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# Caught between a Rock and a Hard Place: Harmonizing Victim Confidentiality Rights with Children's Best Interests

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# Caught Between a Rock and a Hard Place: Harmonizing Victim Confidentiality Rights with Children's Best Interests

*State ex rel. Hope House, Inc. v. Merrigan*<sup>1</sup>

## I. INTRODUCTION

Each year almost two million women are physically battered in the United States.<sup>2</sup> More alarmingly, domestic violence and child mistreatment problems are often intertwined, causing additional millions of children to suffer the effects of domestic abuse.<sup>3</sup> Some states have begun to recognize the serious need to address domestic violence and child welfare issues together instead of as two separate, unrelated events in order to better protect both mothers and their children.<sup>4</sup> The first step for many states is to address statutes that deal, on one hand, with permitting discovery of all potential instances of child abuse where family violence is present, while balancing on the other hand, the need to protect the battered mothers' rights to confidentiality when they have sought refuge in domestic violence shelters.

In *State ex rel. Hope House, Inc. v. Merrigan*, the Missouri Supreme Court examined Missouri Revised Statutes Section 210.140,<sup>5</sup> which eliminates legally recognized privileged communications where there is evidence of child abuse or neglect, and attempted to resolve it with Section 455.220,<sup>6</sup> which establishes strict confidentiality for residents of domestic violence shelters.<sup>7</sup> Although Section 210.140 has previously been the subject of litigation, this case was the first time the court concurrently dealt with Section 455.220 and attempted to harmonize two conflicting statutes that ultimately could have a tremendous effect on the children involved. This Note will examine the potential impact of the court's ruling on battered women, their children, and the shelters trying to help these victims. This Note will also weigh the benefits and detriments of allowing victims' records to be kept confiden-

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1. 133 S.W.3d 44 (Mo. 2004) (en banc).

2. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 12 (2000).

3. Maureen K. Collins, Comment, *Nicholson v. Williams: Who Is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725, 725 (2004).

4. *Id.*

5. MO. REV. STAT. § 210.140 (Supp. 2001).

6. MO. REV. STAT. § 455.220 (2000).

7. *Merrigan*, 133 S.W.3d at 46.

tial, even when children are involved and the potential for child abuse is present.

## II. FACTS AND HOLDING

Maria Martinez left her two minor children at the New House domestic violence shelter with a caregiver on September 8, 2002.<sup>8</sup> Martinez did not provide the shelter with any clue as to her whereabouts after leaving her children.<sup>9</sup> The children were placed in protective custody and a petition was filed on their behalf in the juvenile division of the circuit court.<sup>10</sup> On November 25, 2002, the court ordered that the children remain in the mother's custody.<sup>11</sup> Two days later, Martinez was evicted from the Rose Brooks shelter,<sup>12</sup> at which time she moved with her children into the New House shelter.<sup>13</sup> Martinez remained at New House until she was evicted on December 9, 2002.<sup>14</sup> Martinez and her children then sought shelter at Hope House, until all three were discharged from the facility on January 2, 2003.<sup>15</sup> The Division of Family Services was unable to discern why Martinez and her children were evicted from the domestic violence shelters.<sup>16</sup>

On January 14, 2003, the court held a protective custody hearing and determined that the children should remain in Martinez's care.<sup>17</sup> Two weeks later, the court held a dispositional hearing and ordered that Martinez would retain custody of her children.<sup>18</sup> After this hearing, Martinez went to another domestic violence shelter.<sup>19</sup> On July 28, 2003, the court held a hearing on the juvenile officer's motion to modify the January 28th disposition, yet again

8. *Id.* Because Hope House was not a party to the original proceedings and the underlying case has not yet been settled, many of the facts as to the juvenile matters are not available and, thus, are not discussed in this Note.

9. Brief for Respondent at \*4, *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44 (Mo. 2004) (en banc) (No. SC 85638).

10. *Id.* at \*5.

11. *Id.* at \*4. Although the children were returned to the mother's custody, they were to remain under the supervision of the Division of Family Services. *Id.* The court also stipulated that Martinez must participate in counseling at the Rose Brooks shelter. *Id.* at \*4.

12. *Id.* Martinez resided at the Rose Brooks shelter between the time she left her children at the New House shelter and the court's ruling on November 25, 2002. *Id.*

13. *Id.* After being evicted, Martinez did not contact the Division of Family Services social worker to let the worker know of her whereabouts. *Id.*

14. *Id.* at \*4-5.

15. *Id.* at \*5.

16. *Id.* at \*13.

17. *Id.* at \*5.

18. Brief for Relator at \*5-6, *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44 (Mo. 2004) (en banc) (No. SC 85638).

