


DIGGING DEEPER WITH DOMESTIC VIOLENCE

Judge Robin Kimbrough Hayes
Presenter

Overview: Goals/Objectives

- ▶ Review Dynamics of DV with a little cultural, faith, and disability dynamics.
- ▶ Digging Deeper on the Complications of the OP hearing, mutual OP, lifetime OP, and Restraining Orders
- ▶ Guns

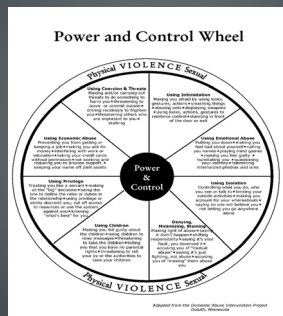


Dynamics

- ▶ Domestic Violence constitutes behaviors which intend to exert power and control over the victim.
- ▶ These behaviors are criminal and non-criminal.
 - ▶ Financial abuse
 - ▶ Threats to children
 - ▶ Sexual abuse
 - ▶ Hitting
 - ▶ Degrading comments



POWER AND CONTROL WHEEL



Cultural, Faith, Addiction, and Mental Health

- ▶ Battering behavior can involve the use of faith: twisting theological principles such as submission, sin, sacrifice, and gender roles and responsibilities, isolation from the church or other sources of spiritual strength/revelation.
- ▶ Cultural beliefs rooted in gender roles, isolation from culture and community, imposition of cultural practices that are oppressive in nature such as genital mutilation, and using culture as a tool to take power away from the individual, i.e., language—limiting communication.
- ▶ Using addiction, mental health status, and other challenges as triggers to engage the person in violent behavior and as a tool to control the person's money, medication, and other resources.





Orders of Protection

Who is Eligible for an Order of Protection

- ▶ A Domestic Abuse Victim (relationship requirement, Pets, Property, Person)
- ▶ Sexual Assault Victim
- ▶ Stalking Victim

Who Can File the Petition?


- ▶ A person over the age of 18 (Adult).
- ▶ The parent of unemancipated minor on behalf of the minor.
- ▶ An advocate from a domestic violence, sexual assault, or a child advocacy center on behalf of unemancipated minor.
- ▶ A Guardian Ad Litem.
- ▶ The Department of Children's Services.

Let's DIG into venue

Venue for an order 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.

PRACTICE QUESTION

- ▶ A Petitioner appears in your court, County X. The Petitioner served the Order of Protection on the Respondent. You learn that the abuse happened in County Y. The Respondent lives in Kentucky. Is venue proper for the order of protection?



Let's Dig Deep Into T.C.A. 36-3-605 (B)

- ▶ Issue an ex parte order of protection, immediate danger or harm.
- ▶ Within 15 days after service of the OP, a hearing must be held.
- ▶ The ex parte order remains in effect within the 15 days.
- ▶ If the hearing is held after 15 days, the petition is still viable, but the ex parte order shall be dismissed.

15-Day Rule (Kite vs. Kite, Luker vs. Luker)

- ▶ The 15-Day Rule is to protect the Respondent, and to ensure that the Petitioner has immediate protection.
- ▶ Only the Respondent can request a continuance "for discovery" with the ex parte order remaining in effect.
- ▶ A Petitioner's request for discovery appears to be discretionary, not sure if the ex parte order will remain in effect.

Hearing held after 15 Days

- ▶ Luker seems to suggest that the Petitioner, if granted a continuance, and the 15 days has expired, then the ex parte order should be dismissed.
- ▶ If the hearing on the order of protection is held after the 15 days, then what?
- ▶ This is important because there may be violations that occur after the 15 days of the order being in effect.

Practice Question

The Petitioner files an order of protection petition along with an ex parte order. The ex parte order is granted and served on the Respondent two weeks after the Petitioner requested it on November 1. The hearing was set on November 20. The Respondent violated the ex parte order on November 18 by texting the petitioner. Is the ex parte order viable?

DISCOVERY AND ORDERS OF PROTECTION, Luker again

- ▶ Luker affirms that a RESPONDENT has an absolute right to discovery in an order of protection, and may request a continuance to do so, and a PETITIONER may have limited discovery.
- ▶ Here are the parameters of discovery: The parties must state what discovery, if any, they want. The Trial Court then must exercise its discretion as to what discovery to allow and the time frame. In the meantime, the ex parte order of protection shall remain in effect through the new hearing.

MUTUAL ORDERS OF PROTECTION, Long vs. Brown

- ▶ Violate due process rights of the respondent if there is no competing order of protection.
- ▶ The judge can only extend or dismiss the order of protection, but does have discretion in making changes to the petition and orders. 36-3-605.

STANDARD OF PROOF

- ▶ Is there domestic abuse, sexual assault, or stalking?
- ▶ Is there still a sufficient need of the order of protection?


