

MEMORANDUM

TO: Richard Orsinger

FROM: Frank Gilstrap

DATE: April 10, 2012

RE: Protective Order Kit

The Protective Order Kit was first presented to SCAC on March 5, 2005 without subcommittee consideration. After discussion by the full SCAC, the kit was approved by the Supreme Court. Now, amendments to the Kit have been referred to our subcommittee.

On April 4, I sent out a memo asking several questions, and I received prompt and helpful responses from Judge Judy Warne, a Harris County family law judge, and Professor Jeana Lungwitz, who heads the Domestic Violence clinic at the UT law school. These answered some of the questions in the April 4 memo, leaving only the questions set out below.

The page references are to the attached handout, which includes the temporary and final orders and parts of Chapters 82, 83 and 85 of the Family Code. Because this handout is taken from a larger document, there are gaps in the page numbering sequence.

1. Notice. Under the statute, the Notice of Application for Protective Order must contain the following statement:

An application for a protective order has been filed . . . alleging that you have committed family violence. You may employ an attorney to defend you against this allegation. You or your attorney may, but are not required to, file a written answer to the application. Any answer must be filed before the hearing on the application. If you receive this notice within 48 hours before the time set for the hearing, you may request the court to reschedule the hearing not later than 14 days after the date set for the hearing. If you do not attend the hearing, default judgment will be taken and a protective order may be issued against you.

TEX.FAM.CODE § 82.041(b) (handout, p.19).

The Notice of Application for Protective order is not part of the Protective Order Kit, and it is supposed to be prepared by the clerk. From what I can tell, the clerks are quite aware of this requirement. The clerks in Tarrant County (pop. 2 million), Johnson County (pop. 200,000) and Wise County (pop. 60,000) include this language in the Notice. It may be possible, however, that in some of the more remote counties, the clerk may not know to include this information.

Even so, the respondent needs to understand that, at the hearing, the judge can restrict his communications, restrict his physical liberty, order him to pay support, order him to leave home, restrict access to children, prohibit him from possessing a gun, and suspend his concealed handgun license. *See* TEX.FAM.CODE §§ 85.021 & 85.022 (b) (handout, pp.29-31). While he may be able to learn this by reading the application and the temporary order, these consequences should be stated in laymen's language, which could be placed in the citation or in the warnings in the temporary order.¹

2. Firearms. Under the statute, the court may prohibit the respondent from possessing a firearm and must suspend the respondent's concealed handgun license. *Id.* §§ 83.001(b) (handout, p.21) & 85.022(b)(6)&(d) (handout, pp.30-31). But under the proposed orders, the court must prohibit the respondent from possessing a firearm and suspend his concealed handgun license.²

It is a crime to possess a firearm after a final order has been entered (but not a temporary ex parte order),³ and the statute requires the respondent to be advised of this. *See* TEX.FAM.CODE § 85.026(a) (handout, pp.32-33).⁴ But the judge is not required to restrain conduct merely because it is criminal. For example, it is obviously a crime for the respondent to assault the applicant, but that box is not checked.⁵ The legislature has given the judge the discretion to prohibit the respondent from possessing a firearm, but the proposed orders take that discretion away.

¹ *See* Temporary Ex Parte Protective Order, p.3 ¶ 7 (handout, p.7).

² *Id.*, p.2 ¶ 3(g) (handout, p.6); Protective Order, p.3 ¶ 4(j) (handout, p.10).

³ *See* 18 U.S.C. § 922(g)(8) & TEX.PENAL CODE § 46.04(c).

⁴ *See also* Temporary Ex Parte Protective Order, p.3 ¶ 7 (handout, p.7) & Protective Order, p.7 (handout, p.14).

⁵ *See also* Temporary Ex Parte Protective Order, p.1 ¶ 3(a) (handout, p.5), Protective Order, p.2 ¶ 4(a) (handout, p.9).

3. Due Process. The respondent has a Second Amendment right to possess a gun in his home for purposes of self-defense.⁶ While the law in this area is only now developing, the respondent will be entitled to some measure of procedural due process before being ordered to surrender firearms. Ordering the respondent to surrender firearms after the hearing should not be a problem, since the respondent has received notice and opportunity to be heard. The problem is the temporary order and particularly the following features: (i) the temporary order is entered ex parte (ii) the order requires the court to prohibit respondent from possessing firearms (iii) the respondent may not receive a hearing for up to 20 days, or even more and (iv) the order contains no specific finding that there is a danger that firearms will be misused.

⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 320, 326 (2010).

Cause No.: _____

Applicant: _____ § In the _____ Court
§
v. § of
§
§
Respondent: _____ § _____ County, Texas

Temporary Ex Parte PROTECTIVE ORDER

Go to the court hearing on: Date: _____ Time: _____ ☐ a.m. ☐ p.m.

Court Address: _____

Findings: The Court finds from the sworn Declaration attached to the *Application for Protective Order* filed in this case that there is a clear and present danger that the Respondent named below will commit acts of family violence that will cause the Applicant, Children and/or Other Adults named below immediate and irreparable injury, loss and damage, for which there is no adequate remedy at law. The Court, therefore, enters this *Temporary Ex Parte Protective Order* without further notice to the Respondent or hearing. No bond is required.

- 1 **Respondent:** The person named below must follow all Orders marked with a check.