19. *Id.* at \*6.

ordering the children to remain in Martinez's custody.<sup>20</sup> The next day the juvenile officer filed an amended motion to modify the disposition.<sup>21</sup> The amended motion alleged that Martinez had failed to maintain stable housing, as evidenced by her eviction from three shelters in less than three months, and that Martinez had placed her children in harm's way by being involved in a violent relationship.<sup>22</sup> The court had not yet held a hearing on the amended motion at the time of the decision in *Merrigan*.<sup>23</sup>

On January 14, 2003, the court issued a subpoena duces tecum, ordering Hope House to appear and produce records regarding the children and their mother.<sup>24</sup> Martinez had never given Hope House written permission to release any records that the shelter may have had.<sup>25</sup> Hope House filed a motion to quash the subpoena on January 24, 2003, citing federal and state laws as the "reasons for its inability to release records and/or provide any identifying information regarding a Maria Martinez and her children."<sup>26</sup> The respondent, Commissioner Molly Merrigan, denied the shelter's motion to quash the subpoena on June 11, 2003.<sup>27</sup> Hope House then filed a petition for writ of prohibition with Judge W. Stephen Nixon, the administrative judge of the Family Court Division of the Circuit Court of Jackson County, Missouri.<sup>28</sup> Judge Nixon denied Hope House's petition for writ of prohibition.<sup>29</sup> Hope House then filed its petition for writ of prohibition with the Western Division of the

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20. *Id.* The juvenile officer filed the motion to modify the disposition on February 4, 2003. *Id.*

21. *Id.*

22. *Id.* The motion specifically alleged that in June 2003, Martinez's ex-lover came to her residence and held a knife to her throat. *Id.* It further alleged that the children were at home at the time of the incident. *Id.* The motion also alleged that on July 11, the ex-lover abused Martinez again, pushed one of the children into a car door, and chased Martinez with a machete. *Id.*

23. State *ex rel.* Hope House, Inc. v. Merrigan, 133 S.W.3d 44, 46 (Mo. 2004) (en banc).

24. Brief for Respondent at \*5, State *ex rel.* Hope House, Inc. v. Merrigan, 133 S.W.3d 44 (Mo. 2004) (en banc) (No. SC 85638). Mary Anne Metheny, Chief Operating Officer of Hope House, Inc., was served with the subpoena. Brief for Relator at \*6-7.

25. Brief for Relator at \*7.

26. *Id.* The juvenile officer filed an answer to the motion to quash on March 25, 2003, and filed its trial brief on May 15, 2003. *Id.* Hope House filed its response to the juvenile officer's trial brief on May 28, 2003. *Id.*

27. *Id.* The court noted that the proper respondent in this case was Jackson County Circuit Court Judge W. Stephen Nixon, not Commissioner Merrigan, and directed the writ as modified toward him. *Merrigan*, 133 S.W.3d at 46 n.2.

28. Brief for Respondent at \*6. Relator filed this petition on June 16, 2003. *Id.* On August 6, 2003, the juvenile officer filed an answer and motion to dismiss petition for writ of prohibition. *Id.*

29. Brief for Relator at \*7-8.

Missouri Court of Appeals on September 8, 2003.<sup>30</sup> The court of appeals denied its petition the same day without issuing any findings.<sup>31</sup> As a final resort, Hope House appealed to the Missouri Supreme Court.<sup>32</sup> The court determined that Missouri Revised Statutes Section 455.220 does not constitute a legally recognized privileged communication subject to Section 210.140,<sup>33</sup> therefore, requiring Hope House to produce statutorily protected information would constitute an abuse of discretion.<sup>34</sup> Three justices dissented.<sup>35</sup>

### III. LEGAL BACKGROUND

#### A. Child Abuse Prevention and Treatment Act

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA),<sup>36</sup> the first federal act dealing with child abuse.<sup>37</sup> CAPTA “formulated the mandates for the development of a bureaucracy within the Department of Health, Education, and Welfare (HEW) . . . to gather information and expertise on the problem of child abuse . . . .”<sup>38</sup> The Act also established the National Center of Child Abuse and Neglect (NCCAN), which provided states with grant money to investigate and prevent child abuse and acted as a clearinghouse of information concerning child protection programs and research.<sup>39</sup> This grant money was only eligible for states enacting mandatory child abuse reporting laws that complied with certain requirements.<sup>40</sup>

Since 1974, these reporting laws have been expanded to include all types of child mistreatment and require mandatory disclosure by many pro-

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30. *Id.* at \*8.

31. *Id.*

32. *Merrigan*, 133 S.W.3d at 45-46.

33. *Id.* at 46.

34. *Id.* at 50.

35. The dissent by Judge Limbaugh, joined by Judges Benton and Price, would have quashed the writ, citing the public policy need to protect children through all available forms of discovery as more important than protecting the confidentiality of victim’s records. *Id.* at 52. (Limbaugh, J., dissenting).

