

# **PROSECUTING AND DEFENDING PROTECTIVE ORDERS**

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**CHAPTER 65**



## *Curriculum Vita*

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## PROTECTIVE ORDERS

### I. INTRODUCTION

Education, public demand, family law specialists and media attention have joined forces during the past several decades of terms of legislature to encourage the development and refinement of laws intended to protect family, in its broadest sense, from family violence. Domestic violence, studies tell us, is experienced in about 25 % of all marriages; in 1983 FBI statistics indicated that domestic violence at the time of separation accounted for more than 50 % of the violent crimes in the United States. Other credible studies place even higher numbers. Perhaps in recognition of the epidemic scope of domestic violence, the US Postal office is issuing commemorative stamp in September, to be sold at a premium, to raise funds to combat this condition.

### II. IDENTIFYING VIOLENCE

#### A. Statutory Definitions

*Family violence* as defined in Sec. 71.004 Texas Family Code (hereafter TFC) means: (1) an act by a member or former member of a family or *household* (emphasis added) against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; or (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G) by a member of a family or household toward a child of the family or household; or (3) dating violence, as that term is defined by Sec. 71.0021.

#### 1. What is a family?

The TFC states that “family” in Sec.71.003 includes “individuals related by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, individuals who are former spouses of each other, individuals who are the biological parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.” This broad definition, by including *household* members, permits protection for relatives, step children, domestic partners, and roommates, in order to maximize protection of individuals.

#### 2. What is a Household?

By extending protective measures to households, as defined in TFC Sec.71.005, “a unit composed of persons living together in the same dwelling, without regard to

whether they are related to each other,” the changing realities of modern trends in living arrangements are recognized and protected. TFC Sec.71.006 expands the protection to a “member of a household” recognizing the need to provide precautions for a person who previously lived in a household.

#### 3. Dating Relationships

In September, 2001, violence between those in a dating relationship became a prohibited subset of family violence. The definition of dating violence tracked the definition of the federal Violence Against Women Act of 2000 (42 U.S.C.A. Sec. 3796.) TFC Sec. 71.0021(a) looks for definition of a dating relationship by examining the length and nature of the relationship and the frequency and type of interaction between the persons involved in the relationship. No protection is found in either that portion of the Code or the portion regarding household members, however, for the subsequent and unfortunate girlfriend or boyfriend of a complainant who has once been part of the household.

#### B. Recognizing Violence in Cases.

After a detailed examination of the definitions of family violence, on the ABA Commission on Family Violence website, Dr. Mary Ann Dutton, a leading clinical psychologist, defines domestic violence as *a pattern of interaction in which one intimate partner is forced to change his or her behavior in response to the threats or abuse of the other partner.* (Dutton, 1994).

Often, a client early in the working relationship with an attorney will deny the existence of violence in the intimate relationship. Questions suggested by the ABA on its website may assist counsel in determining the existence of and or scope of violent behavior between the parties. The client who answers negatively when asked if there has been any family violence may respond more fully on the open ended questions. The questions below may also be phrased to help determine if the client is instead an abuser in a relationship and/or to defend against invalid claims.

#### 1. Questions for Clients

- Everyone argues or fights with their partner or spouse now and then. When you argue or fight at home, what happens? Do you ever change your behavior because you are afraid of the consequences of a fight?
- Do you feel that your partner or spouse treats you well? Is there anything that goes on at home that makes you feel afraid?
- Has your partner or spouse ever hurt or threatened you or your children or other family member?
- Has your partner or spouse ever put their hands on you against your will? Has your partner or spouse

ever forced you to do something you did not want to do? Does your partner or spouse criticize you or your children often?

- Has your partner or spouse ever tried to keep you from taking medication you needed or from seeking medical help? Does your partner refuse to let you sleep at night?
- Has your partner or spouse ever hurt your pets or destroyed your clothing, objects in your home, or something which you especially cared about? Does your partner or spouse throw or break objects in the home or damage the home itself during arguments?
- Does your partner or spouse act jealously, for example, always calling you at work or home to check up on you? Are you forbidden to go out with friends or to leave the house without permission?
- Is it hard for you to maintain relationships with your friends, relatives, neighbors, or co-workers because your partner or spouse disapproves of, argues with, or criticizes them? Does your partner or spouse accuse you unjustly of flirting with others or having affairs? Has your partner or spouse ever tried to keep you from leaving the house?
- Does your spouse or partner make it hard for you to find or keep a job or go to school?
- Every family has their own way of handling finances. Does your partner or spouse withhold money from you when you need it? Do you know what your family's assets are? Do you know where important documents like bank books, check books, financial statements, birth certificates, and passports for you and members of your family are kept? If you wanted to see or use any of them, would your partner or spouse make it difficult for you to do so? Does your spouse or partner sometimes spend large sums of money and refuse to tell you why or what the money was spent on?
- Has your spouse or partner ever forced you to have sex or made you do things during sex that make you feel uncomfortable? Does your partner demand sex when you are sick, tired, or sleeping?
- Has your spouse or partner ever used or threatened to use a weapon against you? Are there guns in your home?
- Does your spouse or partner abuse drugs or alcohol? What happens?

## 2. Magnitude of the Problem

The magnitude of the problems associated with and stemming from family violence is quickly apparent when simple but reliable statistics are studied. The Texas Department of Human Services estimates that in 2001 there were over 900,000 incidents of family violence in

the state. In 2002, more than two women each week were killed by their domestic partners. (Houston Police Online). Children in homes where domestic violence occurs are physically abused or seriously neglected at a rate 1500% higher than the national average in the general population. Children from violent homes have higher risks of alcohol/drug abuse and juvenile delinquency and often experience cognitive or language problems, developmental delay, stress-related physical ailments (such as headaches, ulcers, and rashes), and hearing and speech problems. Boys who witness domestic violence are more likely to batter their female partners as adults than boys raised in non-violent homes. There is no evidence, however, that girls who witness their mothers' abuse have a higher risk of being battered as adults. (TDHS on line)

## 3. Frequent Characteristics of Batterers:

- extreme jealousy --follows partner, opens mail, checks odometer, eavesdrops
- low self-esteem--must be in control, bullying
- traditionalist views --stereotypical masculine sex role blaming others for his actions--blames behavior on drinking, stress, provocation
- stress--inability to deal with stress effectively
- denial--minimizes and denies the seriousness of the violence
- believes in violence --uses violence as problem solving technique, sees it as
- history of abuse --may have grown up in a violent home
- substance abuse
- anger--uses aggression and violence to express anger
- socially isolated --few friends
- uses sex--uses sex as act of aggression
- believes myths--the victim "caused" the violent behavior.

## 4. Domestic Violence Patterns

Dr. Kenneth H. Waldron, for a recent AAML presentation, summarized the body of social science research analyzing patterns, levels and frequency of domestic violence, and identified five domestic violence in divorcing spouses which have been identified:

- a. Chronic Wife beating: Ongoing episodic male battering
- b. Chronic Husband beating: Female initiated violence
- c. Male controlling violence: Both male and female initiated
- d. Psychotic and paranoid reactions; Both male and female

- e. Separation engendered and post-divorce trauma: Both Male and Female initiated.

When parties involved in custody disputes were screened for domestic violence, 38% of the women and 20 % of the men answered affirmatively. When the questioning was couched in milder terms, asking if there was intimidation (with and without a weapon) shoving, slapping and grabbing, 75 % of the women and 61 % of the men answered in the affirmative. Cautioning that some exaggeration or lying by parties may skew the figure, the difference in perception of violence versus intimidation is daunting.

**III. SECURING THE PROTECTIVE ORDER**

**A. Application and Service**

TFC Sec. 82.001-043 detail the necessary contents, timing and issuance of a protective order.

1. Who can file?

See Sec. 82.002. With regard to family violence under Sec. 71.004 (1) or (2) an adult member of the family or household can file to protect him/herself or any other member of his/her family or household. With regard to Sec. 71.004(3) an adult member of a dating relationship may file. Additionally, an adult may apply to protect a child, and a prosecuting attorney or the Department of Protective and Regulatory Services may file.

