34 (Declaration of Parentage) and Minn. Stat. §§ 257.51–74 (Parentage Act). Custody determinations between parents who were never married are determined with the same standards as a custody hearing during dissolution of a marriage. If paternity has been both acknowledged under § 257.34 by declaring it in a document signed by a notary public, and established under §§ 257.51 to 257.74, the father's custody and parenting time rights are determined under Minn. Stat. § 518.17 and § 518.175. Furthermore, if paternity has been recognized under § 257.75, the father may petition for custody and parenting time in an <u>independent</u> (i.e. separate) action. The action will be treated as an original custody determination under § 518.17.

The out-state Minnesota court made a mistake in giving this nonadjudicated father custody rights in this Order for Protection hearing

# Divorce Laws and Family Violence

Many Americans are troubled by the nation's high divorce rate. But feminists have argued that divorce might be better than staying in a violent or abusive marriage. Turns out they have a point.

A new study by the National Bureau of Economic Research in Cambridge, Mass., finds that female suicide rates plunged and domestic violence -- including murder -- fell sharply in states that granted easier access to divorce in the 1970s and 1980s. For more information see NBER's website at www.nber.org/digest/mar04/w10175.html

# Punto de Visto Latino

En este artículo queremos recordar a nuestra comunidad latina que nuestras mujeres y sus hijos menores de edad, matratadas/dos por sus esposos o padres tienen una solución legal para solicitar la residencia permanente en los Estados Unidos.

Si usted es una mujer amenazada o abusada, usted puede calificar para:

- Permiso de empleo
- Permiso para vivir en los Estados Unidos mientras se tramita su solicitud
- Residencia legal permanente sin la ayuda de su esposo
- Atención médica y beneficios del gobierno tales como dinero y cupones o estampillas de comida.

Para poder participar en este programa que se denomina VAWA (Violence Against Women Act) usted necesita:

- Vivir dentro de los Estados Unidos (salvo algunas excepciones como las esposas de militares destacados en bases fuera del territorio de los Estados Unidos)
- Que su esposo la haya maltratado a usted o a alguno de sus hijos durante el matrimonio.
- Haber vivido con su esposo por algún tiempo.
- Que usted no se haya casado exclusivamente para arreglar su situación inmigratoria.
- Que su esposo sea ciudadano estadounidense o residente legal permanente. Si su esposo perdió la residencia legal permanente con motivo de la violencia doméstica, usted mantiene su derecho a este programa por dos años a partir de que su esposo perdió sus derechos inmigratorios. Igualmente si usted quedó viuda o se divorció en razón de la violencia doméstica, por dos años a partir del fallecimiento o del decreto de divorcio usted mantiene su derecho a arreglar su situación inmigratoria por medio de este programa.

Para poder ejercer sus derechos a través de VAWA es importante que comience cuanto antes a:

- Guardar todos sus documentos personales incluyendo documentos de inmigración suyos.
- Guardar copia de los siguientes documentos:
  1. Social Security de su esposo
  2. Certificado de nacimiento de su esposo
  3. Diver License de su esposo
  4. Certificado de matrimonio así como de divorcios anteriores tanto suyos como de su esposo.
  5. Partidas de nacimiento de sus hijos
  6. Copias de todos los documentos que comprueben que vivió con su esposo (como ser: contrato de alquiler, recibo de renta, estados de cuenta conjunta de banco, copias de las cuentas por gastos de electricidad, gas o teléfono, documentos de sus hijos de la escuela, etc.
  7. Copias de los documentos mencionados en el numeral anterior también le servirán para demostrar que usted vivió en los Estados Unidos.
  8. Recuerde que es importante que se contacte con algún programa de immigración que la pueda ayudar a llenar y tramitar su solicitud.
  9. Si usted es una mujer abusada o sus hijos están siendo abusados y cumple con los requisitos enumerados en este comentario, conéctese con Gloria Fressia en el 612 343 9846 o escriba a gloria@bwlap.org para recibir ayuda.

*(Continued from page 2)*

vised annually by the Secretary of Health and Human Services.

