

THE STATE OF TEXAS



THE TEXAS FAMILY VIOLENCE BENCHBOOK

September 2011 EDITION

A READY REFERENCE MANUAL PREPARED FOR
THE JUDGES OF THE STATE OF TEXAS

PREPARED BY THE
OFFICE OF COURT ADMINISTRATION

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USER'S GUIDE

Bullets:

The use of the › signifies the entry is part of a single sentence

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Chapter organization and formatting. Each substantive chapter is divided into two parts: Part I contains primary sources (statutes annotated with case law); Part II contains the non-primary sources and references.

Civil and criminal law topics are addressed separately as are the different types of protective orders. Child custody, support, and abduction in the context of protective orders are addressed both in separate chapters and in pertinent sections of other chapters.

Each chapter title is followed by a list of the statutes addressed in the chapter. The chapter begins with a summary of the topics covered. As noted above, Part I of the chapter sets out the statutes, in outline form, annotated with relevant case law that appears in the footnotes.

Part II of each chapter begins with a narrative summary of the statutes. Thereafter, statistical or other relevant information from secondary sources is presented.

Citation format. The cited statutes and case law are contained in the Lexis 2010 online legal database. Therefore, the citation format used was for electronic sources (see Bluebook Rules 12 and 18). However, the parenthetical (Lexis 2010) after each cite was omitted as unnecessarily repetitive. Bluebook and Texas rules for case law citations were followed.

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Hyperlinks to citations: Statutes and case law citations have been hyperlinked into the Lexis online legal database. By opening the user's online Lexis account and then opening the Benchbook, the user can link directly to the statute or case in the Lexis database. Users lacking Lexis access can go to Texas Courts Online at <http://www.courts.state.tx.us/> to access case law cited in the Benchbook and to the Texas Constitution and Statutes homepage at: <http://www.statutes.legis.state.tx.us/> to link to statutes.

Hyperlinks within sections. Some sections have internal hyperlinks on the first page. For instance, the first page of the Texas cases list has a hyperlinked alphabet so the user can search for cases by the first letter of the citation.

Index. The page number listed in the General Index corresponds to the page number listed in the footer on each page. The “Go To” feature on the toolbar navigates to the page number that appears on the toolbar, which differs from the page number in the footer.

Indices and cross-references. Chapter 19 contains the indices and cross-references to: Texas cases, federal cases, statutes, journal article abstracts, and the general index.

Navigation: From any place in the text, to return to the previous place in the text, hit the “Alt” key and the back arrow (←) key, sequentially.

Resources: Chapter 19 includes a resource list for internet resources, telephonic hotlines, and other material.

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The Supreme Court of Texas

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December 6, 2010

To the Judges of the State of Texas,

I am pleased to introduce a new resource for the Texas judiciary—the first benchbook devoted entirely to the law on family violence in Texas. A project of the Office of Court Administration, this resource was made possible with grant funding from the Criminal Justice Division of the Office of the Governor in conjunction with the U.S. Department of Justice Office of Violence Against Women’s STOP program.

Reported family violence incidents adversely impact the lives of over 200,000 Texans each year and it is estimated that only about half of all family violence incidents are reported to law enforcement. Family violence is a phenomenon with high social and economic costs—costs measured in scores of lost lives, thousands of injuries, and millions of dollars in lost wages and work-days each year.

Only a fraction of the reported family violence incidents result in legal action, but this fraction has significant impact on the Texas legal system. In the thirty years since Texas first enacted its family violence protective order statute, the body of state and federal law in this area has grown exponentially. Familiarity with the law of “family violence” means knowledge of state and federal laws on a wide variety of subjects, including: criminal law; family law (divorces, suits affecting the parent-child relationship, protective orders); immigration; full faith and credit; and firearms regulation. Mastery of family violence law is a formidable task.

To help with this task, this benchbook provides the Texas judiciary with a single, comprehensive reference for family violence law. In addition to identifying and organizing the relevant primary sources (state and federal statutes annotated with case law), the benchbook also takes advantage of current technology by providing hyperlinks to the on-line resources discussed in each chapter’s comments section.

I join the Office of Court Administration, and its grant partner the Texas Council on Family Violence, in commending this benchbook to Texas jurists as a valuable resource for bringing justice to Texans affected by family violence.

Sincerely,

A handwritten signature in cursive script that reads "Wallace B. Jefferson".

Wallace B. Jefferson
Chief Justice

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Resources and References:

California Judges Guide to Domestic Violence Cases

Lexis online legal database

North Carolina Domestic Violence Best Practices Guide for
District Court Judges

O'Connor's Criminal Codes Plus

O'Connor's Family Code

Sampson & Tindall's Texas Family Code Annotated

Texas District and County Attorney Association's Criminal Laws of Texas

West's Texas Statutes and Codes

Washington State Gender and Justice Commission's Domestic Violence Manual
for Judges

All resources referenced in the Benchbook

PREFACE

To present the topic of domestic violence in a neutral way does not mean I condone it, nor does it mean I do not feel compassion and concern for its victims. Neutrality does not mean I think both the victim and the perpetrator share some “blame” for its occurrence. Domestic violence is criminal conduct. It is the result of a conscious choice made by one party to an intimate relationship (statistically, that party is usually male) to engage in dangerous, hurtful and highly inappropriate conduct against the other to gain or maintain power and control. My neutrality reflects my effort to approach the topic of domestic violence from the point of view of a judge and an academic, not an advocate, and to encourage critical thinking about the legal system’s efforts to address it.

Hon. Diane Kiesel, Preface to *Domestic Violence: Law, Policy, and Practice*.¹

In the preface to her textbook on domestic violence, Judge Kiesel could have been describing the purpose of this Benchbook—to set out the Texas and federal laws on family violence and to consider them with the impartial and unbiased view expected of a judge. The readers of this Benchbook are encouraged to use the material herein to begin or continue a critical analysis of how the legal system can best address the problem of family violence.

This Benchbook is an amalgamation of cases, statutes, and other resources. It both sets out the basic law within its “four corners” and guides the user to additional material by exploiting the relevant internet resources. In the 30-odd years since Texas enacted the first family violence protective order statute, scholarship and technology have developed to the point where large amounts of scholarly and empirically-based material are now available literally with a “click.” Rather than rephrase or incorporate material wholesale, the Benchbook summarizes and links to the pertinent resources.

As for format, the Benchbook is primarily structured to be quickly scanned rather than closely read. From the editor’s point of view, success will be measured in part by the accuracy of the context and by the ease of navigation to that content.

Ann Landeros
Domestic Violence Resource Attorney
Office of Court Administration
Editor
December 2010

¹ Diane Kiesel, *Domestic Violence: Law, Policy, and Practice* xix (2007). Copyright Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Reprinted by permission.

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CHAPTER 1—BEST PRACTICES

Summary:

For the best practices listed in this chapter, the underlying premise is that, in family violence cases, the legal process should serve one or both of two goals: (1) improve (personal or communal) safety; or (2) protect due process rights. First and foremost for a victim, legal redress should reduce danger and improve safety. For all parties, the legal process should provide fundamental due process rights—timely notice and an opportunity to be heard—at each stage.

To be a “best” practice, the practice or procedure must enhance one goal without significant adverse impact on the other. The ideal “best” practice actively promotes both safety and due process. A practice that promotes one goal but has a significant adverse impact on the other may be unavoidable in some situations, but it will not be considered a “best” practice.

By training and education, most judges are familiar with procedural and substantive due process concepts. In family violence cases, the judge must also be aware of how the legal process affects the participants’ physical safety. Safety considerations are hardly a mainstay of a standard legal education. Nevertheless, innovative judges have used the legal process to promote safety without impeding due process. These innovations are the subject of many of the suggested “best practices” in this chapter.

The best practices suggested herein represent the collected wisdom of a panel of judges who have decades of experience handling family violence issues. These judges are united in a common dedication to improving the resolution of family violence cases. Their work provides a solid foundation for those who seek to improve the outcomes in cases with family violence issues.

1.1 *Safety considerations in legal proceedings.*

The potential for family violence does not stop at the courthouse door. A judge must be concerned not only for the participants’ safety but also for the safety of everyone who may be exposed to violence inside and outside the courtroom.

1.1.1 Courthouse safety.

Observable and effective courthouse security can not only deter violence but can also help reassure victims and enhance the efficacy of the legal process.

1.1.1.1 Restricted access and entry screening.

Best practices include:

- requiring the public to be screened by a metal detectors or searched with wands by staff before entering the courthouse;
- screening persons attending legal proceedings held outside a courthouse with a wand if metal detectors are not available;
- having special entrances and secure parking for judges and staff; and
- enacting and enforcing restrictions on access to non-public areas of the courthouse (e.g., requiring security cards to access non-public spaces).

1.1.1.2 Waiting and seating areas.

Best practices include:

- screening all persons entering the courthouse to attend a proceeding involving family violence issues for weapons;
- providing separate waiting and seating areas for the applicant/victim and the defendant/respondent; ask persons accompanying a party to sit with that party;
- if separate areas are not available, requiring defendant/respondent to wait in a designated area within the courtroom (e.g., the first row of visitor seating) and have the applicant/victim sit in the area furthest away (and out of line of sight) of the first row;
- reserving a designated, secure waiting area for applicants, victims, advocates, and other persons who provide support for victims and witnesses, and
- limiting the possibility of direct contact between the parties in the courtroom.

1.1.1.3 Monitoring.

Best practices include:

- having the waiting or seating area monitored by staff (preferably an armed peace officer);

- searching courtroom, waiting areas, conference rooms, hallways and stairwells adjacent to the courtroom for weapons;
- searching all persons entering the courtroom (NOTE: due process concerns may be raised if only certain individuals are searched);
- informing applicants/victims of “safe areas” within the courthouse and how to contact courthouse security;
- having enhanced security present in the courtroom when indicated; and
- having staff become familiar with persons who are typically in attendance at court (e.g., advocates, prosecutors, expert witnesses, counselors, public defenders).

1.1.1.4 Departures.

Best practices include:

- staggering departure times from the courtroom. Ask the applicant/victim how long it will take to leave the courthouse complex and require the respondent/defendant to stay in the courtroom (under monitoring) for the amount of time the applicant needs to leave plus fifteen minutes;
- if there are multiple exits from the courthouse, requiring the respondent/defendant to use a particular exit;
- having two court officers simultaneously monitor the inside and immediate vicinity of the courtroom; and
- offering the victim/applicant an escort from the courtroom to transportation.

1.1.2 Courtroom security, arrangement, and etiquette.

Best practices include:

- informing all persons in the courtroom that they must obey courtroom etiquette;
- informing the parties how to behave during the hearing (i.e., direct remarks to the judge; do not interrupt; avoid slang and vulgarities, and speak in a civil tone);

- having armed security present before, during, and after family violence hearings;
- having a “panic button” or other way to summon additional security promptly; and
- arranging the courtroom so that:
 - the exits are easily accessible,
 - there is a center aisle between the seating areas,
 - the judge and staff have the widest possible view of the seating area; and
 - staff has a view from the courtroom into the adjoining hallway.

1.2 *Docketing family violence cases.*

Whether the docket is criminal or civil, a dedicated docket for cases with family violence issues has several advantages. A dedicated docket aids in staffing (e.g., improves the availability of trained staff and security personnel), allows prosecutors and defense attorneys to group cases, facilitates the participation by advocates and treatment providers, and focuses attention on the importance of resolving family cases.

1.2.1 Screening cases.

Early identification of family violence issues in filed cases can help the court plan its docket. The court can work with the clerk’s office to implement a system that identifies and groups family violence cases for designated dockets. When the nature of the case is not obvious, the case can be screened according to the nature of the relationship between the victim and the accused. Whether civil or criminal, if the case involves a victim and accused who are members of a family or household or have a dating relationship,² the case is appropriate for a family violence docket.

Because all the protective order statutes in Texas law have procedural similarities, protective order applications that do not require a particular relationship between the parties (sexual assault victims, magistrate’s orders of emergency protection, victims of bias/prejudice offense) may also be included on a family violence docket.

² As defined in [Tex Fam. Code § 71.002](#) and § 71.004.

Best practices. The best practice is to screen the cases as early as possible (such as when the warrant issues or when the petition is filed) for family violence issues and set the family violence cases on the appropriate docket.

1.2.2 Settings.

A regularly scheduled family violence docket can simplify the logistics of case preparation for all participants.

When choosing a time to hold a family violence docket, input from the “stakeholders” (prosecutors, local bar, probation, advocates, law enforcement) is helpful, as is coordination between courts. Allowing attorneys (on both sides of the case) to group cases promotes efficiency. Organizing the docket according to the type of proceeding (e.g., probation revocation, pretrial motions, trial on the merits) is also helpful. Taking pleas, sentencing, or holding compliance hearings at the start of a docket may enlighten waiting parties in other cases about what to expect from non-compliance.

Best practices. For civil family violence cases, the best practice is to hold the hearing on the merits as soon as practicable consistent with the statute. For instance, the best practice is to hear a Title 4 family violence protective order application as soon as possible after the expiration of the 48-hour-notice period to the respondent.

1.3 Continuances.

Continuances mean delay; delay impedes case resolution. Slow case resolution usually impedes both safety and due process goals.

Regardless of whether the case is on a dedicated family violence docket, continuing a case with family violence issues requires careful consideration.

The first consideration is whether the continuance will adversely impact either safety or due process for a party. Both the accused and the victim/complainant have due process rights. For certain types of cases (e.g., family violence protective orders), there are statutory constraints on granting a continuance—for instance, a civil case may not be delayed solely to await resolution of a criminal matter. (See § 3.4)

The “period of instability” is that period immediately after the victim separates from the abuser. This period is one of the most dangerous times for a family violence victim. Delays in the legal process during this period exacerbate the danger to the victim. A family violence perpetrator may take advantage of a delay in a legal proceeding to further threaten, intimidate, coerce, or discourage

the victim from participating in the case. Lack of financial support or enforceable child custody orders while a case is pending may force a victim to abandon the attempt to live apart from the abuser.

Best practices. Limiting continuances so that the case is almost always tried on its first setting can reduce backlogs, prompt attorneys to be prepared for trial, reduce inconvenience to witnesses, and reduce the period of instability for the parties.

The best practice is for the courts handling civil family violence cases to have a uniform and consistently applied local rule or policy **NOT** to continue a family violence case **UNLESS** the parties agree that neither safety nor due process will be compromised and then **ONLY** if the continuance will not violate a statute, procedural rule, or local rule. Motions for continuance should be in writing or on the record and a ruling granting a continuance should state the specific reason for the continuance on the record.

The best practice for courts handling criminal cases with family violence issues is to set a reasonable time frame (e.g., 90 days after indictment) in which these cases will be resolved consistent with due process. The court should work with prosecutors, the defense bar, the probation office, and victim advocates to determine what time frame is appropriate for all concerned. Cases that linger unresolved past the targeted disposition should thereafter be given a priority setting for trial. Before granting a continuance, the judge should confirm that the defendant is under bond conditions that protect the victim and that those protective conditions have not been violated.

1.4 *Specialized training of judges and staff.*

In addition to dedicated family violence dockets, an additional way to improve handling of family violence cases is to assign those cases primarily to judges who have special training or experience in that subject matter.

With experience and advanced training comes efficiency and facility. Continuity promotes consistency, which is especially important for enforcement and offender accountability. Familiarity with local resources (shelters, treatment providers, etc.) can improve outcomes.

Having staff trained in family violence issues to support the judge also enhances efficiency. Trained staff can better screen cases, disseminate information to parties, and anticipate what resources may be needed to resolve the case. For instance, training staff to screen cases to determine when an interpreter will be needed can avoid delays.

Best practices. The best practice is for courts handling family violence cases to be staffed with judges and other personnel who have subject matter expertise in this area.

1.5 *Community resources.*

Courts handling cases with family violence issues will often need to refer victims and perpetrators to community service providers. The judge should know the availability and quality of the local organizations (e.g., family violence shelters, substance abuse and mental health treatment providers, batterer's intervention programs, and legal aid programs). Representatives from those organizations can provide support that will enhance the parties' ability to follow the court's orders. The court's orders should be tailored to take advantage of the available resources. At the very least, the court should make information about the resources available in the courtroom and at the courthouse.

Best practices. The courts should have a working knowledge of the local community service organizations and the type and quality of resources and invite those organizations to provide information or support to participants in family violence cases.

Best practices for utilizing community resources effectively include:

- working with the organization's staff to learn about the available resources and to coordinate efforts;
- convening a regular stakeholders meeting to discuss how all participants in a family violence case can benefit from local resources;
- making referral information (brochures, flyers, signs, other material) available throughout the courthouse;
- inviting advocates, counselors, and treatment providers to work with court staff to integrate community services into the case process (e.g. allowing advocates to counsel victims who are reluctant to prosecute); and
- offering meeting or office space in the courthouse to community service groups that address the parties' needs.

1.6 *Lethality assessments.*

Judges who handle cases involving family violence issues should be familiar with the risk factors associated with lethality and perform the lethality assessment for each case.

Risk factors that are considered significant include threatened or attempted strangulation (see § 10.37); forced sex, stalking, signs of jealousy/possessiveness, threats to kill self or others, threats to use a weapon, or access to firearms (see § 3.23). An additional factor to consider is whether the accused has access to the victim's children and the degree of risk posed to those children.

Best practices. In any type of proceeding involving family violence issues, the judge should assess the lethality risk posed by the accused to the victim or the victim's family or household and make rulings in accordance with this assessment.

1.7 Pretrial release (bond).

When setting bond conditions for a case involving family violence, the judge or magistrate should evaluate relevant information regarding the impact of the defendant's release on the safety of the victim and the community. Whether a surety or personal bond is granted, the bond conditions should be tailored to promote safety as well as ensure the accused will appear at future settings in the case. In any event, the bond should state that the defendant is subject to arrest for a violation of a condition related to safety.

The judge or magistrate should also evaluate the case to assess whether a magistrate's order of emergency protection should issue. For certain offenses (family violence resulting in serious bodily injury or use or exhibition of a deadly weapon during an assault), a magistrate's order of emergency protection **must** issue.³ In considering the necessity for a magistrate's order of emergency protection, the judge or magistrate should perform a lethality assessment based on the best information available. (See § 1.9)

Best practices. In family violence offenses, to ensure that all relevant information is presented, the magistrate or judge should hear from both parties (i.e., the state and the defendant) before setting bond. In the most optimal situation, the victim is also present at the hearing to provide information. However, in many instances, the bond hearing may need to be held before the state is able to notify the victim. Even if the victim is not at the hearing, the judge or magistrate can, and should, always review the victim or complainant's affidavit before considering bond.

In setting bond in a family violence cases, the judge or magistrate should consider the defendant's history of family violence or crime, the injuries sustained by the victim, whether children were involved or witnessed the incident, the relationship of the accused and the victim, whether weapons were used or displayed during the offense, and the defendant's history of substance

³ The statute ([Tex. Code Crim. Proc. art.17.292](#)) does not state whether the victim can reject the protection of a mandatory order.

abuse. Upon request of the victim, the judge or magistrate should consider the victim's statement prior to setting bond.

Even when the magistrate's order is discretionary, the best practice is for the magistrate to assume that an emergency order of protection is needed UNLESS there is affirmative evidence to the contrary. The magistrate's order should include, at minimum, no-contact and stay-away provisions to protect the victim. These provisions should specify the accused must maintain a distance of at least 200 yards from protected persons and places. The court should set up a system where the orders are immediately available to all law enforcement agencies. The victim should be informed of how to report a violation.

Whether or not a magistrate's order is issued, the bond conditions should be tailored to protect the victim. Unless there is affirmative evidence that protective conditions are not necessary, the bond should contain conditions that the accused stay away from and have no contact with the victim.

1.8 Ex parte hearings.

On the theory that informed litigants are better prepared litigants, it is in the court's interest to encourage the prosecutor's or clerk's offices or community service organizations to have information about protective order legal proceedings available at the courthouse for all potential litigants.

A brochure or checklist citing the relevant statutes and rules might help an applicant evaluate (1) eligibility (does the applicant meet all jurisdictional requirements?); (2) viability (do the facts justify an order?); and (3) feasibility (is the relief available appropriate or desired?). The information should also inform the potential respondent about the respondent's rights and duties in the legal system. The information should be available in a publicly accessible place (e.g., on a table or in a rack) and be translated into other languages common in the community.

Unlike most civil judgments, family violence protective orders are required to include a finding of fact about the occurrence of family violence between the parties.⁴ In applications for temporary *ex parte* orders, the court must determine

⁴ An appellate court held that [Tex. R. Civ. P. 299a](#) (prohibiting findings of fact in judgments) does not control in [Tex. Fam. Code Title 4](#) protective orders. *Pena v. Garza*, 61 S.W.3d 529, 531-32 (Tex. App.—San Antonio 2001, no pet.). In a protective order application case, the trial court did not err by reciting of the findings required by [Tex. Fam. Code § 85.001](#) in the judgment. The specific statutory directive to find whether family violence occurred or is likely to occur in the future trumps the general rule in Tex. R. Civ. Proc. 299a that findings of fact should not be recited in a judgment.

The language requiring the court make findings in the permanent protective order is mirrored in the requirements for a temporary *ex parte* protective order. [Tex. Fam. Code § 85.001](#)(a) states: At the close of the hearing on an application, the court shall find whether (1) family violence and occurred and (2) family violence is likely to occur in the future. Likewise, [Tex. Fam. Code § 83.001](#) requires the court to enter a temporary *ex parte* protective order if it finds that the information in the application establishes a

when the information presented established a clear and present danger of family violence. This determination can be announced as part of the ruling.

Best practices. The best practice is to have information publicly available in the courthouse explaining the basic procedures for an *ex parte* protective order hearing. By so doing, the court can facilitate the hearing process and reduce delays in resolving the case. The court might arrange to have the prosecutor's office, an advocacy group, or other appropriate entity have regular public meetings at the courthouse to explain the process to parties or potential parties.

In its ruling on a matter, a court can state the basis of its decision. When ruling on a protective order application, the court is required to make a finding about family violence. When ruling on an application for a temporary protective order, the court should announce its finding based on the clear and present danger standard. This information will help the parties and the public understand the court's decision.

When an application is denied and no amended application is presented during that court session, the applicant can be directed to the appropriate resource (e.g., the prosecutor's office or a family violence shelter) for safety planning or other information.

When a hearing is required on an *ex parte* application (i.e., when the applicant requests that the respondent be excluded from the parties' shared residence), the best practice is to have the hearing on the record with all witnesses being placed under oath before giving information. (See § 1.28 for due process considerations.) If the defendant/respondent is ordered to vacate and stay away from the residence, the judge should inform the applicant/victim of the right to have a law enforcement officer present when the defendant/respondent is served with the notice.

Whether or not a hearing is held before an *ex parte* order issues, the court should inform the applicant of the necessity of appearing on the hearing date for the permanent order and how to report a violation of the *ex parte* order. The court may also refer the victim to appropriate staff or community service providers to develop a safety plan.

1.9 *Avoiding conflicts with other orders.*

Because the parties, particularly those with children in common, may be subject to other orders, the court should affirmatively inquire or seek out information about prior orders in other civil or criminal cases and tailor the new order to avoid conflicts with prior orders. When the application shows that children are

clear and present danger of family violence. The Pena case rationale for including a finding in a permanent protective order applies equally to temporary *ex parte* protective orders.

living with the parties, the court should specifically inquire if there is an order or case pending regarding the children's welfare.

Best practices. The court should affirmatively inquire about the existence of prior orders. If information about prior orders is unreliable, the court should include a provision in the protective order designating which order controls in the event of a conflict between orders.

1.10 Protective order hearings.

To make a determination about whether a protective order should issue in a family violence case, the judge needs evidence regarding:

- the date of service of the notice of hearing on the respondent;
- the nature of the relationship between the applicant and the respondent;
- the nature of the alleged acts of family violence;
- the nature of the alleged threats to commit family violence;
- where and when the alleged family violence occurred;
- when the alleged threats of family violence occurred;
- the nature and extent of any injury sustained by the applicant or another person as a result of the respondent's acts;
- who, besides the applicant, has been a victim of the family violence;
- whether the respondent possesses firearms or ammunition;
- whether the respondent has full time employment with a law enforcement agency as a peace officer or a member of the armed services who is required to possess a firearm for official use;
- whether the respondent has a concealed handgun permit; and
- whether family violence is likely to occur in the future.

To tailor a protective order to meet the needs of a particular applicant, the judge needs evidence regarding:

- the places where the applicant resides, works, attends school, or regularly frequents (e.g., church);

- the places where other persons protected by the order reside, work, attend school or regularly frequent (e.g., day care);
- the names, ages, and home state jurisdiction for any child the parties have in common (whether by birth or adoption);
- for child support orders, the gross monthly income of each party and whether a party is providing medical insurance coverage for the child and, if so, the cost of the insurance coverage ;
- for child support, whether a party has a duty to support other minor children who are not subject to this order;
- for child custody, whether the presumption regarding joint custody applies;
- for child visitation, whether it is in the child’s best interest to have visitation with the abusive party;
- for child visitation, whether any visitation with the abusive party should be supervised and how such supervision can occur; and
- whether the respondent has a substance abuse problem.

The court has the right and duty to manage the hearing. As with temporary orders, one method of managing the hearing is to have the prosecutor’s or clerk’s office provide the parties (especially *pro se* litigants) a checklist or outline to follow that refers to the controlling statutes, describes the type of information relevant to the proceeding, and enumerates the relief available to the prevailing party. Such case management can help avoid an incomplete, haphazard evidentiary presentation, provide an easy reference to controlling law, and focus the parties’ efforts to present a case.

1.11 Protective order contents.

Protective orders should be crafted to protect the applicant, deter the respondent, be enforceable in Texas, and be entitled to full faith and credit in other states. A well-crafted protective order will:

- be legible (have it typed or, if it is a “fill in the blank” order, make sure the handwritten portion is clearly printed);
- state (print or type) contact information for the issuing court;
- state the names of the parties, their status (i.e., whether applicant or respondent) and state the nature of the qualifying relationship between the parties (e.g., spouses, parent-child, members of the same household, etc.);

- use specific and detailed ordering language (e.g., for stay-away provisions, state the minimum distance that must be maintained in feet or yards and if possible state the prohibited addresses);
- avoid vague terms like “reasonable” in ordering language;
- avoid using terms like “upon the agreement of the parties,” especially about issues concerning visitation, possession of property division, or payment of support;
- separate the findings of fact and conclusions of law from the ordering language;
- set the ordering language off from the “boilerplate” language so that it stands out from the rest of the order;
- state each ordering provision in a separate sentence, rather than ordering a series of acts in one sentence (e.g., “stay at least 500 feet away from 1500 Main Street, Hometown, Texas,” rather than “stay away from the applicant, her home, her church, her school, her family and her children”);
- in each ordering provision, use direct, simple language (to the extent possible avoid modifying clauses, conjunctives, disjunctives, adjectives, or adverbs);
- for visitation provisions, specify the time, the addresses for exchanges, the persons involved in any exchange, the duration of the visit. If there is no supervised exchange location available, exchanges should occur in a safe, public place such as a police or fire station;
- for custody provisions, state each child’s name, age, and date of birth and state which provisions of the order apply to each child; state the type of custody and to whom awarded;
- for custody provisions, state whether Texas is the child’s home state under the UCCJEA and whether the court is aware of any prior orders regarding custody of persons to be protected by the protective order. If prior orders exist, state that the court is exercising its authority under the UCCJEA and the Texas Family Code to issue a temporary emergency order of protection for the child despite the prior order because the child or a sibling or parent of the child has been subjected to or threatened with mistreatment or abuse. Provide a copy of the temporary emergency order to the court that issued the prior order;
- prohibitions on contact are the preferred means of ensuring the peace. For prohibitions on contact or communication, specify the prohibited activities

(telephoning, texting, emailing, via third parties); do not forget to update the standard ordering language to include new technology (e.g., Twitter);

- to be most effective, prohibitions on contact should include a stay-away provision. For stay-away provisions, state the exact distance (e.g., 200 yards) to be maintained from persons and places, and unless contraindicated by security concerns, state the address of the prohibited location. Make sure the distance is great enough (200 yards is standard) to afford protection;
- if applicable, state that specific information about the applicant or other persons to be protected by the order is confidential under [Tex. Fam. Code § 85.007](#) and is not to be disclosed;
- as required by [Tex. Fam. Code § 85.001](#),⁵ state that the court found that the facts admitted into the record established by a preponderance of the evidence that the person restrained committed family violence and is likely to commit family violence in the future;
- if it is an order based on an agreement of the parties under [Tex. Fam. Code § 85.005](#), state that the protective order incorporates the parties' agreement;
- if it is an order under [Tex. Fam. Code § 85.005](#), state that the court finds, irrespective of any agreement to the contrary by the parties, that family violence occurred and is likely to occur in the future;
- if it is an order under [Tex. Fam. Code § 85.005](#), state that a violation of any provision of the order entered under [Tex. Fam. Code § 85.022](#) by the respondent is punishable by contempt or criminal sanction;
- if it is an order based on the parties' agreement, state that the order is not enforceable as a contract;
- specifically state whether the facts admitted into the record established that, in committing family violence, the respondent used physical force, attempted to use physical force, used a deadly weapon, or threatened to use a deadly weapon against a person to be protected by the order;
- include the following findings or conclusions of law:
 - the court had jurisdiction over the subject matter and the parties;
 - the court had jurisdiction to issue the protective order;

⁵ See *Pena*, [61 S.W.3d at 531-32](#).

- all parties, including the respondent (the restrained party), had timely notice of the hearing and an opportunity to be heard as required by statute;
- family violence has occurred and is likely to occur in the future;

OR

- the facts established by a preponderance of the evidence that it is in the best interests of the applicant or a member of the applicant’s household or family to issuance of a protective order;
- cite the statutory basis for the issuance of the protective order (include citations supporting particular types of relief granted (e.g., [Tex. Fam. Code § 85.022\(a\)](#) for an order that the respondent attend counseling);
- state the date that the order expires;
- state whether the order modifies, adopts, overrules, or supersedes a prior order of protection or other court orders from another jurisdiction;
- if applicable, state that the child support under the protective order is to be paid according to the terms in the prior child support order and incorporate the terms of the prior order either verbatim into the protective order or by reference with a copy of the prior child support order attached to the protective order ;
- state that the order does not require the applicant or a person intended to be protected by the order to do or refrain from doing any act listed in [Tex. Fam. Code § 85.022](#) (this statement clarifies that the order does not contain an impermissible “mutual” order which cannot be given full faith and credit under federal law);
- include all necessary warnings and admonishments in the order;
- on the record, orally admonish and warn the parties that the order:
 - is enforceable in all areas within or protected by the United States of America, including all states, territories, tribal lands, commonwealths, possessions, military bases, and the District of Columbia;
 - is enforceable without registration or filing of the order with local law enforcement authorities;
 - prohibits the respondent from possessing firearms for the duration of the order, a prohibition which carries a criminal penalty if violated;

- can only be changed by court order and that a party must return to court to request modifications;
- if violated by the respondent, subjects the respondent to criminal penalties under state law;
- can be enforced against any party by civil contempt;

AND

- carries federal criminal penalties if the respondent crosses state, territorial, tribal, or district boundaries to violate the order by any means including stalking a person protected by the order;
- administer those warnings and admonishments (criminal and civil penalties for violations; federal and state prohibitions on firearms possession, etc.) to the parties;
- state that the order:
 - complies with VAWA’s Full Faith and Credit provision ([18 U.S.C. § 2265](#));⁶
 - requires the respondent to comply with the federal and state laws that prohibit a person restrained by a family violence protective order from possessing weapons ([18 U.S.C. § 922](#); [Tex. Penal Code § 46.04](#));
 - meets VAWA’s definition of a protective order ([18 U.S.C. § 2266](#));

AND

- if applicable, complies with the UCCJEA ([Tex. Fam. Code Ch. 152](#)) and the Parental Kidnapping Prevention Act ([28 U.S.C. § 1738A](#)) standards for custody and visitation of minor children;

⁶ [18 U.S.C. 2265](#) states: (a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State Indian tribe, or territory (the issuing State Indian tribe, or territory) shall be accorded full faith and credit by the court of another State Indian tribe, or territory (the enforcing State Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

(b) Protection order. A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—(1) such court has jurisdiction over the parties and matter under the law of such State Indian tribe, or territory; and (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

- before the hearing adjourns or before the respondent leaves the courtroom, have the respondent sign a written acknowledgement of receipt of the required warnings and admonishments and of a copy of order in court.

1.12 Firearms.

Persons restrained by any type of protective order or convicted of a crime involving family violence are prohibited by state and federal law from possessing a firearm or ammunition. The length of the prohibition varies (e.g., for protective orders, it expires with the order). The court is statutorily required to warn the person of this prohibition and the criminal consequences of a violation.

Best practices. During the hearing, the court should affirmatively inquire of each party whether the respondent/defendant possesses firearms or ammunition and inquire as to the number, type, location, and storage conditions of those firearms.

The court should instruct the respondent/defendant on how to dispose of the firearms; what proof must be submitted to the court to prove the firearms are no longer in the person's possession; the deadline for submitting proof of disposition; and the consequences of failing to comply with the order. The court may want to schedule a compliance hearing and require the defendant/respondent to appear with proof of disposition on that date. (See § 14.7)

Each court or jurisdiction should work with local, state, and federal law enforcement to arrange firearm surrender procedures for persons subject to the prohibitions in [18 U.S.C. § 922](#). The court should consider asking local law enforcement to adopt a procedure for storage of weapons and ammunition for the duration of the protective order.

Whatever arrangements are made for storage, the court should not accept storage of weapons with the respondent's friends, family, business associates, or at any location to which the respondent has access.

1.13 Child custody, visitation, and support provisions in protective orders.

A defendant/respondent's duty to support a dependent child is not abrogated by a temporary or final protective order. When the parties to a protective order application have children in common, leaving the issues of child custody, visitation, and support unaddressed in the protective order may undermine its

efficacy. Lack of financial support may drive a victim back to the abuser⁷ and cannot benefit the child.

Proof of abuse will affect custody and visitation determinations (see § 7.4). In awarding visitation when the non-custodial parent has a history or pattern of abuse, the court must find that the visitation will not endanger the child or any other victim of the family violence.⁸

Best practices. When the parties have a child in common, and if the court has jurisdiction, the judge should address child custody, visitation, and support in the temporary and final protective order, if only to clarify that prior orders addressing those issues are still effective.

For child custody, visitation, and support provisions in a protective order, the judge should:

- ascertain whether there are prior orders with provisions for child custody, visitation, or support;
- if there are preexisting orders, inform the parties which order takes precedence;
- have the parties present evidence about financial needs and resources;
- inform the parties that child support payment will be made through the specified agency (e.g., the Attorney General’s Child Support Division, the local domestic relations office) (payments should NOT be made directly by party to another party);
- when visitation is allowed with the non-custodial parent, specify the conditions for visitation—how the exchange is to occur and if supervised visitation is required, the details for the supervision;
- include a finding of fact and conclusion of law as to whether visitation with the non-custodial parent is in the best interests of the child;
- inform the parties that the child support and visitation provisions expire with the protective order and provide them information about how to contact the Attorney General’s office or private legal counsel to obtain permanent orders; and

⁷ L. Okun, *Woman Abuse: Facts Replacing Myths*, State University of New York Press (1986).

⁸ [Tex. Fam. Code §§ 153.004](#)(d) and 153.191.

- if custody or visitation is denied to a parent, specify what type, if any, of communication between the parent and child is permitted.

1.14 Orders based on an agreement.

Parties can agree to the conditions and findings in a Title 4 family violence protective orders, but the agreement must be approved by the court.⁹ The agreement upon which the order is based should contain stipulated or agreed findings of fact, refer to the relevant statutes, state the terms and conditions that the parties have agreed should be in the order, and state that the parties agree that the enumerated facts support a legal conclusion that it is in the best interests of the applicant or a member of the applicant's family or household to issue a protective order containing the terms and conditions listed.

The court cannot approve an agreement or issue an order that requires that the applicant be subject to a condition that is criminally enforceable.¹⁰ The applicant can agree to be bound by civilly enforceable provisions concerning child custody, visitation, or support, or possession or disposition of property mutually owned or leased by the parties.¹¹

The seminal difference between a protective order issued after a hearing (including a default hearing) and an order based on an agreement is that the statute¹² does not require that an order entered without a hearing (e.g., an order based on an agreement) contain a finding that the respondent has committed family violence and is likely to do so in the future.¹³ However, the statute does not prohibit such a finding and to ensure the order is fully enforceable, some judges will not issue a protective order based on an agreement that lacks a finding of family violence against the respondent.

Best practices. When the parties request that the court issue a protective order based on their agreement, the court should review the agreement to make sure it does not subject the applicant to criminal prosecution for doing or failing to do some act listed in the order. If the parties' agreement subjects the applicant to criminal sanctions, the court's order should specifically reject that part of the agreement. Although [Tex. Fam. Code § 85.005](#) states a protective order based on the parties' agreement is criminally enforceable, the best practice

⁹ [Tex. Fam. Code § 85.005](#)(a). A court has an inherent right to enforce its orders by contempt, which would be the only remedy available should an applicant fail to comply with a provision in an agreed order. See TRCP 308.

¹⁰ [Tex. Fam. Code § 85.005](#)(b)

¹¹ [Tex. Fam. Code §§ 85.005](#) and 85.021

¹² [Tex. Fam. Code § 85.005](#)

¹³ [Tex. Fam. Code § 85.005](#)

is for the court to make a finding of family violence even in an order issued under [Tex. Fam. Code § 85.005](#).

Due to the numerous collateral consequences of a finding of family violence in a judgment (see § 10.4), the judge should specifically announce to the parties whether the order will or will not contain such a finding and the consequences of that decision.

1.15 *Protective order registry.*

All protective orders, including orders based on an agreement, orders issued in divorce/SAPCR cases, magistrate's orders of emergency protection, and probation orders with protective conditions **MUST** be entered into the DPS Protective Order Registry within 10 days of issuance. The Department of Public Safety reports that not all protective orders are forwarded to law enforcement for entry in the Registry. The failure to provide a protective order to the Registry within 10 days not only violates the statute, it also endangers lives. (See § 19.11.)

Best practices. The court **must** ensure that a copy of the signed protective order is forwarded to the designated law enforcement office as soon as possible after issuance and in no event should that act be delayed longer than 10 days after issuance. The court should regularly check to make sure that **ALL** of its orders are in the Registry.

1.16 *Mandatory reporting of abuse or neglect.*

In the course of handling a family violence case, a judge may learn facts that support a belief that a child or elderly or disabled person is being neglected or abused. Judges are subject to the same the mandatory reporting requirements for abuse or neglect that apply to all other adults.

Best practice. The courts should have a policy and protocol for judicial reporting of abuse or neglect.¹⁴

1.17 *Required counseling.*

The statute requires that when the court finds a person has committed family violence, if counseling is ordered, the counseling order must require completion of an accredited battering intervention prevention program (BIPP). There is no statutory authority to substitute another type of counseling (e.g., anger management program) for the BIPP.

¹⁴ Reports can be made to: http://www.dfps.state.tx.us/contact_us/report_abuse.asp Abuse Hotline: 1-800-252-5400; www.txabusehotline.org

Best practices. The court should order the person found to have committed family violence to attend an accredited BIP and schedule a compliance hearing for 90 days after the date the order issues to review compliance with the counseling order. A subsequent compliance hearing should be scheduled within the last two months of the order's duration.

1.18 Compliance.

Judicial monitoring of offender accountability significantly improves compliance rates. Judicial monitoring of protective orders when there is no companion criminal proceeding is especially important because there is no other way (e.g. criminal probation) to monitor compliance. A compliance hearing not only gives the court the opportunity to discourage or sanction violations but also allows the court to give direct positive reinforcement for compliance.

Best practices. For protective orders, the court should set a compliance hearing at the time the order is issued. At least one compliance hearing should be set after the respondent has entered (or should have entered) the required counseling and begun fulfilling other obligations (i.e., paying child support). The court should also schedule an immediate compliance hearing (as soon as proper notice allows) once the court receives a pleading alleging non-compliance.

A best practice is to set all protective orders for a compliance hearing for 90 days after issuance of the order. The compliance hearing can be reset if (1) all court costs have been paid; (2) the respondent has filed a certification of completion of a batterer's intervention counseling program; and (3) if no violations of the order have been alleged. Frequency of compliance hearings can be adjusted according to compliance levels.

1.19 Victim recalcitrance and recantation.

When a prosecutor decides to proceed with a criminal prosecution despite the victim's lack of cooperation, the court may be faced with a request to impose sanctions on the victim to coerce cooperation in the prosecution.

Best practices. Rather than second-guess the victim's reasons for not cooperating with the prosecution, the court should assess whether imposing a sanction on a victim will promote either victim safety or due process. If the sanction will only discourage the victim from seeking help in the future, it is contraindicated. If the sanction can educate and empower the victim (for instance, requiring the victim to prepare a safety plan or to attend counseling session with a victim's advocate), it may be worthwhile. The court can also provide information to the victim about possible outcomes (e.g., deferred

adjudication probation with required counseling or substance abuse treatment) that may overcome the reluctance to participate in the prosecution when the expected outcome is conviction and incarceration.

1.20 *Dismissal of protective order or withdrawal of application.*

When an applicant seeks to dismiss the protective order or wants to withdraw an application for a protective order, the court should have the requested investigated before ruling.

Best practices. The court should refer the applicant to a prosecutor or family violence advocate for an interview about why the dismissal is being requested. The goal of this interview is to establish that the dismissal request has not been coerced and that the applicant is making an informed decision.

Before ruling on a request to dismiss, the court should consider requiring the applicant to counsel with a family violence advocate and to present the court with proof of the counseling and of a safety plan. If relevant, the counseling should include counseling about the effect of family violence on children. For instance, the court could request that the advocacy community provide a regularly scheduled class to counsel applicants and complainants seeking a dismissal of a case with family violence issues.¹⁵

The applicant can be counseled by the prosecutor or advocate as to options that are less drastic than dismissing an order or withdrawing an application. For instance, if the applicant has decided to have contact with the respondent, the order might be modified to allow the contact. (Reminder: a Title 4 protective order cannot be dismissed within a year of issuance.)¹⁶

The court's file or the case docket sheet should document the counseling that applicant received and the information presented by or on behalf of the applicant in support of the request to dismiss.

1.21 *Pro se litigants.*

When dealing with *pro se* litigants, the court must manage the case so as to gather the relevant information efficiently without providing legal advice.

In family violence cases, a preexisting power imbalance between the parties may impede effective advocacy by the applicant/victim. Such a power imbalance might be addressed by referring the applicant to a victim advocate.

¹⁵ For instance, in Travis County, the courts can refer the movant to Project Options, which is a weekly class where counseling is provided.

¹⁶ [Tex. Fam. Code § 85.025\(b\)](#)

The clerk's office or the prosecutor should be encouraged to provide all litigants with information on lawyer referrals. As noted in § 1.8 and 1.10, the court should have a plan for managing the case with *pro se* litigants that focuses the parties on presentation of relevant evidence and allows both parties an opportunity to present an effective case.

Best practices. At the beginning of the hearing, the court should announce that the hearing is being conducted pursuant to the relevant evidentiary and procedural standards. The court can also state specifically what standard of proof applies, what finding must be made to order relief, and the type of relief available if the applicant prevails.

The court may consider referring *pro se* litigants to the county law library or to a non-profit agency for help with legal research. *Pro se* litigants are likely to have difficulty with legal pleadings. Allowing litigants to amend complaints so that a legitimate need for protection is not unmet due to difficulties in the legal process is within the court's discretion. In managing the hearing, the court can admonish the parties to address the court, not each other, and to remain respectful of the court and other parties during examination (e.g. no abusive questions, no interruptions, answer the question asked). When the case involves issues of child custody, visitation, or support, informing the parties that the custody, visitation schedules, and support standards are dictated by statute may help resolve conflicts.

1.22 *Litigants with limited English proficiency (LEP).*

Interpreters are needed when either party asks for an interpreter or when the judge determines an interpreter is needed for effective communication throughout the hearing. Court interpretation should be provided by a qualified professional interpreter who adheres to ethical codes of conduct, is culturally competent, and has training on dynamics of family and sexual violence.

Licensed court interpreters for LEP and certified interpreters for deaf/hard of hearing persons should interpret. Even when permitted by state statute, it is strongly recommended that the services of an unlicensed language interpreter not be used. Family members, personal acquaintances, judges, and court personnel should not function as interpreters. Minor children are not qualified to interpret. A prosecutor cannot interpret for a defendant. Family violence advocates should not interpret because it is their role to explain the proceedings to their client, not to interpret.

In areas where licensed or qualified court interpreters are not available and for interpretation of languages that are not commonly spoken in the community, the

court may want to use a commercial telephone interpretation service.¹⁷ These services are available on demand and most services offer interpretation in more than a hundred languages.

Best practices. Use licensed (for language) and certified (for deaf/hard of hearing persons) court interpreters. If a licensed interpreter is not statutorily required, make sure the interpreter has the requisite skills to adequately interpret a legal proceeding. Inquire about potential conflicts of interest between the interpreter and the parties, especially if the language is not commonly spoken language in the community, and whether the conflict will impact the interpreter’s ability to interpret effectively. The judge may establish need by asking the person to state his or her name; to inform the court the person’s preferred manner of communication; and asking the person whether the person wants an interpreter.

To facilitate communication in an interpreted proceeding, the court should advise everyone in the courtroom about the presence and role of the interpreter.¹⁸

- *For the Jury*- “Modes of communication other than English may be used during the trial. The evidence you are to consider is only that provided through the official court interpreter.”
- *For the Defendant/Witness*- “I want you to understand the role of the interpreter. The court interpreter is impartial and here only to interpret the proceedings. The interpreter will only interpret what is said without adding, omitting or summarizing anything. The interpreter will say everything that you say including tones, sounds, attitudes, jokes and side comments, so do not say anything that you do not want everyone to hear. Do not ask the interpreter for advice. If you do not understand the interpreter, then tell the interpreter, or your lawyer, to tell me that you do not understand. If you need a question or answer repeated, please tell me. Wait until the entire statement has been interpreted before you answer. Do you have any questions?”

¹⁷ For instance, the State of Texas has a contract with Language Line, Inc. for interpretation services by telephone. The contract calls for Language Line to charge state agencies at specified rates for services.

See: http://www2.dir.state.tx.us/ict/contracts/Pages/Details.aspx?dir_contract_number=DIR-SDD-1618&Return=http%3A//www2.dir.state.tx.us/ict/contracts/Pages/ResultsByProduct.aspx%3Fstart%3D1%26a%3DTexasDIRProductType%253a%27TELECOMMUNICATIONS%27+TexasDIRManufacturerName%253a%2522Language+Line%2522

¹⁸ Adopted from the Supreme Court of Ohio Interpreter Services Program.

- *For the Interpreter-* “You will interpret accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law, follow all official guidelines established by this court for legal interpreting, and discharge all of the solemn duties and obligations of legal interpretation and translation.”

Other best practices include:

- instructing participants to speak clearly, in their typical tone of voice and cadence. Allow only one person to speak at a time;
- allowing the interpreter to converse with the LEP person prior to the proceeding to discuss the manner of communication, but not any facts or allegations of the case;
- asking the LEP person if he or she is able to understand and communicate through the interpreter. Instruct the person to raise a hand if something is not understood;
- allowing the interpreter to view court files prior to the proceedings to become familiar with names and technical vocabulary;
- speaking directly to the party or witness, not to the interpreter. Do not ask the interpreter to explain or restate anything the party or witness says. The interpreter will interpret in the first person in order for the record to be accurate. The interpreter will convey all questions, answers and courtroom dialogue. Therefore, the interpreter is always working. Advise the interpreter to notify the court when breaks are needed;
- if the proceedings will last more than two hours or has multiple LEP persons involved, require the presence of at least two interpreters who can switch off as needed; and
- positioning the interpreter in close proximity to the speaker and where the LEP person can hear well to allow optimal communication.

1.23 Immigrant victims.

Immigrant victims often need encouragement to take advantage of legal protections. They need reassurance that immigration status is irrelevant to obtaining legal redress and protection. Immigrants should be informed that the abuser cannot use immigration status to prevent the victim from obtaining

protection. Immigrant victims also often need to be informed that their immigration status may be adjusted, based on their status as victims of family violence or a crime, to allow them to stay in the U.S.

Best practices. The court should make information available to immigrant victims of crime and family violence about the availability of T and U visas. The court should also inform immigrant victims of the right to equal protection under the law ([42 U.S.C. § 1981](#)) and have information about immigration status kept confidential ([8 U.S.C. § 1367](#)).

1.24 Federal offenses.

If the information provided to the court in a state family violence case indicates that a federal family violence crime has occurred,¹⁹ the court should refer the victim to the local Office of the United States Attorney.

1.25 Emergency closures of courts.

The Supreme Court of Texas Task Force to Ensure Judicial Readiness in Times of Emergency has issued an Interim Plan.²⁰ The Plan discusses how courts can deal with emergency closures. The Office of Court Administration website maintains a list of courts reported as closed.²¹

Under the procedures recommended in the Plan or another plan, the court should have a way to disseminate information to persons needing temporary protective or magistrate's orders of emergency protection or whose temporary order expires during an emergency closure. Law enforcement will also need to be informed of how orders are to be enforced under emergency circumstances

Best practices. Each court should inform the Office of Court Administration when the court is closed due to an emergency. Each jurisdiction should adopt an emergency closure plan that will direct persons needing temporary or emergency orders to the location where the necessary relief will be available during the emergency. The courts should also promulgate a policy or rule that automatically continues any temporary protective order until a date certain after the emergency has resolved.

¹⁹ The federal domestic violence crimes are interstate travel to stalk ([18 U.S.C. § 2261A\(1\)](#)) or cyberstalk ([18 U.S.C. § 2261A\(2\)](#)), to commit domestic violence ([18 U.S.C. § 2261](#)), or to violate a protective order ([18 U.S.C. § 2262](#)); and possession of a firearm while restrained by a protective order or after certain criminal convictions ([18 U.S.C. § 922\(g\)](#)).

²⁰ Available at: <http://www.supreme.courts.state.tx.us/emtf/pdf/IntPlan072208.pdf>

²¹ This list is available at: <http://www.courts.state.tx.us/court closures.asp>

1.26 *Admonishments and warnings to the defendant or respondent.*

Statutory and constitutional due process requires that persons who are convicted of, or placed on probation for, crimes with a family violence element (or where an explicit finding of family violence is included in the judgment) be admonished by the court about the consequences of the family violence finding in the judgment. The admonishments should state that the finding renders the defendant unable to possess firearms or ammunition; may result in adverse immigration consequences (removal or deportation); and can result in enhanced criminal penalties for future convictions. The statutorily required warnings for protective orders include information about criminal and civil consequences of a violation of the order and of possessing a firearm while restrained by the order.

Best practices. In addition to giving the required admonishments, the court should also inform the parties that the family violence finding (implicit or explicit) has potential adverse consequences for child custody, occupational licenses, spousal maintenance, and bail. (See § 10.4)

1.27 *Reporting violations.*

The victim or applicant should know how to report a violation of a protective order and that the applicant cannot be held criminally liable even if the applicant cooperates with the respondent or defendant's violation of the order. Immigrant victims should know that immigration status is irrelevant to enforcement of the order.

Best practices. After the order issues, the court should explain to the victim or applicant how to report a violation of the order and that it is important to preserve evidence of the violation. The court should reiterate that only the court can change the order and that a party must return to court to request modifications. The court should also stress the importance of reporting any violations of the prohibition on firearms possession. If the victim or applicant is an immigrant, the court should explain that immigration status does not affect the order's enforceability. The court should also recommend that the applicant or victim keep a copy of the order on hand and keep a copy at every location where a protected person lives, works, or attends school or daycare.

1.28 *Due process.*

Laws addressing family violence balance safety concerns and due process rights. In family violence cases, it is helpful if the court understands how a specific statute addresses this tension.

In general, the law disfavors abridgement of the fundamental due process rights of notice and an opportunity to be heard. Most legal proceedings require that the defendant-party have prior notice of the allegations and the relief sought, and an opportunity to present a defense to the tribunal before a ruling is made.

However, in temporary restraining order (TRO) proceedings, the law gives precedence to maintaining the status quo against irreparable harm over provision of notice and an opportunity to respond. Family violence temporary *ex parte* protective orders and the magistrate's orders of emergency protection are examples of TROs that are available in family violence cases. In these TRO proceedings, the status quo is the state's interest in maintaining the peace and the irreparable harm to be prevented is physical harm to a person.

In certain circumstances, a temporary *ex parte* protective order can exclude a person from the person's residence without notice. This provision has few parallels in the law (e.g., in a divorce TRO, a party cannot be excluded from the party's residence).²²

Despite the lack of prior notice, the statute affords some strict due process requirements before an exclusionary order can issue. The court should be familiar with the statutory due process afforded by: the higher burden of proof (clear and convincing evidence);²³ the mandatory evidentiary requirements (supporting facts in sworn affidavit *and* sworn testimony);²⁴ and specific factual prerequisites (recent act of violence, applicant's recent residency at same property,²⁵ applicant's legal interest in the property or respondent's legal duty to support the applicant or the applicant's child).²⁶

Except for the temporary *ex parte* protective order proceeding, the due process concerns in other legal proceedings involving family violence issues do not differ significantly from those in non-family violence cases. All parties must have sufficient notice of the nature of the allegations and of the time, date, and location of any proceeding to prepare a case. Once they have appeared for the hearing, the parties must be given an opportunity, consistent with the applicable rules of procedure and evidence, to present a case to the trier-of-fact. The court has the right to enforce the rules of procedure and evidence but otherwise must allow each party an opportunity to present a case.

²² [Tex. Fam. Code § 6.501](#)((b)(2). To exclude a party from the party's residence without notice while a divorce proceeding is pending, the court would have to grant a separate parallel temporary *ex parte* protective order under Title 4 of the Family Code.

²³ [Tex. Fam. Code § 83.006](#)(b)(3)

²⁴ [Tex. Fam. Code § 83.006](#)(a)

²⁵ [Tex. Fam. Code § 83.006](#)(b)(1) and (2)

²⁶ [Tex. Fam. Code § 85.021](#)(1)(B)(2). As used throughout [Tex. Fam. Code Title 4](#), and defined in [Tex. Fam. Code § 88.002](#), the term protective order includes a temporary *ex parte* protective order, so § 85.021(1)(B)(2) applies to exclusions under [Tex. Fam. Code § 83.006](#).

Best practices. In addressing due process concerns relating to temporary *ex parte* protective orders, the court should keep in mind that the *ex parte* order is a type of temporary restraining order.

For cases other than *ex parte* protective order proceedings, the court should proceed with the hearing only after receiving sufficient proof that the parties had proper and timely notice of the nature of the case and the date, time, and location of the hearing. Once proper notice is established, all parties appearing at the hearing should be given an opportunity, consistent with the applicable rules of procedure and evidence, to present a case to the trier-of-fact.

The court should assign the burden of proof as required by law and be sensitive to the shifting and static elements within the burden of proof (i.e., burden of persuasion v. burden to present evidence on an issue). The burden of going forward with evidence on statutory presumptions can be especially problematic.

Due process concerns permeate evidentiary rulings. In criminal cases involving family violence, the court should be familiar with the impact of the Sixth Amendment Confrontation Clause and be able to recognize testimonial hearsay. With regard to expert witness testimony, the court must be able to exercise its gatekeeper function in response to evidentiary challenges.

1.29 Family violence in child support hearings.

When the Office of the Attorney General has information that a party to a child support case is a victim of family violence, that information will be recorded in the OAG file and brought to the attention of the court before the hearing.²⁷ Victims can request the court order the victim's personal information (e.g., address) be kept confidential. Displaying posters in the courthouse explaining safety precautions for victims of family violence who are entering in to the child support process can be helpful.²⁸

Best practices. When family violence has occurred between the parties to a child support case, security should be a concern. The court should consider allowing the victim to attend a hearing by telephone or videoconference. The victim should be allowed to have advocates, family members, or other support present at the hearing. The parties should not be left alone during the hearing process and the victim should never be required to negotiate a settlement or mediate a child support case. Security personnel should be present at all times

²⁷ See Summary of OAG Policies regarding family violence in chapter 19-Resources.

²⁸ These posters are available from the Texas Council on Family Violence and the OAG's Child Support Division.

and the victim should be provided with an escort out of the courthouse and before the other party is excused.

The court should inform the parties that a child support provision in a protective order ends when the protective order expires and provide information about the availability of free child support services from the OAG.

To minimize contact between the parties at the hearing, the court can take the steps outlined in §1.1. When ordering visitation, the court should specifically provide for the exchange of children at a safe exchange house or via a *neutral* third party, if possible.

CHAPTER 2—DEFINITIONS

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A

2.1 Abandoned, in the context of a minor child, means the child has been left without provision for reasonable and necessary care or supervision. ([Tex. Fam. Code § 152.102\(1\)](#))

2.2 Abuse of a child includes the following acts or omissions by a person:

(1) **physical injury** that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm; **or**

(2) **sexual conduct** harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under [Tex. Penal Code § 21.02](#), indecency with a child under [Tex. Penal Code § 21.11](#), sexual assault under [Tex. Penal Code § 22.011](#), or aggravated sexual assault under [Tex. Penal Code § 22.021](#); **or**

(3) **compelling or encouraging sexual conduct** as defined by [Tex. Penal Code § 43.01](#), by a child. ([Tex. Fam. Code § 261.001\(1\)\(C\)](#), (E), and (G))

2.3 Access to child. A person with right of "access to" a child may approach, communicate with, and visit with the child, but may not take possession or control of the child away from the managing conservator.²⁹

2.4 Adult means a person who is not a child. ([Tex. Fam. Code § 101.003\(c\)](#))

2.5 Assault means (1) intentionally, knowingly or recklessly causing bodily injury to another, including a spouse; or (2) intentionally or knowingly threatening to cause imminent bodily injury to another, including a spouse, or causing physical

²⁹ *Hopkins v. Hopkins*, [853 S.W.2d 134, 137](#) (Tex. App.—Corpus Christi 1993, no writ). For the definition of possession of child, see the definition of possessory conservator in ch. 2.

contact with another when the person knows or should reasonably know the other person will regard the contact as offensive or provocative. **Aggravated assault** means an assault that causes serious bodily injury or during which the assailant uses or exhibits a deadly weapon. ([Tex. Penal Code § 22.01](#); [Tex. Penal Code §22.01](#))

2.6 Assistance animal means an animal that is specially trained or equipped to help a person with a disability and that is used by a person with a disability who has satisfactorily completed a specific course of training in the use of the animal, and has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide animals with training of this type. ([Tex. Hum. Res. Code § 121.002](#); [Tex. Hum. Res. Code § 121.003\(c\)](#))

2.7 Asylum is the mechanism through which individuals who face persecution in their home country have the opportunity to remain in the U.S. An asylum-seeker differs from a refugee in that the former is already in the U.S. when the status is requested.

B

2.8 Batterer means, in the context of family violence, a person who commits repeated acts of violence or who repeatedly threatens violence against another who: is related to the actor by affinity or consanguinity (as defined in [Tex. Gov't Code ch. 573](#)); is a former spouse of the actor; or resides or has resided in the same household with the actor. ([Tex. Code Crim. Proc. art. 42.141\(1\)](#))

2.9 Bodily injury means physical pain, illness, or any impairment of physical condition. **Serious bodily injury** means bodily injury that creates a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. ([Tex. Penal Code § 1.07\(8\)](#) and [\(46\)](#))

2.10 Brady Act. The federal law requiring federal firearms sellers to perform background checks on prospective purchasers before transferring possession of a firearm. ([18 U.S.C. § 921](#))

C

2.11 Child or minor means:

- (1) for suits affecting the parent child relationship (SAPCR) in general, a person under 18 years of age who is not and has not been married or who has not had the disabilities of a minority removed for general purposes. In the context of child support, child includes a person over 18 years of age for whom an individual may be obligated to pay child support. ([Tex. Fam. Code § 101.003](#));
- (2) for child custody cases, a person under 18 years of age ([Tex. Fam. Code § 152.102\(2\)](#));
- (3) for victims of sexual assault or sexual abuse of a child, child means a person younger than 17 years of age who is not the spouse of the actor. ([Tex. Penal Code § 22.011\(c\)\(1\)](#)); **or**
- (4) for determination of parentage suits, an individual of any age whose parentage may be determined under [Tex. Fam. Code ch. 160](#). ([Tex. Fam. Code § 160.102](#))
- (5) for purposes of admitting a hearsay statement by a victim of family violence, a child is a person aged 12 years or less whose statement describes family violence against the child. ([Tex. Fam. Code §§ 84.006 and 104.006](#))
- (6) for purposes of admitting a hearsay statement by a child victim of a sexual assault, a child is a person aged 14 years or less whose statement describes the offense against the child. ([Tex. Code Crim. Proc. art. 7A.035](#); [Tex. Fam. Code § 104.006](#))

2.12 Child custody determination means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or another monetary obligation of an individual. ([Tex. Fam. Code § 152.102\(3\)](#))

2.13 Child custody proceeding means a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency,

guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement of child custody or visitation. ([Tex. Fam. Code § 152.102\(4\)](#))

2.14 Civil union is any relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabiting persons; and (2) grants to the parties legal protections, benefits, or responsibilities granted to the spouses of a marriage. ([Tex. Fam. Code § 6.204\(a\)](#))

2.15 Clear and convincing evidence means the measure or degree of proof that will produce in the mind of the trier-of-fact a firm belief or conviction as to the truth of the allegations sought to be established. ([Tex. Fam. Code § 101.007](#))

2.16 Commercial social networking site means (for purposes of the criminal offense of online harassment) any business, organization, or other similar entity operating a website that permits persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication or the creation of web pages or profiles available to the public or to other users. **NOTE:** The definition does not include an electronic mail or message board program. ([Tex. Penal Code § 33.07\(f\)](#))

2.17 Concealed handgun means a firearm that is designed, made, or adapted to be fired with one hand and whose presence is not easily discernible to the ordinary observation of a reasonable person. ([Tex. Penal Code § 46.01\(5\)](#); [Tex. Gov't Code § 411.171\(3\) and \(5\)](#))

2.18 Conservatorship means custody.

2.19 Constructive possession of a firearm, under federal law, means that a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others. Texas criminal law follows the federal definition of constructive possession.³⁰

2.20 Court means, in the context of family violence and child custody cases:

³⁰ *U.S. v. Quilling*, [261 F.3d 707, 217](#) (7th Cir. 2001); *Porter v. State*, [873 S.W.2d 729](#) (Tex. App.—Dallas 1994, pet. ref'd) citing *U.S. v. DeLeon*, [641 F.2d 330, 335](#) (5th Cir. 1981).

- (1) for family violence protective orders, the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, statutory county court, constitutional county court, or other court expressly given jurisdiction under the Tex. Fam. Code.³¹ ([Tex. Fam. Code § 71.002](#));
- (2) for child custody cases, the entity authorized under the law of a state to establish, enforce, or modify a child custody determination. ([Tex. Fam. Code § 152.102\(6\)](#))

2.21 Court proceeding (for purposes of appointment of a certified, licensed, or qualified interpreter) includes an arraignment, deposition, examining trial, hearing, trial, mediation, court-ordered arbitration, or other form of alternative dispute resolution. ([Tex. Civ. Prac. & Rem. Code § 21.001](#); [Tex. Civ. Prac. & Rem. Code § 21.003](#); [Tex. Code Crim. Proc. art. 38.31\(g\)](#); [Tex. Gov't Code § 57.001](#) (1) and (7))

D

2.22 Danger to physical health or safety of child includes exposure of the child to loss or injury that jeopardizes the physical health or safety of the child without regard to whether there has been an actual prior injury to the child. ([Tex. Fam. Code § 101.009](#))

2.23 Dating relationship means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of the length and nature of the relationship and the frequency and type of interaction between the persons involved in the relationship. It does not include a casual acquaintanceship or ordinary fraternization in a business or social context. ([Tex. Fam. Code § 71.0021\(b\)](#))

2.24 Dating violence means an act, other than a defensive measure to protect oneself, by an actor that:

- is committed against (1) a victim with whom the actor has or has had a dating relationship **OR** (2) because of the victim's marriage to or dating

³¹ *Williams v. Williams*, 19 S.W.3d 544, 547-48 (Tex. App.—Fort Worth 2000, pet. denied). The court quotes the definition of courts in [Tex. Fam. Code ch. 71](#).

relationship with an individual with whom the actor is or has been in a dating relationship or marriage;

AND

- is intended to result in physical harm, bodily injury, assault, sexual assault **OR** that is a threat that reasonably places the victim in fear of imminent harm, bodily injury, assault, or sexual assault. ([Tex. Fam. Code § 71.0021](#))

2.25 Deadly weapon means: (1) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (2) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. ([Tex. Penal Code § 1.07\(17\)](#))

2.26 Deaf person means an individual who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of proceedings or communication with others. ([Tex. Civ. Prac. & Rem. Code § 21.001](#); [Tex. Civ. Prac. & Rem. Code § 21.003](#); [Tex. Code Crim. Proc. art. 38.31\(g\)](#); [Tex. Gov't Code § 57.001 \(1\)](#) and (7))

2.27 Derivative visa holder means, under federal immigration law, the spouse or child of a primary visa-holder. The derivative status terminates with severance of the family relationship. ([8 U.S.C. § 1101\(a\)\(15\)](#))

2.28 Determination of parentage means the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity under [Tex. Fam. Code chapter 160](#), subchapter D, or by adjudication by a court. ([Tex. Fam. Code § 160.102\(5\)](#))

E

2.29 Electronic communication means, in the context of harassment, a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic, or photo-optical system. The term includes: a communication initiated by electronic mail, instant message, network call, or facsimile machine, and a communication made to a pager. ([Tex. Penal Code § 42.07\(b\)\(1\)](#))

2.30 Emergency means, for purposes of emergency telephone calls, a condition or circumstance in which any individual is, or is reasonably believed by the individual making a telephone call to be, in fear or imminent assault or in which property is, or is reasonably believed by the individual making the telephone call to be, in imminent danger of damage or destruction. ([Tex. Penal Code § 42.062\(d\)](#))

2.31 Excited utterance is a statement relating to a startling event or condition and made while the declarant was perceiving the event or condition or immediately after the declarant perceived the event or condition. [Tex. R. Evid. 803\(2\)](#). The event described by the excited utterance does not have to be the same event that caused the utterance because an excited utterance need not also be a present sense impression.³²

F

2.32 Family includes:

- (1) individuals related by consanguinity or affinity, as determined under [Tex. Gov't Code § 573.022](#) and [Tex. Gov't Code § 573.024](#);
- (2) individuals who are former spouses of each other;
- (3) individuals who are the parents of the same child, without regard to marriage; **or**
- (4) a foster child and foster parent, without regard to whether those individuals reside together. If the relationship is established only by virtue of a marriage (e.g., mother-in-law), the familial relationship ceases to exist once the marriage ends.³³ ([Tex. Fam. Code § 71.003](#))

2.33 Family violence means:

- (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

³² *McCarty v. State*, [257 S.W.3d 238](#) (Tex. Crim. App. 2008).

³³ *James v. Hubbard*, [21 S.W.3d 558, 561](#) (Tex. App.—San Antonio 2000, no pet.).

member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

- (2) abuse, as that term is defined by [Tex. Fam. Code § 261.001](#)(C), (E) and (G), by a member of a family or household toward a child of the family or household; **or**
- (3) dating violence. ([Tex. Fam. Code § 71.004](#))

2.34 Father means one of the following:

- (1) **acknowledged father** is a man who has established a father-child relationship under [Tex. Fam. Code ch. 160](#) ([Tex. Fam. Code § 101.0010](#));
- (2) **adjudicated father** is a man who has been adjudicated by a court to be the father of a child ([Tex. Fam. Code § 169.102\(1\)](#));
- (3) **alleged father** is a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term excludes the presumed father, a man whose parental rights have been terminated or declared void, or a male donor ([Tex. Fam. Code § 101.0015](#)); **or**
- (4) **presumed father** is a man who, by operation of law under [Tex. Fam. Code § 160.204](#), is recognized as the father of a child until the status is rebutted or confirmed in a judicial proceeding. ([Tex. Fam. Code § 160.102\(13\)](#))

2.35 Firearm means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. Firearm does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by [Tex. Penal Code ch. 46](#) and that is:

- (A) an antique or curio firearm manufactured before 1899; **or**
- (B) a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center-fire ammunition. ([Tex. Penal Code § 46.01\(3\)](#); [18 U.S.C. § 921\(a\)\(3\)](#))

2.36 Foreign protective order means a protective order issued by a tribunal of another state. ([Tex. Fam. Code § 88.002](#))

2.37 Forfeiture by wrongdoing means, in the context of the Sixth Amendment right to confrontation of a witness, a wrongful act that caused the witness to be unavailable (such as a murder) must occur simultaneously with an intent (a purpose or design) to prevent the witness from testifying.³⁴

G

H

2.38 Hearsay means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [Tex. R. Evid. 801\(d\)](#). For purposes of the Sixth Amendment confrontation clause, hearsay may be either testimonial or non-testimonial.

- (1) **Testimonial hearsay** is a solemn or sworn declaration made to establish some fact and includes statements made during a criminal investigation to prove that some fact is true or that some event occurred. Under the Sixth Amendment, testimonial hearsay is inadmissible in a criminal case if the declarant is available to testify but does not or if, whether or not the declarant is available to testify, the defendant has not had a previous opportunity to confront the declarant.³⁵
- (2) **Non-testimonial hearsay** includes statements made to obtain help during an ongoing emergency, statements to medical treatment providers, statements to anyone outside law enforcement or court personnel, photographs, statements in business records, and statements made to further conspiracy. See §11.15 of this Benchbook.
- (3) **Hearsay of a child victim of family violence** is admissible as evidence in a Texas Family Code protective order application case if:
 - (a) the child is 12 years of age or younger; **AND**
 - (b) the statement describes family violence against the child; **AND**
 - (c) if the court finds that the time, content, and circumstances of the statement provide sufficient indications of its reliability **AND**

³⁴ *Giles v. California*, 554 U.S. 353, [128 S.Ct. 2678, 2691](#) (2008).

³⁵ *Ibid* at 2691

- (d) either
 - (i) the child testifies or is available to testify at the proceeding or in any other manner required by law; **OR**
 - (ii) the court determines that the use of the child’s statement in lieu of testimony is necessary to protect the child’s welfare. ([Tex. Fam. Code §§ 84.006 and 104.006](#))

(4) **Hearsay of a child victim of sexual assault** is admissible as evidence in a sexual assault protective order application under Texas Code of Criminal Procedure chapter 7A case if:

- (a) the child is 14 years of age or younger; **AND**
- (b) the statement describes family violence against the child; **AND**
- (c) if the court finds that the time, content, and circumstances of the statement provide sufficient indications of its reliability **AND**
- (d) either
 - (i) the child testifies or is available to testify at the proceeding or in any other manner required by law; **OR**
 - (ii) the court determines that the use of the child’s statement in lieu of testimony is necessary to protect the child’s welfare. ([Tex. Code Crim. Proc. art. 7A.035; Tex. Fam. Code § 104.006](#))

2.39 Home state, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), means the state where the child was born (if less than 6 months of age) or where the child lived (was physically located)³⁶ with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding, or at least six months before any child custody proceeding is filed; **AND** where a parent continues to reside. ([Tex. Fam. Code § 152.102\(7\)](#))

³⁶ *Powell v. Stover*, [165 S.W.3d 322, 323](#) (Tex. 2005). With regard to determining a child’s home state under the UCCJEA, the term “lived” strongly connotes physical presence and the physical location of the child is the central factor to be considered when determining child’s home state.

In re Tieri, [283 S.W.3d 889](#) (Tex. App. —Tyler 2008)(orig. proceeding). New Jersey, not Texas, was the child’s home state because the child did not live in Texas for six consecutive months before the custody case was filed.

In re KY, [273 S.W.3d 703, 707](#) (Tex. App. —Houston [14th Dist.] 2008, no pet.) A child’s frequent trips out of Texas during six month period before custody case was filed did not divest Texas of home state jurisdiction.

In re Burk, [252 S.W.3d 736, 740](#) (Tex. App. —Houston [14th Dist.] 2008)(orig. proceeding). To be the child’s home state, Texas must have been the child’s home at some time within the six months before the child custody case was filed.

2.40 Household means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other. ([Tex. Fam. Code § 71.005](#))

2.41 Household member includes a person who lives in the same dwelling with another person or who previously lived in a household with another person. ([Tex. Fam. Code § 71.006](#))

I

2.42 Identifying information means information that alone or in conjunction with other information:

- (1) identifies a person (including a person's name, Social Security number, date of birth, or government-issued identification number);
- (2) is unique biometric data (fingerprint, voice print, retina or iris image);
- (3) is unique electronic identification number, address, routing code, or financial institution account number; **or**
- (4) is a telecommunication identifying information or access device. ([Tex. Penal Code § 32.51](#); [Tex. Penal Code § 33.07\(f\)](#))

2.43 Individual means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth. ([Tex. Penal Code 1.07\(26\)](#))

2.44 Initial determination means the first child custody determination for which enforcement is sought under the Uniform Child Custody Jurisdiction and Enforcement Act. ([Tex. Fam. Code § 152.102\(8\)](#))

2.45 Interpreter means a person who has the requisite skills to communicate in two or more languages, including sign language.

2.45.1 Certified court interpreter means an individual who is qualified as an interpreter, as defined in [Tex. Code Crim. Proc. art. 38.31](#), [Tex. Civ. Prac. & Rem. Code § 21.003](#), or by the Department of Assistive and Rehabilitative Services, for hearing impaired individuals. ([Tex. Civ.](#)

[Prac. & Rem. Code § 21.001](#); [Tex. Code Crim. Proc. art. 38.31\(g\)](#); [Tex. Gov't Code § 57.001](#)

2.45.2 Licensed court interpreter means an individual licensed by the Texas Department of Licensing and Regulation to interpret in court proceedings for individuals who can hear but who do not comprehend, or communicate in, English. ([Tex. Gov't Code § 57.001](#))

2.45.3 Qualified interpreter means a person who is not a licensed interpreter but who is otherwise qualified to provide language interpretation services in a court proceeding by virtue of having the requisite language skills, being qualified as an expert under the Texas Rules of Evidence, being at least 18 years of age, and not being a party to the proceeding. ([Tex. Gov't Code § 57.001](#); [Tex. Gov't Code § 57.002](#))

2.46 Intimate partner means, for a person accused of violating the federal Gun Control Act, an individual is an intimate partner if that person is the: (1) spouse or former spouse of the accused; (2) parent of the accused's child; or (3) a person who currently cohabitates, or formerly cohabitated, with the accused. ([18 U.S.C. § 921\(a\)\(32\)](#))

2.47 Issuing court means the court that makes a child custody determination for which enforcement is sought under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). ([Tex. Fam. Code § 152.102\(9\)](#))

2.48 Issuing state means:

(1) for **family violence protective order** cases, the state in which a tribunal issues a protective order or in which a child custody determination was made. ([Tex. Fam. Code § 88.002](#))

(2) for **child custody cases**, the state in which a child custody determination is made. ([Tex. Fam. Code § 152.102\(10\)](#))

2.49 Issuance of an order means, in civil cases, the date of an order or judgment, which determines when the deadlines begin to run for various post-judgment actions. ([TEX. R. CIV. P. 306A](#))

J

2.50 Jurisdiction means the power of the court over the subject matter of the case and personal jurisdiction over the party.³⁷

³⁷ *Fairfield v. State*, [610 S.W.2d, 771, 779](#) (Tex. Crim. App. 1981).

K

L

2.51 Legal custody of a child means the managing conservatorship of a child. ([Tex. Fam. Code § 152.102\(11\)](#))

M

2.52 Magistrate’s order of emergency protection is a pretrial order of protection issued to prevent family violence by a person who has been arrested and remains in custody. It issues before the defendant is released from custody and can last from 31-91 days. ([Tex. Code Crim. Proc. art. 17.292](#))

2.53 Managing conservatorship means right to custody of a child as ordered in a SAPCR. There are two types:

2.53.1 Joint managing conservatorship (JMC) is a custodial arrangement by which the parties share legal, but not necessarily physical, custody of child pursuant to a SAPCR. JMC is presumed to be in the child’s best interest, but a finding of family violence defeats this presumption. The SAPCR order should designate how any right regarding the child is to be exercised—jointly, independently, or exclusively. The order designates which party should be given the sole right to determine the child’s primary residence. JMC requires almost equal access and possession of the child under the standard possession order. ([Tex. Fam. Code § 153.004](#), [Tex. Fam. Code § 153.071](#), [Tex. Fam. Code §§ 153.131-153.137](#));

2.54.2 Sole managing conservatorship (SMC) is required if the court makes a finding of family violence against a party seeking conservatorship. SMC gives the non-violent party the sole legal custody of the child. The violent party becomes the possessory conservator. The sole managing conservator has the right to make all decisions concerning the child, including deciding where the child resides. ([Tex. Fam. Code § 153.004\(e\)](#))

2.55 Marriage is a relationship between the parties, conferring on them the legal status of husband and wife.³⁸ Texas law does not permit marriages between (1) same sex couples ([Tex. Const. Art. I, § 32](#); [Tex. Fam. Code § 2.002](#)); (2) persons who have certain current or former familial relationships by whole or half blood or by adoption³⁹ ([Tex. Fam. Code § 6.201](#)); (3) more than two persons at one time ([Tex. Fam. Code § 6.202](#)); (4) a transsexual (male to female) to a man;⁴⁰ or with (5) person under the age of 16 except with permission of a court.⁴¹ ([Tex. Fam. Code § 2.103](#), [Tex. Fam. Code § 6.205](#))

2.55.1 A ceremonial or formal marriage is one that has been entered into in accordance with the statutory requirements. ([Tex. Fam. Code § 2.001](#))

2.55.2 Informal (common-law) marriage arises when competent parties over the age of 18 agree or intend to be husband and wife and immediately enter into and maintain a marital relationship without complying with statutory requirements for a formal marriage.⁴² ([Tex. Fam. Code § 2.401](#))

2.55.3 Putative marriage is a marriage that has been contracted in good faith by at least one of the parties but that is void or voidable because of an impediment on the part of one or both parties that is unknown to the putative (claimant) spouse.⁴³

2.55.4 Void marriage is a marriage that is null and void *ab initio*. It is of no effect, whether or not it has been decreed invalid by a court of competent jurisdiction. It may be declared void by a court in a suit to

³⁸ [Grigsby v. Reib](#), 153 S.W. 1124, 1130, 105 Tex. 597 (1913); [Williams v. Williams](#), 336 S.W.2d 757, 758-759 (Tex. Civ. App.—Eastland 1960, *dism'd w.o.j.*); for marriage in general, see 1-1 Texas Family Law: Practice and Procedure B1.01.

³⁹ For marriages after September 1, 2005, the law does not recognize marriages between a current or former step-parent and a step-child. [Tex. Fam. Code § 6.206](#).

⁴⁰ [Littleton v. Prange](#), 9 S.W.3d 223, 225-231 (Tex. App.—San Antonio 1999, *pet. denied*). See also, [Billodeau v. State](#), 263 S.W.3d 318 (Tex. App.—Houston [1st Dist.] 2007) reversed on other grounds and remanded [2009 Tex. App. Lexis 232](#) (Tex. Crim. App., Feb. 22, 2009). In a prosecution for aggravated sexual assault of a child, the defendant and complainant could not have been legally married in Texas because both were males.

⁴¹ For marriages as of September 1, 2005.

⁴² [McArthur v. Hall](#), 169 S.W.2d 724, 726 (Tex. Civ. App.—Fort Worth 1943, *ref. w.o.m.*); [Baker v. Mays & Mays](#), 199 S.W.2d 279, 284 (Tex. Civ. App.—Fort Worth 1946, *dis. w.o.j.*).

⁴³ [Garduno v. Garduno](#), 760 S.W.2d 735, 738-739 (Tex. App.—Corpus Christi 1988, *no writ.*).

declare the marriage void or in a collateral proceeding.⁴⁴ ([Tex. Fam. Code § 6.307\(a\)](#))

2.55.5 Voidable marriage is a marriage that is subject to annulment because one or more of the parties was unable to consent at the time of the marriage due to an impediment. Among the impediments that may render a marriage void are lack of mental competency or being underage, intoxicated, or permanently impotent. A voidable marriage is fully valid until annulled and cannot be challenged in a collateral proceeding. ([Tex. Fam. Code § 1.101](#)) An annulled marriage is not void for purposes of division of property or legitimacy of children.⁴⁵

2.56 Member of a household (see household member) includes a person who previously lived in the household. ([Tex. Fam. Code § 71.006](#))

2.57 Misdemeanor crime of domestic violence means, under the federal **Gun Control Act**, a misdemeanor conviction under state or federal law for a crime that has as an element of either:

- (1) the use or attempted use of physical force; **or**
- (2) the threatened use of a deadly weapon against either a:
 - current spouse;
 - former spouse;
 - parent or guardian of the victim;
 - person with whom the defendant has a child;
 - victim who currently or formerly cohabitated with the defendant as a spouse, parent, or guardian; **or**
 - person similarly situated to a spouse, parent, or guardian of the victim.

([18 U.S.C. § 921\(a\)\(33\)\(A\)](#))

2.58 Modification of a child custody order means a child custody determination that changes, replaces, supersedes, or is otherwise made after a

⁴⁴ [Carter v. Green](#), 64 S.W.2d 1069, 1070 (Tex. Civ. App.—Texarkana 1933, writ ref.).

⁴⁵ [Bruni v. State](#), 669 S.W.2d 829, 835 (Tex. App.—Austin 1984, no writ.); [Stubbs v. Metropolitan Life Ins. Co.](#), 653 F. Supp. 299, 300 (S.D. Tex. 1986).

previous determination concerning the same child, whether or not it is made by the court that made the previous determination. ([Tex. Fam. Code § 152.102\(12\)](#))

2.59 Mutual protective order. A protective order that in a single document imposes criminally enforceable orders on both the applicant and respondent. Such orders are not allowed under Texas or federal law. ([Tex. Fam. Code § 85.003](#))

2.60 Mutual foreign protective order means a protective order issued by a court outside Texas that includes provisions issued in favor of both the protected individual seeking enforcement of the order and of the respondent. ([Tex. Fam. Code § 88.002](#))

N

O

2.61 Obscene means, in the context of a harassing communication, containing a patently offensive description of or a solicitation to commit an ultimate sex act (including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus) or a description of an excretory function. ([Tex. Penal Code § 42.07](#))

2.62 Offense motivated by bias or prejudice means selecting a victim because that person is a member of a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference. Sexual preference means a preference for either heterosexuality, homosexuality, or bisexuality. ([Tex. Code Crim. Proc. art. 42.014](#))

P

2.63 Parent means:

2.63.1 For suits affecting the parent-child relationship, (1) the mother of a child; (2) the adoptive mother of a child; or (3) a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive father of a child. Except for a person ordered to pay child

support, the term does not include a parent as to whom the parent-child relationship has been terminated. ([Tex. Fam. Code § 101.024](#))

2.63.2 For parentage determinations, an individual who has established a parent-child relationship under [Tex. Fam. Code § 160.201](#). ([Tex. Fam. Code § 160.102\(11\)](#))

2.64 Parent-child relationship means the legal relationship between a child and the child's parent as provided by [Tex. Fam. Code ch. 160](#), including the mother-child and the father-child relationship. ([Tex. Fam. Code § 101.025](#))

2.65 Person acting as a parent means, for purposes of child custody cases, a person other than a parent, who: (a) has custody of a child or has had physical custody of a child for a period of six months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding, and (b) has been awarded legal custody by a court or claims a right to legal custody under the Texas law. ([Tex. Fam. Code § 152.102\(13\)](#))

2.66 Person with a disability means a person who has a mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services. ([Tex. Hum. Res. Code § 121.001-121.003](#)). For purposes of criminal prosecutions, a disabled person is a person older than 14 years or age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself. ([Tex. Penal Code § 22.04\(c\)\(3\)](#)).

2.67 Physical custody means the physical care and supervision of a child. ([Tex. Fam. Code § 152.102\(14\)](#))

2.68 Possessory conservator means the party to a suit affecting the parent-child relationship who does not have the right to make decisions regarding the child. A person with rights to possession of a child may exercise possession and control of the child, to the exclusion of all other persons including the managing conservator, during periods of possession. A person with rights of possession of a child also has rights and responsibilities for the child's care and behavior.⁴⁶

⁴⁶ *Hopkins v. Hopkins*, [853 S.W.2d 134, 137](#) (Tex. App. —Corpus Christi 1993, no writ). '

2.69 Prosecuting attorney means the attorney who represents the state in a district or statutory county court in the county in which venue of the application for a protective order is proper. ([Tex. Fam. Code § 71.007](#))

2.70 Protected individual means an individual protected by a protective order. ([Tex. Fam. Code § 88.002](#))

2.71 Protective order (including an order modifying a prior order) means an injunction or other order issued by a tribunal under the domestic violence or family violence law or another law of the issuing state to prevent an individual from engaging in violent or threatening acts against, harassing, contacting or communicating with, or being in physical proximity to another individual. ([Tex. Fam. Code § 88.002](#))

2.71.1 Magistrate’s order of emergency protection. is an protective order issued before a defendant is released from jail after an arrest for a family violence offense or sexual assault, aggravated sexual assault, or stalking. The magistrate’s order has a limited duration (no more than 90 days). It is mandatory when the defendant used or exhibited a deadly weapon in the course of an assaultive offense or when the defendant has caused serious bodily injury to the victim. ([Tex. Code Crim. Proc. art.17.292](#))

2.71.2 Mutual protective order. A protective order that in a single document imposes criminally enforceable orders on both the applicant and respondent. Texas courts are not allowed to issue such orders and foreign mutual protective orders are entitled to full faith and credit only if the respondent filed an application for a protective order and the issuing tribunal made findings in favor of the respondent. ([Tex. Fam. Code. § 85.003](#); [Tex. Fam. Code § 88.003\(g\)](#))

2.71.3 Mutual foreign protective order means a foreign protective order that includes provisions issued in favor of both the protected individual seeking enforcement of the order and the respondent. ([Tex. Fam. Code § 88.002](#))

2.71.4 Qualifying protective order. Under the federal Gun Control Act, a “qualifying” protective order is one which prohibits either (1) harassing, stalking, or threatening an intimate partner (current or former spouse, co-parent, or one who lives or has lived with the respondent) or the child of an intimate partner; or (2) engaging in other conduct which would

place an intimate partner in reasonable fear of bodily injury to self or the partner's child. ([18 U.S.C. § 922\(g\)\(8\)](#); [18 U.S.C. § 921\(a\)\(32\)](#))

2.71.5 Separate protective orders (also known as parallel, concurrent, or simultaneous orders). Two separate documents that impose protective orders on the same parties based on the same or overlapping facts and circumstances that established that family violence was perpetrated by each party against the other party or a member of the family or household of the other party (e.g., applicant in the first order is the respondent in the second order). Such orders may be entered only after filing of an application by each party, notice to the party against whom the protective order is sought, and after separate hearings on the merits for each application (i.e., the two applications may not be considered in a single evidentiary hearing). ([Tex. Fam. Code § 85.003](#))

2.71.6 Sexual assault, stalking, compelled prostitution, or human trafficking (for sexual exploitation) victim's protective order is an protective order that restrains a person alleged to have committed a sexual assault. The protective order can be issued regardless of the nature of the relationship between the alleged assailant and the applicant and regardless of whether a criminal complaint is filed against the alleged assailant. ([Tex. Code Crim. Proc. art. 7A](#))

2.71.7 Stalking victim's protective order is an protective order that restrains a person alleged to have stalked the applicant if there is a related criminal proceeding (that is, a criminal stalking charge pending or has been disposed of against the person restrained). The protective order can be issued regardless of the nature of the relationship between the alleged offender but only in conjunction with a proceeding before the court related to an offense under Tex. Penal Code § 42.072. ([Tex. Code Crim. Proc. art.6.09](#))

2.71.8 Temporary ex parte protective order. A temporary restraining order that can issue under Tex. Fam. Code ch. 83 or Texas Code Crim. Proc. arts. 7A or 7B upon proof of clear and present danger of to the persons seeking protection and without notice to the individual to be restrained. It is criminally enforceable (except under Art. 7B) only after service on the person to be restrained and cannot last more than 14 days (20 days in district courts in multi-county districts or in counties over 2 million in population). ([Tex. Fam. Code § 83.001](#); [Tex. Fam. Code 83.002](#); [Tex.](#)

[Const. Art. I, sec. 11c; Tex. Fam. Code § 84.002; Tex. Code Crim. Proc. art. 7A; Tex. Code Crim. Proc. art. 7B\)](#)

2.71.9 Victim of a crime motivated by bias or prejudice protective order is a protective order that can be issued when a defendant appears to answer for a criminal offense that is alleged to have been committed due to bias or prejudice against the victim. ([Tex. Code Crim. Proc. art. 6.08](#))

2.71.10 Victim of any type of human trafficking protective order is a protective order that can be issued when a defendant appears to answer for a criminal offense of any type of human trafficking. The protective order is available without regard to a relationship between the applicant and the offender. ([Tex. Code Crim. Proc. art. 7B](#))

2.72 Public facility means a public building maintained by any unit or subdivision of government or a building to which the general public is invited. ([Tex. Hum. Res. Code § 121.001-121.003](#))

Q

2.73 Qualifying protective order. With regard to the federal Gun Control Act, a “qualifying” protective order is one which prohibits either (1) harassing, stalking, or threatening an intimate partner (current or former spouse, co-parent, or one who lives or has lived with the respondent) or the child of an intimate partner; or (2) engaging in other conduct which would place an intimate partner in reasonable fear of bodily injury to the partner or the partner’s child. ([18 U.S.C. § 922\(g\)\(8\)](#); [18 U.S.C. § 921\(a\)\(32\)](#))

R

2.74 Refugee is an **immigration** status for persons currently in another country who seek entry into the U.S. to protect themselves. A refugee differs from an asylum-seeker in that the former is already physically present in the U.S. when the status is requested. ([8 U.S.C. § 1101\(a\)\(42\)\(A\)](#))

2.75 Render means the pronouncement by a judge of the court’s ruling on a matter. It may be made orally in the presence of the court reporter or in writing, including a written entry on the court’s docket sheet or by a separate written instrument. ([Tex. Fam. Code § 101.026](#))

2.76 Respondent means, in the context of a family violence **protective order**, the individual against whom a protective order is obtained or against whom enforcement of a protective order is sought. ([Tex. Fam. Code § 88.002](#))

S

2.77 SAPCR (suit affecting the parent-child relationship) means a suit filed as provided by [Tex. Fam. Code Title 5](#) in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested. Excluded from this definition are habeas corpus proceedings under [Tex. Fam. Code ch. 157](#) and proceedings under [Tex. Fam. Code Title 2](#) and ch. 159. ([Tex. Fam. Code § 101.032](#))

2.78 School, in context of protective orders, means a primary or secondary school in which a child is enrolled or, if the child is not enrolled in a primary or secondary school, the public school district in which the child primarily resides. ([Tex. Fam. Code § 101.028](#))

2.79 Self-petitioning. The process by which a spouse or child of an abusive U.S. citizen or lawful permanent resident can petition for lawful immigration status when the only impediment to that status is the abuser's failure to file the required change of status petition. ([8 U.S.C. § 1154](#))

2.80 Serious bodily injury means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. ([Tex. Penal Code § 1.07 \(46\)](#))

2.81 Sexual assault means intentionally or knowingly and without the victim's consent: (1) causing penetration of another's sexual organ or anus by any means, or of another's mouth by the actor's sexual organ; (2) causing another's sexual organ to contact or penetrate the sexual organ, anus, or mouth of another, including the perpetrator's; **OR** (3) any such penetration of a child younger than 17 years of age, regardless of consent. For purposes of criminal prosecution, an act is without consent if the perpetrator: used or threatened to use physical force or violence; knew the victim was unconscious, physically unable to resist, unaware of the assaultive act, or incapable of appraising or resisting the nature of the act; administered any substance without the victim's consent; is a public

servant and uses coercion; is a mental health or health care services provider or a clergyman and exploits the victim's emotional dependency on the perpetrator; or is an employee of a facility where the victim resides. ([Tex. Penal Code § 22.011](#))

2.82 Shelter center means a program that is operated by a public or private nonprofit organization and provides comprehensive residential and nonresidential services to victims of family violence as their primary service. ([Tex. Hum. Res. Code § 51.002](#))

2.83 Spouse means a person to whom another person is legally married under Subtitle A, Title 1, Family Code, or a comparable law of another jurisdiction.⁴⁷ ([Tex. Penal Code § 21.01\(4\)](#); [Tex. Penal Code § 22.011\(c\)\(2\)](#))

2.84 Stalking means knowingly engaging in conduct, including following a person, that the actor reasonably knows or reasonably believes the other person will regard as threatening bodily injury or death to the other person (or a member of the other person's family or household) or that an offense will be committed against the other person's property. It is also stalking if the actor's conduct causes the other person to fear, or would cause a reasonable person to fear, bodily injury or death to the other person or a member of the other person's family or household or that the actor will commit an offense against the other person's property. ([Tex. Penal Code § 42.072](#))

2.85 Standard possession custody order. In SAPCRs, the standard possession order (SPO) allocates the possession of the child between the parties. In a joint managing conservatorship order, the SPO divides the child's time (for children over 3 years of age) approximately 55% to the managing conservator and 45% to the possessory conservator. The SPO is presumed to be in the best interest of the child, but that presumption **DOES NOT** apply where the court has found a history or pattern of neglect or physical or sexual abuse by a party against the other parent, a spouse, or child. In the case of neglect or abuse, there is a rebuttable presumption that it is not in the best interests of the child to have

⁴⁷ See [Littleton v. Prange](#), 9 S.W.3d 223, 225-231 (Tex. App.—San Antonio 1999, pet. denied). For purposes of a wrongful death suit, the term "spouse" does not include a transgendered male-to-female person who was ceremonially married to a male. See also, [Billodeau v. State](#), 263 S.W.3d 318 (Tex. App.—Houston [1st Dist.] 2007) reversed on other grounds and remanded [2009 Tex. App. Lexis 232](#) (Tex. Crim. App., Feb. 22, 2009). In a prosecution for aggravated sexual assault of a child, the defendant and complainant could not have been legally married in Texas because both were males.

visitation with the abusive party. ([Tex. Fam. Code § 153.004](#), [Tex. Fam. Code § 153.312](#), [Tex. Fam. Code § 153.313](#), [Tex. Fam. Code § 153.254](#))

2.86 State means a state of the United States; the District of Columbia; a commonwealth, territory, or insular possession of the United States; a military tribunal; or a tribal court or tribunal (including an Alaskan native village that has jurisdiction over protective orders). ([Tex. Fam. Code § 88.002](#); [Tex. Fam. Code § 101.030](#))

T

2.87 Temporary emergency order of protection for a child, in the context of a pre-existing child **custody** order, means a subsequent order issued by a Texas court under the Uniform Child Custody Jurisdiction and Enforcement Act, to protect a child or its sibling or parent from family violence when a foreign court has previously issued, or has pending, a custody determination for the child. ([Tex. Fam. Code § 152.204](#))

2.88 Tribe means an Native American (Indian) tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state. ([Tex. Fam. Code § 152.102\(15\)](#))

2.89 Tribunal means:

2.89.1 For family violence cases, a court, agency, or other entity authorized by law to issue or modify a protective order. ([Tex. Fam. Code § 88.002](#))

2.89.2 For SAPCRs generally, a court, administrative agency, or quasi-judicial entity of a state authorized to establish, enforce, or modify support orders to determine parentage. ([Tex. Fam. Code § 101.035](#))

U

V

2.90 Venue means the proper place to file a lawsuit or criminal charge.⁴⁸

⁴⁸ *Fairfield v. State*, [610 S.W.2d. 771, 779](#) (Tex. Crim. App. 1981).

2.91 Violation of a protective order means, in context of a criminal prosecution. failing to comply with the criminally enforceable terms and conditions of a protective order entered under [Tex. Fam. Code Title 4](#), [Tex. Fam. Code § 6.504](#), Tex. Code of Crim. Proc. art. 17.292, or entitled to full faith and credit under [Tex. Fam. Code ch. 88](#). ([Tex. Penal Code § 25.07](#)). A protective order violation is also subject to sanction as contempt of a court order. ([Tex. R. Civ. Proc. 308 and 308a](#))

2.92 Visitation means the possession of or access to a child. ([Tex. Fam. Code § 152.102\(16\)](#))

W

2.93 Warrant means, in the context of the Uniform Child Custody Jurisdiction and Enforcement Act ([Tex. Fam. Code ch. 152](#)), an order issued by a court authorizing law enforcement officers to take physical **custody** of a child. ([Tex. Fam. Code § 152.102\(17\)](#))

X,Y,Z

CHAPTER 3—FAMILY CODE TITLE 4 PROTECTIVE ORDERS—PART I: STATUTES AND CASE LAW

(Tex. Fam. Code Title 4)

Summary:

A protective order under [Tex. Fam. Code Title 4](#) is available to persons who are victims of violence perpetrated by a family or household member or by a person with whom the victim had dating relationship.

3.1 Eligibility; venue; application contents.

3.1.1 Standing to apply.

Persons eligible to apply for a protective order under Title 4 of the Texas Family Code are:

- an adult member of the family or household on behalf of anyone in the family or household;
- for applications filed before September 1, 2011, an adult member of a dating relationship;
- for applications filed on or after September 1, 2011, a member of the dating relationship, regardless of whether the member is an adult or child;
- an adult member of the marriage if the victim is or was married as described in Texas Family Code § 71.0021(a)(1)(B);
- any adult on behalf of a child victim of family or dating violence;⁴⁹
- a prosecuting attorney in the county where venue is proper;

OR

- the Department of Family and Protective Services.

⁴⁹ *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App. —Austin 2003, no pet.). In dating violence case, any adult may file for protective order on behalf of child but adult may not file on behalf of another adult.