2. Where is proper filing?

See Sec. 82.003. The county where the applicant resides or where the respondent resides.

3. Contents?

Sec. 82.004 has only four requirements of information that an application must state:

- a. the name and county of residence of each applicant
- b. the name and county of residence of each individual alleged to have committed family violence
- c. the relationships between the applicant(s) and the individuals alleged to have committed family violence; and
- d. a request for one or more protective orders.

Some respected family law specialists have parsed the statutes related to content of applications to argue, in successfully defense of allegations of violation of protective orders. It has been alleged that there are, in fact, two different protective orders possible. TFC Sec.

85.001(a)(1) and (2) require a finding that family violence has occurred and that family violence is likely to occur in the future. This portion of the statute does not require a finding the violence was committed by a particular person, or even that the future violence which was likely was imminent or merely probable.

If violence is found and likely to reoccur, then the court *shall* 1) render an Sec. 85.022 protective order applying only to a person found to have committed family violence and 2) *may* render a Sec. 85.021 protective order. The later more closely tracks the family court restraining orders—support and access to children and property, restrictions on movement of property and children, and disposition of property for a period of time. But the 85.022 order must have specifically identified the party who committed violence (although .001 never says that) or the order may fail to be enforceable.

**B. How does Divorce Affect filing?**

Sec. 82.005 requires a party to a suit for dissolution of a marriage or a SAPCR to file as required by Subchapter D, Chapter 85, which requires that the application for protection must be in a separate document from the divorce petition or SAPCR motion. The order must also be contained within a separate document. If protective orders are sought after the divorce, then Sec. 82.006 requires that the application include a copy of the final decree or a statement that the decree is unavailable and will be provided before the hearing on the application. When protection is sought for a child who is subject to a court’s continuing jurisdiction, a final order or statement that the order will be provided before hearing, must be included with the application. See Sec. 82.007.

**C. What about Other Orders?**

1. Expired Orders.

Sec. 82.008 requires that, if a former protective order has expired, the application must include a copy of the expired order, attached to the application or, if unavailable, a statement that it is unavailable and will be provided. This application must additionally include a description of either the violation of the expired order, if it is alleged that the respondent committed a violation before the order expired or the threatened harm that will reasonably place the applicant in fear of imminent physical harm, bodily injury, assault or sexual assault and, if a violation of the expired order is alleged, a statement that the violation of the expired order has not been grounds for any other order protecting the applicant that has been issued or requested under the subtitle of the code.

2. Before expiration of earlier order

If an application alleges that an unexpired protective order applicable to the respondent is due to expire not later than the 30<sup>th</sup> day after the date the application was filed, the application must provide a copy of the unexpired order or a statement that it will be filed with the court before the hearing, a description of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault or sexual assault.

3. Code of Criminal Procedure Orders vs. Family Court Orders

With H.B. 297 legislative changes enacted, the amendments to the Code of Criminal Procedure Sec. 17.292 create a clear hierarchy defining which orders prevail when both family and criminal courts enter protective orders. If a TFC Sec. 85 order conflicts with a Code of Criminal Procedure Sec. 17.292 order, Family Code prevails. A different result occurs, however, when a *temporary* protective order, issued under TFC Sec. 83, is issued subsequent to a Code of Criminal Procedure Sec. 17.292 order. If these are in conflict, then 1) unless the Family Court is first informed of the existence of the criminal procedure order and 2) makes a specific finding in the Sec. 83 order that the Family Court order is superceding, the criminal court order prevails in the face of conflict. (A subsequent Sec. 85 order would then trump the criminal order.)

4. Magistrate's Order for Emergency Protection

(Art. 17.292 Code of Criminal Procedure)

Commonly referred to as an Emergency Protective Order, a Magistrate's Order for Emergency Protection is available when a person has been arrested for a family violence assault. When the defendant is brought before a judge to receive a bond or bail amount, the judge may issue this order for no less than 31 days and no more than 61 days. The Order may have prohibitions against harassing behavior, stalking, going within a specified distance of the victim, and other restrictions similar to those of the TFC Protective Orders.

If the judge determines that further violence is likely, the defendant may be held up to an additional 24 hours after posting bond, following his or her arrest. Like a protective order, violations of the Magistrate's Order for Emergency Protection can result in the arrest of the defendant. A law enforcement officer, the victim, a prosecutor, or the judge can request the order. Additionally, the judge can grant one on his or her own motion. A Magistrate's Order for Emergency Protection is mandatory in cases where the defendant is charged with a family violence assault causing serious bodily injury to

the victim or the use or exhibition of a deadly weapon during the commission of the assault .

5. Section 42.072, Texas Penal Code

To be charged with stalking, the defendant must have the intent or the knowledge that his or her actions will instill fear of death or bodily injury to the victim or a member of the victim's family or household. Threats can be explicit (e.g. "I'm going to kill you.") or implied (e.g. veiled threats, hurting family pets). Threats must be aimed at a specific person, they cannot be general threats. Threats may be conveyed by the stalker or someone acting on his or her behalf.

Threatening conduct has to occur on more than one occasion and be directed toward the victims and/ or the victim's family or household members. However, only one police report is required. The acts may include threatening contact by mail or phone, or by following the victim, placing her under surveillance, or damaging the victim's property. Stalking is a criminal offense punishable by a fine of \$4,000 and/or up to one year in jail.

Statistics provided by the Texas Department of Justice indicate that as many as one in twelve women and one in forty-five men have been stalked in their lifetimes.

**D. Fees**

1. Court Fees.

See Sec. 81.002. No fee can be charged by the clerk of court, sheriff, constable or any other public official or employee to an applicant for a protective order or an attorney representing an applicant in connection with filing, serving or entering of a protective order. That means *no* fee may be charged to the applicant for certifying copies, comparing copies to the originals, court reporter fees, judicial fund fee, transfer fees, or any other service related to the protective order.

Sec. 81.003 requires the court, unless indigence or a showing of good cause proves otherwise, to order the respondent to pay the \$16 protective order fee and the standard fees charged by the clerk of the court in a general civil proceeding for the cost of serving, costs of court etc., and Section 81.004 holds that the party who is ordered to pay fees and costs and who does not before the date specified maybe found in contempt. The respondent does not get off the hook if the court fails to set a date. The statute provides that, with no date, the fees must be paid before the 60<sup>th</sup> day that the order was rendered.

2. Attorney's Fees

TFC Sec. 81.005 permits the court to order the respondent in either an agreed order or following a contested hearing to pay the applicant's attorneys' fees. If the court fails to adhere to the statutory requirement to

consider the income and ability to pay of the respondent, the failure constitutes reversible error. Although a motion to modify a protective order is brought by respondent, she/he remains the party who committed violence. Therefore the Court may order the respondent who moves for modification to pay “all other fees, charges or expenses in connection with the Protective Order” (TFC Sec. 81.003) to Applicant. Applicant remains the party entitled to be awarded reasonable and necessary attorneys fees and expenses incurred in connection with the protective order. In responding to any motion by respondent to modify or the vacate an order, the protected party should request fees.

**IV. TEMPORARY EX PARTE ORDERS**

**A. Content and Affidavit**

While the original application has four essential elements which must be included, the statute for ex parte protection, under Sec. 82.009 requires that the application contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order. It must also be signed by the applicant who states under oath that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant.

**B. Requirements for Exclusion of Party**

In order to lesson the chance that an action for a protective order will be used merely to seek advantage in rights to remain in the home, statutes require that the applicant appear before the court, through both testimony and affidavit, and that the court have an opportunity, should the need arise, to recess and attempt to reach the respondent.

1. Affidavit and testimony

Section 83.006 contains provisions regulating the circumstances under which a person may be excluded from the occupancy of the person's residence by an ex parte order, including the sworn affidavit providing a detailed description of the facts and circumstances requiring exclusion from the residence.

a. In Person Testimony.

