Planning For The Unforeseeable: How Smart Risk Management Gives Shelters Legal Peace Of Mind.

Scenario #1. Caller to a nonprofit, domestic violence shelter for women: "Hello. I'm a battered man. Admit me to your shelter."

Scenario #2. Caller to a nonprofit shelter for troubled young women: "Hello. I know my daughter is there. Give her back."

Are there lawsuits lurking in these scenarios? You bet. Two private, nonprofit shelters facing scenarios much like these were vindicated by California appellate courts in cases that underscore the need for smart risk management planning. Both cases were triggered by phone calls. Both callers had, on the surface, plausible claims: a man had been battered, and a father was looking for his daughter. But, scratch that surface and an entirely different picture emerges. Unfortunately, it took protracted litigation to get that complete picture out – litigation that ended only when appellate courts ventured into what had previously been unexplored legal terrain. *Blumhorst v. Jewish Family Services of Los Angeles* (February 14, 2005) 126 Cal.App.4th 993; *Robbins v. Hamburger Home For Girls* (February 22, 1995) 32 Cal.App.4th 671. [1] But for the shelters' foresight in smart risk management planning, the scenarios could have been financially devastating.

One lesson from *Blumhorst* and *Robbins* is clear: risk can arise as much from whom you *don't* serve as from your established client base. In the maze of today's federal, state and local laws, someone somewhere is bound to find a law to throw at a shelter when a seemingly straightforward request is denied. No shelter, of course, can reasonably be expected to staff its phone lines with lawyers. But every shelter ought to protect itself with risk management policies

[1] Morris Polich & Purdy, LLP, represented the shelters in both cases at trial and on appeal. Richard H. Nakamura Jr., chair of the Firm's Appellate Practice Group, worked on both appeals.

should trouble come calling.

***Blumhorst:* Is This For Real?**

Blumhorst began when, over a one week period, a male caller telephoned ten domestic violence shelters for women that receive state financial assistance. Litigation revealed that the caller was a member of the National Coalition of Free Men, and that he decided to "test" these state-funded shelters to document whether they discriminate against men. That affiliation and motive, however, were never stated in the phone calls; instead, he told the shelters that "he needed shelter from domestic violence perpetrated against him." When the shelters, all of whom serve battered women, declined to admit the caller, he sued. The complaint demanded an injunction permanently enjoining the shelters from denying men full and equal access to their programs.

The caller relied upon a rarely-litigated state anti-discrimination statute that prohibits programs receiving state financial assistance from discriminating on the basis of sex. (Cal. Gov't Code § 11135.) But the Legislature qualified this general prohibition against discrimination with the following language: "This article shall not be interpreted in a manner that would adversely affect lawful programs which benefit the disabled, the aged, minorities and women." (Cal. Gov't Code § 11139.)

In the trial court, the shelters persuaded the trial judge to rule that section 11139 exempted them from the anti-discrimination provisions of section 11135, and to reject the caller's argument that section 11139 was constitutional.

The appeal, however, never reached the constitutional issues and instead was decided on much narrower grounds: as a self-described "tester," the caller did not suffer an actual injury that was compensable under the state anti-discrimination statute. No case had previously

addressed whether testers have standing to bring a reverse-discrimination suit under section 11135; in fact, state law on tester standing was an essentially clean slate. Nonetheless, the Court of Appeal's reasoning was driven by well-established California law requiring a plaintiff to suffer actual injury. "Testers" are not "damaged," or, as the Court put it, "The right to sue for a violation of section 11135 exists in *injured victims* of unlawful discrimination. The statute does not give standing to a plaintiff who was not injured by a defendant's alleged discriminatory practices."

The case finally ended when the California Supreme Court declined to review the Court of Appeal's decision. It took more than two years to end what the "tester" had started.

***Robbins*: Balancing Parental Rights With Child Safety**

The issue in *Robbins* was vexing: Must a private, nonprofit shelter for abused teenagers disclose its address to a parent who is the alleged abuser where the teenager voluntarily comes to the shelter for temporary protection?

In *Robbins*, a 15-year old girl voluntarily sought out a shelter where she temporarily remained of her own volition and from where she was free to leave at any time. The girl had complained of repeated instances of progressively worse abuse by her father, including beatings, whippings and being hurled across the room. These complaints were made not only to the shelter, but also to the girl's teacher. When the girl arrived at the shelter, the shelter notified the child welfare agency and was instructed by the agency not to disclose the shelter's address to the girl's parents. If contacted by the parents, the shelter was told that the only information they could give was that the girl was safe, in protective care, and that further inquiries should be directed to the agency.

When the girl did not return home from school, her father contacted school employees, who told him that his daughter had made allegations of child abuse that were reported to the police. The father went to the police station. A detective learned the location of the girl, called the shelter, and put the father on the line. The shelter's response to the father's phone call was in accordance with the agency's instructions. The father called the shelter repeatedly for three days, making similar demands and receiving similar responses. No action was taken in response to the child abuse reports. Four days after not returning home, the girl was picked up by her parents at the shelter. When the girl was told her parents were coming, she did not want to go home. The shelter told her there was no basis to hold her there, and that she should go home. After a difficult meeting with her parents and counselors, the girl went home.

Her parents then sued the shelter, alleging federal civil rights violations and various state law claims premised, in large part, on the assertion that the shelter had interfered with their parental rights of custody. The trial court granted summary judgment to the shelter, and the Court of Appeal affirmed.

The gist of the lawsuit was not the reporting of suspected child abuse – which the Court of Appeal ruled protected by statutory immunity – but what the Court called the "subsequent concealment" of the girl while authorities investigated. Existing California law recognized the importance of private assistance efforts in "voluntary, noncommercial and noncustodial relationships." *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 298. Case law had deemed the need for such outreach particularly compelling for child abuse and domestic violence. "Society, we believe, favors the attempt at such help." *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1458. But no case had attempted to balance the competing interests of parents (who may, or may not, be abusive) against the rights of their children to be free from

abuse. On the record before it, the Court of Appeal in *Robbins* concluded that the shelter has "no tort liability for merely giving shelter to a child known to have left home without parental permission, if the child was not induced by other means to stay away from home and [the shelter] was privileged based on probable cause to protect the child from imminent physical violence." Thus, two facts were pivotal: the shelter did nothing to induce the teenager to stay separated from her parents, and the shelter reasonably believed that the teenager might suffer immediate physical harm if she returned home or if her location were disclosed.

Has the shelter lost, the proposed theory of liability could have sounded the death knell for shelters everywhere. If shelters owe a tort duty to an abusive parent or spouse to reveal the exact whereabouts of a person who has voluntarily come for a safe haven, then the idea of a "shelter" loses its meaning. How can any shelter, in good conscience, turn its back on a person who has voluntarily sought safety by handing its keys over to the alleged abuser?

In both *Blumhorst* and *Robbins,* the shelters took no chances. They remained true to their mission and their clients, putting the interests of clients in their immediate care ahead of callers claiming equal or superior rights. Sometimes, that's a tough decision to make. But should it ever be second-guessed in litigation, a risk management policy is a wise and cost-effective way to secure legal peace of mind.