

# **PROTECTIVE ORDERS**

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**EDUCATION:**

J.D. 1989 Southern Methodist University, Dallas, Texas  
B.A. 1986 University of Texas at Tyler, Tyler, Texas, with Honors

**PROFESSIONAL ACTIVITIES AND AFFILIATIONS:**

Partner - Goranson Bain Ausley, PLLC

Board Certified Family Law by the Texas Board of Legal Specialization (since 1995)

Fellow - American Academy of Matrimonial Lawyers (2004 - Present)  
Board of Governors - American Academy of Matrimonial Lawyers (2015-2017)  
Fellow - International Academy of Family Lawyers  
Fellow - Texas Chapter of the Academy of Matrimonial Lawyers (Executive Committee (2006 - 2010; Past President)  
Member - Texas Academy of Family Law Specialists (1995 - Present)  
Member/Chair- Family Law Council, State Bar of Texas (2005 - Present)(Executive Committee, Chair 2016-2017)  
Diplomate - American College of Trial Lawyers – Fellowship is extended by invitation only to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.  
Member - State Bar of Texas Board of Directors (3-year elected term beginning 2019)  
Member - Collaborative Divorce Texas  
Member - State Bar of Texas (Family Law Section)  
Member - American Bar Association (Family Law Section)  
Member - College of the State Bar of Texas  
Member - Dallas Bar Association (Family Law Section)  
Member - Collin County Bar Association (Family Law Section)  
Member - Denton County Bar Association  
Member - Plano Bar Association  
Co-Chair - DAYL People’s Law School (1995 & 1996)  
Instructor - Southeastern Paralegal Institute (1993-1996)  
Member - Fee Dispute Committee - Dallas Bar Association (1998 - 2000)  
Fellow - Collin County Bench Bar Foundation  
Lifetime Fellow - Texas Family Law Foundation (State Bar of Texas)  
Fellow - Texas Bar Foundation – Nominating Committee Member  
Chair - Program Committee, Collin County Bench Bar Conference, 2000

Board Member- Past Board Member of the Advisory Board in CASA of Collin County  
Member/Chair- Grievance Committee, District 1A (2002 - 2007); (Chair – 2006-2007)

Certificate - Advanced Mediation - Family Law (1995)  
Member - Annette Stewart Inn of Court (Board Member 2005-2012)

### **AWARDS AND HONORS:**

Named the “Best Lawyers in America” 2015, 2017 and 2019 Family Law “Lawyer of the Year” in Dallas – only a single lawyer in each practice area within a community is honored with this distinction.

Recipient of the Dan Price Award from the State Bar of Texas in 2018 – this award is presented to a lawyer who has had a significant impact on the Family Law Section for the past year – teaching, writing, and advancing the practice of family law.

Recipient of the Annette Stewart Inn of Court, Serjeant of the Inn Award in 2013 (awarded to an attorney who has significantly contributed to the profession and the community through his or her career).

Recipient of the University of Texas at Tyler, Alumni Association Distinguished Alumni Award (2016).

Best Family Law CLE Article, State Bar of Texas, 2004.

Named "Best Lawyers in Dallas" Family Law by D Magazine (2001, 2005, 2006, 2007, 2008, 2009, 2010, 2017, 2018, 2019, 2020).

Named “Best Female Lawyers in Dallas” by D Magazine (2010).

Named “Best Personal Lawyers in Dallas” by D Magazine (2009).

Named “The Best Lawyers in America” – Woodward and White Press (2003 - 2020).

Named “Top 50 Women Texas Super Lawyers” by Texas Monthly (2003 - 2020).

Named “Top 100 Texas Super Lawyers” by Texas Monthly (2004 - 2009; 2011; 2013-2019).

Named “Top 100 Dallas/Fort Worth Super Lawyers” by Texas Monthly (2003-2009; 2011-2020).

Named “Texas Super Lawyer” in Family Law by Texas Monthly (2003 - 2020).

Diplomate of the American College of Trial Lawyers since 2020 – The organization consists of 100 of the top family law attorneys in the United States. Fellowship is extended by invitation only to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.

### **PUBLICATIONS:**

Co-Author, *Thomson Reuters Publishing Company, TEXAS FAMILY LAW PRACTICE GUIDE* (published March 2000, supplemented each year to the present) – This 3-volume set is written for lawyers and judges, and contains the substantive law regarding family law matters,

including marital property (characterization, tracing, valuation), children and divorce. The treatise is updated each year to contain the current law on each topic.

Primary Author, ***PROTECTING YOUR ASSETS FROM A TEXAS DIVORCE***, Professional Solutions Group (2005).

Co-Author, ***Protecting Children from Incompetent Forensic Evaluations and Expert Testimony***, Journal of the American Academy of Matrimonial Lawyers (2006).

Author, ***Family Law at Your Fingertips – Property***, Family Law Section, State Bar of Texas, 2015, 2016, 2019.

Author, ***Family Law at Your Fingertips – Children***, Family Law Section, State Bar of Texas, 2018, 2019.

Author, ***Family Law at Your Fingertips – Evidence***, Family Law Section, State Bar of Texas, 2019.

Author, ***Evidentiary Issues in Family Law Cases***, Dallas Bar Headnotes, 2020.

Author, ***Fraud on the Community and the Reconstituted Estate***, Family Law Section of the State Bar of Texas Winter Section Report, 2020.

#### **PUBLICATIONS AND PRESENTATIONS:**

***JUDGES PANEL MODERATOR and COURSE DIRECTOR***, Innovations in Child Custody Litigation 2021, State Bar of Texas (May 2021)

***MAINTAINING SEPARATE PROPERTY WITHOUT A MARITAL PROPERTY AGREEMENT***, Estate Planning Council of North Texas (March 2021)

***CHARACTERIZING & VALUING ASSETS TO CREATE AN INVENTORY AND APPRAISEMENT THAT WORKS FOR YOUR CLIENT***, Advanced Family Law Course, State Bar of Texas (August 2020)

***DIRECT AND CROSS EXAMINATION OF A TRACING EXPERT***, Advanced Family Law Course, State Bar of Texas (August 2019)

***REIMBURSEMENT, FRAUD, WASTE AND THE RECONSTITUTED ESTATE***, Marriage Dissolution Institute, State Bar of Texas (April 2019)

***COLLABORATIVE LAW***, State Bar of Texas (March 2019)

***TRIAL OF A CUSTODY CASE***, Innovations – Breaking Boundaries in Child Custody Litigation, State Bar of Texas (January 2019)

***DRAFTING: ARE YOUR PLEADINGS AND DISCOVERY READY FOR TRIAL***, State Bar of Texas (December 2018)

***PROFESSIONALISM AND CIVILITY***, American Academy of Matrimonial Lawyers (November 2018)

***MARITAL AGREEMENTS***, New Frontiers in Marital Property Law, State Bar of Texas (October 2018)

***PREMARITAL AND POSTMARITAL AGREEMENTS***, Advanced Family Law Course, State Bar of Texas (August 2018)

***TRIAL PRESENTATION OF A CUSTODY CASE***, Annual TAFLS Trial Institute, Texas Academy of Family Law Specialists (February 2018)