The applicant must appear in person to testify at the ex parte hearing if exclusion is sought. See TFC Sec. 83.006(a) (1) (2). The requirement of live testimony can be problematic for the party who is in hiding, or worse, has been rendered physically incapable of attending a hearing. The recent statutory provisions for maintaining confidentiality of the application by the Court for a period of time may protect the applicant from the respondent who learned of the request from a hungry defense

attorney. A motion to the court to have the hearing at the hospital bedside, or shelter with court reporter in attendance, may be an additional answer to the problem of the hospitalized or reluctant victim.

b. Current or Recent Residency.

For an ex parte order excluding a person from the person's residence to be granted, the court must find from the required affidavit and testimony that the applicant requesting the exclusion order either resides on the premises or has resided there within thirty days before the date the application was filed TFC Sec. 83.006(b)(2);

c. Violence in past 30 Days

The Court must find that the person to be excluded has within the thirty days before the date the application was filed committed family violence against a member of the household.

d. Likely Danger of Imminent Violence

The court must finally determine that 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. TFC Sec. 83.006(b)(3).

2. Ownership Interest or Duty to Support

To exclude the respondent from a residence, the Court must further find that either the residence is jointly owned or leased by the party being given possession and a party being denied possession or is owned by the party receiving possession or the residence is owned by the party being denied possession but the owner-party has an obligation to support the party who granted possession or to support a child of the party granted possession of the residence.

3. Court May Recess to Call 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. TFC § 83.007.

**C. Assistance to Applicant Mandated.**

On request by an applicant obtaining a temporary ex parte order that excludes the respondent from the respondent's residence, the court granting the temporary order shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer from the department of the sheriff, constable, or chief of police to accompany the applicant to the residence

covered by the order; to inform the respondent that the court has ordered that the respondent be excluded from the residence; to protect the applicant while the applicant takes possession of the residence; and to protect the applicant if the respondent refuses to vacate the residence while the applicant takes possession of the applicant's necessary personal property. TFC § 86.003.

**D. Enforceability**

A temporary protective order as well as the final protective order must carry the warning as set out fully at TFC Sec. 85.026, which must be either boldfaced type, capital letters or underlined.

**E. Information to Have Prepared**

Prior to hearing on exparte order, the client may assist in preparation by providin, if available without risk, copies of clear photograph of Respondent, and by securing information necessary for the completion of court forms, which will include the following information related to Respondent:

- Respondent’s Name
- Social Security Number
- Driver’s License number and Issuing state
- Home address and telephone number
- Work address and telephone number
- Height
- Weight
- Hair Color
- Eye Color
- Skin Tone and Color
- Identifying marks or characteristics
- Automobile Make, model, year, color

Additionally the Applicant should have a list of schools, daycares, employment, residences requiring protection, with addresses and telephone numbers so that the paperwork which the Clerk must complete will be easily, efficiently and completely done.

**V. DOMESTIC ABUSE AND CUSTODIAL ORDERS.**

In the initial paragraphs of the Chapter 153, a chapter which details conservatorship, possession and access, TFC Sec. 153.001 (a)(2) states that it is the public policy of the state to provide a safe, stable and *nonviolent* environment for the child. (emphasis added)

**A. JMC Rebuttal**

A party’s history of domestic violence may, if credible evidence is presented, be used to rebut the presumption that the parents will be joint managing

conservators. Credible evidence of this violence additionally creates a rebuttable assumption that appointment of a parent as the sole managing conservator or the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child. TFC Sec. 153.004(b).

**B. Access Restrictions**

Further, TFC Sec.153.004(d) requires that the court affirmatively find that access would not endanger the child’s physical health or emotional welfare and that access would be in the child’s best interest before a parent with a history or pattern of physical or sexual abuse during the two years prior to or during the suit can have access to the child of the suit. The statute also requires that the possession order be designed to protect the safety and well being of the child and any other person who has been a victim. Exchange of the child in a protective setting, supervision, prohibitions against alcohol consumption, battering intervention and prevention programs are some of the safety provisions which may be required.. Sec. 154.004(e) creates a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history of pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

**VI. VACATING AND MODIFICATION**

**A. Time limits for Vacating Order**

TFC Sec.88.025(a) establishes a two year limit on the protective order. The statute further states that a person who is the subject of a protective order must wait until the one year anniversary of the date on which the order was rendered before requesting that the Court review the protective order to determine whether there is a continuing need for the order. After a hearing, the court may set an expiration date earlier than that originally established, upon a finding that there is no longer a continuing need for the order.

If the person who is the subject of a protective order is confined or imprisoned on the date the protective order would otherwise expire, the protective order may be extended to the one year anniversary of release from confinement or imprisonment.

**B. Modification**

Although the procedures for securing a protective order are strict, detailed and more specific than most other portions of the TFC, Chapter 87, regarding modification of protective orders, is remarkably non-specific.

### 1. Change of Circumstances not required

Unlike SAPCR modifications, modification of protective orders has no requirement of change of circumstance, no placement of burden of proof on need for retaining the orders as originated, and no requirements of periods for notice. On the motion of any party, the court, after notice and hearing, may modify an existing protective order to 1) exclude any item included in the order or 2) include any item that could have been included in the order.

### 2. Responding to Motion to Modify

In responding to a respondent's motion to modify made in the first year, an argument can be made that the respondent is in fact asking for a defacto appeal to the court of its own ruling. It might be argued that the respondent is seeking a review of the original basis for the protective order or is seeking a defacto order to vacate which is prohibited by statute before the expiration of 12 months. On the other hand, a reading of Sec. 87.002 seems to permit the applicant, by motion to modify, to extend a briefer protective order to the full two years provided by statute.

### 3. Modification for Change of Address

Sec. 87004 permits the person who is protected by the protective order to file a notification of change of address or telephone number with the court that rendered the order to modify the information contained in the order. The clerk must attach the notification of the change to the protective order and deliver a copy of the notification to the respondent.

The notice is effective if attempted at the address last known of the respondent by Rule 21a, TRCP measures.

## VII. FINAL OR INTERLOCUTORY?

The Supreme Court of Texas, while urged by Courts of Appeal, has yet to resolve the conflict among the appellate courts regarding whether a protective order issued under TFC Sec. 81 *et seq* is final, and therefore appealable, or interlocutory, with mandamus providing the only avenue to complain of trial court decisions. Within some districts, opinions split hairs, basing finality on whether the protective order is in a pending divorce action or is a post judgment or non-divorce matter. Until the Supreme Court of Texas weighs in on the issue, this question will be determined on a district by district basis. The prevalent holdings of the state's fourteen districts are detailed below. (The different appellate districts' leading cases are marked by **A** - appealable, **M** - mandamus or **X** - no decision found.) Relevant caselaw should be reviewed for later cases refining or distinguishing these and other opinions.

