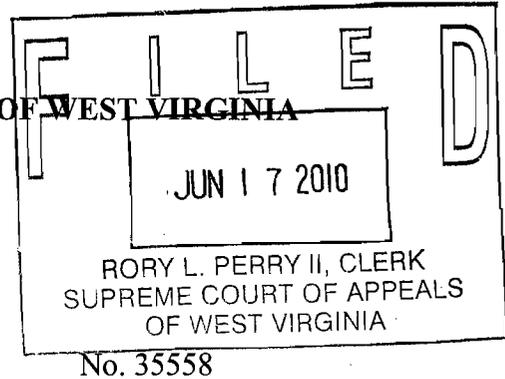


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MEN & WOMEN AGAINST DISCRIMINATION,

Appellee/Plaintiff,

v.

THE FAMILY PROTECTION SERVICES BOARD,
et al.,

Appellants/Defendants.

BRIEF OF *AMICI CURIAE*

**NATIONAL NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE
LEGAL EMPOWERMENT AND APPEALS PROJECT, AND BATTERED WOMEN'S
JUSTICE PROJECT**

Amici Curiae the National Network to End Domestic Violence (“NNEADV”), the Domestic Violence Legal Empowerment and Appeals Project (“DVLEAP”), and the Battered Women’s Justice Project (“BWJP”) submit this brief to provide the court with important context with regard to two key matters associated with the above-captioned proceeding: (1) that the reliance of the West Virginia Family Protection Services Board (“FPSB”) on the West Virginia Coalition Against Domestic Violence (“WVCADV”) as an expert body to provide certification for domestic violence advocates employed in licensed family protection programs is a reasonable delegation of authority not uncommon to other state domestic violence programs throughout the nation; and (2) the litigation brought to this court by Men & Women Against Discrimination (“MAWAD”) can and should be viewed as part of a national campaign of vexatious litigation brought by so-called “fathers rights” groups, with an intent to divert funding away from domestic violence programs and impede the provision of needed services to victims of domestic violence.

I. IT IS A REASONABLE AND COMMON PRACTICE FOR STATE AUTHORITIES TO INVOLVE NON-GOVERNMENTAL ASSOCIATIONS IN CERTIFICATION OF DOMESTIC VIOLENCE SERVICE PROVIDERS AND OTHER PROGRAM MATTERS.

Domestic violence is a profound social problem with far-reaching consequences. Characterized by a pattern of terror, domination and control, domestic violence inexorably obstructs victims' efforts to escape abuse and achieve safety. In order to address this pervasive problem, and as part of its implementation of the legislature's intent to provide for licensure and funding of programs and shelters for victims of domestic violence, the FPSB requires as a condition of licensure that any family protection program ensure that at least one-third of its direct service providers are certified by the WVCADV as "certified domestic violence advocates." West Virginia Code of State Rules § 191-2-3.2.k.12. The circuit court found that "there is no statutory basis" for the FPSB to rely on the WVCADV for certification and noted that no statute specifies "with any degree of particularity" what standards should apply for certification. Men & Women Against Discrimination v. The Family Protection Services Board, No. 08-C-1056, Slip Op. at 4 (Kanawha County Cir. Ct., Oct. 2, 2009). The court held that the rule exceeded the authority granted to the FPSB because "[n]owhere in the enabling statute is the Board authorized to delegate the setting of standards for licensed facilities to a private trade organization" such as the WVCADV. Id. at 9.