Name: _____ County of Residence: _____

- 2 **Protected People:** The following people are protected by the terms of this PROTECTIVE ORDER:

Name: _____ County of Residence: _____

☐ **Applicant:** _____

☐ **Children:** _____

☐ **Other** _____

Adults: _____

- 3 **Temporary Orders** — To prevent family violence, the Court orders the Respondent to obey all orders marked with a check. ☒

The Respondent (person named in 1) must:

- a. ☐ Not commit an act against any person named in 2 above that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places those people in fear of imminent physical harm, bodily injury, assault, or sexual assault.
- b. ☐ Not communicate in a threatening or harassing manner with any person named in 2 above.
- c. ☐ Not communicate a threat through any person to any person named in 2 above.

- d. ☐ Not communicate or attempt to communicate in any manner with: (*Check all that apply*)
☐ Applicant ☐ Children ☐ Other Adults named in 2 above. The Respondent may communicate through: _____ or other person the Court appoints.
Good cause exists for prohibiting the Respondent's direct communications.
- e. ☐ Not go within 200 yards of the: (*Check all that apply*)
☐ Applicant ☐ Children ☐ Other Adults named in 2 above. (except to go to court hearings)
- f. ☐ Not go within 200 yards of the Residence, workplace or school of the: (*Check all that apply*)
☐ Applicant ☐ Other Adults named in 2 above.
The addresses of the prohibited locations are: (*Check all that apply*)
☐ Deemed confidential. The Clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.
☐ Disclosed as follows:
Applicant's Residence: _____
Applicant's Workplace/School: _____
Other: _____
- g. ☒ Not possess a firearm or ammunition, unless the Respondent is a peace officer actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.]
- h. ☐ Not go within 200 yards of the Children's Residence, child-care facility, or school.
The addresses of the prohibited locations are: (*Check all that apply*)
☐ Deemed confidential. The Clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.
☐ Disclosed as follows:
Children's Residence: _____
Children's Child-care/School: _____
Other: _____
- i. ☐ Not stalk, follow or engage in conduct directed specifically toward the Applicant, Children, or Other Adults named in 2 above
that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass them.
- j. ☐ Not remove the Children from their school, child-care facility, or the Applicant's possession.
- k. ☐ Not remove the Children from the jurisdiction of the Court.
- l. ☐ Not harm, or interfere with the care, custody, or control of the following pet, companion animal, or assistance animal: _____ (describe the animal).
- m. ☐ Not interfere with the Applicant's use of the Residence located at: _____, including, but not limited to, disconnecting utilities or telephone service or causing such services to be disconnected.
- n. ☐ Not interfere with the Applicant's use and possession of the following property:

- o. ☐ Not damage, transfer, encumber, or otherwise dispose of any property jointly owned or leased by the Applicant and Respondent, except in the ordinary course of business or for reasonable and necessary living expenses, including, but not limited to, removing or disabling any vehicle owned or possessed by the Applicant or jointly by the parties (whether so titled or not).

4 ☐ Order: Vacate Residence Immediately

The Court finds that the Residence located at:

(Check one):

- ☐ is jointly owned or leased by the Applicant and Respondent;
- ☐ is solely owned or leased by the Applicant; or
- ☐ is solely owned or leased by the Respondent; and the Respondent is obligated to support the Applicant or a child in the Applicant's possession.

The Court further finds that the Applicant currently resides at the Residence, or has resided there within 30 days prior to the filing of the *Application for Protective Order* in this case, and that the Respondent has committed family violence against a member of the household within 30 days prior to the filing of the *Application for Protective Order* in this case. There is a clear and present danger that the Respondent is likely to commit family violence against a member of the household.

The Respondent is therefore ORDERED to vacate the Residence on or before: _____ ☐ a.m. ☐ p.m. on: _____ (date) and to remain at least 200 yards away from the Residence until further order of the Court. The Applicant shall have exclusive use and possession of the Residence until further order of the Court.

IT IS FURTHER ORDERED that the sheriff, constable, or chief of police shall provide a law enforcement officer to accompany the Applicant to the Residence, to inform the Respondent that the Court has ordered the Respondent to vacate the Residence, and to provide protection while the Applicant takes possession of the Residence, and if the Respondent refuses to vacate the Residence, provide protection while the Applicant takes possession of the Applicant's necessary personal property.

5 Go to the Court Hearing

IT IS FURTHER ORDERED that notice issue to the Respondent to appear, and the Respondent is ORDERED to appear in person before this Court at the time and place indicated on page 1 of this form.

The purpose of this hearing is to determine whether the Court should issue the Protective Orders and other relief requested in the *Application for Protective Order* filed in this case.

6 Duration of Order: This Order is effective immediately and shall continue in full force and effect until twenty (20) days from the date it is signed, or further order of the Court.

7 Warning: A person who violates this order may be punished for contempt of court by a fine of as much as \$500 or by confinement in jail for as long as six months, or both.

No person, including a person who is protected by this order, may give permission to anyone to ignore or violate any provision of this Order. During the time in which this Order is valid, every provision of this Order is in full force and effect unless a court changes the Order.

It is unlawful for any person, other than a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to a Protective Order to possess a firearm or ammunition.

A violation of this Order by commission of an act prohibited by the Order may be punishable by a fine of as much as \$4,000 or by confinement in jail for as long as one year, or both. An act that results in family violence may be prosecuted as a separate misdemeanor or felony offense. If the act is prosecuted as a separate felony offense, it is punishable by confinement in prison for at least two years.

This Ex Parte Order signed on (date): _____ Time: _____ ☐ a.m. ☐ p.m.

Judge Presiding: _____

This is a Court Order. No one – except the Court – can change this Order.

IN THE _____ COURT
_____ COUNTY, TEXAS

Protective Order

Cause No. _____

Judge: _____

Applicant/Petitioner

Applicant/Petitioner Identifiers

First Middle Last

Date of Birth of Applicant: _____

And/or on behalf of minor family member(s): (list name and DOB):

Other Protected Persons/DOB:

VS.