*1<sup>st</sup> Dist.* -- *Knight v. Knight*, LEXIS 3141 (n1) (Tex. App. - Houston [1<sup>st</sup>] 2003) Finding that pending issues between the now-divorced parents, regarding child support collection, were not related in any way to the issue of the protective order, the court said that the mere existence of *any* (emphasis in the original) pending issues between the parties does not render a protective order interlocutory. The Court placed importance on the fact that the pending issue was not seeking to establish parameters of future contact and did not depend on evidence of past contact of the parties. The opinion seems to leave the door open for the 1<sup>st</sup> District to decide that, in the right situation, orders were not final and therefore interlocutory. This decision, however, found that protective order was appealable. **A**

*2<sup>nd</sup> Dist.* -- *Winsett v. Edgar*, 22 S.W. 3d 509 (Tex. App. - Fort Worth 2000) The Court acknowledged the contrary holding of *Normand* (below) but elected to follow the reasoning of *James* (below) and finding that the parties had been divorced more than five months before the protective order was signed, the protective order disposed of all issues and parties in their underlying proceeding and was therefore appealable. The Court, on the sole point of appeal, held that the legislature intended the courts and not juries would have the responsibility of making the findings necessary for the issuance of a protective order and that a party was not entitled to a jury trial on a protective order. **A**

*Martinez v. Martinez*, 52 S.W.3d 429 (Tex. App. - Fort Worth 2001) The Court heard appeal from the underlying Court and examined the issue of discovery under Title IV protective order cases. The Court recognized the inherent conflict between normal discovery timing by the rules of civil procedure and the mandatory timing schedule of the family code protective order provisions (Sec. 84.001). The Court held that because the family code required a hearing in 14 days and did not provide for discovery, and that a continuance to permit discovery would be harmful to the applicant whose temporary protective order would expire, the trial court correctly denied discovery. **A**

*3<sup>rd</sup> Dist.* -- *Bilyeu v. Bilyeu*, 86 S.W. 3d 278 (Tex. App. - Austin 2002 no pet.) The Court conducted a review of caselaw related to finality of orders and held that a protective order rendered during the pendency of the parties' divorce is not a final judgment for purposes of appeal. The Court appeared to be persuaded by the absence of specific provisions for appeal and by the statutory presence of a "retained power to modify the order at any time." Quoting the dissent in *Streidel* (below) the Court said that the nature and subject of a protective order requires that the relief it provides "be

tailored and revised to suit dynamic conditions and often volatile circumstances.” **M**

*Hastings v. Hastings*, LEXIS 3160 (Tex. App. - Austin 2001) previously unpublished., holding, with little discussion, that “stand alone protective orders are not subject to challenge on appeal.) **M**

**4<sup>th</sup> Dist.**--*James v. Hubbard*, 985 S.W. 2d 516(Tex. App. - San Antonio 1998 no pet.) After a well reasoned examination of the nature and permanency of injunctive relief, the Court found that the fact that the trial court retains jurisdiction to modify a protective order is of “no consequence” and did not make a protective order interlocutory. The Court urged the Supreme Court of Texas to resolve the conflict quickly and strongly disagreed with the dissenting opinion which argued that because the legislature failed in 1977 to pass HB2811 (a bill providing a mechanism for appellate review of protective orders) the legislature intended the orders to be interlocutory. **A**

**5<sup>th</sup> Dist.**--*Cooke v. Cooke*, 65 S.W. 3d 785 (Tex. App- Dallas 2002, no pet.) The Court noted that, while an order may be *modified* throughout its term, a protective order may not be *vacated* on the motion of a party until at least one year after the order was rendered (Sec. 85.025[b]). Finding the disposition of the parties and the issues, not the retention of jurisdiction, determines status of an order, the Court found the order was final and appealable. **A**

*Hermissole v. Saxton*, LEXIS 5912 (Tex. App. - Dallas 2001) previously unpublished, *dism'd* in part, *revs'd* and *ren'd* in part. Acknowledging that *Normand* and *James* were clearly in conflict, the court said “...we are persuaded to follow *Normand*...an unappealable interlocutory order.” Because the order had expired by operation of law, the Court found the appeal of the order became moot. The Court did, however, sever and reverse the attorneys’ fees issue, finding that the trial court failed to make a finding of the ability of the defendant to pay, as required by TFC Sec. 85.005(b). The lesson is that proof of ability must be part of the evidence and court findings. **M/A**

**6<sup>th</sup> Dist.**--*Matter of the Marriage of Edwards*, No. 06-00-001301 Tex. App.-- Texarkana 2002

**7<sup>th</sup> Dist.**--*In re Delgado*, LEXIS 1778 (Tex. App. - Amarillo 1998) previously unpublished, *dism'd*. The Court held that, without an “express grant” to review an interlocutory order from the legislature, the Court was without jurisdiction to review the grant of a protective order. The appellant’s failure to file a reply brief didn’t help his case. **M**

**8<sup>th</sup> Dist.**--*Ruiz v. Ruiz*, 946 S.W. 2d 123 (Tex. App. - El Paso 1997. The Court found that a protective order issued in conjunction with a divorce petition is not a final

judgment, does not dispose of the parties and the issues, and is not appealable. **M**

*In re Salgado*, 53 S.W.3d 752 (Tex. App. - El Paso 2001). In a lengthy, scholarly opinion, the Court examined the question of appeal and found that the protective order was interlocutory and not one qualified for legislatively authorized appeal. The court also detailed the procedural steps in the event that a protective order conflicts with an existing custodial order, noting that a court may transfer the protective order to the court of continuing exclusive jurisdiction if the Court finds that the transfer is in the interest of justice or for the safety or convenience of a party or witness. (Sec. 85.064) **A**

**9<sup>th</sup> Dist.** *Court of Appeals, Beaumont - no case examining appealability found*) **X**

**10<sup>th</sup> Dist.**--*Normand v. Fox*, 940 S.W.2d 401 (Tex. App. - Waco 1997 no writ) This seminal case holds that a protective order is an unappealable interlocutory order given that the trial court continues to have discretion to modify it. The holding contrasts the authority to modify protective orders with continuing jurisdiction to modify an order that provides for the conservatorship, support or possession of and access to a child., finding the later is a new lawsuit filed after rendition of a final order but that there is no similar provision found in Chapter 81 protective orders. **M**

*Kelt v. Kelt*, 67 S.W.3d 364 (Tex. App. - Waco 2001 no pet.) (n2) In reviewing whether statements made by a child in counseling were admissible as an excited utterance (and finding they were not) the Court acknowledged that since the 1997 *Normand* case, three other Courts of Appeals had determined that protective orders were appealable. Reexamining their prior position, the Court concluded that a protective order “gives injunctive relieve and, if it disposes of all issues and parties, it is a final appealable order.” **A**

**11<sup>th</sup> Dist.** *Court of Appeals, Eastland - no case examining appealability found*) **X**

**12<sup>th</sup> Dist.**--*In re K.S. L.-C.*, LEXIS 4344 (Tex. App. - Tyler 2003) Where husband appealed a protective order granted during divorce action to wife, the Court dismissed the appeal upon finding that the protective order was not final in that it did not dispose of all issues involving all parties. The Court rejected the husband’s argument that the order was appealable because it was issued by a court other than the one in which the divorce was pending. **M**

**13<sup>th</sup> Dist.**--*In re Cummings* 13 S.W.3d 472 (Tex. App. - Corpus Christi 2000 no pet.) Finding that a protective order is one whose duration does not depend upon further action by the trial court and is therefore final, the Court heard and rejected an appeal based upon

appellant's unsupported claim of lack of notice of hearing on the order. **A**

*Striedel v. Striedel* 15 S.W.3d 163 (Tex. App. - Corpus Christi 2000 no pet.) The Court cited and followed *Cummings*, finding a final, and therefore appealable order, and with reversal, further urged the trial court give serious consideration to the right of appellant, with his affidavit of indigency, to appointment of counsel. The consideration appeared based in primary part on the right of a petitioner for a protective order to statutorily guaranteed counsel. **A**

*In re Leisman*, LEXIS 4657 (Tex. App. - Corpus Christi 2002) an unpublished opinion followed *Cummings* logic and held the order appealable. **A**

**14<sup>th</sup> Dist.**--*Ulmer v. Ulmer*, LEXIS 3714 (Tex. App. - Houston [14<sup>th</sup>] 2003) Looking to Austin's *Bilyeu* case as authority, along with its own *Majaraj* case, Houston's 14<sup>th</sup> District found, while acknowledging that there is a split of authority, protective orders are interlocutory and not appealable. **M**

*Maharaj v. Mathis*, LEXIS 2594 (Tex. App. - Houston [14<sup>th</sup>] 2001) A previously unpublished opinion, but noted by the 14<sup>th</sup> District Court in its *Ulmer* decision, held protective orders are interlocutory. The Court said that to permit an interlocutory appeal would negate Civil Practice and Remedies Code Sec. 51.014 which enumerates those interlocutory orders which are capable of appeal and does not include protective orders among them. **M**

## VIII. PROTECTIVE ORDERS AND FIREARMS

In line with most states, the Texas Legislature has over the past several terms institute laws requiring increasing education of law enforcement officials and duties related to them.