But this assessment stands on its head the accepted concept of legislative delegation to administrative agencies. This Court has consistently recognized that the legislature may delegate broadly to an administrative agency to implement its policy directives. See, e.g., Quesenberry v. Estep, 95 SE 2d 832, 843-44 (W. Va. 1956) ("[T]he legislature is not required to legislate for the guidance of administrative agencies further than is practicable, and, where it is impracticable to lay down a definite comprehensive rule, it is not essential that a specific prescribed standard be

expressed.”) (quoting 73 C.J.S., Public Administrative Bodies and Procedure, § 30). The legislature is not required to state with specificity what the standards for certification of domestic violence advocates shall be, but is free to delegate that determination to the expertise of the agency it empowers to establish a certification process. See Appalachian Power Co. v. Tax Dept., 466 SE 2d 424, 440 (W. Va. 1995) (“In the absence of legislative direction as to what elements are to be considered in promulgating a rule, the presumption is that the Legislature is entrusting the decision as to what to consider to the hands of the agency in deference to agency expertise.”) (quoting Kennedy v. Block, 606 F.Supp. 1397, 1403 (W.D.Va.1985)) (alterations omitted). The decision of the FPSB to utilize the expert services of the WVCADV in the certification process for domestic violence advocates is not, as the circuit court held, prohibited unless specifically authorized by the legislature. Instead it is presumably allowable, unless prohibited by the legislature or otherwise in firm in its adoption. See Appalachian Power Co., 466 SE 2d at 440 (“When a legislative rule is constitutionally acceptable, only an unambiguous conflicting statute, contradictory legislative history, a defect in the rulemaking process, evidence of bias or abuse of power, or some other startling revelation of fact would overcome the clearly erroneous burden and justify this Court's interference with an agency's legitimate rulemaking authority.”).

It is not an uncommon practice for an expert domestic violence association to be empowered by a state domestic violence agency to assist in certification or implementation of other programs of the agencies. In fact, domestic violence organizations and associations play a pivotal role in implementing programs aimed at helping *all* victims of domestic violence. For instance:

- Many state agencies and services rely on the expertise of state domestic violence coalitions to identify, understand, and implement best practices in providing services to victims of domestic violence and their children.
- Law enforcement, the child welfare system, and the education systems within states regularly ask state coalitions to help them develop screening tools and response protocols.
- State coalitions also play a significant role in regularly training executive branch agencies about the diverse issues that arise in domestic violence cases.
- Most states have created a commission or task force on domestic violence that develops recommendations for state action to address domestic violence, and the state domestic violence organizations sit on those commissions and task forces at the states' request.
- The staff of state domestic violence coalitions have frequently worked in local programs before coming to work at the state coalition. As a result, they have a unique insight into the diversity of services victims of domestic violence need and special expertise in ensuring that service delivery is effective.
- State coalitions are especially attuned to the diversity of people who are victims of domestic violence and are well-aware that these victims may be young, old, female, male, African-American, Asian-American, Latino, or of European origin.
- State coalitions have access to ever-evolving, specialized research in services and intervention that can inform the certification process in ways that are clearly beyond the ken of the state legislature.

Across this country, including here in West Virginia, cooperative arrangements exist and thrive between state domestic violence agencies and domestic violence associations because state legislatures recognize the pivotal role domestic violence organizations play in effectively combating this pervasive problem. For example:^{1/} **Alabama:** To receive state funding, a domestic violence shelter must be certified by the Alabama Coalition against Domestic Violence

^{1/} The list of state programs identified herein is not exhaustive. To the contrary, this is a representative sampling of the many cooperative arrangements that exist throughout the United States.

(ACADV), which sets standards for domestic violence centers. The ACADV is responsible for allocating state appropriated funds for domestic violence to certified domestic violence centers. Ala. Code § 30-7-1, et seq.

Arkansas: If the Arkansas Child Abuse/Rape/Domestic Violence Commission enters into a contract to fulfill any of its statutory duties, such as shelter evaluation, training, and technical assistance, the contractor must be organized as a statewide nonprofit corporation that provides services, community education, and technical assistance to domestic violence shelters and must be affiliated with the National Coalition Against Domestic Violence, NNEDV, or BWJP. Arkansas Code Ann. § 9-4-103.

Florida: All funds allocated by the legislature for domestic violence services are managed by Florida Coalition Against Domestic Violence (FCADV) through a contract with the Florida Department of Children and Families. See Florida Department of Children and Families, Domestic Violence Program Office at <http://www.dcf.state.fl.us/programs/domesticviolence/>. The FCADV is empowered to “implement, administer, and evaluate” services provided by certified domestic violence centers. See Fla. Stat. § 39.903.