[\(Tex. Fam. Code § 82.002; Tex. Fam. Code § 82.009 Tex. Hum. Res. Code § 54.001\)](#)

3.1.2 Courts with jurisdiction.

The protective order can be issued by a: ⁵⁰

- district court;
- domestic relations court;
- juvenile court having district court jurisdiction;
- statutory county court;
- constitutional county court;

OR

- any other court given express jurisdiction over [Tex. Fam. Code Title 4](#) cases.

NOTE: A post-divorce protective order must be filed in the court where the original divorce petition was filed but may be transferred or reassigned to another court for the hearing.⁵¹

[\(Tex. Fam. Code § 71.002\)](#)

3.1.3 Venue.

The protective order application may be filed in:

- the county where the applicant resides;
- the county where the respondent resides;

⁵⁰ *Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet denied). For purposes of family violence protective orders, the legislature defines “court” as a district court, court of domestic relations, juvenile court having the jurisdiction of a district court, statutory county court, constitutional county court, or other court expressly given jurisdiction under [Tex. Fam. Code Title 4](#).

Magill v. Sheffield, [612 S.W.2d 677](#) (Tex. App.—Dallas 1981, no writ). [Tex. Family Code Title 4](#) controls protective order venue rather than statute governing continuing jurisdiction for SAPCR order.

⁵¹ *Cooke v. Cooke*, [65 S.W.3d 785](#) (Tex. App.—Dallas 2001, no pet.). A post-divorce protective order was required by statute to be filed in the divorce court but the protective order did not have to be heard by that court and could be transferred or reassigned.

- the county where a divorce or SAPCR proceeding between the parties is pending;
- the county where the applicant resides if the applicant lives outside the county where a divorce or SAPCR proceeding is pending;

OR

- the county where a final order was issued in a divorce or SAPCR proceeding before the protective order application was filed.

NOTE: The applicant may choose from the available venues unless the application is filed in the same county where a divorce or SAPCR is pending between the parties. In that case, the application must be filed in divorce/SAPCR court. (Tex. Fam. Code §§ 82.005 and 85.062)

When venue is unclear, the elements in the general civil venue statute that fix venue are examined.⁵² Those elements are: (1) a fixed place of abode; (2) within the party's possession; (3) that is occupied or intended to be occupied consistently over a substantial period of time; and (4) which is permanent rather than temporary.

[\(Tex. Fam. Code § 82.003; Tex. Fam. Code § 85.062; Tex. Fam. Code § 85.063\)](#)

3.1.4 Contents of application.

3.1.4.1 Standard.

The protective order 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 or dating violence;
- the relationship between the applicant and the individual alleged to have committed family violence;

⁵² *In re Salgado*, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001) (orig. proceeding). In *dicta* in a protective order case, the court found that venue for a minor child's protective order application should be determined under the elements in the general civil venue statute, which are: where the applicant has a fixed place of abode within the party's possession that is occupied or intended to be occupied consistently over a substantial period of time; and which is permanent rather than temporary.

AND

- a request for one or more protective orders.

NOTE: If the applicant is requesting a temporary ex parte protective order, the application must contain a detailed description of the facts and circumstances supporting the request and be signed under oath. For applications filed on or after September 1, 2011, the applicant's oath need not be notarized. See [Tex. Civ. Prac. & Rem. Code § 132.001](#).

Although the statute does not require the application to contain either party's address, an address for service of notice of hearing on the respondent will be needed.

([Tex. Fam. Code § 82.002](#); [Tex. Fam. Code 82.009](#))

3.1.4.2 Variables.

If applicable, the protective order application must state:

- **divorce.** If the parties are divorced, the application must state that:
 - a copy of the divorce decree is attached to the application;

OR

- a copy of the decree is unavailable but will be filed before the hearing on the application.

([Tex. Fam. Code § 82.006](#))

- **child custody or support.** If the application requests protection for a child already subject to the continuing jurisdiction of a court, the application must state that:
 - copies of the court orders affecting child custody or child support are attached to the application;

OR

- the orders are unavailable but will be filed with the court before the hearing.

NOTE: To avoid entering conflicting orders or to properly modify a preexisting order, the court should determine the contents of any preexisting child custody, visitation, or support orders. See Chapters 7 and 15.

[\(Tex. Fam. Code § 82.007\)](#)

- **prior, expired protective order.** If the applicant and respondent were parties to a protective order that has expired, the application must state that a copy of the expired order is attached to the application or is unavailable but will be filed with the court before the hearing;

AND

- a statement of how the expired order was violated;

OR

- a statement of the threatened harm that reasonably places the applicant in fear of imminent physical harm, bodily injury, assault or sexual assault.

[\(Tex. Fam. Code § 82.008\)](#)

- **prior, unexpired protective order.** If the applicant and respondent are parties to a protective order that is due to expire within 30 days of the application, the new application must:

- state that a copy of the prior order is attached to the application or will be filed before the hearing;

AND

- describe the protective order violation or threatened harm.

[\(Tex. Fam. Code § 82.0085\)](#)

3.1.5 Contents of notice of the application.

The notice of the application for the permanent protective order must:

- be styled “The State of Texas v. [Respondent’s name]”;

- be signed by the court’s clerk under seal and contain the clerk’s address;
- state the name and location of the court and the cause number;
- show the date that the application was filed and that the notice of the application was issued;
- state the date, time, and location of the hearing;
- state the applicant’s name;
- state the name of all persons alleged to have committed family violence;
- be directed at the person or person alleged to have committed family violence;
- show the name and address of the applicant or the applicant’s legal counsel;

AND

- contain the statement set out in Tex. Fam. Code § 82.041(b).⁵³

[\(Tex. Fam. Code § 82.041\)](#)

3.2 Temporary ex parte protective order.

Upon request of the applicant made before the hearing on the permanent order, the court may issue a temporary (*ex parte*) order.

3.2.1 Temporary ex parte protective order application.

⁵³ [Tex. Fam. Code § 82.041\(b\)](#). The notice of an application for a protective order must state: “An application for a protective order has been filed in the court stated in this notice alleged that you have committed family violence. You may employ an attorney to defend you against this allegation. You or your attorney may, but are not required to, file a written answer to the application. Any answer must be filed before the hearing on the application. If you receive this notice within 48 hours before the time set for the hearing, you may request the court reschedule the hearing not later than 14 days after the date set for the hearing. If you do not attend the hearing, a default judgment may be taken and a protective order may be issued against you.”

In addition to all the elements stated in the application for a permanent order in support of the request for issuance of a temporary *ex parte* protective order, the application must also contain:

- a detailed description of the facts and circumstances of the alleged family violence requiring immediate issuance of a temporary protective order;
- the applicant's signature taken under oath and averring that the allegations are true to the applicant's best belief and knowledge. **NOTE:** For applications filed on or after September 1, 2011, the applicant's oath need not be notarized. See [Tex. Civ. Prac. & Rem. Code § 132.001](#).
- For purposes of this chapter and for applications filed on or after September 1, 2011, statement signed under oath by a child is sufficient if the statement otherwise complies with the chapter.

[\(Tex. Fam. Code § 82.009\)](#)

3.2.2 Request for exclusion from residence.

When the applicant requests that the **temporary *ex parte* protective order** exclude the respondent from a residence shared with the applicant, the application must allege that:

- the respondent committed an act of family violence within the past 30 days;
- the applicant currently resides or has resided at the same residence in the past 30 days;⁵⁴

AND EITHER

- the applicant has a legal interest in the property (ownership or leasehold);

OR

- the respondent has a legal duty to support the applicant or the applicant's child.⁵⁵

⁵⁴ [Tex. Fam. Code § 83.006](#)(b)(1) and (2).

[\(Tex. Fam. Code § 83.006; Tex. Fam. Code § 85.021\(2\)\)](#)

3.2.3 Notice; service; hearing.

The temporary *ex parte* protective order may be issued without:

- prior notice to the respondent;
- service of process on the respondent;⁵⁶

OR

- a hearing, **UNLESS** the applicant is requesting that the respondent be excluded from a residence, in which case the applicant must file a sworn affidavit justifying the exclusion and appear in person at a hearing to request the exclusion.

NOTE: Recess of hearing. As of September 1, 2011, Texas Family Code § 83.007 (allowing the court to recess any temporary order hearing to attempt to contact the respondent) was repealed. Under the new section (c) of Texas Family Code § 83.006, the court may recess the hearing to contact the respondent **only** if application requests that the respondent be excluded the respondent's residence. Regardless of whether the respondent is contacted or attends the hearing, the hearing must resume before the end of that working day.

[\(Tex. Fam. Code § 83.006; Tex. Fam. Code § 83.007\)](#)

3.2.4 Temporary *ex parte* order contents.

In a temporary *ex parte* protective order, the court is authorized by [Tex. Fam. Code § 83.001\(b\)](#) to “direct a respondent to do or refrain from doing specified acts.”⁵⁷ The temporary order should:

⁵⁵ [Tex. Fam. Code § 85.021\(1\)\(B\)\(2\)](#). As used throughout [Tex. Fam. Code Title 4](#), and defined in [Tex. Fam. Code § 88.002](#), the term protective order includes a temporary *ex parte* protective order, so § 85.021(1)(B)(2) applies to exclusions under [Tex. Fam. Code § 83.006](#).

⁵⁶ [Tex. Fam. Code § 82.010](#). See Section 3.2.7 regarding confidentiality of an application in Harris County.

⁵⁷ Unlike the statutorily designated acts for a final protective order (found in Tex. Fam. Code §§ 85.021 and 85.022), the temporary protective order statute does not list what acts may be required or prohibited by the court. However, because a temporary order is a temporary injunction, court orders intended to maintain the peace and the status quo pending the hearing on the final order are appropriate.

- name the parties and designate their respective status;
- name all persons protected by the order and the relationship of each person to the applicant;
- state that the court has jurisdiction over the parties and the subject matter;
- state that the respondent either had reasonable notice of the order or will have reasonable notice and an opportunity to be heard consistent with due process before a permanent order is rendered;
- contain a finding that there is a clear and present danger of family violence by the respondent (the reason for issuance as required by Tex. R. Civ. Pro. 683);
- set the duration of the order, not to exceed 14 day (20 days in multi-county district courts or district courts in counties with a population over 2 million). The temporary order may be extended multiple time for additional 14 day periods (or 20 day periods where allowable);
- state whether the respondent is required to post bond;
- if the respondent is ordered to be excluded from the respondent's residence, state that there is a clear and present danger to the applicant if the respondent is not excluded from the residence;
- list the acts the respondent is required to do or to refrain from doing;
- list the persons with whom the respondent may not have contact;
- list the places the respondent must avoid;
- state the distance (in yards or feet) that the respondent must maintain from any person or location listed in the "stay away" provisions of the order;
- state that the order is entitled to full faith and credit in other jurisdictions under [18 U.S.C. § 2265](#);
- state that the temporary *ex parte* protective order issued under [Tex. Fam. Code Title 4](#) prevails over any other court order made under [Tex. Fam. Code Title 5](#);
- if the respondent is subject to a magistrate's order of emergency protection (under [Tex. Code Crim. Proc. art. 17.292](#)) for alleged

criminal offenses committed against the applicant or a member of the applicant's household, state whether the temporary *ex parte* protective order controls over the magistrate's order of emergency protection ([Tex. Fam. Code §83.005](#));

- if child possession or access is awarded under [Tex. Fam. Code § 85.021](#), state the terms of the exchange of the child (days of the week, time of day the visit begins and ends, the place where the exchange will occur, and any restrictions (e.g. third party supervision); and
- if child support is awarded under [Tex. Fam. Code § 85.021](#), state the amounts to be paid, the date payment is due, and the entity through which payment is to be made;

AND

- contain the warning set out in [Tex. Fam. Code § 85.026](#)⁵⁸ (see § 3.2.5)

([Tex. Fam. Code § 82.009](#); [Tex. Fam. Code § 83.001](#); [Tex. Fam. Code § 83.006](#) [Tex. Fam. Code § 88.003](#) (incorporating [18 U.S.C. § 2265](#); [28 U.S.C. §§ 1732A](#) and [1738B](#)))

Findings of fact and conclusions of law. If findings of fact and conclusions of law are requested or issued, those findings and conclusions should be set out in a separate document and should include

⁵⁸ That warning states: "A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION. A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS."

facts to support the ordering language above. With respect to an order excluding a respondent from a residence, the findings should state that :

- the application contained the applicant’s sworn statement reciting facts establishing the need for the exclusion;
- at the hearing, the applicant provided sworn evidence to support the exclusion;
- the respondent committed family violence against a member of the applicant’s household within the past 30 days;
- that there is a clear and present danger to the applicant if the respondent is not excluded from the residence;
- that the applicant has resided at the residence in the past 30 days;

AND

- that either the applicant has an ownership or leasehold interest in the residence or the respondent has a duty to support the applicant or a child of the applicant;

If child possession, access, or support is ordered, the findings of fact should include facts to support the conclusion that:

- (for child possession or visitation awarded under [Tex. Fam. Code § 85.021](#)) the temporary *ex parte* protective order complies with the Uniform Child Custody Jurisdiction and Enforcement Act ([Tex. Fam. Code ch. 152](#));⁵⁹ and
- (for child support awarded under [Tex. Fam. Code § 85.021](#)) that the temporary *ex parte* protective order complies with the jurisdictional requirements of [Tex. Fam. Code ch. 159](#) and the federal full faith and credit for Child Support Orders Act in [28 U.S.C. § 1738B](#);

3.2.5 Enforcing an order to vacate a residence.

If **temporary ex parte protective order** the temporary or permanent protective order includes a requirement that the alleged offender vacate

⁵⁹ As used throughout [Tex. Fam. Code Title 4](#), and defined in [Tex. Fam. Code § 88.002](#), the term protective order includes a temporary ex parte protective order so that whatever may be ordered in a permanent order under [Tex. Fam. Code §§ 85.021](#) and 85.022 may be included in a temporary protective order.

his residence, the court shall, upon request, issue an order requiring the appropriate law enforcement agency to:

- accompany the applicant-victim to the residence;
- inform the respondent of the order to vacate;
- protect the applicant-victim while the applicant takes possession;

AND

- protect the applicant-victim during the time it takes to gather up personal property if the respondent refuses to vacate the residence.

[\(Tex. Fam. Code § 86.003\)](#)

3.2.6 Warning in temporary *ex parte* protective order.

For applications filed before September 1, 2011, the temporary order warning must state:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.

For orders based on applications filed on or after September 1, 2011, the temporary must **ALSO** contain the following warning, in letters that are either bold type, underscored, or in all caps:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION. A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS.”

[\(Tex. Fam. Code § 85.026\)](#)

3.2.7 Service of temporary *ex parte* protective order.

As a practical matter, the temporary *ex parte* order will almost always be served along with the notice of the application for the permanent order (although in theory it could be filed and served separately) so that the service provisions of [Tex. Fam. Code § 82.043](#) apply. See § 3.4.2.

The applicant should be provided a certified copy of the temporary order. The clerk must also forward a copy of the order, along with the completed DPS protective order data entry sheet (see § 19.11) to the

local law enforcement agency (**either** the police department **or** the sheriff's office, but not the Department of Public Safety) having jurisdiction over the applicant's residence.

NOTE ON CONFIDENTIALITY: In counties with populations of 3.4 million or more (currently only Harris County), the protective order application is confidential except as to the respondent and not subject to disclosure under [Tex. Gov't Code Ch. 522](#) until after the earlier of the time:

- the respondent has been served with the application;

OR

- the date of the hearing on the application.

([Tex. Fam. Code § 82.010](#))

3.2.8 Extension of term of temporary *ex parte* protective order.

A temporary *ex parte* protective order may be extended for periods not to exceed the period of the initial order (14 days except in district court in multi-county districts or in counties over 2 million in population, where it may be extended for 20 days). The extension may be granted on request of the applicant or the court can extend the order on its own motion. Multiple extensions are permitted.⁶⁰

([Tex. Fam. Code § 83.002](#))

3.2.9 Enforcement of temporary *ex parte* protective order.

A temporary order is enforceable against a respondent by any court with jurisdiction in the county where: the order issued, the respondent resides, or an alleged violation occurred. The temporary order is enforceable:

- before service on the respondent, only by contempt;

⁶⁰ *Amir-Sharif v. Hawkins*, [246 S.W3d 267](#) (Tex. App.—Dallas 2007, pet. dism'd w/oj). Statute allowing term of a temporary protective order to be extended is procedural, not jurisdictional. The temporary order can be extended multiple times pending alleged offender's competency evaluation.

- after service on the respondent, by contempt or by criminal enforcement;

([Tex. Const. Art. 1, § 11c](#); [TEX. R. CIV. P. 308](#); [Tex. Fam. Code § 81.010](#))

3.2.10 Motion to vacate.

Any individual affected by a temporary *ex parte* protective order may file a motion to vacate the order. The court must set a hearing on such motion as soon as possible.

([Tex. Fam. Code § 83.004](#))

3.2.11 Conflicting orders.

- A temporary *ex parte* protective order issued under [Tex. Fam. Code Title 4](#) prevails over any other court order made under [Tex. Fam. Code Title 5](#).
- A temporary *ex parte* protective order issued under [Tex. Fam. Code Title 4](#) controls over a magistrate's order issued under [Tex. Code Crim. Proc. art. 17.292](#) **ONLY** if the temporary *ex parte* order contains a specific finding to that effect.
- If there is a pre-existing child custody order and Texas is not the home state of a child for purposes of custody, then the Texas court that issues the temporary *ex parte* order must communicate with the home state court with jurisdiction at the earliest convenient time.⁶¹ See Chapter 7.

([Tex. Fam. Code §83.005](#))

⁶¹ *In re Presley*, [166 S.W.3d 866, 868](#) (Tex. App.—Beaumont 2005) (orig. proceeding). Where a child custody suit was filed first in Florida, a Texas court was required to communicate with the Florida court about the subsequent Texas lawsuit and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re MGM, [163 S.W. 3d 191](#) (Tex. App.—Beaumont 2005, no pet.). For a temporary emergency order of protection for child proceeding, when Michigan was home state for original custody order, the Texas court could, to protect the child, prohibit husband from removing child from wife's possession. Once the Texas court learned of the Michigan proceeding, it had to communicate with Michigan court and, once satisfied that the Michigan court had issued an appropriate order, dismiss the Texas case.

3.3 *Permanent protective order; notice, settings, answer*

3.3.1 **Contents of notice.**

The notice must:

- be styled “The State of Texas” v. “Respondent’s name”;
- be signed by the clerk of the court under the court’s seal;
- contain the name and location of the court and the file number;
- contain the address of the clerk of the court;
- state the date the application was filed;
- state the date notice of the application issued;
- state the date, time, and place of the hearing;
- state the name of each applicant;
- state the name of each person alleged to have committed family violence;
- be directed to each person alleged to have committed family violence;

AND

- state the address of either the applicant or the applicant’s attorney (which may be the state’s attorney).

[\(Tex. Fam. Code § 82.041\)](#)

3.3.2 **Method of service.**

Protective order—family violence Notice shall be issued by the clerk of the court and served in the manner requested by the applicant. Service of the application may be served by any method authorized by the Texas Rules of Civil Procedure **except** service by publication.

[\(Tex. Fam. Code § 82.042; Tex. Fam. Code § 82.043\)](#)

3.3.3 Minimum notice period for hearing.

A respondent is entitled to:

- at least 48 hours prior notice of the hearing date and time;

AND

- to a resetting of the hearing if the notice is received less than 48 hours before the hearing time.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

3.3.4 Trial to the court.

Protective order hearings are to the court; jury trials are not permitted.⁶²

3.3.5 Indigent respondent's right to counsel.

Although **protective order** proceedings are civil for purposes of evidentiary and procedural rules, with regard to an indigent respondent's right to counsel, the proceedings have been deemed quasi-criminal in nature, with an implied right to appointed counsel.⁶³

3.3.6 Initial settings.

The initial setting for the hearing must be:

- no later than the 14th day after the protective order application was filed for all courts, **EXCEPT**
- in *district courts* that cover multiple counties or in *district courts* in counties over 2 million in population, the hearing may, upon request

⁶² *Williams v. Williams*, [19 S.W.3d 544](#) (Tex. App.—Fort Worth 2000 pet. den.)

⁶³ *Striedel v. Striedel*, [15 S.W. 3d 163, 167 n. 2](#) (Tex. App.—Corpus Christi 2000, no pet.). The appellate court discusses the elements to consider, set out in [Lassiter v. Department of Soc. Servs. of Durham County, N.C.](#), [452 U.S. 18, 28-33, 101 S. Ct. 2153, 2159, 68 L. Ed. 2d 640 \(1981\)](#), when deciding if counsel should be appointed to represent an indigent defendant in a civil case. Those elements are: what are the private interests at stake, what is the government's interest, and what is the risk that the procedures used will lead to erroneous decisions. These elements are to be balanced against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

3.3.7 Resetting the hearing for insufficient notice.

If the respondent is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the respondent may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

OR

- within 20 days of the request for cases in the district courts in counties with a population over 2 million or that cover multiple counties.

[\(Tex. Fam. Code §§ 84.003-84.004\)](#)

3.4 Continuances.

- The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#).

[\(Tex. Fam. Code § 84.005\)](#)

- The court *may not* continue or reset a hearing to consolidate it with a subsequently filed protective order application even if that protective order application was filed in conjunction with a divorce or SAPCR proceeding.
- The need to conduct discovery is **not** a statutory basis for continuing a protective order case.⁶⁴

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 85.061\)](#)

3.5 Answer.

⁶⁴ *Martinez v. Martinez*, [52 S.W.3d 429](#) (Tex. App.—Fort Worth 2001, pet. denied). The court erred when it granted the respondent's motion for continuance solely to accommodate his discovery request because that is not one of the bases listed in the statute.

A respondent may, but is not required to, file an answer at any time before the hearing.

[\(Tex. Fam. Code § 82.022\)](#)

3.6 Default.

Whether or not the respondent files an answer, if the respondent fails to appear or be represented at the hearing, a default judgment may be entered after:⁶⁵

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);
- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the respondent committed family violence and is likely to commit family violence in the future;

AND

- upon receipt of any proof necessary to support the requested relief (set out in the terms and conditions to be imposed upon the respondent).

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004; Tex. Fam. Code § 85.006; Tex. R. Civ. P. 107; Tex. R. Civ. P. 239; Tex. R. Civ. P. 243\)](#)

NOTE: In a default proceeding, the court **MUST NOT** take evidence on any issue other than proof of service of notice and sanctions.

3.7 Evidence at hearing.

- Both parties must have reasonable opportunity to present evidence.⁶⁶
- Evidence of past abuse can support an inference that the abusive party will continue abusive behavior in the future.⁶⁷ Only exception to this permissible inference might be if the past abuse was a single, isolated act.⁶⁸

⁶⁵ See *Polley v. State*, No. 11-03-0340-CR, 2004 Tex. App. 11317 (Tex. App.—Eastland, Dec. 16, 2004, no pet.).

⁶⁶ *Striedel v. Striedel*, [15 S.W.3d 163](#) (Tex. App.—Corpus Christi 2000, no pet.). In a protective order proceeding under Title 4 of the Family Code, the court erred in denying the respondent the opportunity to present his evidence at the hearing.

⁶⁷ *Clements v. Haskovec*, [251 S.W.3d 79, 87](#) (Tex. App.—Corpus Christi 2008, no pet.). The trial court can infer future abuse based on evidence of past abuse.

- Harassment alone may or may not be sufficient to establish a threat of violence or actual physical violence.⁶⁹
- Hearsay of a child victim of family violence admissible as evidence in a protective order application case if the child is 12 years of age or younger and the statement describes family violence *against the child* if the court finds that the time, content, and circumstances of the statement provide sufficient indications of its reliability **AND** either (a) the child testifies or is available to testify at the proceeding or in any other manner required by law; **OR** (b) the court determines that the use of the child’s statement in lieu of testimony is necessary to protect the child’s welfare. ([Tex. Fam. Code §§ 84.006 and 104.006](#))

3.8 Permanent protective order requirements.

3.8.1 Requisites.

To issue a permanent protective order, the court must hold a hearing and enter an order stating that:

- the court had jurisdiction over the parties (who are named in the order) and the subject matter;
- the person restrained (the respondent) had notice and a reasonable opportunity to be heard consistent with due process;
- the respondent committed family violence⁷⁰ or violated a prior protective order or agreed to the order (see Chapter 3A);
- the respondent is likely to commit family violence in the future;⁷¹

⁶⁸ See *Long v. Long*, No. 03-97-0073CV, [1997 Tex. App. Lexis 5986](#) (Tex. App.—Austin, Nov. 20, 1997, no pet.).

⁶⁹ *Thompson v. Thompson-O’Rear*, No. 06-03-00129-CV, [2004 Tex. App. Lexis 5033](#) (Tex. App.—Texarkana June 8, 2004, no pet.) (mem. op.). Evidence of harassing behavior that did not include threat of violence or actual physical violence was insufficient to support a finding that respondent threatened victim in such a manner as to cause victim to reasonable fear imminent physical harm or bodily injury.

⁷⁰ See *Pena v. Garza*, [61 S.W.3d 529, 531](#) (Tex. App.—San Antonio 2001, no pet.). Despite TRCP 299a’s prohibition on including findings of fact in judgments, a Title 4 family violence protective order should contain a finding that the respondent committed family violence and is likely to do so in the future.

⁷¹ *Interest of IEW*, No. 13-09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi, Aug. 27, 2010, no pet.) (mem. op.) [Prior memorandum opinion issued in January 2010 and found at [2010 Tex. App. Lexis 404](#) was withdrawn.] There is no presumption that when a respondent agrees to entry of a protective order that lacked findings that family violence has occurred or is likely to occur in the future,

- it is in the best interests of the applicant or of a member of the applicant’s family or household members to enter a protective order requiring the respondent to do or refrain from doing certain acts that are listed in the order;
- the respondent cannot possess firearms or ammunition during the term of the order;
- if child support is awarded, the terms of payment⁷²;
- if child possession or visitation is awarded, the terms for exchange;
- the order was issued in accordance with the requirements of [18 U.S.C. § 2265](#) (regarding full faith and credit for protective orders);
- the order shall be presumed valid and enforceable in Texas and in other jurisdictions;
- that the order is valid and enforceable until the second anniversary after the date it is signed by the court or until modified by court order or until the first anniversary after the date the respondent is released from confinement or imprisonment;
- If the duration of the protective order is longer than two years, a finding that the person restrained by the order: (1) caused serious bodily injury to the applicant or a member of the applicant’s family or household OR (2) was the subject of two or more previous protective orders rendered:
 - to protect a person to be protected by the current order

the respondent has implicitly agreed that he committed family violence or is likely to do so in the future. [NOTE: The original memorandum opinion issued in January 2010 and published at [2010 Tex. App. Lexis 404](#) was withdrawn and the new memorandum opinion issued August 27, 2010. The first and second memorandum opinion reach the same conclusions based on the same reasoning.]

⁷² Pursuant to Tex. Fam. Code § 234.001 and 42 U.S.C. § 654 (b), the Child Support Division of the Texas Attorney General’s Office can administratively process child support orders made in protective order cases. If child support is ordered, the order should include instruction for the obligor to pay all support through the registry of the court: Texas Child Support Disbursement Unit, PO BOX 659791, San Antonio, TX 78265-9791. All payments shall be identified by: obligor name; obligee name; and State Disbursement Unit case number (or cause and number and county if no case number has yet been assigned).

AND

- after a finding that the person restrained has committed family violence and is likely to commit family in the future. ([Tex. Fam. Code §§ 85.001 and 85.025\(a-1\)](#))

If the findings of fact and conclusions of law are issued, those should be set out in a separate document (except for the finding that family violence occurred) and in addition to reciting facts that support all the ordering language set out above, should also state that:

- (for a child support is award)⁷³ that the order complies with the jurisdictional requirements of [Tex. Fam. Code ch. 159](#) and the federal full faith and credit for Child Support Orders Act at [28 U.S.C. § 1738B](#);

AND

- (for an award of child possession or access) that the order complies with the Uniform Child Custody Jurisdiction and Enforcement Act ([Tex. Fam. Code ch. 152](#)).

[\(Tex. Fam. Code. § 85.021; Tex. Fam. Code § 85.022 \(incorporating 18 U.S.C. § 922; 18 U.S.C. § 2265; 28 U.S.C. § 1738A\)\)](#)

NOTE: For the clerk to be able to collect fees and costs from a party to a family violence protective order, the court must first enter a finding in the order that the party committed family violence. Therefore, the best practice is for each order that assesses fees and costs to contain an explicit finding that names the person who committed family violence (ex: “Respondent [respondent’s name] committed family violence and is likely to commit family violence in the future.”)

3.8.1.1 Order provisions pertaining to both parties.

The court may order either party to do or refrain from doing certain acts under [Tex. Fam. Code § 85.021](#) if the court finds it is in the best interests of a protected party(including a member of

⁷³ The order should instruct the party ordered to pay child support to set up an account with the appropriate agency (either the Texas Attorney General’s Child Support Division or the county domestic relation office) and to make payments only through the agency. At least by the time the protective order expires, the parties will likely need to establish a child support obligation in another proceeding. If the payments ordered by the protective order are made through the appropriate agency, it will facilitate any subsequent child support proceeding.

dating relationship) or the party's family or household member. Those orders are limited to:

- requiring a child to remain in the possession of a person named in the order;
- requiring a child to remain in the court's jurisdiction;
- disposing of property (which will not affect the title to real property);
- awarding possession of property, including a residence;
- prohibiting the removal of a pet, companion animal, or assistance animal from the possession of a person named in the order;

OR

- paying child support.⁷⁴

Provisions included in a protective order pursuant to [Tex. Fam. Code § 85.021](#) are enforceable *only* by contempt. See § 3.30. An applicant is *not* subject to a criminal sanction for violating a protective order provision.

([Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.023](#); [Tex. R. Civ. P. 308](#); [Tex. R. Civ. P. 308A](#))

3.8.1.2 Criminal enforcement of the order's provisions.

The court may enter criminally enforceable provisions of a protective order only against a person found to have committed family violence.

3.8.1.3 Separate or “mutual” protective orders.

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant. To enter a protective order containing criminally enforceable provisions under [Tex. Fam. Code §](#)

⁷⁴ See footnotes 72–73.

[85.022](#), against a person, that person must first be served with notice of hearing and after having an opportunity to be heard, the person must be found to have committed family violence.⁷⁵ In other words, the court must not impose terms and conditions pursuant to [Tex. Fam. Code § 85.022](#) against the person who is the applicant in *that* proceeding. A person who was the applicant in the first proceeding could become a respondent in a *separate* proceeding but only after being served with timely notice and given an opportunity to respond in the second, separate proceeding.

([Tex. Fam. Code § 85.001](#); [Tex. Fam. Code § 85.022](#))

3.8.2 Terms and conditions of the protective order.

To protect the applicant or the applicant’s family or household, the court may order a respondent who was found to have committed family violence to do or refrain from doing any of the acts described in [Tex. Fam. Code § 85.021](#) or [Tex. Fam. Code § 85.022](#). The court may order the respondent:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm, including completing an accredited battering intervention and prevention program;⁷⁶ surrendering firearms, or surrendering a concealed handgun license;

⁷⁵ *Cockerham v. Cockerham*, [218 S.W.3d 298, 301](#) (Tex. App.—Texarkana 2007, no pet.). The trial court lacked authority to *sua sponte* enter protective order against daughter when respondent-father had not sought such an order and daughter had never been notified of possibility of such an order being entered against her.

⁷⁶ As of September 1, 2009, all programs and providers of battering intervention and prevention programs (BIPP) must be accredited as required by [Tex. Code Crim. Proc. art. 42.141](#). Under [Tex. Fam. Code § 85.024](#), the court can enforce attendance and completion of the BIPP counseling by civil contempt.

The stated legislative purpose of the counseling requirement of [Tex. Fam. Code § 85.022](#) is to require judges who chose to order counseling to send the respondent to a BIPP program accredited by TDCJ. Thus, the court cannot substitute another type of counseling program, such as an “anger management” program, for the BIPP program. However, as long as completion of a BIPP is ordered, the court seems to have the discretion to also require other types of counseling such substance abuse counseling.

See, Senate Bill 44, 80th Legislature, bill analysis, available at:

<http://www.capitol.state.tx.us/tlodocs/80R/analysis/doc/SB00044F.doc>

and House Research Organization bill analysis for SB 44, available at:

<http://www.hro.house.state.tx.us/pdf/ba80r/sb0044.pdf#navpanes=0>

AND

(2) not to

- communicate directly or indirectly in a threatening or harassing manner with specified persons;
- go near the residence, work place, school, or child-care facility as specifically described in the order;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- possess a firearm (unless the alleged offender works full time as a licensed peace officer);
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;

OR

- carry a concealed handgun (and the court shall suspend the respondent's concealed handgun license issued under [Tex. Gov't Code § 411.177](#)).

([Tex. Fam. Code § 85.022](#); [Tex. Fam. Code § 85.026](#))

NOTE: The federal authorities suggest that the order should contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. ch. 44](#). See Chapter 14.

The Texas Department of Criminal Justice Community Assistance Division adopts the guidelines for BIPPs and accredits the providers. The guidelines are available at:

<http://www.tcfv.org/pdf/guidelines.pdf>

A list of current, accredited BIPP providers is available at:

<http://www.tcfv.org/service-directory/battering-intervention-and-prevention-programs/>

3.8.3 Stay away provisions; confidentiality.

With regard to places the respondent must stay away from, unless the court finds that safety requires such information be withheld from the respondent, the permanent order must:

- specifically describe each location;

AND

- state the minimum distance (in yards or feet) that the respondent must maintain from that location, unless the applicant requests that location not be disclosed.

NOTE: The order is criminally enforceable even if it does not contain specific addresses that the respondent must stay away from.⁷⁷

[\(Tex. Fam. Code § 85.07; Tex. Fam. Code § 85.022\)](#)

3.8.4 Warnings in the permanent order.

All permanent protective orders must contain the following warnings:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE,

⁷⁷ *Patton v. State*, [835 S.W.2d 684](#) (Tex. App.—Dallas 1992, no pet.). In an agreed protective order, the court could reasonably infer that exclusion of confidential information (the wife’s work address) was intentional; omission of the address was not a defense to prosecution for violation of the order where husband did not have wife’s work address.

Collins v. State, [955 S.W.2d 464](#) (Tex. App.—Fort Worth 1997, no pet.). The criminal enforceability of protective order was not adversely affected by lack of information in order even if that lack would undermine a civil contempt proceeding. The minimum distance to be maintained need only be set out if there is such a minimum distance.

ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION. A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS.”

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

[\(Tex. Fam. Code § 85.026\)](#)

3.8.4.1 Lettering.

The warning must be in letters that are either bold, underlined, or all caps.

[\(Tex. Fam. Code § 85.026\)](#)

3.8.4.2 Special warning for counseling requirement.

If the order requires the respondent to complete a counseling course, the order must warn the respondent that failure to complete the course carries a possible penalty of a fine or jail time for contempt of court.

[\(Tex. Fam. Code § 85.024\)](#)

3.8.5 Duration of order.

The permanent order should state its duration, which can be:

- (1) for the time specified in the order, up to two years (except as noted below);
- (2) if no period is stated in the order, until the second anniversary of the date of issuance;
- (3) until modified by court order;⁷⁸
- (4) if the respondent is confined or imprisoned when the order would expire, the order expires on the first anniversary of the date the respondent is released;

OR

- (5) **for applications filed on or after September 1, 2011**, longer than two years (and up to the lifetime of a party) upon a finding that the person restrained by the order: (a) caused serious bodily injury to the applicant or a member of the applicant's family or household **OR** (b) was the subject of two or more previous protective orders rendered:

- to protect a person to be protected by the current order

AND

- after a finding that the person restrained has committed family violence and is likely to commit family in the future.

[\(Tex. Fam. Code §§ 85.001 and 85.025\)](#)

3.8.6 Service and delivery.

3.8.6.1 Service of permanent order on respondent.

If the respondent or his attorney is not present to take possession of a copy when the order is signed, a copy of the protective order shall be delivered to the respondent:

- as provided by [Tex. R. Civ. P. 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);

⁷⁸ *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.). A protective order is generally effective for date stated in order, which is not to exceed two years.

- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#));

OR

- served in open court at the close of the protective order hearing.

3.8.6.2 Delivery of the order to the victim or others.

The applicant or the applicant's attorney shall provide the clerk with the name and address of each law enforcement agency, child-care facility, school, and other individual or entity to which the clerk is required to mail a copy of the order. (See § 19.11).

([Tex. Fam. Code § 85.042\(d\)](#))

The court's clerk shall send or give a copy of the order to:

- the victim or the victim's attorney (this is a certified copy provided without charge);
- if the respondent is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshal of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));
- the local law enforcement agency (**either** the police department **or** the sheriff's office *but not* the Department of Public Safety) with jurisdiction over the protected person's residence. This copy of the order must be accompanied by a completed DPS protective order data entry sheet or its functional equivalent⁷⁹ (see § 19.11);

⁷⁹ See the form in the Supreme Court Task Force's Protective Order Kit, available at: www.TexasLawHelp.org

- a school or child-care facility, if the respondent is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

[\(Tex. Fam. Code § 85.042\)](#)

3.8.7 Counseling requirement.

A person who is ordered to complete a counseling program must file an affidavit:

- within 30 days after the order issues, stating that the person has begun the program or that no program exists within reasonable distance of the person's residence;

AND

- within one year after the order issues, but not later than 30 days before the order expires, stating that the person has completed the program and providing verification of that fact.

[\(Tex. Fam. Code § 85.024\)](#)

3.9 Enforcement.

A protective order under the Texas Family Code is enforceable:

- **by contempt action and criminally** against the respondent. A respondent may not avoid prosecution for a protective order violation by refusing to read the contents of the order;⁸⁰

AND

⁸⁰ *Harvey v. State*, [78 S.W.3d 368](#) (Tex. Crim. App. 2002). In a protective order violation case, the jury charge did not need to contain a finding that the defendant knowingly violated the protective order to be sufficient. The defendant had received sufficient notice of the order so that he would have been reckless to proceed without informing himself of its terms. As long as he was given the resources to learn the provisions of the order (a copy of the order), the respondent's choice not to read it was not a defense to prosecution for its violation.

- **by contempt action** against the applicant if the order contains provisions requiring the applicant to do or refrain from doing any of the acts listed in [Tex. Fam. Code § 85.021](#). See § 3.30 of this Benchbook.

([Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#); [Tex. R. Civ. P. 308](#); [Tex. R. Civ. P. 308A](#); [Tex. Penal Code § 25.07](#))

Venue: For protective orders issued on or after September 1, 2011, the order is enforceable by contempt by *any* court with jurisdiction in the county where: the order issued, the respondent resides, or an alleged violation occurred.

([Tex. Fam. Code § 81.010](#))

3.10 *Protective order based on the parties' agreement.*

The parties may enter into an agreement and ask the court to issue a protective order based on that agreement. Such an order is enforceable by contempt action or criminally against the respondent but only by contempt against the applicant (if the applicant agreed to a condition pursuant to [Tex. Fam. Code § 85.021—custody](#) or possession of children, division and possession of property, or financial support). See Chapter 3A.

([Tex. Fam. Code § 85.005](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#); [Tex. R. Civ. P. 308](#); [Tex. R. Civ. P. 308A](#))

3.11 *Separate protective orders in divorce/SAPCR cases.*

A protective order rendered in a divorce or SAPCR proceeding must be in a separate document from the divorce or SAPCR judgment.⁸¹

([Tex. Fam. Code § 85.001\(b\)](#); [Tex. Fam. Code § 85.003](#); [Tex. Fam. Code § 85.004](#); [Tex. Fam. Code § 85.022](#))

3.12 *Modification, vacation, and reviews of an order.*

3.12.1 Modification.

The order may be modified:⁸²

⁸¹ *In re Marriage of Edwards*, [79 S.W.3d 88, 89](#) (Tex. App.—Texarkana 2002, no pet.). The failure to separate protective order from the divorce judgment does not render the protective order unenforceable.

⁸² *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.). The receiving court has same jurisdiction to modify order as the originating court.

- for substantive changes, after notice to the respondent’s last known address and a hearing;

OR

- to revise the stay away provisions (e.g., change a school address), after notice to the respondent sent by certified or registered mail by the court clerk.

The order may **NOT** be modified to extend its duration beyond either the second anniversary of its issuance or beyond the date the order expires under [Tex. Fam. Code § 85.025\(a-1\)](#) or (c), whichever date is later.

[\(Tex. Fam. Code §§ 87.001-87.004; Tex. R. Civ. P. 21a\)](#)

3.12.2 Vacation of an order.

If an order is vacated, the clerk will provide notice to each individual and entity who received a copy of the original or modified order from the clerk. For respondents on active duty status with state or federal military, the order shall also be sent to the designated military commander of the military installation to which the respondent is assigned.

[\(Tex. Fam. Code § 85.042\(c\)\)](#)

3.12.3 Review of continuing need.

3.12.3.1 Orders lasting two years or less.

A person who is the subject of the order may file a motion not earlier than one year after the order issued to have the court determine whether there is continuing need for the order. Upon filing of the motion the court must hold a hearing to determine whether to allow the order to remain in place until its expiration date or to lift the order.⁸³ The movant must show, with evidence that

BC v. Rhodes, [116 S.W.3d 878](#) (Tex. App.—Austin 2003 no pet.). A court’s continuing jurisdiction during first year of a protective order limited to modification.

⁸³ *Interest of IEW*, No. 13.09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi, Aug., 28, 2010, no pet.) [NOTE: See footnote 71 for procedural history.] In denying a motion to vacate a protective order on the ground it was no longer needed, the trial court did not err because it could have reasonably found that fact that no family violence had occurred since order was entered was due to the

establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

3.12.3.2 Orders lasting more than two years.

A person who is the subject of the order that lasts more than two years may file a motion to shorten the order's duration no earlier than one year after the first anniversary of the date on which the court rendered an order on the movant's prior motion to review continuing need. The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

NOTE: The statute does not define the term "person who is the subject of a protective order." That term is vague enough to apply to either the subject being restrained (the respondent) or the subject being protected (the applicant).

[\(Tex. Fam. Code § 85.025\(c\) and \(d\)\)](#)

3.13 *Transfer of jurisdiction to divorce/ SAPCR court.*

Continuing jurisdiction over the protective order may be transferred to the court having jurisdiction over a divorce or SAPCR proceeding involving the same parties if the court finds that the transfer is in the interests of justice or for the safety or convenience of a party or witness. This transfer provision indicates that a Title 4 permanent protective order will prevail over a pre-existing custody order than conflicts with the protective order.⁸⁴ A protective order that is transferred is subject to modification by the receiving court to the same extent it might have been modified by the rendering court.

order's deterrent effect and that without the order, the child would be exposed to the potential danger the order sought to eliminate.

⁸⁴ *In re Salgado*, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001) (orig. proceeding). If a [Tex. Fam. Code Title 4](#) permanent protective order conflicts with a valid pre-existing custody order and the statutory provision for transfer of cases on final protective orders to SAPCR court indicates that Title 4 order prevails in such a conflict.

[\(Tex. Fam. Code §§ 85.064 and 85.065\)](#)

3.14 Fees.

Only a person who is found to have committed family violence may be assessed fees, costs, or other charges.

- **Applicant.** An applicant may **not** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

- **Respondent.** If the respondent is found to have committed family violence or to have entered into an agreed protective order under Tex. Fam. Code § 85.005, fees (including attorney's fees) must be assessed against the respondent. Non-payment of fees is punishable by contempt.

[\(Tex. Fam. Code §§ 81.003-81.005\)](#)

NOTE: For the clerk to be able to collect fees and costs from a party to a family violence protective order, the court must first enter a finding in the order that the party committed family violence. Therefore, the best practice is for each order that assesses fees and costs to contain an explicit finding that names the person who committed family violence (ex: "Respondent [respondent's name] committed family violence and is likely to commit family violence in the future.")

3.15 Appeal.

A protective order issued under [Tex. Fam. Code Title 4](#) is a final order and may be appealed **UNLESS** it is part of a Title 5 divorce or a SAPCR proceeding, in which case it is not appealable until the final divorce or SAPCR order issues.⁸⁵ Until the divorce is final, a mandamus action is required to seek relief for a protective order issued under [Tex. Fam. Code § 6.504](#).⁸⁶

⁸⁵ *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.). The court has discretion as to whether to transfer a protective order case to the court with pending SAPCR; actions may proceed simultaneously in separate courts; receiving court has same jurisdiction to modify order as originating court; protective order granted in pending divorce action is not appealable.

⁸⁶ *Ruiz v. Ruiz*, [946 S.W.3d 123](#) (Tex. App.—El Paso 1997, no writ).

[\(Tex. Fam. Code § 81.009\(a\)\)](#)

3.16 Duties of law enforcement.

- **Database.** Within 10 days after the law enforcement agency receives a copy of the order and a document (either the DPS Protective Order Data Entry Form or its functional equivalent)⁸⁷ containing the required identifying information about the restrained party (see Texas Family Code § 85.042(d), Tex. Gov't Code § 411.042(b)(6), and *infra*, § 19.11), the agency shall enter the information into the Texas Department of Public Safety statewide law enforcement information system.

[\(Tex. Fam. Code § 86.011\)](#)

- **Firearms dealers.** Upon request, DPS shall inform licensed firearms dealers whether or not a prospective transferee has an active protective order in the DPS database. If so, DPS shall inform the licensed firearms dealer and the transfer is prohibited under [18 U.S.C. § 922](#).

[\(Tex. Fam. Code § 86.002\)](#)

- **Assist exclusion from residence.** Upon request the law enforcement agency with jurisdiction over the applicant's residence will accompany the applicant to the residence, inform the respondent of the order, and protect the applicant until the respondent leaves or arrest the respondent if the court order is violated.

[\(Tex. Fam. Code § 86.004\)](#)

- **Dissemination of information.** Each law enforcement agency shall establish procedures to inform its officers of the existence of protective orders issued in other jurisdictions.

[\(Tex. Fam. Code § 86.005\)](#)

3.17 Mediation inappropriate.

In a divorce case, a protective order applicant shall not be required to mediate an application for a protective order. In a SAPCR case, a party may object to mediation based on the other party's committing family violence, and if mediation is ordered anyway, does not have to have contact with the other person.

⁸⁷ The functional equivalent of the form may be used as well. See the Supreme Court Task Force's Protective Order Kit, which is available at: www.TexasLawHelp.org.

[\(Tex. Fam. Code § 6.602\(d\); Tex. Fam. Code § 153.0071\(f\)\)](#)

Under Texas law, a collaborative lawyer must evaluate the impact of family violence upon the parties to a family law dispute. Once the existence of family violence is ascertained, the collaborative lawyer may not begin or continue a collaborative process until reasonable steps have been taken to address the impact of family violence on the abused party and the abused party requests the collaborative process begin or continue.

[\(Tex. Fam. Code § 15.112\)](#)

CHAPTER 3—PART II: COMMENTS

3.18 *Overview of the law.*

Family Code protective orders are available in “stand-alone” proceedings or in conjunction with divorce or other SAPCR proceedings, including temporary emergency proceedings that involve out-of-state child custody orders.

Applicants can be a victim of family violence, a member of the applicant’s family or household,⁸⁸ a person with whom the respondent had a dating relationship,⁸⁹ a person who is the target of family violence based on a dating relationship with a third person, a prosecuting attorney, or the Department of Family and Protective Services. In dating violence cases, any adult may file for a protective order on behalf of a child but the adult may not file on behalf of another adult.⁹⁰ ([Tex. Fam. Code §82.002](#))

Venue for a protective order application lies in the county where either party resides or where a divorce or SAPCR between the parties is filed. [Texas Family Code Title 4](#) controls protective order venue rather than the statute that governs continuing jurisdiction for SAPCR orders.⁹¹ When venue for a minor child’s protective order application is unclear, venue should be determined under the elements in the general civil venue statute.⁹² ([Tex. Fam. Code § 82.003](#))

Jurisdiction lies in the district (including a juvenile court with district court jurisdiction) court, domestic relations court, statutory county court, constitutional county court, and any other court expressly granted jurisdiction over [Tex. Fam. Code Title 4](#) cases.⁹³ A post-divorce protective order is required by statute to be filed in the divorce court but the protective order does not have

⁸⁸ [Tex. Fam. Code § 71.003](#) defines family as including individuals related by consanguinity or affinity, as determined under [Tex. Gov’t Code §§ 573.022 and 573.024](#), individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together. Member of household is defined as including a person who previously lived in a household. ([Tex. Fam. Code § 71.006.](#))

⁸⁹ [Tex. Fam. Code 71.021](#)(b) defines dating relationship as a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.

⁹⁰ *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.).

⁹¹ *Magill v. Sheffield*, [612 S.W. 2d 677](#) (Tex. App.—Dallas 1981, no writ).

⁹² *In re Salgado*, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001) (orig. proceeding).

⁹³ *Williams v. Williams*, [19 S.W.3d 544](#) (Tex. App.—Fort Worth 2000, pet. denied).

to be heard by that court and can be transferred or reassigned.⁹⁴ ([Tex. Fam. Code § 71.002](#))

The protective order application must identify the parties, their relationship, and their counties of residence; state whether the parties are divorced; state whether the parties have a current or expired protective order; state whether there are child support or custody orders for any child named in the application; and request a protective order. If there are preexisting divorce or SAPCR orders, the protective order court should take care not to issue conflicting orders. ([Tex. Fam. Code §§ 82.002- 82.006](#)) **NOTE:** In Harris County, the existence of a protective order application is confidential until the earlier of the date of service or the date of the hearing. ([Tex. Fam. Code § 82.010](#))

Temporary protective order applications may be granted *ex parte* without a hearing (with one exception) or notice to the respondent. The application for a temporary order must include the same information as the application for a permanent (final) order and the applicant must also provide and swear to a detailed description of the supporting facts. ([Tex. Fam. Code § 83.001](#))

Exclusion from residence. If the applicant requests that the respondent be excluded from a residence, the applicant must provide oral and written sworn testimony and prove by clear and convincing evidence that the respondent has committed violence within the past 30 days; that the applicant resides at the residence or has resided there within the past 30 days; and that the applicant is either legally entitled to occupy the residence or the respondent has a legal duty to support the applicant or the applicant's child. The applicant must appear in person to provide sworn testimony at the temporary *ex parte* order hearing. ([Tex. Fam. Code § 83.006](#); [Tex. Fam. Code 85.021\(1\)](#))

Temporary *ex parte* order hearing. The court may grant the temporary *ex parte* order without a hearing or prior notice to the respondent. If a hearing is held, the court may recess the hearing to contact the respondent but must resume the hearing before the end of the same workday. ([Tex. Fam. Code § 83.001](#); [Tex. Fam. Code § 83.007](#))

Temporary *ex parte* protective orders must:

- name and identify the status of each party;

⁹⁴ *Cooke v. Cooke*, [65 S.W.3d 785](#) (Tex. App.—Dallas 2001, no pet.).

- state the basis for the court’s jurisdiction over the parties and the subject matter;
- state that the respondent has had reasonable notice or will have a reasonable opportunity to contest the application before a permanent order is issued;
- contain a finding that there is a clear and present danger of family violence if the order is not issued;
- set the duration of the order (not to exceed 20 days);
- set out the acts the respondent must do or refrain from doing;
- identify each person to be protected by the order;
- if the respondent is ordered excluded from the respondent’s residence, find that the evidence established that: the applicant has resided at the premises within the preceding 30 days; the respondent has committed family violence within the past 30 days; and either the applicant has an ownership or leasehold interest in the residence or the respondent has a duty to support the applicant or the applicant’s child; and there is a clear and present danger to the applicant if the respondent is not excluded from the residence;
- state that the order is entitled to full faith and credit;
- for child custody or support orders, state that the order complies with the applicable state and federal laws (Uniform Child Custody Jurisdiction and Enforcement Act, incorporated in [Tex. Fam. Code ch. 152](#), and Uniform Interstate Family Support Act, incorporated in [Tex. Fam. Code ch. 159](#));
- state whether the respondent is required to post a bond (bond is not a statutory requirement);⁹⁵
- prohibit the respondent from possessing firearms;

AND

- warn the respondent that violation of the order may result in criminal prosecution or punishment for contempt.

[\(Tex. Fam. Code §§ 82.009- 83.001; Tex. Fam. Code § 83.006; Tex. Fam. Code § 85.021\(1\)\(B\); Tex. Fam. Code § 85.026; Tex. Fam. Code § 88.003 \(incorporating 18 U.S.C. § 2265; 28 U.S.C. § 1732A; 28 U.S.C. § 1732B\)\)](#)

⁹⁵ [Tex. Fam. Code § 83.003.](#)

Extensions of temporary *ex parte* orders in increments of 20 days are allowed; multiple extensions are permitted.⁹⁶ ([Tex. Fam. Code § 83.002](#))

Violations of temporary *ex parte* orders are punishable by civil or criminal sanction if the respondent violated the order after having notice of the order. Violations before the respondent has received service of the notice are only punishable by contempt. ([Tex. Const. Art. 1 § 11\(c\)](#); [Tex. R. Civ. P. 308](#))

Motions to vacate. Any individual affected by the temporary *ex parte* order may file a motion to vacate, which the court must set for hearing as soon as possible. ([Tex. Fam. Code § 83.004](#))

Conflicting orders. A [Tex. Fam. Code Chapter 83](#) temporary *ex parte* protective order controls over an order issued in a [Tex. Fam. Code Title 5](#) case. To control over an order issued under [Tex. Code Crim. Proc. art. 17.292](#), the Chapter 83 temporary *ex parte* order must contain a specific finding to that effect. For conflicts with out-of-state custody orders, the Chapter 83 temporary *ex parte* protective order court must communicate with the originating court to resolve the conflict. ([Tex. Fam. Code § 83.005](#))

The hearing date. The hearing on the permanent order can be held any time after 48 hours have passed since the respondent was served with notice of the hearing.

Notice of hearing must: state the names of the parties, the date, time, and location of the hearing, and the date the application was filed; must identify the parties' status in the case (e.g., who is the applicant and who is the person alleged to have committed family violence); must be signed by the clerk under seal; and must provide the address of the clerk and the applicant or the applicant's attorney. ([Tex. Fam. Code § 82.041](#))

Service of notice of hearing may be accomplished by any method permitted under the Texas Rules of Civil Procedure except by service of publication. ([Tex. Fam. Code § 82.043](#)) If the respondent does not receive notice at least 48 hours before the hearing time, the respondent is entitled to have the hearing date reset. ([Tex. Fam. Code § 84.003](#); [Tex. Fam. Code § 84.004](#))

Answers are not required to be filed. ([Tex. Fam. Code § 82.022](#))

⁹⁶ *Amir-Sharif v. Hawkins*, [246 S.W3d 267](#) (Tex. App.—Dallas 2007, pet. dismissed w.o.j).

Trial to a jury is not available in protective order cases.⁹⁷

Hearings on the permanent order must be set within 14 days of the application's filing except for applications filed in *district* courts in counties over 1.5 million in population, where the setting must be within 20 days of the filing. ([Tex. Fam. Code § 84.001](#))

Resetting of the hearing date for lack of sufficient notice is permitted but the reset date must be within 14 days (or 20 in the district courts in counties over 1.5 in population) of the original hearing date. ([Tex. Fam. Code § 84.001-84.002](#))

Continuances are permitted at the court's discretion except the continuance is not permitted for the purpose of consolidating the protective order hearing with a pending divorce or SAPCR proceeding or to conduct discovery. Discovery requests are not a reason for a continuance of a protective order hearing.⁹⁸ Legislative continuances are at the court's discretion. ([Tex. Fam. Code § 84.001](#); [Tex. Fam. Code § 84.005](#); [Tex. Fam. Code § 85.061](#))

Default orders may be entered if the respondent fails to appear or be represented at the hearing after receiving timely and proper notice. ([Tex. Fam. Code § 85.006](#))

Hearing on a permanent order. Respondents are entitled to the opportunity to present evidence at the hearing.⁹⁹ Evidence of past abuse can support an inference that the abusive party will continue abusive behavior in the future. The only exception to this permissible inference might be if the past abuse was a single, isolated act.¹⁰⁰ Harassment alone may or may not be sufficient to establish a threat of violence or actual physical violence.¹⁰¹ **NOTE:** In divorce/SAPCR cases, a protective order applicant cannot be required to mediate the protective order application. ([Tex. Fam. Code § 6.602\(d\)](#); [Tex. Fam. Code § 153.0071\(f\)](#))

⁹⁷ *Williams v. Williams*, [19 S.W.3d 544](#) (Tex. App.—Fort Worth 2000, pet. denied.).

⁹⁸ *Martinez v. Martinez*, [52 S.W.3d 429](#) (Tex. App.—Fort Worth 2001, pet. denied).

⁹⁹ *Striedel v. Striedel*, [15 S.W.3d 163](#) (Tex. App.—Corpus Christi 2000, no pet.).

¹⁰⁰ *Clements v. Haskovec*, [251 S.W.3d 79, 87](#) (Tex. App.—Corpus Christi 2008, no pet.). The trial court can infer future abuse based on evidence of past abuse.

¹⁰¹ *Thompson v. Thompson-O'Rear*, No. 06-03-00129-CV, [2004 Tex. App. Lexis 5033](#) (Tex. App.—Texarkana, June 8, 2004, no pet.) (mem. op.). Evidence of harassing behavior that did not include threat of violence or actual physical violence was insufficient to support a finding that respondent threatened victim in such a manner as to cause victim to reasonable fear imminent physical harm or bodily injury.

A permanent protective order must contain:

- a statement that the court had jurisdiction over the subject matter and the parties;
- a statement that the respondent had notice and a reasonable opportunity to be heard consistent with due process;
- a finding that the respondent committed family violence and that the violence is likely to occur in the future;
- statement that it is in the best interests of the applicant and the applicant's family or household members to enter a protective order restraining the respondent;
- a statement that the order is entitled to full faith and credit under [18 U.S.C. § 2265](#);
- an order prohibiting the respondent from possessing a firearm for the duration of the order;
- statements that any child custody or support orders are entitled to full faith and credit under the UCCJEA and UIFSA ([Tex. Fam. Code ch. 152](#) and ch. 159) and [28 U.S.C. § 1738B](#);
- ordering language concerning the acts the respondent must do or refrain from doing under [Tex. Fam. Code § 85.021](#) or [Tex. Fam. Code § 85.022](#);
- if applicable, ordering language that requires the applicant to do or refrain from doing act listed in [Tex. Fam. Code § 85.021](#).

NOTE: "Mutual" orders (orders with provisions that are criminally enforceable against both the applicant and the respondent) are not permitted and the applicant cannot be subject to criminally enforceable provisions in a protective order. ([Tex. Fam. Code § 85.003](#); [Tex. Fam. Code § 85.005](#); [Tex. Fam. Code § 85.022](#));

- if applicable, ordering language prohibiting the carrying of a concealed handgun under a license issued by the Department of Public Safety;
- a specific description of each location that the respondent must stay away from, including the distance to be maintained described in yards or feet (or a statement that safety issues require that the locations be kept confidential);

- warnings of the consequences of violating the order or the prohibition against firearms possession;
- if applicable, a warning of the consequences of failing to complete the required counseling course;

AND

- the date on which the order expires (no later than two years from the date of issuance).

[\(Tex. Fam. Code § 85.001; Tex. Fam. Code § 85.021; Tex. Fam. Code § 85.022; Tex. Fam. Code § 85.024; Tex. Fam. Code § 85.026\)](#)

NOTE: If the protective order is issued in a divorce suit, it must be in a separate document, entitled PROTECTIVE ORDER, from the divorce decree. [\(Tex. Fam. Code § 85.004\)](#)

Duration. A protective order expires no later than the second anniversary after the date it issued, unless the order sets an earlier expiration date. If the respondent is confined on the date the order would otherwise expire, the expiration date is extended until the first anniversary of the date of the respondent’s release. [\(Tex. Fam. Code. § 85.025\)](#)

Service of the order shall be effected on the respondent by delivery in court or in manner set out in [Tex. R. Civ. P. 21a](#) or as for an injunction. A copy of the order shall be provided to the applicant and the applicant’s attorney, local law enforcement, and the Department of Public Safety. [\(Tex. Fam. Code § 85.041; Tex. Fam. Code § 85.042; Tex. R. Civ. P. 21a\)](#)

Modification of a protective order. The court may modify the order to exclude an item in the order or to include any item that could have been included in the original order and may change the address or telephone number of a person listed in the order. Modification of the order’s expiration date is not permitted. [\(Tex. Fam. Code §§ 87.001-87.004\)](#)

Review of continuing need. Upon request of “a person who is the subject of a protective order,” after the first anniversary of the order’s issuance, the court may consider whether the order should be lifted. **NOTE:** The statute does not define the term “person who is the subject of a protective order.” That term is vague enough to apply to either the subject being restrained (the respondent) or the subject being protected (the applicant). [\(Tex. Fam. Code § 85.025\(c\)\)](#)

Transfer of jurisdiction. Continuing jurisdiction over a protective order may be transferred to the court with jurisdiction over the parties' divorce or SAPCR action. This transfer provision indicates that Title 4 protective order will prevail over a pre-existing custody order that conflicts with the protective order.¹⁰² ([Tex. Fam. Code § 85.065](#))

Fees. Only a person who is found to have committed family violence (that is, a respondent) may be assessed fees, court costs, or other charges in connection with a protective order proceeding. ([Tex. Fam. Code § 81.002](#); [Tex. Fam. Code § 81.003](#); [Tex. Fam. Code § 81.004](#); [Tex. Fam. Code § 81.005](#))

Enforcement. In addition to being punishable as contempt of court, a respondent's violation of a protective order provision imposed under [Tex. Fam. Code § 85.022](#) may be punished criminally under [Tex. Penal Code § 25.07](#). If the court has ordered a respondent or an applicant to do or refrain from doing an act listed in [Tex. Fam. Code § 85.021](#), non-compliance is punishable only by contempt. ([Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#); [Tex. R. Civ. P. 308](#); [Tex. R. Civ. P. 308A](#); [Tex. Penal Code § 25.07](#)) A respondent who has received the order but has refused to read it is subject to arrest for a violation.¹⁰³

Appeals of protective orders are permitted unless the order is part of a divorce or SAPCR, in which case the appeal cannot be taken until the divorce or SAPCR is final.¹⁰⁴ ([Tex. Fam. Code § 81.009\(a\)](#))

3.19 *Court-ordered counseling.*

If the protective order court requires the person found to have committed family violence to attend counseling, that counseling **MUST** be a battering intervention and prevention program (BIPP) provided by a person or program accredited under [Tex. Code Crim. Proc. art. 42.141](#).

The legislative history of the counseling requirement in [Tex. Fam. Code § 85.022](#) makes it clear that the court has no discretion to substitute other types of counseling (such as anger management) for a BIPP.¹⁰⁵ Other types of

¹⁰² *In re Salgado*, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001) (orig. proceeding). Title 4 final protective orders may conflict with a valid pre-existing custody order and the statutory provision for transfer of cases on final protective orders to SAPCR court indicates that Title 4 order prevails in such a conflict.

¹⁰³ *Harvey v. State*, [78 S.W.3d 368](#) (Tex. Crim. App. 2002).

¹⁰⁴ *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.).

¹⁰⁵ See, Senate Bill 44, 80th Legislature, bill analysis, available at: <http://www.capitol.state.tx.us/tlodocs/80R/analysis/doc/SB00044F.doc>

counseling, such as substance abuse programs, might be ordered in addition to, but not as a substitute for, completion of a BIPP.

The BIPP accreditation guidelines and a list of accredited BIPP providers are available online.¹⁰⁶

3.20 *Goals of judicial intervention.*

- The American Bar Association’s Commission on Domestic Violence has published its “Judicial Checklist” that suggests goals for judges in handling family violence cases. The suggested goals focus judicial resources on: (1) protecting and facilitating the safety of the victims, the public, and all participants in family violence proceedings; (2) implementing policies and procedures that foster public awareness of and zero tolerance for domestic violence; (3) providing victims with information about and access to supportive social services; and (4) holding perpetrators accountable for their violence. The Judicial Checklist is available from the ABA in a fold-out “benchcard” format.¹⁰⁷

3.21 *Suggested judicial approaches.*

To facilitate handling of family violence cases, the judge may need to:

- identify family violence issues;
- assess safety concerns by evaluating the history of violence in terms of length of time, type (verbal, emotional, physical, sexual), type of control exerted (intimidation, coercion, threats); frequency of the violence; whether children are involved; and the type of threats (homicide or suicide);
- allow victim advocates or court personnel to explain court procedures to the victim or applicant;
- provide victims with information about legal options;

and House Research Organization bill analysis for SB 44, available at:

<http://www.hro.house.state.tx.us/pdf/ba80r/sb0044.pdf#navpanes=0>

¹⁰⁶ The guidelines are available at: <http://www.tcfv.org/pdf/guidelines.pdf> A list of current, accredited BIPP providers is available at: <http://www.tcfv.org/service-directory/battering-intervention-and-prevention-programs/>

¹⁰⁷ See www.abanet.org/domviol

- impose consequences for violations of court orders;
- identify the perpetrator and hold the perpetrator accountable;
- use orders to deter abusive behavior;
- train court personnel on family violence dynamics;
- render precise and specific custody, visitation, or support orders that do not provide the perpetrator an opportunity to control the situation;
- limit orders that leave decisions to “cooperation” between the perpetrator and victim;
- assess the parties’ risk of substance abuse;

AND

- impose a supervision plan to hold the perpetrator accountable for non-compliance with the protective order.¹⁰⁸

3.22 *Efficacy of the protective order process.*

There is some empirical evidence that just the act of applying for a protective order reduces the levels of violence in women’s lives.

A study conducted in Harris County during 2001-2002, found that abused women who applied and qualified for a 2-year protective order, irrespective of whether or not the order was granted, reported significantly lower levels of violence during the subsequent 18 months.¹⁰⁹

In a study of the impact of intimate partner violence on women’s health, it was found that risk for sexual assault decreased by 59% or 70% for women contacting the police or applying for a protection order, respectively.¹¹⁰

¹⁰⁸ Domestic Violence Benchbook: A guide to civil and criminal proceedings (Michigan Judicial Institute, 3rd Ed.).

¹⁰⁹ J. McFarlane, et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 American Journal of Public Health 613 (April 2004). A summary of the study is available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448307>

¹¹⁰ N. Sakar, *The Impact of Intimate Partner Violence on Women’s Reproductive Health and Pregnancy Outcome*, 28 Journal of Obstetrics and Gynecology 266 (April 2006). A summary of this article is available at: <http://www.ncbi.nlm.nih.gov/pubmed/18569465>

In a recent study involving about 100 women who received protective orders, half the participants reported a protective order violation within the first six months after issuance, but even when violated, the protective orders were associated with significant reductions in abuse, violence, and fear.¹¹¹

3.23 Lethality assessment factors.

Intimate partner violence results in approximately 1,300 deaths and 2 million injuries annually among women in the United States.

Assessment of the threat of lethality in any given domestic violence case is an inexact art, at best. Studies indicate that the strongest risk factor of death for a female domestic violence victim was the abuser's access to a firearm.¹¹² In addition to access to a firearm, a perpetrator who lived: with the victim and the victim's child, had a prior domestic violence arrest; made prior threats to use a weapon; or was estranged from the victim had a higher risk of killing the victim.¹¹³

Up to a third of hospital emergency room patients have a history of intimate partner violence.¹¹⁴ A meta-analysis of data collected from studies of women seeking care in hospital emergency rooms revealed that unwitnessed head, neck, or facial injuries are significant markers for intimate partner violence.¹¹⁵

¹¹¹ Civil Protective Orders Effective in Stopping or Reducing Partner Violence: Challenges Remain in Rural Areas with Access and Enforcement <http://www.carseyinstitute.unh.edu/publications/IB-Logan-Civil-Protective-Order.pdf>; also, T. Logan, et al., *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs*, University of Kentucky Dept. of Behavioral Sciences.

¹¹² J. Campbell, D. Webster, J. Koziol-McLain, et al., *Risk factors for femicide in abusive relationships: results from a multisite case control study*. 93 *American Journal of Public Health* 1089 (2003). A summary of this article is available at:

<http://ajph.aphapublications.org/cgi/content/abstract/93/7/1089>

¹¹³ *Ibid.*

¹¹⁴ J. Daugherty and D. Houry, *Intimate Violence Partner Screening in the Emergency Department*, 54 *Journal of Postgraduate Medicine* 301 (October 2008). A summary of this article is available at:

<http://www.ncbi.nlm.nih.gov/pubmed/18953150>

¹¹⁵ V. Wu, et al., *Pattern of Physical Injury Associated with Intimate Partner Violence in Women Presenting to the Emergency Department: A Systematic Review and Meta-analysis*, 11 *Trauma, Violence, & Abuse* 71 (April 2010). A summary of this article is available at:

<http://www.ncbi.nlm.nih.gov/pubmed/20430799>

In another study of female abuse victims who sought care in hospital emergency rooms, it was found that women who answered “yes” to at least three of the following questions were at high risk for serious injury from their abuser:¹¹⁶

- Has the physical violence increased in frequency or severity over the past six months?
- Has he ever used a weapon or threatened you with a weapon?
- Do you believe he is capable of killing you?
- Have you ever been beaten by him while you were pregnant?
- Is he violently and constantly jealous of you?

Experts suggest that the court consider and weigh various factors, including whether the respondent has:

- made threats of homicide or suicide;
- fantasies of homicide or suicide—the more developed the fantasies, the more dangerous;
- weapons or has threatened to use or has used weapons to harm in the past;
- a history of arson or threats of arson (fire should be considered a weapon);
- treated the victim like personal property;
- made the victim the center of his life by idolizing or depending on the victim to organize and sustain his life;
- isolated himself from others;
- shown signs of “separation” violence (despair and/or rage at the thought of losing the victim from his life);
- shown signs of or been diagnosed with depression;

¹¹⁶ C. Snider, MD, MPH, D. Webster, ScD, MPH, C. O’Sullivan, PhD, and J. Campbell, PhD, RN, *Intimate Partner Violence: Development of a Brief Risk Assessment for the Emergency Department*, 16 *Academic Emergency Medicine* 1208 (2009). This article is available at:

http://www.dangerassessment.org/webapplication1/pages/da/Snider_BriefIPVRiskAssessment_SAEM_AEM_blinded.pdf

- access to the victim or victim’s family members;
- a history of police involvement after breaches of the peace;
- acted in ways that endanger his own well-being;
- become increasingly insensible to legal or social consequences of his violence;

OR

- given indications or has a history of hostage taking (75-90% hostage takings are related to domestic violence).¹¹⁷

3.24 *Characteristics of batterers and victims.*

3.24.1 Batterers.

Batterers almost always initiate the violence but tend to blame the violence on someone or something else. They often deny the severity of the violence or dismiss evidence of abuse with remarks like, “she wasn’t bleeding” or “she didn’t have to go to the hospital.” Batterers tend to describe the abuse in vague terms and deny that they lost control during the abuse. They will also deny that the victim has any reason to fear them.

Some factors commonly seen in perpetrators of domestic violence are that they are:

- chronic offenders;
- likely to have continuing access to victims;
- often substance abusers;
- likely to portray themselves as the victims;

AND

- likely to present a different persona in public and in private.

¹¹⁷ Adapted from the Texas Advocacy Guide, *Lethality Assessment for Advocates*, by the Texas Council on Family Violence.

3.24.2 Victims.

Victims usually express a sense of shame and confusion about the abuse. Victims' descriptions of abuse tend to be detailed and victims readily admit fearing the abuse of the batterer. Victims seldom initiate physical confrontations with the batterer but may react to physical aggression in self-defense.¹¹⁸

3.24.3 Victims who leave.

Empirical data suggests that the “average” victim tries seven times before finally ending the abusive relationship. The motivating factor that prompts the final break has been described as a “turning point.” A turning point is a dramatic shift in the victim’s beliefs and perceptions of self, the partner, and the relationship that alters the victim’s willingness to tolerate the situation and motivate a change.

One study¹¹⁹ categorized the motivational turning points by theme as:

- (1) protective—the need or desire to protect others from the abuse;
- (2) a perception of increased danger based on escalation of severity of physical abuse or emotional humiliation;
- (3) education and access—increased awareness of options and better access to supportive services;
- (4) fatigue and recognition that the abuser is not going to change and the victim’s suffering is not going to end;

AND

- (5) partner betrayal and infidelity.

3.25 *Batterers’ methods of control.*

¹¹⁸ E. Fray-Witzer. “Twice Abused: Same-Sex Domestic Violence and the Law.” In *Same-Sex Domestic Violence: Strategies for Change*, edited by B. Leventhal and S. Lundy, 19–41 (Sage 1999).

¹¹⁹ J. Chang et al., *Understanding Turning Points in Intimate Partner Violence: Factors and Circumstances Leading Women Victims Toward Change*, 19 *Journal of Women’s Health* 251 (January 2010).

Coercion and control are the hallmarks of abusive behavior. The court should consider evidence of the following as possible indicators of abuse:

3.25.1 Emotional control.

The abuser may:

- refuse to speak to family members;
- humiliate or undermine a parent in front of children;
- threaten to harm other members of the family or household;
- threaten suicide;
- threaten to take a child away from the other parent;

OR

- engage in unpredictable or inconsistent behavior.

3.25.2 Financial control.

The abuser may:

- unduly restrict access to funds by other members of the family or household;
- refuse to pay reasonable or necessary family expenses despite adequate resources;
- forbid other members of the family or household from working or demand control of funds earned by others;

OR

- refuse to account for family income.

3.25.3 Physical control.

The abuser may:

- restrict the physical movements of family or household members;
- monitor or stalk family or household members;

- destroy or threaten to destroy physical property or to harm pets;

OR

- assault or threaten to assault family or household members who disobey.

3.25.4 Sexual control.

The abuser may:

- impose strict gender roles;
- make sexually inappropriate comments in the presence of others, including children;
- demand sexual acts that are humiliating, unwanted, or unpleasant to the other party;

OR

- deny privacy to others.

3.26 *Dealing with pro se litigants.*

Gleaning enough information to make an informed decision from *pro se* litigants can be a challenge. The following techniques may aid in the presentation of the parties' cases:

- instruct each party to direct questions or answers to the court;
- explain the rules of evidence, the party's right to object to evidence, and how objections will be handled;
- instruct the parties not to interrupt the court or each other;
- explain the role of the court reporter and the need to have a clear record;
- explain the order of presentation in the case;
- do not allow intimidating behavior (words, looks, or gestures);

AND

- ask specific clarifying questions, particularly questions to clarify the type and severity of the alleged abuse.¹²⁰

3.27 *An applicant's journey through the legal system*

Participation in the legal process often frustrates litigants, and this reality becomes particularly pronounced for a protective order applicant or a victim-witness in a criminal case with family violence issues. The witness' ongoing personal relationship with the defendant or respondent compounds the usual "witness fatigue" other participants in the criminal and civil justice system face.

During the process of obtaining a protective order, an applicant may be asked to repeatedly provide the same information. For example, the applicant provides a statement initially at the scene of the crime, during subsequent interviews with police, in conversations with intake staff and victim's advocates at the prosecutor's office, again with prosecutors themselves, during the hearing for a temporary order (the applicant must appear if a "kick-out" order is requested) and while testifying at the permanent order hearing. And if the matter is continued or delayed, the victim may be called upon to recount the story of abuse additional times to each of the parties mentioned or to new personnel that have taken over the case.

Aside from continually dredging up difficult associations and emotions related to the abuse, the continued retelling of stories of abuse represents an embarrassing and humiliating experience most of us would logically avoid. In each of these situations, the applicant must: find the time and transportation to be present for all hearing settings; adjust to loss of income, housing, and childcare; recover from physical or emotional injuries; and plan for a future without the batterer.

If concurrent criminal, divorce, or child protection cases require the victim's time and attention, the number of interviews, mandatory court appearances, and related inconvenience and trauma increase. Assume that the victim decides, based on expectations of family, friends, advocates, police officers, or society at large, to avail her/himself of all legal remedies due the victim and to fully "cooperate" by participating in the criminal prosecution of the batterer. The attached calendar provides a glimpse of what that victim's "docket" would look like.¹²¹

¹²⁰ Adapted from the National Council of Juvenile and Family Court Judge's Judicial Guide to Child Safety in Child Custody Hearings, available at:

<http://www.ncjfcj.org/images/stories/dept/fvd/pdf/judicial%20guide.pdf>

¹²¹ See "The Victim's Calendar" click on: [Chapter 19](#).

In the first month alone, the determined and cooperative victim must find time to participate in three or four meetings or hearings a week while simultaneously balancing the needs of dependent children, finding housing, obtaining financial assistance, and, perhaps, facing immigration consequences of leaving the abuser who may have been her means for legal residency.

After the first month, the victim faces a year or more of continued involvement in a court system where delays and challenges to resolution are a reality even in the best of circumstances. Add the possible involvement of Child Protective Services or the possibility that the batterer has been successful in filing unfair or incorrect criminal charges against the victim (as in a cross-arrest and subsequent prosecution or for allegations separate from the current event). Eventually even the most determined and cooperative victim, worn down by the difficult choices, may decide that continued active involvement in the criminal or civil legal process is no longer in her or his best interests.

Most commonly, victims usually rank child custody as the top priority with the legal matters pertaining to economic survival a close second, and all other matters getting less attention. Often, participation in a criminal prosecution ranks as the lowest priority.

Obviously, many of the burdens on a victim participating in the criminal or civil justice system represent systemic barriers that the judiciary cannot independently affect. The need to carefully and fully adjudicate cases, the realities of crowded civil and criminal dockets, and other considerations hinder the judiciary's ability to remove barriers to the victim's participation. However, the court can promote transparency by explaining delays (whether requested by the state or the defense or from another cause) in the case and considering the victim's situation before allowing continuances. By remaining aware of and sensitive to the barriers that the legal system poses to full participation by a family violence victim, the court can enhance due process for all participants in a legal proceeding.

3.28 *Victim non-cooperation.*

Experts estimate that somewhere between 80-90% of domestic violence complainants fail to cooperate with the prosecution at some point in the criminal proceeding. The reasons why victims refuse to cooperate with the prosecution include:

- the risk of retaliation (feared in as many as half of all cases; an actuality in about 30% of criminal cases);
- economic dependence (50% of victims are left below the federal poverty line after leaving their abuser and slightly less than half are threatened with loss of income for aiding the prosecution of the abuser);

- emotional attachment,
- family and community pressures;
- religious and cultural views;
- fear of losing custody of children;
- fear of deportation;
- trauma-induced "emotional paralysis";

AND

- a genuine belief that no crime has occurred.¹²²

3.29 *Domestic violence in same-sex couples.*

Research suggests that violence occurs at the same rate (12 to 50%) in same-gender couples as it does in cross-gender couples. The types of abuse in same-gender relationships are the same as for cross-gender relationships, except for two unique features: the threat of exposing the victim-partner's sexual orientation and the isolation inherent in concealing one's sexual orientation.

Threats by the birth or adoptive parents to take children away from the other partner are particularly effective because in most states the adoptions laws do not permit same-gender parents to adopt each other's children, so the non-biological parent has no legal rights regarding the child if the couple separates.¹²³

3.30 *Contempt by applicant.*

The fact that a remedy may be available does not presuppose that its imposition will result in justice or promote public policy. Before imposing sanctions against an applicant for failing to comply with a provision of a protective order imposed under [Tex. Fam. Code § 85.021](#), the court should consider whether such a sanction may adversely impact the ultimate purpose of the order—to protect the applicant and the applicant's family and household. Holding an

¹²² See, T. Lininger, *Prosecuting Batterers After Crawford*, [91 Va. L. Rev. 747, 769](#) (May 2005) (summarizing the findings of various surveys).

¹²³ J. Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 *Family Court Review* 287 (April 2006). This article is available at: http://www.rohrbaughassociates.net/pdfs/same_sex.pdf

applicant in contempt will generally be counter-productive and should be considered a remedy of last resort, imposed only when non-compliance will cause a safety issue.

3.31 Statewide Law Enforcement Database.

As part of the Texas Crime Information Center (TCIC), the Texas Department of Public Safety maintains a statewide criminal database that includes all types of protective orders (temporary and permanent from the Family Code and the Code of Criminal Procedure) that are issued in the State of Texas or which are issued in another state and registered in Texas. The TCIC system feeds into the National Crime Information Center so that one entered into TCIC, information about a Texas protective order is available to law enforcement officers nationwide.

The TCIC/NCIC system requires certain identifying information for the persons restrained by or protected by a protective order. Unless that information is available, information about the protective order cannot be entered into the database. The information required is listed in Tex. Gov't Code § 411.042(b)(6). The protective order itself will rarely contain all the information needed for a TCIC entry. The law requires that the applicant or the applicant's attorney provide the identifying information to the clerk of the court before or at the time the protective order is issued so that the protective order can be forwarded to local law enforcement for entry into the database.

DPS has promulgated a Protective Order Data Entry Form to capture the required information. That form, or its functional equivalent,¹²⁴ must be completed and accompany the protective order when it is forwarded by the clerk to the local law enforcement agency. See § 19.11 for a copy of the form.

Failure to provide the required identifying information for a respondent along with the protective order will prevent law enforcement from being able to entry the protective order information into TCIC because the TCIC system will reject an incomplete entry.

NOTE: By statute, local law enforcement (the police department or the sheriff's office) is charged with entry of protective order information into the TCIC/the Protective Order Registry. The protective order and the identifying information (optimally, on a completed data entry form) **MUST ALWAYS** be forwarded to the appropriate local law enforcement but is **NOT** to be sent directly to DPS. The only situation in which an additional copy is forwarded directly to DPS is if the protective order has suspended respondent's concealed handgun license, in which case a copy goes to the DPS Concealed Handgun Licensing Division or if the protective order was issued under Tex. Code Crim. Proc. art. 6.08 (see

¹²⁴ See the form in the Supreme Court's Protective Order Task Force Kit, available at: www.TexasLawHelp.org.

Chapter 6). Forwarding a protective order to DPS's Concealed Handgun Division is not a substitute for and does not satisfy the clerk's statutory duty to forward the order and the identifying information to local law enforcement.

CHAPTER 3A—TITLE 4 PROTECTIVE ORDER BASED ON THE PARTIES' AGREEMENT—PART I: STATUTES AND CASE LAW

[\(Tex. Fam. Code §§ 85.005, 85.021, and 85.022\)](#)

Summary:

The parties in a [Texas Family Code Title 4](#) protective order proceeding may ask that an order be issued based on their agreement—and many, if not most, do. The protective order issued based on the parties' agreement is not a contract, but an order that is enforceable by contempt (against either party) or by bringing a criminal charge (against the respondent only).

Unlike the typical settlement agreement between civil litigants, the protective order based on an agreement must be adopted and signed by the judge. Not only does the order represent the parties' agreement, it also must promote the state's interest in protecting the public. The judge should review the contents of the order to ensure it contains the necessary elements to be legally enforceable and to protect the interests of both the parties and the state.

Unlike protective orders issued after a hearing, a protective order based on an agreement may, but is not statutorily required to, contain a finding that the respondent committed family violence. However, the agreed order *must* contain a finding that the agreement is in the best interests of the applicant and other persons protected by the order. The lack of a family violence finding in the agreed order can significantly impact the respondent's status in other legal proceedings (e.g., divorce or SAPCR) and the court should carefully consider whether omitting the finding is in the best interests of all parties and the public.

3A.1 *Mandatory provisions.*

A protective order based on an agreement of the parties must contain:

- the names of the parties;
- the names of all persons to be protected by the order;
- the location of any places from which the respondent must stay away (unless that location is confidential);

- a finding that the order is in the best interests of the applicant and the other persons protected by the order;
- a statement that the parties have agreed to the terms and conditions of the order;
- a statement that by presenting their agreement to the court for approval, each party waived the right to a hearing on the merits;
- the warning found in [Tex. Fam. Code § 85.026](#);¹²⁵
- a statement that the respondent has received a copy of the agreed order;
- an expiration date, not to be later than two years after the date the order issues;
- whichever of the provisions set out in [Tex. Fam. Code § 85.021](#) or [Tex. Fam. Code § 85.022](#) (see § [3A.2](#)) that the parties have agreed to include in the order;
- a statement that the trial court approves the agreement of the parties.¹²⁶

NOTE: Unless the order contains specific findings that the respondent has committed family violence and is likely to do so in the future, those findings cannot be presumed from the fact that the respondent agreed to the order.¹²⁷

¹²⁵ [Tex. Fam. Code § 85.036](#) contains the following warning:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.”

¹²⁶ *In the interest of IEW*, No. 13-09-00216-CV, 2010 Lexis 7163 (Tex. App.—Corpus Christi, Aug. 27, 2010) (mem. op.) [Prior opinion issued January 2010, and found at [2010 Tex. App. Lexis 404](#) was withdrawn.] Agreed protective orders are subject to the approval of the trial court, and the trial court is strictly prohibited from approving any agreement that requires an applicant to do or refrain from doing an act under [Tex. Fam. Code § 85.022](#). [NOTE: The first and second memorandum opinion reach the same conclusions based on the same reasoning.]

¹²⁷ *Ibid.* There is no presumption that by agreeing to an agreed protective order that lacks findings that family violence has occurred or is likely to occur in the future, the respondent has agreed that he committed family violence or is likely to do so in the future.

3A.2 Optional provisions.

A protective order may incorporate some or all of the conditions listed in [Tex. Fam. Code § 85.021](#) or [Tex. Fam. Code § 85.022](#) but the applicant cannot agree to, or be bound by, a criminally-enforceable provision listed in [Tex. Fam. Code § 85.022](#).

3A.2.1 Applicant.

In a protective order based on an agreement, the applicant can agree that:

- a child will not be removed from the person named as possessory conservator in the order;
- a child will not be removed from the court's jurisdiction;
- mutually owned or leased property of the parties will not be transferred, encumbered, or otherwise disposed of, other than in the ordinary course of business;
- one party will have exclusive possession of that party's residence;
- one party will vacate, and the other party take exclusive possession of, the parties' residence if:

- the party taking possession is a joint owner or leaseholder;

OR

- the party retaining possession owns or leases the property;

OR

- the party being denied possession has an obligation to support the other party or a child of the other party;
- a parent of a child will have possession of or access to a child;
- a party will pay support to the other party or child support¹²⁸ if the payor-party has a legal duty to support the other party or the child;

¹²⁸ The order should instruct the party ordered to pay child support to set up an account with the appropriate agency (either the Texas Attorney General's Child Support Division or the county domestic relation office) and to make payments only through the agency. At least by the time the protective order

AND

- a party will have the use and possession of property that is:
 - community property;
 - jointly owned property;

OR

- jointly leased property.

NOTE: The protective order should contain a finding the applicant has not agreed to do or refrain from doing any act listed in [Tex. Fam. Code § 85.022](#).

([Tex. Fam. Code § 85.005](#); [Tex. Fam. Code § 85.021](#))

3A.2.2 Respondent.

The person who is a respondent in a protective order case can agree to any of the provisions to which an applicant can agree and can also agree not to:

- commit family violence;
- communicate with a person, or the family or household member of a person, protected by the order:
 - directly with threats or harassment;
 - indirectly with threats;

OR

- in any manner except through the person's attorney or another person appointed by the court;

expires, the parties will likely need to establish a child support obligation in another proceeding. If the payments ordered by the protective order are made through the appropriate agency, it will facilitate any subsequent child support proceeding. Otherwise, the payor-parent may not get proper credit for the child support payments made during the term of the protective order.

- go to or near the residence, place of employment, or business of the protected person or that of a member of the family or household of the protected person;
- go to or near the residence, child-care facility, or school where a child protected by the order normally resides or attends;

AND

- engage in conduct that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass a person protected by the order.

A respondent can agree to:

- complete an accredited battering intervention prevention program (BIPP) or, if an accredited BIPP is not available, complete either:
 - a BIPP that is in the process of being accredited;

OR

- only if an accredited BIPP or BIPP seeking accreditation is not available, complete counseling with a licensed mental health professional (social worker, physician, psychologist, therapist, professional counselor) who has completed family violence intervention training approved by the Texas Department of Criminal Justice.

In a protective order based on an agreement of the parties, the court *must* order the respondent:

- not to possess a firearm unless the respondent is actively engaged in full-time work as a licensed peace officer;

AND

- to surrender a license to carry a concealed weapon.

[\(Tex. Fam. Code § 85.005; Tex. Fam. Code § 85.022\)](#)

NOTE: The federal authorities request that the order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. ch. 44](#). See chapter 14, *infra*.

3A.3 Enforcement.

Protective orders are enforceable by contempt of court or criminally as to the respondent but only by contempt as to the applicant.

3A.3.1 Applicant: contempt.

Although [Tex. Fam. Code § 85.005](#) does not state so specifically, because a court has both a statutory and inherent power to enforce its judgments, decrees and orders,¹²⁹ a protective order based on an agreement is enforceable by contempt against an applicant to the extent the applicant has agreed in the order to abide by a provision listed in [Tex. Fam. Code § 85.021](#). See § 3.30.

3A.3.2 Respondent: contempt or criminal charge.

The protective order is enforceable against a respondent by contempt or by filing a criminal charge.

3A.3.3 No criminal enforcement against applicant.

A protective order is **NOT** criminally enforceable against an applicant. Whatever an applicant may agree to, a protective order may not impose any of the criminally enforceable provisions of the order (*i.e.*, those found in [Tex. Fam. Code § 85.022](#)) against the applicant.¹³⁰

[\(Tex. Fam. Code § 85.005\)](#)

3A.4 Duration of order.

The final protective order lasts:

- (1) for the time specified in the order, not to exceed two years;
- (2) if no period is stated in the order, until the second anniversary of the date of issuance;

¹²⁹ [Tex. R. Civ. P. 308](#); see also [Tex. R. Civ. P. 308a](#) for SAPCRs. A trial court is vested with explicit statutory authority to enforce its judgments and with inherent judicial authority to enforce its orders and judgments. See, *Cook v. Stallcup*, [170 S.W.3d 916, 920](#) (Tex. App.—Dallas 2005, no pet.) citing *Katz v. Bianchi*, [848 S.W.2d 372, 374](#) (Tex. App.—Houston [14th Dist.] 1993) (orig. proceeding).

¹³⁰ See § 3.30 of this Benchbook.

(3) until modified by court order;¹³¹

OR

(4) if the respondent is confined or imprisoned when the order issues, the order will expire on the first anniversary of the date the person is released.

[\(Tex. Fam. Code § 85.025\).](#)

3A.5. Service and delivery of order.

3A.5.1 Delivery of permanent order to respondent.

If the respondent or his attorney is not present to take possession of a copy when the order is signed, a copy of the protective order shall be delivered to the respondent:

- as provided by [Tex. R. Civ. P. Rule 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);

OR

- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#)).

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

3A.5.2 Delivery of the order to the victim or others.

The court's clerk shall send or give a copy of the agreed order to:

- the victim or the victim's attorney (this is a certified copy provided without charge);
- the local law enforcement agency (**either** the police department **or** the sheriff's office but not the Department of Public Safety) with jurisdiction over the protected person's residence. This copy of the

¹³¹ *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.). A protective order is generally effective for date stated in order, which is not to exceed two years.

order must be accompanied by a completed DPS protective order data entry sheet or its functional equivalent.¹³² (see § 19.11);

- if the respondent is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshall of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));
- a school or child-care facility, if the respondent is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

[\(Tex. Fam. Code § 85.042\)](#)

3A.6 Counseling requirement.

Unless the order states otherwise, if the respondent has agreed to complete a court-ordered counseling program, the respondent must file an affidavit:

- within 30 days after the order issues, stating that the person has begun the program or that no program exists within reasonable distance of the person's residence;

AND

- within one year after the order issues, but not later than 30 days before the order expires, stating that the person has completed the program and providing verification of that fact.

[\(Tex. Fam. Code § 85.024\)](#)

3A.7 Separate protective order in divorce/SAPCR proceedings.

¹³² See the form in the Supreme Court Task Force's Protective Order Kit, available at: www.TexasLawHelp.org.

A protective order based on the parties' agreement and issued in a divorce or SAPCR proceeding must be in a separate document from the divorce or SAPCR judgment.¹³³

([Tex. Fam. Code § 85.001\(b\)](#); [Tex. Fam. Code § 85.003](#); [Tex. Fam. Code § 85.004](#); [Tex. Fam. Code § 85.022](#))

3A.8 Modification and reviews of an order.

3A.8.1 Modification.

The protective order may be modified:¹³⁴

- for substantive changes, after notice to the respondent's last known address and a hearing;

OR

- to revise the stay away provisions (i.e., school address), after notice to the respondent's last known address sent by certified or registered mail by the court clerk.

The order may **NOT** be modified to extend its duration.

([Tex. Fam. Code §§ 87.001-004](#); [Tex. R. Civ. P. 21a](#))

3A.8.2 Review of continuing need.

3A.8.2.1 Orders lasting two years or less.

A person who is the subject of the order may file a motion not earlier than one year after the order issued to have the court determine whether there is continuing need for the order. Upon filing of the motion the court must hold a hearing to determine whether to allow the order to remain in place until its expiration date or to lift the

¹³³ *In re Marriage of Edwards*, [79 S.W.3d 88, 89](#) (Tex. App.—Texarkana 2002, no pet.). The failure to separate protective order from the divorce judgment does not render the protective order unenforceable.

¹³⁴ *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.). The receiving court has same jurisdiction to modify order as the originating court.

BC v. Rhodes, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.). A court's continuing jurisdiction during first year of a protective order is limited to modification.

order.¹³⁵ The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

3A.8.2.2 Orders lasting more than two years.

A person who is the subject of the order that lasts more than two years may file a motion to shorten the order's duration no earlier than one year after the first anniversary of the date on which the court rendered an order on the movant's prior motion to review continuing need. The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

NOTE: The statute does not define the term "person who is the subject of a protective order." That term is vague enough to apply to either the subject being restrained (the respondent) or the subject being protected (the applicant).

[\(Tex. Fam. Code § 85.025\(c\) and \(d\)\)](#)

3A.9 Transfer of jurisdiction to divorce/SAPCR court.

Continuing jurisdiction over the protective order may be transferred to the court having jurisdiction over a divorce or SAPCR proceeding involving the same parties upon the court's finding that the transfer is in the interests of justice or for the safety or convenience of a party or witness. This transfer provision

¹³⁵ *Interest of IEW*, No. 13.09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi, Aug. 28, 2010, no pet.) [NOTE: See footnote 71 for procedural history.] In denying a motion to vacate a protective order on the ground it was no longer needed, the trial court did not err because it could have reasonably found that fact that no family violence had occurred since order was entered was due to the order's deterrent effect and that without the order, the child would be exposed to the potential danger the order sought to eliminate.

indicates that a Title 4 final protective order will prevail over a pre-existing custody order than conflicts with the protective order.¹³⁶

[\(Tex. Fam. Code § 85.064\)](#)

3A.10 Fees.

Only a person who is found to have committed family violence may be assessed fees, costs, or other charges.

- **Applicant.** An applicant may **NOT** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

- **Respondent.** If the order contains a finding that the respondent committed family violence, then fees (including attorney's fees) may be assessed against the respondent. Non-payment of fees is punishable by contempt.

[\(Tex. Fam. Code §§ 81.003-81.005\)](#)

NOTE: For the clerk to be able to collect fees and costs from a party to a family violence protective order, the court must first enter a finding in the order that the party committed family violence. Therefore, the best practice is for each order that assesses fees and costs to contain an explicit finding that names the person who committed family violence (ex: "Respondent [respondent's name] committed family violence and is likely to commit family violence in the future.")

3A.11 Appeal.

A protective order issued under Title 4 of the Tex. Fam. Code is a final order and may be appealed **UNLESS** it is part of a Title 5 divorce or SAPCR proceeding, in which case it is not appealable until the final divorce or SAPCR order issues.¹³⁷ Until the divorce is final, a mandamus action is

¹³⁶ *In re Salgado*, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001) (orig. proceeding). Title 4 final protective orders may conflict with a valid pre-existing custody order and the statutory provision for transfer of cases on final protective orders to SAPCR court indicates that Title 4 order prevails in such a conflict.

¹³⁷ *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.). The court has discretion as to whether to transfer a protective order case to the court with pending SAPCR; actions may proceed simultaneously in separate courts; receiving court has same jurisdiction to modify order as originating court; protective order granted in pending divorce action is not appealable.

required to seek relief for a protective order issued under [Tex. Fam. Code § 6.504](#).¹³⁸

([Tex. Fam. Code § 81.009\(a\)](#))

3A.12 Duties of law enforcement.

- **Database.** Within 10 days after the receipt of a copy of the order and the completed Protective Order Data Entry Form (see § 19.11) by a law enforcement agency, it is to be entered into the DPS statewide law enforcement information system.

([Tex. Fam. Code § 86.011](#))

- **Firearms dealers.** Upon request, DPS shall inform licensed firearms dealers whether or not a prospective transferee has an active protective order in the DPS database. If so, DPS shall inform the licensed firearms dealer and the transfer is prohibited under [18 U.S.C. § 922](#).

([Tex. Fam. Code § 86.002](#))

- **Assist exclusion from residence.** Upon request, the law enforcement agency with jurisdiction over the applicant's residence will accompany the applicant to the residence, inform the alleged offender of the exclusion, and protect the applicant until the alleged offender leaves, or arrest the alleged offender if the court order is violated.

([Tex. Fam. Code § 86.004](#))

- **Dissemination of information.** Each law enforcement agency shall establish procedures to inform its officers of the existence of protective orders issued in other jurisdictions.

([Tex. Fam. Code § 86.005](#))

¹³⁸ *Ruiz v. Ruiz*, [946 S.W.3d 123](#) (Tex. App.—El Paso 1997, no writ).

CHAPTER 3A—PART II: COMMENTS

3A.13 *Overview of the law.*

The parties in a Tex. Fam. Code protective order case may agree to entry of the order, which must be approved by the court. The statute ([Tex. Fam. Code § 85.005](#)) does not require that the parties agree to, or that the court enter, findings that a party committed family violence in the past or is likely to commit family violence in the future. That statute allows the court to approve the respondent's agreement to the terms of a protective order.