### A. Governmental Required Acts

The TFC places affirmative duties on law enforcement officials to, within ten days of receipt of an order, enter information required by section 411.042 (b)(6) Government Code into the statewide law enforcement information system (TFC 86.0011.) Further, on receipt of a request for a law enforcement information system record check of a prospective transferee by a licensed firearms dealer under the Brady Handgun Violence Prevention Act (18 U.S.C. Sec 922, there must be a determination as to whether the DPS has in the department's law enforcement information system a record indicating the existence of an active protective order directed to the prospective transferee. If so, the dealer must be notified immediately that the transfer is prohibited. (TFC 86.002)

Law enforcement officials are ordered to assist the applicant in securing the residence, and informing the respondent of the orders. Under an ex parte order, the applicant will receive escort from the residence if the respondent refuses to vacate (in violation of an order) and on final, law enforcement officials are to remove the reluctant respondent from the protected premises. TFC 86.003-004.)

Procedures for receipt and exchange of information regarding protective orders from other jurisdictions is also required by TFC.

### B. Individuals and Firearms

Texas Government Code, Sec. 411.172 (13) provides that even a temporary restraining order, so definitely a protective order, would prohibit and criminalize the possession of a handgun or securing of a permit. Notice and hearing are required, so that the TRO typically issued which prohibits harassing or threatening behavior or injury to a person would not result in prohibition without notice and hearing. Given that it is the practice of many courts to routinely grant TRO's but issue them mutually, the result may be that an applicant for a TRO could be in violation as well.

TFC Sec. 85.022(b)(6) excludes certain peace officers, defined as sworn, full-time paid employees of a state agency or political subdivision from prohibition against possession a firearm, but regular citizens, duck hunter and skeet shooter alike, are prohibited.

Firearms are also defined by the Texas Penal Code to exclude antiques manufactured before 1899 and replicas of a firearm which was manufactured before that date, so long as the replica does not use rim fire or fire ammunition.

## IX. ORDERS FROM OTHER JURISDICTIONS

TFC Sec 88 et seq details the Uniform Interstate Enforcement of Protective Orders Act.

The statute should be read in its entirety (as should the entire protective order body of statutes in the Family Code) but in brief, this chapter provides for enforcement of orders that are valid on their face. A foreign protective order may be registered by presentation of a certified copy of the order to a law enforcement officer responsible for the registration of orders in the local computer records or by presentation to the TDPS with a request for registration (TFC 88.005)

An important provision to encourage assistance of law enforcement officials is available in TFC Sec. 88.006 which provides immunity to officials acting in an official capacity from civil and criminal liability for an act or omission arising from registration, enforcement of a foreign protective order or the detention or arrest of a

person alleged to have violated a foreign order if done in good faith in an effort to comply with the chapter.

## X. MISCELLANEOUS ISSUES:

**Specificity:** *Collins v State*, 955 S.W. 2d 464 (Tex. App. - Fort Worth 1997 no pet.) In response to an allegation that TFC 85.022 requires an order specify the distance that a defendant must remain from a location, the Court held that the protective order does not have to be specific enough to be enforceable by contempt, but rather only specific enough to meet the normal requirements of specificity that attach to allegations of culpable conduct.

**No Right to Jury Trial:** *Williams v. Williams*, 19 S.W.3d 544, LEXIS 3430, (Tex. App. - Fort Worth 2000 no pet. h) holding that there is no right to a jury trial in a protective order hearing. Also, *Winsett v. Edgar*, 22 S.W. 3d 509 (Tex. App. - Fort Worth 2000)

**Discovery:** *Martinez v. Martinez*, 52 S.W. 3d 429 (Tex. App. - Fort Worth 2001, pet. den) Recognizing the inherent conflict between normal discovery contemplated by TRCP and the mandatory 14 to 20 day hearing date from the date of filing of an application for protective order, the trial court denied the defendant's motion for continuance to conduct discovery. On appeal, the court held that the nature of the relief anticipated by TFC protective orders and the danger that statute seeks to avoid create an abbreviated procedure; the need to conduct discovery is not one of the statutory bases to continue a protective order hearing. In this circumstance, the party resisting discovery was able to show particular, specific and demonstrable injury by facts sufficient to justify protection from discovery.

**Specific Act of Violence Not Required:** *Martinez v. Martinez*, 52 S.W. 3d at 434 held that the application for a protective order needed merely four pieces of information, identity of applicants and respondent, relationship of the applicants and the individual alleged to have committed the violence and the request for the protective order.

**Service on Respondent:** The final protective order is not criminally enforceable until the respondent has at least actual notice of the Order *Ramos v. State*, 923 S.W. 2d 196 (Tex. App. - Austin 1996, no writ) Even when delivered to a respondent in open court, the better practice is to request that the Court note on the docket sheet that the Respondent was in Court, had the order delivered and/or heard the Court's order and acknowledged that Respondent had heard and/or read and understood the orders of the Court and the consequences for failing to abide by those orders.

**Duties of Clerk:** the Clerk of the court must provide copies of the order to

- a. To Respondent no later than 3d business day after hearing TFC Sec.85.041( c)
- b. To Applicant no later than 3d business day TFC Sec.85.041(b)
- c. To police chief or sheriff TFC Sec.85.042(a)
- d. To any child care facility of a protected child TFC Sec.85.04c( b)
- e. To the DPS at Austin Hqs if a concealed handgun license has been suspended. TFC Sec.85.042(e)

## XI. CONCLUSION

The growing body of literature regarding protective orders and family law is only partially reflected by the list of authors and articles detailed in the Bibliography following this paper. To those authors and contributors to our body of study and knowledge, we owe a debt as professionals, and I owe a personal debt as one who benefitted by their able research and writing. The State Bar of Texas, through its CLE on line library, provides exhaustive and complete analysis of the statutes, case law and commentaries on family violence.

The consequences of these problems are felt in our daily lives as parents, employers, teachers, attorneys, citizens, students. As attorneys, family violence, and the protective orders rising from it, are an inescapable part of the family law practice. Those who would raise the cry of family violence where there is none create heartache, loss, and destruction to the families involved . These few but vocal folks create loss of prestige and pride to the practitioners who practice law as a higher art and science. At the same time, those who would minimize family violence—who would shield it from discovery with subterfuge or laugh it off as natural and inevitable consequence of dissolution--leave scars on the families left to negotiate the minefields of their relationships, now and later, and scars on the otherwise noble practice of the profession.

The law that has evolved around this problem may not provide the answers. But this law, and the honorable practice of it, should provide a stable and predictable framework in which those who suffer under the pain of violence can find protection.

