

ORDER OF PROTECTION JUDICIAL BENCHCARD

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I. LEGISLATIVE PURPOSE OF THE ORDER OF PROTECTION ACT (T.C.A. § 36-3-618)

- Recognize the seriousness of domestic abuse as a crime to assure that the law provides a victim enhanced protection from domestic abuse.
- Recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers.
- Official response shall stress enforcing laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.

II. EX PARTE ORDERS: ORDER WITHOUT RESPONDENT PRESENT

Determine petitioner eligibility (T.C.A. § 36-3-601(5)/ T.C.A. § 36-3-602)

- Is the petitioner a domestic abuse victim? (relationship required)
 - Adults or minors who are current or former spouses;
 - Adults or minors who live together or who have lived together;
 - Adults or minors who are dating or who have dated or who have or who have had a sexual relationship;
 - Adults or minors related by blood or adoption;
 - Adult or minor children who are related or were formerly related by marriage;
 - Adult or minor children of a person in a relationship described above.
- Is the petitioner a sexual assault victim? (T.C.A. § 36-3-601(10)) (no relationship requirement for sexual assault victim) The petitioner has been subjected to, threatened with, or placed in fear of any form of:
 - Aggravated rape;
 - Rape;
 - Statutory Rape;
 - Rape of a Child;
 - Aggravated Sexual Battery;
 - Sexual Battery;
 - Sexual Battery by an Authority Figure.
- Is the petitioner a stalking victim? (T.C.A. § 36-3-601(11), T.C.A. § 36-17-315) (no relationship requirement for stalking victim) The petitioner has been subjected to, threatened with, or placed in fear of:

- a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
- Course of Conduct means a pattern of conduct composed of a series of two (2) or more separate, noncontinuous acts evidencing a continuity of purpose, including, but not limited to, acts in which the defendant directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to a person, or interferes with a person's property.
- Harassment means "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress (significant mental suffering), and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
- The petitioner and the respondent can be adults or minors.
- If the petitioner is a minor, the statute provides that the following may sign the petition: (T.C.A. 36-3-602(b))
 - At least one parent or the minor's guardian;
 - A caseworker, but in that case, the petition may not be filed against the minor's parent or guardian;
 - The Guardian ad litem if the court has appointed one;
 - The Department of Children's Services if DCS is a party.
- For good cause shown, the court may issue an ex parte order of protection pursuant to T.C.A. § 36-3-605 upon a sworn petition filed by a law enforcement officer responding to an incident of domestic abuse who asserts in the petition reasonable grounds to believe that a person is in immediate and present danger of abuse and that person has consented to the filing in writing (T.C.A. § 36-3-619)
- The law enforcement officer may seek the ex parte order on behalf of the person, regardless of the time of day or whether or not an arrest has been made. (T.C.A. § 36-3-619)

- Venue for a petition for an order of protection, and all other matters relating to orders of protection, shall be in the county where the respondent resides or the county in which the domestic abuse, stalking, or sexual assault occurred. If the respondent is not a resident of Tennessee, the petition may be filed in the county where the petitioner resides.

Note: There is no statute of limitations on the abuse for filing an order of protection, and there is no requirement to file a police report or other criminal charges to obtain order of protection relief. Venue is waived unless the respondent appears in court and objects to the venue. Venue may be waived and is waived when a defendant “defends upon the merits without first interposing an objection to improper venue.” Kane v. Kane, 547 S.W.2d 559, 560 (Tenn. 1977), Sw. Williamson Cnty. Comm. Ass’n v. Saltsman, 66 S.W.3d 872, 882 (Tenn. Ct. App. 2001).

Determine whether there is good cause (T.C.A. § 36-3-605)

- Is there an immediate and present danger of abuse to the petitioner? Consider the following:
 - A history of violence;
 - Respondent’s pattern of conduct;
 - Petitioner’s injuries;
 - Petitioner’s fear of retaliation;
 - Respondent’s access to weapons;
 - Respondent’s history of stalking;
 - Respondent’s criminal record;
 - Respondent’s use of drugs or alcohol;
 - Respondent’s threats of suicide;
 - Respondent’s history of mental illness;
 - Threats to attack the petitioner, the children, or other family members;
 - Threats to animals (pets);
 - Threats or attacks on family or household members.