Respondent

Respondent Identifiers

First Middle Last

Relationship to Petitioner: _____

Respondent's Address

SEX	RACE	DOB	HT	WT
EYES	HAIR	SOCIAL SECURITY NO. (Last 3 #)		
DRIVERS LICENSE NO.		STATE	EXP DATE	
Distinguishing Features: _____				

A Court hearing was held on: Date: _____ Time: _____ ☐ a.m. ☐ p.m.

THE COURT HEREBY FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard.

☒ Additional findings of this order are as set forth below.

THE COURT HEREBY ORDERS:

☐ That the above named Respondent be prohibited from committing further acts of abuse or threats of abuse.

☐ That the above named Respondent be prohibited from any contact with the Applicant/Petitioner.

☒ Additional terms of this order as set forth below.

The terms of this Order shall be effective until _____, 20_____,
or as otherwise provided for in Section 14 Duration located on page 6 of this Order.

WARNINGS TO RESPONDENT:

This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U. S. Territory, and may be enforced by Tribal Lands (18 U.S.C. Section 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. Section 2262).

Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. Section 922(g)(8)).

Only the Court can change this order.

Findings: All legal requirements have been met, and the Court has jurisdiction over the parties and this case. This Order is in the best interests of the Protected Person(s) and is necessary to prevent future family violence.

- ☐ The Applicant and Respondent are spouses, former spouses, parents of the same child, live-in partners, or former live-in partners, and are thus "intimate partners" as defined by 18 U.S.C. § 921(a)(32); or the applicant is dating or married to a person who was married to or dating the Respondent.
- ☐ The parties have agreed to the terms of this Protective Order.

Statutory grounds for the Protective Order have been established. (Check one or both):

- ☐ The Respondent has committed family violence against the Applicant or Children named below and is likely to commit family violence in the future.
- ☐ The Respondent has violated a prior Protective Order that expired or will expire within 30 days.

1 Appearances: (Check any that apply):

Applicant Respondent

- ☐ ☐ Appeared in person and announced ready.
- ☐ ☐ Appeared in person and by attorney, _____, and announced ready.
- ☐ ☐ Appeared by signature below evidencing agreement to the entry of this Protective Order.
- ☐ Although duly cited, did not appear and wholly made default.

2 Protected People: The following people are protected by the terms of this Protective Order:

Name:

County of Residence:

- ☐ **Applicant:** _____
- ☐ **Children:** _____
- _____
- _____
- ☐ **Other** _____
- Adults:** _____

3 A Record of Testimony (Check one): ☐ was made by: _____ was waived by the parties.

4 Protective Orders — To prevent family violence, the Court orders the Respondent to obey all Orders marked with a check. ☒

The Respondent must:

- a. ☐ Not commit an act against any person named in 2 above that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places those people in fear of imminent physical harm, bodily injury, assault, or sexual assault.
- b. ☐ Not communicate in a threatening or harassing manner with any person named in 2 above.
- c. ☐ Not communicate a threat through any person to anyone named in 2 above.
- d. ☐ Not communicate or attempt to communicate in any manner with: (Check all that apply)
 - ☐ Applicant ☐ Children ☐ Other Adults named in 2 above. (except through: _____)Good cause exists for prohibiting the Respondent's direct communications.

9

- e. ☐ Not go within 200 yards of the: *(Check all that apply)*
- ☐ Applicant ☐ Children ☐ Other Adults named in 2 above.
(Except to go to court hearings or to exchange Children as authorized by a court order)
- f. ☐ Not go within 200 yards of the Residence, workplace or school of the: *(Check all that apply)*
- ☐ Applicant ☐ Other Adults named in 2 above.
The addresses of the prohibited locations are: *(Check all that apply)*
- ☐ Deemed confidential. The clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.
- ☐ Disclosed as follows:
Applicant's Residence: _____
Applicant's Workplace/School: _____
Other: _____
- g. ☐ Not go within 200 yards of the Children's Residence, child-care facility, or school, except as authorized by a court order. The addresses of the prohibited locations are: *(Check all that apply)*
- ☐ Deemed confidential. The clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.
- ☐ Disclosed as follows:
Children's Residence: _____
Children's Child-care/School: _____
Other: _____
- h. ☐ Not stalk, follow or engage in conduct directed specifically to any person named in 2 above that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass them.
- i. ☐ Not harm, threaten, or interfere with the care, custody or control of the following pet, companion animal or assistance animal: _____
- j. ☒ Not possess a firearm or ammunition, unless the Respondent is a peace officer actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision. Any license to carry a concealed handgun issued to the Respondent is hereby **SUSPENDED**. *(describe the animal).*

5 Family Violence Prevention Program

- ☐ The Respondent is ordered to enroll in, pay costs for, and enter the program checked below no later than ____ / ____ / ____, and to complete the program by ____ / ____ / _____. *(Check one):*
- ☐ The local Battering Intervention and Prevention Program that meets the guidelines adopted by the community justice assistance division of the Texas Department of Criminal Justice:

Or if no such Battering Intervention and Prevention Program is available, then:

- ☐ A counseling program recommended and conducted by the following social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor:
- _____
- ☐ The Respondent is ordered to comply with any recommendation or referral for additional or alternate counseling within seven (7) days of the recommendation, and ordered to complete any additional or alternate program recommended. The Respondent is ordered to sign a waiver for release of information upon enrollment so that participation in the program may be monitored by the Applicant and/or the Court.
- ☐ The Respondent must also follow these provisions to prevent family violence:
- _____
- _____