***MARITAL PROPERTY AGREEMENTS***, Advanced Family Law Course, State Bar of Texas (August 2017)

***PROPERTY CASE LAW UPDATE***, Marriage Dissolution Institute, State Bar of Texas (April 2017)

***CHARACTERIZATION OF PROPERTY***, Advanced Family Law Course, State Bar of Texas (August 2016)

***PROFESSIONALISM – THE KEY TO A SATISFYING CAREER***, Marriage Dissolution 101, State Bar of Texas (April 2016)

***NEGOTIATION TECHNIQUES AND STRATEGIES***, Advanced Family Law Course, State Bar of Texas (August 2015)

***JUDGES PANEL***, Innovations – Breaking Boundaries in Child Custody Litigation, State Bar of Texas (June 2015)

***PROTECTIVE ORDERS AND FAMILY VIOLENCE***, Southern Methodist University School of Law (October 2014)

***NEGOTIATION TECHNIQUES AND STRATEGIES***, 40<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 2014)

***EXPERTS, EXAMINATIONS AND ETHICS – A GUIDE TO MENTAL HEALTH EXPERTS – DIRECT AND CROSS, ATTACKING AND DEFENDING RECOMMENDATIONS, DAUBERT CHALLENGES AND PRACTICAL APPROACHES***, Innovations – Breaking Boundaries in Child Custody Litigation, The University of Texas School of Law (June 2014)

***USING A COMPUTER FORENSIC EXPERT***, Family Law Technology Course, State Bar of Texas (December 2012)

***PROPERTY UPDATE***, Advanced Family Law Course, State Bar of Texas (August 2012)

***TURBO CHARGE YOUR COLLABORATIVE PRACTICE***, Advanced Family Law Course, State Bar of Texas (August 2012)

***ATTORNEY'S FEES AGREEMENTS***, Advanced Family Law Course, State Bar of Texas (August 2011)

***CHARACTERIZATION OF PROPERTY***, Family Law on the Front Lines, The University of Texas School of Law (June 2011)

***ELECTRONIC EVIDENCE WORKSHOP***, Advanced Family Law Course, State Bar of Texas (August 2009)

***THE ELECTRONIC EVIDENCE BIBLE***, University of Texas School of Law (June 2009)

***CHARACTERIZATION***, Marriage Dissolution Institute, State Bar of Texas (April 2009)

***PREMARITAL AGREEMENTS***, Collin County Bar Association (February 2009)

***ELECTRONIC EVIDENCE – CIVIL AND ETHICAL IMPLICATIONS***, University of Texas School of Law, Parent-Child Relationships; Critical Thinking for Critical Issues (January 2009)

***PREMARITAL AGREEMENTS***, Collin County Bar Association, Estate Planning Section (September 2008)

***RELOCATION***, Advanced Family Law Course, State Bar of Texas (August 2006)

***TEMPORARY SUPPORT, MAINTENANCE AND ALIMONY***, Marriage Dissolution Institute, State Bar of Texas (April 2006)

***CHILD SUPPORT UPDATE: WITHIN AND OUTSIDE THE GUIDELINES***, Marriage Dissolution Institute (April 2006)

***RELOCATION***, American Bar Association, Section of Family Law, Spring CLE Conference, Washington D.C. (May 2006)

***COLLABORATIVE LAW***, “A Panel of Texas Authors on Texas Collaborative Law” (April 2006)

***MARITAL PROPERTY 101***, State Bar College “Spring Training” 2006, State Bar College (March 2006)

***HIGH TECH EVIDENCE***, Collin County Bar Association, Family Law Section (December 2006)

***HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC.***, Advanced Family Law Drafting Course (December 2006)

***CHILD SUPPORT***, 31<sup>st</sup> Annual Advanced Family Law Course, State Bar of Texas (August 2005)

***PSYCHOLOGICAL TESTING***, American Academy of Matrimonial Lawyers (March 2005)

***RELOCATION***, Dallas Volunteer Attorney Program and Family Law Section, “Nuts and Bolts” Family Law Training (February 2005)

***OPENING STATEMENTS AND CLOSING ARGUMENTS***, Ultimate Trial Notebook – Family Law, State Bar of Texas (December 2004)

***HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC.***, Williamson County (October 2004)

***RELOCATION DEBATE***, 30<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 2004)

***COLLABORATIVE LAW PANEL***, Collaborative Law Spring Retreat (March 2004)

***HIGH TECH EVIDENCE, WEBSITES, HARDDRIVES, E-MAILS, ETC.***, 29<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 2003)

***FAMILY LAW EVIDENCE***, Collin County Bench Bar Conference (May 2003)

***FAMILY LAW EVIDENTIARY ISSUES***, 16<sup>th</sup> Annual Advanced Evidence & Discovery Course, State Bar of Texas (March 2003)

***PARENTAGE: ESTABLISHING, ATTACKING & UNDOING***, Texas Academy of Family Law Specialists (January 2003)

***PARENTAGE: CURRENT ISSUES***, University of Houston Law Center (October 2002)

***OBJECTIONS AT TRIAL***, American Bar Association, Section of Family Law, Fall CLE Conference, Orlando, FL (November 2002)

***DIVISION OF PROPERTY AND DIVIDING SPECIFIC ASSETS***, University of Houston Law Foundation (June 2002)

***FAMILY LAW FOR THE NON-SPECIALIST***, J. Reuben Clark Law Society (April 2002)

***DIVISION OF PROPERTY ON DIVORCE***, University of Houston Law Foundation (September 2001 and September 2002)

***FAMILY LAW UPDATE***, Ten Hot Topics in Family Law, Collin County Bench/Bar Conference (June 2000)

***FAMILY LAW UPDATE***, J. Reuben Clark Law Society (June 2000)

***DIVISION OF PROPERTY ON DIVORCE***, University of Houston Law Foundation (April 2000)

***FAMILY LAW DISCUSSION***, J. Reuben Clark Law Society (October 1999)

***BUSINESS VALUATIONS IN DIVORCE AND CROSS-EXAMINATION OF A VALUATION EXPERT***, American Bar Association, Family Law Section, San Diego (October 1999)

***OPENING STATEMENT - JURY OR NONJURY***, 25<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 1999)

***UPDATE ON FAMILY LAW***, Dallas Women's Lawyers Association (December 1998)

***FAMILY LAW FOR THE NON-SPECIALIST***, Dallas Bar Association (December 1998)

***OBTAINING RECORDS FROM NON-PARTIES***, 24<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 1998)

***DISCOVERY UPDATE***, Dallas Bar Association Friday Clinic (December 1996 and July 1998)

***OPENING AND CLOSING THE FILE***, Family Law Conference for the General Practitioner and Legal Assistant, South Texas College of Law (February 1998 and February 1999)

***DISCOVERY UPDATE***, 23<sup>rd</sup> Annual Advanced Family Law Course, State Bar of Texas (August 1997)

***DISCOVERY UPDATE***, 22<sup>nd</sup> Annual Advanced Family Law Course, State Bar of Texas (August 1996)

***BUSINESS VALUATION IN DIVORCE***, Dallas Chapter Texas Society of Certified Public Accountants Fifth Annual Divorce Conference (September 1996, September 1998)

***DISCOVERY***, Dallas Bar Association Family Law Training Seminar (October 1996)

***ATTORNEY'S FEES***, Family Law Practice Institute, University of Houston (September 1996)

### **CONTINUING LEGAL EDUCATION LEADERSHIP**

***COURSE DIRECTOR***, Innovations in Child Custody Litigation 2021, State Bar of Texas (May 2021)



***CO-COURSE DIRECTOR***, 39<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas (August 2013)

***CO-COURSE DIRECTOR, INNOVATIONS – BREAKING BOUNDARIES IN CUSTODY LITIGATION***, The University of Texas School of Law (January 2012)

***COURSE DIRECTOR***, Collaborative Law Course, State Bar of Texas (March 2011)

***CO-COURSE DIRECTOR***, New Frontiers in Marital Property Law, State Bar of Texas (October 2010)

***ASSISTANT COURSE DIRECTOR***, Collaborative Law Course, State Bar of Texas (2010)

***MODERATOR***, Collin County Bench/Bar Conference (2000)

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State Bar of Texas, May 2012  
*Licensed before:* Northern District of Texas, Eastern District of Texas, and the Supreme Court of the United States.
  