36. Child Abuse Prevention and Treatment Act, Pub. L. 93-247, § 2, 88 Stat. 5 (1970), codified at 42 U.S.C. §§ 5101-5119c (2000).

37. See generally Collins, *supra* note 3; Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and its Consistency with United States Law*, 5 GEO. J. FIGHTING POVERTY 185 (1998); Susan V. Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69 (2001); Caroline Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183 (1998).

38. Mangold, *supra* note 37, at 89-90. The former Department of Health, Education, and Welfare is now known as the Department of Health and Human Services. *Id.*

39. *Id.*

40. *Id.*

professionals who work with children.<sup>41</sup> These child abuse laws stem primarily from society's desire to protect children, rather than from a general concern about children's rights.<sup>42</sup> Thus, the reporting laws override any ethical duties to protect confidential information, including all privileged communications, except those stemming from the attorney-client privilege.<sup>43</sup> In 1996, Congress completely revised CAPTA's confidentiality and disclosure requirements, resulting in states' expanded discretion to decide when to disclose child abuse reports, records, and other confidential information.<sup>44</sup> States must now demonstrate that they have laws preserving the confidentiality of child abuse and neglect records in order to receive CAPTA funding.<sup>45</sup> Some experts recommend that state agencies attempt to harmonize the need for maintaining confidentiality and disclosing vital information by suggesting that "confidentiality should take precedence unless disclosure is necessary to further the goals of child protection."<sup>46</sup>

### *B. Mandatory Disclosure and Missouri Revised Statutes Section 210.140*

Missouri's mandatory disclosure statute is set out in Missouri Revised Statutes Section 210.140, which states:

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41. See generally, <http://nccanch.acf.hhs.gov/general/legal/statutes/manda.pdf> (last modified June 2003). Current statutes require that all people working with children in a professional capacity report suspected cases of mistreatment. *Id.* This includes, but is not limited to, physicians, other health care providers, teachers, and child health care providers. *Id.*

42. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 514 (1998).

43. JOHN E. B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 104-05 (1992).

44. ALICE BUSSIERE ET AL., SHARING INFORMATION: A GUIDE TO FEDERAL LAWS ON CONFIDENTIALITY AND DISCLOSURE OF INFORMATION FOR CHILD WELFARE AGENCIES 7 (1997).

45. *Id.* at 8.

46. *Id.* at 10. Not all states are in agreement as to how to enact their confidentiality laws and apply them to child abuse or neglect situations.

Connecticut's and Pennsylvania's battered woman-counselor privilege statutes have no exception for reporting child abuse or neglect. North Dakota's statute makes reporting and testifying optional if the counselor deems it necessary to protect a child or if compelled to disclose by a court. Several states, including Alaska, Louisiana, Massachusetts, and New Hampshire (the latter three where the perpetrator is being prosecuted criminally), require the court to do a balancing test *in camera*, before ruling on the admissibility of testimony or records.

Joan Forza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 298-99 (1995).

Any legally recognized privileged communication, except that between attorney and client or involving communications made to a minister or clergyperson, shall not apply to situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required or permitted by sections 210.110 to 210.165, to cooperate with the division in any of its activities pursuant to sections 210.110 to 210.165, or to give or accept evidence in any judicial proceeding relating to child abuse or neglect.<sup>47</sup>

Missouri courts have consistently applied this statute to cases involving child abuse to allow privileged communications to be disclosed in order to protect the children involved.

In 1984, the Missouri Supreme Court in *State v. Hoester*<sup>48</sup> extensively examined the language and construction of Missouri Revised Statutes Section 210.140, concluding that in enacting the statute, the legislature had not intended to limit its broad language.<sup>49</sup> The respondent, Judge Hoester, contended that Section 210.140 removed the physician-patient privilege from any judicial proceeding pertaining to child abuse or neglect, a statement with which the court ultimately agreed.<sup>50</sup>

The court addressed each section of the statute separately, discussing the particular meanings of each, so as to set a foundation for subsequent cases that would also look to the language of the statute for guidance as to the legislature's intent.<sup>51</sup> The court held that the term "situations" included all instances having civil or criminal implications but were not limited to either of the two.<sup>52</sup> The court went on to determine that the legislature intended that those who must "report" and "cooperate" under the terms of the child protection and abuse statutes could not raise the privilege in cases where sanctions would be invoked, or reporting and cooperation with the division would be required.<sup>53</sup>

The Missouri Supreme Court upheld the *Hoester* decision four years later in *State v. Ward*<sup>54</sup> when it was forced to address the constitutional challenge to the statute as an alleged violation of the Equal Protection Clause of

47. MO. REV. STAT. § 210.140 (2000).

48. 681 S.W.2d 449 (Mo. 1984) (en banc). D.M. had been charged with sexually assaulting his adopted daughter over the course of a number of years and had apparently sought psychiatric help for his abusive behavior. *Id.* at 450. At trial, the victim asked D.M. to produce his medical records, to which D.M. invoked the physician-patient privilege. *Id.*

49. *Id.* at 451.