Court Costs (T.C.A. § 36-3-617)

Notwithstanding any other provision of law to the contrary, no victim shall be required to bear the costs, including any court costs, filing fees, litigation taxes or any other costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an ex parte order of protection, order of protection, or a petition for either such order, whether issued inside or outside of the state. If the court, after the hearing on the petition issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent.

- There is no initial fee for a petition to the court for any action on an order of protection.
- If the court does not issue or extend an order of protection, the court may assess all court costs, filing fees, litigation taxes and attorney fees against the petitioner if the court finds by clear and convincing evidence: (a) the petitioner is not a domestic abuse victim, stalking victim or sexual assault victim and that such determination is not based on the fact that the petitioner requested that the petition be dismissed, failed to attend the hearing or incorrectly filled out the petition; AND (b) the petitioner knew that the allegation of domestic abuse, stalking or sexual assault was false at the time the petition was filed.

Important!

- The office of the clerk of court shall provide forms that may be necessary to seek a protection order (T.C.A. § 36-3-604).
- Courts shall use the Administrative Office of the Courts

forms. (T.C.A. § 36-3-604) www.tncourts.gov.

- Ex Parte orders stay in effect until the time of the hearing on the matter. (T.C.A. § 36-3-605).
- Within fifteen (15) days of service of an order on the respondent a hearing shall be held. If a hearing is not held within 15 days, the ex parte order expires and the case assumes the posture of a case where no ex parte OP issued. See Kite v. Kite, 22 S.W.3d 803, 805 (Tenn. 1997)
- If the petitioner does not meet the standard of proof for the ex parte order, the judge is required to set a hearing for review. The court shall cause a copy of the petition and notice of the date set for the hearing on such petition, as well as a copy of any ex parte order of protection, to be served upon the respondent at least five (5) days prior to such hearing.
- If the ex parte order is dismissed, the judge must hear the pending petition.

Relief Available:

- Directing the respondent to refrain from committing or threatening to commit domestic abuse, stalking or sexual assault against the petitioner or the petitioner’s minor children;
- Prohibiting the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly;
- Prohibiting the respondent from stalking the petitioner. (See above definition.)

Enforcement of the Ex Parte Order:

An ex parte order of protection can be enforced by arrest once the respondent has been served or has actual knowledge of the order. (T.C.A. §36-3-611) Note: Violations of ex parte orders of protection do not require physical contact.

Enforcement Remedies of the Ex Parte Order:

- Civil Contempt (T.C.A. § 36-3-610/T.C.A. § 36-3-612)
- Criminal Contempt (T.C.A. § 36-3-610/T.C.A. § 36-3-612)
- Warrantless Arrest (T.C.A. § 36-3-611(a))

III. ORDERS OF PROTECTION

If the court finds that the Petitioner has proven the allegations in the petition by a preponderance of the evidence, then the court can grant certain protections to the petitioner against further domestic abuse, sexual assault, and stalking: (T.C.A. § 36-3-606) (Note that, depending upon the population of the county, “court” can mean a court of record with jurisdiction over domestic relation matters, the general sessions court, or a judicial commissioner. See T.C.A. §36-3-601.)

- Directing the respondent to refrain from committing domestic abuse, stalking, or sexual assault, or threatening to do the same;
- Prohibiting the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly;
- Prohibiting the respondent from stalking the petitioner;
- Granting to the petitioner possession of the residence or household to the exclusion of the respondent by evicting the respondent, by restoring possession to the petitioner, or by both;
 - Ordering this relief does not change ownership of the property.
- Directing the respondent to provide suitable alternate

housing for the petitioner when the respondent is the sole owner or lessee of the residence or household;