- **Bachelor of Arts**, Vanderbilt University College of Arts and Sciences, May 2008.  
*Magna Cum Laude* with High Honors

### Professional Experience

- **Partner**, GoransonBain Ausley (2018-present)
- **Associate Attorney**, Atkins O’Toole & Briner, L.L.C.
- **Assistant District Attorney**, Dallas County District Attorney’s Office
  - *Protective Order Unit, Misdemeanor & Family Violence Divisions*
- **Associate Attorney**, The Wright Firm

### Recognition

- D Magazine, “Best Lawyers” (2021)
- D Magazine, “Best Lawyers Under 40” (2020)
- Best Lawyers, “Ones to Watch” (2020)

### Professional Activities

- Texas Academy of Family Law Specialists
- Texas Bar Association
  - Family Law Section Member
  - Women and the Law Section Member
  - College of the State Bar of Texas
- Texas Young Lawyers Association
- Texas Family Law Foundation - Member
  - Bill Review Committee
- Dallas Bar Association
  - Family Law Section Member
  - Board Member – Collaborative Law Section (2019)
  - Women Empowered to Lead (WE LEAD) (2020)
- American Bar Association
  - Family Law Section
- Dallas Area Young Lawyers Association

- 2017 Leadership Class
- Annette Stewart American Inn of Court

### **Volunteer & Community Activities**

- Board of Directors, Jonathan's Place
- Genesis Women's Shelter Young Leaders
- Alumnae, Hockaday School for Girls
  - Chairwoman of the Legal Alumnae Society
  - Class Representative & Fundraising Agent, Class of 2004

### **Published Works & Presentations**

- Moderator, "Assisting Legal Aid (or other Non-Profits) during the Pandemic with Domestic Violence on the Rise," American Bar Association webinar, July 2021.
- Presenter, "Dragnet: Alcohol & Drug Testing & Devices that Actually Work" *Family Law Essentials- Giving Back to Your Community*, 2021, Laredo.
- Guest on the "#Lawyered" Podcast, "Balancing Motherhood and Lawyering," May 2021.
- Co-Author, "Covid-19 and Family Law: What Every Practitioner Needs to Know." Texas Bar Journal, May 2019.
- Author & Presenter, "Understanding 'Just and Right' when Dividing Property in a Divorce," UNT Law Review, 2019.
- Presenter, "Overlap Issues in Criminal Law and Family Law" – 2019 DBA Criminal Law Section, Dallas.
- Presenter, "Drafting Emergency Affidavits" – 2018 Dallas Association of Paralegals Luncheon, Dallas.
- Presenter, "Family Law for Domestic Violence Advocates" – 2016 Latinos Against Domestic Violence Annual Conference, Dallas.
- Author, "Evidentiary Tools in Family Violence Cases" – October 2015 DAYL Headnotes, Dallas.

## PROTECTIVE ORDERS

### **I. Introduction**

This paper discusses the procedural and practical aspects of requesting and obtaining protective orders for acts of family violence, human trafficking, sexual assault, and stalking. Protective order cases often have higher stakes and shorter deadlines than other family law cases. The statutes analyzed throughout this paper carry both humanitarian and preventative purposes. Their core function is not to correct past wrongs or establish liability, but rather to give immediate protection to vulnerable persons. For that reason, it is important for family law attorneys to be knowledgeable about the nuances of protective orders to help victims of family violence, and to defend those wrongfully accused of it.

There are three categories of protective orders under Texas law that will be explored in this paper: (1) Title 4 Protective Orders under the Texas Family Code, (2) Chapter 7B, Texas Code of Criminal Procedure Protective Orders (often “stalking protective orders”), and (3) a Magistrate’s Order for Emergency Protection.

The goal of this paper is to provide a succinct and comprehensive reference tool for these issues when they arise in our family law cases. The authors wish to acknowledge Barbara Nunneley and Hon. Angelina Gooden’s “Presenting Your Case: Protective Orders and Family Violence” which helped in the preparation of this paper.

### **II. Family Violence, Defined**

It is fundamental to understand the definition of family violence when handling protective orders. Most protective orders under Texas Family Code Title 4 and the Texas Code of Criminal Procedure are granted based on an act of “family violence,” as defined by Texas Family Code chapter 71. *See* Tex. Fam. Code § 83.001(a) (temporary ex parte order); §85.001 (final protective order); Tex. Code Crim. Proc. Art. 17.292(a), (m)(1) (magistrate’s emergency protective order); *but see* Tex. Fam. Code §85.002 (protective order can also be issued without a finding of family violence if party violates early protective order by committing act prohibited under Tex. Fam. Code §85.022); Tex. Code Crim. Proc. Art. 17.292(a) (magistrate’s order can also be issued for trafficking, sexual assault, aggravated sexual assault, or stalking).

The term “family violence” is defined as:

- 1) **An act** by a member of a family or household 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 family or household member in fear of imminent physical harm, bodily injury, assault, or sexual assault. *See* Tex. Fam. Code §71.004(1).
- 2) Abuse by a member of the family or household against a child of the family or household, *See* Tex. Fam. Code 261.001(1); or

- 3) Dating violence against a member of a dating relationship or a third party. *See* Tex. Fam. Code §§71.0021, 71.004, *Dukes v. State*, 239 S.W.3d 444, 449 (Tex. App. -- Dallas 2007, pet. ref'd).

**Family** includes individuals related by consanguinity or affinity, former spouses, parents of the same child, a foster child and foster parent. Tex. Fam. Code § 71.003. **Household** consists of persons living together in the same dwelling even if not related. Tex. Fam. Code § 71.005. **Member of a household** includes a person who previously lived in a household.

### **III. Protective Orders under Title 4 of the Texas Family Code**

#### **A. Temporary Ex Parte Protective Orders**

This section discusses how to request and obtain a temporary ex parte protective order under Title 4 of the Texas Family Code Chapter 83.

##### 1) Application

Temporary ex parte protective orders are used to protect members of a family or dating relationship when there is a clear and present danger of family violence. *See* Tex. Fam. Code § 83.001(a).

The following individuals can apply for a protective order or temporary ex parte protective order: (1) an adult member of a family or household; (2) a member of a dating relationship; (3) a third party who is harmed or threatened because the third party is dating or married to a person whom the offending party is dating or married to or used to date or be married to; (4) any adult for the protection of a child; (5) a prosecuting attorney, or (6) the Texas Department of Family and Protective Services. *See* Tex. Fam. Code § 82.002.

There is no limitations period for when a party must request a temporary ex parte protective order under the Family Code. For example, a protective order for violence that happened a year before the filing can be obtained, so long as family violence is likely to occur in the future. However, if the applicant intends to request an ex parte “kick-out order,” the applicant must file within 30 days of living in the residence and the date the incident of family violence occurred. *See* Tex. Fam. Code § 83.006.