In a protective order based on an agreement, either or both parties can agree to be bound by any of the terms set out in [Tex. Fam. Code § 85.021](#), which are the provisions enforceable only by contempt. An applicant may not agree to do or refrain from doing an act listed in [Tex. Fam. Code § 85.022](#). In other words, the applicant cannot by agreement be subjected to criminally enforceable provisions of a protective order. ([Tex. Fam. Code § 85.005](#); [Tex. Fam. Code § 85.021](#))

When approving the agreement, the court must ensure that the agreement and order do not require the applicant to do or refrain from doing any act that would subject the applicant to a criminal penalty for violating the order. ([Tex. Fam. Code § 85.005](#))

3A.14 *Findings of family violence.*

Although [Tex. Fam. Code § 85.005](#) does not require an agreed protective order to contain findings of family violence, some courts decline to issue the order without a finding of family violence. The court should consider whether omitting the finding is in the best interests of all parties and the public. See Ch. 18.

In one case, the court of appeals opined that without a finding of family violence, a protective order based on an agreement was not a valid protective order.¹³⁹

NOTE: For the clerk to be able to collect fees and costs from a party to a family violence protective order, the court must first enter a finding in the order that

¹³⁹ *Interest of IEW*, No. 13.09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi. Aug. 27, 2010, no pet.) (mem. op.) [Prior memorandum opinion issued January 2010 and found at [2010 Tex. App. Lexis 404](#) was withdrawn.] There is no presumption that by entering into agreed protective order that lacks findings that family violence has occurred or is likely to occur in the future, the respondent agreed that he committed family violence or is likely to do so in the future. The respondent was not judicially stopped from contesting the family violence findings in a motion to vacate just because he consented to the agreed order.

the party committed family violence. Therefore, the best practice is for each order that assesses fees and costs to contain an explicit finding that names the person who committed family violence (ex: “Respondent [respondent’s name] committed family violence and is likely to commit family violence in the future.”)

3A.15 *Mediation inappropriate.*

The National Council of Juvenile and Family Court Judges recommends:

Judges should not mandate mediation in cases where family violence has occurred. Because assault of any kind is a serious crime and needs to be treated as such by the courts, mediation of family violence is simply not an appropriate response. Mediation is a process by which the parties voluntarily reach consensus about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the issue before the court is a request for an order of protection or a criminal family violence charge, mediation should not be mandated. The victim receives no protection from the court with a mediated “agreement not to batter.” And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe, that the victim is somehow at fault.¹⁴⁰

Under Texas law, a collaborative lawyer must evaluate the impact of family violence upon the parties to a family law dispute. Once the existence of family violence is ascertained, the collaborative lawyer may not begin or continue a collaborative process until reasonable steps have been taken to address the impact of family violence on the abused party and the abused party requests the collaborative process begin or continue.

[\(Tex. Fam. Code § 15.112\)](#)

¹⁴⁰ *Family Violence: Improving Court Practice* 22 (National Council of Juvenile and Family Court Judges, 1990) at 28. Available at:

<http://www.ncjfcj.org/images/stories/dept/fvd/pdf/improvingcourtpractice.pdf>

CHAPTER 4—MAGISTRATE’S ORDER OF EMERGENCY PROTECTION—PART I: STATUTES AND CASE LAW

[\(Tex. Code Crim. Proc. arts. 17.291, 17. 292, and 17. 293\)](#)

Summary:

After an arrest for certain offenses, there are two situations in which a magistrate can issue an order of emergency protection for the victim and the victim’s family or household members. One is discretionary, the other mandatory.

The purpose of the magistrate’s order is to prevent the defendant from inflicting further harm on the victim after the defendant is released from confinement. The magistrate’s order differs from a [Tex. Fam. Code Title 4](#) protective order in that the former does not require a hearing, does not require the defendant and the victim to have a specific relationship (and can be issued to protect the victim from a stranger), and is issued before the defendant is released from jail. Unlike the protective orders available under Tex. Code Crim. Proc. chapter 7A (sexual assaults) and article 6.08 (crimes motivated by bias or prejudice), the magistrate’s order is available to victims of several different types of offenses. The magistrate’s order should complement the conditions of bond set for the defendant.

Discretionary. After a person is arrested for an offense involving family violence, sexual assault, aggravated sexual assault, or stalking, the magistrate *may* issue an order of emergency protection before the defendant is released from custody.

Mandatory. After an arrest for an offense that involved family violence with serious bodily injury or involved display or use of a deadly weapon, and before the defendant is released, the magistrate *shall* issue an order of emergency protection.

The magistrate’s order is criminally enforceable. Violation of the order is a Class A offense under [Tex. Penal Code § 25.07](#).

4.1 *Predicate offenses.*

A magistrate’s order of emergency protection can issue after an arrest for a violation of:

- [Tex. Penal Code § 22.11](#) (sexual assault);
- [Tex. Penal Code § 22.021](#) (aggravated sexual assault);
- [Tex. Penal Code § 42.072](#) (stalking);

OR

- any offense involving family violence.¹⁴¹

([Tex. Code Crim. Proc. art. 17.292\(a-b\)](#))

4.2 *Standing to apply.*

The order can issue on the magistrate’s own motion or upon the request of the:

- victim;
- victim’s guardian;
- a peace officer;

OR

- the state’s attorney.

([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

4.3 *Hearing.*

A hearing is not required before a magistrate’s order may issue.¹⁴² The statute does not address whether the order can exclude the defendant from the defendant’s residence. However, if the court is asked to do this, the best practice is to hold a hearing on at least that issue to satisfy due process.

¹⁴¹ In this context, “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 member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(2) abuse, as that term is defined by [Tex. Fam. Code § 261.001](#)(C), (E) and (G), by a member of a family or household toward a child of the family or household;

OR

(3) dating violence. ([Tex. Fam. Code § 71.004](#))

¹⁴² *Ex parte* Flores, [130 S.W.3d 100](#) (Tex. App.—El Paso 2003, pet. ref’d). [Tex. Code Crim. Proc. art. 17.292](#) is not unconstitutional because it does not require a hearing be held before the magistrate’s order of emergency protection can issue. Prompt assumption of judicial control following a violent incident outweighs the need for an adversarial proceeding.

4.4 Discretionary order.

A magistrate's order *may* be issued after an arrest for an offense involving family violence, sexual assault, aggravated sexual assault or stalking.

[\(Tex. Code Crim. Proc. art. 17.292\(a\)\)](#)

4.5 Mandatory order.

After an arrest for an offense involving family violence, an emergency order of protection **must** be issued if the magistrate finds the offense also involved:

- serious bodily injury to the victim;
- the use of a deadly weapon during an assault;¹⁴³

OR

- the exhibition of a deadly weapon during an assault.

[\(Tex. Code Crim. Proc. art. 17.292\(a\)\)](#)

4.6 Scope of the order.

To protect the victim, the magistrate may order the arrested person not to:

- commit family violence;
- stalk another person, including the victim;
- communicate directly or indirectly in a threatening or harassing manner with a member of the victim's family or household (including the victim);

OR

- go near the residence, work place, residence, school, or child-care facility of the victim or a member of the victim's family or household.

The magistrate's order **must**:

- suspend the defendant's concealed handgun license;

¹⁴³ [Tex. Penal Code § 1.07](#)(17) defines deadly weapon as (1) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (2) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

AND

- prohibit the defendant from possessing a firearm (unless the alleged offender works full time as a licensed peace officer) for the duration of the order.

NOTE: A copy of the order should be forwarded to the DPS Concealed Handgun Licensing division. The federal authorities request that order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. ch. 44](#). See chapter 14.

[\(Tex. Code Crim. Proc. art. 17.292\(c\), \(c-1\) and \(l\); Tex. Penal Code § 46.04; 18 U.S.C. § 922\(g\)\)](#)

4.7 Contents of the order

The magistrate’s order should include:

- one of the following **findings**:
 - that the defendant was arrested for an offense involving family violence or the offense of sexual assault, aggravated sexual assault, or stalking;

OR

- that the defendant was arrested for an offense involving family violence that resulted in either serious bodily injury to the victim, the use of a deadly weapon during an assault, or the exhibition of a deadly weapon during an assault;
- **ordering language**, including:
 - **stay away provisions**: require the defendant to avoid designated locations and the protected persons:
 - if the person subject to the order must stay away from certain places, specifically describing the locations and the minimum distance that the defendant must maintain from those locations;

OR

- if due to safety concerns, those prohibited locations cannot be disclosed, state that the defendant is subject to re-arrest for going to

or near locations where the persons protected by the order live or work even without specific notice of those locations;

- **concealed handgun license:** language that suspends the defendant's license to carry a concealed handgun;
 - **possession of a firearm:** language that orders the defendant not to possess a firearm during the term of the order;
 - **global positioning monitoring:** if applicable, an order that the defendant person participate in a global monitoring system pursuant to [Tex. Code Crim. Proc. art. 17.49\(b\)](#);
- **in the event of a conflict with another order:**
 - **prior child custody orders:** a statement that if there is a *prior* court order regarding access to, or possession of, a child, the magistrate's order should state that it prevails to the extent there is a conflict with the prior order;
 - **subsequent permanent (final) Family Code protective orders:** a statement that a *subsequent* order issued under [Tex. Fam. Code Titles 1](#) (divorce) or 5 (SAPCR) or [Tex. Fam. Code ch. 85](#) (final family violence protective order) prevails over the magistrate's order unless the Tex. Fam. Code order states otherwise;
 - **a subsequent temporary *ex parte* family violence protective order:** a statement that the magistrate's order prevails over a *subsequently* issued [Tex. Fam. Code ch. 83](#) temporary *ex parte* family violence protective order unless the subsequent order contains a specific finding to the contrary.
 - **notice of the order and warning:**
 - a statement that a copy of the order will be provided to the child-care facility or school of a child protected under the order;
 - a statement that a copy of the order will be provided to the law enforcement agency having jurisdiction over the residence of the persons protected by the order;

AND

- the following warning in bold type or all capital letters:

“A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE OR A STALKING OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN 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, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER.”

[\(Tex. Code Crim. Proc. art. 17.292\(c\)-\(i\)\)](#)

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

4.8 Service; effective date; duration; modification.

4.8.1 Service.

The order shall be served on the defendant in open court.¹⁴⁴

¹⁴⁴ *Hernandez v. State*, No. 01-02-0986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref’d). Whether the defendant read the magistrate’s order of emergency protection or not, testimony that the signature on the order matched the defendant’s signature was sufficient to show notice of the order and once notified, the defendant was responsible for knowing the order’s contents. Accord, *McGregor v. State*, No. 05-02-0993-CR, [2003 Tex. App. Lexis 9270](#) (Tex. App.—Dallas Oct. 30, 2003, pet. ref’d).

NOTE: The order can issue without the victim’s presence in the courtroom.

4.8.2 Effective date.

The order is effective upon issuance, which is the date that the order is signed.

[\(Tex. Code Crim. Proc. art. 17.292\(j\)\)](#)

4.8.3 Duration.

- Discretionary order or mandatory order for serious bodily injury:
 - minimum length—31 days;
 - maximum length—61 days.
- Mandatory order for using or exhibiting a deadly weapon:
 - minimum length—61 days;
 - maximum length—91 days.

[\(Tex. Code Crim. Proc. art. 17.292\(j\)\)](#)

4.8.4 Modification.

After notice to all affected parties and a hearing, the issuing court may modify the order upon a finding that:

- the original order is unworkable;
- AND**
- modification will not increase the risk to the victim;
- AND**
- modification will not endanger a person protected under the order.

[\(Tex. Code Crim. Proc. art. 17.292 \(d\) and \(j\)\)](#)

4.8.5 Transfer of jurisdiction.

Upon motion, notice, and hearing or by agreement of the parties, jurisdiction over the magistrate's order may be transferred to the court having jurisdiction over the criminal offense that precipitated issuance of the magistrate's order. The receiving court may make the same modifications to the preexisting the order that the issuing court can make.

[\(Tex. Code Crim. Proc. art. 17.292\(n\)\)](#)

4.9 Notice to other persons.

The issuing court shall provide a copy of the order to all of the following:

- the victim (by delivery through law enforcement within 24 hours after issuance if the victim is not present when the order issues);
- the child-care facility or school of any child protected by the order;
- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Licensing Division;

AND

- the local law enforcement agency (**either** the police department **or** the sheriff's office but not the Department of Public Safety) with jurisdiction over the protected person's residence. This copy of the order must be accompanied by a completed DPS protective order data entry sheet (see § 19.11).

[\(Tex. Code Crim. Proc. art. 17.292; Tex. Code Crim. Proc. art. 17.293\)](#)

4.10 Enforcement.

A violation of a magistrate's order of emergency protection is a Class A misdemeanor offense under [Tex. Penal Code § 25.07](#).

4.11 Further detention.

If there is probable cause to believe that the defendant's immediate release will result in further violence, then after bond is granted:

- the head of the agency arresting or holding the defendant may *sua sponte* hold the defendant an additional 4 hours;

- the magistrate may order the defendant held for up to 24 hours upon making a finding that violence would continue upon release;
- the magistrate may order the defendant held for up to 48 hours if:
 - in the 10 years preceding the arrest, the defendant had more than one arrest for a family violence offense;

OR

- during commission of, or flight from commission of the offense, the defendant used or exhibited a deadly weapon.

NOTE: Upon application of the state’s attorney, the magistrate may postpone the defendant’s release on bond for up to 72 hours after arrest. ([Tex. Code Crim. Proc. art. 17.033\(c\)](#)). See § 8.4.

([Tex. Code Crim. Proc. art. 17.291](#))

4.12 *Notice of pending release.*

Before releasing a person who has been arrested for a family violence offense or who is being held without warrant to prevent family violence, the law enforcement agency holding the person shall make reasonable attempts to notify the victim.

([Tex. Code Crim. Proc. art. 17.29](#))

4.13 *Global position monitoring.*

In the magistrate’s order, the court can order that the defendant participate in a global position monitoring system. The victim can also be offered an opportunity to participate in the monitoring system. See § 8.5.2.

([Tex. Code Crim. Proc. art. 17.292\(c-1\)](#); [Tex. Code Crim. Proc. art. 17.49](#))

4.14 *Confidentiality of victim’s identity.*

The victim of an offense may file a request for pseudonym form (developed by the state attorney general’s office) requesting that a pseudonym be used instead of the victim’s name in all public files and records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request and provide

notice of the filing to the state's attorney. After receiving notice of the filing, the state's attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. art. 57D.02](#))

CHAPTER 4—PART II: COMMENTS

4.15 *Overview of the law.*

Magistrate's orders of emergency protection are:

- **discretionary** after a person is arrested for an offense involving family violence, sexual assault, aggravated sexual assault or stalking;
- **mandatory** if the arrest was for a family violence offense and if the alleged offense resulted in serious bodily injury to the victim or the use or exhibition of a deadly weapon during an assault. ([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

Applicants can be the victim, the victim's guardian, a peace officer, or the state's attorney. The court may also enter the order on its own motion. ([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

Hearings are not required; the magistrate's order may be granted *ex parte*.¹⁴⁵ The victim need not be present when the order issues. ([Tex. Code Crim. Proc. art. 17.292\(d\)](#)). The statute does not discuss exclusion of the defendant from the defendant's residence. If there is a request to do so, to satisfy due process the magistrate should provide the defendant notice and an opportunity to be heard on that issue.

The terms and conditions of the magistrate's order may prohibit the defendant from: committing family violence; stalking, communicating directly or indirectly in a threatening or harassing manner with the victim or a member of the victim's family or household; or going near the residence, work place, school, or child-care facility of the victim or a member of the victim's family or household. ([Tex. Code Crim. Proc. art. 17.292\(c\)](#))

Exclusion from residence. In the context of setting conditions of bail, the victim is entitled to provide the magistrate with places from which the defendant should be excluded. ([Tex. Code Crim. Proc. art. 17.49](#)) [Tex. Code Crim. Proc. art. 17.292](#) states that the defendant may be ordered to stay away from certain places frequented by the victim. The statute does not specifically address excluding a defendant from a residence shared with the victim.

Firearms possession. The magistrate's order must order the defendant to surrender a concealed handgun license and not to possess a firearm for the

¹⁴⁵ *Ex parte* Flores, [130 S.W.3d 100](#) (Tex. App.—El Paso 2003, pet. ref'd).

duration of the order. ([Tex. Code Crim. Proc art. 17.292\(c\)](#); [Tex. Code Crim. Proc. art. 17.293](#))

Ordering language in the magistrate’s order must include:

- a finding that the defendant was arrested for a qualifying predicate offense;¹⁴⁶
- language ordering the defendant not to communicate with, harass, commit violence against, or stalk the victim or a member of the victim’s family or household and to stay away from locations where persons protected by the order reside or work;¹⁴⁷
- a finding that the defendant is ineligible for a concealed handgun license;
- an order suspending the defendant’s concealed handgun license;
- an order prohibiting possession of a firearm;
- a statement that the magistrate’s order prevails over a conflicting provision in a child custody order;
- a statement that in the event of a conflict with a Tex. Fam. Code protective order issued subsequent to the magistrate’s order, the protective order controls;
- if applicable, language ordering the defendant to participate in a global monitoring system;

AND

- warnings that failure to comply with the order and that possession of a firearm during the term of the order are punishable civilly and criminally. ([Tex. Code Crim. Proc art. 17.292\(c-i\)](#))

The effective date of a magistrate’s order is upon issuance. ([Tex. Code Crim. Proc. art. 17.292\(j\)](#))

Service of the order upon the defendant shall be done in open court. ([Tex. Code Crim. Proc. art. 17.292\(j\)](#))

¹⁴⁶ An offense involving family violence, sexual assault, aggravated sexual assault, stalking, a family violence offense that resulted in serious bodily injury to the victim, or a family violence offense in which the accused used or exhibited a deadly weapon.

¹⁴⁷ The prohibited locations should be specifically described or the order should state the locations cannot be disclosed due to safety concerns.

Duration of a magistrate’s order is 31 to 61 days for a discretionary order and 61 to 91 days for a mandatory order. ([Tex. Code Crim. Proc. art. 17.292\(j\)](#))

Modification of a magistrate’s order is permitted if after a duly noticed hearing, the court finds that: the order is unworkable; modification will not increase the risk to the victim; and modification will not endanger a person protected under the order. ([Tex. Code Crim. Proc. art. 17.292\(d\) and \(j\)](#))

Transfer of jurisdiction over the magistrate’s order to the court having jurisdiction over the criminal offense is permitted. ([Tex. Code Crim. Proc. art. 17.292\(n\)](#))

Notice of the order must be given to the victim, the Department of Public Safety’s protective order registry and Concealed Handgun Division; a school or child-care facility of any child protected by the order; and law enforcement having jurisdiction over the victim’s residence. ([Tex. Code Crim. Proc art. 17.292](#); [Tex. Code Crim. Proc art. 17.293](#))

Global position monitoring. The magistrate can order the defendant to participate in a global position monitoring system for the duration of the order. The victim should be offered the opportunity to be protected by such a system. ([Tex. Code Crim. Proc art.. 17.292\(c-1\)](#); [Tex. Code Crim. Proc art.17.49](#))

Notice of pending release. Whether or not a magistrate’s order is issued, law enforcement must make reasonable attempts to notify the victim before releasing a person who was arrested for a family violence offense. ([Tex. Code Crim. Proc art. 17.29](#))

A violation of the magistrate’s order is Class A misdemeanor offense. ([Tex. Penal Code § 25.07](#))

4.16 Sample order.

A form for the magistrate’s order can be found on the Texas Municipal Court’s Education Center website.¹⁴⁸

4.17 Bond.

Whatever the alleged offense, the magistrate **must** take the safety of the victim or the victim’s family into consideration in setting bail for the defendant. ([Tex.](#)

¹⁴⁸ Available at:

<http://www.tmcec.com/tmcec/public/files/File/Resources/Final%20Website%20Forms%20Book/PDF/05%20Magistrate%20Duties.pdf>

[Code Crim. Proc art. 56.02\(2\)](#)) When the offense justifies or necessitates issuance of a magistrate’s order, the court should consider whether a personal or surety bond is the best mechanism for protecting the victim. In either case, the bond conditions should be tailored to promote victim safety. ([Tex. Code Crim. Proc art. 17.29](#))

For **stalking** offenses, the magistrate **must** require the defendant not to communicate with or go near the victim. ([Tex. Code Crim. Proc art. 17.46](#))

For **family violence** offenses, the magistrate **may** set bond conditions that include staying away from designated locations, not communicating with the victim, and wearing a global monitoring device. ([Tex. Code Crim. Proc art. 17.49](#))

4.18 *Extending the hold or detention.*

If there is reason to believe that immediate release of the defendant will lead to further violence, the detention of the defendant **may** be extended for 4 hours by the head of the law enforcement agency holding the defendant or for 24 to 48 hours by the magistrate. The additional 24-hour hold requires the magistrate to find that the defendant’s release will result in further violence. The additional 48-hour hold requires the magistrate to find that not only will release lead to further violence but also that the defendant has had more than one family violence arrest in the preceding 10 years or that the defendant used or displayed a deadly weapon during commission of or flight from the offense that led to the arrest. ([Tex. Code Crim. Proc art. 17.291](#))

4.19 Comparison of magistrate's order to a [Tex. Fam. Code Title 4 protective order](#).

	Magistrate's Order	Title 4 Protective Order
Type of proceeding	Civil (presumptively, based on standard of proof)	Civil
Standard of proof	Reason to believe arrest was for predicate offense	Preponderance of the evidence
Predicate offense	1) Any offense involving family violence 2) Sexual assault or aggravated sexual assault 3) Stalking	Any incident of family violence that makes it likely that family violence will occur in the future
Available	After arrest for predicate offense	After an incident of family violence
Hearing on merits required	No (unless perhaps the defendant faces exclusion from his or her own residence)	Temporary order—No Permanent order—Yes, unless parties enter into agreement approved by the court
Issued by	Magistrate handling bail	Any court with jurisdiction
When issued	Before release on bond	After application filed and hearing held or agreement approved by the court
Effective	Upon issuance (notice and service are presumed because defendant can be served while in custody)	Upon issuance; enforceable after actual notice or after service effected
Mandatory	Only after arrest for: <ul style="list-style-type: none"> • any offense resulting in serious bodily injury to victim; OR • an assault involving use or exhibition of deadly weapon 	No
Protected persons	Victim of the offense and victim's family or household as listed in the order	Applicant and members of applicant's family and household as listed in the order
Duration	No weapon involved: 31-61 days Weapon involved: 61-91 days	Up to 2 years from date of issuance or until modified or 1 year from release date
Criminally enforceable	Yes	Yes
Bond required	Yes	No

4.20 *Victim's rights.*

In addition to considering victim safety when setting the bond, for offenses involving sexual assault, family violence, or stalking, the magistrate **must** also:

- take the future safety of the victim and the community into consideration before setting bail ([Tex. Code Crim. Proc. art. 17.15\(5\)](#); [Tex. Code Crim. Proc. art. 17.40](#); [Tex. Code Crim. Proc. art. 56.02\(2\)](#));
- protect the victim's privacy ([Tex. Code Crim. Proc. art. 56.09](#) and [57D.02](#));
- instruct the law enforcement agency detaining the defendant to make a reasonable attempt to notify the victim before the defendant is released from jail ([Tex. Code Crim. Proc. art. 17.29](#));
- give the victim an opportunity to list all areas from which the defendant should be excluded ([Tex. Code Crim. Proc. art. 17.49](#));

AND

- inform the victim of the availability of a global monitoring system to track either the defendant. ([Tex. Code Crim. Proc. art. 17.49](#))

CHAPTER 5—PROTECTIVE ORDERS FOR VICTIMS OF COMPELLED PROSTITUTION, SEXUAL ASSAULT, STALKING, OR HUMAN TRAFFICKING (FOR SEXUAL EXPLOITATION), (Art. 7A)—PART I: STATUTES AND CASE LAW

**([Tex. Code Crim. Proc. Ch. 7A](#);
[Tex. Fam. Code Title 4](#))**

Summary:

Under Texas Code of Criminal Procedure Art. 7A, a protective order is available to a victim of certain criminal conduct (sexual assault, stalking, human trafficking (for sexual exploitation), or compelling prostitution) regardless of the victim's relationship with the alleged offender or whether a criminal charge is filed against the alleged offender. A violation of an Art. 7A protective order is a Class A misdemeanor under [Tex. Penal Code § 38.112](#). Except as otherwise provided in [Tex. Code Crim. Proc. Art. 7A](#), the procedures of [Tex. Fam. Code Title 4](#) control an Art. 7A protective order proceeding.

The 82nd Texas Legislature amended Texas Code of Criminal Procedure Art. 7A to add stalking, compelling prostitution, and human trafficking (for sexual exploitation) to sexual assault as predicate criminal conduct that will support issuance of a protective order for the victim. The 82nd Legislature also added two entirely new protective order statutes to the Code of Criminal Procedure: one that creates an alternate stalking victim protective order (Texas Code of Criminal Procedure Art. 6.09); and one that creates a protective order for victims of human trafficking of any kind described in Tex. Penal Code § 20A.02. (Texas Code of Criminal Procedure Art. 7B). Further complicating the situation, Art. 7B overlaps Art. 7A regarding human trafficking victims.

This Chapter discusses only the Art. 7A protective order. The Art. 6.09 stalking protective order is discussed in Chapter 5A and the Art. 7B human trafficking protective order is discussed in Chapter 6A.

The 82nd Legislature amended Art. 7A with four separate bills, three of which overlapped in substance, but none of which tracked each other well.

Art. 7A.01(a) was amended by two bills:

SB 24 (adding human trafficking for sexual exploitation and compelling prostitution to list of predicate criminal conduct); and

SB 250 (adding stalking to the list of predicate criminal conduct).

Art. 7A.03 was also amended by two separate bills:¹⁴⁹

SB 250 (for stalking victims, requiring only one finding to issue the order—that reasonable grounds exist to believe that the applicant was a stalking victim); and

HB 649 (for sexual assault or stalking victims, requiring only one finding to issue the order—that reasonable grounds exist to believe that the applicant was either a sexual assault or stalking victim).

Art. 7A.035, added by HB 1721, made a change regarding evidence:

HB 1721 (under certain circumstances, the court may admit a hearsay statement of a child applicant for a protective order if the child is a victim of conduct that violates Tex. Penal Code §§ 21.02, 21.11, 22.011, or 22.021.) (Note that HB 1721 does not mention any of the other predicate criminal conduct so it is applicable only to child victims of sexual assault.)

As required by the Texas Code Construction Act, any inconsistencies in these laws must be harmonized if possible.¹⁵⁰ In this case, the harmonizing the three laws that amended Arts. 7A.01 and 7A.03 clearly results in the addition of stalking, compelling prostitution, and human trafficking for sexual exploitation to the list of predicate criminal conduct. Additionally, it is clear that for sexual assault victims and stalking victims, the only required finding to support the order is that there is reasonable grounds to believe that the applicant is a victim of that type of criminal conduct.

The amended statute does not specify what findings are required to issue an order for a victim of human trafficking or compelled prostitution. SB 250 tracked the prior law and required additional findings only for sexual assault victims. HB 649 removed the additional findings on sexual assault that SB 250 had reenacted. SB 24, which added human trafficking and compelling prostitution as predicate criminal conduct amended only Art. 7A.01 and those offenses are not mentioned elsewhere in the amended statute. However, the Texas Code Construction Act requires that the law be given effect if possible and to give effect to SB 24, the court must have findings to support issuance of

¹⁴⁹ To the extent it matters for purposes of analyzing provisions of these two bills, HB 649 was enacted after SB 250. Section 311.025 of the Government Code (part of the Code Construction Act) states that if two statutes are irreconcilable, the statute “latest in date of enactment prevails.”

¹⁵⁰ Tex. Gov’t Code § 311.025(b).

a protective order based on the predicate criminal conduct.¹⁵¹ The most harmonious reading of SB 24, SB 250, and HB 649 (and one that gives effect to all the amendments) produces a single required finding to issue a protective order for a victim of either human trafficking or compelled prostitution—that there are reasonable grounds to believe that the applicant is a victim of that type of criminal conduct by the alleged offender.

5.1 Eligibility; jurisdiction; venue.

A victim¹⁵² is eligible for a temporary or permanent protective order under Tex. Code Crim. Proc. Art. 7A, regardless of the relationship between the victim and the offender (or alleged offender) or whether a criminal charge is filed, if the criminal conduct alleged violates:

[Tex. Penal Code § 21.02](#) (continuous sexual abuse of a child);
[Tex. Penal Code § 21.11](#) (indecent with a child);
[Tex. Penal Code § 22.011](#) (sexual assault);
[Tex. Penal Code § 22.021](#) (aggravated sexual assault); **OR**

(for applications filed on or after September 1, 2011):

[Tex. Penal Code § 20A.02\(a\)\(3\),\(4\),\(7\), or \(8\)](#) (human trafficking involving sexual exploitation);
[Tex. Penal Code § 42.072](#) (stalking); **OR**
[Tex. Penal Code § 43.05](#) (compelling prostitution).

([Tex. Code Crim. Proc. art. 7A.01\(a\)](#))

5.1.1 Controlling law.

Except as otherwise stated in Art. 7A, a proceeding under this chapter is controlled by [Tex. Fam. Code Title 4](#).

([Tex. Code Crim. Proc. art. 7A.04](#))

5.1.2 Standing to apply.

Regardless of whether the applicant and the alleged offender had a relationship with each other or whether a criminal charge is filed, an application for the protective order may be filed by:

¹⁵¹ Tex. Gov't Code § 311.021.

¹⁵² As used in this section the term “sexual assault victim” includes a victim of the offense of indecency with a child.

- (1) the victim of criminal conduct that constitutes the predicate offense;
- (2) for applications before September 1, 2011, the parent or guardian of the victim if the victim is under 17 years of age;¹⁵³
- (3) for applications on or after September 1, 2011, the parent or guardian of a victim if the victim is under 18 years of age;

OR

- (4) a prosecuting attorney.

[\(Tex. Code Crim. Proc. art. 7A.01\(a\)\)](#)

5.1.3 Where to file.

The application must be filed in :

5.1.3.1 Type of Court.

- (1) district court;
- (2) juvenile court with district court jurisdiction;
- (3) county court at law;

OR

- (4) constitutional county court.

5.1.3.2 Venue.

Venue lies in the county:

- (1) where applicant resides;

OR

¹⁵³ *In re Ortman*, No. 14-07-1022-CV, [2009 Tex. App. Lexis 5280](#) (Houston [14th] Jul. 9, 2009) (mem. op.). In an application for a protective order under [Tex. Code Crim. Proc. art. 7A](#), the mother of the 17-year-old victim did not have standing to apply for the protective order.

(2) where the alleged offender resides.

[\(Tex. Code Crim. Proc. art. 7A.01 \(b\)\)](#)

5.1.4 Fees.

5.1.4.1 No fees for applicant.

An applicant may **NOT** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

5.1.4.2 No fees for alleged offender.

Although Title 4 of the Tex. Fam. Code authorizes assessment of fees (including attorney's fees), that assessment is tied to a finding that the person committed family violence, a finding that may be inapplicable to a protective order under Art. 7A. Therefore, absent a finding of family violence, there is *no direct statutory authority permitting the assessment of fees or other costs against the alleged offender in this type of hearing.*

[\(Tex. Fam. Code § 81.003\)](#)

5.2 Contents of the application.

The application must contain:

- the name and county of residence of applicant and alleged offender;
- a detailed description of the relevant facts that set out reasonable grounds to believe that the applicant is the victim of the alleged offenders' criminal conduct;
- an allegation that the alleged offender has committed an act (whether or not a criminal charge is filed) that constitutes, or been criminally charged with,

a violation of Tex. Penal Code § 21.02 (continuous sexual abuse of a child); § 21.11 (indecent with a child); § 22.011 (sexual assault); § 22.021 (aggravated sexual assault); § 20A.02(a)(3),(4),(7), or (8) (human trafficking involving sexual exploitation); § 42.072 (stalking); **OR** § 43.05 (compelling prostitution);

- a request for a protective order;

AND

- if a temporary order is requested, the applicant's signature taken under oath. For applications filed on or after September 1, 2011, the applicant's oath need not be notarized and the affidavit of a child is sufficient. See [Tex. Civ. Prac. & Rem. Code § 132.001](#); [Tex. Fam. Code 82.009](#).

[\(Tex. Fam. Code § 82.009\)](#)

5.3 Temporary protective order.

The applicant may request issuance of a temporary protective order.

5.3.1 Requisites for issuing a temporary order.

To issue a temporary order, the court must have:

- received a properly completed application (with the applicant's sworn statement);

AND

- made a finding that the alleged offender poses a clear and present danger of sexual assault, stalking or other harm to the applicant or the applicant's family or household.

[\(Tex. Code Crim. Proc. art. 7A.02\)](#)

5.3.2 Notice; service; hearing.

The temporary protective order may be issued without:

- prior notice to the alleged offender;

- service of process on the alleged offender;

OR

- a hearing, **UNLESS** the applicant is requesting that the alleged offender be excluded from the offender’s residence, in which case the applicant must provide sworn written and oral testimony and appear in person at a hearing to request the exclusion. See § 3.2.3.

([Tex. Code Crim. Proc. art. 7A.02](#); [Tex. Fam. Code § 83.006](#))

5.3.3 Temporary protective order.

The temporary order must:

- contain a finding that the alleged offender presents a clear and present danger of sexual assault, stalking, or other harm to the applicant or the applicant’s family or household members;¹⁵⁴
- set the duration of the order, not to exceed 14 days (20 days in district courts with multiple counties or district courts in counties with populations over 2 million). The temporary order is subject to multiple extensions for the same duration as the initial order.;
- state whether the alleged offender is required to post bond;
- if an exclusion from the alleged offender’s residence is ordered, contain a finding that the applicant resides at the premises or has resided there within the past 30 days and that either the applicant has a legal interest in the property or the alleged offender is required to support the applicant or the applicant’s child;
- list the acts the alleged offender is required to do or to refrain from doing;

¹⁵⁴ Despite TRCP 299a’s prohibition on inserting a finding of fact in a civil judgment, this finding is the equivalent of a finding of family violence in a [Tex. Fam. Code Title 4](#) protective order, which was found to be appropriately included in the order in *Pena v. Garza*, [61 S.W.3d 529, 531](#) (Tex. App.—San Antonio, 2001, no pet.).

- list the persons with whom the alleged offender may not have contact;
- list the places the alleged offender must avoid;
- state the distance that the alleged offender must maintain from any person or location listed in the “stay away” provisions of the order;

AND

- contain the warning set out in [Tex. Code Crim. Proc. art. 7A.06](#).

([Tex. Code Crim. Proc. art. 7A.02](#); [Tex. Fam. Code §§ 83.001-83.006](#); [Tex. Fam. Code § 85.021](#))

5.3.4 Warning on temporary order.

The temporary order must contain the following warning, in letters that are either bold type, underscored, or in all caps:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION. ”

NOTE: The required warning differs from the required warning in Tex. Fam. Code § 85.026 in that it does not require a warning about possible sanctions for a violation.

[\(Tex. Code Crim. Proc. art. 7A.06\)](#)

5.3.5 Enforcing an order to vacate a residence.

If the temporary or permanent order includes a requirement that the alleged offender vacate his residence, the court shall, upon request, issue an order requiring the appropriate law enforcement agency to:

- accompany the victim to the residence;
- inform the alleged offender of the order to vacate;
- protect the applicant while the applicant takes possession;

AND

- protect the applicant during the time it takes to gather up personal property if the alleged offender refuses to vacate the residence.

[\(Tex. Fam. Code § 86.003\)](#)

5.4 Hearing.

Art. 7A does not specifically address the issues of notice, settings, continuances, answers, agreed or separate orders, or defaults so the applicable procedures must be extrapolated from [Tex. Fam. Code Title 4](#). For instance, Art. 7A does not specifically state what sort of notice must be provided to a defendant or alleged offender prior to holding the protective order hearing but its reference to the procedures set out in [Tex. Fam. Code Title 4](#) indicates that the safest course is to follow the requisites of the latter.

5.4.1 Minimum notice period for hearing.

The alleged offender is entitled to at least 48 hours prior notice of the hearing date and time and the alleged offender's request for a resetting for failure to give the minimum notice must be granted.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

5.4.2 Initial setting for hearing.

The initial setting for the hearing must be:

- no later than the 14th day after the protective order application was filed for all courts **EXCEPT**
- in *district courts* that cover multiple counties or in district courts in counties over 2 million in population, the hearing may, upon request of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

5.4.3 Resetting the hearing for insufficient notice.

If the alleged offender is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the alleged offender may request the hearing be rescheduled for a date that is:

may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

OR

- within 20 days of the request for cases in the district courts in counties with a population over 2 million or that cover multiple counties.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

5.4.4 Continuances.

- The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#).

[\(Tex. Fam. Code § 84.005\)](#)

- The court *may not* continue or reset a hearing to consolidate it with a subsequently filed protective order application even if that protective order application was filed in conjunction with a divorce or SAPCR proceeding.

([Tex. Fam. Code § 84.001](#); [Tex. Fam. Code § 85.061](#))

- Conducting discovery is not a basis for continuing a protective order case.¹⁵⁵

5.4.5 Order based on the parties’ agreement.

There is no specific authority for entering an order based on an agreement between the applicant and the alleged offender.¹⁵⁶ If the alleged offender does not contest the application, the court can enter an order based on stipulated or deemed facts.

5.4.6 Separate or “mutual” protective orders.

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant.¹⁵⁷

5.4.7 Hearsay statement of a child witness.

{XE "hearsay:child: sexual assault victim’s protective order" }

The court may admit the outcry statement of a child victim under 14 years in an application for a sexual assault victim’s protective order if the statement describes the offense against the child and if, after a hearing, the court determines that the statement is reliable and if the child testifies or is available to testify or if the court determines that the

¹⁵⁵ *Martinez v. Martinez*, [52 S.W.3d 429](#) (Tex. App.—Fort Worth 2001, pet. denied).

¹⁵⁶ [Tex. Code Crim Proc. art. 7A](#) refers only to “protective orders,” not to “agreed orders.” Title 4 of the Family Code treats protective orders slightly differently from “agreed order” so it is debatable that the procedure for agreed orders set out in Chapter 85 of the Family Code should be utilized in the context of art. 7A protective orders. See Chapter 3. ([Tex. Fam. Code §§ 85.005 and 85.021](#))

¹⁵⁷ In order to require a party to act or refrain from engaging in conduct, the court must find the person has committed family violence. Because Art. 7A does not require a finding of family violence, there does not appear to be a basis for entering a separate order against a person requesting a protective order under Art. 7A. ([Tex. Fam. Code §§ 85.001\(b\), 85.003 and 85.022](#))

use of the statement in lieu of the child's testimony is necessary to protect the child's welfare.

NOTE: This provision does not discuss admissibility of the hearsay statement if the child is a victim of a non-sexual offense such as stalking. This provision applies only to applications file on or after September 1, 2011, but it is not clear whether it applies to a hearsay statement made before that date.

[\(Tex. Code Crim. Proc. art. 7A.035\)](#)

5.5 Answer.

An alleged offender may, but is not required to, file an answer at any time before the hearing.

[\(Tex. Fam. Code § 82.022\)](#)

5.6 Default.

Whether or not the alleged offender files an answer, if the alleged offender fails to appear or be represented at the hearing, a default judgment may be entered after:

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);
- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the alleged offender committed a sexual assault and a protective order is necessary to protect the victim;

AND

- proof of any evidence necessary to support the sanctions (terms and conditions imposed upon the alleged offender) imposed by the order.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004, Tex. Fam. Code § 85.006; Tex. R. Civ. P. 107; Tex. R. Civ. P. 239; Tex. R. Civ. P. 243\)](#)

NOTE: In a default proceeding, the court **MAY NOT** take evidence on any issue other than proof of service of notice and sanctions.

5.7 *Permanent protective order.*

5.7.1 Required findings for a permanent order.

5.7.1.1 Sexual assault victims.

For orders on applications filed before September 1, 2011, the statutorily required findings differ based on the applicant's age. There are two sets of required findings that support a protective order for a sexual assault victim. One set applies if the victim is under the age of 18 and the other if the victim is 18 or older.

For applicants under the age of 18 years, the court must find that there are reasonable grounds to believe that the applicant is:

- a victim of a sexual assault by the alleged offender;

AND

- under the age of 18 years.

For applicants who are 18 years of age or older, the court must find that there are reasonable grounds to believe that applicant is:

- the victim of a sexual assault by the alleged offender;

AND

- the subject of a threat¹⁵⁸ that reasonably causes the applicant to fear further harm from the alleged offender.

¹⁵⁸ *Garcia v. Tautenhahn*, [314 S.W.3d 541](#) (Tex. App.—Corpus Christi 2010, no pet.). In an application for a protective order under [Tex. Code Crim. Proc. art. 7A](#), evidence that the respondent had expressed an interest in seeing the child conceived during the sexual assault and that the respondent's sister had contacted the victim was not sufficient to establish a threat of further harm under Tex. Code Crim. Proc. art. [7A.03](#).

For orders based on applications filed or after September 1, 2011, the only statutorily required finding, regardless of the victim's age, is that reasonable grounds exist to believe that the applicant is the victim of a sexual assault by the offender or alleged offender.

5.7.1.2 Stalking victims.¹⁵⁹

The required finding to issue a protective order for a victim of stalking is that reasonable grounds exist to believe that the applicant is a victim of stalking.

5.7.1.3 All other victims.¹⁶⁰

The statute does not specify what finding is required to support a protective order for a victim of compelled prostitution. After applying the principles set out in the Texas Code Construction Act (requiring harmonization of laws and implementation of legislative intent), the required finding to support a protective order for a victim of compelled prostitution or human trafficking appears to be that there are reasonable grounds to believe the applicant is the victim of the predicate offense, as that offense is defined in the Texas Penal Code.

5.7.1.4 Universal finding.

All protective orders issued under this article should state that the findings support a conclusion that a protective order is necessary to protect the applicant and the applicant's family or household from further harm by the alleged offender.

([Tex. Code Crim. Proc. art. 7A.03](#))

5.7.2 Conditions.

To protect the applicant or the applicant's family or household, the court may order the alleged offender:

¹⁵⁹ See the discussion of the amendments by the 82nd Legislature in the Summary at the beginning of Chapter 5.

¹⁶⁰ See the discussion of the amendments by the 82nd Legislature in the Summary at the beginning of Chapter 5.

(1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

OR

(2) not to:

- communicate directly or indirectly in a threatening or harassing manner;
- go near the residence, work place, residence, school, or child-care facility;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;

The court must order the defendant not to:

- possess a firearm (unless the alleged offender works full time as a licensed peace officer);

OR

- carry a concealed handgun (by suspending a license issued under [Government Code § 411.177](#)).

NOTE: Although Tex. Code Crim. Proc. art [7A.05\(c\)](#) states the court *may* suspend a respondent’s concealed weapon license, as a practical matter the court *must* suspend the license because federal law prohibits the defendant from possessing a firearm and the defendant will no longer qualify for a concealed handgun license once the protective order issues. See [Tex. Gov’t Code § 411.172](#). The federal government recommends using a “Brady marker” on the order to indicate that the defendant is subject to the prohibitions on

firearm possession under [18 U.S.C. ch. 44](#). See Ch. 14 of this Benchbook.

([Tex. Code Crim. Proc. art. 7A.05\(a\)](#); [Tex. Fam. Code §§ 85.021 and 85.022](#))

5.7.3 Stay away provisions; confidential locations.

With regard to places the alleged offender must stay away from, the permanent order must specifically describe each location and the minimum distance that the offender must maintain from that location, *unless* the applicant requests that location not be disclosed.

([Tex. Code Crim. Proc. art. 7A.05\(b\)](#))

5.7.4 Warning.

The permanent (final) protective order must contain the same warning as contained in the temporary order (see § 5.3.5 above):

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION. ”

In addition, the permanent order must also contain the following:

“A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS

LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER.”

The warning must be in letters that are bold, underlined, or all caps.

([Tex. Code Crim. Proc. art. 7A.06](#))

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

NOTE: Oral warning required at hearing. It is not quite clear that the provisions of [Tex. Fam. Code § 85.041\(c\)](#) regarding oral warnings apply in this context (because the Tex. Fam. Code requirements address family violence). However, the better practice seems to be to warn the alleged offender orally as well as in writing of the order’s prohibitions and attendant consequences for violations.

5.7.5 Duration.

The permanent order lasts:

- for the time specified in the order;
- for two years, if no other period is specified in the order;
- **for applications filed before September 1, 2011**, for more than two years (up to the lifetime of the applicant or alleged offender) if the court makes a finding that it reasonably believes that the applicant is threatened with further harm by the alleged offender;
- **for applications filed on or after September 1, 2011**, the court has full discretion to set the term of the order, which may last up to the lifetime of the applicant or alleged offender;

- if the alleged offender was confined or imprisoned when the order issued, until the first anniversary after the alleged offender is released from imprisonment or confinement;

OR

- until the order is rescinded at the request of:
 - an applicant, if the applicant is 17 years of age or older;

OR

- at the request of the parent or guardian of an applicant who is under 17 years of age.

NOTE: With regard to a conflict with [Tex. Fam. Code § 85.025](#), Art. 7A prevails.

([Tex. Code Crim. Proc. art. 7A.07](#))

5.7.6 Service and delivery.

5.7.6.1 Service of the permanent order on respondent.

The protective order shall be delivered to the respondent:

- as provided by [Tex. R. Civ. P. Rule 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);
- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#));

OR

- served in open court at the close of the protective order hearing.

NOTE: Oral warning required at hearing. If the order has not been reduced to writing but the respondent appears at the hearing, the court shall orally warn the respondent about any of the prohibitions listed in [Tex. Fam. Code § 85.022](#) that apply and of any other provisions necessary to prevent family violence.

[\(Tex. Fam. Code § 85.041\)](#)

5.7.6.2 Delivery to victim and others.

The court's clerk shall send a copy of the order to:

- the victim or the victim's attorney;
- the local law enforcement agency (**either** the police department **or** the sheriff's office but not directly to the Department of Public Safety) having jurisdiction over the victim's residence. This copy of the order must be accompanied by a completed DPS protective order data entry sheet (see § 19.11);
- a school or child-care facility, if the alleged offender is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;
- if the restrained person is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshall of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

[\(Tex. Fam. Code § 85.042\)](#)

5.7.7 Confidentiality of victim's identity.

The victim of an offense may file a request for pseudonym form (developed by the state attorney general's office) requesting that a pseudonym be used instead of the victim's name in all public files and

records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request and provide notice of the filing to the state's attorney. After receiving notice of the filing, the state's attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. 57D.02](#))

5.8 *Enforcement.*

A violation of a sexual assault protective order is a Class A misdemeanor under [Tex. Penal Code § 38.112](#). A violator is also subject to punishment for contempt of court.

([Tex. Penal Code § 38.112](#))

5.9 *Rescission of the order.*

The victim or the victim's parent or guardian (for victims under 17 years of age) may file to rescind the protective order at any time.

NOTE: Because the statute only addresses rescission by the victim, the provisions of Texas Family Code § 85.025(b), which allows any person "subject" to the order to file for a review or continuing need, does not seem to apply. Therefore, the offender has no standing to request the order be modified or vacated.

([Tex. Code. Crim. Proc. 7A.07\(c\)](#))

CHAPTER 5—PART II: COMMENTS

5.10 *Overview of the law.*

Victims of sexual assault (as defined in [Tex. Penal Code §§ 21.02, 21.11, 22.011, or 22.021](#)), stalking (as defined in [Tex. Penal Code § 42.072](#)), human trafficking for sexual exploitation (as defined in [Tex. Penal Code § 20A.02\(3\),\(4\),\(7\), or \(8\)](#)), or compelling prostitution (as defined in [Tex. Penal Code § 43.05](#)) are eligible to apply for a protective order against the offender or alleged offender. ([Tex. Code Crim. Proc. art. 7A.01\(a\)](#)). This protective order is available without regard to whether there is any specific type of relationship between the victim and the offender or alleged offender. There is no requirement in the statute that a criminal complaint be filed before a protective order is available under Article 7A.

Application. An application may be filed by the victim, the victim’s parent or guardian, or a prosecuting attorney. For applications filed on or after September 1, 2011, the victim must be under 18 years of age for the parent or guardian to have standing to file an application. For application filed before September 1, 2011, the parent or guardian could file on behalf of a victim under victims under 17 years of age.¹⁶¹ ([Tex. Code Crim. Proc. art. 7A.01\(a\)](#))

The application must be filed in a district court, a juvenile court with district court jurisdiction, a statutory county court, or a constitutional county court in either the county where the victim resides or the county where the alleged offender resides. ([Tex. Code Crim. Proc. art. 7A.01\(b\)](#))

Controlling law. Except where it conflicts with provision of [Tex. Code Crim. Proc. art. 7A](#), the procedures in [Tex. Fam. Code Title 4](#) control a [Tex. Code Crim. Proc. art. 7A](#) protective order proceeding. ([Tex. Code Crim. Proc. art. 7A.04](#))

Temporary order. If the court finds from the application (which must be supported by the applicant’s sworn statement) that the alleged offender poses a

¹⁶¹ Under the law in effect before September 1, 2011, a parent or guardian had no standing to file on behalf of a victim over 17 years of age. See *In re Ortman*, No. 14-07-1022-CV, [2009 Tex. App. Lexis 5280](#) (Tex. App.—Houston [14th] Jul. 9, 2009, no pet.) (mem. op.). In an application for a protective order for a sexual assault victim under [Tex. Code Crim. Proc. art. 7A](#), the victim’s mother did not have standing to apply for the protective order on behalf of her 17-year-old daughter.

clear and present danger of a sexual assault, stalking, or other harm to the applicant, the court may grant a temporary *ex parte* order to protect the applicant and the applicant's family and household. The temporary order may be granted without notice to the alleged offender and without a hearing unless the order excludes the offender from his or her residence. ([Tex. Code Crim. Proc. art. 7A.02](#); [Tex. Fam. Code § 83.006](#))

Hearing and findings for a permanent order. A hearing is required before issuance of a permanent protective order.

The alleged offender is entitled to at least 48 hours prior notice of the hearing and must be given a continuance upon request if notice is untimely. The hearing must be set within 14 days of the application (except for applications in district courts in multi-county districts and in counties over 2 million in population, where the hearing must be held within 20 days). ([Tex. Fam. Code §§ 84.001-84.004](#)) Legislative continuances are within the court's discretion but the court may not continue a hearing on application because a divorce or SAPCR involving the parties is pending. ([Tex. Fam. Code § 84.001](#); [Tex. Fam. Code § 84.005](#); [Tex. Fam. Code § 85.061](#))

There is no clear authority for entering an Article 7A protective order based on an agreement of the parties. There is no authority for issuing separate or "mutual" orders against each party based on a single application.

The alleged offender is not required to file an answer. A default order may be entered if the alleged offender fails to appear or be represented at the hearing after receiving proper notice. ([Tex. Fam. Code § 82.022](#); [Tex. Fam. Code § 85.006](#))

Findings. For applications based on an alleged or proven sexual assault that were filed *before September 1, 2011*, there are two sets of required findings—one for victims over the age of 18 and one for victims under the age of 18.

Under age 18. For victims under the age of 18, the court must find that there are reasonable grounds to believe that the applicant (1) is a victim of a sexual assault by the alleged offender; and (2) is under 18 years of age. ([Tex. Code Crim. Proc. art. 7A.03\(b\)](#))

For victims 18 years of age or older. For victims 18 years old or older, the court must find there are reasonable grounds to

believe that the applicant is (1) a victim of a sexual assault by the alleged offender and (2) has a reasonable fear of further harm from the alleged offender. ([Tex. Code Crim. Proc. art. 7A.03\(b\)](#))

Indirect attempts by the alleged offender to contact the victim may not be sufficient to establish a reasonable fear of further harm.¹⁶² Reasonable fear of harm is viewed from the victim's perspective, and includes, but is not limited to, overt threats the respondent may have made. Conduct or communication that otherwise would be innocuous is often harmful in and of itself when performed by a perpetrator of sexual assault toward his or her victim. The threat of further contact with the respondent often is a threat of further harm.

Required findings for issuance of a protective order for an application filed on or after September 1, 2011. Whatever the predicate criminal conduct, the only required finding is that reasonable grounds exist to believe that the applicant is the victim of that criminal conduct. (See the discussion in the Summary at the beginning of Chapter 5).

Contents of the order. In addition to the required findings, the court may enter any order necessary to protect the victim or the victim's family or household. The order **may** prohibit the alleged offender from: (1) communicating directly or indirectly in a threatening or harassing manner with a protected person; (2) going to or near the residence, place of employment, business, child-care facility, or school of the protected persons; or (3) engaging, harassing, annoying, alarming, abusive, tormenting, or embarrassing conduct directed at the protected persons. The order **shall** prohibit the alleged offender from possessing a firearm and **may** suspend a concealed handgun license (in reality, the court must suspend the license—see note at § 5.7.2). The court may also order other actions necessary to prevent or reduce the likelihood of future harm to the protected persons. **NOTE:** Although Article 7A does not enumerate protection of pets or assistance animals as one of conditions that may be imposed, the Article is meant to mirror Tex. Fam. Code Title 4, so as long as there is no conflict, the terms and condition found in Tex. Fam. Code §§ 85.021 and 85.022 can be part of an Article 7A order ([Tex. Code Crim. Proc. art. 7A.05](#))

Warnings and stay away provisions. The order must also warn the alleged offender of the civil and criminal consequences of violating the order or possessing a firearm. ([Tex. Code Crim. Proc. art. 7A.04](#)). Unless the safety of a

¹⁶² *Garcia*, [314 S.W.3d 541](#).

protected person requires the information to be withheld, the order must specifically state the locations from which the alleged offender must stay away. ([Tex. Code Crim. Proc. art. 7A.05\(b\)](#))

Duration. The protective order lasts: (1) for the period stated in the order; (2) for applications by sexual assault victims filed before September 1, 2011, for the lifetime of the applicant or alleged offender if the court reasonably believes that the applicant is threatened with further harm by the alleged offender; (3) for applications filed on or after September 1, 2011, the court may set the duration of the order at its discretion (up to the lifetime of the applicant or the offender or alleged offender); **OR** (4) if the order does not specify, for the duration is two years from the date of issuance. If the offender is confined or imprisoned on the order's expiration date, the expiration date is extended to the first anniversary after the date of the offender's release. ([Tex. Code Crim. Proc. art. 7A.07](#))

Delivery of order. The signed order shall be served on the alleged offender as provided for in the Texas Rules of Civil Procedure. A copy shall also be provided to the victim or the victim's attorney, the law enforcement agencies where the victim resides, and the locations listed in the order. A completed form containing identifying information about the person restrained by the order will need to be sent to law enforcement with the protective order. (See § 19.11.) ([Tex. Fam. Code § 85.041](#); [Tex. Fam. Code § 85.042](#))

Rescission. The victim (or the victim's guardian) may file to rescind the order at any time. ([Tex. Code Crim. Proc. art. 7A.07\(c\)](#))

Violation. A violation of the order is a class A misdemeanor under [Tex. Penal Code § 38.112](#).

5.11 Comparison of Art. 7A protective order and a [Tex. Fam. Code Title 4](#) protective order.

	Sexual assault order	Title 4 order
Type of proceeding	Civil	Civil
Standard of proof and required findings	<p>Temporary order--preponderance of the evidence shows a clear and present danger to the applicant of sexual assault, stalking, or other harm.</p> <p>Permanent order--reasonable grounds to believe that the applicant was a victim of the predicate offense and that the protective order is necessary to protect the applicant</p>	<p>Temporary order--preponderance of the evidence shows a clear and present danger of family violence against applicant</p> <p>Permanent order--preponderance of the evidence shows that family violence has occurred and is likely to occur in the future</p>
Predicate criminal conduct	<ol style="list-style-type: none"> 1) Continuous sexual assault of a child 2) Indecency with a child 3) Sexual assault 4) Aggravated sexual assault 5) stalking 6) compelling prostitution 7) human trafficking (for sex. exploitation) 	Any incident of family violence that makes it likely that family violence will occur in the future
Available	After the predicate offense	After an incident of family violence
Hearing on merits required	<p>Temporary order--no</p> <p>Permanent order--yes</p>	<p>Temporary order--no</p> <p>Permanent order--yes, unless parties enter into an agreement approved by the court</p>
Issued by	Any court having jurisdiction	Any court having jurisdiction
Effective	Upon issuance with service on the alleged offender required	Upon issuance; enforceable after actual notice or service is effected
Duration	The order lasts: (1) for period stated in the order; (2) for the lifetime of the victim or the accused; (3) if the order does not specify a period, then it expires two years after the date of issuance; or (4) if the offender is confined or imprisoned on the expiration date, the order expires on the first anniversary after the offender's release.	Up to two years from date of issuance or if the offender is confined or imprisoned on the expiration date, the order expires on the first anniversary of the offender's release.
Criminally enforceable	Yes	Yes

5.12 *Victim's rights.*

Before or during the hearing, the court should inform the victim or applicant of the victim's rights. These rights include the right to:

- be informed of the right to claim crime victim's compensation and of the availability of help from social services agencies ([Tex. Code Crim. Proc. art. 56.02\(a\)\(6\)](#));
- have the victim's safety considered when bail is set ([Tex. Code Crim. Proc. 56.02 \(a\)\(2\)](#));
- upon request, to be identified only by a pseudonym in all public records and documents, including judicial records ([Tex. Code Crim. Proc. art. 57D.02](#))
- a free forensic medical examination within 96 hours of the assault if the assault is reported to law enforcement ([Tex. Code Crim. Proc. arts. 56.02\(a\)\(14\), 56.06, and 56.065](#));
- have an advocate present during the forensic medical examination ([Tex. Code Crim. Proc. art. 56.045](#));
- receive counseling regarding HIV/AIDS ([Tex. Code Crim. Proc. art. 56.02\(a\)\(11\)](#));
- be protected by law enforcement from threats and harm motivated by cooperation with the investigation or prosecution of the assailant ([Tex. Code Crim. Proc. art. 56.02\(a\)\(1\)](#));
- be kept informed about relevant investigatory, trial, and appellate proceedings, to be present at all public court proceedings, and to be informed about the criminal justice process ([Tex. Code Crim. Proc. art. 56.02\(a\)\(3-4\) and \(b\)](#));

AND

- upon issuance of final Art. 7A protective order, to terminate a lease without incurring penalties if the sexual assault occurred on the leased premises ([Tex. Prop. Code § 92.016](#)).

5.13 *Bond conditions.*

When there is a pending criminal case, adding no contact and stay away provisions to the conditions of the bond can reinforce the effectiveness of a temporary or final Art. 7A protective order.

5.14 *Custody of child conceived as a result of sexual assault.*

If a respondent has rights to access a child conceived as a result of sexual assault, a full protective order still may be appropriate. The court with jurisdiction to hear the SAPCR will still be able to design a visitation plan around the protective order requirements. A SAPCR order for the child will not obviate the need for a protective order for the victim-mother. The sexual assault victim protective order provides protections to the victim-mother not available in a SAPCR order. ([Tex. Fam. Code § 153.004](#))

5.15 *Incidence of sexual assault and reporting of sexual assaults.*

It is estimated that about 13% of Texans have been sexually assaulted; and, of those, slightly less than 20% reported the assault to law enforcement. Based on 2000 census population figures, about 1.9 million Texans have been sexually assaulted and about 1.5 million (80%) did **NOT** report the crime to law enforcement. Females are about four times more likely than males to be sexually assaulted.¹⁶³

5.16 *Efficacy of protective orders.*

In a study of the impact of intimate partner violence on women's health, it was found that risk for sexual assault decreased by 59% or 70% for women contacting the police or applying for a protection order, respectively.¹⁶⁴

¹⁶³ The University of Texas Institute on Domestic Violence and Sexual Assault, *A Health Survey of Texans: A Focus on Sexual Assault*, (August 2003). (A survey of 1,200 adult Texans to determine the prevalence of sexual assault in Texas.). Available at:

http://www.taasa.org/publications/Prevalence_Final.pdf

¹⁶⁴ N. Sakar, *The Impact of Intimate Partner Violence on Women's Reproductive Health and Pregnancy Outcome*, 28 *Journal of Obstetrics and Gynaecology* 266 (April 2006). A summary of this article is available at: <http://www.ncbi.nlm.nih.gov/pubmed/18569465>

CHAPTER 5A—PROTECTIVE ORDERS FOR STALKING VICTIMS (Art. 6.09):

STATUTES AND CASE LAW

([Tex. Code Crim. Proc. Art. 6.09](#);
[Tex. Fam. Code Title 4](#))

Summary:

At any proceeding before a court related to an offense under Texas Penal Code § 42.072 (stalking), the court may issue a protective order upon finding that reasonable grounds exist to believe that the applicant is a victim of stalking by the defendant.

Except as specified in Art. 6.09, the procedures in [Tex. Fam. Code Title 4](#) control in an Art. 6.09 proceeding.

As of September 1, 2011, there are two statutes that a stalking victim may invoke to obtain a protective order—Texas Code of Criminal Procedure art. 6.09 and art. 7A. Both orders are available regardless of the victim’s relationship with the alleged offender. However, an Art. 6.09 order is available only if a court is considering a formal allegation of criminal conduct by the person to be restrained. An Art. 7A order is available regardless of whether a criminal charge is filed.

A violation of an Art. 7A order is a Class A misdemeanor under [Tex. Penal Code § 38.112](#). There is no criminal penalty associated with a violation of an Art. 6.09 protective order. Possession of a firearm while restrained by an Art. 6.09 order does not violate Tex. Penal Code § 46.04 but, depending what the order prohibits and whom it protects, firearms possession by the restrained party may violate 18 U.S.C. § 921.¹⁶⁵ (See Chapter 14).

This chapter discusses the Art. 6.09 stalking victim’s protective order. The Art. 7A stalking victim’s protective order is discussed in Chapter 5.

¹⁶⁵ 18 U.S.C. § 921 makes it an offense to possess a firearm while restrained by a protective order, which is defined in 18 U.S.C. § 922(g)(8) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

5A.1 Eligibility; jurisdiction; venue.

A stalking victim¹⁶⁶ is eligible for a protective order under Tex. Code Crim. Proc. Art. 6.09, regardless of the relationship between the victim and the alleged offender, when the person to be restrained has appeared in a court at a proceeding related to conduct that constitutes stalking in violation of [Tex. Penal Code § 42.072](#).

5A.1.1 Controlling law.

Except as otherwise stated in Article 6.09, a proceeding under this chapter is controlled by [Tex. Fam. Code Title 4](#).

([Tex. Code Crim. Proc. art. 6.09](#))

5A.1.2 Standing to apply.

[Tex. Code Crim. Proc. art. 6.09](#) states that “a person” may request a protective order under this statute. Reading “person” in the context of the applicable provisions in [Tex. Fam. Code Title 4](#), the potential applicants include:

- (1) the victim;
- (2) an adult member of the victim’s family or household;

OR

- (3) the prosecuting attorney of the county where either the applicant or the defendant resides.

([Tex. Code Crim. Proc. art. 6.09\(a\)](#); [Tex. Fam. Code § 82.002](#)).

5A.1.3 Jurisdiction.

By implication, jurisdiction lies in the court where the associated criminal case is pending. The statute lists the following courts as having jurisdiction:

¹⁶⁶ As used in this section the term “sexual assault victim” includes a victim of the offense of indecency with a child.

(1) constitutional county court;

(2) statutory county court;

OR

(3) district court.

[\(Tex. Code Crim. Proc. art. 6.09\(a\)\)](#)

5A.1.4 Venue.

The statute does not specifically state where venue lies, but venue necessarily follows the associated criminal case.

[\(Tex. Code Crim. Proc. art. 6.09\)](#)

5A.1.5 Contents of the application.

The application must contain:

- the name and county of residence of the applicant and defendant;
- a detailed description of the relevant facts establishing the applicant is a victim of stalking by the alleged offender;
- an allegation that the defendant has appeared in court to answer to a charge of stalking under [Tex. Penal Code § 42.072](#) (stalking) against the applicant;
- a statement that the application for protective order is filed in the same county where the defendant's criminal charge was filed;

AND

- a request for a protective order.

[\(Tex. Code Crim. Proc. art. 6.09; Tex. Fam. Code § 82.009\)](#)

5A.1.6 Fees.

5A.1.6.1 No fees for applicant.

An applicant may **NOT** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

5A.1.6.2 No fees for alleged offender.

Although Title 4 of the Tex. Fam. Code authorizes assessment of fees (including attorney’s fees), that assessment is tied to a finding that the person committed family violence, a finding that may be inapplicable to a protective order under Art. 6.09. Therefore, absent a finding of family violence, there is *no direct statutory authority permitting the assessment of fees or other costs against the alleged offender in this type of hearing.*

5A.2 Temporary order.

As discussed above, it is unclear whether the legislature meant for temporary *ex parte* protective orders to be available in Art. 6.09 proceedings. Art. 6.09 does not mention temporary orders so the only authority for a temporary order derives from the authorization of such orders in Family Code Title 4.¹⁶⁷

NOTE: Should the court contemplate issuing a temporary protective order in an Art. 6.09 proceeding, the applicant will need to submit a sworn statement and the issue of the proper finding must be considered. It is unclear whether the Art. 6.09 probable cause findings supplement or replace the “clear and present danger” finding required by Family Code § 83.001 for a temporary order. To the extent one finding is not subsumed in the other, the better practice may be to include both findings (e.g., a probable cause finding and a clear and present

¹⁶⁷ In comparison, see [Tex. Code Crim. Proc. art. 7A](#), which is also governed by [Tex. Fam. Code Title 4](#) but contains a specific provision for temporary orders.

danger finding). If a temporary order is contemplated, the applicant will have to submit a sworn statement supporting the application.

[\(Tex. Code Crim. Proc art. 6.09; Tex. Fam. Code §§ 83.001-83.006; Tex. Fam. Code ch. 85\)](#)

5A.3 Hearing.

Art. 6.09 does not specifically address the issues of notice, settings, continuances, answers, agreed or separate orders, or defaults so Family Code Title 4 controls the applicable procedures.

5A.3.1 Minimum notice period for hearing.

The defendant is entitled to at least 48 hours prior notice of the hearing date and time, and the defendant's request for a resetting for failure to give the minimum notice must be granted.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

5A.3.2 Initial setting for hearing.

The initial setting for the hearing must be:

- no later than the 14th day after the protective order application was filed for all courts **EXCEPT**
- in *district courts* that cover multiple counties or in district courts in counties over 2 million in population, the hearing may, upon request of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

5A.3.3 Resetting the hearing for insufficient notice.

If the defendant is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the defendant may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

OR

- within 20 days of the request for cases in the district courts in counties with a population over 2 million or that cover multiple counties.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

5A.3.4 Continuances.

The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#). See § 3.4.

[\(Tex. Fam. Code § 84.005\)](#)

5A.3.5 Order based on agreement.

Art. 6.09 refers only to “protective orders,” not to “order based on the parties’ agreement” (a.k.a. “agreed orders”). [Tex. Fam. Code Title 4](#) protective orders are slightly different from “agreed orders” so it is debatable that the procedure for “agreed” orders set out in Chapter 85 of the Family Code should be utilized in the context of Art. 6.09 protective orders. If the court finds that an agreed order is appropriate under Art. 6.09, it should follow the procedures set out in Chapter 85 of the Family Code. See Chapter 3.

[\(Tex. Fam. Code § 85.005; Tex. Fam. Code § 85.021\)](#)

5A.3.6 Separate or “mutual” protective orders.

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant.¹⁶⁸

¹⁶⁸ In order to require a party to act or refrain from engaging in conduct, the court must find the person has committed family violence. Because Art. 6.09 does not require a finding of family violence, there does not appear to be a basis for entering a separate order against a person requesting a protective order under Art. 6.09. [\(Tex. Fam. Code §§ 85.001\(b\), 85.003 and 85.022\)](#)

5A.4 Answer.

A defendant may, but is not required to, file an answer at any time before the hearing.

[\(Tex. Fam. Code § 82.022\)](#)

5A.5 Default.

Whether or not the defendant files an answer, if the defendant fails to appear or be represented at the hearing, a default judgment may be entered after:¹⁶⁹

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);
- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the defendant committed a criminal offense due to bias or prejudice and is likely to commit another such act based on the same motives;

AND

- proof of any evidence necessary to support the sanctions (terms and conditions imposed upon the defendant) imposed by the order.

NOTE: To issue an order based on deemed findings in a default proceeding, the court **MAY NOT** take evidence on any issue other than proof of service of notice and sanctions.

[\(Tex. Code Crim. Proc. 6.09; Tex. Fam. Code § 84.003; Tex. Fam. Code §, 84.004, Tex. Fam. Code §85.006; Tex. R. Civ. P. 107; Tex. R. Civ. P. 239; Tex. R. Civ. P. 243\)](#)

5A.6 Permanent order contents.

5A.6.1 Required findings.

¹⁶⁹ See *Polley v. State*, No. 11-03-0340-CR, 2004 Tex. App. 11317 (Tex. App.—Eastland, Dec. 16, 2004, no pet.).

To issue a permanent order, the court must hold a hearing and find that probable cause exists to believe that:

- (1) the applicant is a victim of a conduct by the defendant that violates [Tex. Penal Code § 42.072](#);
- (2) the nature of the scheme or course of conduct engaged in by the defendant in the commission of the offense indicates that the defendant is likely to engage in further conduct that is prohibited by Texas Penal Code § 42.072(a)(1), (2), or (3);
- (3) a protective order is needed to protect the victim;

The court must further order that:

- (4) a constable will serve a copy of the order on the defendant;

AND

- (5) the court clerk will forward a copy of the order to the local law enforcement agency that has jurisdiction over the applicant's residence.

[\(Tex. Code Crim. Proc. art. 6.09\)](#)

5A.6.2 Conditions.

In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim's family or household. The court may require the defendant:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

AND

- (2) not to:
 - communicate directly or indirectly in a threatening or harassing manner;

- go near the residence, work place, school, or child-care facility of a person protected by the order;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;
- possess a firearm (unless the defendant works full time as a licensed peace officer);

OR

- carry a concealed handgun (by suspending a license issued under [Tex. Gov't Code § 411.177](#)).

NOTE: The federal authorities recommend that the order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. chapter 44](#). See chapter 14, *infra*.

([Tex. Code Crim. Proc. art. 6.09](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#))

5A.6.3 Stay away provisions; confidential locations.

With regard to places the defendant must stay away from, the permanent order must specifically describe each location and the minimum distance that the defendant must maintain from that location, unless the applicant requests that the location not be disclosed.

([Tex. Fam. Code § 85.07](#); [Tex. Fam. Code § 85.022](#))

5A.6.4 Warnings.

The permanent order must contain the same warning as contained in a Family Code Title 4 protective order.

"A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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 WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.

The warning must be in letters that are bold, underlined, or all caps.

[\(Tex. Code Crim. Proc. 6.09\(c\)\(1\); Tex. Fam. Code § 85.026\)](#)

NOTE: Under the controlling statute, Tex. Fam. Code § 85.026, the following language is required in an order issued under Art. 6.09.

A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY LAW OR BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER.

However, use of this warning in an Art. 6.09 article is problematic because, a violation of an order issued under Art. 6.09 is **NOT** a crime. Depending on what the order prohibits and whom it protects, possession of a firearm while restrained by an Article 6.09 order might violate the federal Gun Control Act. 18 U.S.C. §§ 921 and 922(g)(8).¹⁷⁰

¹⁷⁰ 18 U.S.C. § 921 makes it an offense to possess a firearm while restrained by a protective order, which is defined in 18 U.S.C. § 922(g)(8) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate

NOTE: Oral warning required at hearing. Is not quite clear that the provisions of [Family Code § 85.041\(c\)](#) regarding oral warnings apply in this context (because the required warning addresses family violence). however, the better practice seems to be to warn the defendant orally as well as in writing of the order’s prohibitions and attendant consequences for violations.

5A.6.5 Duration.

The permanent order must state its duration, which can be:

- (1) for the time specified in the order, not to exceed two years;
- (2) if no period is stated in the order, until the second anniversary of the date of issuance;
- (3) until modified by court order;
- (4) if the respondent is confined or imprisoned when the order would expire, the order expires on the first anniversary of the date the respondent is released;

OR

- (5) for applications filed on or after September 1, 2011, longer than two years, upon a finding that the person restrained by the order:
 - (a) caused serious bodily injury to the applicant or a member of the applicant’s family or household OR
 - (b) was the subject of two or more previous protective orders rendered:

- to protect a person to be protected by the current order

AND

partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

- after a finding that the person restrained has committed family violence and is likely to commit family in the future.

([Tex. Fam. Code §§ 85.001 and 85.025](#))

5A.6.6 Service of the order.

If the respondent or his attorney is not present to take possession of a copy when the order is signed, a copy of the protective order shall be delivered to the respondent:

- as provided by [Tex. R. Civ. P. Rule 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);

OR

- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#)).

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

([Tex. Fam. Code § 85.041](#))

5A.6.7 Delivery to victim and others.

The court's clerk shall send a copy of the order to:

- the victim or the victim's attorney (this is a certified copy);
- law enforcement agencies with jurisdiction over the victim's residence;

- if the restrained person is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshall of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));
- a school or child-care facility, if the defendant is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

5A.6.8 Confidentiality of victim's identity.

The victim of an offense may file a pseudonym form (developed by the state attorney general's office) requesting that a pseudonym be used instead of the victim's name in all public files and records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request and provide notice of the filing to the state's attorney. After receiving notice of the filing, the state's attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. 57D.02](#))

5A.6.9 Review of continuing need.

5A.6.9.1 Orders lasting two years or less.

A person who is the subject of the order may file a motion not earlier than one year after the order issued to have the court determine whether there is continuing need for the order. Upon filing of the motion the court must hold a hearing to determine whether to allow the order to remain in place until its expiration date or to lift the

order.¹⁷¹ The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

5A.6.9.2 Orders lasting more than two years.

A person who is the subject of the order that lasts more than two years may file a motion to shorten the order's duration no earlier than one year after the first anniversary of the date on which the court rendered an order on the movant's prior motion to review continuing need. The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order's duration can not be changed.

NOTE: The statute does not define the term "person who is the subject of a protective order." That term is vague enough to apply to either the subject being restrained (the respondent) or the subject being protected (the applicant).

[\(Tex. Fam. Code § 85.025\(c\) and \(d\)\)](#)

5A.7 Duties of law enforcement.

- **Database.** Within 10 days after receipt of a copy of the order and the completed DPS protective order data entry sheet or its functional equivalent¹⁷² (see § 19.11), the local law enforcement agency having jurisdiction over the victim's residence shall enter the information about the

¹⁷¹ *Interest of IEW*, No. 13.09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi, Aug. 28, 2010, no pet.) [NOTE: See footnote 71 for procedural history.] In denying a motion to vacate a protective order on the ground it was no longer needed, the trial court did not err because it could have reasonably found that fact that no family violence had occurred since order was entered was due to the order's deterrent effect and that without the order, the child would be exposed to the potential danger the order sought to eliminate.

¹⁷² See the form in the Supreme Court Task Force's Protective Order Kit, available at: www.TexasLawHelp.org.

protective order into the statewide law enforcement information system maintained by DPS.

[\(Tex. Code Crim. Proc. art. 6.09; Tex. Fam. Code § 86.0011\)](#)

- **Firearms dealers.** Upon request, DPS shall inform licensed firearms dealers whether or not a prospective transferee has an active protective order in the DPS database. If so, DPS shall inform the licensed firearms dealer that the transfer is prohibited under [18 U.S.C. § 922](#).

[\(Tex. Fam. Code § 86.002\)](#)

- **Foreign orders.** Each law enforcement agency shall establish procedures to inform its officers of the existence of protective orders issued in other jurisdictions.

[\(Tex. Fam. Code § 86.005\)](#)

CHAPTER 6—PROTECTIVE ORDERS FOR VICTIMS OF CRIMES MOTIVATED BY BIAS OR PREJUDICE (Art. 6.08)— PART I: STATUTES AND CASE LAW

[\(Tex. Code Crim. Proc. Arts. 6.08 and 42.014;](#)
[Tex. Fam. Code Title 4; 18 U.S.C. §§ 245 and 249\)](#)

Summary:

After a defendant appears in court to answer to certain criminal charges, the victim of the offense may be entitled to a protective order upon a showing that the alleged offense was primarily motivated by bias or prejudice. A violation of a protective order under [Tex. Code Crim. Proc. art. 6.08](#) is an offense under [Tex. Penal Code § 25.071](#). Except as specified in Art. 6.08, the procedures in [Tex. Fam. Code Title 4](#) control in an Art. 6.08 proceeding.

6.1 *Bias or prejudice.*

In this context, bias or prejudice means the victim was chosen due to membership (actual or perceived)¹⁷³ in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality).

It is not enough to prove that the defendant has a bias or prejudice against a group. The court must find that charged offense resulted *primarily* from the bias or prejudice, which can be established by circumstantial evidence.¹⁷⁴

[\(Tex. Code Crim. Proc. art. 42.014\).](#)

6.2 *Controlling law.*

¹⁷³ *Martinez v. State*, [980 S.W.2d 662](#) (Tex. App.—San Antonio 1998, pet. ref'd). To enhance punishment for a crime motivated by bias or prejudice, the state need only prove that the defendant perceived the victim to be a member of a group, not that the victim was actually a member.

¹⁷⁴ *Jaynes v. State*, [216 S.W.3d 839](#) (Tex. App.—Corpus Christi 2006, no pet.). It is not enough for the state to show that the defendant has a bias or prejudice; it must also show that the offense charged was primarily motivated by the bias or prejudice. Circumstantial evidence of bias or prejudice can be sufficient to support an enhanced punishment.

Art. 6.08 states a “protective order” shall be rendered “in the manner provided for by Title 4, Family Code,” so to the extent not otherwise specified in Art. 6.08, the proceeding is controlled by the Family Code provisions.

[\(Tex. Code Crim. Proc. art. 6.08\(a\)\)](#)

6.3 Eligibility; jurisdiction; venue; fees.

A person who has been targeted as a crime victim because of bias or prejudice is eligible for a protective order under [Tex. Code Crim. Proc. art. 6.08](#), if the offense alleged or proven violated [Tex. Penal Code Title 5](#), which includes:

- homicide ([Tex. Penal Code ch. 19](#));
- kidnapping ([Tex. Penal Code § 20.03](#) and [Tex. Penal Code § 20.04](#));
- unlawful restraint ([Tex. Penal Code § 20.02](#));
- trafficking of persons ([Tex. Penal Code § 20A.02](#));
- sexual offenses ([Tex. Penal Code ch. 21](#));
- sexual assaults ([Tex. Penal Code § 22.011](#) and [Tex. Penal Code § 22.021](#));

AND

- assaults ([Tex. Penal Code § 22.01](#) and [Tex. Penal Code § 22.02](#))

The protective order is also available to victims of arson ([Tex. Penal Code § 28.02](#)), criminal mischief ([Tex. Penal Code § 28.03](#)), and property defacement by affixing graffiti ([Tex. Penal Code § 28.08](#)).

[\(Tex. Code Crim. Proc. art. 6.08\(a\)\)](#)

6.3.1 Standing to apply.

[Tex. Code Crim. Proc. art. 6.08](#) states that “a person” may request a protective order under this statute. Reading “person” in the context of

the applicable provisions in [Tex. Fam. Code Title 4](#), the potential applicants include:

- (4) the victim;
- (5) an adult member of the victim's family or household;

OR

- (6) the prosecuting attorney of the county where either the applicant or the defendant resides.

[\(Tex. Code Crim. Proc. art. 6.08; Tex. Fam. Code § 82.002\).](#)

6.3.2 Jurisdiction.

Jurisdiction lies in the court where the associated criminal case is pending. The statute lists the following courts as having jurisdiction:

- (4) constitutional county court;
- (5) statutory county court;

OR

- (6) district court.

[\(Tex. Code Crim. Proc. art. 6.08\(a\)\)](#)

6.3.3 Venue.

The statute does not specifically state where venue lies but venue necessarily follows the associated criminal case.

[\(Tex. Code Crim. Proc. art. 6.08\(a\)\)](#)

6.3.4 Contents of the application.

The application must contain:

- the name and county of residence of the applicant and defendant;
- a detailed description of the relevant facts;
- an allegation that the defendant has been charged with committing a criminal offense under [Tex. Penal Code Title 5](#) (homicide, kidnapping, unlawful restraint, trafficking of persons, sexual offenses, assaults, or sexual assaults), arson, criminal mischief, or defacement of property with graffiti against the victim;
- an allegation that the criminal act was motivated by bias or prejudice based on the victim's membership (actual or perceived)¹⁷⁵ in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality);
- a statement that the application for protective order is filed in the same county where the defendant's criminal charge was filed;

AND

- a request for a protective order.

[\(Tex. Code Crim. Proc. art. 6.08; Tex. Fam. Code § 82.009\)](#)

6.3.5 No fees for applicant.

An applicant may not be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

6.3.6 Fees for defendant.

¹⁷⁵ *Martinez v. State*, [980 S.W.2d 662](#) (Tex. App.—San Antonio 1998, pet. ref'd). To enhance punishment for a crime motivated by bias or prejudice, the state need only prove that the defendant perceived the victim to be a member of a group, not that the victim was actually a member.

Although [Tex. Fam. Code Title 4](#) authorizes assessment of fees (including attorney’s fees), that assessment is tied to a finding that the person committed family violence, a finding that is most likely inapplicable to a protective order under Art. 6.08. Therefore, absent a finding of family violence, there is *no direct statutory authority permitting the assessment of fees or other costs against the defendant in this type of hearing.*

[\(Tex. Fam. Code § 81.003\)](#)

6.4 Temporary order.

As discussed above, it is unclear whether the legislature meant for temporary ex parte protective orders to be available in Art. 6.08 proceedings. Art. 6.08 does not mention temporary orders so the only authority for a temporary order derives from the authorization of such orders in Family Code Title 4.¹⁷⁶

NOTE: Should the court contemplate issuing a temporary protective order in an Art. 6.08 proceeding, the issue of the proper finding must be considered. It is unclear whether the Art. 6.08 probable cause findings supplement or replace the “clear and present danger” finding required by Family Code § 83.001 for a temporary order. To the extent that one finding is not subsumed within the other, the better practice may be to include both findings (e.g., a probable cause finding and a clear and present danger finding).

[\(Tex. Code Crim. Proc art. 6.08; Tex. Fam. Code §§ 83.001-83.006; Tex. Fam. Code ch. 85\)](#)

6.5 Hearing.

Art. 6.08 does not specifically address the issues of notice, settings, continuances, answers, agreed or separate orders, or defaults so Family Code Title 4 controls the applicable procedures.

6.5.1 Minimum notice period for hearing.

¹⁷⁶ In comparison, see [Tex. Code Crim. Proc art. 7A](#), which is also governed by [Tex. Fam. Code Title 4](#) but contains a specific provision for temporary orders.

The defendant is entitled to at least 48 hours prior notice of the hearing date and time, and the defendant's request for a resetting for failure to give the minimum notice must be granted.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

6.5.2 Initial setting for hearing.

The initial setting for the hearing must be:

- no later than the 14th day after the protective order application was filed for all courts **EXCEPT**
 - in *district courts* that cover multiple counties or in district courts in counties over 2 million in population, the hearing may, upon request of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

6.5.3 Resetting the hearing for insufficient notice.

If the defendant is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the defendant may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

OR

- within 20 days of the request for cases in the district courts covering multi-county districts or in counties with a population over 2 million.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

6.5.4 Continuances.

The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#). See § 3.4. [\(Tex. Fam. Code § 84.005\)](#)

6.5.5 Order based on agreement.

Art. 6.08 refers only to “protective orders,” not to “order based on the parties’ agreement (a.k.a. “agreed orders.”) [Tex. Fam. Code Title 4](#) protective orders are slightly different from “agreed orders” so it is debatable that the procedure for “agreed” orders set out in Chapter 85 of the Family Code should be utilized in the context of Art. 6.08 protective orders. If the court finds that an agreed order is appropriate under Art. 6.08, it should follow the procedures set out in Chapter 85 of the Family Code. See Chapter 3.

([Tex. Fam. Code § 85.005](#); [Tex. Fam. Code § 85.021](#))

6.5.6 Separate or “mutual” protective orders.

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant.¹⁷⁷

6.6 Answer.

A defendant may, but is not required to, file an answer at any time before the hearing.

([Tex. Fam. Code § 82.022](#))

6.7 Default.

Whether or not the defendant files an answer, if the defendant fails to appear or be represented at the hearing, a default judgment may be entered after:¹⁷⁸

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);

¹⁷⁷ In order to require a party to act or refrain from engaging in conduct, the court must find the person has committed family violence. Because Art. 7A does not require a finding of family violence, there does not appear to be a basis for entering a separate order against a person requesting a protective order under Art. 7A. ([Tex. Fam. Code §§ 85.001\(b\), 85.003 and 85.022](#))

¹⁷⁸ See *Polley v. State*, No. 11-03-0340-CR, 2004 Tex. App. 11317 (Tex. App.—Eastland, Dec. 16, 2004, no pet.).

- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the defendant committed a criminal offense due to bias or prejudice and is likely to commit another such act based on the same motives;

AND

- proof of any evidence necessary to support the sanctions (terms and conditions imposed upon the defendant) imposed by the order.

([Tex. Code Crim. Proc. 6.08](#); [Tex. Fam. Code § 84.003](#); [Tex. Fam. Code §, 84.004](#), [Tex. Fam. Code §85.006](#); [Tex. R. Civ. P. 107](#); [Tex. R. Civ. P. 239](#); [Tex. R. Civ. P. 243](#))

NOTE: In a default proceeding, the court **MAY NOT** take evidence on any issue other than proof of service of notice and sanctions.

6.8 Permanent order contents.

6.8.1 Requisites.

To issue a permanent order, the court must hold a hearing and find that probable cause exists to believe that:

- (6) there is probable cause to believe that the victim is a victim of a crime perpetrated by the defendant that violates [Tex. Penal Code Title 5](#) or [Tex. Penal Code §§ 28.02](#), 28.03, or 28.08;¹⁷⁹
- (7) there is probable cause to believe that the defendant's primary motivation for committing the criminal act against the victim was the victim's actual or perceived membership in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality);
- (8) the nature of the scheme or course of conduct engaged in by the defendant in the commission of the offense indicates that, due to bias

¹⁷⁹ *Jaynes v. State*, [216 S.W.3d 839, 846](#) (Tex. App.—Corpus Christi 2006, no pet.). In a prosecution for aggravated assault with a deadly weapon, enhancement under the Texas Hate Crimes Act may be proven based on circumstantial evidence as long as the causal link between the crime and the bias or prejudice is established.

or prejudice, the defendant is likely commit one of the listed offenses in the future;

(9) a protective order is needed to protect the victim;

(10) a constable will serve a copy of the order on the defendant;

AND

(11) the court clerk will forward a copy of the order to the Texas Department of Public Safety with a notation that the order was issued to prevent offenses committed because of bias or prejudice.

[\(Tex. Code Crim. Proc. art. 6.08\(b\)\)](#)

6.8.2 Conditions.

In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim's family or household. The court may require the defendant:

(1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

AND

(2) not to:

- communicate directly or indirectly in a threatening or harassing manner;
- go near the residence, work place, school, or child-care facility of a person protected by the order;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;

- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;
- possess a firearm (unless the defendant works full time as a licensed peace officer);

OR

- carry a concealed handgun (by suspending a license issued under [Tex. Gov't Code § 411.177](#)).

NOTE: The federal authorities recommend that the order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. chapter 44](#). See chapter 14, *infra*.

([Tex. Code Crim. Proc. art. 6.08\(a\)](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#))

6.8.3 Stay away provisions; confidential locations.

With regard to places the defendant must stay away from, the permanent order must specifically describe each location and the minimum distance that the defendant must maintain from that location, unless the applicant requests that the location not be disclosed.

([Tex. Fam. Code § 85.07](#); [Tex. Fam. Code § 85.022](#))

6.8.4 Warnings.

The permanent order must contain the same warning as contained in a Family Code Title 4 protective order but must also include notice as to punishment for subsequent offenses motivated by bias or prejudice. The warning should read as follows:

"A PERSON WHO VIOLATES THIS 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 SIX MONTHS,

OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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 WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.

"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY LAW OR BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER. IF A CRIMINAL OFFENSE IS FOUND TO HAVE BEEN COMMITTED DUE TO BIAS OR PREJUDICE AGAINST THE VICTIM, THE PENALTY MAY BE ENHANCED UNDER THE PROVISIONS OF CODE OF CRIMINAL PROCEDURE ARTICLE 42.014.

The warning must be in letters that are bold, underlined, or all caps.

[\(Tex. Code Crim. Proc. 6.08\(c\)\(1\); Tex. Fam. Code § 85.026\)](#)

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

NOTE: Oral warning required at hearing. Is not quite clear that the provisions of [Family Code § 85.041\(c\)](#) regarding oral warnings apply in this context (because the required warning addresses family violence). however, the better practice seems to be to warn the defendant orally as

well as in writing of the order's prohibitions and attendant consequences for violations.

6.8.5 Duration.

The permanent order lasts:

- (1) for the time specified in the order, not to exceed two years;
- (2) if no period is stated in the order, until the second anniversary of the date of issuance;

OR

- (3) until modified by court order.¹⁸⁰

[\(Tex. Fam. Code § 85.025\)](#)

6.8.6 Service on defendant.

The court shall require a constable to deliver a protective order issued under Art. 6.08 to the defendant.

[\(Tex. Code Crim. Proc. art. 6.08\(c\)\(2\)\)](#)

6.8.7 Delivery to victim and others.

The court's clerk shall send a copy of the order to:

- the victim or the victim's attorney;
- law enforcement agencies with jurisdiction over the victim's residence;
- if the respondent is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshal of the military installation to which the respondent is

¹⁸⁰ *BC v. Rhodes*, [116 S.W. 3d 878](#) (Tex. App.—Austin 2003, no pet.). A protective order is generally effective for date stated in order which is not to exceed two years.

assigned for immediate notification of the respondent's commanding officer; ([Tex Code Crim. Proc. art. 42.0182](#))

- a school or child-care facility, if the defendant is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

([Tex. Code Crim. Proc. arts. 6.08\(c\) and 42.0182](#); [Tex. Fam. Code § 85.042](#));

6.8.8 Confidentiality of victim's identity.

The victim of an offense may file a request for pseudonym form (developed by the state attorney general's office) requesting that a pseudonym be used instead of the victim's name in all public files and records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request and provide notice of the filing to the state's attorney. After receiving notice of the filing, the state's attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. art. 57D.02](#))

6.8.9 Review of continuing need.

6.8.9.1 Orders lasting two years or less.

A person who is the subject of the order may file a motion not earlier than one year after the order issued to have the court determine whether there is continuing need for the order. Upon filing of the motion the court must hold a hearing to determine whether to allow the order to remain in place until its expiration date or to lift the

order.¹⁸¹ The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order’s duration can not be changed.

6.8.9.2 Orders lasting more than two years.

A person who is the subject of the order that lasts more than two years may file a motion to shorten the order’s duration no earlier than one year after the first anniversary of the date on which the court rendered an order on the movant’s prior motion to review continuing need. The movant must show, with evidence that establishes more than just compliance with the order, that there is no need for the order. Absent an affirmative finding by the court that there is no need for the order, the order’s duration can not be changed.

NOTE: The statute does not define the term “person who is the subject of a protective order.” That term is vague enough to apply to either the subject being restrained (the respondent) or the subject being protected (the applicant).

[\(Tex. Fam. Code § 85.025\(c\) and \(d\)\)](#)

6.9 Notice to law enforcement.

The court’s clerk shall forward a copy of the protective order to the Department of Public Safety with a notation that the order was issued to prevent offenses committed because of bias or prejudice. The clerk must also forward a copy of the order to the local law enforcement agency (**either** the police **or** sheriff’s department, not the Department of Public Safety) having jurisdiction over the applicant’s residence.

¹⁸¹ *Interest of IEW*, No. 13.09-0216-CV, [2010 Tex. App. Lexis 7163](#) (Tex. App.—Corpus Christi, Aug. 28, 2010, no pet.) [NOTE: See footnote 71 for procedural history.] In denying a motion to vacate a protective order on the ground it was no longer needed, the trial court did not err because it could have reasonably found that fact that no family violence had occurred since order was entered was due to the order’s deterrent effect and that without the order, the child would be exposed to the potential danger the order sought to eliminate.

[\(Tex. Code Crim. Proc. art. 6.08\(c\)\(3\) and \(d\); Tex. Fam. Code § 85.042\)](#)

6.10 Duties of law enforcement.

- **Database.** Within 10 days after the law enforcement agency receives a copy of the order and a document (either the DPS Protective Order Data Entry Form or its functional equivalent)¹⁸² containing the required identifying information about the restrained party (see Texas Family Code § 85.042(d), Tex. Gov't Code § 411.042(b)(6), and *infra*, § 19.11), the agency shall enter the information into the Texas Department of Public Safety statewide law enforcement information system.

[\(Tex. Code Crim. Proc. art. 6.08\(d\); Tex. Fam. Code § 86.0011\)](#)

- **Firearms dealers.** Upon request, DPS shall inform licensed firearms dealers whether or not a prospective transferee has an active protective order in the DPS database. If so, DPS shall inform the licensed firearms dealer that the transfer is prohibited under [18 U.S.C. § 922](#).

[\(Tex. Fam. Code § 86.002\)](#)

- **Foreign orders.** Each law enforcement agency shall establish procedures to inform its officers of the existence of protective orders issued in other jurisdictions.

[\(Tex. Fam. Code § 86.005\)](#)

6.11 Federal hate crime laws.

6.11.1 “Hate crime” defined.

The various federal statutes define “hate crimes” a bit differently—the main difference being whether the definition includes bias or prejudice based on gender or sexual orientation.

The federal Hate Crimes Act (enacted as part of the Civil Rights Act of 1968) covers crimes motivated by actual or perceived race, color,

¹⁸² The functional equivalent of the form may be used as well. See the Supreme Court Task Force’s Protective Order Kit, which is available at: www.TexasLawHelp.org.

religion, or national origin, but only while the victim is engaging in a federally-protected activity, like voting or going to school.¹⁸³

The Hate Crimes Act defines “hate crime” as any felony or crime of violence that manifests prejudice based on “race, color, religion, or national origin.” The victim’s membership in the group can be either real or perceived (e.g. a crime against a Sikh based on mistaken perception that the victim is a Muslim is still a hate crime).

The federal definition of “hate crime” was expanded in 2009 to include crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability.

[\(18 U.S.C. §§ 245\(b\)\(2\) and 249\)](#)

Under the Hate Crimes Sentencing Enhancement Act ([28 U.S.C. 994](#)), “hate crime” includes offenses motivated by the victim’s actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.

[\(28 U.S.C. § 994\).](#)

6.11.2 Shepard-Byrd Hate Crimes Prevention Act.

Under the Matthew Shepard-James Byrd, Jr., Hate Crimes Prevention Act (HCPA), it is a federal offense to cause bodily injury¹⁸⁴ to another based on bias or prejudice against the victim’s actual or perceived race,

¹⁸³ The enumerate federal rights are: voting; applying for or enjoying benefits, programs, privileges, activities or services provided or administered by the U.S. or state government; federal or state employment; jury service in any court; or participating in or enjoying any program or activity that receives federal assistance; attending public education; participating in labor organizations, traveling or using any facility in interstate commerce (including hotels, restaurants). [18 U.S.C. § 245\(b\)](#)

¹⁸⁴ The statute incorporates the definition of “bodily injury” in [18 U.S.C. 1354\(h\)\(4\)](#): (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary. This definition excludes emotional or psychological harm.

U.S. v. Bledsoe, [728 F.3d 1094](#) (8th Cir. 1984 Mo.) The defendant, who killed a man in a city park because the victim was black and perceived to be homosexual, was sentenced to life imprisonment under [18 U.S.C. § 245](#) for interfering with the victim’s right to enjoy and use the state park. The Court of Appeals rejected the defendant’s arguments that Congress cannot, through the 14th Amendment, regulate private, as opposed to state, actions.

color, religion, national origin, gender, sexual orientation,¹⁸⁵ gender identity,¹⁸⁶ or disability.

Prior to federal prosecution of a hate crime, the United States Attorney General or his or her designee must certify, in writing, that (1) the state does not have jurisdiction; (2) the state has requested that the federal government assume jurisdiction; (3) the verdict or sentence obtained pursuant to state charges left demonstratively unvindicated the federal interest in eradicating bias-motivated violence; or (4) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

[\(18 U.S.C. § 249\)](#)

6.11.3 Scope of laws.

The federal hate crime statutes cover only violent acts, not speech (or symbolic non-criminal conduct)¹⁸⁷ or association rights. Evidentiary use of speech to prove motive or intent does not violate constitutional rights to free speech.

¹⁸⁵ The HCPA does not define sexual orientation but the Hate Crimes Statistics Act ([28 U.S.C. § 534](#)) defines the term as “consensual homosexuality or heterosexuality.”

¹⁸⁶ The HCPA defines “gender identity” as actual or perceived gender-related characteristic.

¹⁸⁷ *R.A.V. v. City of St. Paul*, [505 U.S. 377](#) (1992). The defendants, who burned a cross on the lawn of an African American family, were charged with violation of a city ordinance that prohibited displays on public or private property of any symbol or object (such as a burning cross) that one knows arouses anger, alarm, or resentment in others based on race, color, creed, religion, or gender. The Supreme Court held the ordinance was invalid because it prohibited speech solely based on its content or method.

Wisconsin v. Mitchell, [508 U.S. 476](#) (1993). A Wisconsin hate crime statute that allowed enhanced punishment for criminal conduct if the victim was chosen based on race was not an invalid under the First Amendment. In this case, the defendant incited a group of black youths to attack a white youth based on the latter’s race. The Supreme Court upheld the statute that enhanced the defendant’s punishment based on the jury’s finding that the offense was motivated by the victim’s race. A person’s abstract thoughts may not be punished unless the thoughts are manifested as criminal conduct. Biased speech that is manifested in criminal conduct can be penalized under hate crime statutes without violating the First Amendment.

CHAPTER 6—PART II: COMMENTS

6.12 *Overview of the law.*

After a defendant appears in court to answer to certain criminal charges,¹⁸⁸ the victim of the offense may apply for a protective order against the defendant upon a showing that bias or prejudice motivated the defendant to commit the offense. ([Tex. Code Crim. Proc. art. 6.08\(a\)](#))

Bias or prejudice defined. In this context, bias or prejudice means the victim was chosen due to membership in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality). ([Tex. Code Crim. Proc. art. 42.014](#)).

