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Kentucky Domestic Violence and Abuse Act: Civil Remedies for Victims

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Advocates for victims of domestic violence have long argued that this violence is no less an offense than an assault by a stranger. In fact, because domestic violence involves closely related victims and offenders, it poses additional and very serious risks to victims. Such risks have led advocates to promote the creation of civil remedies for victims of domestic violence. The Domestic Violence and Abuse Act and its civil protections were created by the 1984 General Assembly, not to replace criminal sanctions, but to afford victims additional civil protections which the criminal justice system does not provide.

The unique strength of pairing civil protective orders and criminal prosecution means that victims can seek relief under both systems to maximize protection. A court which denies a protective order on the basis that a victim should resort solely to the criminal system or to a divorce proceeding risks finding its ruling reversed on appeal. As written by one court in overruling a lower court's decision to refuse a protective order where criminal charges were pending:

The Kentucky Domestic Violence and Abuse Act was passed in order to 'allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible.' KRS 403.715. This protection was added to supplement laws already in existence. It was passed to offer protection as other proceedings, such as dissolutions and criminal actions, are pursued. It is not a mutually exclusive form of protection for victims . . . The Court simply may not dismiss a petition on its face because it holds the view that a different form of relief might be more appropriate. Citizens of this Commonwealth have the right to avail themselves of all avenues of relief provided by Kentucky law.¹

Those Protected Under the Domestic Violence and Abuse Act

The Kentucky domestic violence statutes permit the granting of protective orders to "family members" and "members of an unmarried couple."² "Family member" includes a person's spouse, former spouse, or children. Minor children may seek a protective order by having an adult family member or member of an unmarried couple file on their behalf. Children who witness the abuse of a parent should not have to wait until they themselves also suffer physical injury from the perpetrator, for as recently noted, "surely, fear that a custodial parent will be assaulted or battered by a noncustodial parent constitutes an act of domestic violence as to their child."³ The definition of family member also includes any relative within the second degree of consanguinity or affinity, so that the perpetrator's grandparents and siblings may seek protective orders. While two methods exist for determining degrees of collateral relationship, a Kentucky court is most likely to use the common law method.⁴

The definition of members of an unmarried couple includes members of couples who allegedly have a child in common and the child of such a couple. The definition also includes couples who are living together, or who

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Civil Remedies *continued*

have in the past. The statute does not define "living together," and in interpreting it, courts "should consider the policies underlying the statutory expansion in determining whether a couple has lived together under the statute."⁵ While no published cases exist in Kentucky, other states have liberally construed domestic violence statutes so as to serve the statutes' goals of protecting victims of domestic violence.⁶

The language of the statutes is gender-neutral and does not provide for the denial of protective orders based upon the sexual orientation of the parties. Kentucky courts have rejected interpretations of the domestic violence statutes which would restrict protection to only heterosexual couples as violating the Kentucky constitution and the intent of the legislature in drafting the statutes:

We hold that the domestic violence statutes (KRS 403.715-.785) afford protection to same-sex couples just as they do to the others enumerated therein. The General Assembly has not given preferential treatment to same-sex couples or homosexuals; rather, it has provided for equal treatment under the law for same-sex or homosexual victims of domes-



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tic violence.⁷

The Definition of Domestic Violence and Abuse

The statutes define domestic violence as including not only acts causing physical injury and acts of



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sexual abuse and assault, but also extending to threats and other means of causing "the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault."⁸ Consequently, a victim need not wait until s/he sustains actual physical injury to seek a protective order.⁹

Emergency Protective Orders and Domestic Violence Orders

Two types of protective orders are issued to protect victims. An emer-

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Civil Remedies *continued*

gency protective order (EPO) is issued *ex parte* and, due to the emergency nature of the order, the statutes mandate that a victim must be able to seek an EPO any hour of the day or night.¹⁰ The judge must issue the EPO if s/he finds that the respondent poses "an immediate and present danger" to the victim; alternatively, if the court denies the order, the judge must state the reasons for the denial upon the petition.¹¹ The EPO is valid for fourteen days and can be renewed if service has not been made on the respondent within that period. The order is effective either upon

service or upon actual notice being given by a peace officer to the respondent.¹²