The application must state the name and county of residence of each applicant; the name and county of residence of each individual alleged to have committed family violence, the relationships between the applicant(s) and individuals alleged to have committed family violence; a request for one or more protective orders; and whether an applicant is receiving services from the Title IV-D agency in connection with a child support case, and if known, the agency case number for each open case. *See* Tex. Fam. Code § 82.004.

If the applicant is filing because the respondent has violated a previous protective order or a current protective order is about to expire, then the applicant also should be sure to follow the detailed provisions of Family Code sections 82.008 and 82.0085.

## 2) Jurisdiction

To issue a temporary ex parte protective order under the Family Code, the Court must have subject-matter jurisdiction. Personal jurisdiction over the respondent is not required for ex parte temporary protective orders but is required for the issuance of a final protective order.

If an application for a protective order asks the Court to make an initial child-custody determination, then the Court must also have subject-matter jurisdiction under the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA).

## 3) Venue

The proper venue to file an application for a protective order under Title 4 of the Family Code depends on when the application is filed.

*If application is filed before a suit for divorce or SAPCR between the parties:* The application for a protective order can be filed either in the county where the applicant resides, the county where the respondent resides, or any county in which the family violence is alleged to have occurred. *See* Tex. Fam. Code §82.003.

*If application is filed while a suit for dissolution of marriage or SAPCR is pending:* The application for a protective order can be filed in the court where the suit is pending, or in the court where the applicant resides if the applicant resides outside the jurisdiction of the Court where the suit is pending. *See* Tex. Fam. Code §85.062(a).

*If application is filed after a final order in a suit for dissolution of marriage or a SAPCR has been rendered:* The application can be filed in either the court that rendered the final order if the application is filed in the same county as the prior order, or another court that has jurisdiction. *See* Tex. Fam. Code § 85.063(a). The applicant in this instance must also attach a copy of the prior divorce decree or SAPCR order, or a statement that the orders are unavailable, and a copy will be filed with the court before the hearing on the application. *See* Tex. Fam. Code § 82.006; §82.007.

## 4) Fees

An applicant or an attorney representing an applicant seeking a Protective Order may not be assessed a “fee, cost, charge, or expense” by a district or county clerk of the court or a sheriff, constable or other public official or employee in connection with the filing, serving or entering of a protective order for any other service described by Tex. Fam. Code §81.002, including the fee for certifying copies, a court reporter fee, or “a fee for any other service related to a protective order.” However, note that the court may still set a bond for a temporary Ex Parte Protective Order. *See* Tex. Fam. Code § 83.003.

## 5) Contents of Application for Ex Parte Temporary Protective Order

When seeking an ex parte temporary protective order under Texas Family Code, Chapter 83, the application must (1) contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order, and (2) be signed by each applicant under oath that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant. *See* Tex. Fam. Code § 82.009. Therefore, a child victim may write a supporting affidavit for a protective order. *See* Tex. Fam. Code § 82.009(b); *see also* § 84.006 (hearsay statement of child victim of family violence).

An affidavit should be attached to the application that contains *specific* facts supporting a finding of clear and present danger of family violence. Specific past acts or threats of violence, dates of occurrence, and some basis to believe future violence is likely to occur must be set forth in the affidavit. If the Court finds based on the affidavit that there is a clear and present danger of family violence, then and without further notice to the alleged respondent and without hearing, the court may enter a temporary ex parte order for the protection of the applicant and any other members of the family or household of the applicant. *See* Tex. Fam. Code § 83.001(a).

In addition, the court may dispense with the necessity of a bond for a temporary ex parte protective order. *See* Tex. Fam. Code § 83.003.

#### 6) Duration of Temporary Ex Parte Temporary Protective Order

Upon the filing of a temporary ex parte protective order, the Court shall set a date and time for the hearing on a final order. Generally, the court may not set a date later than the 14<sup>th</sup> date after the date the application is filed. *See* Tex. Fam. Code § 84.001. However, if the request is made by the prosecuting attorney in a county with a population of more than two million or in a county in a judicial district that is composed of more than one county, then the hearing may be set on a date and time not later than 20 days after the date the application is filed or a request is made to reschedule a hearing due to lack of service. *See* Tex. Fam. Code §§ 84.002 and 84.003.

The temporary ex parte protective order is valid for the period specified in the order, but not to exceed 20 days. *See* Tex. Fam. Code § 84.002(a). Upon the request of the applicant, the Court may extend the temporary ex parte protective order for additional 20-day periods. *See* Tex. Fam. Code § 83.002(b).

A temporary ex parte order prevails over any other SAPCR order and can offer some protection while awaiting a hearing on a modification order. *See* Tex. Fam. Code § 83.005.

#### 7) Ex Parte “Kick-Out Orders”

If certain requirements are met, a respondent can be excluded from his or her residence under a temporary ex parte protective order. This is commonly referred to as a “Kick-Out Order.”

There are many misconceptions about “Kick-Out Orders,” so it is important for family law practitioners to follow the terms carefully laid out in the Family Code about them. Under Tex. Fam. Code § 83.006, a person may be excluded from the occupancy of their residence by a temporary ex parte protective order only 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 protective order hearing to justify the issuance of the order without notice.

Further, before the court may render a temporary ex parte order excluding a person from their residence, the court must find from the required affidavit and testimony that: (1) the applicant requesting the kick-out order either resides at the home or has resided there within the 30 days before the date the application was filed; (2) the person to be kicked out has within the 30 days before the date of the application was filed committed family violence against a member of the household; and (3) there is clear and present danger that the person to be excluded is likely to commit family violence against a member of the household. *See* Tex. Fam. Code § 83.006.

#### 8) Conflicting Orders

During the time that a temporary ex parte protective order is in effect, a temporary ex parte protective order prevails over any other court order made under Title 5 (Suits Affecting the Parent-Child Relationship) to the extent of any conflict between the orders. *See* Tex. Fam. Code § 83.005.

#### 9) Modifying Temporary Ex Parte Protective Orders

Any individual affected by a temporary ex parte protective order may file the motion at any time to vacate the order. *See* Tex. Fam. Code § 83.004. On the filing of the motion to vacate, the court shall set a date for hearing the motion as soon as possible. *Id.* The statute does not offer specific grounds to vacate the temporary ex parte protective order. As a practical matter, if the respondent is subject to any correlated criminal charges, it is important for the family law attorney to communicate with criminal counsel about any bond requirements, stay-away orders, or other aspect of the criminal case that may be impacted by modifying the protective order.

### **B. Final Protective Orders**

This section discusses how to request and obtain a final protective order under Title 4 of the Texas Family Code chapters 84 and 85.

#### 1) Grounds for a Final Protective Order

The two-pronged grounds for issuance of a final protective order are found in Texas Family Code Section 85.001(a): A trial court shall render a final protective order if it finds at the close of a hearing that (1) family violence has occurred, and (2) family violence is likely to occur in the future. *See* Tex. Fam. Code §85.001(b). *See* Johnson v. Garcia, 2019 WL 4021886 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2019, no pet. h.)(evidence supported protective order).

A court can also issue a final protective order without making the two-pronged finding above if the respondent violated a previous protective order that was in effect at the time the violation occurred. *See* Tex. Fam Code § 85.002. However, entry of a family violence protective order cannot be based upon the respondent's violation of a temporary ex parte protective order. *Taylor v. Taylor*, 2020 WL 4308787 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2020, no pet. h.).