Motivation. The proof of motivation need only establish that the bias was a substantial factor contributing to the defendant's conduct. The proof also must show a causal link between the crime and the proven bias.¹⁸⁹ The state does not have to show the victim was actually a member of a group—just that the defendant had a bias or prejudice against a group which the defendant perceived the victim to be a member.¹⁹⁰

Controlling law. Unless otherwise specified in [Tex. Code Crim. Proc. art. 6.08](#), the protective order proceeding is governed by Family Code Title 4. ([Tex. Code Crim. Proc. art. 6.08\(a\)](#))

Applicant. The protective order can be requested by the victim, an adult member of the victim's family, or the prosecuting attorney of the county where either the applicant or the defendant resides. ([Tex. Fam. Code § 82.002](#))

Jurisdiction and venue. The protective order may be issued by a constitutional or statutory county court or by a district court that has jurisdiction over the predicate criminal offense. ([Tex. Code Crim. Proc. art. 6.08](#))

¹⁸⁸ Homicide, kidnapping, unlawful restraint, trafficking of persons, sexual offenses, assaults, arson, criminal mischief, or graffiti.

¹⁸⁹ *Jaynes v. State*, [216 S.W.3d 839](#) (Tex. App.-Corpus Christi 2006, no pet.). To prove bias or prejudice motivated a criminal offense, it is not enough for the state to show that the defendant has a bias or prejudice; it must also show that the offense charged was primarily motivated by the bias or prejudice. Circumstantial evidence of bias or prejudice can be sufficient to support an enhanced punishment.

¹⁹⁰ *Martinez v. State*, [980 S.W.2d 662](#) (Tex. App.—San Antonio 1998, pet. ref'd). To enhance punishment for a crime motivated by bias or prejudice, the state need only prove that the defendant perceived the victim to be a member of a group, not that the victim was actually a member of a group.

Temporary orders, notice, answer, continuances, defaults, hearings. Art. 6.08 does not contain specific provisions governing temporary orders, notice, or hearing procedures. Therefore, the provisions of Family Code Title 4 control those matters.

Findings in permanent order. To issue the protective order, the court must find that:

- probable cause exists to believe that that the alleged offender committed one of the predicate offenses (see § 6.1) because of bias or prejudice;¹⁹¹

AND

- the nature of the scheme or course of conduct engaged in by the alleged offender in the commission of the offense indicates that, due to bias or prejudice, the alleged offender is likely commit one of the listed offenses in the future. ([Tex. Code Crim. Proc. art. 6.08\(b\)](#))

Conditions imposed. In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim’s family or household. The court may require the alleged offender:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

AND

- (2) not to:

- communicate directly or indirectly in a threatening or harassing manner;
- go near the residence, work place, school, or child care facility (the location of which must be specifically stated unless the court enters a finding that confidentiality is necessary to protect the victim);
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;

¹⁹¹ *Jaynes v. State*, [216 S.W.3d 839, 846](#) (Tex. App.-Corpus Christi 2006, no pet.). In a prosecution for an offense motivated by bias or prejudice, enhancement under the Texas Hate Crimes Act may be proven based on circumstantial evidence as long as the causal link between the crime and the bias or prejudice is established.

- possess a firearm (unless the alleged offender works full time as a licensed peace officer);

OR

- carry a concealed handgun (with language suspending a license issued under [Government Code § 411.177](#)).

([Tex. Code Crim. Proc art. 6.08\(a\)](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#))

Warnings. The permanent order must contain the same warning as contained in a Family Code Title 4 protective order but must also include notice the punishment of a criminal act that violates the order and was motivated by bias or prejudice is subject to enhancement. ([Tex. Code Crim. Proc art. 6.08\(c\)\(1\)](#) [Tex. Code Crim. Proc. art. 42.014](#)).

Duration. The permanent order lasts: (1) for the time specified in the order, not to exceed two years; (2) if no period is stated in the order, until the second anniversary of the date of issuance; or (3) until modified by court order.¹⁹² ([Tex. Fam. Code § 85.025](#)).

Service and delivery of the order. Service on the alleged offender shall be by a constable. ([Tex. Code Crim. Proc art. 6.08\(c\)\(2\)](#)). A copy of the order shall be sent to DPS and entered into the statewide law enforcement database. ([Tex. Code Crim. Proc art. 6.08\(c\)\(3\)](#)). A copy shall also be provided to the victim or the victim’s attorney; to law enforcement agencies in the jurisdiction where the victim resides; to the schools or child care facilities listed in the order, and to DPS’s concealed handgun licensing division. ([Tex. Fam. Code § 85.042](#))

Modification. The order may be modified¹⁹³ for substantive changes, after notice to the alleged offender’s last known address and a hearing; or to revise the stay away provisions (i.e. school address), after notice to the alleged offender sent by certified or registered mail by the court clerk. The order may

¹⁹² *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.). A protective order is generally effective for date stated in order which is not to exceed two years.

¹⁹³ *Bilyeau v. Bilyeau*, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.). The receiving court has same jurisdiction to modify order as originating court.; *BC v. Rhodes*, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.). The court’s jurisdiction during first year of protective order limited to modification.

NOT be modified to extend its duration nor may a person subject to the order (the respondent) request a modification within one year of its issuance). ([Tex. Fam. Code § 87.001-004; TRCP 21a](#))

Enforcement. A violation of a protective order issued under [Tex. Code Crim. Proc. art. 6.08](#) is: a Class A offense under Penal Code § 25.071 for a first conviction; or a third degree felony offense under Penal Code § 25.071 if the defendant is shown to have two or more prior convictions for Penal Code § 25.071 or violates the order by committing an assault. However, if the court enters a finding in a judgment of conviction for an offense under Penal Code Title 5 or Penal Code §§ 28.02 (arson), 28.03 (criminal mischief), or 28.08 (graffiti) that the offense was motivated by bias or prejudice, punishment may be enhanced under [Tex. Code Crim. Proc. art. 12.47](#). ([Tex. Code Crim. Proc. arts. 12.47 and 42.014](#)). (see § 6.13).

6.13 Required findings in criminal cases.

Under the James Byrd, Jr. Hate Crimes Act, if at the guilt/innocence phase of the trial, the trier-of-fact determines, beyond a reasonable doubt,¹⁹⁴ that the defendant selected the crime victim or victim's property based on bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender or sexual preference, the court must include that finding in the judgment and sentence.¹⁹⁵ ([Tex. Code Crim. Proc. art. 42.014](#)).

6.14 Enhanced punishment ranges.

A finding that the crime was motivated by bias or prejudice against an identified group is necessary to support a request for enhanced punishment under [Tex. Penal Code § 12.47](#). The enhancement increases the punishment to that of the next highest category of offenses. But for two categories, the enhancement is limited:

- **For Class A misdemeanor offenses**, the enhanced punishment is to a minimum of 180 days in jail, rather than to the felony level (this exception does not apply if the motivation for the offense was the victim's disability).
- **For non-capital first degree felonies**, there is not increased punishment.

¹⁹⁴ *Ex parte Boyd*, [58 S.W.3d 134](#) (Tex. Crim. App. 2001). The trier-of-fact must use the beyond a reasonable doubt standard when finding that the crime was motivated by bias or prejudice under [Tex. Code Crim. Proc. art. 42.014](#).

¹⁹⁵ *Brenneman v. State*, [45 S.W.3d 729](#) (Tex. App.—Corpus Christi 200, no pet.). In a prosecution for assault, [Tex. Code Crim. Proc. art. 42.014](#) was not void for vagueness and the finding that the defendant committed the crime due to bias against homosexuals was proper.

[\(Tex. Penal Code § 12.47\)](#)

When a request for such a finding is made, the clerk of the court must report whether the request was granted and whether the finding was included in the judgment of the case. See § 10.5 of this Benchbook. ([Tex. Code Crim. Proc art. 2.211](#))

6.15 Hate crime statistics.

According to the Federal Bureau of Investigation, in 2008, there were 9,168 hate-based offenses affecting 9,691 victims, including seven homicides and eleven rapes.

The vast majority of hate crimes (5,542) were crimes against the person, mainly crimes of assault and intimidation. Of the 3,608 hate crimes against property, destruction of property (vandalism) accounted for most of those (2,970) crimes.

The bias that motivated the hate crime was reported as: racial bias (52%-4704 victims); ethnic/national origin (14%-1,148 victims); religious beliefs (17%-1,609 victims); sexual orientation (16%-1,617 victims); and disability (1%-85 victims).¹⁹⁶

Of the crime motivated by racial bias, the majority of offenses were committed against persons described as “black”; 18% of the victims were categorized as “white.”¹⁹⁷

In Texas, 246 hate crimes were reported in 2008. Of those, the breakdown between categories of bias was: 131-racial; 55-sexual orientation, 35-ethnicity, and 25-religion. The larger urban areas (Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio) accounted for almost half the reported hate crimes.¹⁹⁸

6.16 Perpetrators.

6.16.1 Age.

Most perpetrators of hate-based crimes are under 25 years of age. According to the U.S. Department of Justice figures, in 2001; a significant minority are under 18 years of age.

¹⁹⁶ FBI 2008 Hate Crime Statistics, available at: http://www.fbi.gov/ucr/hc2008/data/table_01.html

¹⁹⁷ *Ibid.*

¹⁹⁸ http://www.fbi.gov/ucr/hc2008/data/table_13tx.html

6.16.2 Race or ethnicity.

In 2006, 289 offenders were involved in hate crime incidents in Texas. The majority of offenders were white (51%), followed by black (13.9%); Asian/Pacific Islander (1.2%); and multi-racial groups (0.4%) (Texas Department of Public Safety, 2006). The race of 33.5% of the offenders were unknown.¹⁹⁹

6.17 Motivations; recidivism.

For purposes of analyzing motivations and recidivism rates, experts categorize offenders into the following categories:²⁰⁰

Offender type	Age	Motive	Types of crime	Hate group affiliation	Recidivism chances
Thrill-seekers	Teens and young adults	Assert power; gain status with peers	Isolated acts of vandalism	Unusual	Low without community support or with social condemnation
Defensive	Various	Defend “turf” (schools, work, neighborhood)	Various	Sometimes	Varies
Mission	Various	Rid the world of targeted victims	Often extremely violent acts	Often	High- offenders often have psychological problems
Retaliatory	Various	Revenge in response to actual or perceived hate crime committed against offender’s group	Often extremely violent acts	Usually	High

6.18 Bias or prejudice based on sexual orientation.

A study released in 2009 revealed that approximately 20% of lesbians, gay men, and bisexual people experienced a crime against their person or property based

¹⁹⁹ Crime Victims’ Institute of Sam Houston University, *Hate Crimes*, August 2008, citing 2006 statistics from the Texas Department of Public Safety. Available at:

<http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf>

²⁰⁰ Ibid.

on their sexual orientation and 50% experienced verbal harassment over their lifetime.²⁰¹

The National Coalition of Anti-Violence Programs issues an annual report on hate crimes affecting lesbian, gay, bisexual, and transgendered persons. These reports show a 26% increase from 2006 to 2008 in reported bias-motivated crimes based on sexual orientation. In 2008, medical attention was required by 46% of all victims of LGBT hate violence reported to NCAVP programs.²⁰²

6.19 Psychological impact of hate crimes.

Hate crimes based on sexual orientation bias have more serious and long-lasting psychological effects than other crimes because of the link to core aspects of the victim's identity and community.²⁰³

The American Psychological Association reports that victims of violent hate crimes suffer more symptoms of psychological distress than victims of other comparable violent crime.²⁰⁴

²⁰¹ G. M. Herek, *Hate Crimes and Stigma-Related Experiences among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 *Journal of Interpersonal Violence* 54 (2009).

²⁰² National Coalition of Anti-Violence Programs, *Hate Violence against Lesbian, Gay, Bisexual, and Transgender People in the United States: A Report by the National Coalition of Anti-Violence Programs*, (NCAVP 2009).

²⁰³ G. M. Herek et al., "Psychological Sequelae of Hate Crime Victimization among Lesbian, Gay, and Bisexual Adults," 67 *Journal of Consulting and Clinical Psychology* 945 (1999) (citing a study by the National Institute of Mental Health).

²⁰⁴ American Psychological Association, *The Psychology of Hate Crimes*, available at:

<http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf>

CHAPTER 6A—PROTECTIVE ORDERS FOR VICTIMS OF ANY TYPE OF HUMAN TRAFFICKING (Art. 7B):

STATUTES AND CASE LAW

[\(Tex. Code Crim. Proc. Art. 7B; Tex. Fam. Code Title 4\)](#)

Summary:

When it passed HB 2329, the 82nd Texas Legislature created a new type of protective order for victims of human trafficking. If there are reasonable grounds to believe a person has been a victim of a human trafficking offense, the person may be entitled to a temporary protective order. If there is a criminal charge pending or after a conviction for a human trafficking offense under [Tex. Penal Code § 20A.02](#), a protective order can issue to protect the victim.

An Art. 7B protective order differs from an Art. 7A order in that the former is available to a victim of any type of human trafficking under [Tex. Penal Code § 20A.02](#); and requires the filing of a related criminal charge (except for a temporary order under Art. 7B.02).

Except as specified in Art. 7B, the procedures in [Tex. Fam. Code Title 4](#) control in an Art. 7B proceeding. Art. 7B has three types of protective order: a temporary order, a pre-trial order that lasts until the disposition of the associated criminal charge; and a post-trial order that can last up to the lifetime of the applicant or offender. Art. 7B.02 temporary order statute makes no mention of an associated criminal charge. The pretrial and post-trial orders are premised on the perpetrator's prosecution for a human trafficking offense, a requirement that distinguishes the Art. 7B order from a Title 4 Family Code protective order or a Code of Criminal Procedure Art. 7A protective order.

Despite the required language in the protective order's warning, a violation of an Art. 7B protective order is not a criminal offense. Neither [Tex. Penal Code § 25.071](#), [§ 38.112](#), or [§ 46.04](#) apply to an Art. 7B order. However, depending on whom the order protects and what findings it contains, it may be a violation of the federal Gun Control Act to possess a firearm while restrained by an Art. 7B order. [18 U.S.C. §§ 921 and 922\(g\)\(8\)](#).²⁰⁵

²⁰⁵ [18 U.S.C. § 921](#) makes it an offense to possess a firearm while restrained by a protective order, which is defined in [18 U.S.C. § 922\(g\)\(8\)](#) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate

The confidentiality provisions of [Tex. Code Crim. Proc. art. 57D.02](#), which allow a victim of human trafficking to elect to be known by a pseudonym “in all public files and records” including “records of judicial proceedings” apply to Art. 7B protective orders.

6A.1 *Eligibility; jurisdiction; venue.*

A human trafficking victim is eligible for a temporary or permanent protective order under Tex. Code Crim. Proc. Art. 7B, regardless of the relationship between the victim and the alleged offender (the person to be restrained), if the offense alleged or proven was in violation of any subsection of [Tex. Penal Code § 20A.02](#). Except for the temporary order under Art. 7B.02, there must be a related pending or disposed of criminal case for an Article 7B protective order to issue.

([Tex. Code Crim. Proc. art. 7B.01\(a\)](#))

6A.1.1 Controlling law.

Except as otherwise stated in Article 7B, this proceeding is controlled by [Tex. Fam. Code Title 4](#).

([Tex. Code Crim. Proc. art. 7B.05](#))

6A.1.2 Standing to apply.

An application may be filed by:

- (1) the victim of conduct that a violates Tex. Penal Code § 20A.02;
- (2) the parent or guardian of a victim under 18 years of age;

OR

- (3) a prosecuting attorney.

partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

[\(Tex. Code Crim. Proc. art. 7B.01\(a\)\)](#)

6A.1.3 Where to file.

The application must be filed in :

6A.1.3.1 Type of Court.

- (1) district court;
- (2) juvenile court with district court jurisdiction;
- (3) county court at law;

OR

- (4) constitutional county court.

6A.1.3.2 Venue.

Venue lies in the county:

- (1) where applicant resides;

OR

- (2) where the alleged offender resides.

[\(Tex. Code Crim. Proc. art. 7B.01 \(a\)\)](#)

6A.1.4 Fees.

6A.1.4.1 No fees for applicant.

An applicant may **NOT** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

6A.1.4.2 No fees for alleged offender.

Although Title 4 of the Tex. Fam. Code authorizes assessment of fees (including attorney's fees), that assessment is tied to a finding that the person committed family violence, a finding that may be inapplicable to a protective order under Art. 7B. Therefore, absent a finding of family violence, there is *no direct statutory authority permitting the assessment of fees or other costs against the alleged offender in this type of hearing.*

[\(Tex. Fam. Code § 81.003\)](#)

6A.2 Contents of the application.

The application must contain:

- the name and county of residence of applicant and alleged offender;
- a detailed description of the relevant facts establishing the applicant is a victim of conduct that violates Tex. Penal Code § 20A.02 by the person to be restrained;
- for orders under Art. 7B.03 or Art. 7B.04, an allegation that the person to be restrained has been charged with or convicted of a violation of Tex. Penal Code § 20A.02 and the applicant is the victim of that conduct;
- a request for a protective order;

AND

- if a temporary order is sought under Art. 7B.02, the applicant's sworn statement (which does not have to be notarized). (See [Tex. Civ. Prac. & Rem. Code § 132.002](#)).

[\(Tex. Fam. Code § 82.009\)](#)

6A.3 Temporary protective order.

A temporary protective order is available without notice to the alleged offender and without a hearing.

6A.3.1 Notice; service; hearing.

The temporary protective order may be issued without:

- prior notice to the alleged offender;
- service of process on the alleged offender;
- a criminal charge being filed against the offender;

OR

- a hearing, **UNLESS** the applicant is requesting that the alleged offender be excluded from the offender's residence, in which case the applicant must provide sworn written and oral testimony and appear in person at a hearing to request the exclusion. See § 3.2.3.

[\(Tex. Code Crim. Proc. art. 7A.02; Tex. Fam. Code § 83.006\)](#)

6A.3.2 Temporary protective order contents.

To issue a temporary order under this section, the court must have:

- received a properly completed application;

AND

- made a finding that there is a clear and present danger that the alleged offender will traffic the applicant in a manner that constitutes an offense under Tex. Penal Code § 20A.02 or that the victim will otherwise suffer harm described by that section.

[\(Tex. Code Crim. Proc. art. 7B.02; Tex. Fam. Code § 83.002\)](#)

The temporary order must:

- contain the required finding that the alleged offender presents a clear and present danger of harm to the applicant or the applicant’s family or household members;
- set the duration of the order, not to exceed 14 days (20 days in district courts with multiple counties or in counties over 2 million in population). The temporary order may be extended;
- state whether the alleged offender is required to post bond;
- if an exclusion from the alleged offender’s residence is ordered, contain a finding that the applicant resides at the premises or has resided there within the past 30 days and that either the applicant has a legal interest in the property or the alleged offender is required to support the applicant or the applicant’s child;
- list the acts the alleged offender is required to do or to refrain from doing;
- list the persons with whom the alleged offender may not have contact;
- list the places the alleged offender must avoid;
- state the distance that the alleged offender must maintain from any person or location listed in the “stay away” provisions of the order;

AND

- contain the warning set out in [Tex. Code Crim. Proc. art. 7B.07](#).

NOTE: For procedures when the applicant requests the offender vacate a residence, see § 3.2.2.

([Tex. Code Crim. Proc. art. 7B.02](#); [Tex. Fam. Code §§ 83.001-83.006](#); [Tex. Fam. Code § 85.021](#))

6A.3.3 Warning for temporary, pretrial, and post-trial orders.

The temporary and permanent order must contain the following warning, in letters that are either bold type, underscored, or in all caps:

“A PERSON WHO VIOLATES THIS 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 SIX MONTHS, OR BOTH. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN 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, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.”

The statute also requires a temporary protective order to include the following language, even though this language is misleading (at best) because violating an Article 7B protective order is NOT a criminal offense nor is possession of a firearms while restrained by the order a *state* offense. Depending on what the order prohibits and who it protects, possession of a firearm while restrained by an Article 7B order might violate the federal Gund Control Act. [18 U.S.C. §§ 921 and 922\(g\)\(8\)](#).²⁰⁶

“A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER.”

²⁰⁶ [18 U.S.C. § 921](#) makes it an offense to possess a firearm while restrained by a protective order, which is defined in [18 U.S.C. § 922\(g\)\(8\)](#) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

[\(Tex. Code Crim. Proc. art. 7B.06\)](#)

6A.3.4 Enforcing an order to vacate a residence.

If the temporary or permanent order includes a requirement that the alleged offender vacate his residence, the court shall, upon request, issue an order requiring the appropriate law enforcement agency to:

- accompany the victim to the residence;
- inform the alleged offender of the order to vacate;
- protect the applicant while the applicant takes possession;

AND

- protect the applicant during the time it takes to gather up personal property if the alleged offender refuses to vacate the residence.

[\(Tex. Fam. Code § 86.003\)](#)

6A.3.5 Duration.

The duration of the temporary order must not exceed 14 days (but may be up to 20 days in district courts with multiple counties or in counties over 2 million in population). The temporary order is subject to multiple extensions for the same duration as the initial order.

[\(Tex. Fam. Code § 83.002\)](#)

6A.4 *Pretrial protective order.*

If a criminal charge of human trafficking is still pending when the protective order application is heard, the applicant may be granted a pretrial protective order that lasts until the disposition of the criminal case. (This order should not be confused with the temporary order available under Art. 7B.02.)

6A.4.1 Required findings.

To issue a pretrial protective order under Art. 7B.03, the court must have:

- received a properly completed application;

AND

- made a finding that:
 - the applicant is younger than 18 years of age or, regardless of age, the subject of a threat that reasonably places the applicant in fear of further harm from the offender;

AND

- reasonable grounds exist to believe the applicant is the victim in the criminal case brought against the alleged offender for a human trafficking offense under Tex. Penal Code § 20A.02.

[\(Tex. Code Crim. Proc. art. 7B.03; Tex. Fam. Code § 85.001\)](#)

6A.4.2 Conditions.

In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim's family or household. The court may require the defendant:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

AND

- (2) not to:
 - communicate directly or indirectly in a threatening or harassing manner;
 - go near the residence, work place, school, or child-care facility of a person protected by the order;

- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;
- possess a firearm (unless the defendant works full time as a licensed peace officer);

OR

- carry a concealed handgun (by suspending a license issued under [Tex. Gov't Code § 411.177](#)).

NOTE: The federal authorities recommend that the order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. chapter 44](#). See chapter 14, *infra*.

([Tex. Code Crim. Proc. art. 7B.05](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#))

6A.4.3 Duration.

The pretrial protective order is effective until the date the alleged offender is convicted or acquitted or the disposition of the criminal case against the alleged offender.

([Tex. Code Crim. Proc. art. 7B.03](#))

6A.5 *Post-trial protective order.*

A permanent protective order may be granted after the disposition of a criminal charge of human trafficking against the offender.

6A.5.1 Required findings.

To issue a post-trial protective order under this section, the court must have:

- received a properly completed application;

AND

- made a finding that:
 - the applicant is younger than 18 years of age or, regardless of age, the subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender;

AND

- reasonable grounds exist to believe the applicant is the victim of a human trafficking offense under Tex. Penal Code § 20A.02 for which the offender has been convicted.

[\(Tex. Code Crim. Proc. art. 7B.04; Tex. Fam. Code § 85.001\)](#)

6A.5.2 Conditions.

In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim's family or household. The court may require the defendant:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

AND

- (2) not to:
 - communicate directly or indirectly in a threatening or harassing manner;

- go near the residence, work place, school, or child-care facility of a person protected by the order;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;
- possess a firearm (unless the defendant works full time as a licensed peace officer);

OR

- carry a concealed handgun (by suspending a license issued under [Tex. Gov't Code § 411.177](#)).

NOTE: The federal authorities recommend that the order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. chapter 44](#). See chapter 14, *infra*.

([Tex. Code Crim. Proc. art. 7B.05](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#))

6A.5.3 Duration.

The post-trial protective order lasts:

- for the time specified in the order;
- for two years, if no other period is specified in the order;
- for more than two years (up to the lifetime of the applicant or offender) if the court found reasonable cause to believe that the applicant is subject to a threat that places the victim in reasonable fear of further harm from the offender;

- if the offender was confined or imprisoned when the order issued, until the first anniversary after the offender is released from imprisonment or confinement;

OR

- until the order is rescinded at the request of:
 - an applicant, if the applicant is 18 years of age or older;

OR

- at the request of the parent or guardian of an applicant who is under 18 years of age.

NOTE: With regard to a conflict with [Tex. Fam. Code § 85.025](#), Art. 7B prevails.

([Tex. Code Crim. Proc. art. 7B.08](#))

6A.6 *Hearing.*

Art. 7B does not specifically address the issues of notice, settings, continuances, answers, agreed or separate orders, or defaults so the applicable procedures must be extrapolated from [Tex. Fam. Code Title 4](#). For instance, Art. 7B does not specifically state what sort of notice must be provided to a defendant prior to holding the protective order hearing but its reference to the procedures set out in [Tex. Fam. Code Title 4](#) indicates that the safest course is to follow the requisites of the latter.

6A.6.1 Minimum notice period for hearing.

The alleged offender is entitled to at least 48 hours prior notice of the hearing date and time and the alleged offender's request for a resetting for failure to give the minimum notice must be granted.

([Tex. Fam. Code § 84.003](#); [Tex. Fam. Code § 84.004](#))

6A.6.2 Initial setting for hearing.

The initial setting for the hearing must be:

- no later than the 14th day after the protective order application was filed for all courts **EXCEPT**
- in *district courts* that cover multiple counties or in district courts in counties over 2 million in population, the hearing may, upon request of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

6A.6.3 Resetting the hearing for insufficient notice.

If the alleged offender is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the alleged offender may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

OR

- within 20 days of the request for cases in the district courts in counties with a population over 2 million or that cover multiple counties.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

6A.6.4 Continuances.

- The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#).

[\(Tex. Fam. Code § 84.005\)](#)

- The court *may not* continue or reset a hearing to consolidate it with a subsequently filed protective order application even if that

protective order application was filed in conjunction with a divorce or SAPCR proceeding.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 85.061\)](#)

- Conducting discovery is not a basis for continuing a protective order case.²⁰⁷

6A.6.5 Order based on the parties' agreement.

There is no specific authority for entering an order based on an agreement between the applicant and the alleged offender.²⁰⁸ If the alleged offender does not contest the application, the court can enter an order based on stipulated or deemed facts.

6A.6.6 Separate or “mutual” protective orders.

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant.²⁰⁹

6A.7 Answer.

An alleged offender may, but is not required to, file an answer at any time before the hearing.

[\(Tex. Fam. Code § 82.022\)](#)

6A.8 Default.

²⁰⁷ *Martinez v. Martinez*, [52 S.W.3d 429](#) (Tex. App.—Fort Worth 2001, pet. denied).

²⁰⁸ [Tex. Code Crim Proc. art. 7B](#) refers only to “protective orders,” not to “agreed orders.” Title 4 of the Family Code treats protective orders slightly differently from “agreed order” so it is debatable that the procedure for agreed orders set out in Chapter 85 of the Family Code should be utilized in the context of art. 7A protective orders. See Chapter 3. ([Tex. Fam. Code §§ 85.005 and 85.021](#))

²⁰⁹ In order to require a party to act or refrain from engaging in conduct, the court must find the person has committed family violence. Because Art. 7B does not require a finding of family violence, there does not appear to be a basis for entering a separate order against a person requesting a protective order under Art. 7B. ([Tex. Fam. Code §§ 85.001\(b\), 85.003 and 85.022](#))

Whether or not the alleged offender files an answer, if the alleged offender fails to appear or be represented at the hearing, a default judgment may be entered after:

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);
- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the alleged offender committed a sexual assault and a protective order is necessary to protect the victim;

AND

- proof of any evidence necessary to support the sanctions (terms and conditions imposed upon the alleged offender) imposed by the order.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004, Tex. Fam. Code § 85.006; Tex. R. Civ. P. 107; Tex. R. Civ. P. 239; Tex. R. Civ. P. 243\)](#)

6A.9 Service and delivery.

6A.9.1 Service.

The protective order shall be delivered to the offender or alleged offender:

- as provided by [Tex. R. Civ. P. Rule 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);
- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#));

OR

- served in open court at the close of the protective order hearing.

NOTE: Oral warning required at hearing. If the order has not been reduced to writing but the (alleged) offender appears at the hearing, the court shall orally warn the person about any of the prohibitions listed in [Tex. Fam. Code § 85.022](#) that apply and of any other provisions necessary to prevent violence.

[\(Tex. Fam. Code § 85.041\)](#)

6A.9.2 Delivery to the victim and others.

The court's clerk shall send a copy of the order to:

- the victim or the victim's attorney (a certified copy);
- the local law enforcement agency (**either** the police department **or** the sheriff's office but not directly to the Department of Public Safety) having jurisdiction over the victim's residence. This copy of the order must be accompanied by a completed DPS protective order data entry sheet (see § 19.11);
- a school or child-care facility, if the alleged offender is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;
- if the restrained person is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshal of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));

AND

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

[\(Tex. Fam. Code § 85.042\)](#)

6A.10 Enforcement.

A violation of an Article 7B protective order is NOT a criminal offense. However a violator is subject to punishment for contempt of court.

[\(Tex. Code Crim. Proc. art. 7B\)](#)

6A.11 *Rescission of the order.*

The victim or the victim’s parent or guardian (for victims under 18 years of age) may file to rescind the protective order at any time.

NOTE: Because the statute only addresses rescission by the victim, the provisions of Texas Family Code § 85.025(b), which allows any person “subject” to the order to file for a review or continuing need, does not seem to apply. Therefore, the offender has no standing to request the order be modified or vacated.

([Tex. Code. Crim. Proc. 7B.08\(c\)](#))

6A.12 *Confidentiality of victim’s information.*

The victim of an offense may file a pseudonym form (developed by the state attorney general’s office) requesting that a pseudonym be used instead of the victim’s name in all public files and records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request or provide notice of the filing to the state’s attorney. After receiving notice of the filing, the state’s attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. 57D.02](#))

CHAPTER 7—PROTECTIVE ORDERS IN DIVORCE CASES AND SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP—PART I: STATUTES AND CASE LAW

[\(Texas Family Code Chapters 6, 85, 153, 154, 156 and 159;
42 U.S.C. §§ 653, 654, and 663\)](#)

Summary:

There are various provisions within the Texas Family Code that address issues specific to protective orders brought in a divorce case or SAPCR. These provisions address: notice to the party of availability of protective order relief, presumptions regarding conservatorship of a child, and transfer of the protective order case. Unless otherwise specified, the procedures for protective order hearings set out in [Texas Family Code Title 4](#) also govern a protective order hearing in a divorce/SAPCR proceeding.

NOTE: Issues derived from enforcement of out-of-state child custody and support orders, including temporary emergency orders of protection for a child, are discussed in Chapter 15.

7.1 *Duty to inform.*

7.1.1 **Court's duty to inform party; collaborative law.**

If, during the pendency of the divorce suit, the court believes on the basis of any information it receives that a party or a member of a party's family or household may be the victim of family violence, the court shall inform the party of the right to seek a protective order under [Tex. Fam. Code Title 4](#).

[\(Tex. Fam. Code § 6.404\)](#)

Under Texas law, a collaborative lawyer must evaluate the impact of family violence upon the parties to a family law dispute. Once the existence of family violence is ascertained, the collaborative lawyer may not begin or continue a collaborative process until reasonable steps have been taken to address the impact of family violence on the abused party and the abused party requests the collaborative process begin or continue.

[\(Tex. Fam. Code § 15.112\)](#)

7.1.2 Party's duty to inform court.

The divorce petition must state whether a protective order issued under [Tex. Fam. Code Title 4](#) exists or if an application for such an order is pending between the parties to the divorce action. A copy of all protective orders affecting both parties to the divorce action must be attached to the petition.

([Tex. Fam. Code § 6.405](#))

7.2 *Ex parte orders: Divorce temporary restraining order vs. Title 4 protective orders.*

The acts that may be enjoined in [Tex. Fam. Code ch. 6](#) divorce temporary restraining order (TRO) somewhat overlap those that may be prohibited by [Tex. Fam. Code Title 4](#) temporary ex parte protective order, but the two types of orders differ in that a divorce TRO cannot exclude a spouse from the spouse's residence.

([Tex. Fam. Code § 6.501\(b\)\(2\)\(A\)](#))

7.3 *Protective orders in divorce/SAPCR proceedings.*

7.3.1 Jurisdiction.

- **Divorce.** Upon a party's motion, the divorce court may render a protective order as provided for in [Tex. Fam. Code Title 4](#).
- **SAPCR.** In deciding conservatorship in SAPCR suit, the court shall consider whether a parent has committed family violence within the prior two years or during the suit and upon a finding of a history or pattern of violence, award conservatorship in a manner that protects the affected child and non-violent parent. Evidence of bad acts, arrests, and incarceration is admissible, with or without evidence of a criminal judgment and sentence, in order to determine the best interests of a child.²¹⁰

²¹⁰ *Interest of MR*, [975 S.W.2d 51](#) (Tex. App.—San Antonio 1998, pet. denied). In a SAPCR, evidence of family violence (acts leading to incarceration) is admissible to determine best interests of the child.

[\(Tex. Fam. Code § 6.504; Tex. Fam. Code § 153.004\)](#)

7.3.2 Separate order required.

The protective order must be in a separate document from other orders in a divorce case.

[\(Tex. Fam. Code § 85.003\)](#)

7.3.3 Transfer of pending protective order application to divorce court.

The pending protective order action may be transferred to the court where the parties' divorce action is pending upon:

- the motion of a party or the court's own motion;

AND

- a finding that the transfer is:
 - in the interests of justice;

OR

- for the safety **or** convenience of a party **or** witness.

[\(Tex. Fam. Code § 85.064\)](#)

7.3.4 Transfer of court files; fees for transfer.

Regarding the transfer of a protective order application between courts:

- the transferring and receiving court clerks shall handle the transfer in the manner set out in [Tex. Fam. Code § 155.207](#);

Interest of KLR, [162 S.W.3d 291, 305](#) (Tex. App.—Tyler 2005, no pet.). In a SAPCR, evidence of arrests admissible to determine the best interests of the child.

Juan A. v. Dallas Co. Child Welfare, [726 S.W.2d 241, 245-56](#) (Tex. App.—Dallas 1987, no writ). In a SAPCR, evidence of incarceration is admissible to determine best interests of the child.

- if the party moving for transfer is the protective order respondent, then the movant may be required to pay fees or costs associated with the transfer;
- in no event shall the applicant for a protective order be assessed transfer fees or costs.

[\(Tex. Fam. Code § 6.504; Tex. Fam. Code § 81.002; Tex. Fam. Code § 85.062; Tex. Fam. Code § 85.065; Tex. Fam. Code § 155.207\)](#)

7.3.5 Spousal maintenance.

If a spouse will, upon dissolution of a marriage, lack sufficient property to provide for that spouse's minimum reasonable needs, the other spouse may be required to pay maintenance if (1) the payor spouse has been convicted of, or has served a deferred adjudication probation²¹¹ for, an offense that also constitutes an act of family violence (as defined in Texas Family Code 71.004) against the receiving spouse or the parties' child; and (2) if the violence that led to the conviction or probation occurred within two years before the divorce was filed or while the divorce was pending.

In a divorce or proceeding for maintenance filed on or after September 1, 2011, cruel treatment during the marriage and a history or pattern of family violence are relevant factors to be considered by the court in setting the amount of spousal maintenance.

The duration of the maintenance order depends in part on how long the parties were married and must be no longer than the minimum time needed for the receiving spouse to be able to earn a living. The maintenance can:

- last:
 - up to five years, if family violence was the basis for the maintenance order and the marriage lasted less than ten years;

²¹¹ *Guillot v. Guillot*, No. 01-06-01039-CV, [2008 Tex. App. Lexis 4831](#) (Tex. App.—Houston, June 26, 2008, no pet.). In a divorce case, spousal maintenance was properly awarded based on family violence assault that resulted in a deferred adjudication probation.

- up to five years if the parties were married more than ten but less than twenty years;
- up to seven years if the parties were married more than twenty but less than thirty years;
- up to ten years if the parties were married for thirty years or more;

OR

- indefinitely, if the receiving spouse cannot earn a minimal reasonable amount because that spouse is the custodian of the parties' disabled child (of any age) and provides care a personal supervision for that child;

AND

- be awarded in the amount of up to:
 - \$5,000 per month; **OR**
 - 20% of the payor spouse's average monthly gross income.

For suits to dissolve a marriage filed before September 1, 2011, maintenance may be ordered in an amount up to \$2,500 per month or 20% of the payor spouse's average monthly gross income and the order can last up to three years or until the receiving spouse or dependent child overcomes impediments to employment.

[\(Tex. Fam. Code § 8.051-8.055\)](#)

7.4 *SAPCR conservatorship awards*

7.4.1 Sole or joint managing conservator.

Absent a finding that it would not be in the child's best interest, there is a presumption that both parents should be appointed as joint managing conservators of a child.

In determining whether a party should be appointed as the sole or as a joint managing conservator, the SAPCR court shall consider:

- whether the party has, in the two years prior to or during the pendency of the suit, intentionally used abusive physical force against a spouse, a parent of the child, or any person under the age of 18;

OR

- whether the party has a history or pattern of past or present child neglect or physical or sexual abuse of a spouse, parent, or child.²¹²

([Tex. Fam. Code § 153.004\(a\) and \(b\)](#); [Tex. Fam. Code § 153.131](#))

7.4.2 Possessory conservator.

There is a presumption that the parent who is not a managing conservator should be appointed possessory conservator. However that presumption does not apply if the court finds such appointment is not in the child's best interest and would endanger the child's physical or emotional welfare.

In determining what level of access²¹³ to a child a possessory conservator should have, the SAPCR court shall consider:

- whether the party engaged in family violence;

AND

²¹² See *Burns v. Burns*, [116 S.W.3d 916](#) (Tex. App.—Dallas 2003, no pet.). In a SAPCR, the trial court did not abuse its discretion in appointing the father joint managing conservator of the child despite evidence that the father had been restrained by a protective order. The evidence did not establish that said order contained a finding of family violence and there was conflicting testimony in the SAPCR as to the alleged incident of violence.

See also, *Danklefs v. Danklefs*, No. 04-01-0849-CV, [2003 Tex. App. Lexis 6718, 5-6](#) (Tex. App.—San Antonio, Aug. 6, 2003, pet. denied); *Long v. Long*, No. 03-97-00073CV, [1997 Tex. App. Lexis 5986](#) (Tex. App.—Austin, Nov. 20, 1997, no pet.).

²¹³ *Hopkins v. Hopkins*, [853 S.W.2d 134, 137](#) (Tex. App.—Corpus Christi 1993, no writ). A person with rights of "access to" children may approach them, communicate with them and visit with them, but may not take possession or control of the children away from the managing conservator. A person with rights to "possession of" children may exercise possession and control of the children, to the exclusion of all other persons including the managing conservator, during periods of possession. A person with rights of possession of children also has rights and responsibilities toward their care and behavior.

- whether the party has a history or pattern of engaging in family violence in the two years prior to or during the pendency of the suit.²¹⁴

NOTE: Under [Tex. Fam. Code § 153.004\(c\)](#), when determining what access a possessory conservator should have to a child, the court must consider all evidence of family violence, not just the instances occurring within the two years prior to the filing of the suit or while the suit is pending.

([Tex. Fam. Code §§ 153.004\(c\) and \(d\)](#); [Tex. Fam. Code § 153.191](#))

7.4.3 Rebuttable presumptions regarding the child’s best interest.

The SAPCR court shall, based on credible proof of a history or pattern of past or present child neglect or sexual or physical abuse of a spouse, a parent, or a child, take as a rebuttable presumption that it is not in the child’s best interest:

- to appoint the abusive parent as sole or managing conservator;
- to appoint the abusive parent as the conservator with the right to determine the child’s primary residence;

OR

- for the abusive parent to have unsupervised visitation with the child.²¹⁵

²¹⁴ *Pena v. Pena*, [8 S.W.3d 639](#) (Tex. 1999) (*per curiam*). The Texas Supreme Court specifically disapproved the following factors, set out in the Corpus Christi Court of Appeals decision (at [986 S.W.2d 696](#)) as being irrelevant to a determination of whether the evidence showed a history or pattern of domestic violence: who initiated the arguments that led to the physical assaults, whether the assaults were provoked; or other factors that contributed to the assaults.

²¹⁵ For the best interests standard in parental rights termination case, see:

Murray v. Tex. Dep’t of Family & Protective Servs., [294 S.W.3d 360, 368](#) (Tex. App.—Austin 2009, no pet.) citing *Holley v. Adams*, [544 S.W.2d 367, 371-72](#) (Tex. 1976). In a parental rights termination case, evidence relevant to the best-interests determination includes but is not limited to: (1) the desires of the child; (2) the current and future emotional needs of the child; (3) the current and future emotional and physical dangers to the child; (4) the parental abilities of those seeking custody; (5) the programs available to assist those individuals in caring for the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) any acts or

[\(Tex. Fam. Code § 153.004\(b\) and \(e\)\)](#)

7.4.4 Limits on access to a child.

Unless the court finds it is not in a child's best interest **AND** would endanger the physical or emotional welfare of the child, the court shall appoint as possessory conservator a parent who is not the sole or joint managing conservator. But if the child's welfare would be endangered, the court may deny possession of or restrict access to the child by the non-managing conservator parent.²¹⁶

7.4.4.1 Access premised on findings.

If the SAPCR court has found that the possessory conservator has a history or pattern of committing family violence, it may not grant access to the child without first finding that the access:

omissions by the parent indicating that the existing parent-child relationship is improper; and (9) any excuse for the acts and omissions by the parent.

For best interests determinations where evidence regarding parental alienation was admitted see:

[Silverman v. Johnson, No 03-08-0271-CV, 2009 Tex. App. LEXIS 7176 \(Tex. App.—Austin, Aug. 26, 2009, no pet.\)](#). In a SAPCR, the trial court did not err in determining that it was in the best interests of the child to restrict the father's access to the child. Evidence from three mental health professionals established that his contact with the child should be limited. The trial court was presented with substantial evidence that the child exhibited behaviors and responses indicative of parental alienation by the father, well as testimony regarding the negative effect of the father's influence on the child's demeanor, attitude, and behavior and the father's questionable ability to interact with the child appropriately.

[Ochs v. Martinez, 789 S.W.2d 949, 958 \(Tex. App. 1990\)](#). In SAPCR, it was not error to allow a mental health expert witness to testify about criteria that are used to assess a child's claim of sexual abuse as long as the expert witness does not give an opinion as to the child's truthfulness.

For best interest determinations where evidence regarding a parent's medical history was admissible, see:

[Garza v. Garza, 217 S.W.3d 538 \(Tex. App.—San Antonio 2006, no pet.\)](#). In a SAPCR, the trial court did not err in admitting the mother's medical and mental health records because the issue of who should be the children's managing conservator required a determination of the children's best interests, which in turn required an assessment of the mother's personality and bipolar disorders.

[In re A, No. 09-06-0471-CV, 2006 Tex. App. Lexis 11108 \(Tex. App.—Beaumont, Dec. 28, 2006\) \(orig. proceeding\)](#). In a SAPCR, the trial court did not err in requiring production of some of the father's treatment records for substance abuse. The public policy of Texas is to protect and promote the child's best interest. Consideration of the child's best interest requires determination of whether the parent can meet the child's needs. A parent's dependence on alcohol or drugs affects the best interests determination.

²¹⁶ [Interest of BP, No. 02-07-251-CV, 2008 Tex. App. Lexis 5061 \(Tex. App.—Fort Worth, July 3, 2008, no pet.\)](#).

- will not endanger the child;

AND

- can occur without endangering any other victim of the family violence.

[\(Tex. Fam. Code § 153.004\(d\); Tex. Fam. Code § 153.191\)](#)

7.4.4.2 Supervised visitation-rebuttable presumption.

It is a rebuttable presumption that when there is credible evidence of child neglect or abuse of the other parent, a child or a spouse by a parent, that parent should not have unsupervised visitation with a child.

7.4.4.3 Credible evidence.

The court must consider whether there was a protective order issued against a parent in determining whether there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by the parent directed at the other parent, a spouse or a child.

[\(Tex. Fam. Code § 153.004\(e\) and \(f\)\).](#)

7.4.5 Conditions for access.

When the SAPCR court has found, based on a preponderance of the evidence, that a parent has engaged in family violence in the two years prior to or during the pendency of the suit, the court may condition access to the child upon:

- supervised visitation;
- exchange of possession occurring in a designated setting and manner;
- the parent's abstention from consuming alcohol or controlled substances in the 12 hours preceding and during the period of access;

OR

- the abusive parent’s completion of a battering intervention and prevention course (as provided in [Tex. Code Crim. Proc. art. 42.141](#) or [Tex. Fam. Code § 153.010](#)).

([Tex. Fam. Code § 153.004\(d\)](#))

7.4.6 Conviction and SAPCR modification.

A person’s conservatorship of a child (sole, joint, or managing) is subject to change if that person is convicted of or receives deferred adjudication probation for an offense involving family violence.

([Tex. Fam. Code § 156.1045\(a\)](#))

7.4.7 False claims and SAPCR modifications.

It is a Class B misdemeanor to falsely claim in a motion to modify that the conservator has a criminal conviction or is on probation for an offense involving family violence.

([Tex. Fam. Code § 156.1045\(b\)](#))

7.5 *Electronic communications with child.*

The SAPCR court may, with the parties’ agreement, permit a child to communicate electronically with a parent who has committed family violence. The order permitting such communication must be in writing and contain:

- the terms of the communication printed in bold-faced capital letters;

AND

- any specific restrictions relating to family violence or supervised visitation legally required to be in a possession or access order.

([Tex. Fam. Code § 153.015\(e\)](#))

7.6 *Appeal.*

A protective order in a divorce or SAPCR proceeding becomes appealable when the final order dissolving the marriage or determining support, possession, and access to the child becomes final and appealable.

[\(Tex. Fam. Code §§ 81.009 ; Tex. Fam. Code § 109.002\)](#)

7.7 *Family violence in child support cases.*

Just as there may be a child support issue in a family violence protective order case, family violence issues may be present in a child support case. If the participants in the child support case have a history of family violence, their encounter at the support hearing raises the same safety concerns that are raised in a protective order hearing. Federal law ([28 U.S.C. § 534](#)) permits courts handling domestic violence or stalking cases to access national criminal databases for criminal history information.

Under the Child Support Review Process in [Tex. Fam. Code chapter 233](#), negotiated settlements are encouraged. The court should be alert to indicators that the parties have a history of family violence so that a batterer and a victim are not left unsupervised during the negotiation.

[\(Tex. Fam. Code § 233.002\)](#)

7.7.1 *Parent locator services.*

Federal law sets the parameters under which states must attempt to collect child support for children who are direct or indirect recipients of federal public benefits.

The Federal Parent Locator Service (FPLS) is available to locate any parent or child who is involved in a case regarding child support, child custody or visitation, or child abduction (including international abductions). The state of Texas also has a parent locator service that can be used by courts having jurisdiction over child support or child custody or visitation issues.

[\(42 U.S.C. § 653; Tex. Fam. Code § 231.301\)](#)

7.7.2 Domestic violence issues.

Information concerning a party or child in the FPLS or state service must be kept confidential if:

- the state has reasonable evidence of domestic violence or child abuse;
- the party from whom child support is sought has been restrained by a protective order;

OR

- the state has reason to believe that the release of the information may result in physical or emotional harm to a party or child.

[\(42 U.S.C. §§ 653-654, 42 U.S.C. § 663; Tex. Fam. Code § 231.108\(e\); Tex. Fam. Code § 231.301\)](#)

7.7.3 FPLS confidentiality determination.

When called upon, the court handling the child support, custody, visitation, or abduction case must make a determination about whether or not to disclose the information in the FPLS based on potential for harm to a party or child.

[\(42 U.S.C. § 654\(26\)\(E\)\)](#)

7.8 *Improving safety in child support cases.*

Courts handling child support cases should consider:

- screening cases for family violence issues before the hearing date;
- screening persons entering the courthouse or hearing room for weapons;
- including in the notice of hearing:

- a procedure by which a participant can request to appear by telephone at the hearing;
- an instruction that the participant should notify the court before the hearing date if the participant has safety concerns;
- notice that if family violence is relevant to the child support case, the party asserting that issue has the burden of proof;

AND

- notice that a victim of family violence has rights to keep personal information confidential;
- ensuring that participants have a safe retreat in the courthouse;
- warning the participants before the hearing that neither physical violence nor verbal abuse will be tolerated;

AND

- drafting orders in such a way as to minimize contact between the parties.²¹⁷

²¹⁷ If child support is ordered, the order should include an instruction for the obligor to pay all support through the registry of the court: Texas Child Support Disbursement Unit, PO BOX 659791, San Antonio, TX 78265-9791. All payments shall be identified by: obligor name; obligee name; and State Disbursement Unit case number (or cause and number and county if no case number has yet been assigned).

CHAPTER 7—PART II: COMMENTS

7.9 *Overview of the law.*

Parties may file for a protective order as part of a divorce or SAPCR. If during the course of a divorce lawsuit, the court has reason to believe a party is a victim of family violence, the court has an affirmative duty to inform the party of the right to seek a protective order. Each party has the duty to inform the divorce court if the parties have a pending application for or an existing protective order between them. ([Tex. Fam. Code § 6.404](#); [Tex. Fam. Code § 6.405](#))

TRO. A divorce temporary restraining order can enjoin many of the same acts prohibited by a Title 4 temporary protective order, but the divorce TRO cannot exclude a spouse from a residence. ([Tex. Fam. Code § 6.501\(b\)\(2\)\(A\)](#)).

Divorce court. A divorce court may issue a protective order upon the request of a party. ([Tex. Fam. Code § 6.504](#)). A divorce protective order must be issued in a separate document from the divorce decree. ([Tex. Fam. Code § 85.003](#)) Upon motion of a party or the court, a Title 4 protective order case may be transferred to the court where the parties' divorce case is pending if the court finds the transfer is either in the interests of justice or for the safety or convenience of a party or witness. ([Tex. Fam. Code § 85.064](#)). Only a respondent-movant may be assessed a fee for the transfer. ([Tex. Fam. Code § 85.065](#))

Spousal maintenance. If a party has been convicted of, or has served a deferred adjudication probation for,²¹⁸ an offense involving family violence that occurred within two years of the filing of the divorce suit, the divorce court may order that party to pay spousal maintenance to a party-victim. The order can last up to three years or until an impediment to gainful employment is removed. The maximum amount that can be awarded is \$5000 per month or 20% of the payor's monthly income. ([Tex. Fam. Code §§ 8.051-8.055](#))

SAPCR court. A SAPCR court must consider evidence of family violence in making conservatorship awards. ([Tex. Fam. Code § 153.004](#))

Sole or joint managing conservatorship. In determining whether a party should be appointed sole or joint managing conservator, the court must consider whether in the two years preceding the SAPCR filing, the party intentionally used physical force against a spouse, parent of the child, or anyone under 18

²¹⁸ *Guillot v. Guillot*, No. 01-06-01039-CV, [2008 Tex. App. Lexis 4831](#) (Tex. App.—Houston, June 26, 2008, no pet.). Spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation.

years of age **OR** whether the party has a history or pattern of past or present child neglect or physical or sexual abuse of a spouse, parent, or child. ([Tex. Fam. Code § 153.004](#); [Tex. Fam. Code § 153.131](#))

Possessory conservatorship. The presumption that a party who is not a sole or managing conservator should have possessory conservatorship rights may be overcome if the court finds that such an award is not in the child's best interest,²¹⁹ in which case access to the child by the possessory conservator may be restricted.²²⁰

Determining level of access. In determining the level of access²²¹ to a child that a possessory conservator should have, the court must consider whether the possessory conservator has engaged in family violence and whether that person has, in the two years preceding the SAPCR filing, a history or pattern of engaging in family violence. ([Tex. Fam. Code § 153.004](#); [Tex. Fam. Code § 153.191](#)) In determining whether there is a history or pattern of family violence, the court should NOT consider: who initiated any arguments that led to assaults; whether the assaults were provoked, or other factors contributing to assaults by the parties.²²² In making this determination, the court must consider credible evidence that the party has been restrained by a protective order. ([Tex. Fam. Code § 153.004](#)) Once the court has credible evidence that a party has neglected or abused a child, there is a rebuttable presumption that the party should have only supervised visitation with the child.²²³ ([Tex. Fam. Code § 153.004](#))

²¹⁹ *Interest of MR*, [975 S.W.2d 51](#) (Tex. App.—San Antonio 1998, pet. denied.). In SAPCR, evidence of family violence (acts leading to incarceration) is admissible to determine best interests of the child.

Interest of KLR, [162 S.W.3d 291, 305](#) (Tex. App.—Tyler 2005, no pet.). In SAPCR, evidence of arrests admissible to determine the best interests of the child.

Juan A. v. Dallas Co. Child Welfare, [726 S.W.2d 241, 245-56](#) (Tex. App.—Dallas 1987, no writ). In SAPCR, evidence of incarceration is admissible to determine best interests of the child.

²²⁰ *Interest of BP*, No. 02.-07-251-CV, [2008 Tex. App. Lexis 5061](#) (Tex. App.—Fort Worth, July 3, 2008, no pet.).

²²¹ *Hopkins v. Hopkins*, [853 S.W.2d 134, 137](#) (Tex. App.—Corpus Christi 1993, no writ). A person with rights of "access to" children may approach them, communicate with them and visit with them, but may not take possession or control of the children away from the managing conservator. A person with rights to "possession of" children may exercise possession and control of the children, to the exclusion of all other persons including the managing conservator, during periods of possession. A person with rights of possession of children also has rights and responsibilities toward their care and behavior.

²²² *Pena v. Pena*, [8 S.W.3d 639](#) (Tex. 1999) (*per curiam*) The Texas Supreme Court specifically disapproved the following factors, set out in the Corpus Christi Court of Appeals decision (at [986 S.W.2d 696](#)) as being irrelevant to a determination of whether the evidence showed a history or pattern of domestic violence: who initiated the arguments that led to the physical assaults, whether the assaults were provoked; or other factors that contributed to the assaults.

²²³ For the best interests standard in parental rights termination case, see:

Murray v. Tex. Dep't of Family & Protective Servs., [294 S.W.3d 360, 368](#) (Tex. App.—Austin 2009, no pet.) citing *Holley v. Adams*, [544 S.W.2d 367, 371-72](#) (Tex. 1976). In a parental rights termination case, evidence relevant to the best-interests determination includes but is not limited to: (1) the desires of the

Limitations on access to child. Before granting access by a possessory conservator after a determination it is in the child's best interest to limit the access, the court must find that the possessory conservator's access to the child will not endanger the child or another person. ([Tex. Fam. Code § 153.004](#); [Tex. Fam. Code § 153.191](#)) The court may condition access to the child upon: supervised visitation, exchange of possession occurring in a designated setting and manner (including limitations on electronic communications); the parent's abstention from consuming alcohol or controlled substances in the 12 hours preceding and during the period of access; or the abusive parent's completion of a battering intervention and prevention course (as provided in [Tex. Code Crim. Proc. art. 42.141](#) or [Tex. Fam. Code § 153.010](#)). ([Tex. Fam. Code § 153.004](#); [Tex. Fam. Code § 153.015\(e\)](#)) A conviction for a family violence offense is a change of circumstance that can be the basis for modifying a SAPCR order. ([Tex. Fam. Code § 156.1045](#))

Appeals of divorce/SAPCR protective orders. Protective orders issued as part of a divorce or SAPCR proceeding become final, appealable orders at the same time the decree dissolving the marriage or determining support, possession, or access to the child becomes final and appealable. ([Tex. Fam. Code § 81.009](#); [Tex. Fam. Code § 109.002](#))

Family violence issues in child support cases. Family violence issues may arise in child support cases and raise the same safety concerns that occur in protective order cases. Both the state and federal governments maintain parent locator services to locate a parent or child involved in a child support or abduction case. Information in the locator service concerning a parent or child may be kept confidential if necessary to protect the person. ([Tex. Fam. Code § 231.108](#); [Tex. Fam. Code § 231.301](#); [42 U.S.C. §§ 653-654](#))

7.10 *Effect of family violence on children.*

One study found that children aged 6 to 18 years of abused mothers exhibit significantly more internalizing, externalizing, and total behavior problems than children for the same age and sex of non-abused mothers. In all age groups studied (1.5 to 18 years), children of abused mothers had significantly more behavioral problems than normal.²²⁴

child; (2) the current and future emotional needs of the child; (3) the current and future emotional and physical dangers to the child; (4) the parental abilities of those seeking custody; (5) the programs available to assist those individuals in caring for the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) any acts or omissions by the parent indicating that the existing parent-child relationship is improper; and (9) any excuse for the acts and omissions by the parent.

²²⁴ J. McFarlane et al., *Behaviors of Children Who are Exposed and Not Exposed to Intimate Partner Violence*, 112 *Pediatrics* 202 (September 2003). The study concluded that the children of abused mothers ages 6 to 18 are at the greatest risk and recommended that abused mothers be identified and treated to

Another study of children 2 to 17 years of age concluded that children exposed to intimate partner violence against their mothers were more likely to exhibit externalizing (i.e., aggressive, delinquent) behavior. If those children were also maltreated themselves, they were more likely to exhibit internalizing (i.e., anxious, depressed) behaviors, externalizing (i.e., aggressive, delinquent) behaviors, and total behavioral problems compared to the normative sample.²²⁵

7.11 Results of childhood exposure to family violence.

A study found that women reporting childhood physical abuse or witnessing parental abuse were found to be 4 to 6 times more likely to become victims of physical domestic violence in adulthood.²²⁶ As adults, men who experienced moderate to severe childhood physical abuse have been found to be at increased risk of perpetrating violence against female partners.²²⁷

7.12 Child maltreatment and family violence.

Courts should be sensitive to signs of family violence against adult-caregivers in any proceeding involving allegations of harm to a child. The court should prioritize removing any abuser before removing a child from a battered mother and work with child welfare and social service agencies to ensure that separate service plans for the perpetrator and the victim of domestic violence are developed.²²⁸

7.13 Supervised visitation issues.

Promoting the safety of the participants and healthy interactions between the parent and child are common goals of supervised visitation orders. Problems inherent in supervised visitation include:

ameliorate the behavior problems of their children. A summary of the article is available at: <http://www.ncbi.nlm.nih.gov/pubmed/12949313?ordinalpos=1&itool=PPMCLayout.PPMCAAppController.PPMCArticlePage.PPMCPubmedRA&linkpos=1>

²²⁵ M. Kernic et al., *Behavioral Problems Among Children Whose Mothers Are Abused by an Intimate Partner*, 27 *Child Abuse & Neglect* 1231 (November 2003). A summary of the article is available at: <http://www.ncbi.nlm.nih.gov/pubmed/14637299>

²²⁶ L. Bensley et al., *Childhood Family Violence History and Women's Risk for Intimate Partner Violence and Poor Health*, 25 *American Journal of Preventative Medicine* 38 (July 2003). A summary of this article is available at: <http://www.ncbi.nlm.nih.gov/pubmed/12818308>

²²⁷ C. McKinney et al., *Childhood Family Violence and Perpetration and Victimization of Intimate Partner Violence: Findings from a National Population-based Study of Couples*, 19 *Annals of Epidemiology* 25 (January 2009). This study also found women who witnessed inter-parental violence were at increased risk of perpetrating violence against male intimate partners. A summary of the study is available at: <http://www.ncbi.nlm.nih.gov/pubmed/18835525>

²²⁸ Adapted from the National Council of Juvenile and Family Court Judges, *The Green Book Initiative- Executive Summary*, available at: http://www.thegreenbook.info/documents/executive_summary.pdf

- providing adequately trained and equipped staff to address security concerns (e.g., staff is able to take appropriate action to confiscate weapons or deal with verbal or physical threats);
- dealing with inappropriate parental communications with the child (e.g., the supervised parent informs the child that the other parent is to blame for the visitation restrictions or tries to get child to reveal information about other parent's life);
- recognizing the supervised parent's attempts to manipulate staff into advocating for the supervised parent or against non-supervised parent (e.g., the supervised parent tries to convince staff that child is being abused by non-supervised parent);
- minimizing the risk that a parent will use visitation to locate, harass, or threaten the other parent;

AND

- addressing overt or covert threats by the supervised parent to harm self or others.

Suggested judicial approaches to the problems raised by supervised visitation include:

- ordering psychological evaluations, including a lethality assessment of the supervised parent, prior to allowing visitation;
- requiring the supervised parent to complete a batterer's intervention program prior to allowing the visitation;
- requiring the supervised parent to return to court periodically for accountability reports;
- having a set of formal policies and procedures that govern how child supervision centers will deal with the family violence perpetrator and delineating the role of the supervisor in such cases;
- obtaining and reviewing formal reports from the supervisors;

AND

- requiring a professional evaluation before ending the supervision. Success in the supervised setting may not reliably predict the viability of unsupervised visitation.²²⁹

²²⁹ Adapted from S. Maxwell and K. Oehme, *Strategies to Improve Supervised Visitation Services in Domestic Violence Cases*, Minnesota Center Against Violence and Abuse (2001). Available at: <http://www.mincava.umn.edu/documents/commissioned/strategies/strategies.html>

CHAPTER 8—PRE-TRIAL CRIMINAL PROCEDURE AND FAMILY VIOLENCE: DUTIES OF LAW ENFORCEMENT, JUDGES, AND PROSECUTORS; AND THE RIGHTS OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM—PART I: STATUTES AND CASE LAW

([Tex. Code Crim. Proc. Chs. 5, 6, 17, and 56](#);
[Tex. Fam. Code Chs. 85 and 86](#);
[Tex. Gov't Code Chs. 22, 41, and 411](#);
[18 U.S.C. §§ 2263 and 3771](#))

Summary:

During the investigation, detention, and bail-setting stages of a criminal case, law enforcement, prosecutors, and the courts have specific duties to protect victims of family violence and stalking offenses and the community at large from further violence by the accused. The dynamics of family violence (greater access to and control over the victim by the arrested person) increase the likelihood that the arrested person will reoffend, or attempt another offense, soon after release. The procedures governing release of persons detained for family violence offenses attempt to reduce the recurrence of violence.

The duties of law enforcement officers include: making warrantless arrests for and written reports of family violence incidents; notifying the victim of the anticipated release of the accused from custody; and maintaining a protective order registry. The duties of prosecutors and courts include: reporting threats of violence and detaining the accused for additional time if there is probable cause to believe that release will result in further violence.

The courts, prosecutors, and law enforcement agencies all have to inform victims of the right to participate in the criminal justice process.

Subchapter A Duties of Law Enforcement, Prosecutors, and Judges in Family Violence Cases

8.1 *Duties of law enforcement.*

8.1.1 Duties of peace officers.

In family violence or potential family violence situations, a peace officer:

- must perform his or her official duties regardless of whether a family or household relationship exists between an alleged offender and the victim ([Tex. Code Crim. Proc. art. 5.03](#));
- must advise the victim or potential victim with written notice of the victim's legal rights and remedies and the availability of shelter or other community services ([Tex. Code Crim. Proc. art. 5.04\(b\)](#));
- must remain at the scene of an alleged incident of family violence to verify the allegation and as long as necessary to maintain the peace ([Tex. Code Crim. Proc. art. 5.045](#); [Tex. Crim. Proc. art. 14.03\(c\)](#));
- may protect a victim of family violence who is removing personal property from a place and has civil and criminal immunity for acts or omissions that occurred in providing the protection ([Tex. Code Crim. Proc. art. 5.045](#));²³⁰
- must make a written report of family violence investigation ([Tex. Code Crim. Proc. art. 5.05](#));

²³⁰ *Poteet v. Sullivan*, [218 S.W.3d 780](#) (Tex. App.—Fort Worth 2007, pet. denied). In a civil rights action brought under [42 U.S.C. § 1983](#), the court held that [Tex. Code Crim. Proc. art. 5.045](#) did not authorize the officers to use force beyond that reasonably necessary to keep the peace (the officers physically restrained and threatened to jail the plaintiff) while providing affirmative aid to plaintiff's ex-girlfriend as she gathered her personal property. The summary judgment evidence raised a fact question as to whether the officers violated the plaintiff's constitutional right against unreasonable searches so summary judgment was inappropriate.

But see, *Vasquez v. State*, Nos. 04-99-567-CR and 04-99-568-CR, [2000 Tex. App. Lexis, 1538](#) (Tex. App.—San Antonio, Mar. 8, 2000, pet. denied). In providing standby assistance to family violence victim under [Tex. Code Crim. Proc. art. 5.04\(a\)](#), police officers did not violate the Fourth Amendment of the U.S. Constitution by engaging in unreasonable search and seizure.

- must state in the written report whether the suspect is a member of a state or federal military force and if so, must send a notice of the incident to the staff judge advocate or provost marshal of the installation to which the suspect is assigned ([Tex. Code Crim. Proc. art. 5.05\(a-2\)](#));
- must act, to the extent of his or her power, to prevent a threatened injury to a person (including the spouse of the person making the threat) or to property ([Tex. Code Crim. Proc. art. 6.05](#); [Tex. Code Crim. Proc. art. 6.06](#); [Tex. Code Crim. Proc. art. 56.02\(a\)\(1\)](#));
- upon request, must inform the victim of the procedures used in the criminal investigation ([Tex. Code Crim. Proc. art 56.02\(a\)\(4\)](#));
- may use the amount of force necessary to prevent commission of an offense that will injure a person (including the spouse of the person about to commit the offense) or property ([Tex. Code Crim. Proc. arts. 6.05-6.07](#));²³¹

AND

- must make a reasonable attempt to inform the victim of an alleged stalking or family violence offense that the accused has been granted bail and is to be released from custody ([Tex. Code Crim. Proc. art 17.29\(b\)](#); [Tex. Crim. Proc. art. 56.02\(a\)\(4\)](#)).

8.1.2 Duties of law enforcement agencies.

Law enforcement agencies must:

- establish procedures to provide to law enforcement officers adequate access to information to enforce protective orders ([Tex. Code Crim.](#)

²³¹ *Pope v. State*, 695 S.W.3d 341, 343 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd). [Tex. Code Crim. Proc. art. 6.05](#) does not enlarge a peace officer's authority to effect a warrantless arrest. See *Vernon v. City of Dallas*, 638 S.W.2d 5, 8-9 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). The amount of force a peace officer may use to prevent a crime is limited by Tex. Code Crim. Proc. arts. 6.05, 6.06, and 6.07 to the amount necessary to repel the aggression or prevent the commission of the offense.

[Proc. art. 5.06\(c\)](#); [Tex. Fam. Code § 86.001](#); [Tex. Fam. Code § 86.0011](#));

- at the earliest possible time after being contacted about an offense, provide the victim with information about:
 - the availability of emergency and medical services;
 - the availability of crime victim compensation;
 - the contact information for the law enforcement agency's victim assistance liaison and case status information;
 - the rights of crime victims;

AND

- in sexual assault cases, contact information for a sexual assault program, if such is available ([Tex. Code Crim. Proc. art. 56.02](#); [Tex. Crim. Proc. art. 56.07](#));
- provide victims of threats and family violence offense with free copies of police reports ([Tex. Code Crim. Proc. art. 5.06\(f\)](#));
- upon request, provide a victim with a form to request that the victim be identified only by a pseudonym in all public records and documents relating to the investigation and prosecution of the criminal offense, must honor the request, and must inform the state's attorney of the request ([Tex. Code Crim. Proc. art. 57D.02](#));
- inform firearms dealers which individuals may not possess firearms due to protective order or criminal conviction ([Tex. Fam. Code § 86.002](#));

AND

- timely enter protective orders (including orders from other jurisdictions) into the state-wide law enforcement database maintained by DPS ([Tex. Fam. Code § 86.005](#); [Tex. Gov't Code § 411.042\(b\)](#)).

8.2 *Duties of prosecutors.*

A prosecuting attorney shall:

- not request dismissal or delay of a family violence criminal case based on the status of a civil case ([Tex. Code Crim. Proc. art. 5.06](#));
- not require a complaining witness or victim in a family violence criminal case to file a divorce suit or SAPCR before initiating the criminal prosecution ([Tex. Code Crim. Proc. art. 5.06](#));
- not require a protective order applicant to also participate in filing a criminal complaint ([Tex. Code Crim. Proc. art. 5.06](#));
- upon request, inform victims of the criminal justice system's procedures and of the proceedings in a particular case ([Tex. Code Crim. Proc. art. 56.02](#));
- upon notice that a crime victim has filed a form requesting to be identified only by a pseudonym in all public records relating to the criminal offense, ensure that the request is honored ([Tex. Code Crim. Proc. art. 57D.02](#));
- return the victim's property after it is no longer needed as evidence ([Tex. Code Crim. Proc. art. 56.02](#));
- within ten days of the return of an information or indictment, provide the victim with:
 - a brief general statement of the applicable criminal procedures;
 - notice of the victim's rights;
 - suggestions for ensuring victim safety;
 - notice of the availability of crime victim compensation;
 - contact information for a local victim assistance coordinator;
 - the cause number and court assignment for the case;

- notice of the right to file and present a victim impact statement;
- notice of the right to appear before the Board of Pardons and Parole ([Tex. Code Crim. Proc. art. 56.02](#));
- inform the victim of the settings, rescheduling, and cancellation of court proceedings ([Tex. Code Crim. Proc. art. 56.02](#));

AND

- complete training in handling of family violence cases ([Tex. Gov't Code § 41.110](#)).

8.3 Duties of judges.

A judge or magistrate handling a family violence case:

- shall not dismiss or delay a family violence criminal case based on the status of a civil case ([Tex. Code Crim. Proc art. 5.06](#));
- upon hearing a threat, or observing an attempt, to injure another person or property, shall immediately notify a peace officer of the threat or issue an arrest warrant for the person making the threat or attempt. If the threat is to take the life of another, an arrest warrant must be issued ([Tex. Code Crim. Proc arts. 6.01-6.03](#));
- when informed under oath of a threat to commit an offense, shall issue an arrest warrant against the person making the threat ([Tex. Code Crim. Proc. art. 7.01](#));
- may order law enforcement to protect a person or property based upon proof that such is necessary and proper ([Tex. Code Crim. Proc art. 7.15](#));
- must consider the safety of the victim and the victim's family when setting bail ([Tex. Code Crim. Proc art. 17.15](#); [Tex. Code Crim. Proc art. 17.40](#); [Tex. Code Crim. Proc art. 56.02](#));²³²

²³² But see *Ludwig v. State*, [812 S.W.2d 323, 325](#) (Tex. Crim. App.1991). Acknowledging but ignoring [Tex. Code Crim. Proc. art. 56.02\(a\)](#), the Court of Criminal Appeals held that only the complainant's safety need be considered when setting bail under [Tex. Code Crim. Proc. art. 17.15](#).

- must inform the victim:
 - of the right to participate in a global positioning monitoring system ([Tex. Code Crim. Proc art. 17.49](#); [Tex. Code Crim. Proc art. 56.02](#));
 - of how to report violations of the bond conditions;
 - of community services available to assist the victim;

AND

- that communications with the court about the global positioning monitoring system or the accused person's whereabouts are not confidential ([Tex. Code Crim. Proc. art. 17.49\(d\)\(7\)](#));
- must consider the victim's wishes in setting bond conditions that require the accused to stay away from certain locations ([Tex. Code Crim. Proc art. 17.49\(c\)](#));
- in sexual assault of a minor or family violence offenses, must consider the impact on the victim before granting a continuance ([Tex. Code Crim. Proc art. 29.14](#));
- must determine whether there is probable cause to believe that violence by a person arrested or held for prevention of family violence will continue if the person is released ([Tex. Code Crim. Proc art. 17.291](#));
- must provide DPS, local law enforcement, and affected schools, and child-care facilities with copies of all protective orders issued ([Tex. Fam. Code § 85.042](#));
- upon issuance of a protective order or conviction of a crime, must inform the respondent or defendant of the federal prohibition on possession of a firearm ([Tex. Code Crim. Proc art. 42.0131](#));
- in divorce cases, must inform suspected victims of family violence of the right to seek a protective order ([Tex. Fam. Code § 6.404](#));

AND

- must complete periodic (12 hours in the first term of office; 5 hours per succeeding term) training in family violence issues if handling cases involving family violence ([Tex. Gov't Code § 22.011](#); [Tex. Gov't Code § 22.110](#)).

Subchapter B Bail and Detention for Protective Order Violations; Conditions of Bond for Family Violence Offenses

8.4 *Bail.*

Upon request of the state's attorney, the magistrate may delay setting bond for a person arrested without a warrant for up to 72 hours. In setting bail, the court *shall* consider the future safety of the victim²³³ and the community. ([Tex. Code Crim. Proc. art. 17.15\(5\)](#); [Tex. Code Crim. Proc. art. 17.033\(c\)](#); [Tex. Code Crim. Proc. art. 17.40](#))

8.4.1 Denial of bail after arrest for protective order or bond condition violation.

Bail *may* be denied if after a hearing, the magistrate determines by a preponderance of the evidence that the person violated a bond condition or committed the offense charged:

- if the accused was rearrested for violating a bond condition imposed as a result of an arrest for a protective order violation ([Tex. Penal Code § 25.07](#)) or for a family violence;

OR

- if the accused was arrested for violating a protective order condition ([Tex. Penal Code § 25.07](#)) other than an order to stay away from a designated place;

OR

- if the accused was arrested for violating a protective order condition requiring the accused to stay away from a designated location and the court finds the accused was at the location intending or threatening to commit either family violence or stalking.

([Tex. Code Crim. Proc. art. 17.152](#))

²³³ *ibid.*

8.4.2 Bail hearing after arrest for violation of a protective order or bond condition.

The bail hearing must be held within 48 hours of arrest for violating a protective order. At the bail hearing, the court *may* consider:

- the order or conditions of bond;
- the nature and circumstances of the alleged offense;
- the relationship between the accused and the victim;
- the criminal history of the accused;

AND

- any other relevant facts and circumstances to the issue of whether the accused poses an imminent threat of future family violence.²³⁴

[\(Tex. Code Crim. Proc. art. 17.152\)](#)

8.4.3 Post-bond detention.

After an arrest without a warrant to prevent family violence, the defendant may be held:

- **4-hour hold:** the head of the agency arresting or holding the person *may* unilaterally decide to hold the arrested person an additional 4 hours after bond is granted;
- **up to 24-hour hold:** the magistrate *may* order in writing that the arrested person be held for up to 24 hours upon a finding that violence would continue upon release;

OR

²³⁴ *Lopes v. State*, No. 05-04-216-CR, [2004 Tex. App. Lexis 3642](#) (Tex. App.—Dallas, Apr. 26, 2004, no pet.). In bond hearing for stalking charge, bond of \$100,000 was not oppressive given evidence that the defendant threatened to cut off the victim's (his former lover) head, had a machete, maps of the victim's house, and had information about the victim, her boyfriend, and lawyer.

- **up to 48-hour hold:** the magistrate *may* order in writing that the arrested person be held for up to 48 hours upon a finding that probable cause exists to believe that the violence will continue upon release and that in the preceding 10 years the person has been arrested:
 - more than once for a family violence offense;

OR

- for any crime, if during commission of or flight from any offense, the person used or exhibited a deadly weapon.

[\(Tex. Code Crim. Proc. art. 17.291\)](#)

8.4.4 Notice to victim of accused person's release.

Before releasing a person accused of stalking or a person arrested or held without warrant in prevention of family violence, the law enforcement agency with custody of the person must make a reasonable attempt to inform the victim of the release.

[\(Tex. Code Crim. Proc. art. 17.29\)](#)

8.5 Bond conditions.

A bond for any offense may require any reasonable condition related to the safety of the victim or the community.

NOTE: For family violence cases, the court should consider whether a personal or surety bond can best be tailored to protect the victim and the community.

[\(Tex. Code Crim. Proc. art. 17.40\)](#)

8.5.1 Family violence offenses.

For an offense involving family violence, the bond may require that the accused person:

- not go to or near a residence (even if it is the residence of the accused), school, place of employment, or other specifically described location frequented by the alleged victim;
- carry or wear a global positioning monitoring device;
- not possess a firearm;
- pay the costs for a device that provides the victim information about the defendant's location;

AND

- pay the costs of the device that monitors the accused person's whereabouts.

NOTE: Unless the peace officer's exception applies, in a magistrate's orders of emergency protection, the magistrate shall suspend the accused person's concealed handgun license and prohibit the accused from possessing a weapon. Federal law prohibits a person restrained by a protective order, such as a magistrate's order of emergency protection, from possessing either firearms or ammunition. See Ch. 14.

[\(Tex. Code Crim. Proc. art. 17.49; Tex. Code Crim. Proc. art. 17.292\)](#)

8.5.2 Global position monitoring system.

A magistrate may require an accused to wear a global position monitoring device as a condition of bond.

8.5.2.1 Considerations.

In determining whether to impose this condition, the magistrate must consider whether the use of the global position monitoring system will deter the defendant from injuring, stalking, or otherwise threatening the victim.

8.5.2.2 Information to the victim.

The magistrate must provide the victim with:

- an opportunity to list the areas from which the defendant should be excluded;
- information concerning the global position monitoring service and its ability to inform the victim of the defendant's location and the resources available to the victim if the defendant violates the stay away provisions of the bond;

AND

- information regarding the victim's right to participate in the global position monitoring system.

[\(Tex. Code Crim. Proc. art. 17.49\)](#)

8.5.3 Stalking offenses.

For the offense of stalking, the bond can require that the defendant not:

- communicate directly or indirectly with the victim;
- go to or near the residence, place of business, school, or day-care facility of the victim or a dependent child of the victim.

[\(Tex. Code Crim. Proc. art. 17.46\)](#)

8.5.4 Bond revocation.

If the magistrate finds by a preponderance of the evidence that the accused violated a bond condition related to victim or community safety, the magistrate **MUST** revoke the bond.

[\(Tex. Code Crim. Proc. art. 17.40\)](#)

Subchapter C The Rights of Victims

8.6 *Victim's rights: federal laws.*

8.6.1 **Right of victim to be heard at bail hearing.**

A victim of a crime charged under [18 U.S.C. § 2261](#) (interstate travel to commit domestic violence), [18 U.S.C. § 2261A](#) (interstate travel to stalk or cyberstalk another), or [18 U.S.C. § 2262](#) (interstate travel to engage or cause another to engage in conduct that violates a protective order) has the right to be heard at a bail hearing with regard to the danger posed by the defendant.

[\(18 U.S.C. § 2263\)](#)

8.6.2 **Crime Victims' Rights Act.**

All federal crime victims, including victims of domestic violence have the right:

- to be reasonably protected from the accused;
- to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape of the accused;
- not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
- to confer with the attorney for the government in the case;
- to full and timely restitution as provided by law;
- to proceedings free from unreasonable delay;

AND

- to be treated with fairness and with respect for the victim’s dignity and privacy.

[\(18 U.S.C. § 3771\)](#)

8.6.3 Restitution.

8.6.3.1 VAWA crimes.

After a conviction for a VAWA crime, a court **must** order the defendant to pay full restitution for the losses sustained by a victim of a VAWA crime. Losses can include medical or psychological care, physical therapy, transportation, temporary housing, child-care, lost income, attorney’s fees, costs incurred in obtaining a civil protection order, and any other losses suffered by the victim as a result of the offense.

8.6.3.2 Violation of the federal Gun Control Act.

After a conviction under the federal Gun Control Act, [18 U.S.C. § 922\(g\)\(8\)](#) or [18 U.S.C. § 922\(g\)\(9\)](#), the court **may** order the defendant pay restitution to a victim of the crime for any losses sustained as a result of the criminal act.

[\(18 U.S.C. § 2264\)](#)

8.7 *Victim’s rights: Texas laws.*

Law enforcement agencies, peace officers, the state’s attorney, and the court are responsible, but not liable, for ensuring compliance with the Texas Crime Victims’ Rights statute.

[\(Tex. Code Crim. Proc. art. 56.02\(c-d\)\)](#)

8.7.1 Crime victim’s rights.

Under Texas law, a victim, a victim’s guardian, or a close relative of a deceased victim has the right to:

- receive adequate protection from law enforcement agencies from harm or threats arising from cooperation with prosecution efforts;

- have the magistrate take the safety of the victim or the victim's family into consideration in setting bail for the accused;
- upon request, be informed by the state's attorney of relevant court proceedings, including appellate proceedings and decisions, and including the right to be informed of cancellation or rescheduling of those proceedings;
- provide information for the presentence report prepared by a probation office;
- receive information regarding crime victim compensation;
- be present at all public hearings in a case, unless the court finds grounds for exclusion of the victim;
- upon request, be informed of and participate in parole proceedings;
- when appearing as a witness, be provided a safe, and if possible, separate, waiting area during any proceeding concerning the offender;
- appear in person at the sentencing hearing to present a victim impact statement;
- have property returned promptly as soon as it is no longer needed as evidence;
- have the state's attorney discuss with the victim's employer the need for the victim to be absent from work to participate in a legal proceeding;
- in sexual assault cases, upon request, receive counseling about and testing for HIV or AIDS;
- request victim-offender mediation coordination by the Texas Department of Criminal Justice;

- be informed of, complete, and have considered by the court a victim impact statement before sentencing or by the Board of Pardons and Paroles before granting parole;
- in sexual assault cases reported to law enforcement within 96 hours of the assault, have a forensic medical examination performed without charge;

AND

- in sexual assault of minor and domestic violence cases, have the impact on the victim considered before granting a continuance in a proceeding.

([Tex. Code Crim. Proc. art. 42.03](#); [Tex. Code Crim. Proc. art. 56.02 \(a-d\)](#))

8.7.2 Victim’s right to privacy.

A victim’s address and telephone number may not be part of the court file except that the address may be stated if it is also the location of the offense.

([Tex. Code Crim. Proc. art. 56.09](#))

8.7.3 Notice of release or escape.

For defendants convicted of offenses under [Tex. Penal Code Title 5](#) or offenses involving family violence, stalking, or violation of a protective order, the Texas Department of Criminal Justice must notify the victim or a witness who testified against a defendant that the defendant is scheduled to be released or has escaped from confinement.

([Tex. Code Crim. Proc. art. 56.11](#); [Tex. Code Crim. Proc. art. 56.12](#))

8.7.4 Victim’s rights: criminal proceeding affected:

- initial appearance
- appointment of counsel
- release or detention pending trial

- waiver of indictment
- arraignment and plea
- joint representation of co-defendants
- waiver of jury trial
- speedy trial act
- competency hearings
- pleas of guilty or *nolo contendere*
- jury selection
- verdict
- trial and post-trial motions
- release or detention pending sentencing or appeal
- death penalty procedures
- sentencing procedures
- revocation of probation or supervised release.

CHAPTER 8—PART II: COMMENTS

8.8 *Overview of the law.*

Persons arrested for family violence offenses have an increased risk of reoffending immediately after release from detention because the arrested person typically has greater access to the victim and because the control issues that lead to family violence are usually not resolved by the arrest. These dynamics drive many of the procedural requirements for arrest, detention, and release in family violence cases.

8.8.1 Law enforcement investigatory duties.

Peace officers responding to family violence incidents must:

- enforce the law and keep the peace irrespective of a familial or intimate relationship between the suspect and victim ([Tex. Code Crim. Proc. art. 5.03](#); [Tex. Code Crim. Proc. art. 56.02\(a\)\(1\)](#));
- protect potential victims of family violence by enforcing state laws and protective orders issued by any jurisdiction ([Tex. Code Crim. Proc art. 5.04\(a-a1\)](#));
- advise possible family violence victims of all possible means for avoiding family violence by giving written notice of the victim’s legal rights and remedies and information about shelters and other community services ([Tex. Code Crim. Proc art. 5.04\(b\)](#));
- provide notice to the person threatened of any threat to the person or the person’s property and aid in the prevention of the threatened act by use of all lawful means ([Tex. Code Crim. Proc art. 6.05](#); [Tex. Code Crim. Proc. art. 6.06](#));
- use discretion as to whether to stay at the scene of an alleged family violence incident to protect the victim or allow the victim to gather personal property and leave or to investigate the offense ([Tex. Code Crim. Proc art. 5.045](#); [Tex. Code Crim. Proc. 14.03\(c\)](#));²³⁵

²³⁵ *Vasquez v. State*, Nos. 04-99-567-CR and 04-99-568-CR, [2000 Tex. App. Lexis, 1538](#) (Tex. App.—San Antonio, Mar. 8, 2000, pet. denied). In providing standby assistance to family violence victim under [Tex. Code Crim. Proc. art. 5.04\(a\)](#), police officers did not violate the Fourth Amendment of the U.S.

- make a written report of any family violence incident or disturbance call that might involve family violence, file the report using a special identifier for family violence cases, and provide the report to DPS ([Tex. Code Crim. Proc. art. 5.05\(a, e\)](#));
- must state in the written report whether the suspect is a member of a state or federal military force and if so, must send a notice of the incident to the staff judge advocate or provost marshal of the installation to which the suspect is assigned ([Tex. Code Crim. Proc. art. 5.05\(a-2\)](#));
- provide officers with access to information about persons protected by protective orders in the law enforcement agency's jurisdiction ([Tex. Code Crim. Proc. art. 5.05\(c\)](#));
- accept as valid and enforce a certified copy of an unexpired protective order ([Tex. Code Crim. Proc. art. 5.05\(d\)](#));
- provide the victim with a free copy of the incident report ([Tex. Code Crim. Proc. art. 5.05\(f\)](#));
- return property to the victim after that property is no longer needed as evidence ([Tex. Code Crim. Proc. art. 56.02\(\(a\)\(9\)\)](#));
- prevent injuries or damage to property about to occur and use all force necessary to repel aggression ([Tex. Code Crim. Proc. art. 6.06](#); [Tex. Code Crim. Proc. art. 6.07](#));
- if a victim of an offense files a request (on a designated form) with the investigating law enforcement agency to be identified only by a pseudonym in all public documents and records concerning the offense, the law enforcement agency shall remove the victim's name

Constitution by engaging in unreasonable search and seizure. But see, *Poteet v. Sullivan*, [218 S.W.3d 780](#) (Tex. App.—Fort Worth 2007, pet. den.). In a civil rights action brought under [42 U.S.C. § 1983](#), the court held that [Tex. Code Crim. Proc. art. 5.045](#) did not authorize the officers to use force beyond that reasonably necessary to keep the peace (the officers physically restrained and threatened to jail the plaintiff) while providing affirmative aid to plaintiff's ex-girlfriend as she gathered her personal property. The summary judgment evidence raised a fact question as to whether the officers violated the plaintiff's constitutional right against unreasonable searches so summary judgment was inappropriate.

and identifying information from all publicly available reports, files, and records in the agency's possession, notify the state's attorney of the need to use the pseudonym, and maintain the form in a manner that protects the victim's confidentiality. ([Tex. Code Crim. Proc. art. 57D.02\(e\)](#))

- effect a warrantless arrest of a person who commits an offense in the officer's presence or within his view, including a violation of [Tex. Penal Code § 25.07](#) or [Tex. Code Crim. Proc. art. 38.112](#) ([Tex. Code Crim. Proc. art.14.01](#); [Tex. Code Crim. Proc. art. 14.03](#));

AND

- effect a warrantless arrest of persons who the officer has probable cause to believe has: committed or is about to commit a felony or a breach of the peace, committed an assault causing bodily injury, violated a protective order, committed an offense involving family violence, interfered with an emergency telephone call, or has committed a felony and is about to escape. ([Tex. Code Crim. Proc art. 14.03\(a\)](#); [Tex. Code Crim. Proc. art. 14.04](#)). .

8.8.2 Law enforcement duties: detention and release.

After arresting a person with or without a warrant, the law enforcement officer has 48 hours to take the person to the magistrate to receive the warnings required under [Tex. Code Crim. Proc. art. 15.17](#). ([Tex. Code Crim. Proc art. 14.06](#); [Tex. Code Crim. Proc. art. 15.17](#)).

After bond has been granted, the head of the detaining law enforcement agency may unilaterally decide to hold the person for an additional 4 hours if there is reasonable cause to believe that violence will result from immediate release. The agency head may extend the hold for an additional 48 hours if authorized by a magistrate. ([Tex. Code Crim. Proc art. 17.291](#))

Before a person who was arrested for stalking or a family violence offense is released from custody, the detaining law enforcement agency must make a reasonable effort to inform the victim of the offense of the pending release. ([Tex. Code Crim. Proc. art. 17.29](#))

Upon request by a victim or a member of the victim's family or household, a peace officer shall explain investigatory and bail procedures related to the case. ([Tex. Code Crim. Proc. art. 56.02\(4\)](#)).

8.8.3 Prosecutor's duties.

Prosecuting attorneys are required to complete training in the handling of family violence cases. ([Tex. Gov't Code § 41.110](#))

A prosecuting attorney must not condition a criminal prosecution on the complainant's pursuit of a civil remedy (divorce or SAPCR) against the accused; must not condition application for a protective order on the applicant's agreement to participate in a criminal prosecution; and must not delay a criminal prosecution based on the status of a civil proceeding. ([Tex. Code Crim. Proc. art. 5.06](#))

Within ten days of filing a criminal case, the state's attorney must provide the victim with information concerning: the applicable criminal procedures, case information (cause number), general criminal procedures, crime victim compensation, victim's rights under the Texas Code of Criminal Procedure; safety planning information, the right to present a victim impact statement, and the right to information about probation and parole proceedings. Whether or not requested, as far as reasonably practical, the prosecutor must provide the victim, the victim's guardian, or the close relative of a deceased victim with terms of an plea bargain agreement to be presented to the court. ([Tex. Code Crim. Proc art. 56.08](#)).

The state's attorney must keep the victim informed of the status of a legal proceeding, including cancellation of hearing and the rulings by the court. A prosecutor must also return the victim's property to the victim once it is no longer needed as evidence. ([Tex. Code Crim. Proc art. 56.02](#))

If a victim of an offense files a request to be identified only by a pseudonym in all public documents and records concerning the offense, the prosecutor has the duty to ensure that the victim is designated by the pseudonym in all legal proceedings. ([Tex. Code Crim. Proc. art. 57D.02\(f\)](#))

8.8.4 Judge's duties.

Training. If the judge handles cases with family violence issues, the judge must complete training in the handling of family violence cases. A judge must have completed 12 hours of family violence training within the first four years of office and 5 hours within every succeeding 4 year period. ([Tex. Gov't Code §§ 22.011 and 22.110](#))

Case proceedings. A judge shall not require that a criminal complainant pursue a civil remedy (divorce or SAPCR) against the defendant; must not condition application for a protective order on the applicant's agreement to participate in a criminal prosecution; and must not delay a criminal prosecution based on the status of a civil proceeding. ([Tex. Code Crim. Proc art. 5.06](#)) Before granting a continuance in a criminal cases involving family violence or sexual assault of a minor, the judge must consider the impact of the continuance on the victim. ([Tex. Code Crim. Proc art. 56.02\(a\)\(15\)](#)).

Threats. A magistrate who learns of a threat must provide notice to the person threatened of any threat to the person or the person's property. If the magistrate views an attempt to injure another, the magistrate must use all lawful means to prevent the injury. ([Tex. Code Crim. Proc art. 6.01](#); [Tex. Code Crim. Proc art. 6.03](#); [Tex. Code Crim. Proc art. 7.01](#)) If the threat is to take a life or commit suicide, the magistrate shall issue an arrest warrant for the person making the threat. ([Tex. Code Crim. Proc art. 6.02](#))

Information to victims. The judge is required to inform a victim in a criminal case that community services are available to aid the victim, that the victim has the right to participate in a global positioning monitoring system; and that the victim should report violations of the bond conditions to the court. ([Tex. Code Crim. Proc arts. 17.49 and 56.02](#))

8.8.5 Bond conditions: family violence offenses or stalking.

A bond for any offense may require any reasonable condition to promote the safety of the community or the victim. ([Tex. Code Crim. Proc art. 17.40](#)) For family violence offenses, the bond may require the defendant to stay away from certain persons and locations, to submit to and pay the

costs of global position monitoring for the defendant and/or the victim, and not to possess a firearm. ([Tex. Code Crim. Proc art. 17.46](#); [Tex. Code Crim. Proc art. 17.49](#); [Tex. Code Crim. Proc art. 17.292](#))

Global position monitoring. In considering whether to require the accused to wear a global position monitoring device, the magistrate **shall** consider the deterrent effect on the defendant’s ability to harm the victim. The magistrate **shall** also provide the victim with the opportunity to choose whether to participate in the monitoring program and to list areas from which the defendant should be excluded. ([Tex. Code Crim. Proc art. 17.49\(c\)](#)). The court must inform the victim that the global position monitoring of either the defendant or the victim is not confidential information. ([Tex. Code Crim. Proc art. 17.49\(d\)](#))

Bond conditions for family violence offenses. For an offense involving family violence, the bond may require that the defendant stay away from designated persons and locations (residence, schools, workplaces, etc.); wear and pay the costs of a global position monitoring device; or not possess a firearm (unless the peace officer exception applies). ([Tex. Code Crim. Proc art. 17.49](#); [Tex. Code Crim. Proc. art. 17.292](#))

Bond conditions for stalking offenses. The bond for a stalking offense may include an order not to communicate directly or indirectly with the victim and to stay away from designated persons and locations. ([Tex. Code Crim. Proc art. 17.46](#).)

Bail for violation of protective order or bond conditions in family violence case. In setting bail in any criminal case, the court **shall** consider the future safety of the victim and the community. ([Tex. Code Crim. Proc art. 17.15](#); [Tex. Code Crim. Proc art. 17.40](#)) In this context, the victim means the complainant.²³⁶ Bond **must** be revoked if the magistrate finds by a preponderance of the evidence that the accused violated a condition of bond related to the safety of the community or the victim. ([Tex. Code Crim. Proc art. 17.40](#))

In considering bail for protective order and bond violations in family violence cases, the court **may** deny bail if, after a hearing, the court finds

²³⁶ *Ludwig v. State*, 812 S.W.2d 323, 325 (Tex. Crim. App.1991). Acknowledging but ignoring [Tex. Code Crim. Proc. art. 56.02\(a\)](#), the court held that only the complainant’s safety need be considered when setting bail under [Tex. Code Crim. Proc. art. 17.15](#).

by a preponderance of the evidence that the defendant: violated a condition of protective order or family violence offense bond; violated a protective order, except for a condition of bond or a stay-away provision; or violated a protective order by going to a prohibited location intending or threatening to commit family violence or stalking. ([Tex. Code Crim. Proc art. 17.152 \(b-d\)](#))

In setting bail for protective order and bond condition violations, a judge **may** consider: the order or condition of bond; the nature and circumstances of the alleged bond; the relationship of the defendant and the victim; the defendant's criminal history; and other relevant facts. ([Tex. Code Crim. Proc art. 17.152\(e\)](#))

Further detention after bond granted. Even after a person arrested to prevent family violence has given bond, a magistrate **may** extend the detention of the person for up to 24 hours upon finding probable cause exists that the violence would continue upon release. The hold **may** be extended up to 48 hours if the magistrate makes an additional finding that in the preceding 10 years the person had been arrested more than once for a family violence offense; **OR** for any crime, if during commission of or flight from any offense, the person used or exhibited a deadly weapon. ([Tex. Code Crim. Proc art. 17.291](#))

Bond revocation. Upon finding by a preponderance of the evidence that the defendant violated a condition of bond related to safety of the victim or the community, the judge must revoke the bond. ([Tex. Code Crim. Proc art. 17.40](#))

8.8.6 Crime victim's rights.

Under state and federal law, victims of crimes have rights to be: protected by law enforcement; kept informed of the case status; consulted about conditions of bail; considered before a legal proceeding is continued; alerted before the defendant is released from custody;²³⁷ and provided information about social services and compensation funds.

²³⁷ The Victims Services Division of the Texas Department of Criminal Justice has a confidential system that allows registrants to receive notifications about the status of an offender who is incarcerated in a Texas prison or who is on parole or under mandatory supervision by TDCJ. Information on this program is available at: <http://www.tdcj.state.tx.us/victim/victim-home.htm>

8.8.6.1 Federal law.

Federal law. A victim of an interstate domestic violence, stalking or cyberstalking, or violation of a protective order has the right to be heard in the defendant's bail proceeding. ([18 U.S.C. § 2263](#)) Once a defendant is convicted of a federal Violence Against Women Act crime, the court **must** order the defendant to pay restitution to the victim. ([18 U.S.C. § 2264](#)) After a conviction of a violation of the federal Gun Control Act, the court may order the defendant to pay restitution to the victim.

All federal crime victims, including victims of domestic violence have the right to:

- be reasonably protected from the defendant;
- reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape of the defendant;
- not be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
- confer with the attorney for the government in the case;
- full and timely restitution as provided by law;

AND

- proceedings free from unreasonable delay; and to be treated with fairness and with respect for the victim's dignity and privacy.

([18 U.S.C. § 3771](#))

8.8.6.2 State law.

State law. Under Texas law, a victim, a victim’s guardian, or a close relative of a deceased victim has the right to:

- receive adequate protection from law enforcement agencies from harm or threats arising from cooperation with prosecution efforts;
- have the magistrate take the safety of the victim or the victim’s family into consideration in setting bail for the defendant;
- upon request, be informed by the state’s attorney of relevant court proceedings, including appellate proceedings and decisions, and including the right to be informed of cancellation or rescheduling of those proceedings;
- as far as reasonably practical, be informed by the prosecutor of the terms of an plea bargain agreement to be presented to the court;
- provide information for the presentence report prepared by a probation office;
- receive information regarding crime victim compensation;
- be present at all public hearings in a case, subject to approval of the judge; upon request, be informed of and to participate in parole proceedings;
- when appearing as a witness, be provided a safe, and if possible, separate, waiting area during any proceeding concerning the defendant;
- appear in person at the sentencing hearing to present a victim impact statement;
- have property returned promptly as soon as it is no longer needed as evidence;
- have the state’s attorney discuss with the victim’s employer the need for the victim to be absent from work to participate in a legal proceeding;

- in sexual assault cases, upon request, receive counseling about and testing for HIV or AIDS;
- request victim-offender mediation coordination by the Texas Department of Criminal Justice;
- be informed of, complete, and have considered by the court before sentencing or by the Board of Pardons and Paroles before granting parole, a victim impact statement;
- in sexual assault cases reported to law enforcement within 96 hours of the assault, receive a forensic medical examination without cost;
- in sexual assault of minor and domestic violence cases, have the impact on the victim considered before granting a continuance in a proceeding;
- have the victim's personal information kept confidential and not be included in the clerk's file except to the extent that information concerns the location of the offense;
- victims of any offense (including human trafficking victims) have a right to be identified only by official pseudonym in all proceedings and records relating to the offense

AND

- for victims of family violence offenses under [Tex. Penal Code Title 5](#) and stalking, to be informed of the release or escape of the defendant from custody.