The second type of protective order is the domestic violence order (DVO). The judge may issue the DVO whether or not s/he has granted the initial EPO; in fact, denial of the EPO mandates that the court must issue a summons for the respondent and set a hearing date within two weeks of its issuance.¹³ At the hearing, the court determines, based upon the preponderance of the evidence, whether domestic violence has occurred in the past and may occur again.¹⁴ Notably, the statutes

contain no requirement that the past acts of domestic violence have occurred within any particular time period and do not exclude past acts as being inadmissible on the basis of remoteness. DVOs may be granted for up to three years and may be reissued even if violence did not recur during pendency of the order. Protective orders are typically issued in district court, but if a district judge is not available the circuit court has jurisdiction to handle either the EPO or the DVO. The circuit court also has jurisdiction to issue a protective order if a divorce or child custody action is pending.¹⁵

Relief Provided Through Orders of Protection

The goals of orders of protection are victim safety and the prevention of further acts of domestic violence. In order to reach those goals, the statutes provide the court with significant discretion in granting relief to victims since a court can enter any order which will be of assistance in preventing further acts of domestic violence. Relief provided under both the EPO and the DVO is substantially identical. In both orders the court may restrain the respondent from directly or indirectly contacting or communicating with the victim. In Commonwealth v. Butler,¹⁶ the anonymous sending of flowers violated the no contact provision in a domestic violence order. Additionally, the court may prohibit the respondent from committing further acts of domestic violence and abuse, disposing of or damaging the petitioner's property, order the respondent to vacate the house shared with the petitioner, and grant temporary custody. When issuing a DVO, the court may also order temporary support and direct either or both parties to receive counseling.¹⁷ Increasingly, courts in Kentucky are

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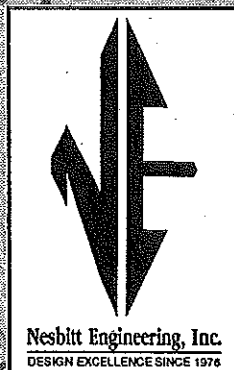
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effectively ordering offenders into treatment through the protective order process.

While the court possesses substantial discretion under the Act, the statutes do forbid issuance of two types of orders. First, the court is explicitly prohibited from issuing mutual orders unless both parties have separately filed seeking such. In that case, the court is required to issue specific orders so police can assess, if there is a violation, which party has violated the order.¹⁸ Secondly, the court is prohibited from ordering the parties into mediation either prior to or as a condition of receiving a protective order and may not order the parties into mediation for resolution of any of the issues raised in the petition.¹⁹ Additionally, a finding of domestic violence eliminates mediation in domestic relations proceedings conducted according to KRS 403.715 to 403.350, unless mediation is requested by the victim. In such case, the court must find that the victim's request is voluntary and that mediation is a realistic and viable alternative. This ban on mediation in cases involving domestic violence arises from the fact that mediation, to be successful, must take place between parties in an equal bargaining position; equality is not considered to be present in domestic violence cases. Also of note, studies have found that mediation significantly increases the dangers faced by victims from their abusers.

Criminal Ramifications of Civil Protective Orders

While a protective order is a civil proceeding, its issuance has ramifications under state and federal criminal law. The issuance of a protective order means that a respondent who then engages in stalking his victim will face a felony rather than a misdemeanor stalking offense.²⁰ A viola-

tion of the order can be a criminal act, constituting a Class A misdemeanor or the perpetrator may be held in contempt by the court, though one or the other must be selected since civil and criminal proceedings for the same violation of a protective order are "mutually exclusive."²¹ "Once either proceeding has been initiated the other shall not be undertaken regardless of the outcome of the original proceeding."²² Importantly, however, recent changes on double jeopardy now permit an offender to be criminally prosecuted for both a violation of a protective order and any other substantive crime s/he committed at that time.²³

Under the federal Violence Against Women Act, respondents subject to a Kentucky protective order who violate that order and cross state lines when doing so have committed a federal crime with the minimum five year prison sentence.²⁴ One of the many advantages to victims of the federal legislation is that a respondent who is guilty of committing the federal offense of violating a protective order must pay restitution to the victim for the full amount of incurred losses which may include medical and counseling services, physical and occupational therapy, transportation, temporary housing, child care, lost income, attorneys' fees, costs incurred in obtaining a protection order, and any other losses suffered by the victim.²⁵ Issuance of this order is mandatory, and the court shall not decline to issue the order because of the economic circumstances of the defendant or because the victim received compensation from any other source.