50. *Id.*

51. *Id.* at 451-52.

52. *Id.* at 451.

53. *Id.*

54. 745 S.W.2d 666 (Mo. 1988) (en banc).

the Federal Constitution.<sup>55</sup> The court rejected the challenge, noting that the legislature had a rational basis for enacting the statute,<sup>56</sup> and restated that the physician-patient privilege is statutory in origin and, thus, “has no constitutional underpinning.”<sup>57</sup> According to the court, the legislature chose to deal with the serious problem of child abuse by not protecting privileged communications between doctors, psychologists, and licensed counselors and their patients when the communications involve or pertain to child abuse or neglect.<sup>58</sup> The court prevented this issue from surfacing in the future by declaring that the legislature acted within its power in abolishing the physician-patient privilege in connection with child abuse and neglect cases.<sup>59</sup>

The Missouri Court of Appeals has continued to give deference to the Missouri Supreme Court’s judgments in *Hoester* and *Ward* since 1988, but the appellate court tends to be more stringent in the statute’s application to cases that could involve child abuse.<sup>60</sup> In *State v. Ermatinger*,<sup>61</sup> 42-year-old Michael Ermatinger was convicted of second degree deviate sexual assault after undressing his 16-year-old male victim and engaging in oral intercourse.<sup>62</sup> Following the assault, the victim sought the help of a psychiatrist, entered a mental hospital for psychiatric reasons, and attempted to commit suicide on at least one occasion.<sup>63</sup> On appeal, Ermatinger argued that under

55. *Id.* at 669. Appellant contended that the statute “violate[d] the Fourteenth Amendment to the United States Constitution because it denied an evidentiary privilege ordinarily extended to defendants” on other charges that appellant considered equally serious. *Id.*

56. *Id.* at 670.

57. *Id.* Constitutional challenges to child abuse reporting statutes have not had much success in a variety of contexts. See Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4th 782, 791 (2004).

58. *Ward*, 745 S.W.2d at 670.

59. *Id.*

60. See generally *Pilger v. Pilger*, 972 S.W.2d 628 (Mo. Ct. App. 1998) (father was prevented from invoking the physician-patient privilege pursuant to the exception under Missouri Revised Statutes Section 210.140 because there existed evidence of child abuse and neglect); *Roth v. Roth*, 793 S.W.2d 590 (Mo. Ct. App. 1990) (holding that the party may not invoke physician-patient privilege in any custody proceedings involving known or suspected child abuse or neglect); *In re S.J. v. V.F.*, 849 S.W.2d 608 (Mo. Ct. App. 1993) (finding that the testimony of therapists, counselors, psychiatrists, and other witnesses who evaluated the children and their parents, which revealed repeated acts of abuse upon the children, was critical to determining the children’s best interests); *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo. Ct. App. 2000) (holding that the exclusion of evidence under the statute was valid); *Daneshfar v. Sly*, 953 S.W.2d 95, 102 (Mo. Ct. App. 1997) (discussing the applicability of the statute to patient-physician privilege).

61. 752 S.W.2d 344 (Mo. Ct. App. 1988).

62. *Id.* at 345.

63. *Id.* at 346.

Missouri Revised Statutes Section 210.140, the victim's physician-patient privilege never existed and that the victim had waived any privilege that may have existed.<sup>64</sup> After reviewing the supreme court's decision in *Hoester*, the court of appeals held that the trial court properly refused to compel the victim and his treating psychiatrist's testimony about the victim's treatment because such evidence fell within the statutory physician-patient privilege.<sup>65</sup>

### C. Missouri Revised Statutes Section 455.220

As set forth in Section 455.220 of the Missouri Revised Statutes, the requirements that a shelter must satisfy to qualify for funding include those mandating that the shelter:

(4) Provide residential service or facilities for children when accompanied by a parent, guardian, or custodian who is a victim of domestic violence and who is receiving temporary residential service at the shelter;

(5) Require persons employed by or volunteering services to the shelter to maintain the confidentiality of any information that would identify individuals served by the shelter and any information or records that are directly related to the advocacy services provided to such individuals;

(6) Prior to providing any advocacy services, inform individuals served by the shelter of the nature and scope of the confidentiality requirement in subdivision (5) of this subsection.<sup>66</sup>

Additionally, Section 455.220 requires that:

2. Any person employed by or volunteering services to a shelter for victims of domestic violence shall be *incompetent* to testify concerning any confidential information described in subdivision (5) of subsection 1 of this section, unless the confidentiality requirement is waived in writing by the individual served by the shelter.<sup>67</sup>

In 2000, the Missouri General Assembly revised this statute and specifically noted that all individuals working or volunteering at a shelter are in-

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64. *Id.* at 350.