([Tex. Code Crim. Proc. art. 42.03](#); [Tex. Code Crim. Proc. art. 56.02\(a-d\)](#); [Tex. Code Crim. Proc. art. 56.08](#); [Tex. Code Crim. Proc. art. 56.11](#); [Tex. Code Crim. Proc. art. 56.12](#) [Tex. Code Crim. Proc. art. 57D.02.](#))

8.9 *Crime victims' compensation.*

In Texas, the Office of the Attorney General administers the application for crime victim's compensation.²³⁸ Victims and survivors of assault, sexual assault, kidnapping, aggravated robbery, failure to stop and render aid, driving while intoxicated, homicide, intoxication manslaughter, and other violent crimes that result in physical or emotional harm are eligible for compensation.

The applicant must report the crime to law enforcement within 72 hours (unless there is a valid reason for a delay); cooperate with law enforcement in the investigation and prosecution of the offense, and file the claim for compensation within one year of the injury.

The compensation award can reimburse for reasonable medical expenses (including medicine, rehabilitation, and mental health counseling), funeral expenses, loss of earnings or support, child-care expenses, reasonable attorney's fees incurred in conjunction with the application, and reasonable repair and replacement costs for property damaged by the offense.

Compensation is limited to a maximum award of \$25,000, including a maximum of \$200 a week for lost wages and \$125 a week for child care.²³⁹

Criminal judgment restitution orders. If a defendant is ordered by a criminal court to pay restitution in addition to serving a prison sentence, the Texas Department of Criminal Justice will begin to collect restitution once the defendant is paroled. If the court sentenced the defendant to probation, the county probation department will collect, monitor, and distribute the restitution payments to the victim. It is essential that the person owed restitution keep TDCJ or the county probation department informed of the person's current mailing address. After a certain amount of time, undistributed restitution money is forfeited to the Texas Crime Victims' Compensation Fund.²⁴⁰

²³⁸ Applications are available on line at:

http://www.oag.state.tx.us/victims/vict_rights.shtml#protectiveorders

²³⁹ Texas Attorney General's Office, Crime Victim Compensation Division, P.O. Box 12548, Austin, TX 78711-2548; (512) 462-6400; 1-800-983-9933; crime.victims@oag.state.tx.us

²⁴⁰ Texas Department of Criminal Justice, Restitution and Fees Section, P.O. Box 4019, Huntsville, Texas, 77342. TDCJ has a brochure entitled "Restitution" available at:

<http://www.tdcj.state.tx.us/publications/finance/B&F%20-%20ABS%20Restitution%20Brochure.pdf>

8.10 Social services for victims.

8.10.1 Shelters and other victim services.

The Texas Council on Family Violence maintains a current list of family violence shelters and other service providers, including accredited battering intervention programs.²⁴¹ The list is organized by county.

8.10.2 Battering intervention prevention programs.

Guidelines for and current accreditation status of battering intervention programs are available from the Texas Department of Criminal Justice.²⁴² The TCFV website also lists the current battering intervention programs in Texas.²⁴³

8.10.3 Child support services.

The Texas Attorney General's office provides services to help parents obtain or collect court-ordered child support from a non-custodial parent.²⁴⁴

8.10.4 Temporary assistance for needy families (TANF).

Families who lack financial resources to pay for basic living necessities and medical care may qualify for Temporary Assistance for Needy Families. The program is administered by the Texas Health and Human Services Commission.²⁴⁵ Approved applicants qualify for help for no more than 36 months. However, a victim of family violence may qualify for extended benefits under the "Family Violence Option."²⁴⁶

TANF may provide an emergency award of \$1,000 for a family in crisis. This award is available to a family only once every twelve months. In

²⁴¹ Shelters and other service providers are listed at: <http://www.tcfv.org/service-directory-results/>

²⁴² <http://www.tcfv.org/pdf/guidelines.pdf>

²⁴³ <http://www.tcfv.org/service-directory/battering-intervention-and-prevention-programs/>

²⁴⁴ The Attorney General's Child Support division can be contacted at 1-800-252-8014. Information is available online at: <http://www.oag.state.tx.us/cs/index.shtml>

²⁴⁵ http://www.hhsc.state.tx.us/help/financial/temporary_assistance.html

²⁴⁶ [Tex. Hum. Res. Code § 31.0322](#); [42 U.S.C. § 602\(a\)\(7\)](#).

this context, “crisis” includes loss of a job or child support, lack of transportation for work, homelessness or a medical emergency.

8.10.5 Hotlines.

Among the various telephone hotlines available to help victims locate needed assistance are:

Abuse/Neglect Hotline (DPRS)	1-800-252-5400
Family Violence Legal Line	1-800-374-HOPE (4673)
Missing and Exploited Children’s Program	202-616-3637
National Center for Missing and Exploited Children	1-800-843-5678
National Domestic Violence Hotline	1-800-799-7233
(TTY) for the Deaf.....	1-800-787-3224
Rape, Abuse, & Incest National Network	1-800-656-4673
State Department Office of Children’s Issues	202-736-7000
(International Child Abductions)	
TASA-Sexual Assault Hotline	1-800-656-HOPE
Texas Attorney General-Child Support Division	1-800-252-8014

CHAPTER 9—CRIMINAL ENFORCEMENT OF PROTECTIVE ORDERS, MAGISTRATE’S ORDER OF EMERGENCY PROTECTION, AND BOND CONDITIONS—PART I: STATUTES AND CASE LAW

[\(Tex. Penal Code §§ 25.07, 25.071, and 38.112\)](#)

Summary:

A violation of a Tex. Fam. Code (under § 6.504 or Title 4) protective order, a magistrate’s order of emergency protection ([Tex. Code Crim. Proc. art. 17.292](#)), or a condition of bond carries criminal sanctions under [Tex. Penal Code § 25.07](#). A violation of a protective order issued after a crime motivated by bias or prejudice under [Tex. Code Crim. Proc. art. 6.08](#) is criminally enforceable under [Tex. Penal Code § 25.071](#). A protective order issue under Tex. Code Crim. Proc. art. 7A is criminally enforceable as a Class A misdemeanor under [Tex. Penal Code § 38.112](#). Violations of [Tex. Code Crim. Proc. art. 6.09](#) and [Tex. Code Crim. Proc. art. 7B](#) are NOT subject to criminal penalties.

Certain protective order violation offenses can be enhanced to a third degree felony upon proof that the defendant has at least two prior convictions for a protective order violation or has violated a condition of bond by committing an assault or stalking offense.

After a court enters a finding that a crime was motivated by bias or prejudice, pursuant to [Tex. Code Crim. Proc. art. 42.014](#), the offense’s penalty range may be enhanced under [Tex. Code Crim. Proc. art. 12.47](#).

9.1 *Penal Code § 25.07: Violation of a Family Code protective order.*

9.1.1 Elements of the offense.²⁴⁷

The prosecution must establish that the defendant:

- (1) was subject to the terms and conditions of a protective order issued under [Tex. Fam. Code § 6.504](#) (divorce), chapter 85 (family violence), or chapter 88 (protective order from a foreign jurisdiction) at the time of the offense;
- (2) knew of the protective order;²⁴⁸
- (3) intentionally and knowingly²⁴⁹ engaged in one or more of the following acts that were prohibited by the order:
 - committed family violence;²⁵⁰

²⁴⁷ *Lee v State*, [799 S.W.2d 750, 752](#) (Tex. Crim. App. 1990). The public policy purpose of former [Tex. Penal Code § 25.08](#) (now § 25.07) is to allow the violator to be removed from the scene by taking that person into custody. A protective order's statutory warnings are sufficient notice of criminal consequences of violation of the order.

See *Gharbi v. State*, [131 S.W.3d 481](#) (Tex. Crim. App. 2003). In a prosecution for violation of a protective order by going to prohibited location, the elements of the offense are: (1) a person; (2) knowingly or intentionally; (3) goes near the residence of a protected individual; and (4) in violation of an order issued under the Tex. Fam. Code. It is immaterial variance if indictment lists one protected individual and proof establishes the violation occurred at home of another protected individual. See also, *Small v. State*, [809 S.W.2d 253, 256](#) (Tex. App.—San Antonio 1991, pet. ref'd); and *Escobedo v. State*, No. 02-05-176-CR, [2006 Tex. App. Lexis 6045](#) (Tex. App.—Fort Worth, July 13, 2006, no pet.). In a prosecution for a protective order violation, variance between the address listed in protective order and the address where violation occurred was immaterial.

But see *Patton v. State*, [835 S.W.2d 684](#) (Tex. App.—Dallas 1992, no pet.). When the state chose to plead cause number of protective order, it was required to prove the number alleged.

²⁴⁸ *Hernandez v. State*, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref'd). Proof that defendant received copy of magistrate's order of emergency protection was sufficient to support conviction for violation of order whether or not defendant actually read the order.

²⁴⁹ *Harvey v. State*, [78 S.W.3d 368](#) (Tex. Crim. App. 2002). In prosecution for violation of a protective order, a culpable mental state is inherent in the term "in violation of the order" because "order" implies a document issued after defendant had notice and an opportunity to be heard at hearing—in other words, a level of knowledge that amounts to a mental state. The "intentionally or knowingly" culpable mental states apply to the acts described as being violative rather than to the phrase "in violation of the order."

²⁵⁰ *Polley v. State*, No. 11-03-00340-CR, [2004 Tex. App. Lexis 11317](#) (Tex. App.—Eastland, Dec. 16, 2004, pet. ref'd) A violation of [Tex. Penal Code § 25.07](#) was proven because the defendant assaulted the protected person by striking her in the head with his hand.

- committed an act in furtherance of the crime of sexual assault, aggravated sexual assault, or stalking;²⁵¹
- directly²⁵² communicated in a threatening or harassing²⁵³ manner with a protected individual or a member of the household or family of a protected individual;

Villareal v. State, [286 S.W. 3d 321](#) (Tex. Crim. App. 2009). Proof that defendant struck his girlfriend with his hand was sufficient to find violation of a protective order that specifically prohibited defendant from committing family violence.

Tovar v. State, No. 05-08-00424-CR, [2009 Tex. App. Lexis 678](#) (Tex. App.—Dallas, Feb. 3, 2009, no pet.). Threats to kill and assault of the victim was sufficient to establish a criminal violation of a family violence protective order.

Sam v. State, No. 14-08-00407-CR, [2009 Tex. App. Lexis 5121](#) (Tex. App.—Houston [14th Dist.] June 30, 2009, no pet.). In a prosecution for violation of a family violence protective order, proof that victim suffered pain when defendant prevented her from breathing and proof that defendant threatened victim by holding a knife to her throat was sufficient to prove the crime.

Wynn v. State, No. 02-04-00394-CR, [2005 Tex. App. Lexis 5155](#) (Tex. App.—Fort Worth, June 30, 2005, no pet.). Testimony of victim and witness to assault was sufficient evidence to convict the defendant of violation of a protective order.

Pickett v. State, No. 02-03-00373-CR, [2004 Tex. App. Lexis 7307](#) (Tex. App.—Fort Worth, Aug. 12, 2004, no pet.). In a prosecution for protective order violation, evidence that defendant tried to hit the victim's car with his car and broke the victim's car window was sufficient to support a conviction.

²⁵¹ *Marston v. State*, No. 11-05-00358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov. 1, 2007, pet. ref'd). In prosecution for violating a protective order by committing acts in furtherance of stalking, evidence that defendant made repeated phone calls that caused the protected person (her former lover) to be fearful and that the defendant had previously attempted to break into the person's home was sufficient to prove the offense.

²⁵² *Lemaire v. State*, No. 05-97-00290-CR, [1999 Tex. App. Lexis 801](#) (Tex. App.—Dallas, February 9, 1999, pet. ref'd). Failure to define “directly” in jury charge was not reversible error in a prosecution for violation of a family violence protective order. Phone call to protected person was sufficient to establish defendant violated the order by directly communicating with protected person in a threatening manner.

Feldman v. State, No. 11-02-339-CR to 11-02-344-CR, [2004 Tex. App. Lexis 1094](#) (Tex. App.—Eastland, Feb. 5, 2004, pet. ref'd). In a violation of a protective order prosecution, proof that the defendant sent a threatening or harassing letter to the protected person (his ex-wife) supported the conviction.

Moreno v. State, No. 04-02-00727-CR, [2003 Tex. App. Lexis 5998](#) (Tex. App.—San Antonio, July 16, 2003, no pet.). In a prosecution for protective order violation, proof that defendant knew of the order when he left a threatening voice mail message for the protected person was sufficient to support the conviction.

Stuyvesant v. State, No. 13-05-00664-CR, [2006 Tex. App. Lexis 5512](#) (Tex. App.—Corpus Christi, June 29, 2006, no pet.). In a prosecution for a protective order violation, defendant violated the order by sending recorded messages delivered to victim by telephone, which were communications prohibited by the order.

Gould v. State, No. 07-00-0018-CR, [2000 Tex. App. Lexis 5135](#) (Tex. App.—Amarillo, Aug. 2, 2000, no pet.). In a protective order violation prosecution, evidence that the defendant called the victim collect

- indirectly communicated a threat to a protected individual or a member of the protected individual’s family or household;
- communicated in a manner prohibited by the protective order with a protected individual or with a member of a protected individual’s family or house (e.g., direct communication when the order prohibits communications except through the protected individual’s attorney);
- possessed a firearm;
- harmed, threatened, or interfered with the care, custody, or control of a pet, companion animal, or assistance animal (as defined in Texas Human Resources Code § 121.002) that is possessed by a person protected by the order;

OR

- went to or within a specific distance of locations specifically described in the order, which may include:
 - a residence;
 - place of employment or business;
 - child-care facility;

OR

over 25 times in a two-hour period was sufficient to prove that the defendant violated the order by communicating with victim in a threatening or harassing manner.

²⁵³ *Garcia v. State*, [212 S.W.3d 877](#) (Tex. App.—Austin 2006, no pet.). [Tex. Penal Code § 25.07](#) is not facially overbroad because it only applies under a narrow set of circumstances to a narrow class of individuals for a limited amount of time; further, it does not reach a substantial amount of constitutionally protected conduct because it is limited to "threatening" or "harassing" communications. As approved in other cases, the definition of "harass" as used to prove a violation of Penal Code § 25.07 is not unconstitutionally vague because it includes the following elements: (1) a course of conduct; (2) directed at a specific person or persons; (3) causing or tending to cause substantial distress; and (4) having no legitimate purpose.

- a school.²⁵⁴

([Tex. Penal Code § 25.07\(a\)](#))

9.1.2 Definitions.

For purposes of prosecution under [Tex. Penal Code § 25.07](#):

- assistance animal has the meaning assigned to it in Texas Human Resources Code § 121.002.
- family violence, family, household, and member of a household have the meanings assigned by [Tex. Fam. Code Chapter 71](#),²⁵⁵

²⁵⁴ *McGiffin v. State*, No. 13-03-094-CR, [2004 Tex. App. Lexis 6305](#) (Tex. App.—Corpus Christi, July 15, 2004, no pet.). In a prosecution for protective order violation, evidence that the defendant went within 500 feet of prohibited place (victim’s residence) was sufficient to support a conviction.

Spencer-Auber v. State, No. 05-03-01259-CR, [2004 Tex. App. Lexis 1723](#) (Tex. App.—Dallas, Feb. 23, 2004, pet. dismissed). In a prosecution for violation of a protective order, testimony from victim and witness that defendant was at a prohibited place (victim’s residence) was sufficient evidence to support the conviction.

Gardner v. State, No. 05-05-00750-CR, [2006 Tex. App. Lexis 4417](#) (Tex. App.—Dallas May 24, 2006, no pet.). In a prosecution for violation of protective order, evidence that the defendant drove past prohibited location (ex-girlfriend’s house) was sufficient to support the conviction.

Dukes v. State, [239 S.W.3d 444](#) (Tex. App.—Dallas 2007, pet. refused). In a prosecution for a violation of a protective order, the defendant knew address of prohibited place (wife’s residence) so the fact that the order had the incorrect address was not a defense to prosecution of violation by going within 500 feet of the prohibited place.

Russell v. State, No. 02-05-00346-CR, [2006 Tex. App. Lexis 8866](#) (Tex. App.—Fort Worth, Oct. 12, 2006, no pet.). In a prosecution for a protective order violation, evidence from a map that established that the defendant was within 200 feet of the victim’s residence supported the conviction.

McIntosh v. State, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. refused). In a prosecution for a protective order violation, it was not a defense to prosecution for being at a prohibited location that defendant and victim were living together.

Sanchez v. State, No. 03-08-00707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Austin, Aug 31, 2009, no pet.). In a prosecution for a violation of a protective order, evidence that the defendant entered a prohibited place (his ex-wife’s home) was sufficient to support the conviction.

McEuen v. State, No. 03-08-0707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.) In a prosecution for a violation of a protective order, evidence in the form of testimony and photographs established that the defendant violated the order by twice going within 200 yards of a prohibited place (victim’s residence).

²⁵⁵ Family includes individuals related by consanguinity or affinity, as determined under [Tex. Gov’t Code §§ 573.022 and 573.024](#), individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together. If the relationship is established only by virtue of a marriage (e.g., mother-in-law), the familial relationship ceases to exist once the marriage ends.²⁵⁵ ([Tex. Fam. Code § 71.003](#))

AND

- firearm has the meaning assigned by [Tex. Penal Code Chapter 46.](#)²⁵⁶

([Tex. Penal Code 25.07\(b\)](#))

9.1.3 Venue; burden and standard of proof; mediation referral prohibited.

- Venue is in the county where:
 - the protective order was issued;

OR

- the offense occurred.
- The prosecution must prove all elements of the case beyond a reasonable doubt.

Family violence means:

(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 member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(2) abuse, as that term is defined by [Tex. Fam. Code § 261.001\(C\), \(E\) and \(G\)](#), by a member of a family or household toward a child of the family or household; or

(3) dating violence ([Tex. Fam. Code § 71.004](#)).

Household means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other. ([Tex. Fam. Code § 71.005](#)).

Member of a household includes a person who previously lived in a household. ([Tex. Fam. Code § 71.006](#)).

²⁵⁶ **Firearm** means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. Firearm does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by this chapter and that is:

(A) an antique or curio firearm manufactured before 1899; or

(B) a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition. ([Tex. Penal Code § 46.01\(3\)](#); [18 U.S.C. 921\(a\)\(3\)](#)).

- In criminal cases for family violence offenses, the court shall **NOT** refer or order the victim or defendant to mediation, dispute resolution, arbitration, or other similar procedures.

([Tex. Code Crim. Proc. art. 5.07](#); [Tex. Code Crim. Proc. art.5.08](#))

9.1.4 Defenses.

- It is **NOT** a defense to prosecution:
 - that the person protected by the order engaged in retaliatory conduct or agreed to the act constituting the violation;²⁵⁷
 - that the protective order lacked confidential information about the protected person’s residence, place of work or the child-care facility or school of a family or household member of the protected person;²⁵⁸

OR

- that the defendant failed to sign as approving the order’s form.²⁵⁹
- A defendant in a criminal case may not collaterally attack a protective order if the defendant had notice and an opportunity to participate in the protective order proceeding.²⁶⁰

²⁵⁷ *McIntosh v. State*, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. ref’d). In a prosecution for a protective order violation, it was not a defense to prosecution for being at a prohibited location that defendant and victim were living together.

²⁵⁸ *Patton v. State*, [835 S.W.3d 684](#) (Tex. App.—Dallas 1992, no pet.). Omission of wife’s work address from the protective order and failure to prove the order’s exact cause number in criminal case for protective order violation did not render the evidence insufficient to prove the crime.

See also *Polk v. State*, No. 02-02-038-CR , [2003 Tex. App. Lexis 4415](#) (Tex. App.—Fort Worth, May 22, 2003).

²⁵⁹ *McIntosh v. State*, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. ref’d). In a prosecution for a protective order violation, the order was not void or otherwise unenforceable because it bore a notation that both the defendant and the victim refused to sign as approving the form of the order.

²⁶⁰ *Ramirez v. State*, No. 08-07-00207-CR, [2008 Tex. App. Lexis 6195](#) (Tex. App.—El Paso, Aug. 14, 2008, no pet.). In a prosecution for a protective order violation, the defendant impermissibly collaterally attacked the protective order by asserting that a variance between the cause number listed in the notice of hearing and the number included on the final order rendered the order unenforceable.

- Because a person protected by the order is not subject to arrest for violating the order, the person’s protected status is a defense to prosecution under the statute.

[\(Tex. Penal Code §§ 25.07\(d\)-\(f\)\)](#)

9.1.5 Dual prosecution.

If the conduct in violation of [Tex. Penal Code § 25.07](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections.²⁶¹

[\(Tex. Penal Code § 25.07\(c\)\)](#)

9.1.6 Continuances.

In prosecutions for violations of Texas Family Code protective orders, motions for continuance require that:

- upon request of a party, the court must state the reason for the continuance on the record;

AND

- before granting a motion for continuance, the court must consider the impact on the victim of continuing the case.

[\(Tex. Code Crim. Proc. art. 29.14\)](#)

9.1.7 Jury charge.

In prosecution for a violation of a protective order, the jury charge should define the phrase “in violation of an order” issued under applicable statute.²⁶²

²⁶¹ See *Marston v. State*, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref’d). A defendant was subject to prosecution for burglary and for violating a protective order by committing acts in furtherance of stalking.

9.1.8 Level of offense.

A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor.

([Tex. Penal. Code § 25.07\(g\)](#))

9.1.9 Enhancement of punishment.

Punishment may be enhanced to a third degree felony upon proof that:

- the defendant has at least two prior convictions for violations of [Tex. Penal Code § 25.07](#);²⁶³
- the defendant violated the protective order by committing an assault;

OR

- the defendant violated the protective order by stalking another person.²⁶⁴

²⁶² *Lemaire v. State*, No. 05-97-00290-CR, [1999 Tex. App. Lexis 801](#) (Tex. App.—Dallas, February 9, 1999, pet. ref'd). Failure to define “directly” in jury charge was not reversible error in a prosecution for violation of a family violence protective order.

Villareal v. State, [286 S.W.3d 321](#) (Tex. Crim. App. 2009). It was not error to instruct the jury on terms “dating violence” and “dating relationship” as those terms affect the meaning of family violence element of protective order violation offense.

Marston v. State, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref'd). In a prosecution for violating a protective order by committing acts in furtherance of stalking, a jury charge that allowed the jury to find the defendant had committed a felony if she committed two or more of enumerated acts did not allow less than unanimous verdict because the conduct listed were just alternate means of committing the offense charged.

Castaneda v. State, No. 08-02-00381-CR, [2004 Tex. App. Lexis 2300](#) (Tex. App.—El Paso, Mar. 11, 2004, no pet.). In a prosecution for a violation of a protective order, the jury charge was proper because the abstract portion of the charge properly listed all the elements of the charge and the application portion required finding that defendant knowingly or intentionally committed an act of family violence against a protected person before the defendant could be convicted.

Harvey v. State, [78 S.W.3d 368](#) (Tex. Crim. App. 2002). In a prosecution for a violation of a protective order, the jury charge should define the phrase “in violation of an order” issued under applicable statute.

²⁶³ *Robertson v. State*, [175 S.W.3d 359](#) (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). In a prosecution for protective order violation, defendant’s sentence was enhanced to felony with proof of two prior violations. Evidence that defendant threatened victim verbally and displayed a box-cutter was sufficient to establish a violation of the order.

²⁶⁴ See *Marston v. State*, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref'd). In a prosecution for violating a protective order by committing acts in furtherance of stalking, evidence that the defendant made repeated phone calls that caused the protected person (her former lover) to be fearful and that the defendant had previously attempted to break into the victim’s

[\(Tex. Penal Code § 25.07\(g\)\)](#)

9.1.10 Sentencing.

The trial court is not required to impose a probated sentence after a conviction for a protective order violation.²⁶⁵ To support a sentence for a protective order violation, the indictment or information must allege that offense.²⁶⁶

9.1.11 Warning.

After a defendant is convicted of a Class A misdemeanor family violence offense, the court must warn the defendant that possession of a firearm is a criminal offense.

[\(Tex. Code Crim. Proc. art. 42.0131\)](#)

9.2 *Penal Code § 25.07: Violation of a magistrate's order of emergency protection.*

9.2.1 Elements of the offense.

The prosecution must establish that the defendant:

- (1) was subject to the terms and conditions of a protective order issued under [Tex. Code Crim. Proc. art. 17.292](#) at the time of the offense;

home was sufficient to prove that defendant committed offense of stalking as well as violation of protective order.

²⁶⁵ *Clark v. State*, No. 14-07-00276-CR, [2008 Tex. App. Lexis 6620](#) (Tex. App.—Houston [14th Dist.] Sept. 2, 2008, pet. ref'd). In a prosecution for violation of [Tex. Penal Code § 25.07](#), the trial court did not have to grant probation when the defendant had prior family violence assault conviction and received the minimum sentence.

Anderson v. State, No. 10-07-00294-CR, [2008 Tex. App. Lexis 6132](#) (Tex. App.—Waco, Aug. 13, 2008, no pet.). In a prosecution for violation of a protective order, the trial court did not abuse its discretion by not reducing length of sentence when probation was revoked due to defendant's commission of another family violence assault.

²⁶⁶ *Owens v. State*, No. 02-06-00145-CR, [2006 Tex. App. Lexis 5756](#) (Tex. App.—Fort Worth, June 29, 2006, no pet.). A defendant had a valid appellate point that his sentence for a protective order violation was a variance from the indicted offense of assault.

- (2) knew of the magistrate’s order;
- (3) intentionally engaged in one or more of the following acts that were prohibited by the order:
- committed an act of family violence;²⁶⁷
 - committed an act in furtherance of the crime of sexual assault, aggravated sexual assault, or stalking;
 - directly communicated in a threatening or harassing manner with a protected individual or a member of the household or family of a protected individual;
 - indirectly communicated a threat to a protected individual or a member of the protected individual’s family or household;
 - communicated in a manner prohibited by the protective order with a protected individual or with a member of a protected individual’s family or house (e.g., direct communication when the order prohibits communications except through the protected individual’s attorney);
 - went to or within a specific distance of locations specifically described in the order, which may include: a residence, child-care facility, or a school;²⁶⁸

OR

- possessed a firearm.

[\(Tex. Penal Code § 25.07\(a\)\)](#)

²⁶⁷ *Hernandez v. State*, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref’d). Proof of assault on a protected person established violation of a magistrate’s order of emergency protection. Proof that defendant received copy of order was sufficient to support conviction for violation of order whether or not defendant actually read the order.

²⁶⁸ See *Torres v. State*, No. 02-03-520-CR, [2004 Tex. App. Lexis 7534](#) (Tex. App.—Fort Worth, Aug. 19, 2004, no pet.). Defendant’s admission that he went to the victim’s apartment, a prohibited place, sufficient to support a conviction for a protective order violation.

9.2.2 Definitions.

For purposes of prosecution under [Tex. Penal Code § 25.07](#):

- family violence, family, household, and member of a household have the meanings assigned by [Tex. Fam. Code Chapter 71](#),²⁶⁹
- firearm has the meaning assigned by [Tex. Penal Code Chapter 46](#).²⁷⁰

([Tex. Penal Code 25.07\(b\)](#)) .

9.2.3 Burden and standard of proof.

The prosecution must prove all elements of the case beyond a reasonable doubt.²⁷¹

9.2.4 Defenses.

- It is **not** a defense to prosecution that the person protected by the order engaged in retaliatory conduct or agreed to the act constituting the violation;
- It is **not** a defense to prosecution that the magistrate's order lacked confidential information about the location of the protected person's residence, place of work, or the child-care facility or school of a family or household member of the protected person;

([Tex. Penal Code §§ 25.07\(d\)-\(f\)](#))

9.2.5 Dual prosecution.

²⁶⁹ See definition of family violence in ch. 2.

²⁷⁰ See definition of firearm in ch. 2.

²⁷¹ *Hernandez v. State*, No. 01-02-00986-CR, 2003 Tex. App. 6190 (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref'd). Proof of the defendant's knowledge of the order was sufficiently proved by the court clerk's testimony that the signature on the order matched the defendant's; testimony of the responding officers was sufficient to establish that the victim of defendant's assault was the person protected by the order magistrate's order of emergency protection.

If the conduct in violation of [Tex. Penal Code § 25.07](#) also violates another section of the Texas Penal Code, the defendant may be prosecuted under both sections.²⁷²

([Tex. Penal Code § 25.07\(c\)](#))

9.2.6 Level of offense.

A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor.²⁷³

([Tex. Penal Code § 25.07\(g\)](#))

9.2.7 Enhancement of punishment.

Punishment may be enhanced to a third degree felony upon proof that the defendant:

- has at least two prior convictions for violations of [Tex. Penal Code § 25.07](#);
- violated the protective order by committing an assault;

OR

- violated the protective order by stalking another person.

([Tex. Penal Code § 25.07\(g\)](#))

9.3 Penal Code § 25.07: Violation of a bond condition.

9.3.1 Elements of the offense.

The prosecution must establish that the defendant:

²⁷² *Black v. State*, No. 02-05-38-CR, [2006 Tex. App. Lexis 7823](#) (Tex. App.—Fort Worth, Aug. 31, 2006, pet. ref'd). Based on proof he threatened his wife and children with a knife, the defendant was convicted of aggravated assault and violation of a protective order with a deadly weapon finding on each count.

²⁷³ *Ludwig v. State*, [969 S.W.2d 22, 29](#) (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

(1) was subject to bond that:

- issued in a case after an arrest for a family violence offense;

AND

- had one or more conditions that related to the safety of the victim or the community;

AND

(2) knowingly or intentionally engaged in one or more of the following acts that were prohibited by a bond condition:

- committed an act of family violence;²⁷⁴
- committed an act in furtherance of the crime of sexual assault, aggravated sexual assault, or stalking;
- directly communicated in a threatening or harassing manner with a protected individual or a member of the household or family of a protected individual;
- indirectly communicated a threat to a protected individual or a member of the protected individual's family or household;
- communicated in a manner prohibited by the protective order with a protected individual or with a member of a protected individual's family or house (e.g., direct communication when the order prohibits communications except through the protected individual's attorney);
- went to or within a specific distance of locations specifically described in the order, which may include: a residence, child-care facility, or a school;²⁷⁵

²⁷⁴ *Hernandez v. State*, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref'd). Proof of assault on protected person established violation of magistrate's order of emergency protection. Proof that defendant received copy of order was sufficient to support conviction for violation of order whether or not defendant actually read the order.

OR

- possessed a firearm or ammunition.

([Tex. Penal Code § 25.07\(a\)](#))

9.3.2 Definitions.

For purposes of prosecution under [Tex. Penal Code § 25.07](#):

- family violence, family, household, and member of a household have the meanings assigned by Chapter 71, Family Code;²⁷⁶
- firearm has the meaning assigned by Penal Code Chapter 46.²⁷⁷

([Tex. Penal Code § 25.07\(b\)](#))

9.3.3 Burden and standard of proof.

The prosecution must prove all elements of the case beyond a reasonable doubt.²⁷⁸

9.3.4 Defenses.

- It is **not** a defense to prosecution that a person protected by bond condition engaged in retaliatory conduct or agreed to the act constituting the violation;
- It is **not** a defense to prosecution that the bond condition lacked confidential information about a protected person's residence, place

²⁷⁵ See *Torres v. State*, No. 02-03-520-CR, [2004 Tex. App. Lexis 7534](#) (Tex. App.—Fort Worth Aug. 19, 2004). Defendant's admission that he went to the victim's apartment, a prohibited place, was sufficient to support a conviction for a protective order violation.

²⁷⁶ See footnote 231.

²⁷⁷ See footnote 232.

²⁷⁸ *Hernandez v. State*, No. 01-02-986-CR, 2003 Tex. App. 6190 (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref'd). Proof of defendant's knowledge of the order was sufficiently proved by the court clerk's testimony that the signature on the order matched the defendant's; testimony of responding officers was sufficient to establish that the victim of defendant's assault was the person protected by the order magistrate's order of emergency protection.

of work or the child-care facility or school of a family or household member of the protected person;

[\(Tex. Penal Code §§ 25.07\(d\)-\(f\)\)](#)

9.3.5 Dual prosecution.

If the conduct in violation of [Tex. Penal Code § 25.07](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections.²⁷⁹

[\(Tex. Penal Code § 25.07\(c\)\)](#)

9.3.6 Level of offense.

A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor.²⁸⁰

[\(Tex. Penal Code § 25.07\(g\)\)](#)

9.3.7 Enhancement of punishment.

Punishment may be enhanced to a third degree felony upon proof that:

- the defendant has at least two prior convictions for violations of [Tex. Penal Code § 25.07](#);
- the defendant violated the bond by committing an assault;

OR

- the defendant violated the bond by stalking another person.

[\(Tex. Penal Code § 25.07\(g\)\)](#)

²⁷⁹ *Black v. State*, No. 02-05-38-CR, [2006 Tex. App. Lexis 7823](#) (Tex. App.—Fort Worth, Aug. 31, 2006, pet. ref'd). Based on threats to his wife and children with a knife, the defendant was convicted of aggravated assault and violation of a protective order with a deadly weapon finding on each count.

²⁸⁰ *Ludwig v. State*, [969 S.W.2d 22, 29](#) (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

9.4 *Penal Code § 25.071: Violation of a protective order for offenses motivated by bias or prejudice.*

9.4.1 Elements of the offense.

The prosecution must establish that the defendant:

- (1) was subject to the terms and conditions of a protective order issued under [Tex. Code Crim. Proc. art. 6.08](#) at the time of the offense;

AND

- (2) knew of the protective order;
- (3) committed one or more of the following acts prohibited by the protective order:

- directly communicated in a threatening or harassing manner with a protected individual or a member of the household or family of a protected individual;
- indirectly communicated a threat to a protected individual or a member of the protected individual's family or household;
- communicated in a manner prohibited by the protective order with a protected individual or with a member of a protected individual's family or house (e.g., direct communication when the order prohibits communications except through the protected individual's attorney);

OR

- went to or within a specific distance of locations specifically described in the order, which may include: a residence, place of employment or business, child-care facility, or a school;

OR

- (4) due to bias or prejudice, intentionally engaged in one or more of the following acts in violation of the order:

- committed an offense under Title 5 (homicide, kidnapping, unlawful restraint, trafficking in persons, sexual offenses, and assaults);
- committed the offense of arson;
- committed the offense of criminal mischief;

OR

- committed the offense of defacing another's property with graffiti.

[\(Tex. Penal Code § 25.071\(a\)\)](#)

9.4.2 Bias or prejudice defined.

In this context, bias or prejudice means the victim was chosen due to membership in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality).

[\(Tex. Code Crim. Proc. art. 42.014\).](#)

9.4.3 Defenses.

A person protected by the order is not subject to arrest or prosecution for violating the order.

[\(Tex. Penal Code § 25.071\(c\)\)](#)

9.4.4 Dual prosecution.

If the conduct in violation of [Tex. Penal Code § 25.071](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections.

[\(Tex. Penal Code § 25.071\(b\)\)](#)

9.4.5 Level of offense.

A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor.

([Tex. Penal Code § 25.071\(d\)](#))

9.4.6 Enhancement of punishment.

Punishment may be enhanced to a third degree felony upon proof that:

- the defendant has at least two prior convictions for violations of [Tex. Penal Code § 25.071](#);

OR

- the defendant violated the protective order by committing an assault.

([Tex. Penal Code § 25.071\(d\)](#))

9.5 *Penal Code § 38.112: Violation of a protective order for a victim of a sexual assault, stalking, compelled prostitution, or human trafficking (for sexual exploitation).*

9.5.1 Elements of the offense.

The prosecution must establish that the defendant:

- (1) was subject to the terms and conditions of a protective order issued pursuant to [Tex. Code Crim. Proc. art. 7A](#) at time of offense;
- (2) knew of the protective order;

AND

- (3) intentionally engaged in one or more of the following acts prohibited by the order:
 - communicated directly or indirectly in a threatening or harassing manner with the applicant or a member of the applicant's family or household;

- went to or near the residence, place of employment or business, child-care facility or school of the applicant or of a member of the applicant’s family or household;

OR

- possessed a firearm.

[\(Tex. Penal Code § 38.1112\(a\)\)](#)

9.5.2 Burden and standard of proof.

The prosecution must prove all elements of the crime beyond a reasonable doubt.

9.5.3 Defenses.

There are no specific defenses listed in [Tex. Penal Code § 38.112](#).

9.5.4 Dual prosecution.

If the conduct that violates [Tex. Penal Code § 38.112](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections.

[\(Tex. Penal Code § 38.112\(b\)\)](#)

9.5.5 Level of offense.

A violation of [Tex. Penal Code § 38.112](#) is a Class A misdemeanor.

9.5.6 Enhancement of punishment.

There is no enhancement provision in [Tex. Penal Code § 38.112](#). The offense is subject to enhancement under the provisions of [Tex. Penal Code § 12.43](#) (enhancement for prior misdemeanor conviction).

CHAPTER 9—PART II: COMMENTS

9.6 *Overview of the law.*

9.6.1 **Violation of a protective order, magistrate’s order of emergency protection, or a condition of bond. ([Tex. Penal Code § 25.07](#)).**

A person who knowingly and intentionally fails to comply with a condition of bond, a magistrate’s order of emergency protection, or a protective order issued under the Texas Family Code (in conjunction with a divorce or SAPCR, or under Title 4) is subject to prosecution for a Class A misdemeanor offense if the person violated a provision of the order or bond.

The manner and means of the violation include: (1) committing family violence;²⁸¹ (2) committing an act in furtherance of the crime of sexual assault, aggravated sexual assault, or stalking;²⁸² (3) directly²⁸³

²⁸¹ *Polley v. State*, No. 11-03-00340-CR, [2004 Tex. App. Lexis 11317](#) (Tex. App.—Eastland, Dec. 16, 2004, pet. ref’d). A violation of [Tex. Penal Code § 25.07](#) was proven because the defendant assaulted the protected person by striking her in the head with his hand.

Villareal v. State, [286 S.W. 3d 321](#) (Tex. Crim. App. 2009). Proof that defendant struck his girlfriend with his hand sufficient to find violation of a protective order that specifically prohibited the defendant from committing family violence.

Tovar v. State, No. 05-08-00424-CR, [2009 Tex. App. Lexis 678](#) (Tex. App.—Dallas, Feb. 3, 2009, no pet.). Threats to kill and assault of the victim were sufficient to establish a criminal violation of a family violence protective order.

Sam v. State, No. 14-08-00407-CR, [2009 Tex. App. Lexis 5121](#) (Tex. App.—Houston [14th Dist.] June 30, 2009, no pet.). In a prosecution for violation of a family violence protective order, proof that the victim suffered pain when defendant prevented her from breathing and proof that defendant threatened the victim by holding a knife to her throat was sufficient to prove the crime.

Wynn v. State, No. 02-04-00394-CR, [2005 Tex. App. Lexis 5155](#) (Tex. App.—Fort Worth, June 30, 2005, no pet.). Testimony of the victim and a witness to assault was sufficient evidence to convict the defendant of violation of a protective order.

Pickett v. State, No. 02-03-00373-CR, [2004 Tex. App. Lexis 7307](#) (Tex. App.—Fort Worth, Aug. 12, 2004, no pet.). In a prosecution for protective order violation, evidence that defendant tried to hit the victim’s car with his car and broke the victim’s car window was sufficient to support a conviction.

²⁸² *Marston v. State*, No. 11-05-00358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov. 1, 2007, pet. ref’d). In a prosecution for violating a protective order by committing acts in furtherance of stalking, evidence that the defendant made repeated phone calls that caused the protected person (her former lover) to be fearful and that the defendant had previously attempted to break into the person’s home was sufficient to prove the offense.

²⁸³ *Lemaire v. State*, No. 05-97-00290-CR, [1999 Tex. App. Lexis 801](#) (Tex. App.—Dallas, February 9, 1999, pet. ref’d). Failure to define “directly” in the jury charge was not reversible error in a prosecution

communicating in a threatening or harassing²⁸⁴ manner with a protected individual or a member of the household or family of a protected individual; (4) indirectly communicating a threat to a protected individual or a member of the protected individual's family or household; (5) communicating in a manner prohibited by the protective order with a protected individual or with a member of a protected individual's family or household (e.g., direct communication when the order prohibits communications except through the protected individual's attorney); (6) possessing a firearm;²⁸⁵ (7) harming, threatening, or interfering with the care, custody, or control of a pet, companion, or assistance animal; or (8) going to or within a specific distance of locations specifically described in the order, which may

for a violation of a family violence protective order. The defendant's telephone call to the protected person was sufficient to establish that the defendant violated the order by directly communicating with a protected person in a threatening manner.

Feldman v. State, [2004 Tex. App. Lexis 1094, No. 11-02-339-CR to 11-02-344-CR](#) (Tex. App.—Eastland, Feb. 5, 2004, pet. ref'd). In a violation of a protective order prosecution, proof that the defendant sent a threatening or harassing letter to the protected person (his ex-wife) supported the conviction.

Moreno v. State, No. 04-02-00727-CR, [2003 Tex. App. Lexis 5998](#) (Tex. App.—San Antonio, July 16, 2003, no pet.). In a prosecution for protective order violation, proof that the defendant knew of the order when he left a threatening voice mail message for the protected person was sufficient.

Stuyvesant v. State, No. 13-05-00664-CR, [2006 Tex. App. Lexis 5512](#) (Tex. App.—Corpus Christi, June 29, 2006, no pet.). In a prosecution for a protective order violation, defendant violated the order by sending recorded messages delivered to victim by telephone, which were communications prohibited by the order.

Gould v. State, No. 07-00-0018-CR, [2000 Tex. App. Lexis 5135](#) (Tex. App.—Amarillo, Aug. 2, 2000, no pet.). In a protective order violation prosecution, evidence that the defendant called the victim collect over 25 times in a two-hour period was sufficient to prove that the defendant violated the order by communicating with the victim in a threatening or harassing manner.

²⁸⁴ *Garcia v. State*, [212 S.W.3d 877](#) (Tex. App.—Austin 2006, no pet.). [Tex. Penal Code § 25.07](#) is not facially overbroad as it only applies under a narrow set of circumstances to a narrow class of individuals for a limited amount of time; further, it does not reach a substantial amount of constitutionally protected conduct because it is limited to "threatening" or "harassing" communication. As approved in other cases, the definition of "harass" as used to prove a violation of Penal Code § 25.07 is not unconstitutionally vague because it includes the following elements: (1) a course of conduct; (2) directed at a specific person or persons; (3) causing or tending to cause substantial distress; and (4) having no legitimate purpose.

²⁸⁵ **Firearm** means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. Firearm does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by this chapter and that is:

- (A) an antique or curio firearm manufactured before 1899; or
- (B) a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition. ([Tex. Penal Code § 46.01\(3\)](#); [18 U.S.C. 921\(a\)\(3\)](#)).

include: a residence; place of employment or business; child-care facility; or a school.²⁸⁶ ([Tex. Penal Code § 25.07\(a\)](#))

Prosecution of a protective order violation. A protective order violation can be prosecuted in either the county where the protective order issued or the county where the offense occurred. The offense must be proven by the beyond a reasonable doubt standard. The court may not order the defendant and victim to mediation. ([Tex. Code Crim. Proc. art. 5.07](#); [Tex. Code Crim. Proc. arts. 5.08](#))

Defenses. It is not a defense to prosecution that the victim filed a criminal complaint in retaliation or agreed to the violation;²⁸⁷ that the order’s “stay away” provision did not specifically describe a prohibited

²⁸⁶ *McGiffin v. State*, No. 13-03-094-CR, [2004 Tex. App. Lexis 6305](#) (Tex. App.—Corpus Christi, July 15, 2004, no pet.). In a prosecution for protective order violation, evidence that the defendant went within 500 feet of prohibited place (victim’s residence) was sufficient to support a conviction.

Spencer-Auber v. State, No. 05-03-01259-CR, [2004 Tex. App. Lexis 1723](#) (Tex. App.—Dallas, Feb. 23, 2004, pet. dismissed). In a prosecution for violation of a protective order, testimony from victim and witness that defendant was at a prohibited place (victim’s residence) was sufficient evidence of violation.

Gardner v. State, No. 05-05-00750-CR, [2006 Tex. App. Lexis 4417](#) (Tex. App.—Dallas May 24, 2006, no pet.). In a prosecution for violation of protective order, evidence that the defendant drove past prohibited location (ex-girlfriend’s house) was sufficient to support conviction.

Dukes v. State, [239 S.W.3d 444](#) (Tex. App.—Dallas 2007, pet. refused). In a prosecution for a violation of a protective order, the defendant knew address of prohibited place (wife’s residence) so the fact that the order had the incorrect address was not a defense to prosecution of violation by going within 500 feet of the prohibited place.

Russell v. State, No. 02-05-00346-CR, [2006 Tex. App. Lexis 8866](#) (Tex. App.—Fort Worth, Oct. 12, 2006, no pet.). In a prosecution for a protective order violation, evidence from a map that established that the defendant was within 200 feet of victim’s residence supported the conviction.

McIntosh v. State, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. refused). In a prosecution for a protective order violation, it was not a defense to prosecution for being at a prohibited location that defendant and victim were living together.

Sanchez v. State, No. 03-08-00707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Austin Aug 31, 2009, no pet.). In a prosecution for violation of a protective order, evidence that the defendant entered a prohibited place (his ex-wife’s home) was sufficient to support the conviction.

McEuen v. State, No. 03-08-0707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.). In a prosecution for a violation of protective order, evidence in the form of testimony and photographs established that the defendant violated the order by twice going within 200 yards of prohibited place (victim’s residence).

²⁸⁷ *McIntosh v. State*, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. refused). In a prosecution for a protective order violation, it was not a defense to prosecution for being at a prohibited location that defendant and victim were living together.

location;²⁸⁸ or that the defendant had not signed or read the order.²⁸⁹ ([Tex. Penal Code § 25.07\(d\)-\(f\)](#)).

Collateral attack. If the defendant had notice and an opportunity to participate in the protective order proceeding, the defendant may not collaterally attack the protective order in the criminal proceeding.²⁹⁰

Multiple offenses. If the conduct in violation of [Tex. Penal Code § 25.07](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections.²⁹¹ ([Tex. Penal Code § 25.07\(c\)](#))

Proceedings. The court must consider the impact of a continuance of a hearing on the victim and state the reason for the continuance on the record. ([Tex. Code Crim. Proc. art. 29.14](#)) In a prosecution for a violation of a protective order, the jury charge should define the phrase “in violation of an order” issued under applicable statute.²⁹²

²⁸⁸ *Patton v. State*, [835 S.W.3d 684](#) (Tex. App.—Dallas 1992, no pet.). Omission of the wife’s work address from the protective order and failure to prove the order’s exact cause number in criminal case for protective order violation did not mean evidence insufficient to prove criminal violation of the order.

See also *Polk v. State*, No. 02-02-038-CR, 2003, [2003 Tex. App. Lexis 4415](#) (Tex. App.—Fort Worth, May 22, 2003).

²⁸⁹ *McIntosh v. State*, No. 04-08-00713-CR and 04-08-00713-CR , [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. ref’d). In a prosecution for a protective order violation, the order was not void or otherwise unenforceable because it bore a notation that both the defendant and the victim refused to sign as approving the form of the order.

²⁹⁰ *Ramirez v. State*, No. 08-07-00207-CR, [2008 Tex. App. Lexis 6195](#) (Tex. App.—El Paso, Aug. 14, 2008, no pet.). In a prosecution for a protective order violation, the defendant impermissibly collaterally attacked the protective order by asserting the order was unenforceable due to a variance between the cause number in the notice of hearing and the cause number on the final order.

²⁹¹ See *Marston v. State*, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref’d). The defendant was subject to prosecution for burglary and for violating a protective order by committing acts in furtherance of stalking.

²⁹² *Lemaire v. State*, No. 05-97-00290-CR, [1999 Tex. App. Lexis 801](#) (Tex. App.—Dallas, February 9, 1999, pet. ref’d). Failure to define “directly” in the jury charge was not reversible error in a prosecution for violation of a family violence protective order.

Villareal v. State, [286 S.W.3d 321](#) (Tex. Crim. App. 2009). No error to instruct the jury on terms “dating violence” and “dating relationship” as those terms affect the meaning of family violence element of protective order violation offense.

Marston v. State, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref’d). In a prosecution for violating a protective order by committing acts in furtherance of stalking, the jury charge that allowed the jury to find the defendant had committed a felony if she committed two or more enumerated acts did not allow less than unanimous verdict because the conduct listed were just alternate means of committing the offense charged.

Punishment. A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor. ([Tex. Penal Code § 25.07\(g\)](#)) Punishment may be enhanced to a third degree felony upon proof that: the defendant has at least two prior convictions for violations of [Tex. Penal Code § 25.07](#);²⁹³ the defendant violated the protective order by committing an assault; **OR** the defendant violated the protective order by stalking another person.²⁹⁴ ([Tex Penal Code § 25.07\(g\)](#)). The trial court is not required to impose a probated sentence.²⁹⁵ To support a sentence for a protective order violation, the indictment or information must allege that offense.²⁹⁶

Firearms possession warning. After a defendant is convicted of a Class A misdemeanor family violence assault, the court must warn the defendant that possession of a firearm is a criminal offense. ([Tex. Code Crim. Proc. art. 42.0131](#))

Castaneda v. State, No. 08-02-00381-CR, [2004 Tex. App. Lexis 2300](#) (Tex. App.—El Paso, Mar. 11, 2004, no pet.). In a prosecution for a violation of a protective order, the jury charge was proper because the abstract portion of the charge properly listed all the elements of the charge and the application portion required a finding that defendant knowingly or intentionally committed an act of family violence against a protected person before the defendant could be convicted.

Harvey v. State, [78 S.W.3d 368](#) (Tex. Crim. App. 2002). In prosecution for a violation of a protective order, the jury charge should define the phrase “in violation of an order” issued under applicable statute.

²⁹³ *Robertson v. State*, [175 S.W.3d 359](#) (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d). In a prosecution for a protective order violation, the defendant’s sentence was enhanced to felony with proof of two prior violations. Evidence that the defendant threatened victim verbally and displayed a box-cutter was sufficient to establish a violation of the order.

²⁹⁴ See *Marston v. State*, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov. 1, 2007, pet. ref’d). In a prosecution for violating a protective order by committing acts in furtherance of stalking, evidence that the defendant made repeated phone calls that caused the protected person (her former lover) to be fearful and that the defendant had previously attempted to break into the person’s home was sufficient to prove that defendant committed offense of stalking as well as violation of protective order.

²⁹⁵ *Clark v. State*, No. 14-07-00276-CR, [2008 Tex. App. Lexis 6620](#) (Tex. App.—Houston [14th Dist.] Sept. 2, 2008, pet. ref’d). In a prosecution for violation of [Tex. Penal Code § 25.07](#), the trial court did not have to grant probation when the defendant had a prior family violence assault conviction and received the minimum sentence.

Anderson v. State, No. 10-07-00294-CR, [2008 Tex. App. Lexis 6132](#) (Tex. App.—Waco, Aug. 13, 2008, no pet.). In a prosecution for violation of a protective order, the trial court did not abuse its discretion by not reducing length of sentence when probation revoked due to the defendant’s commission of another family violence assault.

²⁹⁶ *Owens v. State*, No. 02-06-00145-CR, [2006 Tex. App. Lexis 5756](#) (Tex. App.—Fort Worth, June 29, 2006, no pet.). A defendant had a valid appellate issue because his sentence for a protective order violation varied from the indictment for assault.

9.6.2 Violation of a protective order for a victim of a crime motivated by bias or prejudice. ([Tex. Penal Code § 25.071](#))

For purposes of prosecution under [Tex. Penal Code § 25.071](#), bias or prejudice means the victim was chosen due to membership in a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference (regardless of whether that preference is for heterosexuality, homosexuality, or bisexuality). ([Tex. Code Crim. Proc. art. 42.014](#)).

Elements of the offense. The prosecution must establish that the defendant: (1) was subject to the terms and conditions of a protective order issued under [Tex. Code Crim. Proc. art. 6.08](#) at the time of the offense; (2) knew of the protective order; **AND** (3) violated the order by engaging in an activity prohibited by the order.

The order may be violated by: (1) directly communicating in a threatening or harassing manner with a protected individual or a member of the household or family of a protected individual; (2) indirectly communicating a threat to a protected individual or a member of the protected individual's family or household; (3) communicating in a manner prohibited by the protective order with a protected individual or with a member of a protected individual's family or household (e.g., direct communication when the order prohibits communications except through the protected individual's attorney); (4) going to or within a specific distance of locations specifically described in the order, which may include: a residence, place of employment or business, child-care facility, or a school; **OR** (5) due to bias or prejudice, intentionally engaging in one or more of the following acts in violation of the order: an offense against the person under Penal Code Title 5 (homicide, kidnapping, unlawful restraint, trafficking in persons, sexual offenses, and assaults); arson; criminal mischief; **or** illegally defacing another's property with graffiti. ([Tex. Penal Code § 25.071\(a\)](#))

Punishment. A violation of [Tex. Penal Code § 25.07](#) is a Class A misdemeanor. ([Tex. Penal Code § 25.07\(g\)](#)) Punishment may be enhanced to a third-degree felony upon proof that: the defendant has at least two prior convictions for violations of [Tex. Penal Code § 25.071](#); **OR** the defendant violated the protective order by committing an assault. ([Tex. Penal Code § 25.07\(d\)](#)).

9.6.3 Violation of a protective order for a victim of a sexual assault ([Tex. Penal Code § 38.112](#))

To prove the criminal offense, the prosecution must establish, beyond a reasonable doubt, that the defendant: (1) was subject to the terms and conditions of a protective order issued pursuant to [Tex. Code Crim. Proc. art. 7A](#) at time of offense; (2) knew of the protective order; **AND** (3) intentionally engaged in one or more of the following acts in violation of that order: communicated directly or indirectly in a threatening or harassing manner with the applicant or a member of the applicant's family or household; went to or near the residence, place of employment or business, child-care facility or school of the applicant or of a member of the applicant's family or household; **OR** possessed a firearm. ([Tex. Penal Code § 38.112\(a\)](#))

Defenses and dual prosecution. There are no specific defenses listed in [Tex. Penal Code § 38.112](#). If the conduct that violates [Tex. Penal Code § 38.112](#) also violates another section of the Penal Code, the defendant may be prosecuted under both sections. ([Tex. Penal Code 25.07\(b\)](#))

Punishment. A violation of [Tex. Penal Code § 38.112](#) is a Class A misdemeanor. There is no enhancement provision in [Tex. Penal Code § 38.112](#). The offense is subject to enhancement under the provisions of [Tex. Penal Code § 12.43](#) (enhancement for prior misdemeanor conviction).

9.7 *Victim cooperation.*

Experts estimate that somewhere between 80-90% of domestic violence complainants fail to cooperate with the prosecution at some point in the criminal proceeding.²⁹⁷ The reasons why victims refuse to cooperate with the prosecution include:²⁹⁸

- the risk of retaliation (feared in as many as half of all cases; an actuality in about 30% of criminal cases);

²⁹⁷ See, D. Beloof & J. Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, [11 Colum. J. Gender & L. 1](#) (2002) (90% rate); and L. DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, [8 Yale J.L. & Feminism 359, 367](#) (1996) (80-90% rate).

²⁹⁸ See, T. Lininger, *Prosecuting Batterers After Crawford*, [91 Va. L. Rev. 747, 769](#) (May 2005) (Summarizing the findings of various surveys).

- economic dependence (50% of victims are left below the federal poverty line after leaving their abuser and slightly less than half are threatened with loss of income for aiding the prosecution of the abuser);
- emotional attachment;
- family and community pressures;
- religious and cultural views;
- fear of losing custody of children;
- fear of deportation;
- trauma-induced psychological “paralysis”;

AND

- a genuine belief that no crime has occurred.

CHAPTER 10—CRIMES RELATED TO FAMILY VIOLENCE, STALKING, AND SEXUAL ASSAULT; CRIMES MOTIVATED BY BIAS OR PREJUDICE—PART I: STATUTES AND CASE LAW

**(Tex. Code Crim. Proc. arts. 2.211, 42.013, and 42.014;
Tex. Penal Code Title 5 and §§ 25.03, 25.11
28.03-28.06, 30.05, 33.07, 36.06,
42.062, 42.07, 42.072, and 46.04;
18 U.S.C. §§ 2261, 2261A, and 2262)**

Summary:

Crimes that are often associated with family violence include stalking, assault (including by strangulation), sexual assault, homicide, criminal trespass, criminal mischief, harassment, and terroristic threat. For some offenses (e.g., family violence assault), proof of family violence is an element of the crime so a judgment of conviction will necessarily contain a finding that the defendant committed family violence. For offenses under [Texas Penal Code Title 5](#) that do not have family violence as an element, if the evidence establishes that the offense involved family violence, the court must include a finding of family violence in the judgment. A finding of family violence in a judgment or order, whether in a civil or criminal case, has various potential collateral consequences. After a defendant who was on active duty military status is convicted of or placed on deferred adjudication probation for a family violence offense, the court clerk must send written notice of the conviction or probation to the staff judge advocate or provost marshal of the military installation to which the defendant is assigned.

Federal law makes it a federal felony crime to travel in interstate commerce to commit domestic violence, stalk another, engage in cyberstalking, or to violate a protective order. These federal criminal stalking offenses are gender-neutral and apply without regard to the relationship between the victim and the offender.

Subchapter A

Finding of Family Violence or Bias or Prejudice as the Motivation for a Crime: Requirements and Collateral Consequences

10.1 Finding required.

For some criminal offenses, family violence is an element of the crime²⁹⁹ so that the judgment of conviction will implicitly contain a finding of family violence. For offenses under [Texas Penal Code Title 5](#)³⁰⁰ in which family violence is not an element of the crime, if the evidence establishes at trial that the offense involved family violence, the court must enter an explicit finding that the defendant committed family violence in the judgment of conviction.³⁰¹

- If family violence is not an element of the crime, even if a jury is the fact-finder, the family violence finding is made by the court.³⁰²

²⁹⁹ For instance, [Tex. Penal Code § 22.01](#)(b-1); [Tex. Penal Code § 22.02](#)(b)(1).

³⁰⁰ *Garcia-Hernandez v. State*, No. 05-08-00735-CR, [2009 Tex. App. Lexis 2177](#) (Tex. App.—Dallas, Mar. 31, 2006, no pet.). In the appeal of an assault conviction, because the record affirmatively showed the assault involved family violence, the appellate court had the authority to reform the judgment to include the required finding of family violence.

Smelley v. State, No. 09-05-256 CR, [2006 Tex. App. Lexis 6583](#) (Tex. App.—Beaumont 2006, pet. ref'd). In a prosecution for assault, because the law requires that court enter a finding of family violence if the defendant was convicted, because the defendant knew the victim was his mother-in-law, and because the finding did not enhance punishment, the defendant had sufficient notice of the finding to satisfy due process.

Fullylove v. State, No. 13-0-169-CR, [2001 Tex. App. Lexis 8009](#) (Tex. App.—Corpus Christi, Nov. 29, 2001, no pet.). In a prosecution for harassment, an offense under Penal Code Title 9, the court was not authorized to, and did not, make a finding of family violence in the judgment, because that type of finding is limited to offenses under Penal Code Title 5.

³⁰¹ *Othman v. State*, No. 14-09-444-CR, [2010 Tex. App. Lexis 5746](#) (Tex. App.—Houston [14th Dist.] July 22, 2010, no pet.) (mem. op.). In the judgment of conviction for aggravated assault with a deadly weapon, a separate, specific finding of family violence under [Tex. Code Crim. Proc. art. 42.013](#) was required. The trial court's judgment which listed the offense as "Aggravated Assault-Family Member" was reformed to conform with [Tex. Code Crim. Proc. art. 42.013](#) so that it properly reflected the defendant was convicted of aggravated assault with a deadly weapon under [Tex. Penal Code § 22.02](#)(b)(1) with a finding of family violence.

³⁰² *Morimoto v. State*, No. 2-04-272-CR, [2005 Tex. App. Lexis 2906](#) (Tex. App.—Fort Worth, April 4, 2005, pet. ref'd). In a Class A misdemeanor assault prosecution, the trial court did not have to submit the family violence issue to the jury because the court did not increase the sentence beyond the statutory maximum.

Accord: *Pierce v. State*, No. 04-02-00749-CR, [2003 Tex. App. Lexis 9799 * 17](#) (Tex. App.—San Antonio, Nov. 19, 2003, pet. ref'd); *Rodriguez v. State*, No. 01-05-00589-CR, [2006 Tex. App. Lexis 6416](#) (Tex. App.—Houston [1st Dist.] July 20, 2006). In prosecution for Class A assault, after the jury convicted the defendant of Class C assault by contact, the trial court did not err in entering a finding of

- A judgment's lack of a family violence finding is not conclusive; in a subsequent proceeding, the state may use extrinsic evidence to prove that the prior conviction was for an offense that involved family violence.³⁰³
- The finding of family violence is one, but not the only, method of proving that an offense involved family violence.³⁰⁴
- A court's finding of family violence does not violate a defendant's Sixth Amendment rights.³⁰⁵

family violence because the finding was supported by the evidence, did not conflict with the jury verdict, and did not enhance punishment for the underlying offense.

³⁰³ *Goodwin v. State*, [91 S.W.3d 912](#) (Tex. App.—Fort Worth 2002, no pet.). Although the trial court did not make a finding of family violence in a prior assault judgment, in a separate assault prosecution, the state could use extrinsic evidence to prove the prior case was a family violence assault.

Manning v. State, [112 S.W.3d 740](#) (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). In a family violence assault prosecution, a conviction that predated the effective date of [Tex. Penal Code § 22.01\(b\)\(2\)](#) could be used to enhance the sentence and extrinsic evidence could be used to prove family violence element of prior conviction in a subsequent proceeding.

Mitchell v. State, [102 S.W.3d 772](#) (Tex. App.—Austin 2003, pet. ref'd). In a prosecution for family violence assault, the state was entitled to use extrinsic evidence to prove up family violence element of prior conviction being used to enhance punishment.

Accord: *Anderson v. State*, No 05-08-00864-CR, [2009 Tex. App. Lexis 8640](#) (Tex. App.—Dallas, Nov. 10, 2009, no pet.); *King v. State*, No. 03-01-00531-CR, [2003 Tex. App. Lexis 8499](#) (Tex. App.—Austin, Oct. 2, 2003, pet. ref'd); *Manuel v. State*, No. 01-04-00282-CR, [2005 Tex. App. Lexis 3502](#) (Tex. App.—Houston [1st Dist. May 5, 2005, pet. ref'd); *Merrell v. State*, [2009 Tex. App. Lexis 5518](#) (Tex. App.—Houston [14th Dist.] July 16, 2009, no pet.); *Salguero v. State*, No. 01-01-00508-CR, [2002 Tex. App. Lexis 9104](#) (Tex. App.—Houston [1st Dist.] Dec. 19, 2002, pet. ref'd); *Stoker v. State*, No. 03-02-00137-CR, [2003 Tex. App. Lexis 1704](#) (Tex. App.—Austin, Feb. 21, 2003, no pet.); *Walker v. State*, No. 14-02-00716-CR, [2003 Tex. App. Lexis 4304](#) (Tex. App.—Houston [14th Dist.], May 22, 2003, pet. ref'd).

See *Crawford v. State*, No. 12-05-00293-CR, [2006 Tex. App. Lexis 6520](#) (Tex. App.—Tyler, July 26, 2006, no pet.). In a prosecution for felony family violence assault, where the state was unable to prove its enhancement paragraph by showing either that the court had made a finding of family violence or that the prior assault involved family violence, the judgment had to be reformed to reflect a conviction for a Class A, rather than a felony, assault.

³⁰⁴ *State v. Eakins*, [71 S.W.3d 443](#) (Tex. App.—Austin 2002, no pet.). A finding of family violence under [Tex. Code Crim. Proc. art. 42.013](#) is an additional method, not the only method, for proving a previous conviction for family assault.

³⁰⁵ *Henderson v. State*, [208 S.W.3d 593](#) (Tex. App.—Austin 2006, pet. ref'd). The court's entry of a finding of family violence did not affect the defendant's sentence and so did not violate his Sixth Amendment rights.

- A caption in a charging instrument that includes the words “family violence” provides sufficient notice to the defendant that the state intends to seek a finding of family violence.³⁰⁶

[\(Tex. Code Crim. Proc. art. 42.013\)](#)

10.2 *Family violence defined.*

For offenses against the person, “family violence” means:

- (1) an act by a member of a family or household³⁰⁷ 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 member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

³⁰⁶ *Butler v. State*, [162 S.W.3d 727](#) (Tex. App.—Fort Worth 2005) aff’d [189 S.W.3d 299](#) (Tex. Crim. App. 2006). In a prosecution for family violence assault, information’s caption of “assault family violence” coupled with defendant’s own knowledge that the victim was his fiancée and the mother of his child was sufficient notice that the state would seek a finding of family violence.

Morimoto v. State, No. 2-04-272-CR, [2005 Tex. App. Lexis 2906](#) (Tex. App.—Fort Worth, April 14, 2005, pet. ref’d). In a misdemeanor assault prosecution, the charging instrument’s caption provided the defendant sufficient notice that the state intended to seek a finding of family violence.

Thomas v. State, [150 S.W.3d 887](#) (Tex. App.—Dallas 2004), *cert. denied* [74 US 3207](#) (2005). In an assault prosecution, the court was required to make family violence finding base on the evidence. The defendant had sufficient notice that the state intended to seek a finding of family violence because the record established that defendant knew the victim was his ex-wife and mother of his child.

Smelley v. State, No. 09-05-256 CR, [2006 Tex. App. Lexis 6583](#) (Tex. App.—Beaumont 2006, pet. ref’d). In a prosecution for assault, because the law requires that court enter a finding of family violence if the defendant was convicted, because the defendant knew the victim was his mother-in-law, and because the finding did not enhance punishment, the defendant had sufficient notice of the finding to satisfy due process.

But see, *Ex parte Quintero*, No. 03-08-00463-CR, [2009 Tex. App. Lexis 117](#) (Tex. App.—Austin, Jan. 8, 2009, no pet.). In a writ of habeas corpus after a conviction for family violence assault, although charging instrument listed the offense as family violence assault and the judgment contained finding of family violence, the admonishment and waiver of rights signed by the pro se defendant did not mention family violence so the defendant was entitled to habeas corpus relief.

³⁰⁷ *Word v. State*, No. 11-03-00403-CR [2005 Tex. App. Lexis 3256](#) (Tex. App.—Eastland Apr. 28, 2005) aff’d [206 S.W.3d 646](#) (Tex. Crim. App. 2006). In a family violence assault prosecution, evidence that the defendant “stayed” at the victim’s home multiple nights per week and paid her bills was sufficient to establish defendant and victim were members of the same household.

Hernandez v. State, [280 S.W.3d 384](#) (Tex. App.—Amarillo 2008, no pet.). In a family violence assault prosecution, evidence that defendant and victim were living together at time of offense was sufficient to support finding of family violence.

- (2) [abuse](#), as that term is defined by [Tex. Fam. Code § 261.001\(C\), \(E\) and \(G\)](#), by a member of a family or household toward a child of the family or household;

OR

- (3) dating violence, which is an act by an individual that is:³⁰⁸
- against another individual with whom that person has or has had a dating relationship;

AND

- intended to result in physical harm, bodily injury, assault, or sexual assault;

OR

- a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

[\(Tex. Code Crim. Proc. art. 42.103; Tex. Fam. Code § 71.004; Tex. Fam. Code § 72.0021\)](#)

10.3 *Mandatory fee for probation for offenses against the person.*

If a court sentences a defendant to community supervision probation for an offense under [Tex. Penal Code Title 5](#), the court *must* assess a \$100 fee against the defendant to be paid to a family violence center that receives state or federal funds and is located in the county where the court is located.

[\(Tex. Code Crim. Proc. art. 42.12\(h\)\(11\)\)](#)

³⁰⁸ *Scott v. State*, No. 14-06-00860-CR, [2007 Tex. App. Lexis 9273](#) (Tex. App.—Houston [14th] Nov. 29, 2007, pet. ref'd). In a prosecution for family violence assault where defendant had dated the victim, it was not error to use a prior assault judgment with a finding of family violence that did not specify the familial relationship to elevate the offense from a misdemeanor to felony.

10.4 Collateral consequences.

A finding of family violence against a party (in the pending or in a prior lawsuit, whether civil or criminal), has multiple possible collateral consequences.

In the family law context (divorce or suits affecting the parent-child relationship), such a finding adversely impacts that party's claim to be granted:

- joint managing conservatorship;
- sole or managing conservatorship;
- possessory conservatorship;
- unsupervised access to a child;
- unrestricted electronic communications with a child;

OR

- on-going custody of or access to a child in the face of a request to modify an order to change custody of or restrict access to a child.

A party in a divorce suit who is found to have committed family violence against a spouse may also be required to pay spousal maintenance.

A finding of family violence in a protective order or in a criminal judgment against a defendant may also adversely affect the defendant's right to:

- hold a concealed weapon permit;
- obtain or keep an occupational license issued by the state (e.g., teaching, plumbing, nursing, etc.);³⁰⁹

³⁰⁹ Many occupational licensing agencies require proof of good character before issuing the license and may try to revoke a previously issued license if the licensee is convicted of a crime of moral turpitude. Family violence offenses may be classified as crimes of moral turpitude. See, *Ludwig v. State*, [969 S.W.2d 22, 29](#) (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

- obtain bail;

OR

- obtain permanent residency or citizenship.

10.4.1 Divorce/SAPCR.

10.4.1.1 Spousal maintenance.

A party in a divorce who was been convicted of, or served a deferred adjudication probation³¹⁰ for, an offense that is an act of family violence can be ordered to pay maintenance to the victim-spouse if the violence occurred within two years before the divorce was filed or while the divorce was pending. The order can:

- last up to three years or, if the receiving spouse or a dependent child is incapable of gainful employment, until the spouse or child overcomes the impediment to employment;

AND

- be awarded in the amount of:
 - up to \$2500 per month;

OR

- up to 20 percent of the payor spouse's monthly income.

[\(Tex. Fam. Code § 8.051-8.055\)](#)

10.4.1.2 Joint managing conservatorship.

A finding of family violence:

³¹⁰ *Guillot v. Guillot*, No. 01-06-01039-CV, [2008 Tex. App. Lexis 4831](#) (Tex. App.—Houston, June 26, 2008, no pet.). Spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation.

- destroys the presumption (set out in [Tex. Fam. Code § 153.131](#)) that the parents should be joint managing conservators of the child,

AND

- precludes the appointment of the abusive party as a joint managing conservator of the child.

([Tex. Fam. Code § 153.004\(b\)](#))

10.4.1.3 Sole or managing conservatorship.

A finding of family violence creates a rebuttable presumption that it is not in the child's best interest:

- to appoint the abusive parent as sole or managing conservator,

OR

- to appoint the abusive parent as the conservator with the right to determine the child's primary residence.

([Tex. Fam. Code § 153.004\(b\)](#))

10.4.1.4 Unsupervised visitation.

A finding of family violence creates a rebuttable presumption that it is not in the best interest of the child for the abusive parent to have unsupervised visitation with the child.

([Tex. Fam. Code § 153.004\(e\)](#))

10.4.1.5 Possessory conservatorship.

If there is a finding of family violence, the presumption that the non-managing conservator party should be appointed possessory conservator (set out in [Tex. Fam. Code § 153.191](#)) does not apply unless the court finds that access to the child by that party:

- will not endanger the child;

AND

- can occur without endangering the child or any other victim of the family violence.

[\(Tex. Fam. Code § 153.004\(d\)\)](#)

10.4.1.6 Limited access to a child.

A finding of family violence creates a rebuttable presumption that it is not in the best interests of the child for the child to have unsupervised visitation with the abusive party.

[\(Tex. Fam. Code § 153.004\(e\)\)](#)

10.4.1.7 Limited access to a child with recent violence.

If there has been a finding of family violence within the preceding two years, the court may not allow the abusive party to have access to the child unless the court:

- finds that the access will not endanger the child's physical health or emotional welfare;
- finds that the access is in the child's best interest;

AND

- renders an order of possession that protects the safety of the child and any other person who has been a victim of the abusive party (which may include restrictions on visitation, exchange of the child, abstention from intoxicants, and completion of counseling).

[\(Tex. Fam. Code § 153.004\(d\)\)](#)

10.4.1.8 Limited electronic communication with a child.

If there has been a finding of family violence, the court can award periods of electronic communication with a child only if the parties mutually agree to such access in a written document

that specifies all restrictions relating to family violence or supervised visitation that are legally required to be in a possession order.

[\(Tex. Fam. Code § 153.015\)](#)

10.4.1.9 Modification of a child custody order.

If a party to a child custody order is convicted or placed on deferred adjudication for a crime of child abuse or family violence, the entry of the judgment is a material and substantial change that justifies modifying a child custody order to change conservatorship or access to a child to conform with [Tex. Fam. Code § 153.004\(d\)](#).

[\(Tex. Fam. Code §§ 153.103-153.104\)](#)

10.4.2 Possession of firearms.

If a party is found to have committed family violence in a civil protective order case or in a criminal judgment, the party is prohibited from possessing a firearm and is ineligible for a concealed handgun license:

- if the finding is in a protective order issued after a due process hearing, for the duration of the protective order (i.e., up to two years);

OR

- if the finding is in a criminal judgment (misdemeanor or felony), the prohibition lasts until the conviction is expunged or set aside, or the defendant is pardoned with his civil liberties restored by the jurisdiction where he was convicted.³¹¹

³¹¹ The federal ban on firearms possession in [18 U.S.C. § 922\(g\)](#) does not explicitly state that the ban is permanent and, in fact, it can be lifted in certain instances. In the Act's definition section at [18 U.S.C. 921\(a\)\(20\)](#), the ban on firearms possession can be lifted in three circumstances: if the defendant is pardoned (and the pardon contains a specific restoration of civil liberties)³¹¹; if the conviction is expunged; or if the defendant has his civil rights restored. See *Beecham v. United States*, [511 U.S. 368](#) (1994).

NOTE: The court must admonish a defendant convicted of a family violence offense or who is the subject of a protective order proceeding that the entry of the conviction for the family violence offense or the entry of the protective order against him triggers a federal prosecution against him or her under [18 U.S.C. § 922](#) or under [Tex. Penal Code § 46.064](#) if that individual is found to be in possession of a firearm at a subsequent time.

[\(18 U.S.C. §§ 921\(a\)\(20\) and 922\(g\); Tex. Penal Code § 46.04; Tex. Gov't Code §§ 411.171\)](#)

10.4.3 Occupational licenses.

A finding of family violence in a civil or criminal judgment may be used against a party seeking an occupational license from a state licensing agency. Licensing agencies may condition issuance or renewal of occupational licenses upon showing of good character. A conviction for a crime of moral turpitude may prevent a showing of the required good character.³¹² Licensing agencies routinely review the criminal history of licensees for past or recent criminal convictions or deferred adjudication probations to evaluate good character for licensing purposes. A finding of family violence may be cited by the licensing agency as a basis for a finding of lack of good character that merits denial or revocation of an occupational license.

[\(Tex. Occ. Code Ch. 53\)](#)

10.4.4 Bail.

A finding of family violence may be used:

- in a bail hearing, to justify holding the accused for an additional 24 to 48 hours;

OR

³¹² *Ludwig v. State*, [969 S.W.2d 22, 29](#) (Tex. App.—Fort Worth 1998, pet. ref'd). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

- to impose stay-away orders and other restrictions as a condition of bond.

[\(Tex. Code Crim. Proc. art. 17.29](#) [Tex. Code Crim. Proc. art. 17.291;](#)
[Tex. Code Crim. Proc. art. 17.40\)](#)

10.4.5 Immigration issues.

10.4.5.1 Adjustment of immigration status.

Multiple criminal convictions or a conviction for a crime of moral turpitude render an immigrant ineligible for adjustment of immigration status (e.g., from obtaining lawful permanent residency) or citizenship.

[\(8 U.S.C. § 1182\(a\)\)](#)

10.4.5.2 Removal (denial of lawful admission or deportation).

A criminal conviction for a domestic violence offense subjects the immigrant defendant to removal or denial of entry.

10.4.5.3 Admonishments.

The court should timely admonish a defendant convicted of a family violence offense or who is the subject of a protective order proceeding that the entry of the conviction for the family violence offense or the entry of the protective order against him may affect his immigration status. The court should further inform the defendant that the conviction or deferred adjudication probation or a violation of a protective order could result in deportation or make it impossible for the defendant to obtain legal alien status.

[\(8 U.S.C. § 1227\(a\)\(2\)\(E\)\)](#)

10.4.6 Military.

After a defendant is convicted of, or placed on deferred adjudication probation for, a crime that constitutes family violence, the clerk shall send notice of the conviction or probation to the staff advocate general

or the provost marshal of the military installation to which the defendant is assigned.

[\(Tex. Code Crim. Proc art. 42.0182\)](#)

10.5 Required finding in crimes motivated by bias or prejudice.

Under the James Byrd, Jr. Hate Crimes Act, if at the guilt/innocence phase of the trial, the trier-of-fact determines, beyond a reasonable doubt,³¹³ that the defendant selected the crime victim or victim's property based on bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender or sexual preference, the court must include that finding in the judgment and sentence.³¹⁴

[\(Tex. Code Crim. Proc art. 42.014\)](#)

A finding that the crime was motivated by bias or prejudice against an identified group is necessary to support a request for enhanced punishment under [Tex. Penal Code § 12.47](#). The enhancement increases the punishment to that of the next highest category of offenses. But for two categories, the enhancement is limited:

- For Class A misdemeanor offenses, the enhanced punishment is to a minimum of 180 days in jail, rather than to a felony (this exception does not apply if the motivation for the offense was the victim's disability).
- For non-capital first degree felonies, there is no increased punishment. [\(Tex. Penal Code § 12.47\)](#)

When a request for such a finding is made, the clerk of the court must report whether the request was granted and whether the finding was included in the judgment of the case.

[\(Tex. Code Crim. Proc. art. 2.211\)](#)

³¹³ *Ex parte Boyd*, [58 S.W.3d 134](#) (Tex. Crim. App. 2001). The trier-of-fact (in this case, the jury) must decide, using the beyond a reasonable doubt standard whether the crime was motivated by bias or prejudice under [Tex. Code Crim. Proc art. 42.014](#). Citing *Apprendi v. New Jersey*, [530 U.S. 466](#) (2000), the court held that it is unconstitutional for a legislature to remove from the jury the assessment of facts [other than the fact of a prior conviction] that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

³¹⁴ *Brenneman v. State*, [45 S.W.3d 729](#) (Tex. App.—Corpus Christi 200, no pet.). In a prosecution for assault, [Tex. Code Crim. Proc. art. 42.014](#) was not void for vagueness and the finding that the defendant committed the crime due to bias against homosexuals was proper.

Subchapter B
Offenses against the person
(Tex. Penal Code Title 5)

10.6 Homicide (Penal Code Chapter 19).

Criminal homicide includes murder, capital murder, manslaughter, and criminally negligent homicide. Causing the death of another person is:

- **First degree felony murder** if the act is committed:
 - intentionally or knowingly to cause a death;
 - OR**
 - in the course of an attempt to cause serious bodily injury that involves an act clearly dangerous to human life;³¹⁵
 - OR**
 - in the course of committing or attempting to commit a felony crime.
- **Second degree felony murder** if the act is committed:
 - intentionally or knowingly to cause a death;
 - OR**
 - in the course of an attempt to cause serious bodily injury that involves an act clearly dangerous to human life;
 - OR**
 - in the course of committing a felony while under the immediate influence of a sudden passion arising from an adequate cause.

³¹⁵ *Gil v. State*, No. 05-03-1622-CR and 05-03-1623-CR, [2004 Tex. App. Lexis 9028](#) (Tex. App.—Dallas, Oct. 13, 2004, pet. ref'd). In a prosecution for stalking and attempted capital murder, evidence that the defendant threatened, pushed, and shot the victim (his wife) was legally and factually sufficient to establish the offenses.

[\(Tex. Penal Code § 19.02\)](#)

- **Second degree felony manslaughter** occurs if the homicide results from an act that is reckless.

[\(Tex. Penal Code § 19.04\)](#)

- **State jail felony criminally negligent homicide** if the death is caused by criminally negligent conduct.

[\(Tex. Penal Code § 19.05\)](#)

Finding of family violence: For any degree of the offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

NOTE: In a homicide prosecution when the relationship between the defendant and the deceased is a material issue, evidence of prior domestic violence is admissible under [Tex. Code Crim. Proc. art. 38.36\(a\)](#) and [Tex. R. Evid. 404\(b\)](#).³¹⁶

10.7 Unlawful restraint (Penal Code §§ 20.01 and 20.02).

10.7.1 Class A misdemeanor unlawful restraint.

Unless the defendant was a relative of a child under 14 years old and the restraint was committed with the sole intent to obtain lawful custody of the child, it is an offense for:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- to restrain, which means acting to restrict a person's movements as to

³¹⁶ *Garcia v. State*, [201 S.W.3d 695](#) (Tex. Crim. App. 2006). TRE 404(b) does not block the admission of all relationship evidence.

- substantially interfere with the person's liberty

OR

- move the person from place to place³¹⁷

OR

- confine the person³¹⁸

- another person
- without consent, which means the restraint is accomplished by:
 - force, intimidation, or deception

OR

- by any means, including the victim's agreement, if the victim is:
 - ❖ a child under 14 years of age;

OR

- ❖ an incompetent person for whom consent to restrain has not been obtained;

OR

- ❖ a child between the ages of 14 and 17 years who is taken outside the state **and** outside of a 120-mile radius of the child's home without consent of parent, guardian, or person or institution acting as a parent.

³¹⁷ *Mendoza v. State*, No. 07-06-0200-CR, [2007 Tex. App. Lexis 8275](#) (Tex. App.—Amarillo Oct. 18, 2007, no pet.). In a prosecution for aggravated kidnapping, evidence that the defendant lured the victim (his girlfriend) into his car by false representations and without her consent drove to another county was sufficient to establish restriction of victim's liberty and prove the lesser offense of unlawful restraint.

³¹⁸ *Mazumder v. State*, No. 05-04-01866-CR, [2006 Tex. App. Lexis 5235](#) (Tex. App.—Dallas, June 20, 2006, pet. ref'd). In a prosecution for unlawful restraint, the defendant was not entitled to an instruction on necessity defense because he did not admit to the offense and because there was no evidence that he restrained his victim (his girlfriend) in her house to prevent imminent harm to her. The victim's statements to her daughter and to police immediately after the defendant released her were admissible.

[\(Tex. Penal Code § 20.02\(a-b\)\)](#)

10.7.2 State jail felony unlawful restraint.

It is a state jail felony to unlawfully restrain a child under 17 years of age.

[\(Tex. Penal Code § 20.02\(c\)\(1\)\)](#)

10.7.3 Third degree felony unlawful restraint.

It is a third degree felony to unlawfully restrain a person if:

- the defendant recklessly exposes the restrained person to a substantial risk of serious bodily injury;

OR

- the person restrained is a public servant;

OR

- the defendant is in custody when the restraint occurs.

[\(Tex. Penal Code § 20.02\(c\)\(2\)\)](#)

10.7.4 Finding of family violence.

For any degree of the offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.7.5 Affirmative defense.

It is an affirmative defense that:

- the person restrained was a child older than 14 but younger than 17 years of age;

AND

- the restraint did not occur due to force, intimidation, or deception;

AND

- the defendant was not more than three years older than the restrained child.

([Tex. Penal Code § 20.02\(e\)](#))

10.8 Kidnapping (Penal Code §§ 20.03-20.04).

10.8.1 Third degree felony kidnapping.

There are two manner and means to commit the offense.

10.8.1.1 First manner and means-secreting.

The elements of the offense are:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- abducts³¹⁹ (which means to restrain a person with intent to prevent liberation) another person by
- secreting or holding the person in a place where the person is not likely to be found.³²⁰

10.8.1.2 Second manner and means-deadly force.

³¹⁹ *Mayer v. State*, [274 S.W.3d 898](#) (Tex. App.—Amarillo 2008), aff'd *Mayer v. State*, [2010 Tex. Crim. App. Lexis 100](#) (Tex. Crim. App., Mar. 24, 2010). In an aggravated kidnapping prosecution, the defendant was not entitled to jury charge on lesser included offense of unlawful restraint because the evidence proved, rather than negated, that the defendant abducted his wife.

³²⁰ *Rios v. State*, [230 S.W.3d 252](#) (Tex. App.—Waco 2007, pet. ref'd). In a prosecution for aggravated kidnapping, evidence that the defendant restrained his girlfriend in a car was sufficient to prove he held her in a place where she was unlikely to be found.

The elements of the offense are:

- a person, which includes an individual, association, or corporation
- intentionally or knowingly
- abducts³²¹ (which means to restrain a person with intent to prevent liberation) another person by
- using or threatening to use deadly force.³²²

[\(Tex. Penal Code § 20.03\)](#)

10.8.2 First degree felony aggravated kidnapping.

There are eight ways to commit the offense.

10.8.2.1 First manner and means-ransom.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- hold the person for ransom or reward.

10.8.2.2 Second manner and means-use as hostage.

³²¹ *Mayer v. State*, [274 S.W.3d 898](#) (Tex. App.—Amarillo 2008), aff'd *Mayer v. State*, [2010 Tex. Crim. App. Lexis 100](#) (Tex. Crim. App., Mar. 24, 2010). In an aggravated kidnapping prosecution, the defendant was not entitled to jury charge on lesser-included offense of unlawful restraint because the evidence proved, rather than negated, that the defendant abducted his wife.

³²² *Kenny v. State*, [292 S.W.3d 89](#) (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). In a prosecution for kidnapping, evidence that the defendant assaulted and placed a rope around his victim's neck that briefly interfered with victim's ability to breath and threatened to torture the victim (his girlfriend) was sufficient to establish the defendant used deadly force to kidnap the victim.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- use the person as a shield or hostage.³²³

10.8.2.3 Third manner and means-flight from felony.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- facilitate the commission of, or flight from, a felony or attempt to commit a felony.

10.8.2.4 Fourth manner and means-inflict bodily injury.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly

³²³ *Jenkins v. State*, [248 S.W.3d 291](#) (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). In a prosecution for aggravated kidnapping, evidence that the defendant broke into his former girlfriend's apartment and held several people at gunpoint was sufficient to show that the defendant took hostages as that term is used in Penal Code. 20.04.

Solis v. State, No. 01-02-01069-CR, NO. 01-02-01070-CR, [2004 Tex. App. Lexis 2717](#) (Tex. App.—Houston [1st Dist.] Mar. 25, 2004, no pet.). In an aggravated kidnapping prosecution, the defendant's 4-year-old son could not acquiesce to being held hostage by defendant who had a gun in one hand and son in his lap during standoff with police after the defendant had shot another person.

- abducts another person with the intent to
- inflict bodily injury on the person.³²⁴

10.8.2.5 Fifth manner and means-sexually abuse.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- sexually abuse or violate the person.³²⁵

10.8.2.6 Sixth manner and means-terrorize.

The elements of the first degree felony offense are:

³²⁴ *Girdy v. State*, [175 S.W.3d 877](#) (Tex. App.—Amarillo 2005, pet. ref'd). In an aggravated kidnapping prosecution, evidence that the defendant poked the victim (his girlfriend) with a knife, threatened to kill her, and forced her into his car was sufficient to establish his intent to inflict bodily injury.

Mason v. State, [905 S.W.3d 570](#) (Tex. Crim. App. 1995). In a murder prosecution, the evidence established that the defendant kidnapped the victim (his wife), whom he restrained with bonds and gags, placed in his car trunk, and drove to a remote location before killing her.

Stephenson v. State, [255 S.W.3d 652](#) (Tex. App.—Fort Worth 2008, pet. ref'd). In a prosecution for aggravated kidnapping, aggravated assault, and retaliation, evidence that the defendant burned the victim (his girlfriend) with a torch, assaulted her, locked her in trunk, and threatened her children was sufficient to support conviction.

Flores v. State, No. 11-06-00088-CR, [2007 Tex. App. Lexis 5670](#) (Tex. App.—Eastland, July 19, 2007, no pet.). In a capital murder prosecution, there was sufficient evidence to support jury finding that the defendant had kidnapped his girlfriend before he shot her because the evidence showed that the defendant approached the victim with a shotgun, shot at officers trying to rescue her, and continued to restrain her until she died.

³²⁵ *LaPointe v. State*, [196 S.W.3d 831](#) (Tex. App.—Austin 2006), aff'd *La Pointe v. State*, [2007 Tex. Crim. App. Lexis 505](#) (Tex. Crim. App., Apr. 25, 2007). In an aggravated kidnapping, sexual assault, and assault family violence prosecution, the defendant was not entitled to use evidence of his victim's (the mother of his child) sexual history or alleged mental illness nor was he entitled to exclude evidence of sexual assault of victim during the kidnapping just because that assault occurred in another county.

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- terrorize the person or a third person.

10.8.2.7 Seventh manner and means-interference with government function.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person with the intent to
- interfere with the performance of a governmental function

10.8.2.8 Eighth manner and means-deadly weapon.

The elements of the first degree felony offense are:

- a person, which includes an individual, association, or corporation,
- intentionally or knowingly
- abducts another person
- exhibits a deadly weapon during the abduction.³²⁶

³²⁶ *Walker v. State*, No. 14-05-00692-CR, [2006 Tex. App. Lexis 7104](#) (Tex. App.—Houston [14th Dist.], Aug. 10, 2006, pet. ref'd). In an aggravated kidnapping prosecution, evidence that the defendant threatened his girlfriend with a gun and forced her to go with him in his car was legally and factually sufficient to support conviction.

10.8.3 Second degree felony aggravated kidnapping.

If the defendant proves by a preponderance of the affirmative evidence that the aggravated kidnapping ended with the voluntary release of the abducted person, the offense is a second degree felony.³²⁷

([Tex. Penal Code § 20.04](#))

10.8.4 Finding of family violence.

For any degree of the offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.8.5 Affirmative defense.

It is an affirmative defense that the defendant:

- did not couple the abduction with the intent to use or to threaten to use deadly force;

AND

- was a relative of the person abducted;

AND

³²⁷ *Ballard v. State*, [161 S.W.3d 269](#) (Tex. App.—Texarkana 2005) aff'd [193 S.W.3d 916](#) (Tex. Crim. App. 2006). In an aggravated kidnapping prosecution, the defendant was not entitled to lesser punishment because leaving his victim (his girlfriend) alone in a car with opportunity to escape was not the functional equivalent of releasing her in a safe place.

Cooks v. State, [169 S.W.3d 288](#) (Tex. App.—Texarkana 2005, pet. ref'd). In an aggravated kidnapping prosecution, the defendant was not entitled to mitigation of punishment for voluntarily releasing the victim (his girlfriend) because he took her to the hospital for medical care because the defendant had gun and tried to prevent the victim from speaking to hospital staff, who rescued her.

Patterson v. State, [121 S.W.3d 22](#) (Tex. App.—Houston [1st Dist.] 2003 pet. ref'd). In an aggravated kidnapping prosecution, the defendant was entitled to have punishment reduced to lesser felony because although he premised release of children upon wife's promise she had not called the police, "voluntary release" can include a release premised upon the act of another.

- had the sole intent of assuming lawful control of the victim.³²⁸

10.9 Trafficking of persons (Penal Code Chapter 20A).

10.9.1 Forced labor or services defined.

As of September 1, 2011, the definition of forced labor or services is another's labor or services, other than labor or services that constitute sexual conduct, obtained through the actor's use of force, fraud, or coercion except for labor or services that constitute sexual conduct.³²⁹

An example of this offense is forcing an undocumented person to work as a domestic by threatening to report the person to immigration authorities.³³⁰

([Tex. Penal Code § 20A.01\(2\)](#))

10.9.2 Manner and means.

The elements of the offense are:

³²⁸ *Lugo v. State*, [923 S.W.2d 598](#) (Tex. App.—Houston [1st Dist.] 1995, no pet.). In a prosecution for kidnapping, despite the fact that the defendant was the biological parent and had a valid birth certificate for the child, the defendant was not entitled to a jury instruction based on mistake of fact based on his believe he was the parent of the abducted child and so was entitled to assert control of the child.

In re SAP, No. 07-06-0045-CV, [2007 Tex. App. Lexis 7523](#) (Tex. App.—Amarillo, Sept. 14, 2007, no pet.). In a prosecution for kidnapping, the defendant was not guilty of kidnapping for keeping child from visiting father when he had not performed required drug tests because the defendant was the sole managing conservator of the alleged victim (her child) and had authority to condition father's supervised visits with the child based on the results of his drug and alcohol tests.

Rider v. State, No. 04-08- 00542-CR, [2009 Tex. App. Lexis 8840](#) (Tex. App.—San Antonio, Nov. 18, 2009, no pet.). In a kidnapping prosecution, the defendant had the burden of proof on the affirmative defenses available under [Tex. Penal Code § 20.03\(b\)](#).

³²⁹ Prior to September 1, 2011, the definition was labor or services obtained by: (1) causing or threatening to cause bodily or creating a belief that bodily injury will occur; (2) restraining or threatening to restrain a person or creating a belief that restraint will occur; (3) knowingly destroying, concealing, removing, confiscating, or withholding, or threatening any of these actions, government records, identifying information, or personal property; (4) threatening the person with an abuse of the law or legal process; threatening to report a person to immigration or other law enforcement officials, (5) extorting or blackmailing a person; (6) exerting financial control or using a person as security for a debt; or (7) causing, by any means, a belief that a person will be subject to serious harm or restraint if the person does not provide the labor or services.

³³⁰ *Ramos v. State*, No. 13-06-00646-CR, [2009 Tex. App. Lexis 7837](#) (Tex. App.—Corpus Christi, Oct. 8, 2009, no pet.). In a prosecution for trafficking of a person, the defendant forced the victim, an undocumented worker, to work as the defendant's maid without pay under threat of reporting the victim to immigration authorities.

- a person
- knowingly
- traffics, which means to transport, entice, recruit, harbor, provide, or otherwise obtain a person by any means,
- another person with the intent that the other person will engage in forced labor or services

OR

- benefits from trafficking, including by knowingly receiving forced labor or services of another person

OR

- traffics another person, or benefits from such trafficking, when the trafficked person engages in prostitution (or promoting or compelling prostitution)

OR

- engages in sexual conduct with a trafficked and prostituted person

OR

- traffics a child, or benefits from such trafficking of a child, with intent to use the child in forced service or labor or receives a benefit from trafficking of a child

OR

- traffics a child, or benefits from the child trafficking, and causes the trafficked child to engage in or become the victim of continuous sexual abuse, indecency with a child, sexual assault, aggravated sexual assault, prostitution, promotion of prostitution, sexual performance by a child, employment harmful to a child or possession or promotion of child pornography.

NOTE: Victims of human trafficking have a right to use an official pseudonym in all proceedings and records relating to the offense. See [Tex. Code Crim. Proc. art. 57D.02](#).

([Tex. Penal Code § 20A.02](#))

10.9.3 Degrees felony trafficking of persons; venue.

The offense is a second degree felony unless it involves the forced labor or service involves a child victim or the offense results in the death of the person being trafficked, in which case it is a felony of the first degree.³³¹

Venue lies either in the county where the offense was committed or in any county through which the victim was improperly taken.

([Tex. Penal Code § 20A.02\(b\)](#); [Tex. Code Crim. Proc. art. 13.12](#))

10.9.4 Finding of family violence.

For any degree of the offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.10 Assault and family violence assault (Penal Code § 22.01).

10.10.1 Class C assault—by threat or offensive contact.

There are two ways to commit the offense.

10.10.1.1 First manner and means—threat.

The elements of the offense are:

³³¹ *Buggs v. State*, Nos. 05-07-0676-CR, 05-0-0677-CR, 05-07-00749-CR (Tex. App.—Dallas, Feb. 29, 2008, pet. ref'd). In a prosecution for trafficking of persons, aggravated kidnapping, and compelling prostitution, evidence was factually sufficient to support jury's finding that the defendant took minor female to his residence, physically abused her, restrained her movement, had her engage in prostitution and took her earnings as the jury was the sole arbiter of the credibility of the witnesses.

- a person (the defendant)
- intentionally or knowingly
- threatens bodily injury to
- another person, including the defendant's spouse.

NOTE: For purposes of a jury charge, assault by threat and assault by injury are separate offenses.³³²

[\(Tex. Penal Code § 22.01\(a\)\(2\)\)](#)

10.10.1.2 Second manner and means—offensive contact.

The elements of the offense are:

- a person (the defendant)
- intentionally or knowingly
- caused physical contact with
- another person, including the defendant's spouse,
- when the defendant knows or should reasonably believe that the other person will regard the contact as offense or provocative.

[\(Tex. Penal Code § 22.01\(a\)\(3\)\)](#)

10.10.2 Class A assault with bodily injury.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly³³³

³³² *Dolkart v. State*, [197 S.W.3d 887](#) (Tex. App.—Dallas 2006, pet. ref'd).

- causes bodily injury³³⁴ to
- another person, including the defendant's spouse.

[\(Tex. Penal Code § 22.01\(a\)\(1\)\)](#)

10.10.3 Class A assault by threat or offensive contact (with elderly or disabled person).

The elements of the offense are:

- a person
- intentionally, knowingly, or recklessly
- threatens imminent bodily injury to³³⁵

OR

- causes offensive or provocative physical contact with
- another person who is elderly or disabled.