APPENDIX A

2003 LEGISLATIVE CHANGES RELATED TO PROTECTIVE ORDERS

**H.B. No. 1391.** Legislative Act regarding Confidentiality of Protective Order Applications

AN ACT

relating to the confidentiality of pleadings and protective order applications in certain proceedings in the Family Code. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. Subchapter E, Chapter 6, Family Code, is amended by adding Section 6.410 to read as follows: Sec. 6.410. CONFIDENTIALITY OF PLEADINGS. (a) This section applies only in a county with a population of 3.4 million or more. (b) Except as otherwise provided by law, all pleadings and other documents filed with the court in a suit for dissolution of a marriage are confidential, are excepted from required public disclosure under Chapter 552, Government Code, and may not be released to a person who is not a party to the suit until after the date of service of citation or the 31st day after the date of filing the suit, whichever date is sooner. SECTION 2. Subchapter A, Chapter 82, Family Code, is amended by adding Section 82.010 to read as follows: Sec. 82.010. CONFIDENTIALITY OF APPLICATION. (a) This section applies only in a county with a population of 3.4 million or more. (b) Except as otherwise provided by law, an application for a protective order is confidential, is excepted from required public disclosure under Chapter 552, Government Code, and may not be released to a person who is not a respondent to the application until after the date of service of notice of the application or the date of the hearing on the application, whichever date is sooner. (c) Except as otherwise provided by law, an application requesting the issuance of a temporary ex parte order under Chapter 83 is confidential, is excepted from required public disclosure under Chapter 552, Government Code, and may not be released to a person who is not a respondent to the application until after the date that the court or law enforcement informs the respondent of the court's order. SECTION 3. Chapter 102, Family Code, is amended by adding Section 102.0086 to read as follows: Sec. 102.0086. CONFIDENTIALITY OF PLEADINGS. (a) This section applies only in a county with a population of 3.4 million or more. (b) Except as otherwise provided by law, all pleadings and other documents filed with the court in a suit affecting the parent-child relationship are confidential, are excepted from required public disclosure under Chapter 552, Government Code, and may not be released to a person who is not a party to the suit until after the date of service of citation or the 31st day after the date of filing the suit, whichever date is sooner. SECTION 4. (a) This Act takes effect September 1, 2003. (b) Section 6.410, Family Code, as added by this Act, applies only to a suit for dissolution of a marriage filed on or after the effective date of this Act. A suit for dissolution of a marriage filed before the effective date of this Act is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose. (c) Section 82.010, Family Code, as added by this Act, applies only to an application under Title 4, Family Code, for a protective order or temporary ex parte order filed on or after the effective date of this Act. An application for a protective order or temporary ex parte order filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose. (d) Section 102.0086, Family Code, as added by this Act, applies only to a suit affecting the parent-child relationship filed on or after the effective date of this Act. A suit affecting the parent-child relationship filed before the effective date of this Act is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose.

\_\_\_\_\_  
 President of the Senate Speaker of the House I certify that H.B. No. 1391 was passed by the House on April 30, 2003, by a non-record vote. \_\_\_\_\_ Chief Clerk of the House I certify that H.B. No. 1391 was passed by the Senate on May 27, 2003, by the following vote: Yeas 31, Nays 0. \_\_\_\_\_ Secretary of the Senate  
 APPROVED: \_\_\_\_\_ Date

**H.B. No. 297** .Legislative Act Regarding Magistrates’ Orders of Protection and TFC Protective Orders; Chpt 85, Sub B, Title 4, 1 or 5 prevails in event of conflict, but an order issued subsequent to a Magistrates order under Chpt 83, Sub B, Title 4 does not unless Family Court is informed of Magistrate’s order and makes finding that Family Court supercedes.

AN ACT

relating to the duration and effect of a magistrate's order for emergency protection. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. Article 17.292, Code of Criminal Procedure, is amended

by amending Subsection (j) and by adding Subsections (f-1), (f-2), and (n) to read as follows: (f-1) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 85, Subtitle B, Title 4, Family Code, or under Title 1 or Title 5, Family Code, the condition imposed by the order issued under the Family Code prevails. (f-2) To the extent that a condition imposed by an order issued under this article conflicts with a condition imposed by an order subsequently issued under Chapter 83, Subtitle B, Title 4, Family Code, the condition imposed by the order issued under this article prevails unless the court issuing the order under Chapter 83, Family Code: (1) is informed of the existence of the order issued under this article; and (2) makes a finding in the order issued under Chapter 83, Family Code, that the court is superseding the order issued under this article. (j) An order for emergency protection issued under this article is effective on issuance, and the defendant shall be served a copy of the order in open court. An order for emergency protection issued under this article remains in effect up to the 61st day but not less than 31 days after the date of issuance. After notice to each affected party and a hearing, the issuing court may modify all or part of an order issued under this article if the court finds that: (1) the order as originally issued is unworkable; (2) the modification will not place the victim of the offense at greater risk than did the original order; and (3) the modification will not in any way endanger a person protected under the order. (n) On motion, notice, and hearing, or on agreement of the parties, an order for emergency protection issued under this article may be transferred to the court assuming jurisdiction over the criminal act giving rise to the issuance of the emergency order for protection. On transfer, the criminal court may modify all or part of an order issued under this subsection in the same manner and under the same standards as the issuing court under Subsection (j). SECTION 2. This Act takes effect September 1, 2003, and applies only to an order for emergency protection issued under Article 17.292, Code of Criminal Procedure, as amended by this Act, on or after that date. \_\_\_\_\_ President of the Senate Speaker of the House I certify that H.B. No. 297 was passed by the House on April 1, 2003, by a non-record vote. \_\_\_\_\_ Chief Clerk of the House I certify that H.B. No. 297 was passed by the Senate on May 28, 2003, by the following vote: Yeas 31, Nays 0. \_\_\_\_\_ Secretary of the Senate APPROVED: \_\_\_\_\_ Date \_\_\_\_\_ Governor

**S.B. 317.** Legislative Act amending Penal Code “and” to “or” thereby expanding the range of applicability of acts by defendant which may be prosecuted as a violation of a protective order or magistrate’s order.

AN ACT

relating to the prosecution of the offense of violation of a protective order or magistrate's order. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. Subsection (a), Section 25.07, Penal Code, is amended to read as follows: (a) A person commits an offense if, in violation of an order issued under Section 6.504 or Chapter 85, Family Code, under Article 17.292, Code of Criminal Procedure, or by another jurisdiction as provided by Chapter 88, Family Code, the person knowingly or intentionally: (1) commits family violence or an act in furtherance of an offense under Section 42.072; (2) communicates: (A) directly with a protected individual or a member of the family or household in a threatening or harassing manner; (B) a threat through any person to a protected individual or a member of the family or household; or [and] (C) in any manner with the protected individual or a member of the family or household except through the person's attorney or a person appointed by the court, if the order prohibits any communication with a protected individual or a member of the family or household; (3) goes to or near any of the following places as specifically described in the order: (A) the residence or place of employment or business of a protected individual or a member of the family or household; or (B) any child care facility, residence, or school where a child protected by the order normally resides or attends; or (4) possesses a firearm. SECTION 2. (a) This Act takes effect September 1, 2003. (b) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this subsection, an offense was committed before the effective date of this Act if any element of the offense was committed before that date.

\_\_\_\_\_ President of the Senate Speaker of the House

I hereby certify that S.B. No. 317 passed the Senate on March 20, 2003, by the following vote: Yeas 31, Nays 0. \_\_\_\_\_ Secretary of the Senate I hereby certify that S.B. No. 317 passed the House on May 10, 2003, by a non-record vote. \_\_\_\_\_ Chief Clerk of the House Approved: \_\_\_\_\_ Date \_\_\_\_\_ Governor

**S.B. No. 433** Legislative Act related to victims of sexual assault, and not requiring a domestic relationship

AN ACT

relating to the issuance and enforcement of protective orders to protect victims of sexual assault; providing criminal penalties. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. Title 1, Code of Criminal Procedure, is amended by adding Chapter 7A to read as follows:

CHAPTER 7A. PROTECTIVE ORDER FOR VICTIM OF SEXUAL ASSAULT

Art. 7A.01. APPLICATION FOR PROTECTIVE ORDER. (a) A person who is the victim of an offense under Section 22.011 or 22.021, Penal Code, or a prosecuting attorney acting on behalf of the person, may file an application for a protective order under this chapter without regard to the relationship between the applicant and the alleged offender. (b) An application for a protective order under this chapter may be filed in a district court, juvenile court having the jurisdiction of a district court, statutory county court, or constitutional county court in: (1) the county in which the applicant resides; or (2) the county in which the alleged offender resides.

Art. 7A.02. TEMPORARY EX PARTE ORDER. If the court finds from the information contained in an application for a protective order that there is a clear and present danger of a sexual assault or other harm to the applicant, the court, without further notice to the alleged offender and without a hearing, may enter a temporary ex parte order for the protection of the applicant or any other member of the applicant's family or household.