65. *Id.*

66. MO. REV. STAT. § 455.220 (2000).

67. *Id.* (emphasis added).

competent to testify regarding confidential information.<sup>68</sup> In deciding *Merrigan*, the Missouri Supreme Court took the state's first judicial look at the statute.

#### IV. INSTANT DECISION

##### *A. Majority Opinion*

The Missouri Supreme Court received Hope House's appeal after the court of appeals denied Hope House's motion to quash the subpoena.<sup>69</sup> Judge Richard Teitelman, writing for the court, held that Hope House was not required to produce the statutorily protected information because the order denying Hope House's motion to quash the subpoena violated the confidentiality requirements of Missouri Revised Statutes Section 454.220.<sup>70</sup>

The court began its analysis with a discussion of the severity of the problem that domestic violence has become for many American women, children and families.<sup>71</sup> The court went on to note that for many victims of domestic violence, the choice of whether to stay in the abusive relationship or leave is not an easy one, as the victims cannot be assured that the abuse will end if they leave the situation.<sup>72</sup> For those women who run from their abusers, their safety and the well-being of their children often depends on their ability to keep their whereabouts secret from everyone, especially their abuser.<sup>73</sup> This need for secrecy is the reason confidentiality statutes have been enacted and is why they are vital to the safety of women and children residing in domestic violence shelters.<sup>74</sup>

The court then discussed the Missouri statute requiring domestic violence shelters to maintain strict confidentiality as a means for ensuring safety for their residents.<sup>75</sup> The court began by explaining the five distinguishing features of the confidentiality requirements, beginning with the need to prevent the shelter from releasing any identifying information about the domestic

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68. Brief for Relator at \*15, *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44 (Mo. 2004) (en banc) (No. SC 85638).

69. *State ex rel. Hoe House v. Merrigan*, 133 S.W.3d 44, 46 (Mo. 2004) (en banc). This denial required Hope House to produce any and all material relating to Maria Martinez, her children, and their stay at the shelter. *Id.*

70. *Id.* at 50.

71. *Id.* at 46-47. Although anyone can become a victim of domestic violence, the United States Department of Justice has estimated that the majority of victims are women, with at least two million women being severely abused by their partners each year. *Id.* at 47.

72. *Id.* See also SCHNEIDER, *supra* note 2, at 77-78.

73. *Merrigan*, 133 S.W.3d at 47.

74. Zorza, *supra* note 46, at 294.

75. MO. REV. STAT. § 455.220.1(5) (2000).

violence victim.<sup>76</sup> Functioning as a place of last resort for the victim, the shelter plays an incredibly important role not only by shielding the victim's location from the abuser, but also by ensuring the safety and security of other shelter residents as well.<sup>77</sup> Second, the shelter cannot disclose any information regarding advocacy services it provides to victims.<sup>78</sup> The court reasoned that the secrecy of these communications acts to encourage victims to leave their abusers and seek refuge at a shelter, knowing that third parties will not be informed about the abusive relationship.<sup>79</sup>

The third feature of the confidentiality requirement provides that all shelter employees and volunteers are covered by the requirement; an employee need not work directly with a victim for the confidentiality requirement to apply.<sup>80</sup> The court approached the fourth feature as a clarification, that, under the statute, the confidentiality requirement does not arise within the context of a traditionally protected relationship, such as attorney-client, but rather in circumstances where confidentiality is vital to protecting a person from imminent threats of violence.<sup>81</sup>

The final requirement discussed by the court deals with waiver of confidentiality by the victim.<sup>82</sup> The shelter resident is strictly prohibited from waiving confidentiality unless testimony is sought regarding the shelter's records and information.<sup>83</sup> The court concluded its discussion of Section 455.220 by noting that even where records and information are requested of the shelter, the victim holds the ultimate choice as to whether or not she will waive confidentiality.<sup>84</sup>

76. *Merrigan*, 133 S.W.3d at 47-48. Identifying information includes not just the victim's name, but also former residences, places of employment, the abuser's identity, or the resident's physical description. *Id.*

77. *Merrigan*, 133 S.W.3d at 48.

78. MO. REV. STAT. § 455.220.1(5) (2000)

79. *Merrigan*, 133 S.W.3d at 48.

80. *Id.* The court explained that even someone serving the shelter as a volunteer maintenance worker would be prohibited from divulging any information regarding a resident at the shelter that the volunteer may or may not have seen. *Id.*

81. *Id.*

82. MO. REV. STAT. § 455.220.2 (2000). States do not all agree about whether the victim is the only person who holds the ability to waive confidentiality.

California, Connecticut, Illinois, New Hampshire, Pennsylvania, and Wyoming make clear that the battered woman is the sole holder of the privilege. Alaska and North Dakota give the privilege both to the battered woman and to those working at a domestic violence program. New Hampshire and North Dakota protect the disclosure of a domestic violence shelter's location by also prohibiting the battered woman from revealing it, even if she so desires.