[\(Tex. Penal Code § 22.01\(a\)\(2\) and \(c\)\)](#)

³³³ *Williams v. State*, [216 S.W.3d 44](#) (Tex. App.—Waco 2007, no pet.). In a family violence assault prosecution, the defendant was entitled to acquittal after the victim (his wife) recanted and there was no evidence establishing the defendant intentionally, knowingly, or recklessly committed an assault by pulling the victim's hair as she attempted to drive away.

³³⁴ *Bufkin v. State*, [207 S.W.3d 779](#) (Tex. Crim. App. 2006). In a prosecution for family violence assault, the defendant was entitled to a defensive jury instructions because consent is a defense if the bodily injury is not serious and at trial the victim recanted her allegations that the defendant struck her without provocation in the face and bit her on her body and testified that the defendant struck her in self-defense and the bites were consensual "love bites."

White v. State, [201 S.W.3d 233](#) (Tex. App.—Fort Worth 2006, pet. ref'd). In a prosecution for family violence assault, the defendant was not entitled to a jury charge on defense of a third person based on his assertion that he struck the victim (his wife) to protect her because she endangered herself by interfering with his driving.

³³⁵ *Olivas v. State*, [203 S.W.3d 341](#) (Tex. Crim. App. 2006). In an aggravated assault by threat and stalking prosecution, evidence that the victim (the defendant's ex-girlfriend) noticed two popping sounds as if rocks had hit her truck after the defendant shot at her was sufficient to should she perceived the threat at the time the assault occurred.

10.10.4 Finding of family violence.

For any degree of the foregoing assaultive offenses, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.10.5 Second degree felony *family violence* assault—prior conviction *and* strangulation.

The elements of the offense are:

- a person (the defendant)
- who has been previously convicted
 - by being adjudged guilty
- OR**
- by being placed on deferred adjudication probation after entering a plea of guilt or *nolo contendere*
- OR**
- by being convicted in another state of an offense that has substantially the same elements as the following crimes of family violence: assault; homicide; indecency with a child; or continuous violence against the family;
- intentionally, knowingly, or recklessly
- causes bodily injury to
- another person who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code),

AND

➤ during the assault, impeded the victim's normal breathing or circulation of blood by

- applying pressure to the victim's throat

OR

- blocking the victim's nose or mouth.

[\(Tex. Penal Code § 22.01\(b-1\) and \(f\)\)](#)

10.10.6 Third degree felony *family violence* assault—prior conviction *or* strangulation.

There are two ways to commit a third degree felony aggravated family violence assault.

10.10.6.1 First manner and means--prior conviction.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly
- causes bodily injury to
- another person who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code)
- when the defendant has been previously convicted
 - by being adjudged guilty

OR

- by being placed on deferred adjudication probation after entering a plea of guilt or *nolo contendere*

OR

- by being convicted in another state
- of an offense that has substantially the same elements as the following crimes of family violence: assault; homicide; indecency with a child; or continuous violence against the family.

[\(Tex. Penal Code § 22.01\(b\)\(2\)\(A\) and \(f\)\)](#)

10.10.6.2 Second manner and means--strangulation.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly
- causes bodily injury to
- another person (the victim) who is a member of the defendant's family or household, or with whom the defendant had a dating relationship (as defined in the Texas Family Code)

AND

- during the assault, the defendant impeded the victim's normal breathing or circulation of blood by
 - applying pressure to the victim's throat

OR

- blocking the victim's nose or mouth.

[\(Tex. Penal Code § 22.01\(b\)\(2\)\(B\)\)](#)

10.10.7 Reckless mental state

10.10.7.1 Charging instrument.

If the information or indictment alleges the culpable mental state of “recklessness,” the charging instrument must allege with reasonable certainty the act or acts relied upon to constitute the “recklessness”; a charging instrument is insufficient if it just alleges the accused acted “recklessly” in committing an offense. ([Tex. Code Crim. Proc. art. 21.15](#))

10.10.7.2 Jury charge.

The culpable mental states are defined in [Tex. Penal Code § 6.03](#) and those definitions should be used in the jury charge. Because assault is a result-oriented crime, “recklessly” should be defined in the jury charge as:

“A person acts recklessly or is reckless with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.” ([Tex. Penal Code § 6.03\(c\)](#))

10.11 Aggravated assault (Penal Code § 22.02).

10.11.1 Second degree aggravated assault.

There are two ways of committing the offense.

10.11.1.1 First manner and means--serious bodily injury.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly
- causes serious bodily injury to
- another person, including the defendant’s spouse.

([Tex. Penal Code § 22.02\(a\)\(1\)](#))

10.11.1.2 Second manner and means--deadly weapon.

The elements of the offense are:

- a person
- intentionally, knowingly, or recklessly
- exhibits a deadly weapon³³⁶ during the assault of
- another person.

[\(Tex. Penal Code § 22.02\(a\)\(2\)\)](#)

10.11.1.3 Finding of family violence.

For either manner and means of the foregoing assaultive offenses, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.11.2 First degree felony *family violence* aggravated assault.

The elements of the offense are:

- a person (the defendant)
- intentionally, knowingly, or recklessly
- causes serious bodily injury to

AND

- exhibits a deadly weapon during the assault of

³³⁶ *Rogers v. State*, [28 S.W.3d 725](#) (Tex. App.—Texarkana 2001, pet. ref'd). In a prosecution for aggravated assault by threat, the defendant, who shot into his girlfriend's car without hitting her, was not entitled to a jury instruction on deadly conduct because that offense is not a lesser-included offense of aggravated assault by threat.

- another person who is
 - a member of the defendant’s family or household³³⁷

OR

- a person with whom the defendant shared a dating relationship.³³⁸

[\(Tex. Penal Code § 22.02\(b\)\(1\)\)](#)

10.11.3 Notice to military officials.

³³⁷ *Perez v. State*, No. 03-08-715-CR, [2009 Tex. App. Lexis 8963](#) (Tex. App.—Austin, Nov. 20, 2009, no pet.). In a prosecution for aggravated assault of a family member with a deadly weapon, evidence that the defendant fractured his pregnant wife’s wrist by beating or kicking her was sufficient to support the conviction.

³³⁸ *Childress v. State*, [285 S.W.3d 544](#) (Tex. App.—Waco 2009, pet. ref’d). In a prosecution for aggravated assault and dating violence assault, the dating violence assault was not a lesser-included offense of the aggravated assault because the former is not established by proof of the same or less than all the facts required to establish the commission of the aggravated assault. Evidence that the defendant and victim had a sexual relationship and were dating coupled with evidence that defendant set the victim on fire was sufficient to support the convictions.

Williams v. State, No. 01-08-872-CR, [2009 Tex. App. Lexis 8387](#) (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d). In a prosecution for dating relationship aggravated assault with a deadly weapon, victim’s testimony that the defendant (her boyfriend) beat her with a deadly weapon was sufficient to support deadly weapon finding even though weapon itself was never found.

Cepeda v. State, No. 04-04-205-CR, [2006 Tex. App. Lexis 2143](#) (Tex. App.—San Antonio Mar. 22, 2006, no pet.). In a prosecution for aggravated assault with a deadly weapon, the defendant was not entitled to jury instruction on lesser included offense because the knife used to stab the victim (the defendant’s wife) was *per se* a deadly weapon.

Grover v. State, No. 14-04-672-CR, [2005 Tex. App. Lexis 10821](#) (Tex. App.—Houston [14th Dist.], Dec. 15, 2005, pet. ref’d). In a prosecution for family violence aggravated assault by threat with a deadly weapon, although the victim (the defendant’s wife) recanted at trial, evidence of the size and shape of the knife the defendant used to threaten his family supported deadly weapon finding.

Godfrey v. State, No. 14-04-670-CR, [2005 Tex. App. Lexis 4050](#) (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). In a prosecution for aggravated assault with a deadly weapon, the defendant’s verbal threats, the distance between the defendant and the victim (a household member), and the witnesses’ description of the knife supported the jury’s finding that the defendant used a knife as a deadly weapon..

Dotson v. State, No. 12-06-123-CR, [2007 Tex. App. Lexis 4399](#) (Tex. App.—Tyler, June 6, 2007, pet. ref’d). In a prosecution for aggravated assault with a deadly weapon, the victim’s (the defendant’s girlfriend) testimony that defendant cut her face with a knife, coupled with description of the knife, was sufficient to support a deadly weapon finding.

If the defendant who is convicted or given a deferred adjudication probation for an offense under Texas Penal Code Title 5 or for an offense that constitutes family violence under Texas Family Code 71.004 is on active-duty status with the United States military, the clerk of the court must send written notice of the conviction or the deferred adjudication probation to the staff judge advocate or provost marshal of the military installation where the defendant is assigned.

[\(Tex. Code Crim. Proc. art. 42.0182\)](#)

10.12 Sexual assault and aggravated sexual assault (Penal Code §§ 22.011 and 22.021).

10.12.1 Definitions.

- **Child** means a person under 17 years of age.
- **Spouse** means a person who is legally married to another person.
- **“Without consent”** means the act occurred because:
 - of the use of physical force or violence;
 - OR**
 - of threats to use force or violence (against the victim or another person) when the victim believed the actor has the present ability to execute the threat;
 - OR**
 - the victim was unconscious or otherwise unable to resist;
 - OR**
 - the victim lacked the mental capacity to appraise or resist the act;
 - OR**
 - the victim was unaware of the act;

OR

- the victim, without consent, ingested an incapacitating substance;

OR

- the victim was under the control or influence of a:
 - public servant;

OR

- mental health services provider;

OR

- clergyman;

OR

- residential treatment provider or employee.

[\(Tex. Penal Code § 22.011\(b-c\); Tex. Penal Code § 22.021 \(b-c\)\)](#)

10.12.2 Second degree felony sexual assault.

There are eight ways to commit felony sexual assault.

10.12.2.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the victim's consent (4) causes the penetration of the victim's anus or mouth (5) by any means.

10.12.2.2 Second manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the victim's consent (4) causes the person's sexual organ (5) to penetrate the victim's mouth.

10.12.2.3 Third manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) without the consent of the victim³³⁹ (4) causes the victim's sexual organ (5) to contact or penetrate (6) another person's (including the defendant's) mouth, anus, or sexual organ.

10.12.2.4 Fourth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) the penetration of the anus or sexual organ of a child (5) by any means.

10.12.2.5 Fifth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) the penetration of a child's mouth (5) by the defendant's sexual organ.

10.12.2.6 Sixth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between or penetration of a child's sexual organ and (5) the mouth, anus, or sexual organ of any person, including the defendant.

10.12.2.7 Seventh manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between a child's anus and (5) the mouth, anus, or sexual organ of any person, including the defendant.

10.12.2.8 Eighth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) intentionally or knowingly (3) causes (4) contact between a

³³⁹ *Messenger v. State*, No. 02-070270-CR, [2008 Tex. App. Lexis 4357](#) (Tex. App.—Fort Worth 2008, no pet.). In an aggravated sexual assault prosecution, evidence that victim (the defendant's step-daughter) was asleep at the time of the assault was sufficient to prove the element of lack of consent.

child's mouth and (5) the mouth, anus, or sexual organ of any person, including the defendant.

[\(Tex. Penal Code § 22.011\(a\)\)](#)

10.12.2.9 Finding of family violence.

For any manner and means of the foregoing assaultive offenses, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship.

[\(Tex. Code Crim. Proc. art. 42.013\)](#)

10.12.3 First degree aggravated sexual assault (Tex. Penal Code § 22.021).

There are six ways to commit an aggravated sexual assault.

10.12.3.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) causes serious bodily injury to another or attempts to cause the death of the victim or another person.

10.12.3.2 Second manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) causes the victim to fear, or threatens, that death, serious bodily injury, or kidnapping of any person is imminent.

10.12.3.3 Third manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) uses or exhibits a deadly weapon.³⁴⁰

³⁴⁰ *Davis v. State*, No. 05-05-01694-CR, [2007 Tex. App. Lexis 352](#) (Tex. App.—Dallas, Jan. 8, 2007, no pet.). In a prosecution for aggravated sexual assault, although the victim (the defendant's wife) recanted at trial, her statements to witnesses immediately after the assault were admissible as excited utterances; the baseball bat used in the assault was a deadly weapon.

10.12.3.4 Fourth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) acts in concert with a person committing a sexual assault.

10.12.3.5 Fifth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) facilitates the assault by administering rohyponol, gamma hydroxybutyrate, or ketamine to the victim.

10.12.3.6 Sixth manner and means.

The elements of the offense are: (1) a person (the defendant) (2) in the commission of a sexual assault (3) assaults a person who is under 14 years of age, **or** elderly, **or** disabled.

[\(Tex. Penal Code § 22.021\)](#)

10.12.3.7 Finding of family violence.

For any manner and means of the foregoing assaultive offenses, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship.

[\(Tex. Code Crim. Proc. art. 42.013\)](#)

10.13 Continuous sexual abuse of a child (Penal Code § 21.02).

This offense is a first degree felony.

10.13.1 Elements.

The elements of the offense are:

- a person over 17 years of age
- commits two or more acts of sexual abuse

- of a child under the age of 14 years, regardless of how many victims are abused,
- within any continuous 30-day period.

10.13.2 Sexual abuse defined.

Sexual abuse means an act that violates one or more of the following Texas Penal Code sections:

- 20.04(a)(4) (aggravated kidnapping with intent to sexually abuse);
- 20A.02(a)(7-8) (trafficking of persons involving sexual conduct by a child)
- 21.11(a)(1) (indecenty with a child);
- 22.011 (sexual assault);
- 22.021 (aggravated sexual assault);
- 30.02 (burglary with intent to commit sexual assault);
- 43.05(a)(2) (compelling prostitution involving a child)
- 43.25 (sexual performance by a child).

10.13.3 Requirements for “continuous” offense.

- the assaults may have the same or different victims;
- the jury must find that at least two of the alleged assaults occurred within one continuous 30-day period;
- if more than two assaults are alleged, the jury does not have to agree which specific two assaults occurred;
- to separately convict the defendant of one of the assaults alleged to be part of the continuous conduct, the separate assault must be:

- alleged in the alternative;
- have occurred outside the 12-month period;

OR

- be a lesser included offense.

10.13.4 Affirmative defense.

It is an affirmative defense that the defendant:

- was not more than five years older than the youngest victim;
- did not use duress, force, or threats;

AND

- was not required to register as a sexual offender and did not have a reportable offense for a sexual offense.

[\(Tex. Penal Code § 21.02\(a\)\)](#)

10.13.5 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.14 Injury to a child or to an elderly or disabled person (Penal Code § 22.04).

10.14.1 Elements of the offense.

A person commits an offense if the person:

- intentionally, knowingly, recklessly, or with criminal negligence

- causes by act or omission
 - ❖ serious bodily injury,
 - ❖ serious mental deficiency, impairment, or injury,
- OR**
- ❖ bodily injury
- to a child, elderly individual, or disabled individual.

10.14.2 Family violence victim's defense.

It is a defense that the defendant was a victim of family violence; did not cause the injury; and that the defendant did not believe he or she could prevent the perpetrator of family violence from injuring the child or elderly or disabled individual.³⁴¹

[\(Tex. Penal Code § 22.04\(1\)\(2\)\(B\)\)](#)

10.14.3 Penalty ranges.

- **First degree felony.** Intentional or knowing conduct that results in serious bodily injury or serious mental deficiency, impairment, or injury;
- **Second degree felony.** Reckless conduct that results in a serious bodily injury or serious mental deficiency, impairment, or injury;
- **Third degree felony.** Intentional or knowing conduct that results in bodily injury.

[\(Tex. Penal Code § 22.04\)](#)

³⁴¹ **NOTE:** [Tex. Penal Code § 22.04\(1\)\(2\)\(B\)](#) was added in 2005 so it was not an available defense in the following case: *Chapa v. State*, [747 S.W.2d 561](#) (Tex. App.—Amarillo 1988, pet. ref'd). In a prosecution for injury to a child, the evidence was sufficient to convict defendant, who was the victim's managing conservator, based on the failure to seek medical attention for her niece who had been repeatedly beaten by defendant's husband, who also sometimes beat defendant.

10.14.4 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.15 Abandoning or endangering a child (Penal Code § 22.041).

10.15.1 Abandonment defined.

Abandonment of a child means leaving a child in any place without providing reasonable and necessary care for the child under circumstances under which no reasonable, similarly situated adult would leave a child of that age or ability.

([Tex. Penal Code § 22.041\(a\)](#))

10.15.2 Elements of the offense.

There are two ways to commit the offense.

10.15.2.1 First manner and means.

The elements of the offense are: (1) a person (2) intentionally (3) abandons (4) a child for whom the person has care, custody, or control (5) in any place (6) under circumstances that expose the child to an unreasonable risk of harm.

([Tex. Penal Code § 22.041\(b\)](#))

10.15.2.2 Second manner and means.

The elements of the offense are: (1) a person (2) intentionally knowingly, recklessly, or with criminal negligence (3) by act or omission (4) engages in conduct (5) that places a child younger than 15 years of age (6) in imminent danger of death, bodily injury, or physical or mental impairment.

([Tex. Penal Code § 22.041\(c\)](#))

10.15.3 Presumption of danger.

There is a presumption that the child was placed in imminent danger of death, bodily injury, or physical or mental impairment if the actions of the defendant caused the child to be exposed to methamphetamine or a controlled substance in Penalty Group I, Section 481.102, Tex. Health & Safety Code.

[\(Tex. Penal Code § 22.041\(c-1\)\)](#)

10.15.4 Penalty ranges.

An offense under this statute is a:

- state jail felony for:
 - abandonment with intent to return to the child;
- OR**
- abandonment that places a child under 15 years in imminent danger of death, bodily injury, or physical or mental impairment;
- third degree felony for abandonment without the intent to return to the child;
- second degree felony for abandonment of a child under 15 years by a person having care, custody or control of a child under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

[\(Tex. Penal Code § 22.041\(d-f\)\)](#)

10.15.5 Defense.

It is a defense that the person's conduct was to allow a child to practice for or to participate in an athletic event.

[\(Tex. Penal Code § 22.041\(g\)\)](#)

10.15.6 Exception.

It is an exception to this statute that the person voluntarily delivered the child to a designated emergency infant care provider under [Tex. Fam. Code § 262.302](#).

([Tex. Penal Code § 22.041\(h\)](#))

10.15.7 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.16 Deadly conduct (Penal Code § 22.05).

10.16.1 Class A misdemeanor deadly conduct.

The elements of the offense are:

- a person
- recklessly
- engages in conduct that places the victim
- in imminent danger of serious bodily injury.³⁴²

([Tex. Penal Code § 22.05\(a\)](#))

³⁴² *Kingsbury v. State*, [14 S.W.3d 405](#) (Tex. App.—Waco 2000, no pet.). In a prosecution for terroristic threat and deadly conduct, evidence that the defendant threatened to burn his house up with the victim (his wife) inside and tried to set the victim on fire was sufficient to support the convictions.

Williams v. State, No. 10-03-132-CR, [2004 Tex. App. Lexis 8742](#) (Tex. App.—Waco, Sept. 29, 2004, pet. ref'd). In a prosecution for deadly conduct, evidence that the defendant used his car to intentionally bump the victim's (his ex-wife) car into oncoming traffic was sufficient to prove the crime because causing someone to lose control of a vehicle and send the vehicle into oncoming traffic lane is sufficient proof of imminent danger of serious bodily injury.

10.16.2 Third degree felony deadly conduct.

The elements of the offense are:

- a person
- knowingly
- with recklessness disregard of occupancy
- discharges a firearm in the direction of
 - ❖ one or more individuals

OR

- ❖ a habitation, building, or vehicle.³⁴³

[\(Tex. Penal Code § 22.05\(b\)\)](#)

10.16.3 Recklessness presumed.

Whether or not the defendant believed the firearm to be loaded, recklessness and danger are presumed if the defendant knowingly pointed the firearm at or in the direction of another.

[\(Tex. Penal Code § 22.05\(c\)\)](#)

10.16.4 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of

³⁴³ [Tex. Penal Code § 30.01](#) defines these terms.

Building means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

Habitation is a structure or vehicle adapted for the overnight accommodation of persons.

Vehicle includes any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as habitation.

the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

10.17 Terroristic threat (Penal Code § 22.07).

10.17.1 Elements of the offense.

A person commits an offense if the person:

- threatens to commit any offense involving violence
- to any person or property
- with intent to
- place any person in fear of imminent serious bodily injury.³⁴⁴

([Tex. Penal Code § 22.07\(a\)](#))

10.17.2 Level of offense.

A terroristic threat is a Class A misdemeanor.

([Tex. Penal Code § 22.07\(c\)](#))

10.17.3 Finding of family violence.

For either manner and means of the foregoing offense, the court must include a finding in the judgment that the crime involved family violence if the evidence proved that the victim was either a member of the defendant's family or household, **or** a person with whom the defendant shared a dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#))

Subchapter C

³⁴⁴ *Cook v. State*, [940 S.W.2d 344](#) (Tex. App.—Amarillo 1997, pet. ref'd). In a prosecution for terroristic threat, evidence was sufficient to support conviction even though the threats by defendant were left on the victim's voicemail when the victim (a former employee of the defendant) was out of town.

Offenses Against the Family **(Tex. Penal Code Title 6)**

10.18 Interference with child custody (Penal Code § 25.03).

This offense is a state jail felony. There are three ways to commit the crime.

10.18.1 First manner and means.

The elements of the offense are: (1) a person (2) takes or retains (3) a child under 18 years of age (4) when the person knows that the taking or retention violates the express terms of a judgment or order (including a temporary or foreign³⁴⁵ order) that disposes of the child's custody.³⁴⁶

10.18.2 Second manner and means.

The elements of the offense are: (1) a person (2) takes or retains (3) a child under 18 years of age (4) if the person has not been awarded custody of the child by a court of competent jurisdiction or knows that a suit for divorce or a civil suit or application for habeas corpus has been filed and takes the child out of the court's geographic jurisdiction without the court's permission and with the intent to deprive the court of jurisdiction over the child;³⁴⁷

10.18.3 Third manner and means.

³⁴⁵ *Perry v. State*, [727 S.W.2d 781](#) (Tex. App.—Austin 1987, pet. ref'd). In a prosecution for interference with child custody, the defendant's violation of a Missouri custody decree violated [Tex. Penal Code § 25.03\(a\)\(1\)](#).

³⁴⁶ *Cabrera v. State*, [647 S.W.2d 654](#) (Tex. Crim. App. 1983). In a prosecution for interference with child custody, the evidence was insufficient to convict the defendant because the custody order was not specific enough to put the defendant on notice that she had lost custody or that taking the child would be a crime.

Garcia v. State, [172 S.W.3d 270](#) (Tex. App.—El Paso 2005, no pet.). In a prosecution for interference with child custody, despite having legal custody of as the child's managing conservator, the defendant could be convicted of the offense for failing to allow the possessory conservator access to the child as required by the court order.

³⁴⁷ *Charlton v. State*, No. 05-05-1043-CR, [2008 Tex. App. Lexis 1989](#) (Tex. App.—Dallas, Mar. 19, 2008, no pet.). In a prosecution for interference with child custody, evidence that the defendant took child out of Texas without the father's or a court's permission was sufficient to support the conviction.

The elements of the offense are: (1) a person (2) takes or retains a child younger than 18 years of age (3) outside the United States with intent to deprive a person entitled to possession of a child of that possession or access and without the permission of that person.

10.18.4 Affirmative defenses and exception.

It is an affirmative defense that: (1) the taking or retention of the child was pursuant to a valid order providing for possession of or access to the child; or (2) the retention of the child was due to circumstances beyond the actor's control and the actor promptly provided notice or made reasonable attempts to provide notice of those circumstances to the other person entitled to possession of or access to the child.

Family violence exception. It is not interference with child custody if the person was entitled to possession of or access to the child and was fleeing commission or attempted commission of family violence, as defined in Tex. Fam. Code § 71.004, against the child or the person.

NOTE: A child taken to avoid family violence is not a “missing child” within the meaning of Tex. Code Crim. Proc. 63.001(3).

[\(Tex. Penal Code § 25.03\)](#)

10.19 *Continuous violence against the family (Penal Code § 25.11).*

This offense is a third degree felony. The elements of the offense are:

- a person (the defendant)
- engages in conduct that constitutes an assault with bodily injury
 - ❖ of a family or household member
- OR**
- ❖ of a person with whom the defendant had a dating relationship
- two or more times

- during a period of less than 12 months.

10.19.1 Purpose.

The statute allows simultaneous prosecution of multiple assaults with bodily injury charged in one indictment and provides for a greater penalty upon conviction than is available for a single incidence of assault. By charging multiple assaults under this statute, the state is able to increase the possible sentence in cases where unadjudicated offenses are not available to enhance the penalty for a single incidence of assault with bodily injury.

10.19.2 Establishing the continuous nature of the offense.

- the type of family violence is limited to assaults with bodily injury;
 - the assaults may have the same or different victims;
 - the jury must find that at least two of the alleged assaults occurred within one continuous 12-month period;
 - if more than two assaults are alleged, the jury does not have to agree which specific two assaults occurred;
 - to separately convict the defendant of one of the assaults alleged to be part of the continuous conduct, the separate assault must be:
 - alleged in the alternative;
 - have occurred outside the 12-month period;
- OR**
- be a lesser included offense.

[\(Tex. Penal Code 25.11\)](#)

- \$500-less than \$1,500 Class A misdemeanor
- \$1,500-less than \$20,000 State jail felony
- \$20,000-less than \$100,000 Third degree felony
- \$100,000-less than \$200,000 Second degree felony
- \$200,000 or more First degree felony

[\(Tex. Penal Code § 28.03\(b\)\)](#)

10.20.5 Interest in property not a defense.

The fact that the defendant in a criminal mischief case had an interest in the affected property is **NOT** a defense if another person also has an interest in the property that the defendant was not entitled to abridge.

[\(Tex. Penal Code § 28.05\)](#)

10.21 Criminal trespass (Penal Code § 30.05).

10.21.1 Class B misdemeanor criminal trespass.

The elements of the offense are:

- a person (the defendant)
- enters or remains on or in property of another³⁴⁹
- intentionally, knowingly, or recklessly (implied culpable mental state)³⁵⁰
- without effective consent³⁵¹
- after the defendant had

³⁴⁹ *Brown v. State*, No. 06-09-18-CR, [2009 Tex. App. Lexis 6485](#) (Tex. App.—July 31, 2009, no pet.). In a prosecution for criminal trespass, evidence that the defendant remained on his father-in-law’s property after being told to leave at least twice was sufficient to support a conviction, even though the defendant did not verbally refuse to leave and eventually left the property before law enforcement arrived.

³⁵⁰ *Holloway v. State*, [583 S.W.2d 376](#) (Tex. Crim. App. 1979). In a prosecution for criminal trespass, the defendant was convicted based on evidence that he entered his father-in-law’s house without consent and demanded to know where his estranged wife was. The conviction was reversed for failure to include a culpable mental state in the jury charge. The culpable mental state of intentionally, knowingly, or recklessly, although set out in [Tex. Penal Code § 30.05](#), is implied in [Tex. Penal Code § 6.05](#).

³⁵¹ *Davis v. State*, [799 S.W.2d 398](#) (Tex. App.—El Paso 1990, pet. ref’d). In a prosecution for criminal trespass, there was no implied consent by virtue of the marital relationship that gave the defendant the right to enter his estranged wife’s apartment that she had rented after their separation, to which he did not have a key, and where he had never lived.

- notice that entry was forbidden³⁵²

OR

- received notice to depart but failed to do so.³⁵³

[\(Tex. Penal Code § 30.05\(a\)\)](#)

10.21.2 Class A misdemeanor criminal trespass.

It is a Class A misdemeanor to commit a trespass:

- in a habitation or shelter center;
- while carrying a deadly weapon;

OR

- on a Superfund site or on or in a critical facility.

[\(Tex. Penal Code § 30.05\(d\)\)](#)

10.22 Exploitation of a child, an elderly person, or a disabled person (Penal Code § 32.53).

10.22.1 Definition of “exploitation.”

“Exploitation” means the illegal or improper use of a child, elderly person, or disabled individual (or the person’s resources), for monetary or personal benefit, profit, or gain.

10.22.2 Elements of the third degree felony offense.

³⁵² *Bradley v. State*, No. 07-05-281-CR, [2007 Tex. App. Lexis 2128](#) (Tex. App.—Amarillo, Mar. 20, 2007, no pet.). In a prosecution for criminal trespass, evidence showed that the defendant was present at his ex-girlfriend’s property after being warned to keep off so it was sufficient to support a conviction.

³⁵³ *Jackson v. State*, No. 14-03-945-CR, [2005 Tex. App. Lexis 3631](#) (Tex. App.—Houston [14th Dist.], May 5, 2005, no pet.). In a prosecution for criminal trespass, evidence that defendant refused to leave his estranged wife’s apartment, where he had never lived and for which he had never paid rent, after arguing with her was sufficient to support the conviction.

A person commits an offense if the person:

- intentionally, knowingly, or recklessly
- causes the exploitation
- of a child, elderly individual, or disabled individual.

[\(Tex. Penal Code § 32.53\)](#)

10.23 Online harassment (Penal Code § 33.07).

10.23.1 Third degree felony online harassment.

The elements of the offense are:

- a person
- uses the name or persona of another person (the victim)
- to create a web page on or to post one or more messages
- on a commercial social networking site
- without obtaining the victim's consent

AND

- with intent to harm, defraud, intimidate, or threaten any person.

[\(Tex. Penal Code § 33.07\(a\)\)](#)

10.23.2 Class A misdemeanor online harassment.

The elements of the offense are:

- a person
- sends an electronic mail message, text message, or similar communication

- that references a name, domain address, phone number, or other item of identifying information belonging to any person (the victim)
- without obtaining the victim's consent;

AND

- with intent to cause a recipient of the communication to reasonably believe that the victim authorized or transmitted the communication;

AND

- with the intent to harm or defraud any person.

Enhancement: This offense becomes a third degree felony if the defendant intended to solicit a response by emergency personnel.

[\(Tex. Penal Code § 33.07\(b\)\)](#)

10.23.3 Definitions.

For purposes of this offense:

- **Commercial social networking site** means any business, organization, or other similar entity operating a website that permits persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication with other users or the creation of web pages or profiles available to the public or to other users. The term does not include an electronic mail program or a message board program.
- **Identifying information** means information that alone or in conjunction with other information that consists of:
 - personal identifiers (including a person's name, Social Security number, date of birth, or government-issued identification number);
 - unique biometric data (fingerprint, voice print, retina or iris image);

- unique electronic identification number, address, routing code, or financial institution account number;
- telecommunication identifying information or access device.

([Tex. Penal Code § 32.51](#); [Tex. Penal Code § 33.07\(f\)](#))

Subchapter E

Offenses Against Public Administration

(Tex. Penal Code Title 8)

10.24 Third degree felony obstruction or retaliation (Penal Code § 36.06).

There are two ways to commit this offense.

10.24.1 First manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) harms or threatens to harm (4) another person (5) by an unlawful act (6) in retaliation for, or on account of, the service or status of another as a public servant, witness,³⁵⁴ prospective witness,³⁵⁵ informant, **or** a person who has reported or intends to report a crime.³⁵⁶

³⁵⁴ *Hartfield v. State*, [28 S.W.3d 69](#) (Tex. App.—Texarkana 2000, pet ref'd). In a prosecution for murder and retaliation, evidence that the defendant publicly threatened to kill his wife if he ever got out of jail for sexual assault charge she had brought against him and that he subsequently strangled her after he was acquitted was sufficient to prove the crime of retaliation.

³⁵⁵ *Schmidt v. State*, [232 S.W.3d 66](#) (Tex. Crim. App. 2009). In a prosecution for retaliation, evidence that the defendant struck the victim (his girlfriend) in retaliation for her services as a prospective witness was sufficient to show that the defendant threatened to harm the victim while he was actually hitting her. The beating that the victim sustained was enough to show that she felt threatened. The threat of harm and the actual harm can arise from the same act and occur simultaneously; the threat need not precede the initial harm.

Busby v. State, No. 08-04-155-CR, [2005 Tex. App. Lexis 4636](#) (Tex. App.—El Paso, June 16, 2005, no pet.). In a prosecution for retaliation, evidence that the defendant struck the victim (his common-law wife) after she admitting speaking to a detective who was investigating the defendant and after she told the defendant she could not provide him an alibi was sufficient to prove the crime.

McNeely v. State, No. 05-98-879-CR, [1999 Tex. App. Lexis 7863](#) (Tex. App.—Dallas, Oct. 22, 1999, pet. ref'd). In a prosecution for retaliation, evidence that the defendant's threat to kill his common-law wife after he was arrested for assaulting her, which was overheard by a jailer while the defendant was

10.24.2 Second manner and means.

The elements of the offense are: (1) a person (2) intentionally or knowingly (3) harms or threatens to harm (4) another person (5) by an unlawful act (6) to prevent or delay the service of another (7) as a public servant, witness, prospective witness, informant, **or** a person who has reported or intends to report a crime.

([Tex. Penal Code § 36.06\(a\)](#))

10.25 *False statement regarding child custody determination made in a foreign country (Penal Code §37.14).*

A person commits a third degree felony offense if the person:

- knowingly
- makes or causes to be made

talking on the telephone to someone, was sufficient to prove the crime even though the wife could not remember the threat.

Archuleta v. State, No. 05-96-1880-CR, [1998 Tex. App. Lexis 1731](#) (Tex. App.—Dallas, Mar. 20, 1998, pet. ref'd). In a prosecution for retaliation, the defendant's threat to burn down her ex-boyfriend's home (which subsequently burned) after she was arrested for burglary of his home was sufficient to convict her of retaliation.

Johnston v. State, [917 S.W.2d 135](#) (Tex. App.—Fort Worth 1996, pet. ref'd). In a prosecution for retaliation as a habitual criminal, the defendant's threat to blow his son's head off if the son called parole officer again after the son had reported prior threat to parole officer was sufficient to convict; however prosecutor's failure to disclose arrest warrant for son was reversible error.

Stephenson v. State, [255 S.W.3d 652](#) (Tex. App.—Fort Worth 2008, pet. ref'd). In a prosecution for aggravated kidnapping, aggravated assault and retaliation, evidence that the defendant burned the victim (his girlfriend) with a torch (which was deadly weapon), assaulted her, locked her in trunk, and threatened her children was sufficient to support convictions.

Plascencia v. State, Nos. 05-08-242-CR and 05-08-243-CR, [2009 Tex. App. Lexis 8546](#) (Tex. App.—Dallas, Nov. 5, 2009, no. pet.). In a prosecution for sexual assault of a child and retaliation, evidence that the defendant threatened to kill his wife and minor stepdaughter (the victim) after he was arrested for sexually assaulting the stepdaughter by placing his penis in her vagina was sufficient to prove both offenses.

³⁵⁶ *Hart v. State*, No. 06-04-50-CR, [2004 Tex. App. Lexis 11439](#) (Tex. App.—Texarkana, Dec. 21, 2004, pet. ref'd). In a prosecution for retaliation, evidence that the defendant called the victim (his elderly, blind aunt) from jail and threatened to assault her because she reported his criminal trespass to the police was sufficient to support the conviction.

Blaylock v. State, No. 05-03-617-CR, [2004 Tex. App. Lexis 9440](#) (Tex. App.—Dallas, Oct. 27, 2004, no. pet.). In a prosecution for retaliation, violation of a protective order, and assault, evidence that the defendant hit and pulled the hair of his live-in girlfriend after she reported his violation of the protective order to the police was sufficient to establish retaliation and assault.

- a false statement relating to a child custody determination (as defined in Texas Family Code § 152.102) made in a foreign country
- and the false statement is made during a hearing held under Texas Family Code Chapter 152 or Chapter 153, Subchapter I.

([Tex. Penal Code § 37.14](#))

10.26 Interference with an emergency telephone call (Penal Code § 42.062).

10.26.1 Class A misdemeanor interference with an emergency telephone call.

There are two ways to commit this offense.

10.26.1.1 First manner and means.

The elements of the offense are: (1) a person (2) knowingly (3) prevents or interferes with (4) another individual’s ability to place an emergency telephone call³⁵⁷ **or** to request assistance in an emergency from (5) a law enforcement agency, a medical facility, **or** another agency or entity that provides for safety.

³⁵⁷ *Jackson v. State*, [287 S.W.3d 346](#) (Tex. App.—Houston [14th Dist.] 2009, no pet.). In a prosecution for interference with emergency telephone call, evidence that the defendant knocked the telephone out of the hand of his live-in girlfriend’s hand after she had announced intention to call police to get him to leave the residence was sufficient to convict.

In re JAG, No. 03-05-4-CV, [2006 Tex. App. Lexis 3531](#) (Tex. App.—Austin, Apr. 28, 2006, no pet.). In a prosecution for interfering with emergency telephone call, evidence that police officer found grandmother upset and at the scene the grandmother admitted being intimidated by juvenile and having fled her home to call 911 after the juvenile disconnected her first 911 call was sufficient to prove offense.

Nolen v. State, No. 13-08-526-CR, [2009 Tex. App. Lexis 9054](#) (Tex. App.—Corpus Christi, Nov. 24, 2009, no pet.). In a prosecution for interfering with emergency telephone call, evidence that the defendant broke into his estranged wife’s house, was enraged, caused the wife to fear for her safety, and grabbed telephone out of her hands before she could dial 911 was sufficient to convict.

Vinson v. State, [221 S.W.3d 256](#) (Tex. App.—Houston [14th Dist.] 2006, rev’d on other grounds [252 S.W.3d 336](#) (Tex. Crim. App. 2008)). In a prosecution for interference with an emergency telephone call and assault, evidence from responding police officer that he responded to a “hang-up 911” call and at the scene the defendant’s girlfriend stated the defendant had assaulted her and knocked the telephone out of her hand when she tried to call 911 was sufficient to prove interference with emergency call offense.

But see, *Matlock v. State*, No. 12-05-413-CR, [2006 Tex. App. Lexis 6753](#) (Tex. App.—Tyler, July 31, 2006, no pet.). In a prosecution for interference with an emergency telephone call, evidence was insufficient to establish the emergency nature of the call even though the defendant entered his estranged wife’s apartment through a window and grabbed the telephone from her hand after she dialed 911 because there was no direct evidence that the wife was afraid of the defendant.

10.26.1.2 Second manner and means.

The elements of the offense are: (1) a person (2) recklessly (3) renders unusable (4) a telephone (5) that would otherwise be used by another person (6) to place an emergency telephone call **or** to request assistance in an emergency from (7) a law enforcement agency, a medical facility, **or** another agency or entity that provides for safety.

10.26.2 State jail felony interference with an emergency telephone call.

If the defendant has previously been convicted of interfering with an emergency telephone call, the subsequent offense is a state jail felony.

10.27 Harassment ([Penal Code § 42.07](#)).

10.27.1 Class B misdemeanor harassment.

There are six ways to commit this offense.³⁵⁸

10.27.1.1 First manner and means—obscenity.

The elements of the offense are: (1) a person (2) with intent to (3) annoy,³⁵⁹ alarm, abuse, torment, **or** embarrass (4) another person (5) communicates (by telephone, in writing, or by

³⁵⁸ *Garcia v. State*, [212 S.W.3d 877](#) (Tex. App.—Austin 2006, no pet.). In a prosecution for aggravated assault with a deadly weapon, family violence felony assault, violation of a protective order, and endangering a child, Penal Code § 25.07 is not facially overbroad or void for vagueness because it prohibits harassing communications. The restriction on speech was limited to the parties subject to the order and necessary due to prior violent or criminal conduct. The term harass in the statute includes a course of conduct directed at a specific person or persons causing or tending to cause substantial distress that has no legitimate purpose.

³⁵⁹ *Karenev v. State*, 2009 Tex. Crim. App. 961 (Tex. Crim. App. 2009), on remand [2009 Tex. App. Lexis 7533](#) (Tex. App.—Fort Worth, Sept. 24, 2009). In a prosecution for harassing estranged wife, the defendant could not raise unconstitutionality of statute for first time on appeal; on remand, evidence that the emails, which concerned the divorce settlement were, at least, annoying, was sufficient to support the conviction.

Smallwood v. State, No. 02-02-438-CR, [2003 Tex. App. Lexis 7167](#) (Tex. App.—Fort Worth Aug. 21, 2003, no pet.). In a prosecution for harassment, evidence that the defendant called her children's stepmother seven times in one day ranting and using foul language was sufficient to establish the calls annoyed the stepmother, and proving the crime.

electronic communication) a comment, request, suggestion, or proposal that is obscene.³⁶⁰

10.27.1.2 Second manner and means—threat.

The elements of the offense³⁶¹ are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (the recipient) (5) threatens (by telephone, in writing, or by electronic communication), in a manner likely to alarm the

³⁶⁰ *Rendon v. State*, No. 03-07-616-CR, [2008 Tex. App. Lexis 8139](#) (Tex. App.—Austin, Oct. 24, 2008, no pet.). In a prosecution for harassment, evidence that the defendant left a recorded telephone message for her stepmother stating that the stepmother was a whore who could only charge fifty cents and used the standard euphemism for sexual intercourse was sufficient to prove the offense.

³⁶¹ *Davidson v. State*, No. 08-03-34-CR, [2005 Tex. App. Lexis 371](#) (Tex. App.—El Paso, Jan. 19, 2005, no pet.). In a prosecution for harassment by making threatening and harassing calls to ex-wife, evidence that the content of the calls was vulgar and contained threats to file felony charges against ill son was sufficient to prove the victim was alarmed, annoyed, and terrified, thus proving the crime.

White v. State, No.01-05-514-CR, [2006 Tex. App. Lexis 4463](#) (Tex. App.—Houston [1st Dist.] pet. ref'd). In a prosecution for harassment of ex-wife with repeated telephone calls, evidence that the defendant called incessantly (up to 2 calls per minute and 329 over eight days) and would not stop when asked was sufficient to prove the offense.

McBride v. State, No. 01.-6-400-CR, [2008 Tex. App. Lexis 3937](#) (Tex. App.—Houston [1st Dist.] pet. ref'd). In a prosecution for harassment of ex-girlfriend by repeated telephone calls, unwanted gifts, and other communications, evidence that the defendant continued to call and attempt to communicate with the victim after being repeatedly asked to stop was sufficient to prove the offense.

Gillenwaters v. State, No. 03-04-77-CR, [2007 Tex. App. Lexis 8525](#) (Tex. App.—Austin, Oct. 25, 2007, pet. ref'd). In a prosecution for harassment of ex-wife, evidence that the defendant called ex-wife's work place repeatedly for 7 straight hours, and up to 40 times an hour during that period, and did not stop after being requested to do so was sufficient to prove the offense.

Owen v. State, No. 06-07-153-CR, [2008 Tex. App. Lexis 2315](#) (Tex. App.—Texarkana, Mar. 4, 2008, no pet.). In a prosecution for harassment, evidence that the defendant repeated called ex-girlfriend and told ex-girlfriend that he would continue to telephone her mother until the mother had a heart attack was sufficient to prove the offense.

Haigood v. State, [814 S.W.3d 262](#) (Tex. App.—Austin 1991, pet. ref'd). In a prosecution for harassment of ex-wife by repeated telephone calls, evidence that the defendant called his ex-wife 26 times in 8 minutes and ignored her repeated requests to stop calling was sufficient to prove the offense. Because the calls were received in Travis County, the offense occurred in that county.

Chatmon v. State, No. 14.97-1422-CR, [1999 Tex. App. Lexis 7643](#) (Tex. App.—Houston [14th Dist.] no pet.). In a prosecution for harassment, evidence that the defendant called his aunt who was in Texas and threatened to kill her and her family was sufficient to prove the offense occurred in Texas because call was received in the state.

But see, *Kramer v. State*, [605 S.W.2d 861](#) (Tex. Crim. App 1980). In a prosecution for harassment, the evidence was insufficient to prove offense because the offending communication, sent to the wife of the defendant's former boyfriend, could not be tied to the defendant as the only connection was a typewritten name on the letter that was the same as the defendant's first name.

recipient (6) to inflict bodily injury³⁶² **or** to commit a felony against the recipient or the family, household member, or property of the recipient.

10.27.1.3 Third manner and means—false report.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) conveys, in a manner reasonably likely to alarm the recipient, a report the defendant knows to be false that another person is dead or has suffered a serious bodily injury.

10.27.1.4 Fourth manner and means—repeated telephone calls.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) causes another person's telephone to ring repeatedly **or** makes the repeated telephone communications anonymously **or** in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

10.27.1.5 Fifth manner and means.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (5) makes a telephone call and intentionally fails to hang up or disengage the connection **or** knowingly permits a telephone under the person's control to be used by another to commit the offense of harassment.

10.27.1.6 Sixth manner and means.

The elements of the offense are: (1) a person (2) with intent to (3) annoy, alarm, abuse, torment, **or** embarrass (4) another person (the recipient) (5) sends repeated electronic

³⁶² *Estep v. State*, No. 05-940584-CR, [1997 Tex. App. Lexis 3056](#) (Tex. App.—Dallas, June 12, 1997, pet. ref'd). In prosecution for harassment, evidence that the defendant telephoned the mother of his child and told her she was going to die when she reported his child abuse to the authorities was sufficient to prove the crime.

communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.³⁶³

10.27.2 Class A misdemeanor harassment.

The offense of harassment is a Class A misdemeanor if the defendant has a prior conviction for that offense.

([Tex. Penal Code § 42.07](#))

10.28 Stalking (Penal Code § 42.072).

10.28.1 Third degree felony stalking.

There are three ways to commit this offense.³⁶⁴

10.28.1.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct³⁶⁵ that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct³⁶⁶ that (6) the defendant knows or reasonably³⁶⁷ believes

³⁶³ *Scott v. State*, Nos. PD-1069-09 and PD-1070-09, [2010 Tex. Crim. App. Lexis 1249](#) (Tex. Crim. App., Oct. 6, 2010). In prosecution for harassment of ex-wife by leaving repeated voice messages, the criminal portion of defendant's conduct (repeated use of telephone to inflict emotional distress by invading another's privacy) did not implicate free speech and was not shown to be unduly vague as to defendant's conduct.

³⁶⁴ *Woodson v. State*, [191 S.W.3d 280](#) (Tex. App.—Waco 2006, pet. ref'd). In a prosecution for stalking, the statute was not unconstitutionally vague.

Accord, *Sisk v. Sisk*, [74 S.W.3d 893](#) (Tex. App.—Fort Worth 2002, no pet.); *State v. Seibert*, [156 S.W.3d 32](#) (Tex. App.—Dallas 2004, no pet.); *Lewis v. State*, [88 S.W.3d 383](#) (Tex. App.—Fort Worth 2002, pet. ref'd); *Battles v. State*, [45 S.W.3d 694](#) (Tex. App.—Tyler 2001, no pet.); *Clements v. State*, [19 S.W.3d 82](#) (Tex. App.—Austin 2003, pet. ref'd.)

³⁶⁵ *Battles v. State*, [45 S.W.3d 694](#) (Tex. App.—Tyler 2001, no pet.). In a prosecution for stalking, element of "conduct" includes speech within the definition of acts. The stalking statute is not facially invalid for failure to define the phrase "pursuant to the same scheme or course of conduct." Between the Penal Code's definition of conduct and the commonly understood meaning of "scheme" and "pursuant to," the statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

³⁶⁶ *State v. Seibert*, [156 S.W.3d 32](#) (Tex. App.—Dallas 2004, no pet.). In a prosecution for stalking, [Tex. Penal Code § 42.072](#) is not unconstitutionally vague because the word "following" as used in the statute was not so broad as to encompass non-criminal activities.

the stalking victim will regard as threatening and that would cause a reasonable person to fear either (7) bodily injury or death to the stalking victim,³⁶⁸ bodily injury or death to a member of

Soto v. State, No. 08-05-0227-CR, [2007 Tex. App. Lexis 9321](#) (Tex. App.—El Paso, Nov. 29, 2007, no pet.). In a prosecution for stalking, evidence that the defendant went to places where he knew the victim would be and engaged in conduct he knew would place her in fear (following her, making inappropriate comments, and grabbing her) was sufficient to prove he followed her and committed the offense.

Medellin v. State, No. 08-04-363-CR, [2006 Tex. App. Lexis 7867](#) (Tex. App.—El Paso, Aug. 31, 2006, no pet.). In a prosecution for stalking, the jury charge did not have to contain the phrase “by following the victim” because that phrase describes a manner of committing crime and is not a required element of the offense.

³⁶⁷ *Sisk v. Sisk*, [74 S.W.3d 893](#) (Tex. App.—Fort Worth 2002, no pet.). In a prosecution for violation of protective order by stalking, evidence that the defendant followed victim (his ex-wife), knew of the protective order, and knew the victim had made complaints to the police about him was sufficient to establish that he knew or reasonably believed the victim would regard his following her as a threat of bodily injury.

Woodson v. State, [191 S.W.3d 280](#) (Tex. App.—Waco 2006, pet. ref’d). In a prosecution for stalking, the statute was not unconstitutionally vague because it incorporated the “reasonable person” standard or because the statute does not require the course of conduct be completed within a specific period of time.

Martinez v. State, No. 03-04-495-CR, [2005 Tex. App. Lexis 7476](#) (Tex. App.—Austin, Sept. 9, 2005, pet. ref’d). In a prosecution for stalking, the defendant’s knowledge that a reasonable person would perceive his conduct as threatening was inferred from his conduct. The defendant followed the victim repeatedly and telephoned repeatedly her to state that he was watching and videotaping her.

³⁶⁸ *Mollett v. State*, No. 05-08-728-CR, [2009 Tex. App. Lexis 2178](#) (Tex. App.—Dallas, Mar. 31, 2009, pet. ref’d). In a prosecution for stalking, evidence that on multiple occasions the defendant threatened to kill the victim (who had dated the defendant briefly) was sufficient to support a conviction for a third degree felony.

Sheffield v. State, No. 06-07-00116-CR, [2008 Tex. App. Lexis 3517](#) (Tex. App.—Texarkana, May 21, 2008, no pet.). In a prosecution for stalking, evidence that the defendant left several threatening messages on victim’s (his ex-girlfriend) telephone answering machine and banged on door of her workplace was legally and factually sufficient to support the conviction.

Lewis v. State, No. 09-06-047-CR, [2007 Tex. App. Lexis 6097](#) (Tex. App.—Beaumont, Aug. 1, 2007, no pet.). In a prosecution for stalking, evidence that over a span of several years, the defendant trespassed on victim’s (ex-girlfriend) property, beat on walls and doors of her residence, threatened to kill her, and pushed her was factually sufficient to prove the offense.

Kahara v. State, No. 01-05-00414-CR, [2006 Tex. App. Lexis 10984](#) (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.). In a prosecution for stalking, evidence that the defendant vandalized the victim (his ex-girlfriend) vehicle, repeatedly drove by the victim’s house, followed her, and demanded she talk to him, was legally and factually sufficient to prove the offense.

Thomas v. State, No. 13-03-655-CR, [2005 Tex. App. Lexis 5990](#) (Tex. App.—Corpus Christi July 28, 2005, no pet.). In a prosecution for stalking, evidence that over the span of 24 years, the defendant continually followed, threatened, assaulted, made harassing telephone calls, and imposed unwanted attention on the victim (his ex-wife) was legally and factually sufficient to prove the offense.

Criswell v. State, No. 08-03-090-CR, [2004 Tex. App. Lexis 1502](#) (Tex. App.—El Paso, Feb. 12, 2004, no pet.). In a stalking prosecution, evidence that the defendant made 34 calls to the victim’s (his ex-wife) residence over 2 days, followed the victim, and waited outside her home was factually sufficient to prove the offense.

the stalking victim's family or household or to an individual with whom the stalking victim has a dating relationship; **or** that an offense will be committed against the stalking victim's property.

10.28.1.2 Second manner and means.

The elements of the offense are: (1) a person (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct that (6) causes the stalking victim or a member of the stalking victim's household or family or an individual with whom the stalking victim has a dating relationship (7) to fear bodily injury or death **or** that an offense will be committed against the stalking victim's property.

10.28.1.3 Third manner and means.

The elements of the offense are: (1) a person (2) on more than one occasion **AND** (3) pursuant to the same scheme or course of conduct that is directed specifically at another person (the stalking victim) (4) knowingly (5) engages in conduct that (6) would cause a reasonable person to fear (7) bodily injury or death of (8) the stalking victim, of the stalking victim's family or household, or of an individual with whom the stalking victim has a dating relationship **or** to fear that an offense will be committed against the stalking victim's property.

Allen v. State, [218 S.W.3d 905](#) (Tex. App.—Beaumont 2007, no pet.). In a prosecution for stalking, the jury could have reasonably found that evidence that the defendant had called the victim (his girlfriend) hundreds of times shortly before she spent the night with him was probative of her fear of him and that he had subjective awareness that his conduct caused the victim to fear bodily injury by him.

Marston v. State, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov.1, 2007, pet. ref'd). In a stalking prosecution, evidence that the defendant made repeated telephone calls to the victim (his ex-girlfriend), attempted to break into her house, and violated a protective order was sufficient to prove the offense.

Gil v. State, No. 05-03-1622-CR and 05-03-1623-CR, [2004 Tex. App. Lexis 9028](#) (Tex. App.—Dallas, Oct. 13, 2004, pet. ref'd). In a prosecution for stalking and attempted capital murder, evidence that the defendant threatened, pushed, and shot the victim (his wife) was legally and factually sufficient to establish the offenses.

NOTE: If more than one manner and means of stalking are pled, the application paragraph of the jury charge must set out each element of a particular manner and means in the conjunctive.³⁶⁹

[\(Tex. Penal. Code § 42.072\(a\)\)](#)

10.28.2 Second degree felony stalking.

A stalking offense is second degree felony if the evidence proves that the defendant has a prior stalking conviction. The state may prove its enhancement allegation with proof of stalking convictions from other jurisdictions. The “same scheme or course of conduct” can include an act or all of the acts that constitute stalking under Texas Penal Code § 42.072.

[\(Tex. Penal Code § 42.072\(b\)\)](#)

10.28.3 Venue.

Stalking may be prosecuted in any county in which an element of the offense occurred.

[\(Tex. Code Crim. Proc. § 13.36\)](#)

10.28.4 Evidence admissible in stalking prosecution.

With regard to whether the defendant’s conduct would cause a reasonable person to experience fear, testimony is admissible as to all relevant facts and circumstances, including any existing or previous relationship between the defendant and the victim, a member of the victim’s family or household, or an individual with whom the victim has a dating relationship. This section does not affect the admissibility of character evidence under the Texas Rules of Evidence or other law.

[\(Tex. Code Crim. Pro. § 38.46\)](#)

³⁶⁹ *Ploeger v. State*, [189 S.W.3d 799](#) (Tex. App.—Houston [1st Dist.] 2006, no pet.). In a stalking prosecution, the trial court committed reversible error when it failed to charge the elements, set out in [Tex. Penal Code § 42.072\(a\)\(1-3\)](#) in the conjunctive.

10.28.5 Interstate stalking statute.

See Subchapter G, *infra*.

Subchapter F
Offenses Against the Public Health, Safety, and Morals and Required
Finding for Crimes Motivated by Bias or Prejudice
(Tex. Penal Code Title 9)

10.29 *Sexual performance by a child (Penal Code § 43.25).*

10.29.1 Second degree felony.

The elements of the offense are:

- a person, including a parent or guardian who permits the child to engage in the conduct or performance,
- knowing the character and content thereof
- employs, authorizes, or induces
- a child younger than 18 years of age
- to engage in sexual conduct or performance.

10.29.2 First degree felony.

If the victim is under 14 years of age, the offense is a first degree felony.

10.29.3 Defenses.

It is a defense that:

- the defendant and the child are spouses;
- the defendant is not more than two years older than the victim;

OR

- the conduct was for a *bona fide* educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose.

[\(Tex. Penal Code § 43.25\)](#)

10.30 Unlawful possession of a firearm (Penal Code § 46.04).

10.30.1 Third degree felony unlawful possession of a firearm.

There are two ways to commit the third degree felony offense.

10.30.1.1 First manner and means.

The elements of the offense are: (1) a person who has been convicted of a felony (2) possesses a firearm (3) after conviction and before the fifth anniversary of the person's release from (4) confinement for the felony or supervision under community supervision or mandatory supervision (whichever date is later).

10.30.1.2 Second manner and means.

The elements of the offense are: (1) a person who has been convicted of a felony (2) possesses a firearm at any location other than the person's home (3) more than five years after release from confinement or community supervision or mandatory supervision.

[\(Tex. Penal Code § 46.04\)](#)

10.30.2 Class A misdemeanor unlawful possession of a firearm.

There are two ways to commit the Class A misdemeanor offense.

10.30.2.1 First manner and means.

The elements of the offense are: (1) a person (the defendant) (2) who has been convicted of assault involving the defendant's family or household member³⁷⁰ (3) possesses a firearm (4) before the fifth anniversary following the date of conviction of the later

³⁷⁰ *Worley v. State*, No. 01-03-329-CR, [2004 Tex. App. Lexis 3271](#) (Tex. App.—Houston [1st Dist.] Apr. 8, 2004, pet. ref'd). In a prosecution for unlawful possession of a firearm, evidence from the defendant that he had been arrested after a fight with his wife was sufficient to corroborate judgment of conviction and establish that he was the same person who deferred adjudication probation for family violence assault was revoked, thus proving an element of the offense.

of the defendant's (5) release from confinement **or** release from community supervision.

[\(Tex. Penal Code § 46.04\(b\)\)](#)

10.30.2.2 Second manner and means.

The elements of the offense are: (1) a person who is restrained by a protective order (whether issued under [Tex. Fam. Code § 6.504](#) or Chapter 85 or [Tex. Code Crim. Proc. art. 17.292](#) or Chapter 7A or from a foreign jurisdiction) (2) possesses a firearm (3) after receiving notice of the order and before the order expires.

[\(Tex. Penal Code § 46.04\(c\)\)](#)

Subchapter G
**Federal Crimes-Interstate Travel to Commit Domestic Violence,
Stalking, Cyberstalking, or to Violate a Protective Order**

10.31 Interstate travel to commit domestic violence.

It is a federal crime:

- to travel in interstate or foreign commerce with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner;

OR

- to cause a spouse, intimate partner, or dating partner to travel in interstate commerce by force, duress, or fraud and during, as a result of or to facilitate such conduct or travel, to commit or attempt to commit a crime of violence against the spouse, intimate partner, or dating partner.

[\(18 U.S.C. § 2261\(a\)\)](#)

10.32 Interstate stalking.

It is a federal felony to travel across state lines to stalk someone. The elements of the crime are:

- a person
- travels across state, territorial, foreign, or tribal lines or on military installations
- with intent to kill, injure, harass, or intimidate another person (the victim)
- if in the course of or as a result of such travel the victim is placed in reasonable fear of serious bodily injury or death
- to the stalked person or the victim's immediate family or intimate partner.

[\(18 U.S.C. § 2261A\)](#)

10.33 Interstate cyberstalking statute.

It is a federal felony for a person to use the mail, telephone, or internet repeatedly to place a victim in another state or jurisdiction in reasonable fear of serious bodily injury or death or of serious bodily injury or death to the victim's immediate family or intimate partners.

[\(18 U.S.C. § 2261A\)](#)

10.34 Interstate violation of a protective order.

It is a federal crime:

- to travel in interstate or foreign commerce with the intent to engage in conduct that violates the portion of a protective order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to another person, or that violate such a portion of a protection order in the jurisdiction in which the order was issued;

OR

- to cause another person to travel in interstate commerce by force, duress, or fraud if, in the course of, as a result of, or to facilitate such conduct or travel, the offender engages in conduct that violates a protective order.

[\(18 U.S.C. § 2262\)](#)

10.35 Scope of VAWA criminal protections.

VAWA's protections against interstate domestic violence, dating violence, and stalking:

- protect male as well as female victims,³⁷¹
- apply to crimes committed by a member of the same sex as the victim,³⁷²

³⁷¹ [42 U.S.C. § 13925\(b\)\(8\)](#). See *U.S. v. Bell*, [303 F.3d 1187](#) (9th Cir. 2002). Male victims of interstate stalking are protected by [18 U.S.C. § 2261A](#); *U.S. v. Page*, [167 F.3d 325](#) (6th Cir. 1999) (concurrency) VAWA's criminal provisions are gender-neutral.

AND

- apply regardless of the relationship between the victim and the offender.

³⁷² The federal anti-stalking statute and crime of interstate travel to violate a protective order applies to protected victims who are the same sex as the defendant and regardless of the relationship between victim and the defendant. Memorandum Opinion for the Acting Attorney General, VAWA Opinion, April 27, 2010; available at: <http://www.justice.gov/olc/2010/vawa-opinion-04272010.pdf>

See. *U.S. v. Bell*, [303 F.3d 1187](#) (9th Cir. 2002). Male convicted of stalking several other males.; *U.S. v. Wills*, [346 F.3d 476](#) (4th Cir. 2003). Male convicted of stalking another man.; *U.S. v. Nedd*, [262 F.3d 85](#) (1st Cir. 2001). Male convicted of violating a protective order protecting both a female and male victim; *U.S. v. Fuller*, [584 F.3d 132](#) (3d Cir. 2009). Activist convicted of stalking individuals associated with animal testing.

CHAPTER 10—PART II: COMMENTS

10.36 *Overview of the law.*

A crime may be related to family violence even if family violence is not an element of the crime if the facts in evidence establish the requisite relationship between the perpetrator and the victim. Crimes related to family violence include all offenses perpetrated against a member of the perpetrator’s family or household, or against a person with whom the perpetrator had a dating relationship. See Part I of this chapter.

Family violence and dating violence defined. “Family violence” includes all offenses that involve: (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 member in fear of imminent physical harm, bodily injury, assault, or sexual assault but does not include defensive measures to protect oneself; (2) abuse; or (3) dating violence. ([Tex. Fam. Code § 71.004](#)).

“Dating violence” means an act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, or assault, or sexual assault, or that is a threat that reasonably places the individual in fear of imminent harm, bodily injury, assault, or sexual assault but does not include defensive measures to protect oneself. ([Tex. Fam. Code § 71.0021](#))

Relational definitions. “Family” includes (1) individuals related by consanguinity or affinity, as determined under [Tex. Gov’t Code §§ 573.022 and 573.024](#); (2) individuals who are former spouses of each other; (3) individuals who are the parents of the same child, without regard to marriage, and (4) a foster child and foster parent, without regard to whether those individuals reside together. ([Tex. Fam. Code § 71.003](#)) If the relationship is established only by virtue of a marriage (e.g., mother-in-law), the familial relationship ceases to exist once the marriage ends.³⁷³

“Dating relationship” means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature but does not include a casual acquaintanceship or ordinary fraternization in a business or social context. ([Tex. Fam. Code § 71.0021\(b\)](#))

“Household” means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other and includes a

³⁷³ *James v. Hubbard*, [21 S.W.3d 558, 561](#) (Tex. App.—San Antonio 2000, no pet.).

person who previously lived in a household. ([Tex. Fam. Code §§ 71.005-71.006](#))

Required family violence findings and mandatory fee. [Tex. Penal Code Title 5](#) contains several assaultive offenses (e.g., [Tex. Penal Code §§ 22.01\(b\)\(2\), \(b-1\), and \(f\)](#); [Tex. Penal Code 22.02\(b\)\(1\)](#)) in which family violence is an element of the crime. When family violence is an element of the crime, the judgment of conviction has an inherent finding of family violence.

For those Title 5 offenses³⁷⁴ in which family violence is not an element, the court is required to enter a finding of family violence in the judgment if the evidence established that the defendant and the victim had a familial or dating relationship. ([Tex. Code Crim. Proc. art. 42.013](#)) The finding is made by the court, rather than the jury.³⁷⁵

If the court sentences a defendant to community supervision probation for an offense under Penal Code Title 5, the court *must* assess a \$100 fee against the defendant to be paid to a family violence center that receives state or federal funds and is located in the county where the court is located. ([Tex. Code Crim. Proc. art. 42.12\(h\)\(11\)](#)). For purposes of the federal Gun Control Act, the finding should state whether the defendant used force against the victim.

Collateral consequences of a finding of family violence. A finding of family violence in a civil or criminal judgment has several potential collateral consequences.

Family law. In the family law context (divorce or suits affecting the parent-child relationship), such a finding adversely impacts that party's

³⁷⁴ *Fullylove v. State*, No. 13-0-169-CR, [2001 Tex. App. Lexis 8009](#) (Tex. App.—Corpus Christi, Nov. 29, 2001, no pet.). In a prosecution for harassment, an offense under Penal Code Title 9, the court was not authorized to, and did not, make a finding of family violence in the judgment, because that type of finding is limited to offenses under Penal Code Title 5.

³⁷⁵ *Morimoto v. State*, No. 2-04-272-CR, [2005 Tex. App. Lexis 2906](#) (Tex. App.—Fort Worth, April 4, 2005, pet ref'd). In a Class A misdemeanor assault prosecution, the trial court did not have to submit the family violence issue to the jury because the court did not increase the sentence beyond the statutory maximum.

Accord: *Pierce v. State*, No. 04-02-00749-CR, [2003 Tex. App. Lexis 9799 * 17](#) (Tex. App.—San Antonio, Nov. 19, 2003, pet. ref'd); *Rodriguez v. State*, No. 01-05-00589-CR, [2006 Tex. App. Lexis 6416](#) (Tex. App.—Houston [1st Dist.] July 20, 2006). In a prosecution for Class A assault, after the jury convicted the defendant of Class C assault by contact, the trial court did not err in entering a finding of family violence because the finding was supported by the evidence, did not conflict with the jury verdict, and did not enhance punishment for the underlying offense.

claim to be granted conservatorship of or unsupervised access to (including by electronic communication) a child or to resist a motion to modify a child custody order based on the criminal conviction. ([Tex. Fam. Code § 153.004\(b, d, and e\)](#); [Tex. Fam. Code § 153.015](#); [Tex. Fam. Code §§ 153.103-153.104](#)) It may also result in the party being required to pay spousal maintenance of up to \$2500 a month (or 20% of income) for up to three years.³⁷⁶ ([Tex. Fam. Code § 8.051-8.055](#))

Criminal law. In a bail hearing, a finding of family violence may be used to justify extending a defendant’s detention in jail or to impose stay away orders and other restrictions as a condition of bond. ([Tex. Code Crim. Proc. art. 17.29](#); [Tex. Code Crim. Proc. art. 17.291](#); [Tex. Code Crim. Proc. art. 17.40](#))

Firearms. A finding of family violence in a civil or criminal judgment affects the defendant’s right to possess a firearm. Under a protective order, the respondent may not possess a firearm for the duration of the order. After a criminal conviction for a family offense, the defendant may never possess a firearm unless pardoned of the offense, given a restoration of civil liberties, or unless the offense is expunged. A violation of the ban is a criminal offense under state and federal law. ([18 U.S.C. §§ 921\(a\)\(20\) and 922\(g\)](#); [Tex. Penal Code § 46.04](#); [Tex. Gov’t Code § 411.171](#))

Occupational licenses. A finding of family violence in a civil or criminal judgment may be used against a party by a state licensing agency on the basis that the party lacks the good character required to hold the occupational license. Family violence offenses may be crimes of moral turpitude³⁷⁷ so that a conviction or probation for the crime will defeat a presumption of good character for a licensee or applicant for a license. ([Tex. Occ. Code ch. 53](#))

Immigration. An immigrant may be rendered ineligible for adjustment of status after a conviction for certain crimes or for multiple convictions.

³⁷⁶ *Guillot v. Guillot*, No. 01-06-01039-CV, [2008 Tex. App. Lexis 4831](#) (Tex. App.—Houston, June 26, 2008, no pet.). Spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation.

³⁷⁷ *Ludwig v. State*, [969 S.W.2d 22, 29](#) (Tex. App.—Fort Worth 1998, pet ref’d). A conviction for the misdemeanor offense of violation of a protective order will be considered a crime of moral turpitude when the underlying, uncharged offense is one of family violence or the direct threat of family violence.

([8 U.S.C. § 1182\(a\)](#)). A criminal conviction may also result in removal or denial of lawful admission of an immigrant. ([8 U.S.C. § 1227\(a\)\(2\)\(E\)](#))

Required finding of bias or prejudice. If at the guilt/innocence phase of the trial, the trier-of-fact (judge or jury) determines, beyond a reasonable doubt,³⁷⁸ that the defendant selected the crime victim or victim's property based on bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender or sexual preference, the court must include that finding in the judgment and sentence.³⁷⁹ ([Tex. Code Crim. Proc. art. 42.014](#)) The direct consequence of such a finding is that the punishment may be enhanced to the next higher offense level except for (1) Class A misdemeanors (which are enhanced by imposing a minimum sentence of 180 days confinement) and (2) non-capital first degree felonies. ([Tex. Penal Code § 12.47](#))

Offenses that require a family violence finding. Whether or not family violence is an element of the offense, if the predicate family or dating relationship is established between the defendant and the victim, a finding of family violence is required after a criminal conviction for [Tex. Penal Code sections: 19.01-19.05](#) (homicide); 20.01-20.05 (kidnapping, unlawful restraint, unlawful transport); 21.02 (continuous sexual abuse of a child); 21.11 (indecenty with a child); 22.01-22.05 (assault, sexual assault, aggravated assault or sexual assault, injury to child, elderly, or disabled person; abandoning or endangering a child; deadly conduct); and 22.07 (terroristic threat).

Offenses that may involve family violence. In addition to offenses under Penal Code Title 5 that require a finding of family violence upon proper proof, many other offenses may involve family or dating violence.³⁸⁰ One appellate case

³⁷⁸ *Ex parte Boyd*, [58 S.W.3d 134](#) (Tex. Crim. App. 2001). The trier of fact (in this case, the jury) must decide, using the beyond a reasonable doubt standard whether the crime was motivated by bias or prejudice under [Tex. Code Crim. Proc. art. 42.014](#). Citing *Apprendi v. New Jersey*, [530 U.S. 466](#) (2000), the court held that it is unconstitutional for a legislature to remove from the jury the assessment of facts [other than the fact of a prior conviction] that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

³⁷⁹ *Brenneman v. State*, [45 S.W.3d 729](#) (Tex. App.—Corpus Christi 200, no pet.). In a prosecution for assault, [Tex. Code Crim. Proc. art. 42.014](#) was not void for vagueness and the finding that the defendant committed the crime due to bias against homosexuals was proper.

³⁸⁰ Offenses that commonly involve family and dating violence are: violations of protective orders or bond conditions ([Tex. Penal Code §§ 25.07](#) and 25.071), interference with child custody ([Tex. Penal Code § 25.03](#)), continuous violence against the family ([Tex. Penal Code § 25.11](#)), criminal mischief ([Tex. Penal Code § 28.03](#)), criminal trespass ([Tex. Penal Code § 30.05](#)), interference with an emergency telephone call ([Tex. Penal Code § 42.062](#)); harassment ([Tex. Penal Code § 42.07](#)); and stalking ([Tex. Penal Code § 42.07](#)).

found that it is **NOT** appropriate to include a finding of family violence in judgments for non-Title 5 offenses.³⁸¹

Enhanced penalty for crimes associated with family violence.

Offense (Penal Code §)	Penalty level	Enhanced penalty level	Required proof for enhancement
Assault (22.01)	Class A misdemeanor	Third degree felony	Proof of: familial or dating relationship between the victim and the defendant AND either: (1) a prior conviction under Penal Code ch. 19, §§ 20.03, 20.04, 21.11, or 25.11; OR (2) proof the offense involved strangulation
Assault by strangulation (22.01(b-1))	Class A misdemeanor	Second degree felony	Proof of: familial or dating relationship; AND prior conviction under Penal Code ch. 19, §§ 20.03, 20.04, 21.11, or 25.11; AND proof the offense involved strangulation
Terroristic threat (22.07)	Class B misdemeanor	Class A misdemeanor	Proof that victim was member of defendant's family or household
Violation of a bond condition or of a protective order issued under the Family Code or CCP art. 17.292 (magistrate's order of emergency protection) (25.07)	Class A misdemeanor	Third degree felony	Two prior § 25.07 convictions; OR the violation of order or bond condition was by either assault or stalking
Violation of protective order issued under CCP art. 6.08 (bias-prejudice motivated crime) (25.071)	Class A misdemeanor	Third degree felony	Two prior convictions under Pen. Code § 25.071; OR violation of the order by assault
Criminal trespass (30.05)	Class B misdemeanor	Class A misdemeanor	Proof that defendant carried a deadly weapon while committing offense
Harassment (42.07)	Class B misdemeanor	Class A misdemeanor	Proof of prior conviction for harassment
Stalking (42.072)	Third degree felony	Second degree felony	Proof of prior conviction for stalking

³⁸¹ *Fullylove v. State*, No. 13-0-169-CR, [2001 Tex. App. Lexis 8009](#) (Tex. App.—Corpus Christi, Nov. 29, 2001, no pet.). In a prosecution for harassment, an offense under [Tex. Penal Code Title 9](#), the court was not authorized to, and did not, make a finding of family violence in the judgment, because that type of finding is limited to offenses under [Tex. Penal Code Title 5](#).

10.37 Domestic violence, sexual assault, and stalking statistics.³⁸²

10.37.1 Homicide statistics.

In calendar year 2009, there were 111 reported homicides of females by an intimate partner in Texas.³⁸³

10.37.2 Assault and other injuries by domestic violence.

In a study conducted in the late 1990s, over a third (37%) of female patients at hospital emergency rooms were there because of injuries resulting from violence by intimate partners.³⁸⁴ In a 2000 study, a third of all female homicide victims died as a result of intimate partner violence.³⁸⁵

10.37.3 Sexual assault statistics.

It is estimated that slightly more than half (52%) of sexual assaults go unreported in the U.S.³⁸⁶ Sexual assaults by strangers are more likely to be reported (41% reported) than sexual assaults by intimate partners or dates (24%).³⁸⁷ About a fifth of all women in the U.S. report being the victim of a completed or attempted rape or sexual assault at least once.³⁸⁸ The reported incidence of sexual assault on males is about 3%.³⁸⁹

³⁸² See, The Family Violence Prevention Fund, *Facts on Domestic, Sexual, and Stalking Violence*. Available at: http://www.endabuse.org/content/action_center/detail/754

³⁸³ The Texas Council on Family Violence reports the annual homicide of females by intimate partners. For 2009, the statistics are available at: <http://www.tcfv.org/wp-content/uploads/2010/09/womenkilled-2009.pdf>

³⁸⁴ M. Rand. *Violence Related Injuries Treated in Hospital Emergency Departments*. U.S. Department of Justice, Bureau of Justice Statistics (August 1997).

³⁸⁵ C. Rennison and S. Welchans, *Intimate Partner Violence*. Bureau of Justice Statistics (2000).

³⁸⁶ Bureau of Justice Statistics Special Report, *Reporting Crime to the Police, 1992-2000* (March 2003).

³⁸⁷ *Ibid.*

³⁸⁸ The Commonwealth Fund, *Health Concerns Across a Woman's Lifespan: 1998 Survey of Women's Health* (May 1999).

³⁸⁹ National Institute of Justice and Centers for Disease Control and Prevention, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (November 1998).

In 2007, there were almost a quarter of a million (248,300) sexual assaults reported in the United States (over 500 per day). Women were about twenty times more likely than men to be sexually assaulted.³⁹⁰

About three quarters of the reported sexual or physical assaults on women over the age of 18 were by an intimate partner or a date.³⁹¹ In 2001, 41,740 women reported being sexually assaulted by an intimate partner.³⁹²

In 2003 dollars, the cost of intimate partner sexual or physical assault and stalking was estimated at more than \$8.3 billion for direct medical care and lost productivity.³⁹³

10.37.4 Stalking statistics.

Most (78%) reported stalking victims are women and most (60%) of the stalkers of women are intimate partners. (only 30% of men report being stalked by an intimate partner).³⁹⁴ Most (80%) women who are stalked by former husbands have been physically assaulted by the stalker and a significant minority (30%) have been sexually assaulted by that person.³⁹⁵

For those over the age of 18, 20 out of 1000 women reported being stalked while only 7 out of 1000 men report being the victim of a stalker. In a twelve-month period in 2005-2006, 3.4 million persons identified themselves as stalking victims.³⁹⁶

³⁹⁰ National Crime Victimization Survey: Criminal Victimization, 2007-2008. U.S. Department of Justice, Bureau of Justice Statistics. <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv07.pdf>

³⁹¹ U.S. Department of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (November 1998).

³⁹² Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence, 1993-2001*, (February 2003).

³⁹³ *Costs of Intimate Partner Violence Against Women in the United States*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. (2003). Available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf

W. Max, et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 *Violence and Victims* 259 (2004).

³⁹⁴ Center for Policy Research, *Stalking in America* (July 1997).

³⁹⁵ *Id.*

³⁹⁶ K. Baum, et al., *Stalking Victimization in the United States*. U.S. Department of Justice Bureau of Justice Statistics 2009. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svus.pdf>

In 2009, a quarter of stalking victims reported being “cyberstalked” with electronic mail or text messaging.³⁹⁷ Stalkers use some sort of electronic monitoring in over a tenth of stalking cases.³⁹⁸

10.38 Abuse in same-sex relationships.

The National Violence Against Women Survey reported that slightly more than 11% of the women who had lived with a woman as part of a couple reported being raped, physically assaulted, and/or stalked by a female cohabitant.³⁹⁹

Researchers also report a high rate of battering within male gay intimate partnerships, with 39% of those studied reporting at least one type of battering by a partner over a five-year period⁴⁰⁰

Transgender people may experience a higher level of both intimate partner violence and sexual assault.⁴⁰¹

In 2006, a total of 3,534 incidents of domestic violence affecting lesbian, gay, bisexual, and transgendered (LGBT) individuals were reported to the 33 community-based anti-violence programs in 12 regions that make up the National Coalition of Anti-Violence Programs (NCAVP)⁴⁰²

Abusers often capitalize on widespread bias directed at sexual orientation or gender identity by threatening to “out” (reveal the sexual orientation and/or gender identity of) the victim to family members, employers, landlords, or others in positions of power. This threat is an effective tool of manipulation and

³⁹⁷ *Ibid.*

³⁹⁸ *Id.*

³⁹⁹ *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, National Institute of Justice (Washington, DC: GPO, NCJ 181867) (2000). Available at: <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>

⁴⁰⁰ G.L. Greenwood et al., *Battering Victimization among a Probability-based Sample of Men Who Have Sex with Men*, 92 *American Journal of Public Health* 1964 (December 2002); available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447360/pdf/0921964.pdf>

⁴⁰¹ S. Gentlewarrior, *Culturally Competent Service Provision to Lesbian, Gay, Bisexual, and Transgender Survivors of Sexual Violence*, Applied Research Forum (Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence, 2009), <http://www.vawnet.org>; and R. L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *Aggression and Violent Behavior* 171 (2009).

⁴⁰² Fountain, K., & Skolnik, A. (2007). *Lesbian, gay, bisexual and transgender domestic violence in the United States in 2006: A Report of the National Coalition of Anti-Violence Programs*, cited at: <http://vaw.umn.edu/documents/inbriefs/domesticviolence/domesticviolence.html#fountain2007>

control because once “outed,” people may lose jobs and homes, as well as custody of their children.⁴⁰³

10.39 Strangulation.

In medical terms, strangulation is a form of asphyxia characterized by closure of the blood vessels or air passages of the neck as a result of external pressure on the neck. Strangulation cuts off the flow of blood and oxygen to the brain causing loss of consciousness within seconds, followed by death (within minutes).

Under Texas law, assault by strangulation is the intentional, knowing, or reckless impeding of normal breathing or circulation of blood of the person by applying pressure to the person’s throat or neck or by blocking the person’s mouth or nose. ([Tex. Pen. Code § 22.01\(b\)\(2\) and \(b-1\)](#)).

Most strangulation occurs either by ligature (wrapping an object around the neck) or manually (with the hands or forearm wrapped around the neck or by standing or kneeling on the neck). Pressure on the neck can affect the trachea (airway-made of cartilage), esophagus (food passage), carotid artery (carries blood to brain), jugular vein (carries blood from brain), hyoid bone (bone at back of throat supporting the tongue—which fuses around age 30).

Signs and symptoms of strangulation may be difficult to detect in a survivor because much of the potential damage cannot be seen without invasive procedures or does not manifest itself until days, weeks, or even months after the injury. Forensic evidence about strangulation may include the following signs, symptoms, and causes:⁴⁰⁴

⁴⁰³ G.L. Greenwood et al., *Battering Victimization among a Probability-based Sample of Men Who Have Sex with Men*, 92 *American Journal of Public Health* 1964 (December 2002); available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447360/pdf/0921964.pdf>

⁴⁰⁴ Adapted from G. Strack, J.D., and G. McClane, M.D., *How to Improve Your Investigation and Prosecution of Strangulation Cases*, (rev. 1999); also published as G. Strack, G. McClane, and D. Hawley, *A review of 300 strangulation cases* [in three parts], 21 *Journal of Emergency Medicine* 303 (October 2001).

Symptom or sign	Indicator of	Chances symptom will be fatal
Hoarseness (dysphonia); loss of voice (aphonia)	Bruising of larynx	Not likely
Fractured hyoid bone	In persons at least 30 years old, indicates manual strangulation	Usually only detected by autopsy; a signature of death by strangulation but only in victims over 30 years of age (age at which bone fuses)
Difficulty swallowing (dysphagia or odynophagia)	Larynx or hyoid bone fracture, internal tissue swelling	Possible
Difficulty breathing (apnea)	Tracheal damage	Possible up to 36 hours after injury
Fluid in lungs (pulmonary edema)	Excessive pressure on neck	High
Pneumonitis; pneumonia	Aspiration of vomit or other fluid	High: gastric juice eats lung tissue
Restlessness; combativeness	Lack of oxygen in brain	High: if brain tissue is damaged enough; may result in amnesia or psychosis
Scratches, red marks (erythema), abrasions, bruises (ecchymoses or purpura), cuts, fingernail marks, ligature marks	Offensive or defensive wounds	Not likely
Petechiae ⁴⁰⁵ (tiny rash-like red spots)	Ruptured capillaries (usually in eyes or on face or neck)	Not likely
Bloodshot eyes (subconjunctival hemorrhages)	Ruptured capillaries in sclera (whit part of eye); indicates victim struggled	Not likely
Swollen tissue (edema)	Internal or external	Possible, if blocks air or blood passageway
Cognitive or neurological deficits	Brain tissue has died or is dying from effects of lack of oxygen	High: death can occur weeks or months after injury
Fractured larynx (subcutaneous emphysema)	Allows air to escape into tissue	Possible, if enough air is lost before reaching lungs

Despite having a high potential for permanent damage, strangulation injuries are frequently unreported and under-treated. A study of women seeking emergency room treatment for strangulation injuries caused by an intimate partner or family member concluded that such women have a high risk of morbidity or

⁴⁰⁵ Some experts consider petechiae a “signature” sign of strangulation but Dr. Hawley [see note 32 supra] notes that petechiae is the hallmark of sudden asphyxiation by any cause (strangulation, drowning, aspiration of fluid, drug intoxication (central nervous system depression), and some natural diseases).

mortality from being in a relationship where the abuse involves strangling.⁴⁰⁶ Victims of repeated intimate partner strangulations report increased symptoms, yet only about 39% of those victims sought medical treatment for strangulation-related injuries.⁴⁰⁷

10.40 Stalking.

About a third of the approximately 3.4 million people who are victims of stalking each year are stalked by a current or former intimate partner.⁴⁰⁸ The intimate partner stalker is more likely to use a weapon and to reoffend.⁴⁰⁹ In a study of homicides and attempted homicides of women by intimate or former intimate partners, over 75% of the victims had been stalked by the defendant in the year prior to the murder or attempted murder.⁴¹⁰ A seminal study released in 1998, showed that most (78%) stalking victims are female and most stalkers (87%) are male.⁴¹¹

Stalking behaviors include: unwanted contacts (in person, by telephone, by electronic means); following the victim physically or by “cyberstalking”; waiting for the victim; leaving unwanted “gifts” or other items; and disseminating information (particularly gossip or rumors) about the victim.

The Stalking Resource Center recommends that courts consider imposing special conditions for stalkers under community supervision. Those conditions could include requiring the probationer:

- to submit to unannounced home visits and warrantless searches and seizures of all personal property (including computers, cell phones, etc.);

⁴⁰⁶ L. Wilbur, M.D., et al, *Survey of women who have been strangled while in an abusive relationship*, 21 *Journal of Emergency Medicine* 297 (October 2001); abstract available at: [http://www.jem-journal.com/article/S0736-4679\(01\)00398-5/abstract](http://www.jem-journal.com/article/S0736-4679(01)00398-5/abstract)

⁴⁰⁷ D. Smith, PhD, et al, *Frequency and relationship of reported symptomology in victims of intimate partner violence: the effect of multiple strangulation attacks*, 21 *Journal of Emergency Medicine* 323 (October 2001); abstract available at: [http://www.jem-journal.com/article/S0736-4679\(01\)00402-4/abstract](http://www.jem-journal.com/article/S0736-4679(01)00402-4/abstract)

⁴⁰⁸ K. Baum et. al, *Stalking Victimization in the United States*, Bureau of Justice Statistics (2009) cited at: <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=47528>

⁴⁰⁹ K. Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers*, 51 *Journal of Forensic Sciences* 147 (2006), cited in: <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=47528>

⁴¹⁰ McFarlane, *Stalking and Intimate Partner Femicide*, 3 *Homicide Studies*, Sage Publications. A summary of key findings is available at:

http://www.ncvc.org/src/main.aspx?dbID=DB_Intimate_Partner_Femicide122

⁴¹¹ P. Tjaden and N. Thoennes, *Stalking in America, Findings from the National Violence Against Women Survey*, National Institute of Justice, Centers for Disease Control and Prevention (April 1998). Available at: <http://www.ncjrs.gov/pdffiles/169592.pdf>

- to provide all aliases, screen names, internet service provider account information, cell-phone numbers, and other identifying data;
- to undergo mental health assessments and mental health treatment and permit disclosure of mental health treatment records;
- to obey stay-away and no contact orders and curfews;
- to surrender all firearms and other weapons and not acquire more weapons;
- to waive extradition;
- to notify the probation officer within one day of all police contacts; and
- to disclose the probationary status to any intimate or dating partners or potential partners.⁴¹²

Stalkers who target former intimate partners often have significant personal information, such as bank account and Social Security numbers and knowledge of personal habits, which can be used to facilitate the stalking behavior. Disabled stalking victims are particularly vulnerable because they may depend on social services (e.g., subsidized housing) that cannot be easily replaced if the victim needs to radically alter living conditions to avoid the stalker.⁴¹³

10.41 Cyberstalking.

Cyberstalking is commonly defined as any use of technology to bother, alarm, or harass a person. However, the federal law defines cyberstalking⁴¹⁴ in a way that does not cover the use of pagers, cellular telephones, global positioning systems (GPS), or surveillance cameras.

In one study, more than a quarter of stalking victims reported the stalker used “cyber” technology. Slightly less than one-tenth of the victims were subject to

⁴¹² Stalking Resource Center and American Probation and Parole Association, *Responding to stalking—a guide for community corrections officers* (2009). Available at:

<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=47528>

⁴¹³ See Stalking Resource Center, *Victims with Disabilities Face Unique Challenges*, 6 *The Source* (Winter 2006). Available at:

<http://www.ncvc.org/src/main.aspx?dbName=DocumentViewer&DocumentI>

⁴¹⁴ The federal law ([18 U.S.C. § 2261A](#)) states that it is a felony to use the mail, telephone, or internet repeatedly to place a victim in another state or jurisdiction in reasonable fear of serious bodily injury or death or of serious bodily injury or death to the victim’s immediate family or intimate partners.

electronic monitoring by video or digital cameras, listening devices, or global positioning system (GPS) technology.⁴¹⁵

Technology that has been used to “cyberstalk” includes:

- tracking devices—these devices can use GPS, WiFi capability, Bluetooth, infrared communication ports, or RFID tags (the tags attached to store items to deter theft) to track the whereabouts of the person carrying the tracking device;
- visual monitors—webcams that can be set up at any location to which the stalker has access;
- spyware—allows the stalker to remotely read every keystroke on a computer. Spyware can access unencrypted signals from a WiFi, cell phone, or Bluetooth connection;
- actuators—using the same wireless modules or power lines that allow a homeowner to remotely access light switches, the stalker can install remotely controlled devices in any location to which he has access. A device attached to the outside power socket of a house will be sufficient to implement this technology.⁴¹⁶

⁴¹⁵ K. Baum, et al., *Stalking Victimization in the United States*, Bureau of Justice Statistics Special Report (January 2009), available at:

<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=45862>

⁴¹⁶ See *Stalking by a High Tech Guy*, available at:

<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=41389>

CHAPTER 11—SELECTED EVIDENTIARY ISSUES—PART I: STATUTES AND CASE LAW

[\(Tex. R. Evid. 201, 203, 404, 504, 505, 509, 510, 601, 607-609, 613, 701-705, 801-804; Tex. Code Crim. Proc. art. 38.10\)](#)

Summary:

This section is intended as a quick reference for evidentiary issues that commonly arise in family violence cases.

Family violence cases may involve challenging evidentiary issues, especially regarding hearsay, privileges, and expert witness testimony. For instance, when prosecutors attempt to prove up criminal charges without a victim,⁴¹⁷ the victim's extra-judicial statements may be challenged as inadmissible testimonial hearsay.

⁴¹⁷ Experts estimate that somewhere between 80-90% of domestic violence complainants fail to cooperate with the prosecution at some point in the criminal proceeding. See, D. Beloof & J. Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, [11 Colum. J. Gender & L. 1, 3](#) (2002) (90% rate); and L. DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, [8 Yale J.L. & Feminism 359, 367](#) (1996) (80-90% rate).

The reasons why victims refuse to cooperate with the prosecution include:

- the risk of retaliation (feared in as many as half of all cases; an actuality in about 30 % of criminal cases);
- economic dependence (50% of victims are left below the federal poverty line after leaving their abuser and slightly less than half are threatened with loss of income for aiding the prosecution of the abuser);
- emotional attachment,
- family and community pressures;
- religious and cultural views;
- fear of losing of custody of children;
- fear of deportation;
- trauma-induced "learned helplessness"; and
- a genuine belief that no crime has occurred.

See, T. Lininger, *Prosecuting Batterers After Crawford*, [91 Va. L. Rev. 747, 769](#) (May 2005) (summarizing the findings of various surveys).

In most instances, civil family violence cases will not proceed in the absence of the victim (e.g., when the protective order applicant fails to participate in the proceeding) so the more common evidentiary issues in civil family violence cases involve expert witnesses and assertions of privilege.

The spousal privileges (either the communication privilege or the immunity from compelled testimony) do not apply in proceedings between spouses. In criminal cases, the privileges do not apply when the victim is the defendant's spouse, member of the victim-spouse's family or household, or a minor child.

Challenges to expert witness testimony are common in family violence cases. Because many of the challenges will be to the qualifications or reliability of an expert witness in a "soft" science (such as psychology), familiarity with the standards for admissibility for that sort of testimony may expedite the court's ruling.

11.1 *Texas Rules of Evidence inapplicable to certain criminal proceedings.*

The TRE (including the hearsay rules) do not apply:

- at all in bail hearings;
- at all in hearings on pretrial detention not involving bail;

OR

- with regard to hearsay rules only, in probable cause hearings.

[\(Tex. R. Evid. 101\(d\)\(1\)\(E\) and \(F\)\)](#)

11.2 *TRE 202 and 203: Proof of foreign laws.*

If necessary to decide a question of law (for instance, to determine if the state law complies with the federal requirement for full faith and credit of the state's protective order), the law of another state or a foreign country may be considered by a court.

11.2.1 *Laws of other states.*

The court may take judicial notice of the laws of another state:

- at any stage of the proceeding;

- upon request of a party or on its own motion (without a pleading);⁴¹⁸
- after requiring a party to provide sufficient information and notice to other parties;

AND

- subject to review as a ruling on a question of law.

NOTE: A party is entitled, upon timely request, to be heard as to the propriety of taking judicial notice of the laws of another state. This right can be waived.⁴¹⁹

11.2.2 Laws of other countries.

The court may take evidence that establishes the law of another country:

- upon written notice (pleading or other document);
- if the proffering party provides copies of all materials (with an English translation) it intends to rely upon at least 30 days before the hearing;
- including otherwise inadmissible evidence in the form of affidavits, testimony, briefs, and treatises, if the parties are given time to respond to such evidence;

AND

- subject to review as a question of law.

NOTE: In the absence of adequate evidence of a foreign law introduced under the procedures set out in TRE 203, there is a presumption that the foreign law is identical to Texas law.⁴²⁰

⁴¹⁸ *Daugherty v. Southern Pacific Transp.*, [772 S.W.2d 81, 82](#) (Tex. 1989). No pleading is required for the court to take judicial notice of another state's laws under TRE 202.

⁴¹⁹ *Hardy v. State*, [187 S.W.3d 232](#) (Tex. App.—Texarkana 2006, pet. ref'd). In a sexual assault prosecution, the trial court properly took judicial notice under TRE 202 of the defendant's prior sexual assault conviction in California and it was proper to submit the enhancement issue to the jury for during the punishment phase.

⁴²⁰ *Pennwell Corp. v. Ken Assocs.*, [123 S.W.3d 756, 760-61](#) (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Failure to provide timely notice of intent to use foreign law can waive the right to introduce proof of the foreign law.⁴²¹

([Tex. R. Evid. 202](#); [Tex. R. Evid. 203](#))

11.3 *TRE 404-405: Evidence of character.*

11.3.1 **Prior bad acts or criminal conduct.**

TRE 404(b) limits the admissibility of evidence of other bad conduct to prove character. However, evidence of a party's prior bad conduct may be admissible under TRE 404(b) for other purposes (to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.)⁴²² if the state provides prior notice of its intent to introduce a prior bad act at trial.

- **Statutory exceptions.** [Tex. Code Crim. Proc. art. 38.36](#) and [Tex. Code Crim. Proc. art. 38.37](#) allow evidence of other crimes in prosecutions for homicide and certain sexual and assaultive offenses against persons under 17 years of age. Under art. 38.37, for offenses committed against persons under 17 years of age, extraneous offense evidence is admissible to show the state of mind of the defendant or the child or the previous and subsequent relationship between the defendant and the child.
- **The victim's character.** Evidence of a victim's character for violence is admissible under [TRE 404\(a\)\(2\)](#) to show that the victim was the first aggressor or under [TRE 404\(b\)](#) to show that the defendant's state of mind (i.e., that the defendant perceived the victim to be a violent person), unless the court excludes it under TRE 403 because the prejudicial effect of the evidence outweighs its probative value.⁴²³ Evidence of the victim's extraneous acts of

⁴²¹ *In re SNA*, No. 02-07-349-CV, [2008 Tex. App. Lexis 8721](#) (Tex. App.—Fort Worth, Nov. 20, 2008, no pet.). In a SAPCR, father's right to introduce proof that Canadian law should apply was waived by his failure to comply with TRE 203 by giving timely notice of his intent to use the foreign law or to provide copies of that law to the court or the opposing party.

⁴²² *Hammer v. State*, [296 S.W.3d 555](#) (Tex. Crim. App. 2009). In a prosecution for indecency with a child, the trial court abused its discretion in excluding evidence regarding the complainant's prior false allegations against the defendant because such evidence, barred by TRE 608(b), was admissible under TRE 404(b) to show bias, pattern, or plan.

Davis v. State, No. 05-05-1694-CR, [2007 Tex. App. Lexis 352](#) (Tex. App.—Dallas, Jan. 18, 2007, no pet.). In a prosecution for sexual assault, the trial court did not err in allowing the state to impeach the victim with a prior inconsistent statement about how she broke her nose prior to the alleged offense. The impeachment evidence was admissible under TREs 404(b) and 613.

⁴²³ *Mozon v. State*, [991 S.W.3d 841, 846](#) (Tex. Crim. App. 1999). In a prosecution for aggravated assault, a victim's character for violence was admissible under TRE 404(a)(2) to show the victim was the

violence may be admitted as the basis of opinion or reputation evidence under [TRE 405](#).⁴²⁴

- **The defendant’s character.** A defendant’s extraneous bad acts are admissible under [TRE 404\(b\)](#) to show motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident, but is subject to exclusion under [TRE 403](#) as unfairly prejudicial, confusing the issue, misleading the jury, creating undue delay, or being needless cumulative evidence.⁴²⁵
- **Prior domestic violence.** In a homicide case when the relationship between the defendant and the decedent is a material issue, evidence illustrating the nature of the relationship (including prior instances of domestic violence) may be admissible as evidence of prior bad acts under [TRE 404\(b\)](#) and [Tex. Code Crim. Proc. art. 38.36](#).⁴²⁶
- **State of mind.** Evidence of a prior bad act may be used to show the defendant had the culpable mental state.⁴²⁷

first aggressor. The victim’s extraneous acts of violence are also admissible under [TRC 404\(b\)](#) to show the defendant’s state of mind. Evidence of the victim’s violent acts, admissible under [404](#), is still subject to exclusion under [TRE 403](#) as being more prejudicial than probative.

Ex parte Miller, No. AP-76,167, [2009 Tex. Crim. App. Lexis 1486](#) (Tex. Crim. App., Oct. 28, 2009). In a prosecution for homicide, the defendant was entitled to offer reputation or opinion testimony or evidence of specific prior acts of violence to show the victim’s character for violence or aggression. When the defendant perceives the victim is dangerous (regardless of whether the perception is accurate) based on demonstrated violent tendencies, the “communicated character” is admissible to prove the defendant’s defensive state of mind. Also, the defendant may offer “uncommunicated character evidence,” in the form of reputation and opinion testimony, of the victim’s violent character to prove that the victim was the first aggressor.

⁴²⁴ *Id.*

⁴²⁵ *Montgomery v. State*, [810 S.W.2d 372](#) (Tex. Crim. App. 1991). In a prosecution for indecency with a child, evidence of extraneous bad acts (that the defendant had exposed himself to children in the household on other occasions) was admissible under [TRE 404\(b\)](#) to show the defendant’s intended to gratify himself sexually when he touched the child.

⁴²⁶ *Garcia v. State*, [201 S.W.3d 695, 703](#) (Tex. Crim. App. 2006).