- Awarding temporary custody of, or establishing temporary visitation rights with regard to, any minor children born to or adopted by the parties;
 - Courts should consider the history of domestic violence and the violent behavior of the respondent in setting visitation and craft custody orders that will protect the petitioner and the minor children.
- Awarding financial support to the petitioner and such persons as the respondent has a duty to support. Except in cases of paternity, the court shall not have the authority to order financial support unless the petitioner and respondent are legally married;
 - Child support should be set based upon the Tennessee Child Support Guidelines. The Guidelines allow for deviations.
- Directing the respondent to attend available counseling programs that address violence and control issues or substance abuse problems. A violation of a protection order or part of such order that directs counseling may be punished as criminal or civil contempt;
- Directing the care, custody, or control of any animal owned, possessed, leased, kept, or held by either party or a minor residing in the household. In no instance shall the animal be placed in the care, custody, or control of the respondent, but shall be placed in the care, custody and control of the petitioner or in an animal foster situation;
- Directing the respondent to immediately and temporarily vacate a residence shared with the petitioner, pending a hearing on the matter;
- Directing the respondent to pay the petitioner all costs, expenses and fees pertaining to the petitioner's breach of a lease or rental agreement for residential property if the petitioner is a party to the lease or rental agreement or if the court finds that continuing to reside in the rented or leased premises may jeopardize the life health or safety of the petitioner or the petitioner's children. This does not alter the terms, liability, or parties to the lease agreement;
- An order of protection issued pursuant to this part that fully complies with 18 U.S.C. § 922(g)(8) shall contain the disclosures set out in § 36-3-625(a).
 - T.C.A. § 36-3-625 requires that a judge, upon issuing an order that complies with provisions of 18 U.S.C.S. § 922 (g) (8), order the respondent to terminate physical possession of firearms by any lawful means within 48 hours of issuance of the order.

Note: Respondent must complete an Affidavit of Firearm Dispossession form and return it to the court.

- The Court is not limited to the relief specifically enumerated in the statute. To be effective, Orders of Protection must include all necessary protection against future abuse, given the needs of the victim.
- Other remedies may include:
 - Payment of utilities;
 - Cost of replacement of locks;
 - Use of an automobile;
 - Return of immigration and other important papers;
 - Restitution for property damage.

Findings

- Courts should make findings of fact regarding the order of protection. Findings should reflect the grounds for the order of protection; whether domestic abuse, sexual assault, or stalking.

Important! Agreed Orders of Protection

- The Respondent and the Petitioner may enter into an agreed order of protection, or a court-approved consent agreement. This is no different than an order of protection that was not entered into by agreement. The same protections and enforcement remedies are still available, including prohibitions on weapons as set forth in T.C.A. § 39-17- 1351(c)(8) and T.C.A. § 39-17-1316(a)(1).

Weapons

- A person under an order of protection cannot ship, transport, possess, receive, or transport a firearm. (18 U.S.C.S. § 922 (g)(8), T.C.A. § 36-3-625)
- T.C.A. § 36-3-625 requires that a judge, upon issuing an order that complies with provisions of 18 U.S.C.S. § 922 (g) (8), must:
 - Transfer possession to a third party who is not prohibited from possessing firearms, within forty-eight (48) hours.
 - If the firearm is registered under the National Firearms Act, compiled in 26 U.S.C.S. §§ 5801 et seq., that requires the approval of any state or federal agency prior to the transfer of the firearm, the respondent may comply with the dispossession requirement by having the firearm or firearms placed into a safe or similar container that is securely locked and to which the respondent does not have the combination, keys or other means of normal access.
 - If the respondent is licensed as a federal firearms dealer or a responsible party under a federal firearms license, the determination of whether such an individual possesses firearms that constitute business inventory under the federal license shall be determined based upon the applicable federal statutes or the rules, regulations and official letters, rulings and publications of the bureau of alcohol, tobacco, firearms and explosives. The order of protection shall not require the surrender or transfer of the inventory if there are one (1) or more individuals who are responsible parties under the federal license who are not the respondent subject to the order of protection.
- Upon issuance of an order of protection that fully complies with 18 U.S.C.S. § 922(g)(8), the order shall include on its face the following disclosures:
 - That the respondent is required to dispossess the respondent by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms, of all firearms the respondent possesses within forty-eight (48) hours of the issuance of the order;
 - That the respondent is prohibited from possessing a firearm for so long as the order of protection or any successive order of protection is in effect, and may reassume possession of the dispossessed firearm at such time as the order expires or is otherwise no longer in effect; and

- Notice of the penalty for any violation of T.C.A. § 36-3-625(a) or T.C.A. § 39-17-1307(f).
- A person under an order of protection cannot have a permit to carry a handgun. (T.C.A. § 39-17-1351(c)(8))
- A person cannot sell a firearm to anyone who is prohibited by a qualifying order of protection. (T.C.A. § 39-17-1316(a)(1) and 18 U.S.C.S. § 922(d)(8))
- A person who possesses a firearm and is under a qualifying order of protection is subject to a class A misdemeanor. (T.C.A. § 36-3-625, T.C.A. § 39-17-1307, T.C.A. § 39-13-113)