Illinois: The Illinois Department of Human Services (IDHS) Bureau of Domestic and Sexual Violence Prevention and the Illinois Coalition Against Domestic Violence (ICADV) have cooperatively developed and published a set of minimum standards with which all funded community-based domestic violence services programs must comply. See Illinois Domestic Violence Service Provider Guidelines at http://www.ilcadv.org/resources/services_guidelines/il_dv_service_guidelines_2007.pdf.

Iowa: The Iowa Department of Human Services is required to “cooperat[e] with victim service providers” and “work with various professional organizations” to establish training

programs for “professionals who work in the area of domestic abuse prevention and services.”

Iowa Code § 236.17,

Kentucky: All state-funded domestic violence programs in Kentucky are required, by the terms of their contract with the state, to be accredited by the Kentucky Domestic Violence Association (KDVA) and all direct-service domestic violence program staff of these programs are required to be certified by the KDVA.

Oklahoma: The Oklahoma Domestic Violence and Sexual Assault Advisory Council (DVSAAC) is nine-member committee appointed by the Attorney General with four of the members selected from a list of eight nominees provided by the Oklahoma Coalition on Domestic Violence and Sexual Assault and one additional member required to be a representative of a domestic violence programs funded by the Attorney General, and one additional member required to be a citizen with expertise in the area of sexual assault services. The duties of the DVSAAC are to review rules and overall policies relating to the operation and funding of domestic violence and sexual assault programs in Oklahoma and make recommendations to the Attorney General regarding its findings. See Domestic Violence and Sexual Assault Advisory Council at <http://www.oag.state.ok.us/oagweb.nsf/v-dvsa.html>.

Tennessee: The Tennessee Domestic Violence State Coordinating Council (TDVSCC), created by statute to develop model domestic violence policies and training curriculums for law enforcement agencies and the courts and batterers' intervention programs, Tenn. Code Ann. § 38-12-101, et seq., and its committees are staffed by the Tennessee Coalition Against Domestic and Sexual Violence (TCADSV), and public questions about the TDVSCC are referred to the TCADSV. See Tennessee Domestic Violence State Coordinating Council at <http://www.tcadsv.org/Websites/DVSCCWeb/dvscc.html>.

Virginia: The Virginia Department of Social Services is required to work with the Statewide Domestic Violence Coalition to develop policies and procedures that guide the work of persons providing services to victims of domestic violence and their children. Va. Code Ann. § 63.2-1612.

Washington: The Washington Department of Social and Health Services has established a Washington Domestic Violence Perpetrator Treatment Program Standards Advisory Committee to provide technical assistance on program standards, implementation, and certification and recertification criteria. Eight of the fourteen members of the committee are chosen with input from either the Washington State Coalition Against Domestic Violence (WSCADV) or the Washington Association of Domestic Violence Intervention Professionals (WADVIP). Wash. Admin. Code 388-60-0575.

As these examples demonstrate, state legislatures across this country recognize the importance of utilizing well-established domestic violence organizations to implement programs and draft standards, policies and procedures to ensure that state programs meet the often complex needs of domestic violence victims regardless of gender.

II. THE COMPLAINT BROUGHT BY MAWAD IS CONSISTENT WITH A NATIONAL PROGRAM OF VEXATIOUS LITIGATION BROUGHT BY “FATHERS’ RIGHTS” GROUPS.