Art. 7A.03. REQUIRED FINDINGS; ISSUANCE OF PROTECTIVE ORDER. (a) At the close of a hearing on an application for a protective order under this chapter, the court shall find whether there are reasonable grounds to believe that the applicant is: (1) the victim of a sexual assault; and (2) the subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender. (b) If the court finds reasonable grounds to believe that the applicant is the victim of a sexual assault and is the subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender, the court shall issue a protective order that includes a statement of the required findings.

Art. 7A.04. APPLICATION OF OTHER LAW. To the extent applicable, except as otherwise provided by this chapter, Title 4, Family Code, applies to a protective order issued under this chapter.

Art. 7A.05. CONDITIONS SPECIFIED BY ORDER. (a) In a protective order issued under this chapter, the court may: (1) order the alleged offender to take action as specified by the court that the court determines is necessary or appropriate to prevent or reduce the likelihood of future harm to the applicant or a member of the applicant's family or household; or (2) prohibit the alleged offender from: (A) communicating directly or indirectly with the applicant or any member of the applicant's family or household in a threatening or harassing manner; (B) going to or near the residence, place of employment or business, or child-care facility or school of the applicant or any member of the applicant's family or household; (C) engaging in conduct directed specifically toward the applicant or any member of the applicant's family or household, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person; and (D) possessing a firearm, unless the alleged offender 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. (b) In an order under Subsection (a)(2)(B), the court shall specifically describe each prohibited location and the minimum distance from the location, if any, that the alleged offender must maintain. This subsection does not apply to an order with respect to which the court has received a request to maintain confidentiality of information revealing the locations. (c) In a protective order, the court may suspend a license to carry a concealed handgun issued under Section 411.177, Government Code, that is held by the alleged offender.

Art. 7A.06. WARNING ON PROTECTIVE ORDER. (a) Each protective order issued under this chapter, 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." (b) Each protective order issued under this chapter, 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 A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER." SECTION 2. Subsections (a), (b), and (c), Article 14.03, Code of Criminal Procedure, are amended to read as follows: (a) Any peace officer may arrest, without warrant: (1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws; (2) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to another person and the peace officer has probable cause to believe that there is danger of further bodily injury to that person; (3) persons who the peace officer has probable cause to believe have committed an [the] offense defined by Section 25.07, Penal Code (violation of Protective Order), or by Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is not committed in the presence of the peace officer; or (4) persons who the peace officer has probable cause to believe have committed an assault resulting in bodily injury to a member of the person's family or household. (b) A peace officer shall arrest, without a warrant, a person the peace officer has probable cause to believe has committed an offense under Section 25.07, Penal Code (violation of Protective Order), or Section 38.112, Penal Code (violation of Protective Order issued on basis of sexual assault), if the offense is committed in the presence of the peace officer. (c) If reasonably necessary to verify an allegation of a violation of a protective order or of the commission of an assault against a member of the family or household, a peace officer shall remain at the scene of the investigation to verify the allegation and to prevent the further commission of the violation or of family violence. SECTION 3. Chapter 38, Penal Code, is amended by adding Section 38.112 to read as follows: Sec. 38.112. VIOLATION OF PROTECTIVE ORDER ISSUED ON BASIS OF SEXUAL ASSAULT. (a) A person commits an offense if, in violation of an order issued under Chapter 7A, Code of Criminal Procedure, the person knowingly: (1) communicates directly or indirectly with the applicant or any member of the applicant's family or household in a threatening or harassing manner; (2) goes to or near the residence, place of employment or business, or child-care facility or school of the applicant or any member of the applicant's family or household; or (3) possesses a firearm. (b) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or under both sections. (c) An offense under this section is a Class A misdemeanor. SECTION 4. Subsection (c), Section 46.04, Penal Code, is amended to read as follows: (c) A person, other than a peace officer, as defined by Section 1.07, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to an order issued under Section 6.504 or Chapter 85, Family Code, under Article 17.292 or Chapter 7A, Code of Criminal Procedure, or by another jurisdiction as provided by Chapter 88, Family Code, commits an offense if the person possesses a firearm after receiving notice of the order and before expiration of the order. SECTION 5. This Act takes effect September 1, 2003.

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President of the Senate Speaker of the House

I hereby certify that S.B. No. 433 passed the Senate on April 3, 2003, by the following vote: Yeas 31, Nays 0.  
 \_\_\_\_\_ Secretary of the Senate I hereby certify that S.B. No. 433 passed the House on May 20, 2003,  
 by a non-record vote. \_\_\_\_\_ Chief Clerk of the House Approved:  
 \_\_\_\_\_ Date \_\_\_\_\_ Governor

## APPENDIX B

## SITES WITH INFORMATION AND LINKS TO FAMILY VIOLENCE RESOURCES

[www.austin-safeplace.org](http://www.austin-safeplace.org)

Austin based, shelters, education, restoration of family relationships etc., has a lending library with over 350 items available for checkout nation wide including books, tapes, dolls, curriculum kits; places advocates in both the Austin county and district attorney's office for assistance to victims through the legal system.

<http://www.brokenspirits.com/directory/index>

National directory of information related to family violence, detailed by states, and including an alphabetical listing of Texas Abuse Resources, listed by organization name, location and telephone number.

[http://www.brokenspirits.com/security/email\\_security.asp](http://www.brokenspirits.com/security/email_security.asp)

Detailed article with instructions for protecting email privacy. Often victims of abuse seek resources over the internet at home, forgetting that cached memory, name completion, deleted folders may permit information to fall in the hands of the abuser.

[http://www.ci.houston.tx.us/department/police/fvu\\_community.htm](http://www.ci.houston.tx.us/department/police/fvu_community.htm)

Houston Police Department on line site with detailed recommendations for safety measures including escape plans for potential victims of abuse, shelters and advocacy groups, behavior to avert or deter stalking.

<http://www.hawc.org/>

Site of the Houston Area Women's Center, details of the HAWC services are listed, including advocacy resources, rape crisis counseling, crisis intervention, counseling for children and teenagers as well as adults, relocation assistance. English, Spanish and Vietnamese speaking programs and assistance are available.

<http://www.dhs.state.tx.us/programs/familyviolence/shelters.htm>

Provided as a service of the Texas Department of Human Services, this site lists (by city, shelter name, telephone number and hotline number) nearly 80 available shelters from Abilene to Wichita Falls.

<http://www.abanet.org/domviol/home.html>

American Bar Association site for the Commission on Family Violence, with educational and instructional information regarding violence. <http://www.abanet.org/domviol/internet.html> provides suggestions for ways that a victim can avoid leaving clues on a family-accessed computer for the abuser to discover.

<http://www.abanet.org/domviol/phone>

List of important telephone numbers

National Domestic Violence Hotline 1-800-799-SAFE provides emergency and non-emergency referral information in the caller's area, and offers TDD service and multilingual information.

<http://www.ama-assn.org/ama/pub/category/2295.html>

This American Medical Association site provides a description of programs and resources available nationwide to health care providers, communities, schools, and other organizations on the topic of youth violence

<http://www.ama-assn.org/ama1/pub/upload/mm/386/domesticviolence>

The AMA's Physician's Diagnostic and Treatment Guidelines for Domestic Violence in pdf format. AMA statistics report that 2-4 million women are subjected to domestic violence each year; and there is a 20 to 30 % lifetime risk that a woman will be battered.

[http://www.txdps.state.tx.us/administration/staff\\_support/victimservices](http://www.txdps.state.tx.us/administration/staff_support/victimservices)

The Texas Department of Public Safety site provides information for reporting violence, and means of securing safety for potential victims.



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APPENDIX 3

Sample Application for Protective Order with Request for Exclusion of Respondent

(The application below is provided only for general instructive example and is not intended for use without review and editing to comport with the facts, circumstances and relationships of each case. Wherever Applicant and Respondent appear, use proper name if appropriate. Edit to suit the facts of the individual case, and refer to TFC to insure completion of necessary information for relief sought.)