6 Property Orders

- ☐ The Court finds that the Residence located at: _____
(Check one):
- ☐ is jointly owned or leased by the Applicant and Respondent;
 - ☐ is solely owned or leased by the Applicant; or
 - ☐ is solely owned or leased by the Respondent; and the Respondent is obligated to support the Applicant or a child in the Applicant's possession.
- ☐ IT IS ORDERED that the Applicant shall have exclusive use of the Residence identified above, and the Respondent must vacate the Residence no later than: _____ ☐ a.m. ☐ p.m. on: _____ (date).
- ☐ IT IS FURTHER ORDERED that the sheriff, constable, or chief of police shall provide a law enforcement officer to accompany the Applicant to the Residence, to inform the Respondent that the Court has ordered the Respondent to be excluded from the Residence, to provide protection while the Applicant takes possession of the Residence and the Respondent removes any necessary personal property, and, if the Respondent refuses to vacate the Residence, to remove the Respondent from the Residence and arrest the Respondent for violating the Court's Order.

7 Other Property Orders

- ☐ The Court finds that the Applicant and Respondent jointly own or lease the following Additional Property, and awards the Applicant the exclusive use of:
- _____
- _____

The Respondent must not damage, transfer, encumber, or otherwise dispose of the Additional Property identified above or any other property jointly owned or leased by the parties, except in the ordinary course of business or for reasonable and necessary living expenses, including, but not limited to, removing or disabling any vehicle owned or possessed by the Applicant or jointly by the parties (whether so titled or not).

8 Spousal Support Order

- ☐ IT IS ORDERED that the Respondent pay the Applicant support in the amount of \$_____ per month, with the first payment due and payable on ____ / ____ / ____ and a like payment due and payable on the ____ day of each following month until further Order of this Court. IT IS ORDERED that all payments be sent to the Applicant at the address listed below and postmarked on or before the due date for each payment:
- _____

9 Orders Related to Removal, Possession and Support of Children

The Court finds that the Respondent is a parent of the Children. The Protective Order below is in the best interests of the Applicant, Children, and/or Other Adults named in 2 above.

- ☐ **Removal** — Check one or both:

The Respondent must:

- ☐ Not remove the Children from the Applicant's possession or from their child-care facility or school, except as specifically authorized in a possession schedule ordered by the Court.
- ☐ Not remove the Children from the jurisdiction of the Court.

- ☐ **Possession** — Check one:

- ☐ The Applicant is granted exclusive possession of the Children, and the Respondent shall have no possession or access to the Children, unless and until further Orders are entered by the Court. This Order supersedes any previous order granting the Respondent possession or access to the Children.
- ☐ The Applicant is granted primary possession of the Children, and the Respondent may have possession of the Children pursuant to the possession schedule attached to this Protective Order as Exhibit A, subject to the terms and conditions stated herein as necessary for the safety of the Applicant and the Children. The possession

schedule hereby ordered supersedes any previous order granting the Respondent possession and access to the Children.

- ☐ The possession schedule previously entered on ____ / ____ / ____, in case number _____, styled _____, shall continue to govern the Respondent's possession and access to the Children, except that no exchanges of the Children shall occur at a prohibited location described in this Protective Order.

☐ **Child Support — Nothing in this Protective Order shall be construed as relieving the Respondent of any past or future obligation to pay child support as previously ordered. — Check one:**

- ☐ The Respondent is ordered to pay child support to the Applicant in the amount of \$_____ per month, with the first such payment due and payable on ____ / ____ / ____, and a like payment due and payable on the _____ day of each month thereafter for the term of this Protective Order or until further Order of the Court, whichever occurs first.

The Respondent is ordered to make all child support payments payable to the Applicant, and must mail all payments to:

Texas Child Support Disbursement Unit, P.O. Box 659791, San Antonio, TX 78265-9791

That agency will send the payment to the Applicant for the support of the Children. The Respondent must keep the child support registry informed of the Respondent's Residence and work addresses.

On this date, the Court signed an Income Withholding Order, ordering the employer and any subsequent employer of the Respondent to withhold court-ordered child support from the Respondent's earnings. **The existence of the Order for withholding from earnings for child support does not excuse the Respondent from personally making any child support payment herein, except to the extent the Respondent's employer actually makes the payment on behalf of the Respondent.**

- ☐ The Child Support Order previously entered on ____ / ____ / ____, in cause number _____, styled _____, shall continue to govern the Respondent's child support obligations with respect to the Children.

10 ☐ Fees and Costs

Within 60 days after this Order is signed, the Respondent must pay the Total Fees and Costs as follows:

Total to be paid: \$_____

(This includes fees for service: \$_____ + all other Court fees and costs: \$_____)

Address where Respondent must pay the Clerk of the Court with cash, cashier's check, or money order:

11 ☐ Attorney's Fees

Within 60 days after this Order is signed, the Respondent must pay the attorney who helped enter this Protective Order the Attorney Fees listed below. Pay with cash, cashier's check, or money order.

Attorney Fees awarded by the Court: \$_____

Attorney's name: _____

Attorney's address: _____

Attorney (name) _____ shall have and recover judgment against the Respondent (name) _____ for \$ _____, such judgment bearing interest at _____ percent per annum compounded annually from the date this judgment and Order is signed until paid, for which let execution issue if it is not paid.

12 Service

This Protective Order (*Check all that apply*):

- ☐ Was served on the Respondent in open court.
- ☐ Shall be personally served on the Respondent.
- ☐ Shall be mailed by the Clerk of the Court to the Respondent's last known address.
- ☐ Shall be delivered to the Respondent by certified mail, return receipt requested, or by fax, to the Respondent's last known address or fax number, or in any other manner allowed by Tex. R. Civ. P. 21a.