Over the past several years, so-called “fathers’ rights” groups have filed a number of lawsuits across the nation that, while “couched in neutral legal terms like ‘reverse discrimination’ and equal protection,” . . . are in reality part of a systematic attack on laws designed to protect women and children.” Molly Dragiewicz and Yvonne Lindgren, The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis, 17 J. of Gender, Soc. Pol. & Law 101, 104 (2009). This effort is loosely organized and the

characteristics of the MAWAD complaint are consistent with the vexatious litigation efforts of fathers' rights groups across the country,

Fathers' rights groups are typically "characterized by their participants as a 'civil rights' movement that seeks to protect the rights of fathers in the face of increasing state-facilitated services for battered women, enforcement of domestic violence laws and collection of child support obligations." *Id.* at 103-04. They generally believe that "family law and domestic violence laws are biased in favor of women and that feminist activists in the court system have stripped fathers of their rightful place in the family," *id.* at 104, and that men are now the victims of the family law justice system, Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 Wisc. L. Rev. 1657, 1700 (2004). See also Shannon M. Garrett, Battered by Equality: Could Minnesota's Domestic Violence Statutes Survive a "Fathers' Rights" Assault?, 21 Law & Ineq. J. 341, 341 (2003) ("[M]ost fathers' rights groups are primarily concerned with what they perceive as discrimination against men in the family law context."). The fathers' rights movement, "gains much of its impetus from fathers who have been denied custody rights in family law cases, [but] has expanded to argue domestic violence policy is biased against men, presumes men to be guilty of violence, and ignores men who are its victims." Sack, supra, at 1700.

The rhetoric of fathers' rights groups "often embraces the moderate-sounding goals of ensuring equal protection for fathers under the law." Garrett, supra, at 341. They often couch their arguments in terms of seeking formal equality, arguing that "language, policy, and funding should be blind to sex and gender differences in women's and men's violence against intimates" and "suggest that this formal equality is in the interest of justice and fairness." Molly

Dragiewicz, Patriarchy Reasserted: Fathers' Rights and Anti-VAWA Activism, 3 Feminist Criminology 121, 130 (2008).

Despite fathers' rights groups proclamations that their intent "is in being inclusive and affirming the 'legislative intent'" of legislation addressing domestic violence, "the demand for language that obfuscates sex and gender differences ignores the reasons why it was necessary to pass a specific law targeting violence against women in the first place." Id. Indeed, fathers' rights groups "do not have a specific strategy for improvements in domestic violence policy, arguing [only] that resources should either be removed from the domestic violence area in general or from feminist-run services, or perhaps redistributed among both men's and women's services." Id. at 1710. Beyond their argument for reallocating scarce resources away from women's domestic violence services, "these groups do not have much of a point to their domestic violence policy critique." Id. The history of fathers' rights litigation across the country has been summarized as "a systematic attempt to, at the very least, divert already inadequate and scarce resources away from women's shelters and, at worst impede battered women's efforts to secure safety, accurate information, and service." Dragiewicz & Lindgren, supra, at 104.

The MAWAD attack on West Virginia's implementation of domestic violence programs fits the pattern described by researchers studying fathers' rights groups. It is couched in language that on its face seeks equality. See Plaintiff's Combined Motion for Summary Judgment and Memorandum in Support Thereof, Kanawha County Circuit Court, Case No. 08-C-1056 (filed June 4, 2009). But one can search in vain for any effort or even rhetoric from MAWAD in support of the battered men it purports to have filed its suit to aid. See, e.g., MAWAD website at <http://www.mawadwv.org/>. The aim of the suit can instead be viewed as an

attempt to disrupt current delivery systems for domestic violence services and to divert scarce funding for domestic violence away from those areas where it is most needed.

CONCLUSION

As demonstrated above, reliance of the West Virginia FPSB on the WVCADV as an expert body to provide certification for domestic violence advocates is a reasonable delegation of authority not uncommon to other state domestic violence programs throughout the nation; and the complaint by MAWAD can and should be viewed as part of a national campaign of vexatious litigation brought by fathers' rights groups to divert funding away from domestic violence programs and impede the provision of needed services to victims of domestic violence. Amici appreciate the opportunity to bring this important information before the court.

Respectfully, *Helen G. Guyton / WDJ*

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2010, I caused one copy of the foregoing
*Corrected Page 10 of the Brief of Amici Curiae National Network to End Domestic Violence,
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