## 2) Prong One: Family Violence has Occurred

The definition of family violence is as follows:

- 1) **An act** by a member of a family or household 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 family or household member in fear of imminent physical harm, bodily injury, assault, or sexual assault. *See* Tex. Fam. Code §71.004(1).
- 2) Abuse by a member of the family or household against a child of the family or household, *See* Tex. Fam. Code §261.001(1); or
- 3) Dating violence against a member of a dating relationship or a third party. *See* Tex. Fam. Code §§71.0021 and 71.004.

There is no requirement under Texas law for actual physical violence to have occurred for the Court to issue a protective order. Angry outbursts are sufficient to support a protective order even though there is no evidence of physical violence. *Burt v. Francis*, 528 S.W.3d 549 (Tex. App.—Eastland 2016, no pet. h.).

As one can see by a careful reading of the statute, the term “family violence” also encompasses a threat that reasonably places the person receiving the threat in fear of imminent physical harm, bodily injury, assault, or sexual assault. Even in circumstances where no express threats are conveyed, the factfinder may nonetheless conclude that an individual was reasonably placed in fear. *Wilmeth v. State*, 808 S.W.2d 703, 706 (Tex. App.—Tyler 1991, no pet.) (noting that even without verbal threats, a reasonable person may be placed in fear by a menacing glance and hand gesture). In determining whether a person is placed in fear of imminent physical harm, the intent of the respondent in his/her actions is not relevant; the sole question is whether the applicant's fear is reasonable. *Bedinghaus v. Adams*, No. 2-08-096-CV (Tex. App.—Fort Worth 2009, no pet.) (mem. op.). It is important to look at the course of conduct between the person making the threat and the victim when determining whether there is sufficient evidence of a threat.

The following situations have not involved physical harm to the applicant, but nonetheless have been confirmed by Texas appellate courts to constitute family violence:

- Evidence of various incidents, in which step-son pulled gun and shot beer cans in demonstration to step-mother, told her he never missed, showed her ammunition and said he always had plenty of it; told her that if she was in his way at family business, something would happen to her; and finally in which he came to her house intoxicated, with a gun, looking for her, and other incidents in which he made threats to her. *Wilkerson v. Wilkerson*, 321 S.W.3d 110 (Tex. App.-Houston [1<sup>st</sup> Dist] 2010, no pet.).
- Ex-boyfriend sent 600 to 800 emails or text messages to a woman, sent her threatening messages, hired a private investigator to follow her, printed derogatory statements about her and sent them to relatives, friends, neighbors, and employer,

and created a blog on the internet referencing her. *Bedinghaus v. Adams*, No. 02-08-096-CV (Tex. App.-Fort Worth 2009, no pet).

- Father's escalating threats, violent gestures, and escalating conduct that reasonably placed family members in fear. *Burt v. Francis*, 528 S.W.3d 549 (Tex. App.—Eastland, 2016, no pet. h.).
- Protective order was entered against Mother's new husband where he threatened father on multiple occasions and father testified that the threats placed him in fear for his safety. *Kitchen v. Lutcavage*, 2020 WL 3468147 (Tex. App.—Austin 2020, no pet.)(mem. op.)

Except for "kickout" orders, there is no time requirement for when the violence must have happened. For example, a protective order for violence that happened a year before the filing can be obtained, so long as family violence is likely to occur in the future.

### 3) Prong Two: Family Violence is Likely to Occur in the Future

There is a long-standing principle that allows Texas courts to infer that history will repeat itself when it comes to family violence. In other words, if a person engaged in abusive conduct in the past, then he or she is considered likely to continue violent behavior in the future. *See Boyd v. Palmore*, 425 S.W.3d 425, 432 (Tex. App.-Houston [1<sup>st</sup> Dist.] 2011, no pet.) (“A finding of a likelihood of future family violence... is not required to be based on a pattern of more than one act of family violence); *see also In re Epperson*, 213 S.W.3d, 541, 543 (Tex. App.—Texarkana 2007, no pet). *In re T.L.S.*, 170 S.W.3d 164, 166 (Tex. App.—Waco 2005, no pet.); *In re M.G.M.*, 163 S.W.3d 191, 202 (Tex. App.—Beaumont 2005, pet. denied); *In re K.A.S.*, 131 S.W.3d 215, 223-25 (Tex. App.—Fort Worth 2004, no pet.); *Ulmer v. Ulmer*, 130 S.W.3d 294, 300-01 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.).

Past incidents of family violence alone have been held to support a finding that family violence is likely to occur in the future. *Teel v. Shifflett*, 309 S.W.3d 597 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2010, pet. denied); *Maples v. Maples*, 602 S.W.3d 23 (Tex. App. -- Tyler 2020, no pet. h.)(husband struck wife in the face and arms, kicked wife with his feet, and discharged a firearm during the assault – this conduct plus evidence of family violence committed by husband during the marriage caused the court to render a 5-year protective order against husband).

Evidence of a single incidence of family violence (including placing the applicant in fear of family violence) is sufficient to meet the standard of evidence necessary to meet the second prong that family violence is likely to occur again in the future. The following cases give some examples of this.

- Even though father never hurt mother, worked out visitation with mother, and did not contact mother for weeks prior to the hearing, father had previously engaged in family violence by blocking mother's car with his body and jumping on its hood, and thereafter continued to harass mother via text messaging. *Boyd v. Palmore*, 425 S.W.3d 425 (Tex. App. -- Houston (1<sup>st</sup> Dist.) 2011, no pet.).

- Father’s alleged threats to his wife and daughter and raising his fists at daughter were sufficient to meet both prongs for a Title 4 Protective Order. *Clements v. Haskovec*, 251 S.W.3d 79, 84 (Tex. App.—Corpus Christi 2008, no pet.).
- *Collier v. State*, 2013 WL 4769267 (Tex. App.—Tyler 2013 (mem. op.))(one incident of violence that includes a threat of future violence was enough to prove that family violence occurred and was likely to occur in the future).

However, *In re J.A.T.*, No. 13-04-004770CV, 2005 WL 1981497 at \*1 (Tex. App.—Corpus Christi, Aug. 18, 2005, no pet.) (mem. op.), the appellate court upheld a finding of no family violence when there was a single incident where the husband pulled the child out of wife’s arms, resulting in the child being pulled between the two.

#### 4) Protective Orders for a Child

If the request for protective order is for a child, the request must contain facts sufficient to show specific violence was perpetrated against the child. *Martin v. Martin*, 2017 WL 4161687 (Tex. App.—El Paso 2017, no pet. h.)(without evidence of bad acts against the children, trial court erred in specifically including children as protected persons in the protective order).

#### 5) Notice to Respondent

A respondent is entitled to reasonable notice of an Application for a Protective Order. Reasonable notice is considered under the statute to be more than 48 hours in advance of the hearing. The court shall reschedule a hearing for a final protective order for a date not later than 14 days after the date set for hearing if a respondent receives service of notice of an application for a protective order within 48 hours before the time set for the hearing. *See* Tex. Fam. Code § 84.004; *See* *Johnson v. Simmons*, 2020 WL 827598 (Tex. App.—Fort Worth, no pet. h.)(Rule 107(H) of the Texas Rules of Civil Procedure does not apply to default family violence protective orders – it is not necessary for the return of service to be on file for at least 10 days).