13 Copies Forwarded

The Clerk is ORDERED to forward copies of this Protective Order and accompanying Respondent Information Form to (*Check all that apply*):

- ☐ Sheriff and Constable of _____ County, Texas.
- ☐ Police Chief of the City of _____.
- ☐ Children's child-care facility/schools listed above.
- ☐ The staff judge advocate at Joint Force Headquarters or the provost marshal of the military installation to which Respondent is assigned.

Any law enforcement agency receiving a copy of this Protective Order MUST, within 10 days, enter all required information into the Department of Public Safety's statewide law enforcement information system.

14 Duration of Order

This Protective Order is in full force and effect until:

- ☐ _____ (*this date must be no more than two years from the date this Order is signed.*)
- ☐ _____ (*duration*) This date is more than two years from the date this Protective Order is signed.
 - ☐ The Court finds that the Respondent caused serious bodily injury to the Applicant or a member of Applicant's family or household; or
 - ☐ The Respondent was the subject of two or more previous Protective Orders protecting the Applicant and both of those Protective Orders contained findings that Respondent has committed family violence and the Respondent is likely to commit family violence in the future.

If Respondent is confined or imprisoned on the date this Protective Order is scheduled to expire, the Protective Order will expire one year after the date of the Respondent's release.

WARNING: A person who violates this Order may be punished for contempt of court by a fine of as much as \$500 or by confinement in jail for as long as six months, or both.

No person, including a person who is protected by this Order, may give permission to anyone to ignore or violate any provision of this Order. During the time in which this Order is valid, every provision of this Order is in full force and effect unless a court changes the Order.

It is unlawful for any person, other than a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to a Protective Order to possess a firearm or ammunition.

A violation of this Order by commission of an act prohibited by the Order may be punishable by a fine of as much as \$4,000 or by confinement in jail for as long as one year, or both. An act that results in family violence may be prosecuted as a separate misdemeanor or felony offense. If the act is prosecuted as a separate felony offense, it is punishable by confinement in prison for at least two years.

Possession of a firearm or ammunition while this Protective Order is in effect may subject respondent to federal criminal penalties. It is unlawful for any person who is subject to a Protective Order to knowingly purchase, rent, lease, or receive as a loan or gift from another, a handgun for the duration of this Order.

Interstate violation of this Protective Order may subject the Respondent to federal criminal penalties. This Protective Order is enforceable in all fifty states, the District of Columbia, tribal lands, and U.S. territories.

This Protective Order signed on (date): _____ Time: _____ ☐ a.m. ☐ p.m.

Judge Presiding:  _____

This is a Court Order. No one – except the Court – can change this Order.

Agreed Order

By their signatures below, the Applicant and Respondent agree to the entry of the foregoing Protective Order and approve all terms stated in the Order:

Applicant

Respondent

Receipt Acknowledged – The Respondent hereby acknowledges receipt of a copy of this Protective Order.

Respondent

Comment

In some cases, respondents claim that the applicant has committed family violence against them. This section of the code requires that the respondent file a written application for a protective order instead of arriving at the hearing and orally requesting a protective order. This requirement gives the applicant proper notice that a protective order is being sought against her or him.

Leading Case

State for Protection of Cockerham v. Cockerham, 218 S.W.3d 298 (Tex. App.—Texarkana 2007, no pet.) (court cannot issue a protective order for a person who has not filed an application, expired protective order is subject to review due to the collateral consequences exception to mootness doctrine)

SUBCHAPTER C. NOTICE OF APPLICATION FOR PROTECTIVE ORDER

§ 82.041. Contents of Notice of Application

(a) A notice of an application for a protective order must:

- (1) be styled "The State of Texas";
- (2) be signed by the clerk of the court under the court's seal;
- (3) contain the name and location of the court;
- (4) show the date the application was filed;
- (5) show the date notice of the application for a protective order was issued;
- (6) show the date, time, and place of the hearing;
- (7) show the file number;
- (8) show the name of each applicant and each person alleged to have committed family violence;
- (9) be directed to each person alleged to have committed family violence;
- (10) show the name and address of the attorney for the applicant or the mailing address of the applicant, if the applicant is not represented by an attorney; and
- (11) contain the address of the clerk of the court.

(b) The notice of an application for a protective order must state: "An application for a protective order has been filed in the court stated in this notice alleging that you have committed family violence. You may employ an attorney to defend you against this allegation. You or your attorney may, but are not required to, file a written answer to the application. Any answer must be filed before the hearing on the application. If you receive this notice within 48 hours before the time set for the hearing, you may request the court to reschedule the hearing not later than 14 days after the date set for the hearing. If you do not attend the hearing, a default judgment may be taken and a protective order may be issued against you."

§ 82.042. Issuance of Notice of Application

(a) On the filing of an application, the clerk of the court shall issue a notice of an application for a protective order and deliver the notice as directed by the applicant.

(b) On request by the applicant, the clerk of the court shall issue a separate or additional notice of an application for a protective order.

§ 82.043. Service of Notice of Application

(a) Each respondent to an application for a protective order is entitled to service of notice of an application for a protective order.

(b) An applicant for a protective order shall furnish the clerk with a sufficient number of copies of the application for service on each respondent.

(c) Notice of an application for a protective order must be served in the same manner as citation under the Texas Rules of Civil Procedure, except that service by publication is not authorized.

(d) Service of notice of an application for a protective order is not required before the issuance of a temporary ex parte order under Chapter 83.