Heard v. State, No. 08-02-0353-CR, [2004 Tex. App. Lexis 3254](#) (Tex. App.—El Paso Apr. 8, 2004, pet. ref’d). In a homicide prosecution, evidence of the relationship between the defendant and the victim (in this case, prior instances of domestic violence between them) was admissible under [Tex. Code Crim. Proc. art. 38.36](#) and [TRE 404](#) because it was evidence relating to the defendant’s state of mind at the time of the offense.

Davila v. State, No. 08-07-0041, [2009 Tex. App. Lexis 554](#) (Tex. App.—El Paso, Jan. 29, 2009, no pet.). The trial court did not err in allowing the prosecutor to read the defendant’s stipulation regarding his prior conviction for family violence assault to the jury.

⁴²⁷ *Prescott v. State*, [123 S.W.3d 506](#) (Tex. App.—San Antonio 2003, no pet.). In a prosecution for reckless injury to a child by omission, evidence that the victim, the defendant’s 4-year-old daughter, had on several prior occasions before her drowning death in apartment complex pool been found wandering

- **Consciousness of guilt.** Criminal acts (e.g., threatening a witness) meant to reduce the likelihood of prosecution, conviction, or incarceration for the offense on trial may be admissible under [TRE 404\(b\)](#) to show “consciousness of guilt.”⁴²⁸
- **Rebutting a defensive theory.**⁴²⁹ Evidence of prior bad acts may be admissible to rebut a defensive theory (such as mistake or accident, retaliation, or any defense that negates an element of the crime). Also, when a witness testifies as to the defendant’s good character, evidence of extraneous offenses to rebut that testimony is admissible under [TRE 405](#).⁴³⁰

11.3.2 Transactional contextual v. background evidence.

The Texas Court of Criminal Appeals has identified two types of background (“contextual”) evidence:

- **“Same transaction” contextual evidence** is evidence necessary to understand the charged offense. If relevant, it is admissible under the “other evidence” provision of [TRE 404\(b\)](#) and the state does not have to provide prior notice of intent to use same transaction evidence.⁴³¹

unsupervised around the complex was admissible under TRE 404 to show the defendant’s recklessness as the child’s ability to get out of the apartment.

Martinez v. State, No. 03-04-495-CR, [2005 Tex. App. Lexis 7476](#) (Tex. App.—Austin, Sept. 9, 2005, pet. ref’d). In a prosecution for stalking, under TRE 404, evidence of the defendant’s prior murder conviction was admissible because it was relevant to the reasonableness of the victim’s fear of the defendant.

Clements v. State, [19 S.W.3d 442](#) (Tex. App.—Houston [1st Dist.] 2000, no pet.). In a prosecution for stalking, evidence of other instances of bad conduct not pled in the indictment were admissible because those incidents established the victim’s state of mind with regard to her fear of the defendant.

⁴²⁸ *Ransom v. State*, [920 S.W.3d 288, 299](#) (Tex. Crim. App. 1996) (op. on rehrg.); *Wilson v. State*, [7 S.W.3d 136, 141](#) (Tex. Crim. App. 1999).

⁴²⁹ *Robbins v. State*, [88 S.W.3d 256, 259](#) (Tex. Crim. App. 2002). Evidence of a person’s bad character may be admissible when it is relevant to a non-character conformity material issue such as establishing intent or rebutting a defensive theory.

⁴³⁰ *Allen v. State*, [218 S.W.3d 905](#) (Tex. App.—Beaumont 2007, no pet.). In a prosecution for stalking, the state was entitled under TRE 405 to rebut the witness’s testimony vouching for the defendant’s good character with evidence of the defendant’s prior violation of a protective order and family violence assault.

⁴³¹ *Rogers v. State*, [853 S.W.2d 29, 33](#) (Tex. Crim. App. 1993); *McDonald v. State*, [179 S.W.3d 571, 577-578](#) (Tex. Crim. App. 2005).

- **“Background” contextual evidence** is evidence helpful to understand the context in which the charged offense occurred. It is **NOT** admissible under the “other evidence” provision of [TRE 404\(b\)](#).⁴³²

11.4 TRE 412: Evidence of previous sexual conduct.

In sexual assault cases:

- opinion or reputation evidence concerning the alleged victim is **NOT** admissible;
- evidence of a specific instance of sexual conduct by the alleged victims is **ONLY** admissible if the evidence:
 - is necessary to explain or rebut the prosecution’s scientific or medical evidence;⁴³³
 - is of sexual behavior with the accused;
 - is offered by the accused to prove the alleged offense involved consensual sexual behavior by the alleged victim;
 - relates to the alleged victim’s motive or bias;
 - is admissible under [TRE 609](#) (for impeachment by evidence of prior conviction);

OR

- is constitutionally required to be admitted.
- if the evidence falls within one of the enumerated categories, it is admissible only if it is more probative than prejudicial under [TRE 403](#);
- before deciding whether to admit evidence of past sexual conduct, the court must conduct an adversarial hearing with the parties present and allow the

⁴³² *Rogers v. State*, [853 S.W.2d 29, 33](#) (Tex. Crim. App. 1993); see *Pollard v. State*, [255 S.W.3d 184, 189](#) (Tex. App.—San Antonio 2008), *aff’d*, [277 S.W.3d 25](#) (Tex. Crim. App. 2009). In a prosecution for retaliation by threat, the trial court erred in admitting evidence of prior murder conviction because that evidence was not necessary to explain the charged offense.

⁴³³ *Delapaz v. State*, [297 S.W.3d 824](#) (Tex. App.—Eastland 2009, no pet.). In a prosecution for sexual assault of a child, evidence that another person had previously sexually assaulted the child was properly excluded during punishment phase because it was irrelevant under TRE 609 and did not fit any exceptions under TRE 412 (the rape shield law).

attorneys to question witnesses and present evidence, which evidence shall be kept in the record under seal.⁴³⁴

11.5 TRE 504(a): Spousal confidential communication privilege.

11.5.1 Scope of the privilege.

The privilege covers confidential communications made by the person to the person's spouse while they were married. A person may:

- refuse to disclose a confidential communication with a spouse;

OR

- prevent another from disclosing a confidential communication made by the person to a spouse.

[\(Tex. R. Evid. 504\(a\)\(2\)\)](#)

11.5.2 Definition.

A “confidential” communication between spouses is one that is:

- made privately;
- by a person to that person's spouse;

AND

- not intended for disclosure to any other person.

[\(Tex. R. Evid. 504\(a\)\(1\)\)](#)

11.5.3 Standing to claim.

The spousal confidential communication privilege may be claimed by:

- a spouse (whether or not a party);

OR

- the guardian or representative of an incompetent or deceased person who is or was a spouse.

⁴³⁴ *Lapointe v. State*, [225 S.W.513](#) (Tex. Crim. App. 2007) *cert. denied*, [128 S.Ct. 544](#).

[\(Tex. R. Evid. 504\(a\)\(3\)\)](#)

NOTE: To claim the confidential communication privilege, there must be some proof of the existence of a ceremonial or common-law marriage.⁴³⁵ An informal (common-law) marriage arises when competent parties over the age of 18 agree or intend to be husband and wife and immediately enter into and maintain a marital relationship without complying with statutory requirements for a formal marriage. The proof necessary to establish a common law marriage is set out in [Tex. Fam. Code § 2.401](#).

11.5.4 Applicability.

The spousal confidential communication privilege claim may be asserted during **OR** after the marriage for communications made during the marriage but does **not** cover communications made between persons before they marry or after they divorce.⁴³⁶

[\(Tex. R. Evid. 504\(a\)\(2\)\)](#)

11.5.5 Exceptions.

The privilege does not apply:

- to further a crime or fraud;
- in proceedings between spouses;
- in proceedings between a surviving spouse and a person whose claim derives from the deceased spouse;
- in a prosecution for a crime:
 - against the spouse;
 - against a minor child;

⁴³⁵ *Colburn v. State*, [966 S.W.3d 511, 514](#) (Tex. Crim. App. 1998).

⁴³⁶ *Earthman's Inc. v. Earthman*, [526 S.W.2d 192, 206](#) (Tex. App.—Houston [1st Dist.] 1975, no writ). Communications prior to or after a marriage was dissolved were not inadmissible under the spousal communications privilege.

- against a member of the other spouse’s household;⁴³⁷

OR

- charged under [Tex. Penal Code § 25.01](#);
- in a commitment or guardianship proceeding against either spouse;
- in a competency proceeding brought by or on behalf of either spouse;

OR

- to out-of-court statement made by a witness-spouse.⁴³⁸

([Tex. R. Evid. 504\(a\)\(4\)\(A-E\)](#))

11.6 TRE 504(b); [Tex. Code Crim. Proc. art. 38.10](#): Spousal immunity privilege in criminal cases.

In addition to the spousal confidential communication privilege, in criminal cases there is also a spousal immunity privilege. Under the privilege, the defendant’s spouse may chose:

- to claim a privilege not to be called as witness for the state;

OR

- to voluntarily testify for the state even over the defendant’s objection⁴³⁹ (and thereafter be subject to cross-examination under TRE 611(b)).

EXCEPTION: The spousal immunity privilege not to be called as a witness does not apply:

- to matters occurring prior to the marriage;

OR

⁴³⁷ *Fuentes v. State*, [775 S.W.2d 64, 65-66](#) (Tex. App.—Houston [1st Dist.] 1989, no pet.); *Riley v. State*, [849 S.W.2d 902, 903](#) (Tex. App.—Austin 1993, pet. ref’d). For purposes of TRE 504, “member of the household” uses the same definition as [Texas Family Code § 71.005](#).

⁴³⁸ *Jones v. State*, [859 S.W.2d 537](#) (Tex. App.—Houston [1st Dist.] 1983, pet. ref’d), citing *United States v. Archer* [733 F.2d 354, 359](#) (5th Cir. 1984) *cert denied*, [469 U.S. 861](#) (1984). Neither a defendant nor his spouse may exclude an out-of-court statement by the spouse when offered against the defendant by a writing or through a third-party witness.

⁴³⁹ See *Anderson v. State*, [880 S.W.35, 37](#) (Tex. App.—Tyler 1994, pet. ref’d).

- when the defendant is charged with bigamy under [Tex. Penal Code § 25.01](#);

OR

- when prosecution is for a criminal offense against:
 - the defendant's spouse;⁴⁴⁰
 - a member of either spouse's household;

OR

- any minor child.⁴⁴¹

([Tex. R. Evid. 504\(b\)\(1\)](#) and [\(b\)\(4\)](#); [Tex. Code Crim. Proc. art. 38.10](#))

11.6.1 Standing to claim.

The defendant-spouse may **NOT** invoke the spousal immunity privilege; the privilege may be invoked by:

- the witness-spouse;

OR

- the witness-spouse's guardian or representative.

([Tex. R. Evid. 504\(b\)\(3\)](#))

11.6.2 Comment on failure to call spouse as witness.

Counsel may properly comment on the defendant's failure to call the spouse as a witness when the evidence indicates the spouse has relevant information.⁴⁴²

([Tex. R. Evid. 504\(b\)\(2\)](#))

⁴⁴⁰ *Jackson v. State*, No. 14-03-0945-CR, [2005 Tex. App. Lexis 3631](#) (Tex. App.—Houston [14th Dist.] May 5, 2005, no pet.). In criminal trespass case against husband (who had never lived in wife's residence), the trial court did not err in ordering wife to testify after she claimed her spousal privilege.

⁴⁴¹ *Hernandez v. State*, [205 S.W.3d 555](#) (Tex. App.—Amarillo 2006, pet. ref'd); *Rodriguez v. State*, No. 14-07-0307-CR, [2008 Tex. App. Lexis 1162](#) (Tex. App.—Houston [14th Dist.], Feb. 19, 2008, no pet.). In a prosecution for murder of a minor child, the defendant's wife did not have a spousal privilege not to testify under TRE 504(b) because the victim was a child.

⁴⁴² *McDuffie v. State*, [854 S.W.2d 195, 217](#) (Tex. App.—Beaumont 1993, pet. ref'd).

11.7 TRE 505: Clergy-communicant privilege.

Confidential communications between a member of the clergy (priest, rabbi, minister, Christian Scientist practitioner, or other spiritual adviser) and a communicant are privileged if made in the member's professional character as a spiritual adviser. ;

11.7.1 Standing to claim.

The privilege may be claimed by:

- the communicant
- the member of the clergy;
- the communicant's guardian or conservator;

OR

- a deceased communicant's representative.

[\(Tex. R. Evid. 505\(c\)\)](#)

11.7.2 Confidential nature of the communication.

A clergy-communicant communication is privileged if:

- made privately;

AND

- not intended to be disclosed to other persons.

[\(Tex. R. Evid. 505\(a\)\(2\)\)](#)

11.7.3 Disclosure to third party.

The communication retains its privileged nature even after disclosure to a third party if the disclosure was made in furtherance of the purpose of the communication.

[\(Tex. R. Evid. 505\(a\)\(2\)\)](#)

11.7.4 Scope of privilege.

The privilege:

- covers the identity of the communicant;⁴⁴³
- does not apply to proceedings concerning the abuse or neglect of a child;⁴⁴⁴

AND

- only applies to communications addressed to the clergy in his capacity as a spiritual adviser; communications with a clergyperson regarding non-spiritual matters are not privileged.⁴⁴⁵

([Tex. R. Evid. 505\(b\)](#))

11.8 TRE 509: Physician-patient privilege.

11.8.1 Limited application in criminal proceedings.

There is no physician-patient privilege in criminal proceedings **EXCEPT** when the patient has voluntarily sought treatment for drug or alcohol abuse.⁴⁴⁶

([Tex. R. Evid. 509\(b\)](#))

11.8.2 Definitions.

- **Confidential communication** is a communication:
 - between a patient and a physician;

⁴⁴³ *Simpson v. Tennant*, [871 S.W.2d 301, 306](#) (Tex. App.—Houston [14th Dist.] 1994) (orig. proceeding).

⁴⁴⁴ *Almendarez v. State*, [153 S.W.3d 727, 728](#) (Tex. App.—Dallas 2005, no pet.). The only privilege that can be invoked to exclude evidence in a proceeding for child abuse or neglect is the attorney-client privilege.

⁴⁴⁵ *Maldonado v. State*, [59 S.W.3d 251, 253](#) (Tex. App.—Corpus Christi 2001, pet. ref'd). Communications to clergy person made during a disciplinary or administrative meeting were not privileged.

⁴⁴⁶ *Licea v. State*, No. 13-01-0849-CR, [2004 Tex. App. Lexis 9464](#) (Tex. App.—Corpus Christi, Oct. 28, 2004) (mem. op.). In a prosecution for sexual assault of a child, the trial court did not err in admitting the defendant's written confession made to a social worker because the social worker was not treating him for substance abuse or depression so the exception in TRE 509(b) did not apply.

AND

- not intended to be disclosed to third parties other than those present to further the patient's interests in treatment (those necessary to transmit the communication or who are participating in the diagnosis or treatment of the patient).
- **Patient** is a person who consults or receives medical care from a physician.
- **Physician** is a person who is, or whom the patient reasonably believes is, licensed to practice medicine in any state or nation.

[\(Tex. R. Evid. 509\(a\)\)](#)

11.8.3 Standing to claim.

The privilege may be claimed by:

- the patient;
- the patient's representative on behalf of the patient;

OR

- the physician on behalf of the patient (under a rebuttable presumption of authority).

[\(Tex. R. Evid. 509\(d\)\)](#)

11.8.4 Scope of privilege.

In civil cases, the physician-patient privilege covers:

- direct confidential communications between the patient and physician;

AND

- patient records created or maintained by the physician.

[\(Tex. R. Evid 509 \(c\)\)](#)

11.8.5 Exceptions.

The privilege does not apply:

- in proceedings brought by the patient against the physician;
- if the patient waives the privilege in writing;
- in proceedings brought against the patient to collect on a claim for medical services;
- in any proceeding where the patient's physical, mental, or emotional condition is a part of the claim for relief or defense;⁴⁴⁷
- in disciplinary proceedings against a medical doctor or a nurse;
- in involuntary civil commitment proceedings;

OR

- in proceedings regarding the abuse, neglect, or cause of any abuse or neglect of a resident in an institution providing residential or nursing care.

NOTE: In a SAPCR, if medical records are relevant to a determination of the child's best interest, the court has the discretion to admit the records despite a claim of privilege under [TRE 509](#).⁴⁴⁸

([Tex. R. Evid. 509\(e\)](#))

11.9 TRE 510: Mental health information in civil cases.

In civil cases, a communication (including a written record) between a patient and a professional providing mental health or drug abuse treatment is confidential if not intended to be disclosed to third parties except those

⁴⁴⁷ *RK v. Ramirez*, [887 S.W.2d 836, 843](#) (Tex. 1994). Under TREs 509 and 510, a condition is part of a party's claim or defense if the information communicated to a doctor or psychotherapist may be relevant to the merits of an action but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.

⁴⁴⁸ *Garza v. Garza*, [217 S.W.3d 538](#) (Tex. App.—San Antonio 2006, no pet.). In a SAPCR, the trial court did not err in admitting the mother's medical and mental health records because the issue of who should be the children's managing conservator required a determination of the children's best interests, which in turn required an assessment of the mother's personality and bipolar disorders.

In re A, No. 09-06-0471-CV, [2006 Tex. App. Lexis 11108](#) (Tex. App.—Beaumont, Dec. 28, 2006) (orig. proceeding). In a SAPCR, the trial court did not err in requiring production of some of the father's treatment records for substance abuse. The public policy of Texas is to protect and promote the child's best interest. Consideration of the child's best interest requires determination of whether the parent can meet the child's needs. A parent's dependence on alcohol or drugs affects the best interests determination.

participating in the treatment, evaluation, or diagnosis, or transmitting information relevant to the treatment, evaluation, or diagnosis. The confidentiality exception terminates when the communications and records are relevant to an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies upon the condition as part of the party's claim or defense.⁴⁴⁹

11.10 TRE 601: Competency of witnesses.

It is presumed that every person is competent to be a witness except:

- persons whom the court finds to be insane at the time the testimony is given;

OR

- children or other persons who upon examination by the court do not possess sufficient intellect to relate transactions that are the subject of the interrogation.

11.10.1 Competency determination.

The three elements to be considered in determining the competency of a potential witness are:

- could the witness intelligently observe the events in question at the time they occurred;
- does the witness have the capacity to recall the events;

AND

- does the witness have the capacity to narrate the events.⁴⁵⁰

11.10.2 Burden of proof.

⁴⁴⁹ *Easter v. McDonald*, [903 S.W.2d 887, 890](#) (Tex. App.—Waco 1995) (orig. proceeding). TRE 510 did not apply in case where stepfather's claim that father sexually abused child put father's mental condition in issue.

⁴⁵⁰ *Hollinger v. State*, [911 S.W.2d 35, 38-39](#) (Tex. App.—Tyler 1995, pet ref'd). TRE 601 creates a presumption that every person is competent to testify as a witness.

De Los Santos v. State, [219 S.W.3d 71](#) (Tex. App.—San Antonio 2006, no pet.). In a prosecution for aggravated sexual assault of children, the trial court did not err in admitting testimony of two victims because both children had the capacity to narrate events, understood the difference between the truth and a lie, had the ability to intelligently recall and narrate events, and understood her moral obligation to tell the truth. The child witnesses were qualified to testify under TRE 601.

The burden of proving incompetency is on the party asserting it.⁴⁵¹

11.10.3 Competency of a child witness.

The child witness may be deemed competent to testify even if the child does not understand the oath as long as it established to the court's satisfaction that the child knows it is wrong to tell a lie.⁴⁵²

11.11 TREs 607-609 and 613: Impeachment of a witness.

A witness may be impeached by either the sponsoring or an opposing party. However, a party may not call a witness for impeachment if the primary purpose of the examination is to place otherwise inadmissible evidence before the jury.⁴⁵³

Impeachment falls into the following categories:

- **Specific** (the witness may generally be truthful but is wrong in this instance):
 - with prior inconsistent statements;⁴⁵⁴
- OR**
- by statement of another witness.
- **Non-specific** (an attack on the witness generally):
 - through proof of bias, motive, or interest;
 - by defects in testimony;
 - by lack of credibility or truthfulness in general;⁴⁵⁵

⁴⁵¹ *Contreras v. State*, [745 S.W.59, 62](#) (Tex. App.—San Antonio 1987, no pet.).

⁴⁵² *Fields v. State*, [500 S.W. 2d 500, 502](#) (Tex. Crim App. 1973).

⁴⁵³ *Barley v. State*, [906 S.W.3d 27, 37](#) (Tex. Crim. App. 1995) citing *U.S. Hogan*, [763 F.2d 697, 702](#) (5th Cir. Tex. 1985).

⁴⁵⁴ *Hughes v. State*, [4 S.W.3d 1](#) (Tex. Crim. App. 1999). In a prosecution for indecency with a child by contact, the state called the victim as a witness knowing that she would deny her prior allegations against the defendant and with the intent of impeaching her with her prior statements. Lack of surprise is an element to be analyzed under TRE 403, not TRE 607. It would be an abuse of discretion for a trial court to allow the state to admit impeachment evidence for the primary purpose of placing otherwise inadmissible evidence before the jury when the state's purpose is to have the jury misuse it by considering for the truth of the matter asserted.

⁴⁵⁵ *Michael v. State*, [235 S.W.3d 723, 725-26](#) (Tex. Crim. App. 2007).

- by evidence that the person is subject to manipulation;⁴⁵⁶
- by evidence of lack of mental capacity;⁴⁵⁷

OR

- by proof certain of a criminal conviction.⁴⁵⁸

([Tex. R. Evid. 607](#))

11.11.1 Character and conduct evidence.

Witness credibility may:

- be impeached by opinion or reputation evidence as to truthfulness only;⁴⁵⁹
- be rehabilitated, after impeachment, only as to truthfulness;

AND

- not be impeached by specific instances of conduct.⁴⁶⁰

⁴⁵⁶ *Schutz v. State*, [957 S.W.2d 52, 69-70](#) (Tex. Crim. App. 1997). Under TRE 608, an attack on general capacity of witness to ascertain the truth can include evidence that the witness is: generally the sort of person who is easily manipulated; shows signs or symptoms of being manipulated; or was subject to manipulation by acts or words of a third party. Rebuttal evidence can include evidence that the witness: is not the sort of person who is easily manipulated; does not display signs or symptoms of manipulation; or was not subject to manipulative words or acts of a third party.

⁴⁵⁷ *Perry v. State*, [236 S.W.3d 859, 865](#) (Tex. App.—Texarkana 2007, no pet.). Mental illness or disturbance can be used to impeach credibility under TRE 608.

⁴⁵⁸ *Gonzales v. State*, [929 S.W.2d 546, 549](#) (Tex. App.—Austin 1996, pet. ref'd). A witness's character may be attacked by opinion or reputation evidence or by proof certain of a criminal conviction. Other than proof of a criminal conviction, the witness's character for truthfulness may not be attacked by evidence of specific conduct.

⁴⁵⁹ *Scott v. State*, [222 S.W.3d 820](#) (Tex. App.—Houston [14th Dist.] 2007, no pet.). In a prosecution for aggravated sexual assault of a child, the trial court did not err in allowing the witness to testify as to the witness's opinion about the complainant's reputation for truthfulness. In dicta, the court notes that TRE 608 does not permit a witness to testify as to whether someone is telling the truth or lying in a particular instance.

⁴⁶⁰ *Fierro v. State*, No. 03-05-0266-CR, [2007 Tex. App. Lexis 2160](#) (Tex. App.—Austin, Mar. 22, 2007, pet. ref'd). In a prosecution for injury to a child, the trial court did not err in excluding evidence of child's prior accusation of abuse. Under TRE 608, specific instances of conduct of a witness, other than proof of a criminal conviction, may not be introduced to support or attack the witness's credibility except to expose bias, correct affirmative misrepresentations made on direct examination, or to demonstrate lack of capacity. Absent proof that the prior accusation was false or that the prior and current accusations

[\(Tex. R. Evid. 608\)](#)

11.11.2 Admissibility of proof of criminal conviction.

A witness's credibility may be impeached with evidence, in the form of the witness's admission or a public record, that the witness has been convicted of or released from confinement for:

- a felony or a crime involving moral turpitude, defined as:
 - crimes involving dishonesty, fraud, deceit, misrepresentation, or deliberate violence;
 - crimes involving matters of personal morality;
 - crimes committed knowingly and contrary to justice, honesty, principle, or good morals;
 - crimes involving baseness, vileness, or depravity;
 - conduct that is immoral in itself;

OR

- conduct that is willful, flagrant, or shameless and shows moral indifference.⁴⁶¹
- within the preceding 10 years;

AND

- if the probative value of the evidence outweighs the prejudicial impact.

were similar, the evidence of the prior accusation has too little probative value to outweigh the danger that it would confuse a jury.

Lopez v. State, [18 S.W.3d 220, 223](#) (Tex. Crim. App. 2000). In a prosecution for sexual offense, there is no exception under the Sixth Amendment Confrontation Clause to TRE 608's prohibition on impeachment with specific instances of conduct that would render evidence of witness's prior false accusations of abuse admissible.

But see *Palmer v. State*, [222 S.W.3d 92, 95](#) (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). A defendant must prove the prior allegation was false as threshold to impeaching witness with prior false allegation.

⁴⁶¹ *Escobedo v. State*, [202 S.W.3d 844, 848](#) (Tex. App.—Waco 2006, pet. ref'd).

[\(Tex. R. Evid. 609\(a and b\)\)](#)

11.11.3 Proof of criminal conviction inadmissible.

A witness's conviction for a crime may not be used for impeachment if:

- more than 10 years have elapsed since the conviction or release from confinement, whichever occurred later;
- the witness has completed probation for or received a pardon, annulment, certificate of rehabilitation, or other equivalent procedure for the conviction and has no subsequent conviction for a crime that could be used for impeachment;
- based on a finding of innocence, the witness has received a pardon, annulment, or other equivalent procedure;
- the conviction is on appeal;
- the witness is a juvenile (except for juvenile justice proceedings under [Tex. Fam. Code Title 3](#));
- the crime is unadjudicated unless the proffer is to show vulnerability to prosecution **OR** bias, or interest in testifying in the state's behalf;⁴⁶²

OR

- the opposing party has not been given sufficient notice of the intent to use the conviction for impeachment.

[\(Tex. R. Evid. 609\(c\)\)](#)

NOTE: [TRE 609](#) does not bar admission of evidence concerning a prior conviction if the evidence is being admitted to establish

⁴⁶² *McCrary v. State*, No. 05-06-1163-CR, [2007 Tex. App. Lexis 4200](#) (Tex. App.—Dallas May 30, 2007, pet ref'd). In a prosecution for family violence assault, the trial court did not err by not allowing the defendant-husband to cross examine the victim-wife regarding another case in which she was charged with assaulting the defendant-husband. Although TRE 609 prohibits admission of unadjudicated crimes to show bad character for truthfulness, a party may cross examine a witness regarding an unadjudicated offense to show bias because of vulnerability to prosecution, not to discredit the witness, or to show any bias or interest to testify in the state's behalf. However, the defendant failed to preserve error by showing that he intended to use the unadjudicated offense to show bias, interest, or vulnerability to prosecution.

what is in the best interests of a child for purposes of child custody.⁴⁶³

11.11.4 Prior inconsistent statements of a witness.

Before impeaching a witness with a prior inconsistent statement⁴⁶⁴ or a statement showing bias or prejudice, the witness must be:

- told (but not shown) the contents of the statement;
- when, where, and to whom the statement was made;
- afforded an opportunity to explain or deny such statement;

AND

- if denied by the witness, proven through extrinsic evidence.⁴⁶⁵

([Tex. R. Evid. 613](#))

11.11.5 Prior statement to show bias or prejudice.

Impeachment by prior statements that show bias or prejudice can include specific instances of prior conduct.⁴⁶⁶

⁴⁶³ *Interest of MR*, [975 S.W.2d 51, 55](#) (Tex. App.—San Antonio 1998, no pet.). The Texas Family Code mandates that evidence of a prior conviction be admitted for another purpose—in order to establish what is in the best interest of the child. The wife was not trying to prove that the husband committed acts in conformity with a prior act of violence. Instead, she was trying to establish that the husband’s violent act made it less in the child’s best interest that he be named sole managing conservator.

⁴⁶⁴ *Sohail v. State*, [264 S.W. 3d 251](#) (Tex. App.—Houston [14th Dist.] 2008, pet ref’d). In a prosecution for misdemeanor domestic violence assault, the trial court committed harmless error in excluding evidence that the complainant had told her sister that the alleged assaultive contact was an accident because the evidence was admissible under TRE 613(a).

Davis v. State, No. 05-05-1694-CR, [2007 Tex. App. Lexis 352](#) (Tex. App.—Dallas, Jan. 18, 2007, no pet.). In a prosecution for sexual assault, the trial court did not err in allowing the state to impeach the victim with a prior inconsistent statement about how she broke her nose prior to the alleged offense. The impeachment evidence was admissible under TREs 404(b) and 613.

Billodeau v. State, [277 S.W.3d 34](#) (Tex. Crim. App. 2009). In a prosecution for sexual assault of a child, the trial court erred in excluding evidence of complainant’s threats to neighbors to falsely accuse neighbors of sexual molestation. Even though the threats occurred after the alleged incident on trial, the statements were admissible under TRE 613(b) to show bias or motive.

⁴⁶⁵ *Fields v. State*, [966 S.W.2d 736, 741](#) (Tex. App.—San Antonio 1998), rev’d on other grounds, [1 S.W.3d 687](#) (Tex. Crim. App. 1999). After the witness denies making a prior inconsistent statement, extrinsic evidence of the statement may be introduced.

⁴⁶⁶ *Dixon v. State*, [2 S.W.3d 263, 271](#) (Tex. Crim. App. 1999).

[\(Tex. R. Evid. 613\)](#)

11.12 TRE 701-705: Expert witnesses

11.12.1 TRE 701: Lay witness opinion testimony.

A person who has not been qualified as an expert witness may give opinion testimony if the opinion is:

- rationally based on the witness's perception;

AND

- helpful to a clear understanding of:
 - the witness's testimony;

OR

- a determination of a fact in issue.

A person may be both a lay and expert witness.⁴⁶⁷ A lay witness may generally testify about:

- the state of that person's own health;⁴⁶⁸
- whether another person is intoxicated;⁴⁶⁹
- the amount of damage based on diminished market value of property owned by the person;⁴⁷⁰

AND

- the value of property.⁴⁷¹

NOTE: A lay witness may not testify as to guilt or innocence.⁴⁷² Nor may a lay witness testify as to a mixed question of law and fact.⁴⁷³

⁴⁶⁷ *Osbourne v. State*, [92 S.W.3d 531](#) (Tex. Crim. App. 2002).

⁴⁶⁸ *City of San Antonio v. Vela*, [762 S.W.2d 314, 321](#) (Tex. App.—San Antonio 1988, writ denied).

⁴⁶⁹ *DPS v. Struve*, [79 S.W.3d 796, 803](#) (Tex. App.—Corpus Christi 2002, pet. denied)

⁴⁷⁰ *Porras v. Craig*, [675 S.W.2d 503, 505](#) (Tex. 1984).

⁴⁷¹ *Sierad v. Barnett*, [164 S.W.3d 471, 483-484](#) (Tex. App.—Dallas 2005, no pet.).

11.12.2 TRE 702: Expert witness testimony.

Expert witness testimony is admissible if it will help the trier-of-fact understand the evidence or decide a fact issue.⁴⁷⁴ An expert witness may not give an opinion as to the truthfulness of an individual or a class to which the individual belongs.

11.12.2.1 Qualifications.

A person with scientific, technical, or other specialized knowledge may testify as a subject matter expert if shown to have more than common level of:

- knowledge;
- skill;
- experience (sufficient background in a particular field which is relevant to the matter at issue);⁴⁷⁵
- training;

OR

- education.

NOTE: For medical doctors, expertise is specific to the particular field of medicine; having a medical license does not by itself qualify the physician as an expert in all fields of medicine.⁴⁷⁶

⁴⁷² *Lovell v. State*, No. 12-04-0291-CR, [2006 Tex. App. Lexis 6062](#) (Tex. App.—Tyler, July 12, 2006, pet. ref'd). In a prosecution for interference with child custody, the trial court committed harmless error in allowing a police officer to state his opinion as to the defendant's guilt or innocence. Such testimony is inadmissible under TRE 701.

⁴⁷³ *Martin v. State*, No. 06-03-0139-CR, [2004 Tex. App. Lexis 7142](#) (Tex. App.—Texarkana, Aug. 11, 2004, no pet.). In a prosecution for retaliation, the trial court erred in admitting police officer's testimony that interpreted the meaning of the defendant's statement because such testimony stated a legal conclusion from the facts and thus expressed an opinion of mixed law and fact in violation of TRE 701.

⁴⁷⁴ *Fielder v. State*, [756 S.W.2d 309, 320](#) (Tex. Crim. App. 1988). In a homicide prosecution, it was reversible error to exclude expert witness to explain why, as a battered woman, the defendant could both fear the deceased and continue to live with him. The law recognizes the fact that future conduct may reasonably be inferred from past conduct.

⁴⁷⁵ *Vela v. State*, [209 S.W.3d 128](#) (Tex. Crim. App. 2006).

⁴⁷⁶ *Brodgers v. Heise*, [924 S.W.2d 148, 152-53](#) (Tex. 1996).

11.12.2.2 Reliability of scientific expert witness testimony.

The proponent of the expert witness testimony must establish its reliability. The proponent of scientific evidence has the burden of demonstrating by clear and convincing evidence that the evidence is reliable.⁴⁷⁷ To be sufficiently reliable and relevant to help the trier-of-fact, scientific expert witness evidence must be:

- based on a valid underlying scientific theory
- that was properly applied with a valid technique
- on the occasion in question⁴⁷⁸

AND

- adequately tied to the relevant facts.⁴⁷⁹

11.12.2.3 Establishing scientific reliability for the “hard” sciences.

When assessing scientific reliability of a theory in a “hard” (those in which precise measurement, calculation, and prediction are generally possible)⁴⁸⁰ science, factors that should be evaluated include:

- the extent that the relevant scientific community has accepted the theory as valid;
- the expert witness’s qualifications;
- the existence of literature accepting or rejecting theory;
- the potential rate of error;
- the availability of other experts to test and evaluate the technique;

⁴⁷⁷ *Jackson v. State*, [17 S.W.3d 664, 670](#) (Tex. Crim. App. 2000).

⁴⁷⁸ *Kelly v. State*, [824 S.W. 2d 568](#) (Tex. Crim. App. 1992).

⁴⁷⁹ *Morales v. State*, [32 S.W.3d 862, 866](#) (Tex. Crim. App. 2000); see *Griffith v. State*, [983 S.W.2d 282, 287](#) (Tex. Crim. App. 1998); *Acevedo v. State*, [255 S.W.3d 162, 169-170](#) (Tex. App.—San Antonio 2008, pet. ref’d). Expert witness testimony of medical doctor that was based solely on hypotheticals unrelated to the facts and so the expert witness’s testimony lacked probative value.

⁴⁸⁰ *Weatherred v. State*, [15 S.W.3d 540, 542, n. 2](#) (Tex. Crim. App. 2000).

- the clarity with which the theory and technique can be explained to the court;
- the experience and skill of the person who applied the technique on the occasion in question;

AND

- the non-judicial uses that have been made of the theory or technique.⁴⁸¹

11.12.2.4 Establishing scientific reliability in the “soft” sciences.

The “soft” sciences are those that do not readily lend themselves to precise measurement or calculation. Expertise in “soft” sciences tends to be a matter of experience and training.⁴⁸² In assessing the reliability of evidence in a soft science, the factors to be considered are:

- whether the field of expertise is a legitimate one;
- whether the subject matter of the expert witness’s testimony is within the scope of that field;

AND

- whether the expert witness’s testimony properly relies on or utilizes the principles involved in the field.⁴⁸³

NOTE: An expert witness’s testimony may compare a victim’s (even when the victim is a defendant) behavioral patterns with the general or classical behavioral patterns of a certain type of victim.⁴⁸⁴

⁴⁸¹ *E.I. du Pont de Nemours & Co. v. Robinson*, [923 S.W.2d 549, 557](#) (Tex. 1995); *Kelly*, [832 S.W.3d 568](#).

⁴⁸² *Robinson*, [923 S.W.2d at 557](#).

⁴⁸³ *Nenno v. State*, [970 S.W.2d 549](#) (Tex. Crim. App. 2000); *Taylor v. TDPRS*, [160 S.W.3d 641, 650](#) (Tex. App.—Austin 2005, pet. denied).

⁴⁸⁴ *Scugoza v. State*, [949 S.W.2d 360, 363](#) (Tex. App.—San Antonio 1997, no pet.). Evidence admissible under Rule 702 may include testimony which compares general or classical behavioral characteristics of a certain type of the victim with the specific the victim's behavior patterns. The trial court did not err in admitting expert testimony from licensed professional counselor as to the “cycle of abuse” in domestic violence cases.

Capello v. State, No. 03-05-0553-CR, [2006 Tex. App. Lexis 7551](#) (Tex. App.—Austin 2006, pet. ref’d). Under TRE 702, licensed professional counselor was qualified as expert witness to explain the emotional

11.12.2.5 Lack of reliability.

Reliability evaluations:

- analyze the expert witness' methodology, not his conclusions;⁴⁸⁵
- cannot be based on mere subjective belief, speculation, or conjecture;⁴⁸⁶

AND

- cannot be based on unreliable foundational data.⁴⁸⁷

11.12.2.6 Truthfulness or state of mind.

Expert witness testimony regarding the truthfulness of a person or a class of persons is **NOT** admissible.⁴⁸⁸ Generally, an expert witness may **NOT** testify as to a defendant's state of mind at the time of the offense.

Domestic violence exception. The Texas Court of Criminal Appeals carved out a narrow exception to the general rule and allowed expert witness testimony regarding the state of mind of the defendant in a homicide case when the victim was the defendant's domestic violence batterer.⁴⁸⁹

11.12.3 TRE 703: Basis of expert opinion testimony.

Facts or data relied upon by the expert witness need not be admissible into evidence if that sort of information is the type reasonably relied

and behavioral patterns typical of battered women and explained why some victims of domestic violence do not immediately report the abuse.

⁴⁸⁵ *Mack Trucks, Inc. v. Tamez*, [206 S.W.3d 572, 581](#) (Tex. 2006).

⁴⁸⁶ *Coastal Transp. Co. v. Crown Central Pet. Corp.*, [136 S.W.3d 227, 233](#) (Tex. 2004); *Exxon Pipeline Co. v. Zwahr*, [88 S.W.3d 623, 629](#) (Tex. 2002).

⁴⁸⁷ *Merrell Dow Pharms. v. Havner*, [953 S.W.2d 706, 714](#) (Tex. 1997).

⁴⁸⁸ *In re GMP*, [909 S.W.2d 198, 206](#) (Tex. App.—Houston [14th Dist.] 1995, no writ).

⁴⁸⁹ *Fielder v. State*, [756 S.W.2d 309, 320](#) (Tex. Crim. App. 1988). In a homicide prosecution, it was reversible error to exclude expert witness to explain why, as a battered woman, the defendant could both fear the deceased and continue to live with him. The law recognizes the fact that future conduct may reasonably be inferred from past conduct. See also, *Arnold v. State*, [853 S.W.2d 543, 547](#) (Tex. Crim. App. 1993).

upon by experts in that particular field.⁴⁹⁰ The expert witness may rely upon:

- hearsay;
- privileged communications;⁴⁹¹

AND

- objects not personally inspected.⁴⁹²

11.12.4 TRE 704: Opinion on ultimate issue.

The expert witness's opinion or inference is:

- not objectionable on the basis that it goes to the ultimate issue to be decided;
- is not objectionable because it addresses a mixed question of law and fact;⁴⁹³
- is objectionable if it addresses a pure question of law.⁴⁹⁴

11.12.5 TRE 705: Disclosure of data underlying expert opinion.

The facts or data underlying the expert witness's opinion:

- are admissible into evidence to explain the opinion unless the court determines that:
 - the underlying facts or data are insufficient to support the opinion;

OR

⁴⁹⁰ *State v. Resolution Trust Corp.*, [827 S.W.3d 106, 109](#) (Tex. App.—Austin 1992, writ denied).

⁴⁹¹ *In re Christus Spohn Hosp. v. Kleberg*, [222 S.W.3d 434, 440](#) (Tex. 2007).

⁴⁹² *Shronk v. City of Burleson*, No. 10-07-00399-CV, [2009 Tex. App. Lexis 5654 *28](#) (Tex. App.—Waco, July 22, 2009, pet. denied). But see, *Estate of Ella v. Mask*, No.04-07-0667-CV, [2008 Tex. App. Lexis 7790](#) (Tex. App.—San Antonio, Oct. 15, 2008, pet. denied). There was no evidence to establish lack of testamentary capacity when the expert witness testified based solely on a review of the testator's hospital and pharmacy records and without personal observation or examination of the testator.

⁴⁹³ *Birchfield v. Texarkana Mem'l Hosp.*, [747 S.W.2d 361, 365](#) (Tex. 1987).

⁴⁹⁴ *Dickerson v. DeBarbieris*, [964 S.W.3d 680, 690](#) (Tex. App.—Houston [14th Dist.] 1998, no pet.).

- the danger that the underlying facts and data will be used for purposes other than to explain the expert witness's opinion is too great.⁴⁹⁵
- may be disclosed for the first time on direct or cross-examination unless the court requires prior disclosure;
- may be required to be disclosed on cross-examination;
- may include hearsay if such information is usually relied upon by experts in the field;
- in a criminal case, **shall** be subject to *voir dire* examination prior to disclosure in testimony;

AND

- in a civil case, **may** be subject to *voir dire* examination prior to disclosure in testimony.

[\(Tex. R. Evid. 705\)](#)

11.13 TRE 801-804: Hearsay.

11.13.1 Definition.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (TRE 801(d)).

NOTE: An interpretation or translation of an otherwise admissible out-of-court statement is not rendered inadmissible hearsay by virtue of its interpretation or translation.⁴⁹⁶

⁴⁹⁵ *In re Commitment of Tolleson*, No. 09-08-0338-CV, [2009 Tex. App. Lexis 3660](#) (Tex. App.—Beaumont, May 28, 2009, no pet.). In a civil commitment of alleged sexually violent predator, the trial court did not err in allowing the expert witness to disclose, on direct examination, the basis of his opinion even though the “underlying facts and data” cited were otherwise inadmissible hearsay.

⁴⁹⁶ *Saavedra v. State*, [297 S.W.3d 342](#) (Tex. Crim. App. 2009). In a prosecution for aggravated sexual assault, the trial court did not err in admitting interpreter’s translation of the defendant’s statements to a police officer. For an otherwise admissible out-of-court assertion by a party, if the party makes an interpreter his agent to communicate, the translation of the assertion rendered by the interpreter is not inadmissible hearsay by virtue of its status as an interpreter or translated statement. The out-of-court interpreted statement was admissible under TRE 801(e)(2).

11.13.2 Hearsay exceptions pertinent to family violence cases.

Child victim hearsay exception: Hearsay of a child victim of family violence admissible as evidence in a protective order application case if the child is 12 years of age or younger and the statement describes family violence against the child if the court finds that the time, content, and circumstances of the statement provide sufficient indications of its reliability **AND** either (a) the child testifies or is available to testify at the proceeding or in any other manner required by law; **OR** (b) the court determines that the use of the child’s statement in lieu of testimony is necessary to protect the child’s welfare. ([Tex. Fam. Code §§ 84.006 and 104.006](#))

A statement of a child sexual assault victim under 14 years, is admissible under the same hearsay exception standards. ([Tex. Code of Crim. Proc. art. 7A.035](#); [Tex. Fam. Code § 104.006](#))

Other exceptions. The following are not hearsay:

- former testimony;⁴⁹⁷
- dying declarations;
- statement of personal or family history;
([Tex. R. Evid. 804\(b\)](#))
- present sense impression;
- excited utterance;⁴⁹⁸
- then-existing mental, emotional, or physical condition;
- statements for purposes of medical diagnosis or treatment;⁴⁹⁹
- statements against interest;

⁴⁹⁷ *Davis v. State*, [961 S.W.2d 156](#) (Tex. Crim. App. 1998). A defendant who invoked the Fifth Amendment right against self-incrimination is not entitled to introduce his prior testimony under TRE 804.

⁴⁹⁸ *Hudson v. State*, [179 S.W.3d 731](#) (Tex. App.—Houston [14th Dist.] 2005, no pet.). In a prosecution for family violence assault, the trial court did not err in admitting hearsay evidence because the victim was visibly shaken and highly upset at the time she told EMS and police officers how she sustained her visible injuries; it was irrelevant that the victim was intoxicated when she made the statements.

⁴⁹⁹ There must be proof, prior to admission of the evidence, that the statement was made for the purpose of medical treatment.

- judgment of previous conviction;
- character and reputation;

AND

- various records.⁵⁰⁰

[\(Tex. R. Evid. 803\)](#)

11.14 TRE 803(2): Excited utterance.

11.14.1 Excited utterance defined.

The excited utterance inquiry focuses on whether the declarant made a statement under the stress of a startling event. An “excited utterance” is a statement:

- relating to a startling event or condition;

AND

- made:
 - while the declarant was perceiving the event or condition;

OR

- immediately after the declarant perceived the event or condition.

NOTE: The event described by the excited utterance does not have to be the same event that caused the utterance because an excited utterance is not necessarily also a present sense impression.⁵⁰¹

⁵⁰⁰ TRE 803 excepts the contents of the following from hearsay rule: recorded recollection; records of a regularly conducted business activity; absence of entry in records kept in ordinary course of business; public records or reports; vital statistics records; absence of public record or entry; records of religious organizations; marriage, baptismal, and similar certificates; family records; statements or records of documents affecting an interest in property; statements in ancient documents; market reports and commercial publications; learned treatises; reputation concerning personal history, family history, boundaries, or general history.

⁵⁰¹ *McCarty v. State*, [257 S.W.3d 238](#) (Tex. Crim. App. 2008). In a prosecution for indecency with a child, the victim’s statement qualified as an excited utterance even though it was made well after the assault occurred and under a different stimulus (being tickled by another person). An excited utterance is

The excited utterance exception derives from the common law doctrine of *res gestae*. The rationale for the excited utterance exception is that the individual is so overcome with emotion, shock, fear, excitement, or another dominating feeling from the startling event that whatever the individual may immediately say is inherently reliable.⁵⁰²

11.14.2 Criteria to establish excited utterance.

The court should examine (outside the presence of the jury):

- how much time elapsed between the provoking incident and the utterance;
- the declarant's physical or mental condition when the statement was made;
- whether the statement was made spontaneously or in response to questioning;
- whether the statement expresses emotion or indicates a particular mental state (e.g., surprise);

AND

- whether the statement appears to have resulted from impulse rather than reason and reflection.⁵⁰³

([Tex. R. Evid. 803\(2\)](#))

11.15 Testimonial hearsay.

A testimonial statement is a solemn (or sworn) declaration made to establish some fact and includes statements made during an investigation to prove that

not a present sense impression and therefore the startling event could produce an excited utterance that related to a much earlier incident.

⁵⁰² *Ricondo v. State*, [475 S.W.2d 793, 796](#) (Tex. Crim. App. 1971). The statement is trustworthy because it represents an event "speaking through the person rather than the person speaking about the event."

Zuiliiani v. State, [97 S.W.3d 589, 595](#) (Tex. Crim. App. 2003). To be admissible as an excited utterance hearsay exception, the critical determination is whether the declarant was still dominated by emotions, excitement, fear, or the pain of the event or condition at the time of the statement.

⁵⁰³ *Tyler v. State*, [167 S.W.3d 550, 555](#) (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

some fact is true or that some event occurred.⁵⁰⁴ The Sixth Amendment right to confront witnesses (the Confrontation Clause) in a criminal case renders testimonial hearsay inadmissible if:

- the declarant is available⁵⁰⁵ to testify but does not;

OR

- whether or not the declarant is available to testify, the defendant has not previously had an opportunity to confront the declarant.⁵⁰⁶

This exclusion applies regardless of whether the hearsay would otherwise be admissible as an exception to the rule against hearsay (e.g., as an excited utterance).⁵⁰⁷ Other grounds for objecting to testimonial statements are hearsay and the right to confrontation in [Tex. Const. art. I, § 10](#). The court should rule on all objections asserted.

Forfeiture by wrongdoing exception: If the state proves that the defendant acted with intent to prevent the declarant from being a witness against the defendant, then the testimonial hearsay may be admitted without violating the Sixth Amendment right to confrontation.⁵⁰⁸ See § 11.16.

⁵⁰⁴ *Russeau v. State*, [171 S.W.3d 871, 880](#) (Tex. Crim. App. 2005). Generally, a statement is “testimonial” if it is a solemn declaration made for purposes of establishing some fact. See *Grant v. State*, [218 S.W.3d 225](#) (Tex. App.—Houston 2007, pet. ref’d). In an aggravated robbery prosecution, it was harmless error to admit testimonial statements contained in the defendant’s high school disciplinary records into evidence over his Confrontation Clause objection.

⁵⁰⁵ Under TRE 804(a), a witness is unavailable if:

- the court has sustained the declarant’s invocation of a privilege against testifying; **OR**
- the declarant:
 - refuses to comply with a court order to testify;
 - cannot remember the subject matter;
 - lacks the mental or physical capacity to testify due to death or an existing illness or infirmity; **OR**
 - cannot be brought to court under subpoena or by other reasonable means.

⁵⁰⁶ *Giles v. California*, 554 U.S. 353 2678, [128 S.Ct. 2678, 2691](#) (2009) citing *Crawford v. Washington*, [541 U.S. 36, 68](#) (2004). Prior *confronted* statements by witnesses who are unavailable are admissible whether or not the defendant was responsible for their unavailability.

⁵⁰⁷ *Crawford v. Washington*, [541 U.S. 36](#) (2004). If the declarant’s extrajudicial statement was testimonial in nature, it is inadmissible unless the declarant testifies.

⁵⁰⁸ *Gonzalez v. State*, [195 S.W.3d 114, 115](#) (Tex. Crim. App. 2006). When the evidence established that the defendant murdered the victim at least in part to prevent the victim from testifying against him, the defendant waived his right to confrontation of the victim-witness and the victim’s excited utterance was admissible.

Whether a statement is testimonial in nature is a question of law.⁵⁰⁹

NOTE: The Sixth Amendment right to confrontation applies only in criminal prosecutions, so the prohibitions on testimonial hearsay are inapplicable in the civil context.

11.15.1 Determining if the excited utterance is testimonial.

To determine if an excited utterance is testimonial, the court examines whether a reasonable declarant, similarly situated would have had the capacity to appreciate the legal ramifications of the statement. The court determines:

- whether the statement is an excited utterance (if not, the inquiry usually ends);
- if the statement is an excited utterance, whether the surrounding circumstances make it likely that at the time the statement was made, a reasonable person would have retained or regained the capacity to make a testimonial statement;⁵¹⁰
- whether the statement is testimonial. It is testimonial if the circumstances, viewed objectively, show that the statement:
 - was not made to obtain assistance or to enable responders to assist with ongoing emergency;⁵¹¹

AND

If the hearsay statement the prosecution seeks to have admitted is not an excited utterance, proof of forfeiture by wrongdoing alone will not render the hearsay statement admissible. See *Woods v. State*, No. 08-07-203-CR, [2009 Tex. App. Lexis 8749](#) (Tex. App.—El Paso, Nov. 12, 2009, no pet.). In a prosecution for murder, witness's statement that decedent told witness shortly before her murder that she was trying to leave the defendant and that the defendant had threatened her was inadmissible hearsay. The forfeiture by wrongdoing exception to the Sixth Amendment's Confrontation Clause is not an exception to the hearsay rule.

⁵⁰⁹ *Langham v. State*, [305 S.W.3d 568](#) (Tex. Crim. App. 2010).

⁵¹⁰ *Wall v. State*, [184 S.W.3d 730, 742](#) (Tex. Crim. App. 2006). Admission of a police officer's testimony recounting hospitalized the victim's statement about how the defendant assaulted the victim with a two-by-four board violated the defendant's Sixth Amendment right because the victim did not testify at the trial and his statements to the officer were testimonial in nature when analyzed from the point of view of a reasonable person in the declarant's position at the time the statements were made (citing *Brito v. State*, [427 F.3d 53, 61-62](#) (1st Cir. 2005)).

⁵¹¹ *Vinson v. State*, [252 S.W.3d 336, 340](#) (Tex. Crim. App. 2008). The trial court reasonably found that before the defendant had been secured in the patrol car any interrogation was non-testimonial because the police officer still assessing the situation and that, until the defendant was secured, an emergency situation was ongoing.

- was in response to questioning when the primary purpose of the interrogation⁵¹² was to establish or prove past events potentially relevant to later criminal prosecution.⁵¹³

NOTE: Although most of the Sixth Amendment Confrontation Clause challenges involve an excited utterance, other types of evidence may be challenged as violating the Confrontation Clause.

11.15.2 Types of testimonial hearsay.

Types of extrajudicial statements that might be considered testimonial are:

- *ex parte* in-court testimony or its functional equivalent (materials such as affidavits, custodial examinations, or prior testimony) that the accused had not opportunity to submit to cross-examination or similar pretrial statements that declarant would reasonably expect to be used in a prosecution;
- extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial;

⁵¹² *Langham v. State*, [395 S.W.3d 568](#) (Tex. Crim. App. 2010). When there are competing purposes, "primary" means "first in importance" rather than "first in time." When the police respond to an emergency, for as long as the emergency situation is still ongoing, the "primary purpose" of the communication is not to develop a factual predicate for later litigation; rather, it is to decide how to respond appropriately to the situation. The exchange cannot be said to have been undertaken for the "primary" purpose of memorializing facts for future prosecution. Once the emergency is resolved, however, any continuing or subsequent interrogation may well provoke a testimonial response for Confrontation Clause because at that juncture, objectively viewed, the primary, if not the sole, purpose of the interrogation has become to investigate a possible crime. (citing *Davis v. Washington*, [547 U.S. 813](#) (2006)).

⁵¹³ *Davis v. Washington*, [547 U.S. 813, 822](#) (2006). A victim's statements to police dispatch while asking for assistance were not testimonial.

Villareal v. State, Nos. 03-05-0100-CR and 03-05-0101-CR, [2006 Tex. App. Lexis 6304](#) (Tex. App.—Austin, July 21, 2006, pet. ref'd) (mem. op.). In a prosecution for felony family violence assault, the trial court did not err in admitting police officer's testimony about the victims' statements because the victims testified at the trial and the statements were excited utterances.

White v. State, [201 S.W.3d 233](#) (Tex. App.—Fort Worth 2006, pet. ref'd). In a prosecution for family violence assault, the victim-wife's statements were admissible as excited utterances and, for purposes of TRE 607, her statements were not proffered by the state solely for the purpose of introducing otherwise inadmissible hearsay.

- *ex parte* testimony at a preliminary hearing;
- statements taken by law enforcement in the course of interrogations;⁵¹⁴

AND

- business records created for the purpose of establishing or proving some act at trial.⁵¹⁵

11.15.3 Prosecutorial proffer of testimonial evidence.

When testimonial hearsay is offered by the prosecution, the proffer satisfies the Sixth Amendment Confrontation Clause only if:

- the declarant is produced for cross-examination;
- the declarant was previously subject to cross-examination by the defendant;
- there is proof that the accused forfeited his right of confrontation by wrongfully procuring the absence of the declarant (i.e., forfeiture by wrongdoing);⁵¹⁶

⁵¹⁴ *Wall*, [184 S.W.3d 730 at 735](#).

⁵¹⁵ *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, [129 S.Ct. 2527](#) (2009). In a prosecution for distribution of cocaine, admission of forensic analyst’s report that substance seized from the defendant was cocaine violated the Sixth Amendment’s Confrontation Clause because the report was a testimonial statement.

⁵¹⁶ *Crawford*, [541 U.S. at 62](#); *Davis*, [547 U.S. at 833](#); *Giles v. California*, 554 U.S. 353, [128 S.Ct. 2678](#) (2008). The *Giles* facts involved a defendant who claimed he killed his former girlfriend in self-defense. The defendant objected to the admission of the victim’s statements to police three weeks before the murder about a prior episode of abuse at the hands of the defendant.

A majority of the Supreme Court concluded that the defendant did not forfeit his right of confrontation simply by murdering the victim and that the prosecution was required to show that the wrongful act was done with the purpose or design of rendering the witness unavailable. The Court ruled that to constitute an act of forfeiture by wrongdoing, the wrongful act that caused the witness to be unavailable (such as the girlfriend’s murder) had to occur simultaneously with an intent (a purpose or design) to prevent the witness from testifying. Thus, when invoking the forfeiture by wrongdoing doctrine, the state must prove not only the wrongful act but also the specific contemporaneous intent to prevent the witness from testifying. The Court noted:

Only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing. . . .

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence

- the proffer qualifies as a dying declaration;⁵¹⁷

OR

- the statements are in business records or were made in furtherance of a criminal conspiracy.⁵¹⁸

11.15.4 Preservation of error.

An objection to hearsay alone does not preserve error for purposes of a challenge based on the Sixth Amendment Confrontation Clause.⁵¹⁹

11.15.5 Burden of proof on testimonial nature of hearsay.

Upon timely objection, the proponent of the evidence has the burden to establish that the proffered statement is not testimonial in nature.⁵²⁰ The U.S. Supreme Court has suggested that the burden of proof is a preponderance of the evidence and that is the standard adopted in [Fed. R. Evid. 804\(b\)](#).⁵²¹

11.15.6 Non-testimonial hearsay

There is no Sixth Amendment Confrontation Clause restraint on the admissibility of non-testimonial hearsay.⁵²² Types of evidence that are usually non-testimonial include:

- statements made to obtain help during an ongoing emergency;

may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. . . .

The state courts in this case did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine. This view of the law was error, but the court is free to consider evidence of the defendant's intent on remand. [128 S.Ct. at 2692-2693](#).

⁵¹⁷ *Crawford*, [541 U.S. at 53, 59](#).

⁵¹⁸ *Crawford*, [541 U.S. 56, n. 6](#).

⁵¹⁹ *Horn v. Quarterman*, [508 F.3d 306](#) (5th Cir. 2007).

⁵²⁰ *De La Paz v. State*, [273 S.W.3d 671](#) (Tex. Crim. App. 2008).

⁵²¹ *Davis*, [547 U.S. at 823](#).

⁵²² *Davis*, [541 U.S. at 823-824](#) (dicta); *United States v. Tolliver*, [454 F.3d 660, 665 n. 2](#) (7th Cir. 2006).

- statements to medical treatment providers;
- statements to anyone outside law enforcement or court personnel;
- photographs;⁵²³
- statements in business records;⁵²⁴
- statements made to further a conspiracy;⁵²⁵
- business records (unless created for purpose of proving a fact at trial).⁵²⁶

11.16 Forfeiture by wrongdoing.

To constitute an act of forfeiture by wrongdoing, the wrongful act that caused the witness to be unavailable (such as a murder) must occur simultaneously with an intent (a purpose or design) to prevent the witness from testifying. Thus, when invoking the forfeiture by wrongdoing doctrine, the state must prove by a preponderance of the evidence that the defendant's wrongful conduct actually undermined the judicial process and that the defendant's bad act was accompanied by a specific *contemporaneous* intent to prevent the witness from testifying.⁵²⁷

To establish forfeiture by wrongdoing, the state must show that:

- the declarant is unavailable;
- the declarant was expected to be a witness;
- the defendant acted with intent to prevent the declarant from testifying;

AND

- there is a nexus between the defendant's acts and the declarant being unavailable to testify.⁵²⁸

⁵²³ *Sevin v. Parish of Jefferson*, [621 F.Supp. 372, 382](#) (5th Cir. 2009).

⁵²⁴ *Crawford*, [541 U.S. at 56](#).

⁵²⁵ *Ibid.*

⁵²⁶ *Melendez-Diaz*, ___ U.S. ___, [129 S.Ct. at 2539-2940](#) (2009).

⁵²⁷ *Giles*, 554 U.S. 353, [128 S.Ct. 2678](#) (2008).

⁵²⁸ [Fed. R. Evid. 804\(b\)\(6\)](#).

NOTE: The U.S. Supreme Court has not ruled on the procedures required to prove forfeiture by wrongdoing: whether a hearing is required, what standard of proof applies, whether the burden of going forward can shift, or whether hearsay is sufficient to prove forfeiture.⁵²⁹

Noting the applicability of TRE 104's requirement that the court decide preliminary questions of admissibility of evidence, the Texas Court of Criminal Appeals upheld a conviction after a trial in which the forfeiture issue was decided at a hearing outside the presence of the jury during the trial. The case does not mention of the standard of proof used to determine whether a forfeiture occurred.⁵³⁰

⁵²⁹ See M. McAllister, *Down but not Out: Why Giles Leave Forfeiture by Wrongdoing Still Standing*, 59 Case Western Reserve Law Review 393 (Winter 2009). Under [Fed. R. Evid. 804\(b\)\(6\)](#), statements regarding forfeiture by wrongdoing are not hearsay and need only be proven by a preponderance of the evidence.

⁵³⁰ *Gonzales v. State*, [195 S.W.3d 114, 124](#) (Tex. Crim. App.2006).

CHAPTER 11—PART II: COMMENTS

11.17 TRE 202 and 203. Proof of foreign laws.

Proof of foreign laws is made to the court, not to the jury. If the foreign law is introduced and applies, the court then instructs the jury on the foreign law.⁵³¹ In rule of law cases dealing with ownership of personal property, as between spouses, the rule of domicile prevails.⁵³²

11.18 TRE 504; [Tex. Code Crim. Proc. art. 38.10](#). Spousal privileges.

There are two spousal privileges in the Texas Rules of Evidence: the spousal immunity privilege and the spousal communications privilege. [Tex. Code Crim. Proc. art. 38.10](#) creates an exception to the spousal immunity privilege when the crime is either bigamy or against the spouse, a minor child, or a member of either spouse's household.

⁵³¹ *El Paso & S.W. Co. v. La Londe*, [173 S.W. 890](#) (Tex. Civ. App.—El Paso, 1915, writ ref'd).

⁵³² *Ossorio v. Leon*, [705 S.W.3d 219, 222](#) (Tex. App.—San Antonio 1985, no writ).

Privilege	Who may claim	Type of case	When applicable	Subject matter covered
Confidential marital communication	Either spouse	Civil or criminal	During or after the marriage (e.g., ex-spouse can claim the privilege)	Applies only to confidential communications made during the marriage.
Spousal immunity from testifying	Testifying spouse ⁵³³	Criminal only	Only during the marriage (i.e. divorce ends the privilege)	Is an absolute bar to spouse's testimony, regardless of the subject matter or when the communication occurred. ⁵³⁴
Spousal crime exception	Criminal prosecutor	Criminal	Only when the spousal immunity privilege is invoked	Is an absolute bar to invoking the spousal immunity privilege.

With regard to [Tex. Code Crim. Proc. art. 38.10](#) and recantation by a victim-spouse, one commentator opined that:

[[Tex. Code Crim. Proc. art. 38.10](#)] should be construed to give the state power to compel a victim spouse's testimony to the same extent the state may compel the testimony of any other crime victim. Any other interpretation reduces the importance of domestic violence by treating it as a species of tort rather than crime.⁵³⁵

The spousal communication privilege under TRE 504 applies to utterances, not acts. Thus, a defendant cannot successfully invoke the privilege to prevent a spouse from testifying about the defendant's acts.⁵³⁶ It should be noted that the

⁵³³ The spouse of the accused has a privilege not to be called to testify, which means the testifying spouse holds the spousal immunity privilege. See *Johnson v. State*, [803 S.W.3d 272, 281](#) (Tex. Crim. App. 1990) (en banc); *Gibbons v. State*, [794 S.W.2d 887, 893](#) (Tex. App.—Tyler 1990, no pet.).

⁵³⁴ *Perkins v. State*, [698 S.W.3d 762](#) (Tex. App.—Austin 1985, pet. ref'd). The spousal immunity privilege applies only to bar spousal testimony about marital communications. Where a wife repeated husband's statements about having murdered two men and the wife's statements were used as basis for issuance of arrest warrant for husband, the wife's out-of-court statements did not constitute testimony that was subject to the spousal privilege.

⁵³⁵ See, M. Seymour, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, [2 Tex. Wesleyan L. Rev. 239, 246-247](#) (Fall 1995).

⁵³⁶ *Sterling v. State*, [814 S.W.2d 261](#) (Tex. App.—Austin, 1991, pet. ref'd) (*per curiam*); *State v. Mireles*, [904 S.W.2d 885, 890](#) (Tex. App.—Corpus Christi 1995, pet. ref'd). A wife may testify about husband's actions she observed but not about husband's statements made to her during marriage.

spousal privilege applies only to married couples and only to those marriages that are legal under Texas law—under current law, those are limited to marriages between a genetic male and a genetic female⁵³⁷

11.19 TRE 509 and 510. Physician-patient privilege.

Under the patient-litigant exception to the physician-patient privilege, *any* party (not just the patient) can waive the privilege by putting the mental, emotional, or physical condition of the patient in issue.⁵³⁸ A party may not use the privilege offensively to withhold information that would materially weaken or defeat the asserting party's claim.⁵³⁹ Once waived, the privilege does not apply to subsequent treating physicians for the mental, emotional, or physical condition at issue. Even if a condition is "part" of a party's claim or defense, patient records should be revealed only to the extent necessary to provide relevant evidence relating to the condition alleged.⁵⁴⁰

11.20 TRE 701-705: Expert witnesses.

11.20.1 Noteworthy subject matter and admissibility.

In family violence cases, the noteworthy subjects for expert witness testimony include battered woman's syndrome (BWS) (which includes theories of, learned helplessness and the cycle of violence), child sexual abuse accommodation syndrome (CSAAS), and parental alienation syndrome (PAS).

The foregoing syndromes were primarily developed for forensic purposes and may not have an exact or recognized medical diagnostic or psychological counterpart. For instance, the standard psychological or psychiatric diagnosis would be post-traumatic stress disorder, not BWS. This forensic/medical dichotomy may be part of a challenge to either witness qualifications or admissibility of the expert witness's testimony.

[Freeman v. State, 786 S.W.2d 56, 59](#) (Tex. App.—Houston [1st Dist.] 1990, no pet.). An ex-wife's testimony that her ex-husband carried weapons with him all the time during their marriage does not violate the communications privilege.

⁵³⁷ See [Littleton v. Prange, 9 S.W.3d 223, 225-231](#) (Tex. App.—San Antonio 1999, pet. denied); see also, [Billodeau v. State, 263 S.W.3d 318](#) (Tex. App.—Houston [1st Dist.] 2007) rev'd on other grounds and remanded, [2009 Tex. App. Lexis 232](#) (Tex. Crim. App., Feb. 22, 2009). In a prosecution for aggravated sexual assault of a child, the defendant and complainant could not have been legally married in Texas because both were males.

⁵³⁸ [Easter v. McDonald, 903 S.W.2d 887, 890](#) (Tex. App.—Waco 1995) (orig. proceeding).

⁵³⁹ [R.K. v. Ramirez, 887 S.W.2d 836](#) (Tex. 1994).

⁵⁴⁰ [Ibid.](#)

11.20.2 Reliability assessment.

With regard to a reliability challenge, the foregoing syndromes are considered part of the “soft sciences.” In assessing the reliability of evidence regarding a soft science, the factors to be considered are: whether the field of expertise is a legitimate one; whether the subject matter of the expert witness’s testimony is within the scope of that field; and whether the expert witness’s testimony properly relies on or utilizes the principles involved in the field.⁵⁴¹

11.20.3 Types of expert witnesses.

In family violence cases, the courts have allowed marriage and family counselors,⁵⁴² battered women’s shelter program services directors,⁵⁴³ licensed professional counselors,⁵⁴⁴ and child abuse investigators to serve as expert witnesses on various issues.

11.20.4 Battered Woman’s Syndrome (BWS).

In the late 1970s, psychologist Lenore Walker published her theory of BWS to explain “why battered women ‘stay’ in abusive relationships,”⁵⁴⁵ as well as to explain why a battered woman may attack her abuser at a time when she is not being physically abused.

In the past, the acceptance of the theory underlying BWS was so widespread that VAWA included funding to train forensic expert witnesses about it. However, more recently, psychologists, forensic scientists, and legal scholars have criticized the theory’s underlying

⁵⁴¹ *Nenno v. State*, [970 S.W.2d 549](#) (Tex. Crim. App. 2000); *Taylor v. TDPRS*, [160 S.W.3d 641, 650](#) (Tex. App.—Austin 2005, pet. denied).

⁵⁴² *Fielder v. State*, [756 S.W.2d 309, 321](#) (Tex. Crim. App. 1988). In a homicide prosecution, it was reversible error to exclude expert witness to explain why, as a battered woman, the defendant could both fear the deceased and continue to live with him. The law recognizes the fact that future conduct may reasonably be inferred from past conduct.

⁵⁴³ *Scugoza v. State*, [949 S.W.2d 360, 363](#) (Tex. App.—San Antonio 1997, no pet). Evidence admissible under [Tex. R. Evid. 702](#) may include testimony which compares general or classical behavioral characteristics of a certain type of victim with the specific victim's behavior patterns. The trial court did not err in admitting expert testimony from licensed professional counselor as to the “cycle of abuse” in domestic violence cases.

⁵⁴⁴ *Capello v. State*, No. 03-05-0553-CR, [2006 Tex. App. Lexis 7551](#) (Tex. App.—Austin 2006, pet. ref’d). Under [Tex. R. Evid. 702](#), licensed professional counselor was qualified as expert witness to explain the emotional and behavioral patterns typical of battered women and explained why some victims of domestic violence do not immediately report the abuse.

⁵⁴⁵ K. Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, [58 Alb. L. Rev. 1087](#) (1995).

premises. In the main, critics challenge Walker's research methodology and the concepts.⁵⁴⁶ Some advocacy groups now caution against relying on the battered woman's syndrome as a defense due to its noted shortcomings.

Basis of BWS. Over a period of several years, Walker studied an economically and culturally homogeneous group of middle-class women in central Colorado. Her study group reported their experiences with domestic violence. Most of the women had ceased to live with the abuser prior to the study. She used this work as the basis for theory of BWS.

Learned helplessness. Walker's theory incorporated psychologist Martin Seligman's theory of learned helplessness, a theory that sought to explain certain forms of psychological paralysis. Seligman subjected confined dogs to repeated, random electric shocks and observed that after a while the animals ceased to attempt to escape, even when escape was a possible choice. He hypothesized that the animals' suffering had distorted their perceptions of their capacity to alter their situation.⁵⁴⁷

Walker theorized that women who suffer repeated (a woman must be battered more than once to have BWS) abuse react similarly to Seligman's shocked dogs and ultimately abandon attempts to escape in favor of developing coping or survival skills.⁵⁴⁸ According to Walker's theory, just as Seligman's dogs stopped responding to the electric shocks due to distorted perceptions, after repeated assaults, women victims stop responding due to diminished perceptions or motivation.⁵⁴⁹ Walker adopted Seligman's term "learned helplessness" to describe this phenomena.

Cycle of violence theory. Besides the theory of learned helplessness, the other key component of BWS is the "cycle of violence" theory. The cycle of violence theory describes a "typical" battering dynamic as having three sequential phases: a 'tension building' phase; an 'acute battering incident'; and a phase of remorse with 'loving contrition.'⁵⁵⁰ The first two phases explain why the victim lives in a perpetual state of fear, while the remorse phase explains why the victim does not leave the abusive relationship.

⁵⁴⁶ See Z. Craven, *Battered Woman Syndrome*, Australian Domestic & Family Violence Clearinghouse (2003). Available at: <http://www.adfvc.unsw.edu.au/PDF%20files/battered%20woman%20syndrome.pdf>

⁵⁴⁷ *Id.*

⁵⁴⁸ L. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J. L. Ethics & Pub. Pol'y 321 (1992).

⁵⁴⁹ Craven, *supra* note 530 at 4.

⁵⁵⁰ L. Walker, *The Battered Woman Syndrome* (1979).

Criticisms of BWS. Citing logical flaws in the theory, one critic declared that BWS “illustrates all that is wrong with the law’s use of science.”⁵⁵¹ The theory of BWS has been criticized for inadvertently reinforcing harmful stereotypes and misconceptions about domestic violence, rendering the forensic use of the theory counterproductive and ineffective.⁵⁵²

Criticism of methodology. With regard to methodology, critics note that Walker’s study lacked a control group (women who had never experienced intimate partner violence), lacked an explanation of the frequency with which the subjects exhibited a learned helplessness response, and used secondary sources (the subjects’ descriptions) rather than verifiable data for information on the perpetrators’ actions. Finally, not only have the results of Walker’s study never been replicated, other studies have produced results that contradict her findings.⁵⁵³

Critics also note that BWS fails to take into account the other myriad of reasons a victim may feel compelled to stay, such as cultural pressures and economic hardship.

Critique of learned helplessness theory. Critics assert that characterizing a homicide of a batterer by the victim as the result of a “syndrome,” indicates the victim’s act resulted from faulty reasoning or judgment instead of being a rational and a proportional response to systematic abuse.

Critics of the BWS note the degrading nature of the learned helplessness generalization and its reliance on images of women as weak and defenseless. These critics reject learned helplessness as labeling the sufferer as having diminished capacity or being “psychologically disabled.”⁵⁵⁴

Critics also note a conceptual flaw in Walker’s learned helplessness theory. Walker’s battered woman is unable to offer anything other than passive and submissive acceptance of abuse. But there is nothing passive or submissive about the act of killing an abusive intimate partner. If it were truly the case that the victim became so helpless as to be incapable of escaping her situation, it would be unlikely she would be as

⁵⁵¹ D. Faigman & A. Wright, *The Battered Women’s Syndrome in the Age of Science*, [39 Ariz. L. Rev.](#) [67](#) (1997).

⁵⁵² [Id.](#)

⁵⁵³ [Id. at 9.](#)

⁵⁵⁴ [Id. at 70.](#)

autonomous as to actually kill her batterer when presented with such an opportunity.

Studies have shown that the murder of an abusive partner often follows an act of abuse that is qualitatively different from prior acts, usually because the act is coupled with a threat of more serious injury.⁵⁵⁵ Critics note that if learned helplessness truly paralyzes the victim, the quality of the abuse should not produce a different and dynamic reaction.

Critique of the cycle of violence theory. Critics assert the cycle of violence theory lacks supporting empirical data (many victims do not report or identify with the cyclical nature of the abuse).⁵⁵⁶ The remorse or “loving contrition” phase is not universally reported by the victims.⁵⁵⁷ Battered women often describe their abusers as unpredictable with the violence occurring “out of nowhere” and often describe feeling constant fear and apprehension, even when the batterer expresses remorse.

The cycle of violence theory explains why battered victim would perceive imminent harm when it might not be apparent to an outside observer. In terms of the legal theory of self-defense, the theory fails to explain why a battered woman foregoes the opportunity to retreat from her abuser. Under the law, a valid self defense claim requires that the battered woman reasonably perceive a threat of imminent harm by her abuser and to lack an opportunity for retreat. The cycle of violence theory alone cannot establish a valid self defense claim because it fails to address the duty to retreat element.

Summary of criticisms. BWS is a forensic term, not a psychiatric diagnosis. As noted above, the only empirical data supporting the theory came from a study conducted by Walker and that study has been challenged as flawed.⁵⁵⁸ Some experts assert that before BWS can be used to support self-defense, the psychiatric diagnosis of Post Traumatic Stress Disorder should be established by a psychologist or psychiatrist.⁵⁵⁹

⁵⁵⁵ [Id.](#)

⁵⁵⁶ D. Crosson, M.Ed, *Basics of Domestic Violence Training*, Texas Advocates’ Guide (2008).

⁵⁵⁷ [Faugman supra note 535.](#)

⁵⁵⁸ [Id. at 78.](#)

⁵⁵⁸ J. von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed toward Women and the Impact on Child Witnesses*, [27 W. St. U. L. Rev. 111 \(1999-2000\)](#).

⁵⁵⁹ [Id.](#) See also, Craven supra note 530 at 4; Donald A. Downs, *More than Victims: Battered Women, the Syndrome Society, and the Law*, University of Chicago Press, 1996; Britannica Concise Encyclopedia. Copyright © 1994-2008 entry on Battered Woman’s Syndrome, available at <http://encyclopedia2.thefreedictionary.com/battered+woman+syndrome>:

Admissibility. Expert testimony on BWS has been admitted in Texas courts.⁵⁶⁰ In a homicide prosecution, the Texas Court of Criminal Appeals held it was reversible error to exclude expert witness to explain why, as a battered woman, the defendant could both fear the deceased and continue to live with him.⁵⁶¹

11.20.5 Parental Alienation Syndrome (PAS).

PAS is a purported disorder defined by the late child psychiatrist Richard Gardner as one parent's (called the "alienating parent") campaign against the other parent (the "alienated parent") to gain an advantage in child custody dispute by encouraging a child to make false allegations of abuse against the alienated parent.

Gardner asserted that PAS manifests itself when the alienating parent indoctrinates a child to dislike and to falsely accuse the alienated parent of child abuse. In Gardner's opinion, this indoctrination is the "true abuse" and the indoctrinating parent should not be granted custody of the child. Under Gardner's theory, when PAS occurs the child's best interest require minimal, or no, contact with the alienating parent.

Identifying features of PAS. According to Gardner there are eight symptoms of PAS that can be used to differentiate between legitimate and manufactured false allegations of parental child abuse. In PAS, the indoctrinating parent wages a "campaign" against the other parent that involves:

- denigrating the alienated parent;
- rationalizing the denigration with weak, frivolous, or absurd reasons;
- unequivocally asserting that the alienated parent is inadequate as a parent;
- exhibiting the "independent thinker" phenomenon;
- convincing the child to reflexively support the alienating parent in the parental conflict;
- lacking guilt over cruelty to and/or exploitation of the alienated parent;

⁵⁶⁰ See *Scugoza v. State*, [949 S.W.3d 360](#) (Tex. App.—San Antonio 1997, no pet.); *Capello v. State*, No. 03-05-553-CR, [2006 Tex. App. Lexis 75517551](#) (Tex. App.—Austin, Aug. 25, 2006, pet. ref'd).

⁵⁶¹ *Fielder v. State*, [756 S.W.2d 309, 320](#) (Tex. Crim. App. 1988).-

- using “borrowed” scenarios to implicate the alienated parent;

AND

- spreading of the animosity to the friends and/or extended family of the alienated parent.⁵⁶²

Criticisms of PAS. Critics assert that PAS is not generally accepted in the psychological and psychiatric communities. It is not a psychiatric diagnosis recognized in the DSM-IV (the Diagnostic and Statistical Manual of Mental Disorders) nor is there a clear or recognized standard for its diagnosis. Critics also cite the lack of empirical data to substantiate either the existence of PAS or its diagnosis.⁵⁶³ The American Psychological Association has issued a formal statement that there is no data to support the phenomenon called parental alienation syndrome.⁵⁶⁴

The theory underlying PAS has also been criticized for requiring the court to assume that the child is alienated by the alienating parent’s discussion of the abuse rather than the abuse itself. Further, critics assert that PAS diverts attention from the alienated parent’s abusive behavior toward the alienating parent’s response to the abuse. Finally, PAS disregards the child’s ability to independently reject the alienated parent’s abusive actions.

Admissibility. The appellate courts have upheld trial court decisions to both to admit and to exclude expert witness testimony regarding PAS.⁵⁶⁵

⁵⁶² R. Gardner, *Differentiating between Parental Alienation Syndrome and Bona Fide Abuse-Neglect*, 27 *American Journal Family Therapy* 97 (1999).

⁵⁶³ J. von Tralge, *supra* note 542 at 158.

⁵⁶⁴ American Psychological Association, *Violence and the Family Report of the American Psychological Association Presidential Task Force on Violence and the Family* 40, 100 (1994). (The report states that custody and visitation disputes appear to occur more often in cases in which there is a history of domestic violence).

⁵⁶⁵ See *Allen v. Mancini*, [170 S.W.3d 167](#), (Tex. App.—Eastland 2005, pet. denied). In a SAPCR, the court did not err in finding that a material and substantial change had occurred since rendition of custody decree or in finding that the mother had interfered with the child’s relationship with the father by telling the child that father did not love child.

Rangel v. State, No. 14-06-090-CR, [2007 Tex. App. Lexis 4761](#) (Tex. App.—Houston [14th Dist.], June 14, 2007, pet. ref’d). In a prosecution for sexual assault of a child, the trial court did not err in excluding the defendant’s evidence of “parental alienation syndrome” because the victim was the defendant’s niece by marriage, not his child, so there was no parental or blood relationship between the victim and appellant, nor did he cite any authority for its application in such circumstances. The trial court did not prevent appellant from attempting to show that the victim’s parents influenced her to fabricate allegations of sexual abuse.

11.20.6 Child Sexual Abuse Accommodation Syndrome (CSAAS).

Child Sexual Abuse Accommodation Syndrome (CSAAS) is a theory that explains why children react to sexual abuse in certain identified, if counter-intuitive, ways. The theory was first expounded by Dr. Roland Summit in 1983.⁵⁶⁶ It is not used to diagnose sexual abuse, but as a therapeutic tool to understand why the child reacted to the abuse in unexpected ways.

The syndrome. The syndrome occurs when a sexually abused child is accused of lying or enjoying the abuse because the child did not immediately complain of the abuse or kept the abuse secret over a period of time. Dr. Summit's theory is that the failure to immediately disclose abuse is the child's way of dealing with the fears and anxieties that the abuse causes.

The five elements of CSAAS. Dr. Summit identified five reactive behaviors in children from known sexual abuse: secrecy; helplessness; entrapment and accommodation; delayed disclosure; and retraction. He described secrecy and helplessness as "precursors" to abuse. The former enables the crime to go undetected; the latter results from the power imbalance between the child and perpetrator that keeps the child from challenging the abusive authority figure even in the absence of overwhelming force or threat of violence. The child's silence is not willing compliance, but rather the result of fear of being blamed or left unprotected even after the disclosure.

The third element of entrapment and accommodation explains why the child appears to "cooperate" with the abuser. Dr. Summit opines that the child feels powerless and fears the abuser's anger, violent acts, or threats of violence, and so delays or hesitates to disclose the abuse. The element of retraction occurs when the child bends to pressure from the abuser or

Silverman v. Johnson, No 03-08-0271-CV, [2009 Tex. App. Lexis 7176](#) (Tex. App.—Austin, Aug. 26, 2009, no pet.). In a SAPCR, the trial court did not err in determining that it was in the best interests of the child to restrict the father's access to the child. Evidence from three mental health professionals established that his contact with the child should be limited. The trial court was presented with substantial evidence that the child exhibited behaviors and responses indicative of parental alienation by the father, well as testimony regarding the negative effect of the father's influence on the child's demeanor, attitude, and behavior and the father's questionable ability to interact with the child appropriately.

⁵⁶⁶ R. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177 (1983); see *Duckett v. State*, [797 S.W.2d 906, 912-13](#) (Tex. Crim. App. 1990).

others and tries to restore the pre-disclosure status by recanting allegations or denying the abuse.⁵⁶⁷

Proponents. Proponents assert that CSAAS is relevant to the issue of whether child abuse occurred because it is a rehabilitative tool that explains the child's unusual reactions to abuse. CSAAS proves that the child's unexpected reactions result from the abuser's behavior. In other words, CSAAS explains how the abuser causes the child to help conceal the crime. Proponents also argue that CSAAS aids jurors in understanding a matter that is beyond the scope of common knowledge.

Criticisms. Critics assert that CSAAS is at best a therapeutic, rather than diagnostic or forensic, tool. They challenge its scientific reliability, as there is a dearth of scientific research to validate the syndrome's existence or to establish that it is typical of sexually abused children.⁵⁶⁸

Even if CSAAS exists, critics opine that it is irrelevant because the syndrome does not help prove that: (1) abuse occurred (the syndrome only explains reactions to known abuse); or (2) who perpetrated the abuse. Critics also note that CSAAS cannot establish that the child's perception of abuse meets the statutory criteria necessary to establish criminal conduct and cannot eliminate other causes for the vague set of symptoms that embody CSAAS.

The critics further argue that CSAAS is ultimately irrelevant to the issue of whether a particular person actually abused the child as a matter of law. Additionally, critics challenge expert testimony on CSAAS as improper bolstering, a comment on the child's truthfulness, and an invasion of the jury's role on matters that do not require expert testimony.

Admissibility. In the face of challenges to admissibility on the grounds of relevance and bolstering, the Texas Court of Criminal Appeals ruled CSAAS was admissible because it helped the trier-of-fact understand the full significance of the evidence. The Court also held that CSAAS can be used to rehabilitate a child witness after impeachment.⁵⁶⁹

⁵⁶⁷ See, R. Flint, *Child Abuse Accommodation Syndrome*, 23 American Journal of Criminal Law 171 (Fall 1995).

⁵⁶⁸ L. Askowitz & M. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, [15 Cardozo L. Rev. 2027](#) (1994); C. Holmes, Note, *Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence*, 25 Tulsa L.J. 143, 159 (1989).

⁵⁶⁹ *Duckett v. State*, [797 S.W.2d 906](#) (Tex. Crim. App. 1990).

11.20.7 Psychiatric/psychological forensic evaluations professional guidelines.

In evaluating challenges to psychological or psychiatric expert witness testimony, courts should consider the professional guidelines for a competent and thorough forensic psychiatric examination. Those guidelines require the expert witness to:

- understand the legal issues, evidentiary standards, and special issues in the case;
- understand the parameters of confidentiality with the person being evaluated;
- thoroughly review the pertinent documents;
- review the person's medical records, from before and after the alleged incident, including medication history;
- review the person's legal, mental health, educational, occupational, and social services history (e.g., interactions with the police);
- evaluate the person's psychosocial (emphasizing incidents of abuse or other victimization) history, including substance abuse, social habits, and relationship problems;
- perform a mental status evaluation, observing dress and appearance, attitude, behavior, psychomotor activity, speech patterns, mood, affect, perception, thought process, alertness, orientation (to person, place, and time); degree of concentration, memory and retention ability, general intelligence, judgment, insight, and reliability;⁵⁷⁰
- perform a structured or semi-structured interview (of 4-6 hours duration) to take the individual's history;
- perform collateral interviews with family and friends to collect character and past history and compare the individual's behavior and attitude before and after the alleged incident;
- perform psychological testing (such as the Minnesota Multiphasic Personality Inventory 2);

⁵⁷⁰ *Estate of Ella v. Mask*, No.04-07-0667-CV, [2008 Tex. App. Lexis 7790](#) (Tex. App.—San Antonio, Oct. 15, 2008, pet. denied). There was no evidence to establish lack of testamentary capacity when the expert witness testified based solely on a review of the testator's hospital and pharmacy records and without personal observation or examination of the testator.

AND

- perform a neurological examination and if positive for abnormal symptoms, administer neuropsychological diagnostic testing.⁵⁷¹

11.20.8 Mental state of the defendant at time of crime-domestic violence exception.

Generally, Texas courts exclude as speculative and unreliable any testimony, other than that of the defendant, concerning the defendant's mental state at the moment the crime was committed. Such testimony is considered speculative and unreliable.

Domestic violence exception. In a homicide case where the defendant had killed an abusive intimate partner, the Texas Court of Criminal Appeals has created a narrow exception to the general rule and allowed expert witness testimony concerning the defendant's mental state at the time of the offense.⁵⁷²

⁵⁷¹ J. von Tralge, note 142 supra at 160-163.

⁵⁷² *Avila v. State*, [954 S.W.2d 830, 839](#) (Tex. App.—El Paso 1997, pet. ref'd), citing *Fielder v. State*, [756 S.W.2d 309, 320](#) (Tex. Crim. App. 1988).

SECTION V— INTERSTATE ISSUES AND RELATED FEDERAL LAWS

CHAPTER 12—IMMIGRATION ISSUES IN FAMILY VIOLENCE CASES; HUMAN TRAFFICKING—PART I: STATUTES AND CASE LAW

[\(8 U.S.C. §§ 1101 et seq., 1151 et seq., 1182 et seq., 1255, 1375a, 1367, and 1401 et seq.; 22 U.S.C. § 7101 et seq.\)](#)

Summary:

Protective orders are available to the victims of abuse without regard to the victim's immigration status. Not only are immigrant victims of abuse entitled to the same protections as victims who are citizens, under federal law, immigrant victims of family violence, human trafficking, and other crimes may qualify for relief with an adjustment in immigration status.

Fear of deportation may drive many decisions made by immigrant victims, including whether the victims of abuse seek legal protections. Other impediments to seeking protection from abuse include: limited English proficiency, lack of familiarity with the U.S. legal system, and economic vulnerability. As with any victim, safety is the paramount concern for the immigrant victim.

Human trafficking affects both immigrant and domestic victims. The very nature of such trafficking is the abuse and exploitation of the victims. Fear of deportation or other consequences may render the immigrant trafficking victim reluctant to disclose the abuse or exploitation. Some victims, especially sexually exploited underage victims, may not be willing to admit they are being exploited. Indicators of human trafficking may be subtle; knowledge of the phenomena can aid in the identification of possible victims.

To protect immigrant victims from abuse of process by the abuser, the federal Illegal Immigration Reform and Immigrant Responsibility Act contains a provision ([8 U.S.C. § 1367](#)) that prevents use of immigration information furnished solely by a family or

household member who has battered the immigrant or subjected the immigrant to extreme cruelty. The provision also forbids disclosure or use of information relating to T or U visas by anyone not working for the Department of Homeland Security.

NOTE: The complexities of immigration law are beyond the scope of this Benchbook, which addresses only the basics of immigration law in the context of family violence.

Subchapter A Basic Immigration Terms

12.1 *Immigration status.*

For purposes of immigration, all persons physically located in the United States are classified as either citizens or non-citizens.

12.1.1 Citizen.

This status is obtained:

- by birth in the United States or its territories (Puerto Rico, Panama Canal Zone, Virgin Islands, Guam) ([8 U.S.C. § 1401-1407](#));
- by birth to a U.S. citizen living abroad with registration at birth⁵⁷³ ([8 U.S.C. § 1401\(c-e\)](#));

OR

- by naturalization ([8 U.S.C. § 1423](#); [8 U.S.C. § 1427](#)).

12.1.2 Non-citizens.

The following are the most common types of non-citizen categories:

- **Lawful permanent resident** (“green card” holders). This status provides the right to permanently live and work in the U.S. It is most often obtained by the sponsorship, including the filing of an affidavit of support by:

⁵⁷³ There are certain exceptions to the registration at birth requirement.

- a citizen for a spouse, minor or adult child, parent, or adult sibling ([8 U.S.C. §§ 1151 and 1153](#));
- a lawful permanent resident for a spouse or child ([8 U.S.C. § 1153](#));

OR

- employer for employee in a particular job in a designated shortage occupation ([8 CFR § 204.5](#)).

Lawful permanent resident status can also be obtained through a self-petition under VAWA; a U visa or T visa for crime or domestic abuse victims; or a special immigrant juvenile status proceeding. (See § 12 5 et seq.).

- **Immigrant visa-holder.** This status identifies the immigrant as having officially declared the intent to remain permanently in the U.S. It is the precursor to an application for lawful permanent residency status. Examples include family petitions, employer petitions, and VAWA self-petitions.
- **Non-immigrant visa-holder.** This status carries the right to be in the U.S. temporarily and for a specific purpose. The most common types are:
 - **Business or tourist.** These visas last 3 months and do not allow the holder to work ([8 U.S.C. § 1101\(a\)\(15\)\(B\)](#)).
 - **Student.** This visa has various durations, requires at least part-time enrollment in a school, and allows the holder to work on campus during full-time enrollment and for one year after completing studies ([8 CFR § 274a.12\(b\)\(6\)](#)).
 - **Specialty occupation.** This visa can last up to 3 years and allows primary holder (but not dependents) to work ([8 CFR § 274a.12\(b\)\(9\)](#)).
 - **Immigrant spouse visa.** This visa, known as the K3 visa, allows an immigrant spouse of a U.S. citizen to enter the U.S. A

petition to immigrate must be filed before entry. It is valid for two years and allows multiple entries into the U.S.

NOTE: When a U.S. citizen sponsors an immigrant spouse but the marriage occurred less than two years earlier, the sponsored spouse is issued a conditional green card that expires after two years. With the conditional green card, the sponsored immigrant spouse becomes a conditional resident, who enjoys all the same legal rights as a lawful permanent resident. The sponsor and sponsored spouse must file a joint petition for change of status before the end of the two-year period. The waiting period to adjust status for immigrant spouses of lawful permanent residents is five years.

AND

- **Fiancée.** This visa, known as the K1 visa, is good for six months but requires a legal marriage between the visa-holder and the sponsor occur within 90 days of the visa-holder's entry into the U.S. The visa-holder is allowed to work if a work permit is obtained. It is subject to regulation under the International Marriage Broker Regulation Act. Only one entry into the U.S. is permitted under the K1 visa. ([8 U.S.C. § 1375a](#)).

([8 U.S.C. § 1101\(a\)\(15\)\(K\)\(i\)](#); [8 U.S.C. § 1375a](#); [8 CFR § 274a.12\(a\)\(6\)](#)).

- **Asylum-seeker and refugee.** Both categories describe persons who seek residency in the U.S. for protection from persecution in their home country based on membership in a protected class. An asylum-seeker is already in the U.S. when the status is requested; the refugee applies for status from abroad. To receive asylum, the petitioner must prove:
 - a well-founded fear of persecution based on membership in a protected class (race, religion, nationality, political opinion, or social group, the latter of which may include gender or domestic violence victims although neither are recognized as a protected class *per se*);⁵⁷⁴

⁵⁷⁴ But see [In re Kasinga](#), Interim Dec. 3278, 6 Immigr. Rep. (MB) at B1-84, B1-91 (BIA June 13, 1996) 21 I&N Dec. 357, 358 (BIA 1996). Applicant for asylum was found to be a member of social

- physical presence in the U.S.;

AND

- application filed within one year of entry into U.S. (or qualification under an exception to the deadline).

([8 U.S.C. § 1101\(a\)\(42\)\(A\)](#))

- **Victim of human trafficking or another crime.** Immigrants whose presence in the U.S. is the result of a crime or who have knowledge of criminal activity in the U.S. may qualify for a U visa or a T visa based upon their cooperation in the investigation or prosecution of criminal activity.

([8 U.S.C. § 1101\(a\)\(15\)\(U-T\)](#) et seq.; [22 U.S.C. § 7101](#) et seq.)

12.1.3 Unlawful presence (undocumented or without status).

An undocumented person is one who has no current immigration status.⁵⁷⁵ A person accrues an “unlawful presence” if the person:

- entered the U.S. without inspection (EWI) (without receiving an I-94 document) from U.S. customs ([8 U.S.C. § 1182\(a\)\(9\)\(B\)\(ii\)](#));
- is present in the U.S. after overstaying an authorized entry (e.g., remains after a visa or I-94 document expires) ([8 U.S.C. § 1182\(a\)\(9\)\(B\)\(ii\)](#));

OR

group (women from a tribe in Togo who had not undergone genital mutilation) and so was entitled to claim asylum as a protected social class.

In the case of *In Re R.A.*, 22 In & N Dec. 906 (BIA 2001), a Guatemalan woman successfully petitioned for asylum on the grounds that she would not be adequately protected from her batterer if she were removed to Guatemala. That decision was overturned on appeal on the basis that Guatemalan female victims of intimate partner violence were not a social group for asylum purposes. The appellate decision was vacated by the U.S. Attorney General. *In Re R.A.* 22 I & N Dec. 907 (BIA 2001).

⁵⁷⁵ In 2004, about 1.2 million (or 13% of the estimated 9.3 million undocumented persons in the U.S.) lived in Texas. Passel, Capps, and Fix, *Undocumented Immigrants* (Jan. 12, 2004).

- violated the terms of the visa (e.g., is not enrolled in educational program while present on a student visa).

Reentry is barred for three years after accruing 181-364 days of unlawful presence in the U.S. If the unlawful presence was for 365 days or more, reentry is barred for 10 years. Unlawful presence before the age of 18 is not counted in determining the period.

12.2 Work authorization.

To lawfully work in the U.S., a non-citizen must have either:

- a valid Employment Authorization Document (EAD) card (also known as a work permit), which allows the person to work for any employer ([8 CFR § 274a.13\(a-b\)](#));
- a work visa, which allows employment only with a specific employer and for a specific amount of time ([8 CFR § 274a.12\(b\)](#));

OR

- a conditional or permanent resident’s “green” card,⁵⁷⁶ which allows the person to work without an EAD card. Only lawful permanent residents or conditional residents are eligible for the green card.

12.3 Bars to admissibility.

Based on a ground of inadmissibility (which are set out in [8 U.S.C. § 1182\(a\)](#)), a non-citizen can be barred from the U.S. Grounds of inadmissibility apply when an otherwise eligible non-citizen cannot obtain lawful immigration status based on the bar; when the bar defeats a claim to the good moral character necessary for naturalization ([8 U.S.C. § 1101\(f\)](#)); or when it prevents the non-citizen from demonstrating his or her admissibility.

Persons who seek to adjust their immigration status must show that they would be qualified to enter the U.S. Bars to admissibility include:

⁵⁷⁶ A conditional green card expires after 2 years; a “permanent” green card expires after 10 years. When the conditional green card expires, the holder loses immigration status. When the permanent green card expires, the holder does not lose permanent resident’s status but the card itself becomes ineffective.

- health-related grounds (e.g., communicable disease, mental illness that threatens public safety);
- convictions for: multiple crimes, crimes of moral turpitude, controlled substance violations, prostitution, or commercial vices;
- national security grounds;
- the applicant's poverty as it relates to the likelihood that the applicant will become a public charge;
- entry without inspection or unlawful presence;
- false claim to citizenship;
- multiple unlawful entries;
- prior removal;
- entry without inspection after prior removal;
- child abduction (in certain circumstances);⁵⁷⁷
- suspected terrorist activities;

OR

- giving false information to receive an immigration benefit.