NO. 2003 - \_\_\_\_\_

<b>IN THE MATTER OF THE MARRIAGE OF</b>  <b>Applicant</b> <b>AND</b> <b>Respondent</b>  <b>AND IN THE INTEREST OF</b> <b>X, Y and Z, Minor Children</b>	§ § § § § § § § § §	<b>IN THE DISTRICT COURT</b>   <b>___TH JUDICIAL DISTRICT</b>   <b>_____ COUNTY, TEXAS</b>
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AN APPLICATION FOR A PROTECTIVE ORDER INCLUDING REQUEST FOR EXPARTE PROTECTIVE ORDER

1. *Discovery Level*  
Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.
2. *Parties*  
This Application for a Protective Order is brought by *Applicant*, who is a resident of *county* Texas. Respondent is (*Name*), who is a resident of (*City & County*), Texas and has committed family violence against Applicant in the preceding 30 day period.  
(If applicable) This Application is further brought on behalf of the minor children, X, Y and Z who are further identified below, who are the biological children of Applicant and Respondent and who reside with Applicant at 111 Street, Town, State.
3. *Service*  
Process should be served by the clerk of the court on Respondent by a constable, deputy or other process server, over the age of eighteen and authorized by this county to serve citation (Or, if applicable: by and through respondent’s attorney of record (Attorney name and address) pursuant to Rule 21a of the Texas Rules of Civil Procedure and §82.043 of the Texas Family Code.
4. *Relationship of Parties*  
Applicant is currently married to Respondent. (*or otherwise identify the relationship of the parties*) This application is/ is not in a pending suit for dissolution of marriage. (If applicable: A Magistrate’s Order for Emergency Protection is in effect at the time of filing of this application, but will expire on (date).) Or, Applicant and Respondent were previously divorced in Cause No. \_\_\_\_; and a certified copy of that Decree of Divorce is not currently in the possession of Applicant but will be provided to the Court at or prior to hearing on this Application.

5. *Grounds*

Respondent has engaged in conduct that constitutes family violence.

Respondent committed acts that were intended by Respondent to result in physical harm, bodily injury, assault, or sexual assault or were threats that reasonably placed Applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault. Respondent's acts therefore constitute family violence. Respondent has committed acts that did cause physical harm and bodily injury to *Applicant*.

Respondent's conduct was reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass *Applicant*.

Good cause exists for prohibiting Respondent from communicating with *Applicant* except through Respondent's attorney.

6. *Request for Protective Order*

*Applicant* requests the Court, after notice and hearing, to issue its protective order:

Prohibiting Respondent from committing family violence.

Prohibiting Respondent from removing the children from the jurisdiction of the Court.

Prohibiting Respondent from transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

Prohibiting Respondent from communicating directly with Applicant in a threatening or harassing manner, from communicating a threat through any person to Applicant, and, on a finding of good cause, from communicating in any manner with Applicant except through Respondent's attorney.

Prohibiting Respondent from going to or near the residences or places of employment or business of Applicant and schools and day care facilities of the minor children. Applicant requests the Court to specifically prohibit Respondent from going to or near the residence of Applicant at *street, city, TX zip*, and the place of employment of Appellant at *The Company, 1 Street, City, TX zip*, and the school of a child for whom protection is sought at *City Elementary School, 1 Avenue, City, TX zip* and the day care facility of a child for whom protection is sought, at *address, city, state, zip*, and that Respondent be ordered to remain at least 300 feet from each location.

Prohibiting Respondent from engaging in conduct directed specifically toward Applicant, including following Applicant, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass Applicant.

7. *Request for Temporary Ex Parte Order*

Before the filing of this application, Respondent has engaged in conduct that constitutes family violence. The specific conduct that necessitates this application is set forth in the Affidavit and photographs of Applicant attached hereto as Exhibit "A" and incorporated herein. (If applicable: There is a Magistrate's Order of Protection issued by the *identifying criminal court and cause number* which will expire on \_\_\_\_\_. An immediate need exists for the protective order requested in this application.)

Based on the conduct of Respondent as alleged, *Applicant* reasonably fears that there is a clear and present danger of family violence, which will cause immediate and irreparable injury, loss, and damage, for which *Applicant* has no adequate remedy at law.

Applicant therefore requests the Court, immediately and without hearing, to issue a temporary ex parte order for the protection of Applicant:

Prohibiting Respondent from committing family violence.

Prohibiting Respondent from communicating directly with Applicant in a threatening or harassing manner, from communicating a threat through any person to Applicant, and, on a finding of good cause, from communicating in any manner with Applicant except through Respondent's attorney or a person appointed by the Court.

Prohibiting Respondent from going to or near the residences or places of employment or business of Applicant. *Name of Applicant* requests the Court to specifically prohibit Respondent from going to or less than 300 feet from (*residence, place of employment, schools and day care, with identifying addresses, listed above*)

Prohibiting Respondent from engaging in conduct directed specifically toward Applicant, including following Applicant, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass Applicant.

Prohibiting Respondent from removing *children's names* from the jurisdiction of the Court.

Prohibiting Respondent from transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

*7.b Request for Immediate Exclusion of Respondent from Residence by Temporary Ex parte Order*

*Applicant* has filed an Affidavit, attached hereto and incorporated by reference, avowing under oath that Applicant and Respondent currently reside, and for a period in excess of 30 days prior to the filing of this application, have resided in a residence located at 111 Street, (address); that Applicant and Respondent are the owners of that residence, that Respondent has committed family violence against Applicant, who is a member of the household, and that unless Respondent is excluded from the residence at 111Street, there is a clear and present danger that Resident will commit family violence against Applicant, a member of the household. Applicant asks that the Court, without hearing, order that Respondent is excluded from and prohibited from entering, going to or within 300 feet of the residence.

*8. Request for Orders Related to Assistance of Law Enforcement Officials*

Pursuant to Texas Family Code Sec. 86.003, issue a directive or order to the Sheriff of XX County, and or the Chief of Police of Town, to provide a law enforcement officer to accompany the applicant to the residence and to inform the respondent that the court has ordered that the respondent be excluded from the residence and to protect applicant while applicant takes possession of the residence and to protect applicant if respondent should refuse to vacate the residence while applicant takes possession of necessary personal property.

*9. Request for Dispensing of Bond*

*Applicant* requests the Court to dispense with the necessity of a bond.

*10. Best Interest*

The protective order requested is in the best interest of the family, household, or member of the family or household.

*11. Attorney's Fees and Costs*

The Court should find that Respondent has means to pay attorney's fees and costs of Applicant and the Court should assess against Respondent a reasonable attorney's fee as compensation for *Applicant's attorney*, and judgment should be rendered in favor of this attorney against Respondent.

*Applicant* requests that Respondent be ordered to pay reasonable attorney's fees, the \$16 protective order fee, the cost of service of the protective order, the costs of court, and all other fees, charges, or expenses incurred in connection with the protective order before the sixtieth day after the date the order is rendered.

12. *Prayer*

*Applicant* prays that notice of this Application for a Protective Order issue as required by law and that the Court enter the protective orders as requested in this application.

*Applicant* further prays that the Court immediately order and have issued a temporary protective order, ex parte, in conformity with the allegations stated above, prohibiting Respondent from the acts and ordering Respondent to do the acts set forth above until a hearing can be held.

*Applicant* prays that a hearing be held no later than the fourteenth day ( or 20<sup>th</sup> day, depending on size of county) after the date this application is filed; that, after notice and hearing, the Court grant the relief requested above; and that the Court dispense with the necessity of a bond.

*Applicant* prays for attorney's fees, costs, charges, and expenses.

*Applicant* prays for general relief.

Respectfully submitted,  
Signature Block

Affidavit Attached  
Photos of Victim attached and referenced in Affidavit