(e) The requirements of service of notice under this subchapter do not apply if the application is filed as a motion in a suit for dissolution of a marriage. Notice for the motion is given in the same manner as any other motion in a suit for dissolution of a marriage.

Comment

Because the protective order has the unusual quality of being criminally enforceable, service by publication, typically allowable in a civil case, is not an acceptable form of service in a protective order case.

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CHAPTER 83. TEMPORARY EX PARTE ORDERS

- § 83.001. Requirements for Temporary ex Parte Order.
- § 83.002. Duration of Order; Extension.
- § 83.003. Bond Not Required.
- § 83.004. Motion to Vacate.
- § 83.005. Conflicting Orders.
- § 83.006. Exclusion of Party From Residence. [amended]
- § 83.007. ~~Recess of Hearing to Contact Respondent~~ [repealed]

§ 83.001. Requirements for Temporary ex Parte Order

(a) If the court finds from the information contained in an application for a protective order that there is a clear and present danger of family violence, the court, without further notice to the individual alleged to have committed family violence and without a hearing, may enter a temporary ex parte order for the protection of the applicant or any other member of the family or household of the applicant.

(b) In a temporary ex parte order, the court may direct a respondent to do or refrain from doing specified acts.]

§ 83.002. Duration of Order; Extension

(a) A temporary ex parte order is valid for the period specified in the order, not to exceed 20 days.

(b) On the request of an applicant or on the court's own motion, a temporary ex parte order may be extended for additional 20-day periods.

Comment

Temporary ex parte protective orders historically have been enforced through contempt proceedings as opposed to arrest, due to the lack of due process on the respondent who typically is not present when the order is rendered. However, effective November 6, 2007, the Texas Constitution was amended to specifically provide that, along with magistrate's emergency protective orders and regular protective orders, a respondent who has violated a temporary ex parte order after having been served with the order may be arrested. Further, the respondent "may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate in this state determines by a preponderance of the evidence that the person violated the order or engaged in the conduct constituting the offense." TEX. CONST. ART. 1, § 11C.

Leading Case

Amir-Sharif v. Hawkins, 246 S.W.3d 267 (Tex. App.—Dallas 2007, rev. dismissed w.o.j.) (repeated extensions of ex parte order was allowed where respondent being evaluated for competency to stand trial)

§ 83.003. Bond Not Required

The court, at the court's discretion, may dispense with the necessity of a bond for a temporary ex parte order.

§ 83.004. Motion to Vacate

Any individual affected by a temporary ex parte order may file a motion at any time to vacate the order. On the filing of the motion to vacate, the court shall set a date for hearing the motion as soon as possible.

§ 83.005. Conflicting Orders

During the time the order is valid, a temporary ex parte order prevails over any other court order made under Title 5 to the extent of any conflict between the orders.

Comment

In 2003, the legislature addressed the confusion caused by the entry of a temporary ex parte order under Title 4 after the entry of a magistrate's order of emergency protection under TEX. CRIM. PROC. CODE, art. 17.292. That statute provides that the terms and conditions imposed by the magistrate's order prevail unless the court issuing the subsequent temporary ex parte order is informed of the existence of the magistrate's order, and makes a finding that the court is superseding the magistrate's order. The terms of a final protective order rendered after a magistrate's order of emergency protection always prevail over the magistrate's order.

§ 83.006. Exclusion of Party From Residence

(a) Subject to the limitations of Section 85.021(2), a person may only be excluded from the occupancy of the person's residence by a temporary ex parte order under this chapter if the applicant:

(1) files a sworn affidavit that provides a detailed description of the facts and circumstances requiring the exclusion of the person from the residence; and

(2) appears in person to testify at a temporary ex parte hearing to justify the issuance of the order without notice.

(b) Before the court may render a temporary ex parte order excluding a person from the person's residence, the court must find from the required affidavit and testimony that:

(1) the applicant requesting the excluding order either resides on the premises or has resided there within 30 days before the date the application was filed;

(2) the person to be excluded has within the 30 days before the date the application was filed committed family violence against a member of the household; and

(3) there is a clear and present danger that the person to be excluded is likely to commit family violence against a member of the household.

(c) The court may recess the hearing on a temporary ex parte order to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court shall resume the hearing before the end of the working day.

Amended by Acts 2011, 82nd Leg., ch. 632 (S.B. 819), § 4, eff. Sept. 1, 2011.

§ 83.007. ~~Recess of Hearing to Contact Respondent~~

~~The court may recess the hearing on a temporary ex parte order to contact the respondent by telephone and provide the respondent the opportunity to be present when the court resumes the hearing. Without regard to whether the respondent is able to be present at the hearing, the court shall resume the hearing before the end of the working day.~~

Repealed by Acts 2011, 82nd Leg., ch. 632 (S.B. 819), § 6(1), eff. Sept. 1, 2011.

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- (2) the place of employment or business of a person protected by the order; or
 - (3) the child-care facility or school a child protected by the order attends or in which the child resides.
- (b) On granting a request for confidentiality under this section, the court shall order the clerk to:
- (1) strike the information described by Subsection (a) from the public records of the court; and
 - (2) maintain a confidential record of the information for use only by the court.

§ 85.008. Repealed.

§ 85.009. Order Valid Until Superseded

A protective order rendered under this chapter is valid and enforceable pending further action by the court that rendered the order until the order is properly superseded by another court with jurisdiction over the order.