Due to the expedited nature of protective order proceedings, attorneys seeking a continuance should be procedurally compliant and prepared to articulate a compelling reason. If a respondent seeks a continuance of a protective order hearing, then the request must be in writing as well as conforming to the Rules of Civil Procedure and any applicable local rules of the jurisdiction. *Dempsey v. Dempsey*, 227 S.W.3d 771, 776 (Tex. App.—El Paso 2005, no pet.). The Court of Appeals upheld a trial court’s ruling to deny a pro se respondent’s motion for continuance, in part, because he received nine days’ notice of the hearing and he failed to support his motion by affidavit as required under Tex. R. Civ. P. 251. *Taherzadeh v. Ghaleh-Assadi*, 108 S.W.d 927 (Tex. App. -- Dallas 2003, pet. denied).

#### 6) Hearing – No Right to Jury Trial

A respondent is not entitled to a jury trial in a suit for a Title 4 Protective Order. Texas appellate courts have held that courts, not juries, have the sole responsibility of making the findings necessary for the issuance of a family violence protective order brought under the Texas Family

Code. *Roper v. Jolliffe*, 493 S.W.3d 624 (Tex. App. -- Dallas 2015, pet. denied); *Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet. denied).

## 7) Contents of a Final Protective Order

A protective order can include a broad list of terms which are contained in Texas Family Code § 85.022. Whenever a court enters a final protective order that requires a respondent to do an act or refrain from an act identified in Texas Family Code § 85.022, then the order must include a finding that the applicant has committed family violence and is likely to commit family violence in the future.

In a protective order, the court may prohibit the person found to have committed family violence from the following acts pursuant to Texas Family Code § 85.022:

- (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;
  - (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 or is in the actual or constructive care of 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 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 of the Texas Penal Code.

Under Family Code Section 85.022(a), when a court has found that a person has committed family violence, it may also order the respondent to perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence. This includes:

- (1) complete a battering intervention and prevention program accredited under Article 42.141, Code of Criminal Procedure;
- (2) 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 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.

If a party is ordered to attend counseling under Family Code section 85.022(a)(1), (2), or (3) above, there are deadlines to complete these requirements. Pursuant to Family Code Section 85.024, a respondent shall file with the court an affidavit before the 60<sup>th</sup> 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. He or she must complete the program not later than the 30<sup>th</sup> day before the expiration date of the protective order, or the 30<sup>th</sup> day before the first anniversary of the protective order was issued, whichever is earlier. Tex. Fam. Code § 85.024.

A Title 4 protective order may also include language that broadly affects parties’ rights to children, property, and financial support. A protective order may include a child custody determination. However, a protective order cannot affect the title to any real property. *See* Tex. Fam. Code § 75.023. A Title 4 protective order may include any of the following orders under Tex. Fam. Code § 85.021:

- (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;

- 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 or actual or constructive care 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 child; or
- (5) Award to a party the use and possession of specified property that is community property or jointly owned or leased property.

8) Duration

A Title 4 Protective Order shall last for the period stated in the order, not to exceed two years; or if a period is not stated in the order, until the second anniversary of the date the order was issued. *See* Tex. Fam. Code § 85.025(a).

A protective order may last for more than two years if the court finds that the respondent:

- (1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense;
- (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or
- (3) 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. *See* Tex. Fam. Code § 85.025(a-1).

In *Maples v. Maples*, 602 S.W.3d 23 (Tex. App. -- Tyler 2020, no pet. h.), the court rendered a 5-year protective order against the husband when it found that the husband committed assault and his use of a gun during the assault constituted aggravated assault,

which is a felony. In *Onkst v. Morgan*, 2019 WL 4281913 (Tex. App.—Austin 2019, no pet. h.)(mem. op.), the mother was entitled to a lifetime protective order against the father because two protective orders had been entered against him, and there were findings he had committed family violence and was likely to do so in the future. Similarly, in *Copeland v. Copeland*, 2020 WL 4047969 (Tex. App.—Dallas 2020, no pet. h.)(mem. op.), evidence showing that a father had committed a felony offense involving family violence supported the lifetime duration of a protective order. On the other hand, in *Lewis v. Yancy*, 2020 WL 7251448 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2020, no pet. h.)(mem. op.), the evidence was sufficient to support the issuance of a protective order against a father. However, the court of appeals found that the lifetime duration of the protective order was erroneous in absence of the statutorily required findings and conflicting provisions prohibiting the father from being around the child while simultaneously providing for the father’s possession of the child was improper.

The duration of a protective order may be extended if the person who is the subject of a protective order is confined or imprisoned on the date the protective order would expire, or if the protective order would expire not later than the first anniversary of the date the person is released from confinement or imprisonment. If this is the case, then the period for which the order is effective is extended and the order expires on:

- (1) the first anniversary of the date the person is released from confinement or imprisonment, if the person was sentenced to confinement or imprisonment for more than five years; or
- (2) the second anniversary of the date the person is released from confinement or imprisonment if the person was sentenced to confinement or imprisonment for five years or less. *See* Tex. Fam. Code § 83.025(c).

#### 8. Agreed Protective Orders

Parties can sign agreed protective orders under the Family Code. *See* Tex. Fam. Code § 85.005. However, it may not be an advisable course of action depending on the circumstances. Agreed protective orders are not enforceable as contracts. The Court may not approve an agreement that requires **the applicant** to do or refrain from doing an act under Section 85.022 (criminally enforceable provisions). It is important to note that an agreed protective order that contains the requirements of Family Code section 85.021 (dealing generally with children, property, pets, and exclusion from a residence) is not required to include a finding of family violence; however, an agreed order that contains the contents of section 85.022 (provisions intended to prevent or reduce the likelihood of family violence) must include a finding of family violence. The Court must approve all agreed orders and render an agreed protective order that is in the best interest of the applicant, the family or household, or a member of the family or household. *Id.*

#### 9. Motions to Reconsider

For Title 4 protective orders only, the court may reconsider the need for a final protective order after it has been rendered. *See* Tex. Fam. Code § 85.025 (b-3) stating “Subsection (b) does not apply to a protective order issued under Subchapter A, Chapter 7B, Code of Criminal Procedure.”

However, there are limitations on how frequently this request can be made to the court. Under Family Code § 85.025(b), a person subject to a final 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. *See* Tex. Fam. Code § 85.025(b). After this motion is filed, a person subject to a protective order may only file a subsequent motion after the first anniversary on the date on which the court rendered an order on the previous motion. *See* Tex. Fam. Code § 85.025(b-1).

The Family Code allows either the original applicant or the person subject to the protective order to move the issuing court to reconsider the continuing need for the protective order after one year. By contrast, when a protective order is issued under the Code of Criminal Procedure in response to a sexual assault, the trial court may only rescind the order upon the victim's request, which may be made at any time. *R.M. v. Swearingen*, 510 S.W.3d 630, 634 (Tex. App. -- El Paso 2016, no pet.); *see also* Tex. Code Crim. Proc. Ann. Art. 7B.07(b).

#### **IV. Chapter 7B Protective Orders under Texas Code of Criminal Procedure - Human Trafficking, Sexual Assault and Stalking Protective Orders**

The Texas Code of Criminal Procedure provides for the issuance of protective orders for victims of human trafficking, sexual assault, and stalking.

##### **A. Procedure**

Chapter 7B Protective Orders parallel the procedure for Title 4 Family Violence Protective Orders under the Texas Family Code. Therefore, the form of the application, the content of the orders and the process for the hearing on the final order operate in the same manner as the Title 4 Protective Orders addressed above.