Zorza, *supra* note 46, at 298.

83. *Merrigan*, 133 S.W.3d at 48.

84. *Id.*

The court next examined Missouri Revised Statutes Section 210.140 as it relates to Section 455.220.<sup>85</sup> The court noted that the operative limitation on Section 210.140 is that its application applies only to a legally recognized “privileged communication” but that the statute does not define the parameters of what a “privileged communication” may be.<sup>86</sup> Using their decision in *State ex rel. Linthicum v. Calvin* that a term will be given its plain meaning as derived from the dictionary in absence of a statutory definition,<sup>87</sup> the court determined that a “privileged communication” is partially defined as a communication that is “protected by law from forced disclosure.”<sup>88</sup> Continuing with its discussion of what constitutes a “privileged communication,” the court noted the Black’s Law Dictionary definition of “privilege,” which provides that a privilege is “[a]n evidentiary rule that gives a witness the option not to disclose the fact asked for, even though it might be relevant . . . esp[ecially] when the information was originally communicated in a professional or confidential relationship.”<sup>89</sup> The court then reasoned that the “privileged communications” in Section 210.140 are evidentiary privileges; thus, the statute does not establish a blanket rule of confidentiality.<sup>90</sup>

Using this definition of “privileged communication,” the court concluded that the Section 455.220 requirements are distinguishable from the privileged communications of Section 210.140 in three important ways.<sup>91</sup> First, the Section 455.220 requirements pertain to all shelter workers and volunteers and are in place not to foster open communication but to ensure the residents’ safety.<sup>92</sup> Second, the privileged communications in Section 210.140 have a very limited scope, whereas Section 455.220 applies to a wide variety of forms and types of communication, including any information regarding the resident’s identity.<sup>93</sup> Finally, Section 455.220.2 does not allow for the confidentiality requirements to be waived, except when the resident does so after testimony has been requested.<sup>94</sup> The court concluded by holding that the Section 210.140 limitations of privileged communications do not apply to the confidentiality requirements of Section 455.220.<sup>95</sup>

85. *Merrigan*, 133 S.W.3d at 48.

86. *Id.* at 49.

87. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857-58 (Mo. 2001) (en banc) (per curiam).

88. *Merrigan*, 133 S.W.3d at 49 (citing BLACK’S LAW DICTIONARY 273 (7th ed. 1999)).

89. *Id.* (citing BLACK’S LAW DICTIONARY 1215 (7th ed. 1999)). Black’s Law Dictionary goes on to list physician-patient and husband-wife privileges as examples of evidentiary privileges. BLACK’S LAW DICTIONARY 1215 (7th ed. 1999).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 49-50.

### B. Dissenting Opinion

Judge Limbaugh, in dissent, contended that Missouri Revised Statutes Sections 455.220 and 210.140 are in conflict when applied to cases dealing with a domestic violence shelter resident who is accused of child abuse or neglect.<sup>96</sup> Judge Limbaugh was troubled by the fact that Section 455.220 establishes a legally recognized privilege for communication, yet Section 210.140 does not allow any privilege to pertain to situations involving child abuse or neglect.<sup>97</sup> His concern was compounded by the majority's failure to reconcile these statutory differences.<sup>98</sup> Using Missouri Revised Statutes Section 211.011 for its basis in ascertaining the legislative intent for enacting both statutes,<sup>99</sup> Judge Limbaugh determined that children would be best served by privileging all relevant testimony and other evidence that would help protect children from continuing abuse.<sup>100</sup>

Before concluding, Judge Limbaugh noted that he would only eliminate the confidentiality requirement in limited circumstances where a parent is being accused of child abuse or neglect.<sup>101</sup> In light of the contradictory language of Sections 210.140 and 455.220 and the public policy arguments for protecting child victims of abuse and neglect, Judge Limbaugh would have ordered Hope House to produce the requested information.<sup>102</sup>

### V. COMMENT

Institutional responses to family violence today are bifurcated into two separate systems: the child protective services system and the domestic violence system.<sup>103</sup> Both systems believe there is a clearly identifiable victim: "the innocent child in need of protection in the child protective services sys-

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96. *Id.* at 51. (Limbaugh, J., dissenting). Judges Benton and Price concurred in Judge Limbaugh's dissent.

97. *Id.* (Limbaugh, J., dissenting).

98. *Id.* (Limbaugh, J., dissenting).

99. This section states: "The child welfare policy of this state is what is in the best interests of the child." MO. REV. STAT. § 211.011 (2000).