IV. ENFORCEMENT REMEDIES AND VIOLATIONS

A violation of an order of protection could result in or all of the following:

- Civil Contempt: (T.C.A. §29-9-102)/T.C.A. § 36-3-610/T.C.A. § 36-3-612
 - Imprisonment until the act is performed
 - May impose a civil penalty of \$50
 - Bond
- Criminal Contempt: (T.C.A. §29-9-103/T.C.A. § 36-3-610/T.C.A. § 36-3-612)
 - Imprisonment
 - Fine up to \$50
- Class A Misdemeanor (T.C.A. §39-13-113(g))
 - Fine not less than \$100 nor more than \$2,500
 - Any sentence of incarceration shall be served consecutively to sentence for any other offense that is based in whole or in part on the same factual allegations. However, sentence based out of same facts can be served concurrently.
- 5 or 10 Year Extension (T.C.A § 36-3-605 (d))
- Aggravated Assault (T.C.A. § 39-13-102(c)).
 - If an order of protection is in place before the assault, aggravated assault becomes a Class C felony. (T.C.A. §39-13-102(c)) Stalking becomes Aggravated Stalking and is a Class E felony if there is an OP in effect at the time of the stalking. (T.C.A. §39-17-315(c)(1)(E))
- Unlawful Possession of a Firearm (T.C.A. § 36-3-625, T.C.A. § 39-17-1307)

Civil and Criminal Contempt are available for both the ex parte order and the order of protection. (T.C.A. § 36-3-610/ T.C.A. § 36-3-612)

Violation of Protective Order (T.C.A. § 39-13-113) only applies in cases where:

- The person received notice of the request for an order of protection or restraining order;
- The person had an opportunity to appear and be heard in connection with the order of protection or restraining order;
- The court made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse, sexual assault, or stalking.

Note: Tennessee law makes the violation of a protective order a misdemeanor crime of domestic violence.

V. EXTENSIONS OF THE ORDER OF PROTECTION (T.C.A. § 36-3-608)

Orders of Protection are ordered for a definite period of time not to exceed one year. However, orders can be extended upon motion. When extending an order of protection, the court should consider the following:

- Has the order of protection been effective in stopping the violence and keeping the respondent away?
- Does the petitioner fear that the respondent will continue the abusive behavior that resulted in the order of protection?

If the defendant is convicted of an order of protection violation, the order can be extended upon the petitioner's motion or the judge's own motion. (T.C.A. § 36-3-605(d))

The initial petition must have been served according to T.C.A. § 36-3-605(c).

- The order may be extended upon the petitioner's motion or sua sponte.
- If the respondent is found to be in violation of the order, the court may extend the order of protection up to five years or up to ten years on the second or subsequent violation. (T.C.A. § 36-3-605(d)). A party seeking a modification or extension only needs to prove the allegation of domestic abuse, stalking or sexual assault by a preponderance of the evidence. See *Gibson v. Bikas*, No. E2017-00883-COA-R3-CV, 2018 Tenn. App. LEXIS 110, *19 (Tenn. App. Feb. 28, 2018); *Wadhvani v. White*, No. M2015-01447-COA-R3-CV, 2007 Tenn. App. LEXIS 7, 2007 WL 27329 (Tenn. App. Jan. 3, 2007); *Cardwell v. Hutchinson*, No. E2009-02680-COA-R3-CV, 2010 Tenn. App. LEXIS 733, 2010 WL 4810671 (Tenn. App. Nov. 24, 2010)

Note: If a divorce complaint is filed, the order of protection shall remain in effect until the court in which the divorce action lies modifies or dissolves the order. (T.C.A. §36-3-603)

VI. Full Faith and Credit (T.C.A. § 36-3-606(e), 36-3-622)

- An order of protection issued pursuant to this part shall be valid and enforceable in any county of the state. T.C.A. § 36-3-606(e)
- Any valid order of protection from another state shall be afforded full faith and credit.
- For foreign orders to be valid in this state the respondent must have had notice and an opportunity to be heard before the order was issued.
- Regardless of whether a foreign order of protection has been filed in this state pursuant to T.C.A. § 36-3-622, a law enforcement officer may rely upon a copy of any such protection order and may also rely upon the statement of any person protected by the order that the order remains in effect.
- Mutual orders of protection shall not be enforceable against a petitioner unless the respondent filed a cross or counter petition, and the court made specific findings against the petitioner.