SUBCHAPTER B. CONTENTS OF PROTECTIVE ORDER

§ 85.021. Requirements of Order Applying to Any Party

In a protective order, the court may:

- (1) prohibit a party from:
 - (A) removing a child who is a member of the family or household from:
 - (i) the possession of a person named in the order; or
 - (ii) the jurisdiction of the court; or
 - (B) transferring, encumbering, or otherwise disposing of property, other than in the ordinary course of business, that is mutually owned or leased by the parties; or
 - (C) removing a pet, companion animal, or assistance animal, as defined by Section 121.002, Human Resources Code, from the possession of a person named in the order;
- (2) grant exclusive possession of a residence to a party and, if appropriate, direct one or more parties to vacate the residence if the residence:
 - (A) is jointly owned or leased by the party receiving exclusive possession and a party being denied possession;
 - (B) is owned or leased by the party retaining possession; or
 - (C) is owned or leased by the party being denied possession and that party has an obligation to support the party or a child of the party granted possession of the residence;
- (3) provide for the possession of and access to a child of a party if the person receiving possession of or access to the child is a parent of the child;
- (4) require the payment of support for a party or for a child of a party if the person required to make the payment has an obligation to support the other party or the child; or
- (5) award to a party the use and possession of specified property that is community property or jointly owned or leased property.

Amended by Acts 2011, 82nd Leg., ch. 136 (S.B. 279), § 1, eff. Sept. 1, 2011.

Comment

Similar to the connection between intimate partner violence and child abuse, there is also a link between family violence and abuse of animals. Recognizing this association, in 2011 the Texas legislature amended this section to add a prohibition against removing animals from the possession of a person named in the order.

In addition to safety, two big issues that cause people to stay in abusive relationships are finances and their children. This section of civilly enforceable provisions available in a protective order can be essential to helping applicants escape the abuse.

§ 85.022. Requirements of Order Applying to Person Who Committed Family Violence

(a) In a protective order, the court may order the person found to have committed family violence to perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence and may order that person to:

(1) complete a battering intervention and prevention program accredited under Article 42.141, Code of Criminal Procedure;

(2) beginning on September 1, 2008, if the referral option under Subdivision (1) is not available, complete a program or counsel with a provider that has begun the accreditation process described by Subsection (a-1); or

(3) if the referral option under Subdivision (1) or, beginning on September 1, 2008, the referral option under Subdivision (2) is not available, counsel with a social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor who has completed family violence intervention training that the community justice assistance division of the Texas Department of Criminal Justice has approved, after consultation with the licensing authorities described by Chapters 152, 501, 502, 503, and 505, Occupations Code, and experts in the field of family violence.

(a-1) Beginning on September 1, 2009, a program or provider serving as a referral option for the courts under Subsection (a)(1) or (2) must be accredited under Section 4A, Article 42.141, Code of Criminal Procedure, as conforming to program guidelines under that article.

(b) In a protective order, the court may prohibit the person found to have committed family violence from:

(1) committing family violence;

(2) communicating:

(A) directly with a person protected by an order or a member of the family or household of a person protected by an order, in a threatening or harassing manner;

(B) a threat through any person to a person protected by an order or a member of the family or household of a person protected by an order; and

(C) if the court finds good cause, in any manner with a person protected by an order or a member of the family or household of a person protected by an order, except through the party's attorney or a person appointed by the court;

(3) going to or near the residence or place of employment or business of a person protected by an order or a member of the family or household of a person protected by an order;

(4) going to or near the residence, child-care facility, or school a child protected under the order normally attends or in which the child normally resides;

(5) engaging in conduct directed specifically toward a person who is a person protected by an order or a member of the family or household of a person protected by an order, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person; and

(6) possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision; and

(7) harming, threatening, or interfering with the care, custody, or control of a pet, companion animal, or assistance animal, as defined by Section 121.002, Human Resources Code, that is possessed by a person protected by an order or by a member of the family or household of a person protected by an order.

(c) In an order under Subsection (b)(3) or (4), the court shall specifically describe each prohibited location and the minimum distances from the location, if any, that the party must maintain. This subsection does not apply to an order in which Section 85.007 applies.

(d) In a protective order, the court shall suspend a license to carry a concealed handgun issued under Subchapter H, Chapter 411, Government Code, that is held by a person found to have committed family violence.

(e) In this section, "firearm" has the meaning assigned by Section 46.01, Penal Code.

Amended by Acts 2011, 82nd Leg., ch. 136 (S.B. 279), § 2, eff. Sept. 1, 2011.

Comment

Subsection (b)(6) authorizes the court to prohibit a person from possessing a firearm for the duration of a protective order. This subsection conforms to the Penal Code regarding an offense for possession of a firearm by an individual while subject to an active protective order, or for possession of a firearm for five years following conviction for a family violence assault. TEX. PENAL CODE ANN. § 46.04. This legislation was enacted to give local law enforcement agencies authority to take action against weapons declared illegal by federal law (albeit rarely enforced in that context), see 18 U.S.C.A. §922(g)(8), (9). The "official use exemption" for on-duty peace officers mirrors language in the corresponding federal statute. 18 U.S.C.A. §922(a).

The 81st Texas Legislature amended this chapter to require, rather than permit, the court to suspend a license to carry a concealed handgun for someone who is the subject of a Protective Order. This amendment aligns state law to the existing federal law prohibiting those who are subject to protective orders from possessing a firearm. 18 U.S.C.A. §922(g).

In 2011, protection available was extended to prohibit a respondent from using pets or service animals to further abuse, harm, or threaten the applicant. One thing is certain; respondents are creative in their efforts engage in bad conduct, and the legislature has been responsive to requests to counter that creativity.

§ 85.023. Effect on Property Rights

A protective order or an agreement approved by the court under this subtitle does not affect the title to real property.