- Whether the individual is elderly (age 65 and over).
- Whether the individual is disabled and submits verification of her/his disability.
- The age and number of dependents in the individual family's household who are seeking derivative status of benefits concurrently with the principal applicant.
- Humanitarian or compassionate reasons, either temporary or permanent, which justify a granting of a fee waiver request. Examples given in the policy of this exceptional situation are: the applicant is temporarily destitute; the applicant does not own, possess, or control assets sufficient to pay the fee without a showing of substantial hardship; or an applicant is on a fixed income and confined to a nursing home.
- Any other evidence of factors that the USCIS Officer believe establishes an applicant's inability to pay the required filing fee.

According to the new policy fee waivers' petitions must be accompanied by documentation providing evidence of the "inability to pay." Examples of these documents are:

- Proof of living arrangements and evidence of whether the individual's dependents are residing in his or her household.
- Evidence of current employment such as recent pay statements, W-2 forms, income tax returns, etc.
- Mortgage payment receipts, rent receipts, food and clothing receipts, utility bills, tuition bills, medical expenses receipts, and any other essential expenditures.
- Proof that verifies the individual's disability, such as previous determination of the disability by the Social Security Administration, The Department of Health and Human Services, the Department of Veteran Affairs, the Department of Defense, or other appropriate federal agency.
- Proof of the individual's extraordinary expenditures of her or his dependents residing in the United States. Extraordinary expenditures are defined as those which do not occur on a monthly basis but which are necessary for the well being of the individual or her/his dependents.
- Proof that the individual has, within the last 6 months, qualified for and/or received federal public benefits.
- Documentation to show all assets owned, possessed, or controlled by the individual or by her/his dependents.
- Documentation establishing other financial support or subsidies, such as parental support, alimony, child support, fellowships, pensions, etc.
- Documentation of debts and liabilities and any other expenses the individual is responsible for (i.e. insurance, medical/dental bill, etc.).

The new policy also establishes that to apply for a fee waiver an applicant must submit:

- Affidavit – that is an un-sworn declaration that is signed and dated and includes the statement: "I declare under penalty of perjury that the foregoing is true and correct"- requesting the fee waiver and stating the reasons why she/he is unable to pay the filing fee.
- The affidavit and any supporting documentation must be submitted along with the benefit application or petition.
- "Fee Waiver Request" must be written in large print on the outside of the mailing envelope, as well as at the top of their affidavit and each page of any supporting information.
- If a fee waiver request is denied, the entire application package will be returned to the applicant, who must begin the application process again re-filing for the benefit with the check for the appropriate fee.

Applicants of fee waivers must be aware that certain immigration benefits have income requirements or require evidence that the applicant or beneficiary is not likely to become a public charge. In those cases, as for example, nonimmigrant visa petitions, family-based visa petitions, employment-based visa petitions, employment authorizations, advance parole, etc., applicants should not apply for a fee waiver.

# Must Crime Victims Testify Against the Defendant?

On March 8, 2004, the United States Supreme Court issued a decision in the case *Washington v. Crawford* that may significantly affect whether an accuser, usually the victim of the crime, must take the stand and testify against the accused criminal defendant.

At issue in the Crawford case was whether it violated the Confrontation Clause of the US Constitution to accept into evidence a statement made to police at the time of the crime, when the giver of the statement was not available to testify at trial and therefore could not be cross-examined by the criminal defendant.

Normally statements made other than on the stand (such as statements made to police at the scene) are not allowed as evidence because they are hearsay. "Hearsay" is an out-of-court statement offered as evidence to prove the truth of the content of the statement. However, there are many exceptions to the rule against hearsay.

In contrast to the many exceptions to the hearsay rule, there was only one exception to the Confrontation Clause's requirement that a witness must take the stand and be subject to cross-examination rather than allowing any earlier statement in as substitute testimony. Now, however, the Supreme Court in Crawford has taken away that exception to the Confrontation Clause and replaced it with an extremely high standard.

*Crawford* holds that testimonial statements made by witnesses who are absent from the trial may be admissible in court only when 1) that witness is unavailable (not merely unwilling) to testify, and 2) the defendant had a prior opportunity to cross-examine that witness. This holding requires three independent steps to assess whether *Crawford* applies and whether the witness statement can be used as a substitute for the witness's live testimony.

**1. What is "Testimonial"?**

By its own language, the *Crawford* decision applies only to "testimonial" statements given by a witness who is later unavailable to testify at trial. The Court declined to define what "testimonial" means, but did state that it definitely includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

*Crawford* does not then apply to statements that are not testimonial in nature. In other words, if at the time the statement was made, the person making that statement did not intend or could not reasonably expect that it later would be used at a trial, it is unlikely that the statement will be deemed testimonial and excluded under the *Crawford* decision.