However, in a Chapter 7B Protective Order, the applicant does not need to provide an affidavit to obtain a temporary ex parte protective order. The Court may enter a temporary ex parte order for the protection of the applicant and the applicant's family or household without notice and without hearing if the court finds from the application alone that there is "clear and present danger of sexual assault or abuse, stalking trafficking, or other harm to the applicant. *See* Tex. Code Crim. Proc., Article 7B.002.

##### **B. Venue**

The Texas Code of Criminal Procedure states that the application for a protective order may be filed in a district court, juvenile court having the jurisdiction of a district court, statutory county court, or constitutional county court in one of the following locations: the county in which the applicant resides; the county in which the alleged offender resides; any county in which an element of the alleged offense occurred; or any court with jurisdiction over a protective order under Title 4 of the Family Code involving the same parties named in the application.

##### **C. Applicants**



Unlike Title 4 Family Code protective orders, applicants under Chapter 7B protective orders do not need to know or be in a relationship with one another. The Code of Criminal Procedure grants a trial court authority to issue a protective order “without regard to the relationship between the applicant and the alleged offender” if the applicant is a victim of one of the listed crimes in the statute. *See* Tex. Code Crim. Proc., Article 7B.001(a).

#### **D. Duration**

A protective order under the Code of Criminal Procedure may last up to the lifetime of the offender and the victim or for any shorter period stated in the order. If no duration is stated, the order expires two years after it is issued. *See* Tex. Code Crim. Proc., Article 7B.007(a).

#### **E. Grounds for a Chapter 7B Protective Order**

Unlike Title 4 Family Code protective orders, applications for Chapter 7B protective orders do not need to satisfy the second prong of likelihood for family violence to occur in the future. For a protective order to be issued under the Code of Criminal Procedure, the Court must only find that there are “reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, stalking or trafficking.” Black’s Law Dictionary defines “reasonable grounds” as “substantially probable cause.” If there is sufficient evidence that one of the enumerated offenses has occurred, then the protective order shall be issued.

#### **F. Human Trafficking**

If the Court finds reasonable grounds to believe that the applicant is a victim of the trafficking provisions of the Penal Code, and is younger than 18 years of age, or without regard to his/her age is reasonably placed in fear of further harm from the alleged offender, the Court shall issue a Chapter 7B protective order.

#### **G. Sexual Assault**

If the Court finds reasonable grounds to believe that the applicant for a protective order is the victim of a sexual assault, then the Court shall issue a Chapter 7B protective order. The offenses include continuous sexual abuse of a child (2 or more acts of sexual abuse in a period that is 30 or more days in duration), indecency with a child, sexual assault of a victim of any age, or aggravated sexual assault at any age. *See* Tex. Penal Code §§ 21.02, 21.11, 22.011, and 22.021.

#### **H. Stalking**

If the Court finds reasonable grounds to believe that the applicant is a victim of the stalking provisions of the Penal Code, then the court shall issue a protective order under Chapter 7B of the Code of Criminal Procedure. The broad definition of stalking is found in section 42.072 of the Texas Penal Code:

- 1) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
  - i. constitutes an offense under Section 42.07, or that the actor knows or reasonably should know the other person will regard as threatening:
    1. bodily injury or death for the other person;
    2. bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or
    3. that an offense will be committed against the other person's property;
  - ii. causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
  - iii. would cause a reasonable person to:
    1. fear bodily injury or death for himself or herself;
    2. fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;
    3. fear that an offense will be committed against the person's property; or
    4. feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended. *See Lopez v. Crisanto*, 2019 WL 4058589 (Tex. App.—El Paso 2019, no pet. h.)(evidence supported protective against husband’s girlfriend for stalking wife by sending wife multiple obscene photos of girlfriend and husband engaged in sex).
- 2) An offense under this section is a felony of the third degree, except that the offense is a felony of the second degree if the actor has previously been convicted of an offense under this section or of an offense under any of the following laws that contains elements that are substantially similar to the elements of an offense under this section:
  - i. the laws of another state;
  - ii. the laws of a federally recognized Indian tribe;
  - iii. the laws of a territory of the United States; or
  - iv. federal law.
- 3) For purposes of this section, a trier of fact may find that different types of conduct described by Subsection (a), if engaged in on more than one occasion, constitute conduct that is engaged in pursuant to the same scheme or course of conduct.
- 4) In this section:
  - i. “Dating relationship,” “family,” “household,” and “member of a household” have the meanings assigned by Chapter 71, Family Code.
  - ii. “Property” includes a pet, companion animal, or assistance animal, as defined by Section 121.002, Human Resources Code.

A careful read of the stalking definition reveals that a person can violate the stalking statute through harassment, which is defined in Section 42.07 of the Texas Penal Code. This can be an important fallback if a respondent's behavior does not rise to the fear-inducing level of stalking defined above, then it may still be able to be found in the harassment provisions. A person harasses another if, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another," he or she "sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another. Tex. Penal Code. § 42.07(a)(7). At least one court has held that the communications at issue under this statute do not have to be sent directly to the applicant, but just need to reach the applicant. *See Onkst v. Morgan*, No. 3-18-00367-CV (Tex. App. -- Austin 2019, no pet. h.)(mem. op.).

## **V. Magistrate's Order for Emergency Protection**

When a person is arrested for family violence, as defined by Chapter 71 of the Texas Family Code, or is arrested for sexual assault, stalking or human trafficking, the victim is eligible for a Magistrate's Order for Emergency Protection through law enforcement. This is authorized by Texas Code of Criminal Procedure, Article 17.292. The procedures for presenting a Magistrate's Order for Emergency Protection are determined by a local magistrate and law enforcement.

A Magistrate's Order for Emergency Protection does not require a conviction. An arrest alone is sufficient grounds for issuing the order. In fact, it has been held that issuing the order without a hearing does not violate due process rights because of the temporary nature of the order. *Ex Parte Flores*, 130 S.W.3d 100 (Tex. App. -- El Paso 2003, no pet.). If approved, the Magistrate's Order for Emergency Protection is effective immediately and must be served on the Respondent either in person or electronically. Tex. Code Crim. Proc., Article 17.292(j).

### **A. Request and Issuance**

A Magistrate's Order for Emergency Protection may be requested on the Magistrate's own motion, or on the request of a victim of the offense, the victim's guardian, a peace officer, or the attorney representing the state.

Once requested, the issuance of the Magistrate's Order for Emergency Protection by the Magistrate is *discretionary* after an arrest for family violence, sexual assault, stalking or human trafficking. However, issuance is *mandatory* if the arrest is for family violence coupled with an offense that involves serious bodily injury or a deadly weapon used or displayed during the assault.

### **B. Contents**

The Texas Code of Criminal Procedure states that the Magistrate may prohibit the arrested person from the following:

- Committing family violence, assault or assault on the protected person;
- Committing human trafficking or stalking;
- Communicating directly with a member of the family or household or with the protected person under the order in a threatening or harassing manner;

- Communicating a threat through any person to a member of the family or household to the person protected;
- Going to or near a minimum distance from a protected person’s home, school, or place of employment (this also applies to members of the protected person’s family or household);
- Possessing a firearm and suspending any license to carry a handgun by the arrested person, unless he or she is a peace officer;
- Ordering participation in a GPS monitoring program.

It is important to note that Magistrate’s Orders for Emergency Protection are not necessarily “no contact” orders between the protected person and arrested person. It is important to read the order carefully. Generally, Magistrate’s Orders for Emergency Protection only prohibit certain types of unwanted communication, such as communicating in a threatening or harassing manner. Only on a finding of good cause may a Magistrate prohibit the arrested person from communicating in any manner with a protected person, unless through counsel or a person appointed by the Court. *See* Tex. Code Crim. Proc., Article 17.292. This is especially important to look for in the order if the arrested person and protected person are co-parents together.