Relief Available after Hearing on Ex Parte Order—Full Order of Protection

- ▶ Grant of Petitioner possession of the residence. This does not affect title to any real property.
- ▶ Direct Respondent to provide suitable alternate housing only if the petition is not based on a dating or sexual relationship.
- ▶ Award of custody of children.
- ▶ Award financial support for children and Petitioner if parties are married.
- ▶ Direct Respondent to attend counseling programs.
- ▶ Court must order the respondent to surrender any weapons in his/her possession.

Relief Related to 3rd Parties

- ▶ 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 and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the petitioner or the petitioner's children. Nothing in this subdivision (a)(11) shall be construed as altering the terms of, liability for, or parties to such lease or rental agreement.
- ▶ Ordering 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.

Enforcement Issues and Orders of Protection-1



- ▶ A violation could result in the following:
 - ▶ Civil Contempt: imprisonment until the act is performed
 - ▶ Criminal Contempt: imprisonment not in excess of (10) days
 - ▶ Class A Misdemeanor: imprisonment up to 11/29
 - ▶ Extension of the order from 5 to 10 years.* (by motion)
 - ▶ \$2500 bond.
- ▶ States enforce one another's Order of Protections (Full Faith and Credit).

Enforcement Issues and Orders of Protection-2

- ▶ A person who knowingly violates an order of protection commits the offense of violation of a protective order under the provisions of T.C.A. § 39-13-113.
- ▶ Elements:
 - ▶ Person must have received notice of the order of protection or restraining order.
 - ▶ Person must have had an opportunity to be heard on the order of protection or restraining order.
 - ▶ Court must make specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse as defined in this part.
- ▶ Subject to arrest with or without a warrant.
- ▶ A person who fails to comply with the provisions of T.C.A. § 36-3-625.
- ▶ Conditions of Release (12-hour hold).
- ▶ Sentences served consecutively or concurrent at judge's discretion.

Weapons and the Order of Protection: Status of Rahimi

- ▶ Zackey Rahimi was issued a civil restraining order by a Texas state court on February 5, 2020; the order barred him from engaging in certain harassment-related behaviors towards his ex-girlfriend or her child, as well as owning firearms.
- ▶ Rahimi, having been involved in multiple shootings, was charged and convicted in a federal district court of unlawful firearm possession under 18 U.S.C. § 922(g)(8), which prohibits individuals from owning firearms if they are "subject to a court order that restrains [them] from harassing, stalking, or threatening an intimate partner."



Weapons and the Order of Protection: Status of Rahimi

- ▶ The Fifth Circuit applying the historical traditional test announced by Justice Clarence Thomas, which states, , stated that the historical laws disarming "dangerous" classes of people were not similar to the modern law, because "The purpose of these 'dangerousness' laws was the preservation of political and social order, not the protection of an identified person from the specific threat posed by another".¹
- ▶ Further comment was that, "civil protective orders are too often misused as a tactical device in divorce proceedings – and issued without any actual threat of danger". Judge Wilson went further and argued that Section 922(g)(8) could even put victims of domestic violence "in greater danger than before",² because they would be unable to defend themselves against their abusers with guns, if a judge had issued a "mutual" protective order.³



What is a Qualifying Order of Protection?

- ▶ Petitioner is an intimate partner of the Respondent.
- ▶ Respondent received actual notice and had an opportunity to be heard.
- ▶ Restrains future conduct.
- ▶ Finding of a credible threat to the physical safety of an intimate partner.
- ▶ If there are no findings, the respondent can keep his/her firearms.

Vulnerable Adult Order of Protection

- ▶ Petitioner is an intimate partner of the Respondent.
- ▶ Respondent received actual notice and had an opportunity to be heard.
- ▶ Restrains future conduct.
- ▶ Finding of a credible threat to the physical safety of an intimate partner.
- ▶ If there are no findings, the respondent can keep his/her firearms.

Orders of Protection and Vulnerable Adults

- ▶ This law permits a relative to file an order of protection on behalf of an "adult" as defined under the Adult Protection Act T.C.A. § 71-6-101, who is the victim of willful abuse, neglect or exploitation (T.C.A. § 71-6-117).

Who is a relative?

- ▶ The relative filing the petition must be a spouse, child, including stepchild, adopted child or foster child; parents (stepparents, adoptive parents or foster parents); siblings of the whole or half-blood; step-siblings, grandparents, grandchildren, of any degree, and aunts, uncles, nieces and nephews.

How long does it last?

- ▶ At the time of the hearing, if the judge finds by a preponderance of the evidence that the allegations are true, then the court may issue an order of protection for a definite period of time not to exceed 120 days. The court has the discretion to appoint a guardian ad litem under T.C.A. § 34-1-107

What can the judge order?

- ▶ Order the respondent to refrain from committing a violation of this part against the adult, T.C.A. § 71-6-117.
- ▶ Refrain from threatening to misappropriate or further misappropriating any monies, state or federal benefits, retirement funds or any other personal or real property belonging to the adult.
- ▶ Order the return to the adult or the adult's caretaker or conservator or to the fiduciary any monies or benefits misappropriated from the adult.
- ▶ The court may also enter a judgment against the respondent for repayment.

