

ORDER OF PROTECTION JUDICIAL BENCHCARD

TNCOALITION.ORG | 615.386.9406 | 800.289.9018

July 2022

II. ORDER OF PROTECTION

(See **I. Ex Parte Orders of Protection Bench Card** for criteria to determine petitioner eligibility (T.C.A. § 36-3-601(5)/T.C.A. § 36-3-602)

Service T.C.A. § 36-3-605(c)

A copy of the petition and notice of the date set for the hearing on such petition, as well a copy of any ex parte order of protection shall be served upon the respondent at least five (5) days prior to such hearing.

An ex parte order, the original summons, and certified summons issued shall be personally served upon Respondent. However, if the respondent is not a resident of Tennessee, service of process shall be made by lodging, by the plaintiff, the ex parte order, the original summons, and certified summons with the secretary of state, who shall send the certified copy by registered or certified return receipt mail pursuant to §§ 20-2-215 and 20-2-216.

Service T.C.A § 36-3-609

(a) If the respondent has been served with a copy of the petition, notice of hearing, and any ex parte order issued pursuant to § 36-3-605(c), any subsequent order of protection shall be effective when the order is entered.

(b) (1) As used in subsection (a), service upon a party or counsel shall be made by delivering to such party or counsel a copy of the order of protection, or by the clerk mailing it to the party's last known address. In the event the party's last known address is unknown and cannot be ascertained upon diligent inquiry, the certificate of service shall so state. Service by mail is complete upon mailing.

(2) Notwithstanding § 16-15-902, an ex parte order of protection may be served within one (1) year of issuance.

Findings

If the court finds that the Petitioner has proven the allegation of domestic abuse, stalking, sexual exploitation of a minor, sexual assault, or a human trafficking offense by a preponderance of the evidence, the court may, at that time, issue and order of protection for a definite period of time, not to exceed one (1) year. See T.C.A. § 36-3-605(b).

Courts should make findings of fact regarding the order of protection. Findings should reflect the grounds for the order of protection; whether domestic abuse, stalking, sexual exploitation of a minor, sexual assault, or a human trafficking offense..

The Order of Protection may:

- Direct the respondent to refrain from committing domestic abuse, stalking, or sexual assault, or threatening to do the same;
- Prohibit the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly;
- Prohibit the respondent from stalking the petitioner;
- Grant 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.)
- Direct the respondent to provide suitable alternate housing for the petitioner when the respondent is the sole owner or lessee of the residence or household;
- Award 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.)
- Award 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.)
- Direct 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;
- Direct 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;
- Direct the respondent to immediately and temporarily vacate a residence shared with the petitioner, pending a hearing on the matter;
- Direct 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;

- Order a wireless service provider to transfer the billing responsibility for and rights to the wireless telephone number or numbers to a petitioner pursuant to § 36-3-621.

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.

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.

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.

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, or receive any firearm. (18 U.S.C.S. § 922 (g)(8), T.C.A. § 36-3-625)

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)

ENFORCEMENT REMEDIES AND VIOLATIONS (T.C.A. §39-13-113; T.C.A. §36-3-610)

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.

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

Civil Contempt:(T.C.A. §29-9-104)/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 for up to 10 days
- Fine up to \$50

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)

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.

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))

EXTENSIONS OF THE ORDER OF PROTECTION (T.C.A. § 36-3-605)(D)

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:

- (1) Has the order of protection been effective in stopping the violence and keeping the respondent away?
- (2) 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. [Gibson v. Bikas, 2018 Tenn.App. LEXIS 110, *19 \(Tenn. App. 2018\)](#); [Wadhvani v. White, 2007 Tenn. App. LEXIS 7, 2007 WL 27329 \(Tenn.App. 2007\)](#); [Cardwell v. Hutchinson, 2010 Tenn.App. LEXIS 733, 2010 WL 4810671 \(Tenn.App. 2010\)](#)

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)

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.

III. LIFETIME ORDER OF PROTECTION T.C.A. §36-3-627

(a)(1) Notwithstanding §36-3-608, **a victim of a felony assault, attempted homicide, kidnapping, or sexual offense** may file a petition for a lifetime order of protection against the offender who was convicted of the offense.

(2) **“Victim”** has the meaning given in §40-38-203 - an individual who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a crime or an immediate family member of a minor victim or a homicide victim.

(b) A petition filed by an unemancipated person under eighteen (18) years of age must be signed by one (1) of that person's parents or by that person's guardian. The petition may also be signed by a caseworker ...[but] may not be filed against the unemancipated minor's parent or legal guardian... In cases before the juvenile court where the department of children's services is a party or where a guardian ad litem has been appointed for the child by the juvenile court, the petition may be filed by the department or the guardian ad litem.

(c) Venue for a petition for an order of protection under this section, and all other matters relating to orders of protection, is in the county where the respondent resides or the county in which the offense occurred. If the respondent is not a resident of this state, the petition may be filed in the county where the petitioner resides.

(d) The court shall cause a copy of the petition and notice of the date set for the hearing on such petition to be served upon the respondent at least five (5) days prior to the hearing. The notice must advise the respondent that the respondent may be represented by counsel. **In every case, unless the court finds that the action would create a threat of serious harm to the minor, when a petitioner is under eighteen (18) years of age, a copy of the petition, and notice of hearing must also be served on the parents of the minor child, or in the event that the parents are not living together and jointly caring for the child, upon the primary residential parent.**

(e) At the hearing on the petition, the court shall, if the petitioner has proved the respondent was convicted of an offense listed in subsection (a) and that the petitioner was the victim of the offense, issue a lifetime order of protection that remains in effect until the death of the petitioner or the respondent. If the petitioner has not provided proof that respondent was convicted of such an offense and that the petitioner was the victim of the offense, the court shall dismiss the petition.

(f) An order of protection granted under this section must:

- (1) Prohibit the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;
- (2) Include a statement of the maximum penalty that may be imposed pursuant to § 36-3-610 for violating such order; and
- (3) Be valid and enforceable in any county of this state.

(g) A lifetime order of protection is effective and must be served as provided in § 36-3-609.

(h)(1) Upon violation of a lifetime order of protection, the court may hold the defendant in civil or criminal contempt and, following a contempt hearing as provided in § 36-3-612, punish the defendant in accordance with the law.

(2) In addition to the authorized punishments for contempt of court, the judge may assess any person who violates a lifetime order of protection a civil penalty of fifty dollars (\$50.00). The judge may further order that any support payment made pursuant to an order of protection or a court-approved consent agreement be made under an income assignment to the clerk of court.

(i) **An arrest for violation of a lifetime order of protection issued pursuant to this section may be with or without warrant.** A law enforcement officer shall arrest the respondent without a warrant if:

- (1) The officer has proper jurisdiction over the area in which the violation occurred;
- (2) The officer has reasonable cause to believe the respondent has violated or is in violation of a lifetime order of protection; and
- (3) The officer has verified whether a lifetime order of protection is in effect against the respondent. If necessary, the officer may verify the existence of a lifetime order of protection by telephone or radio communication with the appropriate law enforcement agency.