### **C. Duration**

The Magistrate’s Order for Emergency Protection is effective immediately. If no deadly weapon was present, the Order will last a minimum of 31 days and a maximum of 61 days. If a deadly weapon was used or even displayed, the Order will last a minimum of 61 days and a maximum of 91 days. The statute does not provide for an extension of a Magistrate’s Order for Emergency Protection. *See* Tex. Code Crim Proc., Article 17.292(j).

### **D. Conflicting Orders**

There may be other family law orders in effect or protective order applications pending at the time a Magistrate’s Order for Emergency Protection is issued. If this happens, it is important to advise your client which one is controlling.

If there is a Title 5 SAPCR order or Title 1 divorce decree in effect between the parties before the issuance of the Magistrate’s Order for Emergency Protection, then the Magistrate’s Order for Emergency Protection supersedes and controls over the terms of the family law order.

If an applicant files a child custody or divorce suit after the issuance of a Magistrate’s Order for Emergency Protection, the applicant must inform the family law court about the existence of any protective order issued under Title 4 of the Texas Family Code; under subchapter A, Chapter 7B, Code of Criminal Procedure; or under Article 17.929, Code of Criminal Procedure. This also applies as to the status of any pending application for a protective order under these statutes. *See* Tex. Fam. Code § 6.405(a); §160.6035.

If an applicant later obtains a Title 4 Ex Parte Protective Order after the Magistrate’s Order for Emergency Protection, then the Code of Criminal Procedure states that the Magistrate’s Order for Emergency Protection prevails unless the Court signing the Ex Parte Protective Order makes a

specific finding that the Temporary Ex Parte Order supersedes the Magistrate's Order for Emergency Protection. *See* Tex. Code Crim. Proc., Article 17.292(j).

### **E. Modifications**

After notice and hearing, the Magistrate may modify all or part of a Magistrate's Order for Emergency Protection. The Magistrate's Court must make the following findings to modify a prior order under: (1) the original order is unworkable; (2) the modification will not place the victim at greater risk than the original order; and (3) the modification will not in any way endanger a protected person.

For example, it may be grounds to modify a Magistrate's Order for Emergency Protection if the protected person and arrested person live, work, or go to the same school in the same location, or need to exchange custody of children pursuant to a prior order.

### **F. Violations**

A respondent subject to a Magistrate's Order for Emergency Protection must abide by the order. It is a Class A misdemeanor should a respondent violate a Magistrate's Order for Emergency Protection. However, this may be enhanced to a 3<sup>rd</sup> Degree Felony if it is shown that the respondent has been previously convicted two or more times of violating Texas Penal Code § 25.07 (violation of certain court orders or conditions of bond in a family violence, child abuse or neglect, sexual assault or abuse, indecent assault, stalking, or trafficking case).

## **VI. Violations and Legal Consequences of an Affirmative Finding of Family Violence**

A person commits a crime if the person knowingly or intentionally violates a protective order. Texas Penal Code 25.07(a). Reconciliatory actions or agreements made by persons affected by a protective order do not affect the validity of the order or the duty of a peace officer to enforce it. Texas Penal Code 25.07(d).

Violating a protective order is a Class A misdemeanor (maximum of one year in jail and/or a \$4,000 fine), unless the defendant has previously been convicted 2 or more times or has violated the protective order by committing an assault or the offense of stalking, in which event the offense is a third-degree felony (2-10 years in prison and/or a \$10,000 fine). Texas Penal Code 25.07(g). A person who violates a protective 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 6 months or both.

Most protective orders discussed in this paper include an affirmative finding of family violence. This finding carries enormous consequences for the respondent that should carefully be explained to the respondent and argued before the court. Some of the consequences of a finding include:

- a. Grounds for objecting to mediation (Tex. Fam. Code §§ 6.602(d); 153.0071(f));
- b. Removes 60-day divorce waiting period (Tex. Fam. Code § 6.702(c));

- c. For protective orders, family violence creates the grounds/basis for:
  - i. For presumption that family violence has occurred and is likely to occur in the future (Tex. Fam. Code § 81.0015);
  - ii. For rendering a protective order that is in effect for longer than two years if person committed felony family violence against the applicant or a member of the applicant's family or household (Regardless of charge or conviction) (Tex. Fam. Code § 85.025(a-1)(1));
  - iii. For rendering a protective that is longer than two years if the person was subject to two or more earlier protective orders rendered to protect the same person, and both were found that respondent had committed family violence and it was likely to occur in the future;
  - iv. For issuing a magistrate's emergency protective order (Tex. Fam. Code § 85.025(a-1)(3));
  - v. For issuing a kick-out order to remove someone from a residence (Tex. Code Crim. Proc. art. 17.292(a) (emergency order); Tex. Fam. Code § 81.001 (final protective order), § 83.006(b) (kick-out order), § 85.025(a-1) (duration of order);
  - vi. Requirement that offender will pay court fees and costs, and court has discretion to assess attorney's fees (Tex. Fam. Code § 81.003, 81.005).
  - vii. Requires suspension of license to carry a handgun (Tex. Fam. Code § 85.022(d));
- d. Provides evidence of mistreatment/abuse to support temporary emergency jurisdiction over a child custody allegation (*See* Tex. Fam. Code § 152.204).
- e. Grounds for divorce based on cruelty (*See* Tex. Fam. Code § 6.002);
- f. Grounds to decline to enter judgment based on mediated settlement agreement (Tex. Fam. Code § 153.0071(e-1));
- g. Grounds for granting spousal maintenance (Tex. Fam. Code § 8.051(1));
- h. Grounds for determining whether to deny, restrict or limit the possession of a child by a parent who is appointed as a possessory conservator (Tex. Fam. Code § 153.004(c); *see also* Tex. Fam. Code § 153.004(e), (f));
- i. Grounds for not allowing a parent to have access to a child when a history or pattern of family violence is shown by a preponderance of the evidence (Tex. Fam. Code § 153.004(d); *see* Tex. Fam. Code § 153.004(e), (f));
- j. Basis for rebuttable presumption that it is not in the child's best interest to have unsupervised visitation (Tex. Fam. Code § 153.004(e), (f));
- k. Removes the presumption that the appointment of the child's parents as joint managing conservators is in the child's best interest (Tex. Fam. Code § 153.131(b));
- l. Constitutes a material and substantial change for a SAPCR modification. (Tex. Fam. Code § 156.1045(a); *see* Tex. Fam. Code § 156.102(b)(1)).
- m. Prohibits the offender from being appointed as a guardian of a ward or proposed ward who is subject to the protective order (Tex. Est. Code § 1104.358);
- n. Grounds for harsher criminal penalties for future family violence offenses and witness tampering (Tex. Pen. Code § 36.05(e-2)); and
- o. Can justify prosecution and conviction under the Brady Bill (required criminal history checks and waiting periods to purchase a firearm); (*see* 18 U.S.C. § 922(g)(8)).

## **VII. Conclusion**

Nearly all family lawyers will encounter a protective order case at some point in their career. The factual situations that give rise to these cases are urgent, dangerous, and will require prompt thinking both in and out of the courtroom. For this reason, family lawyers must always be armed with knowledge about the various types of protective orders to help victims of family violence, and to defend those wrongfully accused of it.