The harder kinds of statements are those given to the police at the scene. Arguably, such statements are not given for the purpose of testimony. Usually the purpose is to provide information to the police so that they can determine whether to make an arrest, pursue the suspect, call for medical care, be alert to an imminent danger, etc. Whether statements made to police will be considered testimonial under *Crawford* remains to be seen, and BWLAP urges anyone with knowledge of such a ruling to call us.

**2. Unavailable to Testify**

"Unavailable" is a legal term of art with a very particular definition (given in the Minnesota Rules of Evidence Rule 804). "Unavailability as a witness" includes situations in which the witness is exempted from testifying by ruling of the court on the ground of privilege; or the witness persists in refusing to testify despite an order of the court to do so; or the witness testifies to a lack of memory of the subject matter; or is unable to be present or to testify at the hearing because of death or then existing physical or mental illness of infirmity; or is absent from the hearing or trial and the proponent of the witness's statement has been unable to procure the witness's attendance (or her testimony by deposition) by process or other reasonable means.

In cases of sexual and/or domestic violence, frequently the crime victim does not want to take the stand at all, refusing to testify or to show up in court whatsoever. If the witness simply does not come to court, the prosecutor can subpoena her, and can have her arrested and taken by squad to the courtroom (assuming the police can find her; a warrant for her arrest may be issued). It is the trial judge who determines whether a witness's testimony is unavailable at trial; because discretion lies with the judge, this determination depends on who is making it. If the witness is not found "unavailable" by the court, then she must testify or any prior statements given by her will be excluded.

**3. Prior Opportunity to Cross-Examine**

There are few situations in which a criminal defendant has an opportunity to cross-examine prior to trial. The clearest example would be deposition testimony. [A deposition is a form of pretrial discovery through which testimony is given under oath, recorded, and transcribed by a court reporter. Most depositions are oral—in person—although the Rules of Civil Procedure also provide for written depositions in civil cases; the Rules of Criminal Procedure require depositions to be oral.] For example, if the accusing witness is deposed prior to the trial, the defendant has a right to be present and to question the deponent about her testimony. If that witness/deponent is later deemed unavailable to testify at the trial, her testimony from the deposition could be admitted and used instead of her live trial testimony.

**Conclusion**

It is unquestionable that the *Crawford* case makes prosecutors' jobs more difficult. *Crawford* also puts immense pressure on crime victims to take the stand and testify against their perpetrators, something that many victims are too afraid and/or traumatized to do. Advocates for battered women have long fought for evidence-based prosecution rather than relying on victim testimony to prosecute the perpetrator. Now, under *Crawford*, evidence that involves the victim's prior statements may be excluded unless they are found not testimonial in nature, or unless the victim is officially unavailable and the defendant had a prior opportunity to cross-examine her.

A more thorough analysis of the Crawford decision, as well as its impact on advocacy for battered women, is available at our website, www.bwlap.org. If you want further information, or wish to discuss any aspect of *Crawford* and its impact, please call Nicole at 612-343-9844.

Battered Women's Legal Advocacy Project, Inc.
1611 Park Ave South, Suite 2
Minneapolis, MN 55404

Non Profit Organization
US Postage Paid
St. Paul, MN
Permit 3542

BWLAP is a Minnesota-based, statewide, non-profit organization that provides legal information, consultation, training, litigation and legal resource support, and policy development assistance to battered women and to criminal justice, legal and social service systems.
Questions or Comments? E-mail us: staff@bwlap.org

## MARK YOUR CALENDARS!

**April 30, 2004**

Board of Trustees Meeting
10:30-12:30
Free brunch provided!

**Would you like to serve on BWLAP's Board?**

We are taking applications. If you are interested, please e-mail:
**staff@bwlap.org**

## Cell Phone Donations

BWLAP is still collecting old cell phones for re-use as emergency phones for battered women. Many of you have old cell phones gathering dust at the bottom of a desk drawer. These phones can be put to good use and may be a life line for a battered woman. You may also be able to get a tax deduction based on the value of the phone you donate. Please consider donating cell phones that you no longer use. Drop off used phones at our office or you can mail them to us.