100. *Merrigan*, 133 S.W.3d at 51 (Limbaugh, J., dissenting). *See also* *State v. Ward*, 745 S.W.2d 666, 670 (Mo. 1988) (en banc). Judge Limbaugh noted that, although there would be some situations where a child would benefit from the confidentiality provisions of Section 455.220 in terms of convincing a parent to seek refuge at a domestic violence shelter from an abuser, the benefits would be significantly outweighed by the detriment caused to children when the parent residing at a shelter is also abusing or neglecting the children. *Merrigan*, 133 S.W.3d at 51. (Limbaugh, J., dissenting).

101. *Merrigan*, 133 S.W.3d at 51. (Limbaugh, J., dissenting).

102. *Id.* at 52 (Limbaugh, J., dissenting).

103. Mangold, *supra* note 37, at 104.

tem and the battered wife in the domestic violence system.”<sup>104</sup> While both systems seek to protect victims who are incapable of ensuring their own safety, the law has tended to position the systems against each other in creating ways for each to help their victims.

As society becomes more aware of the pervasiveness of domestic violence, a growing consensus believes that children are harmed by witnessing this abuse.<sup>105</sup> In one survey, 87% of battered women living with children said they knew their children were aware of the abuse.<sup>106</sup> Researchers suggest that “[t]hree to ten million children per year experience the psychological trauma of seeing a parent beaten or otherwise assaulted.”<sup>107</sup> However, because the amount of violence children witness and the circumstances surrounding the experience will vary, the harm suffered will not be the same for every child.<sup>108</sup>

Unfortunately, children are not only indirect victims of domestic violence. The likelihood that a child will suffer physical abuse increases when a parent is abused, because battered mothers are more likely to abuse their children, and fathers who beat their wives will frequently abuse their children as well.<sup>109</sup> A study of the estimated incidents of child maltreatment in the United States, including cases not reported to authorities, concluded that over one and a half million children a year suffer harm from abuse or neglect at the hands of parents or caretakers.<sup>110</sup> Thus, the need to protect children from contributing to these statistics is great. The Missouri General Assembly demon-

104. *Id.*

105. Linda Spears, *Building Bridges Between Domestic Violence Organizations and Child Protective Services*, Violence Against Women Online Resources (last revised February 2000) at <http://www.vaw.umn.edu/documents/dvcps/dvcps.html>. See also Kim Ahearn et al., *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000).

106. Mangold, *supra* note 37, at 107.

107. NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, AM. PROSECUTORS RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 6 (3d ed. 2004), citing P. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990). See also Davidson, *supra* note 37, at 188.

108. Spears, *supra* note 105.

109. NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, AM. PROSECUTORS RESEARCH INST., *supra* note 107, at 7, citing M. STRAUS & R. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (1990) (finding that mothers beaten by their partners are twice as likely to abuse their children); see also SCHNEIDER, *supra* note 2, at 152, citing Evan Stark & Anne Flitcraft, *Woman Battering, Child Abuse and Social Heredity: What is the Relationship?* in MARITAL VIOLENCE (Norman Johnson, ed. 1985).

110. Davidson, *supra* note 37, at 188. An estimated three million children each year are abused, and more than one million children are actually found to be abused or neglected each year. *Id.*

strated its awareness of this need by enacting Missouri Revised Statutes Section 210.140.<sup>111</sup>

The asserted goal of the domestic violence system is to empower women. Unfortunately these women are all too often pitted against the child protective system in a purported effort to protect children.<sup>112</sup> When a battered woman with children attempts to end an abusive situation, she faces many problems that lack clear solutions. First, she must decide how to best protect herself and her children from her abuser.<sup>113</sup> If she decides to leave her abuser, the mother then must determine how she will obtain housing and money to feed her children.<sup>114</sup> Thus the battered mother has to make serious decisions about her own welfare and means for survival as well as the well being of her children.

In *Merrigan*, the Missouri Supreme Court faced a situation with which it had never dealt when asked to harmonize conflicting statutes dealing with child welfare and victim confidentiality. But the importance of *Merrigan* goes further than just a synchronization of statutes – it provides Missouri’s domestic violence shelters with clear guidance regarding the requirements for maintaining victim confidentiality when faced with demands for victim records.<sup>115</sup> Hope House argued that the conflicting state and federal laws about confidentiality left shelters virtually stuck between a rock and a hard place in ensuring compliance with all state and federal regulations.<sup>116</sup> Since federal<sup>117</sup> and state<sup>118</sup> laws required Hope House to maintain victim confidentiality in order to receive substantial amounts of state and federal funding, the shelter’s ability to serve domestic violence victims and their children would be severely compromised if the shelter violated the confidentiality requirements.<sup>119</sup> However, had the court not issued the writ of prohibition, based on the supreme

111. MO. REV. STAT. § 210.140 (Supp. 2001).

112. Mangold, *supra* note 37 at 73.

113. Collins, *supra* note 3, at 751-52.

114. *Id.* at 752. Battered women clearly face great economic, social and safety hurdles when attempting to leave a violent partner. Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, Minnesota Center Against Violence and Abuse (1994), available at <http://www.mincava.umn.edu/documents/wingsp/wingsp.html>.