What can the judge order?

- ▶ If the amount in question exceeds ten thousand dollars, the court may require the caretaker or custodian of funds appointed under this subsection to post a bond.
- ▶ Enjoin the respondent from providing care for an adult on a temporary or permanent basis;
- ▶ Prohibit the respondent from telephoning, contacting, or otherwise communicating with the adult, directly or indirectly, and any other necessary relief to protect the adult.

What are the penalties for violating the order?

- ▶ Any violation can be treated like an order of protection issued under the Order of Protection Act.
- ▶ This would include contempt (T.C.A. § 36-3-610) and the violation of the order of protection (T.C.A. 39-13-113).
- ▶ The Tennessee firearms prohibition may apply depending on the relationship between the respondent and the adult.

Vulnerable Adult Orders of Protection Best Practice Tips

- ▶ Use the forms promulgated by the AOC.
- ▶ Treat the petition and the issuing of the ex parte order just if it were one requested by a competent adult.

Lifetime Order of Protection, T.C.A. 36-3-627

- ▶ Victims of domestic violence and certain felonies may obtain a Lifetime Order of Protection in Tennessee. The new law enacted as Tenn. Code Ann. §36-3-627 on July 1, 2021, allows certain felony victims meeting certain criteria to apply for a Lifetime Order of Protection.
- ▶ **Victim Defined:** To apply for a Lifetime Order of Protection a person must be an individual who has suffered direct or threatened physical, emotional or financial harm as the result of the commission of a felony. A person may also apply if they are an immediate family member of a minor victim or a homicide victim.
- ▶ **Felony Defined**
 - ▶ A victim is required to prove the respondent has been convicted of one of the following types of felony offenses against the victim:
 - Assault
 - Homicide
 - Kidnapping for False Imprisonment
 - Sexual Offense

Lifetime Order of Protection, T.C.A. 36-3-627

- ▶ A Lifetime Order of Protection request must be filed in the county where the respondent resides or where the offense occurred. It may also be filed in the county where the victim resides if the respondent is not a resident of Tennessee.
- ▶ Remains in effect until the death of the victim or respondent.
- ▶ Must prohibit contact between respondent and victim.
- ▶ Must state penalty for violating the Lifetime Order of Protection.
- ▶ Must state the Lifetime Order of Protection is enforceable in any county of this state.

Lifetime Order of Protection, T.C.A. 36-3-627

- ▶ The hearing on the order of protection must be within 5 days of service.
- ▶ Violation of the order constitutes a criminal or civil contempt, including a \$50 civil penalty in addition to support payment.
- ▶ 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 for 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 for protection by telephone or radio communication with the appropriate law enforcement agency.

Domestic Violence and the Criminal Case

Arrest-T.C.A. § 36-3-619

- ▶ If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor or felony, or
- ▶ If two (2) or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor.
- ▶ Arrest is the preferred response only with respect to the primary aggressor.

Bail Considerations in Domestic Abuse Cases

- ▶ Threat to the alleged victim or other family or household member
- ▶ Threat to public safety
- ▶ Reasonably likely to appear in court

Conditions of Release

- ▶ Enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim
- ▶ Prohibiting the defendant from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly

Special Protections for Victims of Domestic Abuse , Sexual Assault, and Stalking

- ▶ Bail Considerations
- ▶ Mandatory 12-Hour Hold
- ▶ Conditions of Release
- ▶ Victim Notification of Release
- ▶ Special Probation Considerations



Some reminders about the 12-Hour Hold

- ▶ Shall not be released within twelve (12) hours of the time of arrest. The magistrate or other official duly authorized to release the offender may, however, release the offender in less than twelve hours if the official finds that the offender is not a threat to the victim or the community.
- ▶ Findings shall be reduced to writing. The writing shall be attached to the warrant and shall be preserved as part of the record. The arresting officer shall make a written report of the arrest in order to establish the beginning of the twelve-hour period required by this subsection (h).
- ▶ If the offender is released prior to the conclusion of the twelve-hour period, the official shall make all reasonable efforts to directly contact the victim and inform the victim that the person charged with the offense will be released prior to the conclusion of the twelve-hour period mandated in subdivision (h)(1).



PRACTICE QUESTION

- ▶ A warrant is issued for Susan on a domestic assault. Susan is arrested. The warrant indicates that the alleged incident happened 2 years ago. The victim now lives in Georgia. Would the 12-hour hold apply?



Best Practices

- ▶ Keep in touch with your local domestic violence program.
- ▶ Don't issue mutual orders of protection.
- ▶ Ensure that you are sending folks to BIPS programs, where applicable, and working with your probation officers.
- ▶ Be careful what you say from the bench. 😊

The truth about orders of protection and domestic violence crimes is that it's complicated and changing.

--Robin Kimbrough Hayes