The issuance of a protective order mandates that a respondent, in certain circumstances, give up weapons during the pendency of the order. Pursuant to KRS 237.220(10), a respondent to an EPO or DVO is required to immediately surrender any

permit to carry a concealed weapon to the judge or the officer serving the protective order. When off duty, peace officers subject to a domestic violence order are not permitted to carry concealed weapons. Under recent federal legislation, Congress banned gun possession by certain protective order respondents and forbade anyone from selling or otherwise transferring firearms to anyone the seller believes is subject to a domestic violence order.²⁶ Those who knowingly violate the federal gun possession ban face paying a fine and/or up to ten years in federal prison.²⁷


In order for a Kentucky protective order to result in the respondent being banned from weapon possession under the federal statute, the order must meet both a due process re-

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Handgun purchase denials due to the applicant having a Domestic Violence Order against him/her numbered 288 in 1996, which represented 23% of the total number of denials.

**Statistical Source:
Kentucky State Police**



continued

quirement and a substantive requirement, meaning that EPOs issued in Kentucky will not subject the respondent to the gun ban, while the issuance of the DVO will. Substantively, the order must restrain the respondent from "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child."²⁸ Notably, the federal gun ban protects a narrower class of victims than Kentucky's law, including only victims who are the respondent's intimate partner or a child of such intimate partner.²⁹ An "intimate partner" is defined under federal law as "the spouse of the person, a spouse or former spouse, an individual who is a parent of the respondent's child and an individual who cohabits or has cohabited with the respondent."³⁰

The Full Faith and Credit of Domestic Violence Orders

The Violence Against Women Act provides that all states, territories, and tribal courts enforce orders of protection issued by other states in the same manner as they would their own orders.³¹ Valid orders entitled to full faith and credit are those in which the

issuing state had jurisdiction over the parties and the subject matter, and the respondent is given reasonable notice and an opportunity to be heard which is sufficient to protect his due process rights.³² In contrast to the federal gun ban, both EPOs and DVOs are entitled to interstate enforcement. The legislation provides that in the case of *ex parte* orders, the respondent's due process rights are protected if notice and opportunity to be heard is provided within the time required by state or tribal law "and in any event within a reasonable time after the order is issued."³³ An order must be enforced as it is written, even if it provides protection to parties not entitled to such protection or provides a type of relief not available in the enforcing state. Consequently, there is no restriction on the class of petitioners entitled to interstate enforcement of domestic violence orders.

Victims of domestic violence who move to or travel through Kentucky are entitled to police and court enforcement of their protective orders, whether or not they file their orders in the local court system. However, to maximize protection, victims may wish to register their orders in Kentucky courts so that the order may be entered in the Law Information Network of Kentucky, or LINK system. The entry of the protective order in this computerized system is not necessary for the enforcement of the order, but it enhances the ability of law enforcement to check the validity of an order and to enforce its provisions, thereby increasing victim safety.

Under Kentucky statutes, foreign protective orders have a rebuttable presumption of validity and, until determined by a court of competent jurisdiction to be invalid, "shall be given full faith and credit by all peace officers and courts" in Kentucky.³⁴ Officers are entitled not to enforce the order only if "it is readily apparent

... that the order has either expired according to a date shown on the order, or that the order's provisions clearly do not prohibit the conduct being complained of."³⁵ Police officers acting in good faith are immune from civil and criminal liability.

Only two types of orders present problems for interstate enforcement. Like the Kentucky domestic violence statutes, the federal full faith and credit legislation does not favor mutual orders. Mutual orders are not entitled to interstate enforcement unless both parties filed seeking protection and the court made specific findings that both parties were entitled to such an order.³⁶ Protective order provisions which concern custody of children remain problematic under the full faith and credit legislation, and it is not clear whether interstate enforcement is provided for such provisions. The terms of the protective order should be entitled to interstate enforcement if they meet the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA)³⁷ and the Parental Kidnapping Prevention Act (PKPA).³⁸

Conclusion

While not a complete guarantor of safety, domestic violence orders provide additional controls on the conduct of offenders, additional sanctions and remedies for abusive conduct, and, as a result, offer critical protections to victims and their children. Providing effective legal counsel to domestic violence victims requires attorneys to fully understand the provisions of the Domestic Violence and Abuse Act and the methods by which victims can access this type of essential protection. ■

ENDNOTES

1. *Burnett v. Burnett*, 97-XX-00017 (Fayette Cir. Ct., May 22, 1997), at 5-6. See also *Thomas v.*
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Statistical Source: Cabinet for Families and
Children, Dept. for Social Services
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