115. See Emily Umbright, DOMESTIC VIOLENCE CENTERS RETAIN CONFIDENTIALITY RIGHT, St. Louis Daily Record and St. Louis Countian (April 15, 2004).

116. Brief for Relator at \*13-14, State *ex rel.* Hope House, Inc. v. Merrigan, 133 S.W.3d 44 (Mo. 2004) (en banc) (No. SC 85638), citing 42 U.S.C.A. § 10604(d) (2004) and MO. REV. STAT. §§ 455.215, 455.220 (2000).

117. 42 U.S.C. § 10604(d) (2000).

118. MO. REV. STAT. § 455.220 (2000).

119. Brief for Relator at \*13.

court's previous decisions regarding Section 210.140,<sup>120</sup> Hope House would have been forced to violate these laws to comply with the subpoena and provide confidential records without Martinez's consent.<sup>121</sup> Thus, the court was faced with a decision that had the potential to adversely affect victims of child abuse or neglect regardless of the decision reached.

In his dissent, Judge Limbaugh stated his belief that the public policy benefit to children of requiring disclosure of victims' records outweighs the detriment to shelter residents.<sup>122</sup> While children may indeed benefit from full discovery of shelter records that could reveal evidence of abuse and neglect, the potential for harm to both the domestic violence victim and her children could be even greater once the abuser discovers that the family's secrets have been revealed. Many women are discouraged from even entering shelters with their children for fear that their children will be taken from their custody if any kind of abuse is discovered.<sup>123</sup> For example, in Massachusetts, the Department of Social Services found that when child protective workers identified domestic violence in the home, their discovery resulted in an increase in child abuse reports and a decrease in the number of battered women seeking services.<sup>124</sup> The best solution to help these battered mothers and their children is through increased collaboration and coordination between child protection services and women's advocate services and shelters.<sup>125</sup>

In the face of evidence suggesting the need for disclosure of victims' records to investigate child abuse and neglect cases, the court was able to find a way to justify its position in allowing Hope House to keep Martinez's records confidential without violating Missouri Revised Statutes Section 210.140.<sup>126</sup>

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120. See generally *supra* notes 47-53, 60-65 and accompanying text; *State v. Eisenhouer*, 40 S.W.3d 916, 919 (Mo. 2001) (en banc) (declining to decide the constitutionality of the statute).

121. Brief for Relator at \*14.

122. *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 51 (Mo. 2004) (en banc) (Limbaugh, J., dissenting).

123. Collins, *supra* note 3, at 750.

124. *Id.* See also Ahearn et al., *supra* note 105, at 857-58.

125. Collins, *supra* note 3, at 752.

126. *Merrigan*, 133 S.W.3d at 50. The supreme court's ability to reconcile both of these statutes allows employees and volunteers in Missouri shelters to breathe a little easier, but this is not the case around the county. Shelters nationwide continue to argue with state and federal government agencies about the need to keep resident information confidential. See Mackenzie Carpenter, *Local Shelter to Give Up Funding Rather Than Turn Over Data on Abuse Victims*, PITTSBURGH POST-GAZETTE (October 8, 2004) (discussing one shelter's decision not to violate state and federal laws requiring strict confidentiality in the face of the U.S. Department of Housing and Regulation's new requirements mandating the disclosure of information to track the number of homeless people using government services); *Shelters Forfeit Federal Funds to Maintain Anonymity for Clients*, CHILDREN AND YOUTH FUNDING REPORT (April 28, 2005) (noting that many shelters across the country are choosing to forgo

In doing so, the Missouri Supreme Court created a landmark ruling that will be the foundation on which shelters and child protective services can build the idea that in supporting the mother's ability to maintain her confidentiality rights, the child's best interests are met as well.

## VI. CONCLUSION

Child abuse and neglect will continue to be a major problem in American society as long as action is not taken to prevent domestic violence in the family. To provide safety for battered women and for their abused and neglected children, society must continue to create a shared agenda of combating these problems as one cohesive issue.<sup>127</sup> In *Merrigan*, the Missouri Supreme Court took the first step in attempting to harmonize current statutes so that both battered mothers and their children are adequately protected from further abuse. With the continued support of the Missouri Supreme Court and Missouri General Assembly, laws providing for an environment where victims and their children are safe and protected from their abusers should enable more victims of domestic violence to flee their abusive situations. Allowing shelter workers to maintain the high confidentiality requirements of state and federal laws is a step in the right direction not only for Missouri domestic violence shelters,<sup>128</sup> but for all the victims who begin new lives within them.

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receiving federal funds by opting out of the homelessness data-gathering system to protect shelter residents).

127. Spears, *supra* note 105.

128. See Umbright, *supra* note 115.