§ 85.024. Enforcement of Counseling Requirement

(a) A person found to have engaged in family violence who is ordered to attend a program or counseling under Section 85.022(a)(1), (2), or (3) shall file with the court an affidavit before the 60th day after the date the order was rendered stating either that the person has begun the program or counseling or that a program or counseling is not available within a reasonable distance from the person's residence. A person who files an affidavit that the person has begun the program or counseling shall file with the court before the date the protective order expires a statement that the person completed the program or counseling not later than the 30th day before the expiration date of the protective order or the 30th day before the first anniversary of the date the protective order was issued, whichever date is earlier. An affidavit under this subsection must be accompanied by a letter, notice, or certificate from the program or counselor that verifies the person's completion of the program or counseling. A person who fails to comply with this subsection may be punished for contempt of court under Section 21.002, Government Code.

(b) A protective order under Section 85.022 must specifically advise the person subject to the order of the requirement of this section and the possible punishment if the person fails to comply with the requirement.

§ 85.025. Duration of Protective Order

(a) Except as otherwise provided by this section ~~Subsection (b) or (c)~~, an order under this subtitle is effective:

- (1) for the period stated in the order, not to exceed two years; or
- (2) if a period is not stated in the order, until the second anniversary of the date the order was issued.

(a-1) The court may render a protective order sufficient to protect the applicant and members of the applicant's family or household that is effective for a period that exceeds two years if the court finds that the person who is the subject of the protective order:

- (1) caused serious bodily injury to the applicant or a member of the applicant's family or household; or**
- (2) was the subject of two or more previous protective orders rendered:**
 - (A) to protect the person on whose behalf the current protective order is sought; and**
 - (B) after a finding by the court that the subject of the protective order:**
 - (i) has committed family violence; and**
 - (ii) is likely to commit family violence in the future.**

(b) A person who is the subject of a protective order may file a motion not earlier than the first anniversary of the date on which the order was rendered requesting that the court review the protective order and determine whether there is a continuing need for the order. A person who is the subject of a protective order under Subsection (a-1) that is effective for a period that exceeds two years may file a subsequent motion requesting that the court review the protective order and determine whether there is a continuing need for the order not earlier than the first anniversary of the date on which the court rendered an order on a previous motion by the person under this subsection. After a hearing on the motion, if the court does not make a finding that finds there is no continuing need for the protective order, the protective order remains in effect until the date the order expires under this section. Evidence of the movant's compliance with the protective order does not by itself support a finding by the court that there is no continuing need for the protective order. If the court finds there is no continuing need for the protective order, the court shall order that the protective order expires on a date set by the court.

(c) If a person who is the subject of a protective order is confined or imprisoned on the date the protective order would expire under Subsection (a) or (a-1), the period for which the order is effective is extended, and the order expires on the first anniversary of the date the person is released from confinement or imprisonment.

Amended by Acts 2011, 82nd Leg., ch. 627 (S.B. 789), § 2, eff. Sept. 1, 2011.

Comment

One of the most far reaching amendments to this title in 2011 allows the court to enter a Protective Order of any duration in limited circumstances.

Leading Cases

- In re I.E.W.*, 2010 WL 197270 (Tex. App.—Corpus Christi, 2010) (burden is on person requesting modification of protective order to establish that there was no "continuing need" for the order)
- B.C. v. Rhodes*, 116 S.W.3d 878 (Tex. App.—Austin 2003, no pet.) (protective orders generally in effect for the period stated, not to exceed two years or until modified by issuing court)

§ 85.026. Warning on Protective Order

(a) Each protective order issued under this subtitle, including a temporary ex parte-order, must contain the following prominently displayed statements in boldfaced type, capital letters, or underlined:

"A PERSON WHO VIOLATES THIS ORDER MAY BE PUNISHED FOR CONTEMPT OF COURT BY A FINE OF AS MUCH AS \$500 OR BY CONFINEMENT IN JAIL FOR AS LONG AS SIX MONTHS, OR BOTH."

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER."

"IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION."

"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS."

(b) Each protective order issued under this subtitle, except for a temporary ex parte order, must contain the following prominently displayed statement in boldfaced type, capital letters, or underlined:
~~"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS."~~

(c) Each protective order issued under this subtitle, including a temporary ex parte order, must contain the following prominently displayed statement in boldfaced type, capital letters, or underlined:

"NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER."

Amended by Acts 2011, 82nd Leg., ch. 632 (S.B. 819), §§ 5, 6(2), eff. Sept. 1, 2011.

SUBCHAPTER C. DELIVERY OF PROTECTIVE ORDER

§ 85.041. Delivery to Respondent

(a) A protective order rendered under this subtitle shall be:

- (1) delivered to the respondent as provided by Rule 21a, Texas Rules of Civil Procedure;
- (2) served in the same manner as a writ of injunction; or
- (3) served in open court at the close of the hearing as provided by this section.

(b) The court shall serve an order in open court to a respondent who is present at the hearing by giving to the respondent a copy of the order, reduced to writing and signed by the judge or master. A certified copy of the signed order shall be given to the applicant at the time the order is given to the respondent. If the applicant is not in court at the conclusion of the hearing, the clerk of the court shall mail a certified copy of the order to the applicant not later than the third business day after the date the hearing is concluded.

(c) If the order has not been reduced to writing, the court shall give notice orally to a respondent who is present at the hearing of the part of the order that contains prohibitions under Section 85.022 or any other part of the order that contains provisions necessary to prevent further family violence. The clerk of the court shall mail a copy of the order to the respondent and a certified copy of the order to the applicant not later than the third business day after the date the hearing is concluded.

(d) If the respondent is not present at the hearing and the order has been reduced to writing at the conclusion of the hearing, the clerk of the court shall immediately provide a certified copy of