[\(8 U.S.C. § 1182\(a\)\)](#)

12.4 Removal (a.k.a. deportation).

Based on grounds of deportability (which are set out in [8 U.S.C. §§ 1227\(a\) and 1229a](#)), a non-citizen can be removed from the U.S. The legal proceeding,

⁵⁷⁷ A non-U.S. citizen may be denied entry into the U.S. if that person has violated child custody order issued in the U.S. by detaining, retaining, or holding the child outside the U.S. in a country that is not a party to the Hague Convention. ([8 U.S.C. § 1182](#), [INA § 212\(a\)\(10\)\(C\)](#)).

conducted in a federal immigration court to remove a person from the U.S., is called a removal proceeding.

12.4.1 Grounds for removal.

Removal proceedings may be instigated after the person is convicted of a: crime of moral turpitude, aggravated felony, prostitution, commercial vice, high-speed flight from an immigration checkpoint, offenses involving controlled substances or firearms; conspiracy, or domestic violence offenses (including stalking and violations of temporary or final protective orders). A defendant has a constitutional right to be warned that a guilty plea has the potential immigration consequences of removal or deportation.⁵⁷⁸

[\(8 U.S.C. § 1227\(a\)\(2\)\(E\); 8 U.S.C. § 1229a\)](#)

12.4.2 Immigration consequences of convictions for selected crimes.

An adult immigrant convicted of certain crimes may be subject to a removal proceeding.⁵⁷⁹

- **Aggravated felonies.** Conviction for an aggravated felony will result in the worst possible immigration consequences. The person will almost surely be removed or deported as almost no waivers are available, absent a strong claim of fear of persecution or torture in their home country. Such crimes include:
 - crimes of violence with a one-year sentence imposed. A crime of violence includes any felony or misdemeanor that involves the

⁵⁷⁸ See [Padilla v. Kentucky](#), ___ U.S. ___, 130 S. Ct. 1473 (2010). The United States Supreme Court ruled that criminal defense attorneys do have an obligation to inform their clients if a guilty plea carries a risk of deportation. Writing for the majority, Justice Stevens stated, "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." The lower court's ruling was therefore reversed, and the case remanded.

⁵⁷⁸ See also Aleinkoff, Executive Associate Commissioner, Office of Programs, INS Memo entitled, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents," April 16, 1996, 73 Interpreter Releases 737, May 24, 1996.

⁵⁷⁹ Juvenile adjudications of delinquency are not "convictions" for any immigration purpose, regardless of the nature of the offense. [Matter of Devison, Int. Dec. 3435 \(BIA 2000\); Matter of Ramirez-Rivero, 18 I.&N. 135 \(BIA 1981\).](#)

intent to use or threaten force against a person or property, as well as any felony that carries an inherent risk that force will be used. ([18 U.S.C. §16](#));

- rape ([8 U.S.C. §1101\(a\)\(43\)\(A\)](#));
- sexual abuse of a minor ([8 U.S.C. §1101\(a\)\(43\)\(A\)](#));

OR

- statutory rape.⁵⁸⁰
 - **Domestic violence.** Conviction of any of the following makes the person deportable under the “domestic violence” ground of deportability, if the conviction occurred on or after September 30, 1996:
 - a specially defined “domestic violence” offense;
 - stalking;
 - child abuse;
 - child neglect;
- OR**
- child abandonment.

NOTE: The court should inform a defendant convicted of a family violence offense or who is the subject of a protective order proceeding that the entry of the conviction for the family violence offense or the entry of the protective order against him may affect his immigration status and could result in his or her deportation. The court should also inform the defendant convicted of a family violence offense that if he is in the United States illegally, he may never be granted legal alien status.

⁵⁸⁰ [Matter of Small, 23 I&N 448 \(BIA 2002\)](#).

[\(8 U.S.C. §1227\(a\)\(2\)\(E\)\(i\)\)](#)

- **Crimes involving moral turpitude.** No clearly delineated definition exists within the law for “crime of moral turpitude,” although the Bureau of Immigration Appeals (BIA) has defined the term “moral turpitude” as referring to conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”⁵⁸¹ The BIA also has noted that a crime of moral turpitude is an act that is *malum in se*, that is, bad in itself or intrinsically wrong, as opposed to *malum prohibita*, that is, wrong simply because a statute prohibits it.
- **Offenses related to controlled substances or alcohol.** Almost any felony conviction of an offense relating to a controlled substance is an aggravated felony. ([8 U.S.C. §1101\(a\)\(43\)\(B\)](#)).

Almost any conviction is a basis for deportability and inadmissibility under the controlled substance conviction ground. ([8 U.S.C. §1182\(a\)\(2\)\(A\)\(i\)\(II\)](#); [8 U.S.C. §1227\(a\)\(2\)\(B\)\(I\)](#)).

- Bad conduct that does not require a conviction. Bad conduct includes:
 - prostitution ([8 U.S.C. §1182\(a\)\(1\)\(A\)\(i\)](#));
 - “reason to believe” drug trafficking. If law enforcement has “reasons to believe” that a noncitizen has assisted or been a drug trafficker, the person is inadmissible. ([8 U.S.C. §1182\(a\)\(2\)\(C\)](#));
 - violation of a protective order. A person is deportable if, on or after September 30, 1996, a criminal or civil court judge found that person violated portions of a protective order that involved serious threats and harassment. ([8 U.S.C. §1227\(a\)\(2\)\(E\)\(ii\)](#)).

⁵⁸¹ *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994).

Subchapter B

Immigrant Victims of Domestic Violence

12.5 *Barriers to legal protection for immigrant victims.*

Immigrants who are the victims of family violence are often hampered from seeking or receiving help by:

- lack of ability or proficiency with spoken or written English;
- economic dependency on the abusive party, in part because of inability to legally work;
- social isolation due to lack of language skills, financial resources, transportation (the abuser may be the immigrant victim's sole source of money, food, housing, transportation, and social contact);
- lack of information about resources for the victims of family violence;
- fear that interactions with the government will result in deportation;
- general distrust of the legal system;
- isolating cultural or religious beliefs;
- lack of family, community, or peer support;

OR

- inability to safely return to the country of origin due to:
 - lack of economic resources;
 - danger from family or friends of the abuser (in U.S. or in country of origin);
 - concerns about separation from children and other dependents;

OR

- unstable political situation

12.6 *Communicating with immigrant victims.*

To promote victim safety, it is important that the immigrant victim (or the victim whose immigration status is unknown) be informed of the victim's legal right to be free of family violence and right to independently seek lawful permanent residency or citizenship status. A brochure, written in the victim's first language, conveying this information is one way to achieve this goal.⁵⁸²

12.7 *Effect of criminal conviction on immigration status.*

12.7.1 Conviction of the abuser.

The criminal conviction of the non-citizen abuser of an immigrant victim can have adverse consequences for the victim. Most felony, and some misdemeanor, convictions (including for crimes involving domestic violence) can result in loss of immigration status (i.e., deportation). If the loss of status was related to an incident of domestic violence, the immigrant victim can initiate a self-petition proceeding to obtain an adjustment of status independent of the abuser. The self-petition must be filed within two years of the abuser's loss of immigrant status. (See § 12.8.)

NOTE: Deportation of a family's sole or main source of income is likely to have significant adverse impacts on the victim's financial and social condition. For that reason, an immigrant victim may have a mixed reaction to a criminal conviction of an abuser.

[\(8 U.S.C. § 1154\(a\)\(1\)\(A\)\(iii\)\)](#)

12.7.2 Conviction of the immigrant victim.

If a criminal conviction of an immigrant victim is shown to be connected to domestic abuse, the conviction may not be a bar to self-petitioning for an adjustment of status. If the criminal act is not shown to be connected with the abuse, the immigrant victim may have trouble achieving a change in status.

⁵⁸² See Ch. 19, Resources, for links to sample brochures. The brochures are available at:

http://www.endabuse.org/section/programs/immigrant_women/questions_immigrant_refugee

[\(8 U.S.C. § 1182\(h\); 8 U.S.C. § 1227\(a\)\(7\)\)](#)

12.8 Options for immigrant victim's status adjustment.

So that immigrants do not have to remain in an abusive relationship to achieve lawful immigration status, federal law allows current and former spouses and children who are abused by a U.S. citizen or lawful permanent resident to petition for lawful resident's status under VAWA. This relief extends to immigrant parents who are abused by an adult child who is a U.S. citizen. Immigrant victims with conditional residency can petition to remove the conditions without the assistance of the abusive spouse. Immigrants facing removal can apply to cancel the proceeding based on abuse. (See § 12.9.)

12.8.1 VAWA self-petitions.

A person can apply to self-petition (change status without the abusive spouse, child, or parent's participation) if the person is abused by a spouse, a parent, the spouse of a parent; or an adult child. ([8 U.S.C. § 1154\(a\)\(1\)\(B\)](#))

An immigrant spouse can petition independently of an abusive spouse if the petitioner can prove that:

- a good faith marriage (ceremonial or common-law) (or the petitioning spouse believed the marriage was in good faith) to the abusive spouse:
 - exists;
- OR**
- was terminated within the two years preceding filing of the petition;
- the abusive (current or former) spouse is:
 - a citizen;
 - a lawful permanent resident;

OR

- lost the status as a citizen or lawful permanent resident due to domestic violence within the two years prior to the filing of the petition ([8 U.S.C. § 1154\(a\)\(1\)\(B\)\(ii\)\(aa\)\(CC\)\(aaa\)](#); [8 U.S.C. § 1154\(a\)\(1\)\(B\)\(ii\)\(aa\)\(CC\)\(bbb\)](#));
- the petitioner resided with the abuser as the spouse or intended spouse of the abuser (in or outside of the U.S.) ([8 U.S.C. § 1154\(a\)\(1\)\(A\)\(iii-iv\)](#); [8 U.S.C. § 1154\(a\)\(1\)\(b\)\(ii-iii\)](#));
- the petitioner was the victim of the abuser’s battery or extreme cruelty⁵⁸³ during the marriage ([8 CFR § 204.2 \(c\)\(1\)\(vi\)](#));

AND

- the petitioner is of good moral character.

NOTE: A self-petitioning proceeding under [8 U.S.C. § 1154](#) is not available to a victim who is:

- not married to the abuser;
- in a same-sex relationship with the abuser;

OR

- with an abuser who was not either a citizen or lawful permanent resident.

⁵⁸³ [Hernandez v. Ashcroft, 345 F.3d 824, 839 \(9th Cir. 2003\)](#). The Ninth Circuit Court of Appeals noted that "Congress clearly intended extreme cruelty to indicate nonphysical aspects of domestic violence. Defining extreme cruelty in the context of domestic violence to include acts that 'may not initially appear violent but that are part of an overall pattern of violence' is a reasonable construction of the statutory text"

Extreme cruelty is broadly and flexibly defined as encompassing physical, sexual, and psychological acts, as well as economic coercion. See Aleinkoff, Executive Associate Commissioner, Office of Programs, INS Memo entitled, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents," April 16, 1996, 73 Interpreter Releases 737, May 24, 1996.

The VAWA self-petitioner can include their children as derivatives, whether or not the children are abused or are the children of the abusive spouse. ([8 U.S.C. § 1154\(a\)\(1\)\(A\)](#)).

12.8.2 Self-petitioning child.

A person under the age of 21 years and unmarried may self-petition under the same criteria as a spouse except instead of a good faith marriage, the existence of the parent-child relationship must be proven. To qualify, the child must be related to the abuser either:

- as a legitimate child of married parents;
- as a step-child (if the relationship was created before the child's 18th birthday);
- as the legitimized child of whom the abusive parent has custody (if legitimization occurred before the child turned 18 years old);
- as the illegitimate child of an abusive father (in which case the father must prove the relationship);
- as the adopted child who is under 16 years old and has been in the adoptive parents custody for at least two years;
- as an orphan under the age of 16 years who has been adopted or whose prospective adopted parent is a U.S. citizen;

OR

- as the adopted child, who is under 18 years, of a U.S. citizen who previously or simultaneously adopted a natural sibling under the age of 16 years.

([8 U.S.C. § 1101\(b\)\(1\)\(A-F\)](#))

12.8.3 Adjustment of status.

In self-petition proceeding under [8 U.S.C. § 1154](#), the petitioner may qualify for exceptions to bars to admissibility or adjustment (from unlawful to lawful) status. For a self-petitioner, the following are not bars to adjustment of status:

- working without authorization;
- illegal entry (if connected to the abuse);
- a single illegal entry;
- unlawful presence of any duration;
- criminal conviction (if the criminal conduct was connected to the abuse or falls within certain VAWA exceptions);
- public charge--the petitioner may receive certain public benefits;

OR

- lack of an affidavit of support by the sponsor.

[\(8 U.S.C. § 1182; 8 U.S.C. §1227; 8 U.S.C. § 1255\)](#)

12.8.4 Removal of conditions from lawful permanent residency (green) card.

For immigrant victims who have been married for less than two years to a U.S. citizen and have a conditional (for two years' duration) green card, the victim can independently petition to have the two-year condition removed and to receive permanent (unconditional) resident's status if the victim can prove that one or more of the following grounds applies:

- battery or extreme mental cruelty during a good faith marriage;
- termination of a good faith marriage by divorce or annulment;

- extreme hardship⁵⁸⁴ from removal;

OR

- the sponsoring spouse is deceased.

NOTE: A conditional resident child of a person petitioning for removal of conditions may petition independently for the same relief or may be included in the parent's application. The application should be filed before the child's conditional residency expires.

[\(8 CFR §§.216.4-216.5\)](#)

12.8.5 Special cancellation of removal proceedings.

To have a removal proceeding cancelled, an immigrant victim must prove:

- relationship as a spouse; intended spouse; parent of an abused child; or child of an abusive citizen or conditional permanent resident;

AND

- battery or extreme cruelty by a spouse or parent who is a U.S. citizen or a lawful permanent resident;

OR

- battery or extreme cruelty by an intended spouse who is a U.S. citizen or a lawful permanent residence if any marriage was invalid due to the intended spouse's bigamy;

AND

- the petitioner:
 - has good moral character;

⁵⁸⁴ A qualifying extreme hardship is more than mere separation from family or dependents or lowered standards of living in the native country. Extreme hardship in this context generally involves showing that specific injury (e.g., inability to receive necessary medical care for specific illness) will result from removal.

- has been physically present in the U.S. for three years;
- has no bar to admissibility;

AND

- will suffer extreme hardship (or has a parent or child who will suffer extreme hardship), if removed.

[\(8 U.S.C. § 1229\(b\)\)](#)

Subchapter C Visas for Victims of Crime or Human Trafficking (U and T Visas); Fiancée (K Visas)

Summary:

The Victims of Trafficking and Violence Prevention Act ([8 U.S.C. § 1101](#) et seq.) created a new class of visa to help immigrant victims who do not qualify for the immigration relief in the Violence Against Women Act (because they are not married to the abuser, are in a same-sex relationship with the abuser, or the abuser is not a citizen or lawful permanent resident). This visa, known as the U visa or crime victim’s visa, is a non-immigrant, temporary visa. After three years with this immigration status, the U visa holder can apply for lawful permanent residency. ([8 U.S.C. § 1255\(m\)](#)). The Act also provides relief for the victims of crimes who have no familial or intimate partner relationship with the perpetrator.

The Trafficking Victims Protection Act ([22 U.S.C. § 7101](#) et seq.) provides immigration status (the T visa) for the victims of severe forms of human trafficking. It should be noted that not all the victims of human trafficking are immigrants. U.S. citizens, particularly runaway children, are frequently forced into servitude and exploited.

The International Marriage Broker Regulation Act ([8 U.S.C. 1375a](#)) mandates that women coming into the United States as “mail-order brides” on the fiancée K1 visa must be informed of their legal rights, including the right to be free of domestic abuse, and of available resources should the visa-holder become a victim of abuse.

12.9 *U visas for crime victims.*

Immigrant victims who assist or are willing to assist authorities in investigating crimes may qualify for a U visa. This visa is available to an immigrant who:

- suffered substantial physical or mental harm from abuse;
- is the victim of serious criminal activity;
- possess information concerning criminal activity that violates the laws of or occurred in the U.S.;⁵⁸⁵

AND

- are helpful, have been helpful, or are likely to be helpful to the investigation or prosecution of a crime, as certified by an authority investigating, prosecuting, or trying the crime.

[\(8 U.S.C. § 1101\(a\)\(15\)\(U\); 8 U.S.C. § 1184\(p\)\)](#)

12.9.1 Adjustment of status for U visa holders.

After being physically present in the U.S. for three years, the holder of a U visa may apply for lawful permanent residency if humanitarian reasons, family unity, or the public interest justifies the victim's continued presence in the U.S. The U visa is valid for four years.

[\(8 U.S.C. § 1255\(m\)\(1\)\)](#)

12.9.2 Status of immediate relatives.

The spouse and children of a U visa holder can qualify for immigration relief. A spouse will not qualify if the U visa application is predicated upon an unlawful act by the spouse. If the applicant is under 21 years of age, the applicant's spouse, child, parent, or unmarried sibling can

⁵⁸⁵ The enumerated list of crimes are: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felony assault, witness tampering, obstruction of justice, perjury, and attempt, conspiracy, or solicitation to commit any of the foregoing crimes.

qualify as derivative family members. If the applicant is over 21 years of age, only the applicant's spouse or child qualify.

[\(8 U.S.C. § 1101\(a\)\(15\)\(U\)\)](#).

12.10 Immigrant victims of human trafficking: T visas.

The Trafficking Victims Protection Act ([22 U.S.C. § 7101 et seq.](#)) provides immigration status for the victims of severe forms of human trafficking. Like the U visa, the T visa is a temporary non-immigrant visa, but a person with this visa may apply for lawful permanent residency after three years.

NOTE: Not all the victims of human trafficking are immigrants. U.S. citizens, particularly vulnerable populations such as runaway children, are frequently forced into servitude and exploited.

12.10.1 “Severe form” of human trafficking defined.

Severe forms of human trafficking include the use of force, fraud, or coercion for purposes of placing a person in involuntary servitude, peonage, debt bondage, slavery, or to engage commercial sex acts (if under 18 years old).

[\(22 U.S.C. § 7102\(8\)\)](#).

12.10.2 Indications of human trafficking.

Human trafficking victims frequently:

- do not have possession of a passport;
- owe a large debt for travel and other costs;
- receive little or no wages;
- have little or severely-restricted independent mobility;
- are moved around by their traffickers;

OR

- receive threats to their safety and their family’s safety.

12.10.3 Requirements for a T visa.

To qualify for a T visa, an immigrant must:

- be or have been the victim of a severe form of human trafficking;
- be physically present in the U.S. due to human trafficking;
- comply with reasonable requests for assistance in investigating and prosecuting acts of human trafficking (unless the victim is under 18 years old);

AND

- be exposed to extreme hardship involving unusual and severe harm upon removal.

[\(8 U.S.C. § 1101\(a\)\(15\)\(T\)\)](#)

The T visa status is good for four years. The visa-holder may work and can apply for lawful permanent resident status after three years continuous presence in the U.S. The holder’s spouse and children may qualify for visas upon showing of extreme hardship if not allowed to join the holder.

[\(8 U.S.C. § 1255\(l\)\(1\); 8 U.S.C. § 1101\(a\)\(15\)\(T\)\)](#)

12.11 *International Marriage Broker Regulation Act (IMBRA): K1 visas for fiancées.*

The International Marriage Broker Regulation Act (IMBRA) ([8 U.S.C. §1375a](#)) mandates that women coming into the United States as “mail-order brides” on the fiancée K1 visa must be informed of their legal rights, including the right to be free of domestic abuse, and of available resources should the visa-holder become a victim of abuse.

12.11.1 Information.

A person who enters the United States under a K1 visa for the purpose of marriage must be provided information on the following:

- the illegality of domestic violence, sexual assault, and child abuse in the United States and the dynamics of domestic violence;
- the non-immigrant K visa application process and the marriage-based immigration process, including conditional residence and adjustment of status;
- domestic violence and sexual assault services in the United States, including the National Domestic Violence Hotline and the National Sexual Assault Hotline;
- the legal rights of immigrant victims of abuse and other crimes in immigration, criminal justice, family law, and other matters, including access to protection orders;
- the obligations of parents to provide child support for children;
- marriage fraud under United States immigration laws and the penalties for committing such fraud;
- a warning concerning the potential use of non-immigrant K visas by United States citizens who have a history of committing domestic violence, sexual assault, child abuse, or other crimes and an explanation that such acts may not have resulted in a criminal record for such a citizen;

AND

- notification that international marriage brokers must provide foreign national clients with background information gathered on United States clients from searches of Federal and State sex offender public registries. The notice must also state that brokers must obtain the marital history and domestic violence or other violent criminal history of their U.S. clients, but that such information may not be complete or accurate because the United States client may not have a criminal record or may not have truthfully reported their marital or criminal record.

12.11.2 Dissemination of information.

The United States State Department must mail a pamphlet containing the required information to each applicant for a K1 visa. The pamphlet must be provided in translation in the applicant's primary language.

12.11.3 Criminal background checks required.

The Department of Homeland Security must provide the State Department with the results of criminal background checks on the person sponsoring the immigrant (the petitioner or fiancé) and the information will be disclosed to the immigrant (the visa applicant) during the consular interview prior to immigration.

[\(8 U.S.C. § 1375a\(a\)\)](#)

12.11.4 Marriage brokers.

Marriage brokers are entities that, for a fee, provide petitioner sponsors with contact information of a potential "fiancée," who will be the visa applicant if a marriage is arranged.

12.11.4.1 Duties with regard to petitioner-sponsors.

With regard to the petitioner-sponsor of the visa applicant, a marriage broker is required to:

- perform background checks on the petitioner-sponsors including searching the National and state sex offender registries;
- require each petitioner-sponsor to attest in writing that the petitioner-sponsor is:
 - not subject to restraint under a temporary or permanent civil protective order or other restraining order;

AND

- has not been convicted of a crime of violence, a sexual offense, kidnapping, human trafficking, or other unlawful

restraint of another, prostitution or solicitation or stalking;

AND

- require each petitioner sponsor to disclose that person's:
 - marital history;
 - minor children and the children's ages;

AND

- countries of residence since age 18.

12.11.4.2 Duties for visa applicants.

For the fiancée immigrant, a marriage broker must: provide the applicant (in the applicant's primary language) with:

- the sponsor's background information;
- a pamphlet setting out the applicant's rights, as required in [8 U.S.C. § 1375a\(a\)](#);

AND

- information about the applicant's right to prevent release of contact information to a sponsor.

[\(8 U.S.C. § 1375a\(d\)\)](#)

12.12 Special Immigrant Juvenile Status (SIJS).

12.12.1 Definition of status.

Juveniles who have been placed under the custody of an individual or entity appointed by a state or juvenile court are eligible for SIJS. A juvenile court need only find that reunification with one or both parents

is not viable due to abuse, neglect, or abandonment.⁵⁸⁶ Once an SIJS petition is granted, the juvenile is eligible to apply for lawful permanent resident status.

12.12.2 Eligibility.

To be eligible for SIJS a juvenile must demonstrate that the applicant:

- is physically present in the U.S.;
- is under the age of 21 and not married;
- has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court located in the United States, and whose reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law;
- has been the subject of a determination in administrative or judicial proceedings that it would not be in the immigrant's best interest to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence;

AND

- in whose case the Secretary of Homeland Security consents to the grant of SIJS, except that—
 - no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction;

AND

- no natural parent or prior adoptive parent of any immigrant provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under the Immigration and Nationality Act.

⁵⁸⁶ Trafficking Victims Protection Reauthorization Act §235(d)(1)(A).

[\(8 U.S.C. §1101\(a\)\(27\)\(J\)\(i\)-\(iii\)\)](#)

NOTE: The Juvenile Court must retain jurisdiction of the child until U.S. Custom and Immigration Service finally rules on the immigration application and the child is made a legal permanent resident. ([8 CFR §204.11\(c\)\(5\)](#))

12.13 Confidentiality for immigrant victims.

Under federal law, information regarding a VAWA self-petitioner, VAWA cancellation applicant, or applicant for a U or T visa is protected and cannot be used as the basis for a removal or denial proceeding. In addition to the Department of Homeland Security (DHS), the prohibition applies to family court officers, criminal court judges, and law enforcement officers.

Under [8 U.S.C. §1367](#) (commonly referred to as the § 384 confidentiality provision) disclosure of **ANY** information relating to an alien who is a VAWA self petitioner, VAWA cancellation applicant, or T or U visa applicant is prohibited. The prohibition remains in effect until “the application for relief is denied and all opportunities for appeal of the denial have been exhausted.” There are limited exceptions to the prohibition on disclosure for:

- legitimate law enforcement purposes;
- statistical purposes (without identifiers or location information);

AND

- public benefit application purposes.

The Department of Homeland Security cannot rely on information from an abuser or his family to harm the abuser’s victim or remove or deny status to the victim. DHS agents must meet certification requirements imposed to assure that they did not rely on the abuser or perpetrator to provide information against the immigrant victim.

An immigration judge will dismiss a removal case against an immigrant victim if any part of an immigration enforcement action occurs at a: shelter; rape crisis center; supervised visitation center; family justice center; victim services program or provider; community based organization; courthouse in connection

with any protection order case, child custody case, civil or criminal case involving or related to domestic violence, sexual assault, trafficking, or stalking.

Prohibited acts include:

- seeking or using information from a prohibited source;
- disclosing or permitting disclosure of information in or about any VAWA petition or T or U visa case;

OR

- making a false certifications in a notice to appear.

Violations of the confidentiality provision are punishable by disciplinary action, a \$5,000 per violation fine for the individual, and dismissal of the immigration proceeding against the non-citizen.

CHAPTER 12—PART II: COMMENTS

12.14 *Immigration status.*

Equal protection under the law is not conditioned upon citizenship,⁵⁸⁷ so immigration status is irrelevant in deciding whether a protective order should issue or whether a crime of family violence has occurred. Inquiring into the victim's immigrant status has been recognized as having a notable chilling effect on the willingness of immigrant victims to seek legal redress.⁵⁸⁸

Abusers of immigrant victims have been known to manipulate federal immigration authorities to interfere with legal proceedings. By notifying or threatening to notify the federal authorities that the victim will be present at a hearing, the abuser can intimidate the immigrant victim and discourage or prevent the victim from participating or appearing in the case. Information regarding a VAWA self-petitioner, VAWA cancellation applicant, or applicant for a T or U visa is confidential under federal law. ([8 U.S.C. § 1367](#)). Judges should not allow such information to be discussed in a state legal proceedings.

Invocation of a spouse or intimate partner's immigration status to gain advantage in a civil case (e.g., a child custody case) may indicate domestic violence or an imbalance of power between the parties. A court may consider explaining to immigrant participants in a legal proceeding that: (1) both genders can testify and have weight given to the testimony; (2) the outcome of a legal

⁵⁸⁷ Equal protection under the laws of the United States is determined by presence in the jurisdiction, not upon immigration status. See [42 U.S.C. § 1981](#), which states:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

⁵⁸⁸ *TXI Transp. Co v. Hughes*, 306 S.w.3d 230 (Tex. 2010). Admission of evidence regarding the immigration status of the defendant's employee was reversible error because that information was irrelevant to the issue of whether the employee caused a fatal collision. See, for instance, *Rivera v. NIBCO*, [364 F.3d 1057](#) (9th Cir. 2004). The immigration status of plaintiffs was not discoverable because it was irrelevant to their claims.

system proceeding in the U.S. is not based on economic power; (3) bribery is a serious crime; (4) immigration status seldom is relevant in non-immigration civil proceedings; (5) in child custody disputes, the best interests of the child is the main concern, rather than economic resources or immigration status; (5) in protective order cases, the order will be enforceable regardless of the party's immigration status; and (6) after conviction of a crime, a non-citizen may be removed from the U.S.⁵⁸⁹

12.15 Immigrants and domestic violence.

Immigrant women are at high risk for domestic violence. Studies of discrete populations of immigrant women have revealed that: over half the female homicide victims were immigrants; abuse rates increased after immigration; and over half of a population of married immigrant women reported battering by their spouses.⁵⁹⁰ Not surprisingly, batterers use the victim's immigrant status as a form of control.⁵⁹¹

12.16 Self-petitioning.

12.16.1 Documentation for self-petitioning.

One common problem for immigrant victims is lack of access to documentation of the abusive spouse's immigrant status. When relevant to a legal proceeding, the abuser can be required to turn over proof of status and dissolutions of prior marriages to the self-petitioning spouse.

12.16.2 Findings of abuse.

⁵⁸⁹ Adapted from G. Pendleton, *Ensuring Fairness and Justice for Non-citizen Survivors of Domestic Violence*, *Juvenile and Family Court Journal* 69 (Fall 2003).

⁵⁹⁰ See, Family Violence Prevention Fund, *Facts on Immigrant Women and Domestic Violence*, available at: http://www.endabuse.org/userfiles/file/Children_and_Families/Immigrant.pdf

citing to: *Femicide in New York City: 1995-2002*. New York City Department of Health and Mental Hygiene, October 2004. Available at: <http://www.ci.nyc.ny.us/html/doh/html/public/press04/pr145-1022.html>

M. Dutton, L. Orloff, and G. A. Hass, *Characteristics of Help-Seeking Behaviors, Resources and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *Georgetown Journal on Poverty Law and Policy* (2000).

P. Tjaden. and N. Thoennes. 2000. *Extent, Nature and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*. The National Institute of Justice and the Centers for Disease Control and Prevention. Available at:

<http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

⁵⁹¹ *Ibid.*

When established by the evidence in a case, the judgment should contain specific findings of abuse because a self-petitioning immigrant is entitled to use such findings as proof of eligibility for adjustment of status.

12.17 Annulments of marriage by default.

Request for annulments by default based on failure to answer or appear by an immigrant spouse deserve close scrutiny. A default situation may not be solely the result of the immigrant spouse's lack interest in asserting that the marriage was valid. Under these circumstances, a default may indicate that the immigrant spouse did not understand the consequences of service of process in the U.S. legal system. The immigrant spouse may be unaware of the need to or lack the resources (especially language comprehension or financial) to file answer or appear at the hearing.

12.18 Dissemination of U visa information to crime victims.

Immigrant crime victims should be informed that cooperating with a criminal investigation: (1) might help obtain an adjustment in immigration status; and (2) will not bring unwanted attention to their immigration status.⁵⁹²

12.19 Human trafficking.

The incidence of human trafficking in immigrants in the United States has been estimated at 20,000 a year.⁵⁹³

12.19.1 Trafficking “red flag” questions.

To assess whether the person is a trafficking victim, the court should consider the person's answers to these questions:

- How did you get into Texas?
- What happened once you arrived in Texas?
- Was your decision to come to Texas made based on someone telling you a lie or coercing you?
- Did you feel that you were really free to choose whether or not to come to Texas?

⁵⁹² Material regarding U-visas for dissemination to the victims is available at: <http://www.islabay.org/uvisa.html>

⁵⁹³ U.S. Dept. of State, *Fighting Human Trafficking with the United States* (Fact Sheet, May 12, 2004)..

- Who controls your living situation (where you live, where you work, who you can speak with)?
- Are you free to leave (your residence, your employment, Texas)?
- Who controls the money that you earn?
- Who has your passport or visa or other property that you value?
- Do you believe that your family is safe?⁵⁹⁴

12.19.2 Servile marriages.

Trafficking and domestic violence overlap in servile marriages, which are marriages in which the immigrant spouse is exploited for labor and physically abused by the sponsoring spouse. A battered immigrant spouse may be eligible for a T visa or associated services.

12.19.3 Characteristics of trafficking victims.

- **Occupations.** Becoming a sex worker is a common, but not the only, fate of human trafficking victims. Trafficking victims may also work in sweatshops, restaurants, agriculture, construction, or as domestic servants or beggars.
- **Gender and age.** Both males and females, and adults and children may be human trafficking victims.
- **Education.** A high level of education does not insulate the victims. Promises of lucrative employment may lure an educated person into being a victim of human trafficking.

12.19.4 Smugglers v. human traffickers.

Human traffickers bring their victims into the U.S. and coerce the victims to work for them. The act of smugglers involves bringing people into the U.S. illegally. Smugglers may or may not also engage in human trafficking.

⁵⁹⁴ Adapted from the Family Violence Prevention Fund, *Collaborating to Help Trafficking Survivors*, available at:

<http://www.endabuse.org/userfiles/file/ImmigrantWomen/Collaborating%20to%20Help%20Trafficking%20Survivors%20Final.pdf>

12.19.5 Communicating with the trafficking victim.

A victim of human trafficking who appears in a legal proceeding may be less than cooperative or forthcoming about his or her situation. Awareness of certain situational and cultural impediments may assist the court in assessing the victim's true condition.⁵⁹⁵

- **Passivity.** The victim's survival techniques may involve passivity and unquestioning acceptance of authority. To overcome this passivity, the court should allow the victim to explain the necessary facts in his or her own words. The court should also ask the victim explain any instructions from the court in the victim's own words to ensure comprehension.
- **Trauma.** The victims may be so traumatized that they are unable to articulate or comprehend their own needs. The court may need to evaluate the victim's physical and mental health needs.
- **Fears.** The victim may be intimidated by the legal system and by threats to the well-being of family or friends both in the U.S. and in the victim's country of origin. The court may need to assure the victim that the U.S. legal system is based on due process for the victim as well as the accused.
- **Rights.** Immigrant victims may not be aware that they have a right to counsel, to remain silent, or to have a hearing before a judge if charged with a crime or before being removed from the U.S. Being informed of these rights may help the victim better understand the help available through the U.S. legal system.
- **Interpretation.** If an interpreter is needed to communicate with the victim, be aware that an interpreter from the victim's immediate community may not be the best choice. The interpreter should be screened for ties to the trafficker or the victim. The victim should be informed that the law requires an interpreter to keep private communications between the victim and the victim's attorney confidential.
- **Help for child victims.** The Office of Refugee Resettlement (ORR), in the U.S. Department of Health and Human Services handles all cases of human trafficking of children. Child victims are eligible for the refugee foster care program.

⁵⁹⁵ *Id.*

**CHAPTER 13—FULL FAITH AND CREDIT FOR
PROTECTIVE ORDERS; MILITARY PROTECTIVE ORDERS—
PART I: STATUTES AND CASE LAW**

[\(10 U.S.C. § 1561a; 18 U.S.C. §§ 2265 and
2266; 28 U.S.C. 1738A and 1738B;
Tex. Fam. Code chs. 88 and 159](#)

**Full Faith and Credit for Child Support Orders Act
Parental Kidnapping Prevention Act
Uniform Child Custody Jurisdiction and Enforcement Act
Uniform Interstate Enforcement of Protection Orders Act
Uniform Interstate Family Support Act**

Summary:

Texas has incorporated the federal Violence Against Women Act’s (VAWA) full faith and credit provision ([18 U.S.C. § 2265](#)) and adopted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act⁵⁹⁶ into [Texas Family Code Chapter 88](#).

Protective orders generally. The full faith and credit statutes require that Texas courts enforce, civilly or criminally, the provisions of a valid protective order (whether temporary or permanent) issued in another state or federal territory (including tribal territory). Valid protective orders are those that were issued after the restrained party had reasonable notice and an opportunity to be heard. Mutual protective orders are afforded full faith and credit only in very limited circumstances (i.e., if separate applications are filed, served, and heard by the court.)

Child custody. Child custody or visitation awards in an out-of-state protective order are entitled to full faith and credit. The full faith and credit provisions in VAWA specifically exclude child custody and support orders, but [Texas Family Code chapter](#)

⁵⁹⁶ The National Conference of Commissioners on Uniform State Laws (NCCUSL) researches, drafts, and promotes uniformity of state statutes. With regard to family law, the NCCUSL promulgated the Uniform Child Custody Jurisdiction Act and its successor, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act. Its best known work may be the Uniform Commercial Code. A uniform act does not become law until adopted by a state. NCCUSL comments to a uniform statute provide helpful historical and interpretative facts.

[88](#) allows Texas courts to enforce child custody or visitation determinations if the foreign order complies with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, which is incorporated in [Texas Family Code Chapter 152](#)) and the Parental Kidnapping Prevention Act (PKPA)([28 U.S.C. § 1738A](#)). ([Tex. Fam. Code § 88.003\(b\)](#))

Child support. Child support awards in an out-of-state protective order are entitled to full faith and credit. [Texas Family Code Chapter 159](#) (which incorporates the Uniform Interstate Family Support Act) authorizes Texas courts to give full faith and credit to foreign child support orders if those orders were issued in compliance with the Uniform Interstate Family Support Act and the federal Full Faith and Credit for Child Support Orders Act ([28 U.S.C. § 1738B](#)).

NOTE: Chapter 15 discusses jurisdiction to issue a temporary emergency order of protection for a child (to protect a child or its parent or sibling from family violence) that contains provisions temporarily modifying an out-of-state child custody or visitation order. (Out-of-state child support orders must be afforded full faith and credit unless the Texas modification proceeding follows the requirements in [Tex. Fam. Code chapter 159](#) for modifying child support orders.)

Military protective orders. Protective orders issued by military tribunals are not enforceable by Texas courts. Protective orders issued by civilian courts are entitled to full faith and credit, and to be enforced, on military installations. ([10 U.S.C. § 1561a](#)).

Subchapter A

Full Faith and Credit and Enforcement of Protective Orders Issued Outside of Texas

Texas law incorporates the federal Uniform Interstate Enforcement of Protective Orders Act, which requires Texas to give full faith and credit to family (domestic) violence protective orders granted by the tribunal of another state or territory.⁵⁹⁷ ([18 U.S.C. § 2265](#); [Tex. Fam. Code ch. 88](#))

⁵⁹⁷ The UCCJEA does not apply to protective orders that are unrelated to domestic or family violence. [Tex. Fam. Code § 88.002](#), NCCUSL comment. The Violence Against Women Act is not an independent basis for full faith and credit for child custody orders because it applies only to protective orders and specifically excludes “custody orders” from its definition of “protective order.” [18 U.S.C. §§ 2265; 18 U.S.C. § 2266](#).

13.1 *Definitions.*

- **Foreign protective order** means a protective order issued by a tribunal of another state.
- **Issuing state** means the state in which a tribunal issues a protective order.
- **Mutual foreign protective order** means a foreign protective order that includes provisions enforceable against an applicant or other person protected by the order as well as the respondent.
- **PKPA** is the acronym for the Parental Kidnapping Prevention Act.
- **Protected individual** means an individual protected by a protective order.
- **Protective order** (including an order modifying a prior order) is:
 - an injunction or other order
 - issued by a tribunal
 - under the domestic violence or family violence law or another law of the issuing state
 - to prevent an individual from engaging in violent or threatening acts against, harassing, contacting or communicating with, or being in physical proximity to, another individual.
- **Respondent** means the individual against whom enforcement of a protective order is sought.
- **State** means a:
 - state of the United States;
 - the District of Columbia;
 - a commonwealth, territory, or possession of the United States;
 - military tribunal;

OR

- tribal court or tribunal (including an Alaskan native village that has jurisdiction over protective orders).
- **Tribunal** means a court, agency, or other entity authorized by law to issue or modify a protective order.
- **UCCJEA** is the acronym for the Uniform Child Custody Jurisdiction and Enforcement Act
- **UIFSA** is the acronym for the Uniform Interstate Family Support Act, enacted in Texas as [Tex. Fam. Code Chapter 159](#).

[\(Tex. Fam. Code § 88.002\)](#)

13.2 Full faith and credit for an order issued outside Texas.

A protective order issued by a non-Texas tribunal (a “foreign order”) is valid and entitled to full faith and credit by a Texas court if the order:

- contains the names of the protected individual and the respondent;⁵⁹⁸
- is currently in effect (if the order has been modified, the modified order is the order currently in effect);
- was rendered by a tribunal that had jurisdiction over the parties and the subject matter;

AND

- was rendered after the respondent had reasonable notice and an opportunity to be heard either before the order issued or within a reasonable amount of time after the order was rendered (for an *ex parte* order);

⁵⁹⁸ The Act provides that the terms “protected individual” and “respondent” refer to the relief sought by the parties in the action brought in the enforcing state; the designation of parties in the case style or otherwise is not determinative as many protective order cases are brought in the name of the state. ([Tex. Fam. Code, 88.002](#), NCCUSL comment.)

- **Child custody provision.** Whether a child custody provision in a protective order is entitled to full faith and credit is determined, not under [18 U.S.C. § 2265](#), but rather under the UCCJEA ([Tex. Fam. Code ch. 88](#)) and the Parental Kidnapping Prevention Act ([28 U.S.C. § 1738A](#)). The UCCJEA requires notice and an opportunity to be heard before the order issues; thus, an *ex parte* order's custody provision is not enforceable under the UCCJEA because it issued before the respondent had an opportunity to be heard. Although the Texas Family Code states that a foreign order is to be enforced if valid under the laws of the issuing state, almost every state has adopted the UCCJEA so the UCCJEA's prohibition on enforcement of *ex parte* orders will govern most situations.

[\(Tex. Fam. Code § 88.003; Tex. Fam. Code § 152.106; Tex. Fam. Code § 152.108; Tex. Fam. Code § 152.204\)](#)

13.3 Proof of validity; affirmative defense.

To make a *prima facie* case for the validity of a foreign protective order, the proponent may present an unauthenticated copy of a facially valid order. It is an affirmative defense to enforcement of a foreign protective order that it lacks at least one of the elements of an enforceable order under [18 U.S.C. § 2265](#).

[\(Tex. Fam. Code § 88.003\(e-f\)\)](#)

13.4 Judicial enforcement.

The substantive terms of a foreign protective order shall be enforced in Texas:

- if it is a valid order that meets the criteria in [Tex. Fam. Code § 88.003\(d\)](#);
- whether or not the relief granted in the order is not available under Texas law;
- in accordance with the laws of the issuing state for provisions concerning possession of and access to a child;⁵⁹⁹

⁵⁹⁹ Depending on the state or territory, the applicable law could be either the UCCJA, the UCCJEA, or the PKPA. As of December 2010 (when New Hampshire's law took effect), only Massachusetts, Vermont, and Puerto Rico will have not adopted the UCCJEA. Because the UCCJA and the PKPA conflict in some areas, enforcement of child custody orders from Massachusetts, Vermont, or Puerto Rico may take special consideration.

- for child support orders, only if the provisions are consistent with the jurisdictional requirements of [Tex. Fam. Code ch. 159](#) and [28 U.S.C. § 1738B](#);
- as long as it was issued in response to a complaint, petition, or motion filed on behalf of a person seeking protection from family violence and regardless of whether the order was obtained as the result of an independent action or ancillary to another proceeding;
- if it contains mutual orders restraining the protected person, the foreign protective order is enforceable **ONLY** if:
 - the respondent filed a written pleading seeking a protective order;

AND

 - the issuing tribunal made specific findings in favor of the respondent.

NOTE: For procedural matters, enforcement of a foreign protective order is governed by Texas law.

([Tex. Fam. Code § 88.003](#); [28 U.S.C. § 1738B](#); [18 U.S.C. § 2265\(c\)](#))

13.5 Non-judicial enforcement of out-of-state protective order.

13.5.1 Probable cause.

Probable cause to enforce a foreign protective order exists if the law enforcement officer is presented with a facially valid order that identifies the protected persons and the respondent by name. The order may be presented in any form, including electronic media, and need not be certified to support a probable cause finding.

13.5.2 Enforcement.

Law enforcement shall enforce a foreign protective order if there is probable cause to believe a valid order exists and has been violated.

13.5.3 Notice to the respondent.

If the only impediment to enforcement of a foreign protective order is lack of notice to the respondent, the law enforcement officer shall:

- make reasonable attempts to serve the respondent;

AND

- allow the respondent a reasonable opportunity to comply with the order.

[\(Tex. Fam. Code § 88.004\)](#)

13.6 *Registering or filing an out-of-state order in Texas.*

The Texas Department of Public Safety maintains a statewide registry for protective orders. A foreign protective order can be submitted for entry into the DPS registry and be provided to local law enforcement agencies as well. An individual who chooses to register a foreign protective order in Texas can do so by: providing a copy, certified by the issuing state, of the order **and** an affidavit of a person protected by the order stating that to the best of that person's knowledge the order is in effect to:

- a local law enforcement office that is responsible for entering orders in local computer records (sheriff, police, constable, or DPS);

OR

- to DPS with a request that it be entered into the statewide registry maintained by DPS.

Enforceability under full faith and credit does **NOT** require that:

- the foreign protective order be registered or filed in the enforcing state;

OR

- the person restrained by the order be notified of its registration or filing in another jurisdiction.

[\(Tex. Fam. Code § 88.005\)](#)

13.7 Immunity.

For acts in connection with the registration or enforcement (including detention and arrest of a person) of a foreign protective order, civil and criminal immunity exists for:

- state or local governmental agencies or officials;
- law enforcement officers;
- prosecuting attorneys;

AND

- clerks of courts.

[\(Tex. Fam. Code § 88.006\)](#)

Subchapter B The Military and Protective Orders

13.8 *Protective orders from military tribunals.*

Because protective orders issued by military courts do not have the same due process protections as orders issued by civilian courts, military protective orders are **NOT** “valid” orders under [18 U.S.C. § 2265](#) and thus are not enforceable by Texas state courts. A military installation may have a memorandum of understanding with local law enforcement to detain alleged violators until military police can respond.

13.9 *Enforcement of civilian protective orders on military bases.*

Although military installations are not included in the full faith and credit clause of the Violence Against Women Act, under the Armed Forces Domestic

Security Act, protective orders issued by civilian courts are required to be enforced on military installations.⁶⁰⁰

[\(10 U.S.C. § 1561a\)](#)

13.10 Notice of conviction or probation in civilian court.

If the defendant who is convicted or given a deferred adjudication probation for an offense under Texas Penal Code Title 5 or for an offense that constitutes family violence under Texas Family Code 71.004 is on active-duty status with the state military or the United States military, the clerk of the court must send written notice of the conviction or the deferred adjudication probation to the staff judge advocate or provost marshal of the military installation where the defendant is assigned.

[\(Tex. Code Crim. Proc. art. 42.0182\)](#)

⁶⁰⁰ The National Center on Domestic Violence and Sexual Assault has compiled much valuable information about the military response to domestic violence and sexual assault. It is available at: http://www.ncdsv.org/ncd_militaryresponse.html

CHAPTER 13—PART II: COMMENTS

13.11 Overview of the law.

Protective orders issued outside Texas are entitled to full faith and credit in Texas if the orders meet the criteria set out in [Texas Family Code Chapter 88](#), which complies with the federal full faith and credit provisions at [18 U.S.C. § 2265](#) and incorporates the Uniform Interstate Enforcement of Domestic Violence Protection Orders. Out-of-state protective orders are enforceable both civilly and criminally. ([Tex. Fam. Code § 88.003](#))

In the proceeding that led to issuance of the foreign order, the person restrained by the foreign order must have received basic due process of fair notice and an opportunity to be heard (either before the order issues or within a reasonable time thereafter) for full faith and credit to be accorded an out-of-state order. Both temporary *ex parte* and permanent protective orders may be entitled to full faith and credit, assuming that the issuing court had jurisdiction over both the subject matter and the parties. See § 13.2. ([Tex. Fam. Code § 88.003\(d\)](#))

One quirk in the statutory scheme that enforceability of out-of-state child custody orders is determined solely by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which limits full faith and credit to orders issued *after* notice. Thus, under the UCCJEA, the child custody provision of an out-of-state *ex parte* protective order is not entitled to full faith and credit.⁶⁰¹ However, the UCCJEA does provide for the issuance of a temporary emergency order of protection for a child based on family violence, so while the Texas court may not be able to enforce a custody provision of an out-of-state *ex parte* protective order, the Texas court could, upon request, assert temporary emergency jurisdiction over the child to protect the child, its sibling, or a parent. See § 15.4. ([Tex. Fam. Code § 152.106](#); [Tex. Fam. Code § 152.108](#); [Tex. Fam. Code § 152.204](#))

For child support orders to be accorded full faith and credit, the order must meet the jurisdictional requirement in [Texas Family Code Chapter 159](#) and in [28 U.S.C. § 1738B](#). ([Tex. Fam. Code § 88.003\(c\)](#))

Family Code provides specific immunity to courts and court personnel for acts done in connection with enforcing an out-of-state protective order either civilly or criminally. ([Tex. Fam. Code § 88.006](#))

⁶⁰¹ See [Tex. Fam. Code § 152.204](#), comments; also, the National Council of Juvenile and Family Court Judges' Benchcard "Enforcing Custody, Visitation, and Support."

Orders issued by military tribunals are not entitled to full faith and credit in Texas courts because military courts lack the requisite due process guarantees. However, protective orders issued by Texas courts are entitled to full faith and credit. An out-of-state protective order must be enforced if it meets the due process requirements set out above, even if the relief granted is not available under Texas law. For instance, if the out-of-state order lasts for 30 months, it is enforceable for that period in Texas even though under Texas law, a protective order cannot last more than two years. ([Tex. Fam. Code § 88.003](#))

Mutual orders are not entitled to full faith and credit, unless the orders resulted from concurrent, separate applications by the parties and resulted in specific findings in favor of the respondent in the original application. ([Tex. Fam. Code § 88.003\(g\)](#))

The out-of-state order does *not* have to be filed or registered with law enforcement or the courts to be enforceable in Texas. An order which is facially valid must be accepted and enforced, even if only an unauthenticated copy is presented. ([Tex. Fam. Code § 88.005](#))

The Texas Family Code provides specific immunity to courts and court personnel for acts done in connection with enforcing an out-of-state protective order either civilly or criminally. ([Tex. Fam. Code § 88.006](#))

Orders issued by military tribunals are not entitled to full faith and credit in Texas courts because military courts lack the requisite due process guarantees. However, protective orders issued by Texas courts are entitled to full faith and credit by military tribunals. ([10 U.S.C. § 1561a](#))

13.12 Tips for drafting an order that is entitled to full faith and credit.

To ensure that the order issued can be accorded full faith and credit in another jurisdiction:⁶⁰²

- make sure the order is legible (have it typed or, if it is a “fill in the blank” order, make sure the handwritten portion is clearly printed);
- state (print or type) the contact information for the issuing court and the state registry’s telephone number and any other useful contact information;

⁶⁰² Section 13.11-13.14 were adapted from the Full Faith and Credit Benchcard of the National Council of Juvenile and Family Court Judges. These are available at:

<http://www.ncjfcj.org/images/stories/dept/fvd/pdf/ffc%20webaug10.pdf>

- state the names of the parties, their status (i.e., whether applicant or respondent) and state the nature of the qualifying relationship between the parties (e.g., spouses, parent-child, members of the same household)
- use specific and detailed ordering language (e.g., for stay away provisions, state the minimum distance that must be maintained in feet or yards and if possible state the prohibited addresses);
- avoid vague terms like “reasonable” in ordering language;
- avoid using terms like “upon the agreement of the parties,” especially about issues concerning visitation, possession of property, or payment of support;
- separate the findings of fact and conclusions of law from the ordering language;
- set the ordering language off from the “boilerplate” language so that it stands out from the rest of the order;
- state each ordering provision in a separate sentence, rather than ordering a series of acts in one sentence (e.g., “stay at least 500 feet away from 1500 Main Street, Hometown, Texas” rather than “stay away from the applicant, her home, her church, her school, her family and her children”);
- in each ordering provision, use direct, simple language (to the extent possible avoid modifying clauses, conjunctives, disjunctives, adjectives, or adverbs);
- for visitation provisions, specify the time, the addresses for exchanges, the persons involved in any exchange, the duration of the visit;
- for custody provisions, state each child’s name, age, and date of birth and state which provisions of the order apply to each child; state the type of custody and to whom awarded;
- for custody provisions, state whether Texas is the child’s home state under the UCCJEA and whether the court is aware of any prior orders regarding custody of persons to be protected by the protective order. If prior orders exist, state that the court is exercising its authority under the UCCJEA and the Texas Family Code to issue a temporary emergency order of protection for the child despite the prior order because the child or a sibling or parent of the child has been subjected to or threatened with mistreatment or abuse. Provide a copy of the temporary emergency order to the court that issued the prior order;

- for prohibitions on contact or communication, specify the prohibited activities (telephoning, texting, emailing, via third parties) and do not forget to update the standard ordering language to include new technology (e.g., Twitter);
 - for stay-away provisions, state the exact distance to be maintained and, if possible, the prohibited address;
 - if applicable, state that specific information about the applicant or other persons to be protected by the order is confidential under [Tex. Fam. Code § 85.007](#) and is not to be disclosed;
 - make a finding of fact that family violence has occurred and is likely to occur in the future;
 - if it is an agreed order, state that the protective order is approved as an agreement of the parties and state whether there is or is not a finding of family violence under [Tex. Fam. Code § 85.005](#);
 - in the findings of facts regarding the supporting facts, specifically state whether the respondent used physical force, attempted to use physical force, used a deadly weapon, or threatened to use a deadly weapon against a person to be protected by the order;
 - include the following findings or conclusions of law :
 - the court had jurisdiction over the subject matter and the parties;
 - the court had jurisdiction to issue the protective order;
 - all parties, including the respondent (the restrained party), had timely notice of the hearing and an opportunity to be heard as required by statute;
 - family violence has occurred between the parties and is likely to occur in the future;
- OR**
- if it is an agreed order, state whether the court will accept the parties' agreement in whole or in part and specifically state whether the court has made a finding that family violence has occurred and is likely to occur in the future;

- the facts established by a preponderance of the evidence that the statutory standards for issuance of a protective order were met based on this record.
- cite the statutory basis for the issuance of the protective order [include citations supporting particular types of relief granted (e.g., [Tex. Fam. Code § 85.022\(a\)](#)) for an order that the respondent attend counseling];
- state the date that the order expires;
- state whether the order modifies, adopts, overrules, or supersedes a prior order of protection or other court orders from your jurisdiction or any other jurisdiction;
- state that the order does not require the applicant or a person intended to be protected by the order to do or refrain from doing any act listed in [Tex. Fam. Code § 85.022](#) (this statement clarifies that the order does not contain an impermissible “mutual” order which cannot be given full faith and credit under federal law);
- include all necessary warnings and admonishments in the order;
- on the record, orally admonish and warn the parties that the order:
 - is enforceable in all areas within or protected by the United States of America, including all states, territories, tribal lands, commonwealths, possessions, military bases, and the District of Columbia;
 - is enforceable without registration or filing of the order with local law enforcement authorities;
 - prohibits the respondent from possessing firearms for the duration of the order, a prohibition which carries a criminal penalty if violated;
 - if violated by the respondent, subjects the respondent to criminal penalties under state law;
 - can be enforced against any party by contempt;

AND

- if violated, carries federal criminal penalties if the respondent crosses state, territorial, tribal, or district boundaries to violate the order by any means including stalking a person protected by the order.
- state that the order:

- complies with VAWA’s Full Faith and Credit provision ([18 U.S.C. § 2256](#));
- requires the respondent to comply with the federal and state laws that prohibit a person restrained by a family violence protective order from possessing weapons ([18 U.S.C. § 922](#); [Tex. Pen. Code § 46.04](#));
- meets VAWA’s definition of a protective order ([18 U.S.C. § 2266](#));

AND

- if applicable, complies with the UCCJEA ([Tex. Fam. Code Ch. 152](#)) and the Parental Kidnapping Prevention Act ([28 U.S.C. § 1738A](#)) standards for custody and visitation of minor children.
- before the hearing adjourns or before the respondent leaves the courtroom, have the respondent sign a written acknowledgement of receipt of the required warning and admonishments and of receipt of a copy of order in court.

13.13 Facilitating protection.

The issuing court can take the following steps to enhance the protective order’s effectiveness:⁶⁰³

- when requested, consult with the enforcing court to clarify provisions or answer questions about ambiguities, notice or service issues, or other matters;
- when requested, promptly respond to all law enforcement inquiries about the nature of the acts of family violence that supported the issuance of the order;
- transmit the order as soon as possible to the appropriate law enforcement entities, including the state (DPS) and national (NCIC Protective Order File) registries and have staff follow up to make sure the protective orders are timely entered in the registries;
- provide certified copies of the order to all persons protected by the order;
- inform the applicant that custody orders are temporary and expire with the protective order so that the applicant is on notice to pursue further relief if desired (especially important for child custody and support provisions);

⁶⁰³ *Ibid.*

- provide the applicant or other persons protected by the order with resource information, including the National Domestic Violence Hotline telephone number (800-799-SAFE; TTY 800-787-3224);

AND

- suggest that persons protected by the order keep a copy with them at all times and provide copies to their employers, schools, churches, family, and friends who might interact with the respondent.

13.14 Verifying the order is enforceable.

To verify that an out-of-state protective order is enforceable in Texas,⁶⁰⁴ the enforcing court must determine if the order:

- was issued by a court having jurisdiction over the subject matter and the parties;
- was issued after the respondent had prior notice of the hearing and a reasonable opportunity to be heard before or after the order issues;
- does not impose criminal sanctions on a person protected by the order (i.e., is not an unenforceable “mutual” order);

AND

- has not expired.

NOTE: In general, *ex parte* protective orders are entitled to full faith and credit if the respondent is given an opportunity to contest the temporary order **EXCEPT** provisions in *ex parte* orders concerning child custody are not enforceable because the UCCJEA requires notice and an opportunity to be heard before the order issues;

13.15 Duties of the enforcing court

The court enforcing an out-of-state protective order must:

- apply the laws of the issuing jurisdiction to determine whether a provision is valid as to persons protected (e.g., same-sex partners) or relief available (e.g., the respondent’s exclusion from residence where the applicant has not

⁶⁰⁴ *Id.*

resided in the past 30 days) or duration of the order (e.g., more than two years);

- apply the laws of Texas to determine how to enforce the order (e.g., whether the violation is a crime is determined under the Texas Penal Code; an award attorney’s fees is determined under Texas law);

AND

- impose sanctions for violations of the order as provided for in Texas law.

13.16 Maintaining confidentiality.

It is a violation of VAWA to notify a respondent that a protective order restraining the respondent has or will be registered or filed in a particular jurisdiction. This requirement does not affect notice of the hearing or right to be heard because it is POST-hearing matter that serves to keep the respondent from locating the applicant after the protective order has been issued and served on the respondent.

VAWA also prohibits publicizing on any publicly available forum (including a website) that protective order has been issued, filed, or registered in a particular jurisdiction UNLESS the applicant requests on the record that this action be taken. ([18 U.S.C. § 2265\(d\)](#))

13.17 National Center on Protection Orders Full Faith and Credit.

The NCPOFFC has resources,⁶⁰⁵ including training and assistance, on:

- full faith and credit for protective orders;
- federal firearms prohibitions relating to domestic violence;
- federal domestic violence and stalking crimes; and
- inter-jurisdictional child custody issues.

⁶⁰⁵ These resources are available at: http://www.bwjp.org/ncffc_home.aspx

CHAPTER 14—FIREARMS—PART I: STATUTES AND CASE LAW

[\(18 U.S.C. §§ 921 and 922;](#)
[Tex. Code Crim. Proc. arts. 18.19, 46.04, and 46.06\)](#)

Summary:

State and federal law prohibit persons restrained by a protective order or convicted of a crime (misdemeanor crime of domestic violence or a felony) from possessing a firearm if the firearm has at some point been in interstate commerce. Texas law does not provide a procedural mechanism for surrender of a firearm, but the court can work with local law enforcement to set up such procedures.

14.1 Federal statutes: Gun Control Act (GCA) of 1994.

14.1.1 Prohibited acts.

Under the GCA, [18 U.S.C. § 921](#) *et seq.*, a person restrained by a protective order, convicted of certain criminal offenses, or subject to certain disabilities is prohibited from:

- possessing a firearm or ammunition;
- shipping or transporting firearms or ammunition in interstate or foreign commerce;
- receiving any firearm or ammunition which has been shipped in interstate or foreign commerce;

AND

- regaining possession of a seized firearm.

14.1.2 Firearm defined.

Under the GCA, the term firearm includes:

- any weapon (including starter gun but excluding antique weapons) that will or is designed to convert or readily may be converted to expel a projectile by the action of an explosive;
- the frame or receiver of any such weapon;
- any firearm muffler or silencer (defined as any device for muffling, silencing, or diminishing the report of a portable firearm);

OR

- any destructive device, which is defined as:
 - any explosive, incendiary, or poison gas;
 - any type of weapon, other than a shotgun or shotgun shell, that the United States Secretary of the Treasury finds is generally recognized as suitable for sporting purposes, by whatever name known, that will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant and that has a barrel with a bore of more than one-half inch in diameter;

OR

- any combination of parts either designed or intended for use in converting any device into any destructive device described above and from which a destructive device can be readily assembled.

[\(18 U.S.C. § 921\(a\)\(3-4\)\)](#)

14.1.3 Persons affected

The prohibition against possession of a firearm applies to a person who:

- is a respondent restrained by a qualifying protective order⁶⁰⁶ issued after a hearing in which the person had the opportunity to participate;⁶⁰⁷

OR

- is a defendant who has been convicted of:
 - a misdemeanor crime of domestic violence;⁶⁰⁸
 - any crime punishable by imprisonment for more than one year;

OR

⁶⁰⁶ In *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. den., 122 S. Ct. 2362 (2002), the Fifth Circuit upheld the constitutionality of 18 U.S.C. § 922(g)(8)(C)(ii) in the face of a challenge under the Second Amendment.

⁶⁰⁷ In *U.S. v. Spruill*, 292 F.3d 207 (5th Cir. 2002), the Fifth Circuit held that an agreed protective order issued under Texas Family Code § 85.005, entered into without actual prior notice of a hearing, could not support a prosecution for a violation of 18 U.S.C. § 922(g)(8) because the GCA’s requirement of a hearing applies only to protective orders entered after a hearing—which requires prior notice and an opportunity to participate.

The Fifth Circuit likewise held in *U.S. v. Miles*, No. 05-30045, 2006 U.S. Dist. Lexis 27123 (5th Cir. 2006) that to be prosecuted under subsection (A) of § 922(g)(8), a respondent need only have notice of the protective hearing and an opportunity to be heard at the hearing. There is no requirement that he have notice of the issuance of the final protective order.

⁶⁰⁸ Under the GCA, a misdemeanor crime of family violence is a conviction under state or federal law for a crime that has as an element either: (1) the use or attempted use of physical force; or (2) the threatened use of a deadly weapon and is perpetrated against either a (1) current spouse; (2) former spouse; (3) parent or guardian of the victim; (4) a person with whom the defendant has a child; (5) victim who currently or formerly cohabitated with the defendant as a spouse, parent, or guardian; or (6) person similarly situated to a spouse, parent, or guardian of the victim. (18 U.S.C. 921(a)(33)(A)).

To be prosecuted under the GCA for possessing a weapon after conviction for a misdemeanor crime of family violence, in the prosecution of the predicate crime, the accused must have: (1) been represented by counsel or (2) knowingly and intelligently waived right to counsel and have either been convicted by a jury or knowingly and intelligently waived the right to jury trial. (18 U.S.C. 921(a)(33)(B)(i)).

U.S. v. White, 258 F.3d 374 (5th Cir. 2001). In a prosecution for violation of the Gun Control Act (possession of a firearm by a person convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9)), neither of the predicate convictions alleged (for reckless conduct (Tex. Penal Code § 22.05) or for terroristic threat (Tex. Penal Code § 22.07)) was a crime of domestic violence as required by 18 U.S.C. § 921(a)(33)(A) because neither crime had the use or attempted use of physical force or threatened use of a deadly weapon as an element.

See Depart of Justice brochure entitled: *Misdemeanor Crimes of Domestic Violence--Information Needed to Enforce Firearm Prohibition* available at: <http://www.fbi.gov/hq/cjisd/nics/mcdvbrochure.pdf>

- a state misdemeanor crime punishable by imprisonment for more than two years.
- has been convicted of a crime punishable by imprisonment for more than one year;
- is illegally in the United States or present under a non-immigrant visa;
- is addicted to, or unlawfully uses, controlled substances;
- has been adjudged mentally incompetent;
- has been acquitted of a criminal charge by reason of insanity;
- has been dishonorably discharged from the United States military;
- is a fugitive from justice;

OR

- has renounced U.S. citizenship.

NOTE: A persons convicted of a felony or a misdemeanor crime of domestic violence can almost NEVER regain the right to possess a firearm; a person restrained by a protective order regains the right to possess a firearm when the order expires.

[\(18 U.S.C. § 922\(g\) and \(n\)\)](#)

14.1.4 Exemptions.

The GCA's prohibitions on possession of firearms under [18 U.S.C. § 922 \(g\)\(8-9\)](#) do not apply to:

- federal or state offenses related to the regulation of some business practices;
- any state offense classified by state law as a misdemeanor and punishable by imprisonment for two years or less;

- police, military personnel and other government employees who use firearms and ammunition in connection with their official duties **EXCEPT** that there is no exemption if the person has been convicted of a felony or a misdemeanor crime of domestic violence;

OR

- *ex parte* (temporary) protective orders.

NOTE: The law enforcement exemption applies only to use or possession of a firearm in the course of official duties; it does not extend to off-duty use or possession of personal firearms.

[\(18 U.S.C. § 921\(a\)\(20\)\(A-B\); 18 U.S.C. § 922\(d\)\(1-9\) and \(g\)\(1-9\); 18 U.S.C. § 925\(a\)\(1\)\)](#)

14.1.5 Qualifying protective order.

A person may be subject to prosecution for a violation of [18 U.S.C. § 922\(g\)\(8\)](#) if a person is subject to a court order which:

- prohibits:
 - harassing, stalking, or threatening an intimate partner (current or former spouse, co-parent, or person who lives or has lived with the respondent) or the child of such partner;

OR

- engaging in other conduct which would place an intimate partner in reasonable fear of bodily injury to self or child;

AND

- contains:
 - a finding that the respondent poses a credible threat to the physical safety of the intimate partner or child;

OR

- a specific prohibition against the use, attempted use, or threat of physical force, which would reasonably be expected to cause bodily injury, against an intimate partner or child.

[\(18 U.S.C. § 921\(a\)\(32\); 18 U.S.C. § 922\(g\)\(8\)\)](#)

NOTE: For purposes of the GCA, the protective order should contain finding as to whether the order meets the standards set out in [18 U.S.C. § 922\(g\)\(8\)](#). Agreed orders issued without a hearing *can* support a prosecution under [18 U.S.C. § 922\(g\)\(8\)](#) only if the restrained person had actual prior notice of the hearing and waived the right to a hearing by entering into an agreed order.⁶⁰⁹

14.1.6 Qualifying misdemeanor conviction.

Under [18 U.S.C. 922\(g\)\(9\)](#) (the 1996 Lautenberg Amendment), it is illegal for a person to possess, ship, or transport a firearm or ammunition that has been in interstate commerce if that person has been convicted after a jury trial while represented by counsel (or having entered a valid waiver to those rights) of a criminal act that:

- violated either state or federal law;
- required proof to establish an element of the crime that the defendant:

⁶⁰⁹ See *U.S. v. Spruill*, [292 F.3d 207](#) (5th Cir. 2002).

- used or attempted to use physical force;⁶¹⁰

OR

- threatened to use a deadly weapon.⁶¹¹
- was committed by the victim's:
 - current or former spouse,
 - parent or guardian;

⁶¹⁰ There has been split among the federal circuits as to whether the physical force element requires only *de minimus* contact or whether it requires physical violence; the Fifth Circuit has adopted the latter definition. [Gonzalez-Garcia v Gonzales](#) 166 Fed. Appx. 740, 2006 U.S. App. Lexis 3512 (5th Cir. 2006). Assault conviction under [Tex. Penal Code Ann. § 22.01\(a\)\(3\)](#) was not crime of violence, as defined by [18 U.S.C.S § 16](#), and, thus, was not crime of domestic violence under [8 U.S.C.S § 1227\(a\)\(2\)\(E\)\(i\)](#) because it was Class C misdemeanor, not felony, and because element of "offensive or provocative conduct" could be committed without use of physical force; therefore, alien was not removable and was entitled to apply for discretionary waiver, pursuant to [8 U.S.C.S § 1182\(c\)](#).

The following cases hold that an assault by offensive contact is a crime of violence under [18 U.S.C. § 16](#): *U.S. v. Griffith*, [455 F.3d 1339](#) (11th Cir. 2006). Under the plain meaning rule, the "physical contact of an insulting or provoking nature" made illegal by the Georgia battery statute satisfied the "physical force" requirement of [18 U.S.C.S. § 921\(a\)\(33\)\(A\)\(ii\)](#), which was defined into [18 U.S.C.S. § 922\(g\)\(9\)](#).

U.S. v. Nason, [269 F.3d 10](#) (1st Cir. 2001). All convictions under the Maine statute necessarily involved, as a formal element, the use of physical force. Accordingly, any conviction predicated thereon that involved persons in the requisite relationship status qualified as a predicate offense (a misdemeanor crime of domestic violence) sufficient to trigger the proscriptions of [§ 922\(g\)\(9\)](#). The court rejected defendant's contention that [§ 922\(g\)\(9\)](#) was unconstitutionally vague.

U.S. v. Smith, [171 F.3d 617](#) (8th Cir. 1999). The Iowa simple misdemeanor assault conviction to which appellant pled guilty after signing a waiver of right to counsel, had an element of physical force within the meaning of [18 U.S.C.S. § 921\(a\)\(33\)\(A\)\(ii\)](#).

The following case holds that an assault by offensive contact is not a crime of violence:

U.S. v. Belless, [338 F.3d 1063](#) (9th Cir. 2003). The Wyoming battery statute's failure to include a domestic relationship as an element of the crime did not mean it could not serve as a predicate offense for a conviction under [§ 922\(g\)\(9\)](#). However, as the battery statute encompassed less violent behavior than the "use or attempted use of physical force" as set forth in [18 U.S.C.S. § 921\(a\)\(33\)\(A\)\(ii\)](#), it was too broad to qualify as a "misdemeanor crime of domestic violence." "Physical force" under [18 U.S.C.S § 921\(a\)\(33\)\(A\)\(ii\)](#) was the violent use of force against the body of another individual, but mere touching could constitute a violation of the battery statute

⁶¹¹ *U.S. v. Hernandez-Rodriguez*, [467 F.3d, 492](#), (5th Cir. 2006). Enhancement was proper under federal sentencing guidelines because the defendant's prior conviction for deadly conduct ([Tex. Penal Code § 22.05\(b\)\(1\)](#)) was a crime of violence as the conscious choice to discharge a firearm in the direction of another person constituted a real threat against the person.

- co-parent;

OR

- former or current live-in domestic or sexual partner.
- was committed by a person similarly situated to the spouse,⁶¹² parent, or guardian of the victim.

NOTE: For purposes of enforcing the GCA, a criminal misdemeanor judgment or order should contain a specific finding as to whether the conviction is for a “crime of domestic violence” as that term is defined in [18 U.S.C. § 921](#) and [18 U.S.C. § 922](#).

For purposes of the predicate crimes in various federal statutory schemes, including domestic violence laws, the term “crime of violence” is defined in [18 U.S.C. § 16](#).⁶¹³ For GCA purposes, the critical factor is whether the predicate offense involved the use or attempted use of physical force,⁶¹⁴ but “domestic violence” does not have to be an element of the predicate offense.⁶¹⁵

There is no “law enforcement” exception to this disqualification. Thus, even should a convicted misdemeanant keep employment as a law enforcement officer after a conviction, that person would not legally be able to possess a firearm, even for professional purposes.

[\(18 U.S.C. §§ 921\(a\)\(33\); 18 U.S.C. § 922\(g\)\(9\)\)](#)

⁶¹² See, *U.S. v. Cuervo*, [354 F.3d 969](#) (8th Cir. 2004). “Similarly situated to the spouse . . . of the victim” defined as a person who has an “intimate personal relationship” but does not cohabit with the victim. See, *U.S. Costigan*, 18 F. App’x 2 (1st Cir. 2001). Factors to determine whether the defendant and victim were cohabiting include: length of the relationship; shared residence (determining by where the person spends the night and keeps his or her belongings; intimate relations, sharing household duties, child care, meals; providing financial support; expecting fidelity or monogamy from the other person; and recognition of the relationship by third parties.

⁶¹³ [18 U.S.C. § 16](#). Crime of violence defined. The term “crime of violence” means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

⁶¹⁴ See footnote 585.

⁶¹⁵ *U.S. v. Heckenliable*, [446 F.3d 1048](#) (10th Cir. 2006). For purposes of prosecution under [18 U.S.C. § 922\(g\)\(9\)](#), domestic violence does not have to be an element of the predicate crime.

14.1.7 Duration of prohibition.

The GCA ban on possession of a firearm lasts:

- for bans imposed under [18 U.S.C. § 922\(g\)\(8\)](#), until the protective order expires

OR

- for a ban imposed under [18 U.S.C. § 922\(g\)\(9\)](#), until the criminal conviction is set aside or expunged, or the defendant has been pardoned of the crime or had his or her civil rights restored.

[\(18 U.S.C. § 921 \(a\)\(20\) 18 U.S.C. § 922\(g\)\(8-9\)\)](#)

14.1.8 Brady Handgun Violence Prevention Act.

The Brady Act requires federal firearms licensees to investigate, prior to the transfer of a firearm, whether such transfer would violate the GCA. The statute requires:

- every prospective purchaser to fill out a form (ATF Form 4473);
- every firearms seller to use the information on ATF Form 4473 to check whether a transfer of the firearm would violate the Gun Control Act;

AND

- the federal government to respond to inquiries about the legality of a firearm transfer by the end of the third business day after the check was initiated.

[\(18 U.S.C. § 922\(d\)\(8\)\)](#)

14.2 Texas statutes.

14.2.1 Firearm possession prohibited.

Texas law prohibits possession of a firearm or ammunition by a person who:

- has been convicted of a felony⁶¹⁶ or a Class A assault involving the person’s family or household; this prohibition lasts for five years after the release from confinement or supervision;

OR

- is a respondent in a final protective order or magistrate’s order for emergency protection (**EXCEPT** for law enforcement personnel).⁶¹⁷

NOTE: The court must notify a defendant who has been convicted of a crime of family violence that it is unlawful for the defendant to possess or transfer a firearm or ammunition. ([Tex. Code Crim. Proc. art. 42.0131](#))

([Tex. Penal Code §. 46.04 \(a\)\(1\)\(b\) and \(c\)](#); [Tex. Code Crim. Proc. art. 17.292\(c\)\(2\)](#))

14.2.2 Handgun transfer prohibited.

It is a Class A misdemeanor offense to deliver (if the transferring party knows the following information) or to receive on any terms (sell, rent, lease, loan, or give) a handgun when the recipient:

- is the respondent in an unexpired protective order;
- intends to use the weapon unlawfully or in the commission of an unlawful act;

OR

- has been convicted of a felony unless more than five years have passed since the recipient’s release from confinement or parole.

([Tex. Penal Code § 46.06\(a\)\(1, 4, 5, and 6\)](#))

⁶¹⁶ *Cuellar v. State*, [70 S.W.3d 815](#) (Tex. Crim. App. 2002). For purposes of [Tex. Penal Code § 46.04](#) (felon in possession of a firearm), a person does not have a felony conviction if the judge has set aside the conviction, dismissed the indictment, and released the person from all penalties and disabilities flowing from the conviction.

⁶¹⁷ This exception applies to sworn, full-time paid peace officers in the active employ of a state agency or political subdivision.

14.2.3 Prohibited weapons.

Third degree felony. It is a third degree felony offense for a person to possess:

- an explosive weapon;
- a machine gun;
- a short-barrel firearm;
- armor-piercing ammunition;
- a chemical dispensing device;

OR

- a zip gun.

Class A misdemeanor. It is a Class A misdemeanor to possess either a switchblade knife or knuckles.

This statute contains certain exceptions and affirmative defenses (e.g., item is antique, possession is auxiliary to service in state militia, etc.)

[\(Tex. Penal Code § 46.05\)](#)

14.2.4 Concealed handgun license.

In Texas, a license issued by the Texas Department of Public Safety is required to carry (possess on one's person) a handgun that is concealed (not easily discernible to the ordinary observation of a reasonable person).

14.2.4.1 Persons not eligible for licensure.

A person may not be issued a concealed handgun license if the person:

- is a convicted felon;

- has a pending felony charge;
- has been convicted of disorderly conduct within the preceding five years;
- has a pending charge for a Class A or B misdemeanor or of disorderly conduct ;
- has a chemical dependency;
- cannot exercise sound judgment with regard to proper use and storage of a handgun;
- has been adjudged delinquent in child support payments administered or collected by the attorney general;
- is currently restrained under a Texas Family Code protective order;
- is currently under a magistrate's order of emergency protection;
- is currently restricted by a restraining order affecting the spousal relationship (unless the order only concerns property interests);

OR

- has, in the preceding ten years, been adjudicated as having engaged in felonious delinquent conduct.

[\(Tex. Gov't Code §§ 411.171-411.172; Tex. Code Crim. Proc. art. 17.292\)](#)

14.2.4.2 Suspension of license.

There are two procedures by which a concealed handgun license may be suspended:

- (1) by a judge in a protective order issued under [Tex. Fam. Code chapter 85](#), Tex. Code Crim. Proc. chapter 7A, or Tex. Code Crim. Proc. arts. 6.08 or 17.292;

NOTE: If the order suspends a license to carry a concealed handgun, a copy should be sent to the Concealed Handguns License section of DPS.

OR

- (2) pursuant to the procedures set out in [Tex. Gov't Code § 411.180](#) and [Tex. Gov't Code § 411.187](#)

- by DPS if the licensee receives appropriate notice but does not contest the suspension request;

OR

- by a justice of the peace after a hearing if the licensee contests the suspension.

[\(Tex. Code Crim. Proc. art. 7A.05; Tex. Code Crim. Proc. art. 6.08; Tex. Fam. Code § 85.022; Tex. Gov't Code § 411.180; Tex. Gov't Code § 411.187\)](#)

14.2.4.3 Revocation of license.

Pursuant to the procedures set out in [Tex. Gov't Code § 411.180](#) and [Tex. Gov't Code § 411.186](#) (subject to a hearing upon request before a justice of the peace), a license may be revoked if the licensee:

- subsequently becomes ineligible for a license under Section 411.172, unless the sole basis for the ineligibility is that the license holder is charged with the commission of a Class A or Class B misdemeanor or equivalent offense, or of an offense under Section 42.01, Penal Code, or equivalent offense, or of a felony under an information or indictment; or is convicted of an offense under Section 46.035, Penal Code;

- is convicted of unlawful carrying or holding a handgun;
- was not eligible for the license when it was issued or subsequently became ineligible (including being or becoming ineligible because of a protective order or magistrate's order of emergency protection;

OR

- gave false information on the application.

[\(Tex. Gov't Code § 411.180; Tex. Gov't Code § 411.186\)](#)

14.3 *Surrender of firearms.*

When the court order prohibits a person from possessing a firearm, the court should: warn the person of the consequences of violating the order; determine whether the person possesses firearms; and inform law enforcement of the prohibition. See § 14.6 of this Benchbook.

14.3.1 Warning.

The person subject to the prohibition must be warned orally and in writing (preferably with a signed acknowledgement of receipt of the warning) about the consequences under state and federal law of possessing firearms while the order is in effect.

14.3.2 Reporting.

A copy of the order suspending the license should be forwarded to:

- the DPS Concealed Handgun Licensing division;

AND

- the FBI's National Instant Background Check System.

14.3.3 Inquiries into possession.

The court should ask either the applicant or the respondent, or both, whether the respondent owns, has access to, or otherwise is in possession of, a firearm. For handguns, the DPS Concealed Handgun License database can be checked. Additional inquiries can be made of probation officers, law enforcement, or other witnesses.

14.3.4 Firearms relinquishment.

Although there is no formal process for firearms relinquishment, the court can consider several steps to ensure a firearms prohibition is obeyed.⁶¹⁸ Possible courses of action include:

- providing a written form to the defendant or respondent that states how the person is to provide proof of relinquishment to the court (e.g., sales receipt from a licensed firearms dealer; police report showing report of lost or stolen firearms) and giving a deadline for submission of such proof;
- setting a compliance hearing on relinquishment within a certain time frame;

AND

- arranging for local law enforcement agencies to accept firearms for relinquishment or safekeeping for the duration of the order.

⁶¹⁸ See Judge Macias ' Replication Manual, available at: <http://www.co.el-paso.tx.us/388DC/documents/388th%20DV%20Firearms%20Replication%20Manual%202011%20-%206.28.11v.1.pdf>

CHAPTER 14—PART II: COMMENTS

14.4 *Overview of the law.*

The federal Gun Control Act (GCA), [18 U.S.C. § 921](#) *et seq.*, and the Texas statute at [Tex. Penal Code § 46.04](#) prohibit a person restrained by a protective order, convicted of a misdemeanor crime of domestic violence or a felony, or found to be mentally incompetent from possessing a firearm. The prohibition for a person restrained by a protective order lasts for the term of the protective order. For criminal convictions, the federal prohibition is commonly referred to as a “lifetime” ban, although the ban can be lifted by a pardon, restoration of civil liberties, or an expunction of the criminal conviction.

It should be noted that the prohibition in [18 U.S.C. § 922\(g\)\(8\)](#) applies to protective orders against “intimate” partners,” a term which does not appear in any of the Texas protective order statutes, but which overlaps with the definition of family or member of a household found in the Texas Family Code.

Texas prohibitions. Under [Tex. Penal Code § 46.04](#), a person restrained by a temporary or final protective order (brought under the Texas Family Code, [Tex. Code Crim. Proc. art. 7A](#) (sexual assault), or an out-of-state protective order) or by a magistrate’s order of emergency protection may not possess a firearm for the term of the order and cannot possess a concealed handgun license. That statute also bans possession of a firearm by a person convicted of a felony Class A misdemeanor family violence assault for five years after release from confinement or supervision.

Criminal offenses. Under the federal prohibitions, it is a criminal offense both for the restrained or convicted person to possess a firearm and for anyone to transfer a firearm to such a person. Under both state and federal law, the term firearm includes both the weapon and the ammunition for the weapon.

Due process requirements for prosecution of federal offense. Enforcement of the federal ban on firearms possession while restrained by a protective order requires proof that the defendant had prior notice and an opportunity to be heard (or waived the opportunity for a hearing) before the order issued.

Required proof for prosecution of federal offense. Federal prosecution for possession of a firearm after conviction for a misdemeanor crime of domestic violence requires proof that the criminal offense involved the use of force, or threatened use of force or a deadly weapon against the complainant. The defendant and the complainant must have a qualifying relationship (current or former spouses, parents of the same child; a current or former co-habiting domestic or sexual partners, or parent-child, guardian-ward, or persons similarly

situated to a spouse, parent, or guardian). In the prosecution for the predicate crime, the defendant must have been represented by counsel and been convicted after a jury trial or knowingly waived the right to counsel or the right to a jury trial.

Concealed handgun licenses. In Texas, a person convicted of misdemeanor crimes of domestic violence or restrained by a protective order must have his concealed handgun license cancelled by the court issuing the judgment or order.

Peace officer exception. If a licensed peace officer is convicted of a misdemeanor crime of domestic violence, the officer may no longer possess a weapon for any reason. Peace officers who are restrained by a magistrate's order of emergency protection or by a protective order may carry a weapon but only for professional purposes (while on duty and carrying a department-issued weapon).

14.5 *Federal enforcement of prohibitions.*

14.5.1 Protective order ban.

To facilitate criminal prosecution under the GCA, [18 U.S.C. § 922\(g\)\(8\)](#) (possession by person restrained by a protective order against an intimate partner), the protective order should state:

- the nature of the relationship between the respondent and the applicant to establish the protective order involved domestic violence;
- a finding of fact or conclusion of law stating that the protective order is required because the respondent used or threatened to use physical force or threatened to use a deadly weapon against the applicant or other person protected by the order;
- that the respondent was warned by the court about the prohibition against possessing a firearm until the day after the order expires and the consequences for violating the prohibition;

AND

- the date that the order expires.

14.5.2 Criminal conviction ban.

To facilitate criminal prosecution under the GCA, [18 U.S.C. § 922\(g\)\(9\)](#) (possession by person convicted of a felony or misdemeanor crime that

involved the use or attempted use of physical force or threatened use of a deadly weapon), the criminal judgment should state:

- the nature of the relationship between the defendant and the victim (although domestic violence does not have to be an element of the predicate crime);
- a finding of fact or conclusion of law stating that the defendant used or threatened to use physical force or threatened to use a deadly weapon in committing the offense for which convicted;

AND

- a warning that the defendant is prohibited from possessing a firearm unless pardoned.

14.5.3 Notification required.

Under VAWA, a court is required to have policies and procedures in place for informing domestic violence offenders and persons restrained by a protective order about laws that limit the right to possess a firearm.

Texas law conforms with VAWA because notice of the prohibition on possession of a firearm is required to be in the warning for:

- a Texas Family Code protective order ([Tex. Fam. Code Title 4](#));
- a magistrate's order of emergency protection ([Tex. Code Crim. Proc. art. 17.292](#));
- for a protective order for a victim of a crime motivated by bias or prejudice ([Tex. Code Crim. Proc. art. 6.08\(c\)](#));

AND

- after a defendant convicted of a crime of family violence. ([Tex. Code Crim. Proc. art. 42.0131](#))

14.6 *Surrender of firearms.*

Unlike some other states, Texas has no statutory procedures for the surrender of firearms. Some courts, however, have worked with local law enforcement to set up procedures for surrender, storage, and return of firearms.

In El Paso, Texas, Judge Patricia A Macias, presiding Judge of the 388th Judicial District Court, organized the Firearm Surrender Protocol Project on May 18, 2005. The project was guided by the multi-agency Firearms Surrender Protocols Advisory Committee comprised of representatives from law enforcement, military, victims' advocates, and the judiciary. The process for developing the protocols involved judicial coordination of agency partners; development of common principles and community standards; development of firearms protocols; and implementation. The El Paso firearms surrender protocols were implemented in 2007.⁶¹⁹

The El Paso firearms surrender protocols include protocols for at-the-scene; emergency protective orders; victims' advocates; and family courts.

It is incumbent upon each court or jurisdiction to work with local, state, and federal law enforcement to arrange firearm surrender procedures for persons subject to the prohibitions in [18 U.S.C. § 922](#).

14.7 Suggested practices for firearms surrender.

The National Council of Juvenile and Family Court Judges recommends that a court take steps to ensure that firearms are safely surrendered.⁶²⁰ At the very least, after the pronouncement of judgment (e.g., that the protective order will issue or after a finding of guilt), the court should:

- warn the defendant-respondent orally and in writing that it is a violation of state and federal law to possess a firearm;
- inquire of both the victim-applicant and the defendant-respondent about whether the latter possesses or has access to firearms;

AND

- if there is reason to believe the defendant-respondent does possess or have access to firearms, order those items surrendered.

The court may also consider taking the following steps:

⁶¹⁹ See the 388th Judicial District Court's Replication Manual. The Manual describes the genesis and outcomes of El Paso County's firearms surrender protocol. It is available at: <http://www.co.el-paso.tx.us/388DC/documents/388th%20DV%20Firearms%20Replication%20Manual%202011%20-%206.28.11v.1.pdf>.

⁶²⁰ See the National Council of Juvenile and Family Court Judges' "Firearms" benchcard; available at: www.vaw.umn.edu/documents/judgefin/judgefin.html

- provide the defendant respondent with specific instructions on how to surrender the firearms and provide the receiving party with a copy of the order and the instructions;
- set a deadline for the surrender;
- for surrender by sale to a third party (person not residing with the defendant-respondent), require the defendant get the court's prior approval;
- require the defendant-respondent get a receipt for the surrendered items from the receiving party and to file a copy of the receipt with the court by a specific deadline or to file an affidavit with the court that the defendant-respondent does not possess or have access to firearms;
- if applicable, require the defendant-respondent to file an affidavit attesting to the surrender of that person's concealed handgun license;
- provide the defendant-respondent with information about how to apply to have the surrendered items returned;
- inform the defendant-respondent that unless a request to return the surrendered item is filed within a set period after the disqualification is removed (i.e., after the protective order expires), the surrendered items will be destroyed;
- allow the victim-applicant an opportunity to contest a request to return surrendered firearms;

AND

- in the event of non-compliance, set a conditional date for a show cause hearing on the surrender issue.

14.8 *Return of surrendered firearms.*

To ensure that a court does not improperly authorize the return of a firearm to a disqualified person, the National Council of Juvenile and Family Court Judges recommends that the court:

- search criminal information databases, both state and national, to ensure the person is not disqualified from possession of a firearm. Such searches are authorized under [28 U.S.C. 534\(f\)\(1\)](#);
- require the person to appear at a show cause hearing regarding possession;

- if transfer to a third party is requested, require the third party to appear at a hearing and warn the party that:
 - federal law prohibits constructive possession;
 - the prohibited person may not have access to the firearm;
 - the third party is subject to criminal penalties if the prohibited person is allowed to have access to the firearm after the transfer;
 - the third party must consent to, undergo, and clear a criminal background check before the court will consider the transfer request;

AND

- require both the prohibited party and the third party to sign an acknowledgment form under oath and penalty of perjury stating that they understand the penalties that may be imposed for violating the state and federal laws regarding possession of a firearm by the prohibited party.⁶²¹

14.9 *Suggested practices for return of surrendered firearms.*

When a defendant or respondent applies for the return of a surrendered firearm, the National Council of Juvenile and Family Court Judges recommends that the court inquire into whether the defendant or respondent:

- has been found guilty of a felony or misdemeanor crime of domestic violence;
- is currently restrained by another final protective order in effect in Texas or any other state;
- seeks a weapon that is the subject of a forfeiture action pending in another court;
- has been adjudicated mentally defective or been committed to a mental institution;
- is legally and lawfully in the United States;
- has ever been dishonorably discharged from the Armed Services;
- has ever renounced U.S. citizenship;

⁶²¹ *Ibid.*

- is currently under indictment for any felony;⁶²²
- has been convicted of a felony or misdemeanor crime of domestic violence;
- has been on probation or pretrial diversion, or had adjudication withheld for an act of domestic violence in Texas within the past 3 years;

AND

- is under a legal impediment to owning or possessing a firearm.

The court should also:

- require that the defendant-respondent notify the applicant that the defendant-respondent has requested return of firearms;
- allow the applicant sufficient time to file any objections;
- set a hearing on the request;
- before the hearing, conduct a criminal history check to verify that the defendant-respondent is not disqualified from receipt of firearms by virtue of a pending criminal charge or other disqualifying event;

AND

- review all evidence presented at the hearing.⁶²³

14.10 Admonishments regarding firearms prohibitions.

After the protective order is granted, the court must inform the respondent or the defendant that possession of a firearm is illegal under Texas law (assuming no exceptions apply). The necessary admonishments are:⁶²⁴

- the protective order is enforceable in all 50 states, all U.S. territories, all tribal lands, and in the District of Columbia;

⁶²² The court is entitled to obtain and use national criminal databases in domestic violence and stalking cases. See [28 U.S.C. § 534](#)(e)(1).

⁶²³ See footnote 2.

⁶²⁴ See for instance, the Texas Council on Family Violence's benchcard on firearms possession in the Texas Judges Guide to Issuing and Enforcing Protective Orders.

- a violation of the order may result in a prosecution for a crime under state, federal, or tribal law;
- the federal statute at [18 U.S.C. § 922g](#) and [Tex. Penal Code § 46.04](#) prohibit possession of a firearm for the entire duration of the protective order;
- information concerning the protective order will be entered into statewide and national databases maintained by the Texas Department of Public Safety and by the Federal Bureau of Investigation. The databases are accessible to local, state, and national law enforcement;
- whether or not the order is accessible in a law enforcement database, law enforcement personnel can act to enforce the order if shown a legible copy or if the officer has reasonable basis to believe an order is being violated. To aid law enforcement, the protected person should carry a copy of the order at all times. The copy just needs to be legible; it does not have to be a certified copy;

AND

- it is also recommended that the court inform the applicant and other protected individuals of the National Domestic Violence hotline, which can provide information, referral, or crisis help. The hotline is open 24 hours a day, seven days a week. The number is 1-800-799-SAFE (7233); or 800-787-3224 (TTY for the hearing-impaired).

CHAPTER 15—TEMPORARY EMERGENCY ORDERS OF PROTECTION FOR A CHILD AND PRIOR CHILD CUSTODY DETERMINATIONS—PART I: STATUTES AND CASE LAW

[\(28 U.S.C. § 1738A; 42 U.S.C. §§ 653, 663, 11601-11610; Tex. Fam. Code ch. 152\)](#)

Uniform Child Custody Jurisdiction and Enforcement Act International Child Abduction Remedies Act Federal Parent Locator Act Hague Convention on the Civil Aspects of International Child Abduction

SUMMARY:

The protections afforded by a protective order issued under [Tex. Fam. Code Title 4](#) are available to a child who is already subject to a child custody determination or whose custody is subject to the continuing jurisdiction of an out-of-state tribunal. In such situations, a Texas court may exercise temporary emergency jurisdiction over the child and issue a temporary order of emergency protection with child custody and support provisions.

Priorities in child custody determinations. Texas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which delineates when a Texas court may: (1) enforce a child custody order from another state; (2) take primary jurisdiction over a child custody case that originated in another state; or (3) modify another state’s child custody order.⁶²⁵

Subject matter jurisdiction under the UCCJEA cannot be waived and can be raised at any time.⁶²⁶ The adoption of the UCCJEA in Texas has reduced the conflicts between state law and the federal Parental Kidnapping Prevention Act (PKPA) ([28 U.S.C. §](#)

⁶²⁵ Texas adopted the UCCJEA in 1999. The UCCJEA differs from its predecessor (the Uniform Child Custody Jurisdiction Act) primarily in that the UCCJEA (1) gives jurisdictional priority to the child’s “home” state; (2) awards continuing exclusive jurisdiction to the first court that enters a child custody determination; and (3) eliminated “bests interests of the child” as a criteria for determining whether a court has jurisdictionally significant connections with parties to a custody case

⁶²⁶ *Alfonso v. Skadden*, [251 S.W.3d 52](#) (Tex. 2008).

[1738A](#)) (regarding full faith and credit for foreign custody determinations), so that the PKPA is rarely invoked.

Temporary emergency jurisdiction to protect a child. When a child in Texas needs protection from family violence but is already the subject of child custody order from an out-of-state tribunal, the UCCJEA allows a Texas court to issue a temporary emergency order to protect the child or its parent or sibling from mistreatment or abuse or the threat thereof. Child custody awards in out-of-state orders are entitled to full faith and credit only if issued in accordance with the UCCJEA and/or the PKPA.⁶²⁷ See Ch. 13. ([Tex. Fam. Code § 152.204](#))

International child custody; the Hague Convention. Pursuant to the International Child Abduction Remedies Act (ICARA) ([42 U.S.C. §§ 11601-11610](#)) and [Tex. Fam. Code § 152.301-152.317](#), international child custody determinations are subject to the Hague Convention on the Civil Aspects of International Child Abduction, which requires the return of a child who is illegally removed from or retained in a foreign nation. Under [Tex. Fam. Code § 153.502](#), in child custody determinations, the court must use specific factors to assess the risk of international parental abduction of a child. However, the court must also consider evidence that the parent's actions were motivated by a good faith believe that abduction was necessary to avoid imminent harm to the child.

A court enforcing a state or federal law regarding unlawful taking or restraint of a child or making or enforcing a child custody or visitation order may use the Federal Parent Locator Service ([42 U.S.C. § 663](#)) to obtain information about the whereabouts of a child or parent.

Subchapter A

Uniform Child Custody Jurisdiction and Enforcement Act

15.1 UCCJEA.

Texas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which:

⁶²⁷ The UCCJEA incorporates the standards in the federal PKPA ([28 U.S.C. § 1738A](#)), so the full faith and credit provision of the PKPA is rarely invoked separately.

- requires Texas courts to afford full faith and credit to child custody orders from other states⁶²⁸ and territories and from a foreign country ([Tex. Fam. Code § 152.203](#));
- recognizes that continuing and exclusive jurisdiction for child custody determinations vests in:
 - the courts of a child’s home state;
 - the court issuing the initial child custody or support order;

OR

- in the absence of a home state, in the state with significant connections with the child and a parent and where there is substantial evidence relevant to the child custody determination ([Tex. Fam. Code § 152.202](#)).
- allows Texas courts to issue a temporary emergency order (i.e., a temporary protective order with child custody provisions) that temporarily supersedes a foreign child custody order if the temporary emergency order is necessary to protect the safety of a child or its sibling or parent ([Tex. Fam. Code § 152.204](#));
- requires Texas courts to consider domestic violence as a factor when deciding an inconvenient forum issue ([Tex. Fam. Code § 152.207\(b\)\(1\)](#));
- requires Texas courts to safeguard victim information in protective and custody orders ([Tex. Fam. Code § 152.209\(e\)](#));
- does **NOT** apply to adoption proceedings or proceedings regarding emergency medical care of a child ([Tex. Fam. Code § 152.103](#));
- controls over other Texas law, if there is a conflict ([Tex. Fam. Code § 152.002](#));⁶²⁹

⁶²⁸ See *Perry v. State*, [727 S.W.2d 781](#) (Tex. App.-- Austin 1987, pet. ref’d). In a prosecution for interference with child custody, the defendant’s violation of a Missouri custody decree violated [Tex. Penal Code § 25.03\(a\)\(1\)](#).

⁶²⁹ *In re Bellamy*, [67 S.W.3d 482, 484](#) (Tex. App.--Texarkana 2002, no pet.), disapproved on other grounds, [140 S.W.3d, 373](#) (Tex. 2004). Where there is a conflict between a provision in [Texas Family Code chapter 152](#) (Uniform Child Custody Jurisdiction and Enforcement Act) and other Texas law, the

AND

- requires Texas courts to enforce a child custody order made by a foreign nation that is a party to the Hague Convention as if it were a child custody determination from the state of Texas. ([Tex. Fam. Code § 152.302](#)).⁶³⁰

15.2 *Definitions.*

- **Abandoned** means left without provision for reasonable and necessary care or supervision.
- **Child** means an individual under 18 years of age.
- **Child custody determination** means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders. The term does not include an order relating to child support or another monetary obligation of an individual.
- **Child custody proceeding** means a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination or parental rights, *and protection from domestic violence* in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement of child custody or visitation.

former controls. Accord, *In re McCormick*, [87 S.W.3d 746](#) (Tex. App.--Amarillo 2002) (orig. proceeding).

⁶³⁰ *In re JH*, No. 13-07-0373-CV, [2008 Tex. App. Lexis 6379](#) (Tex. App.--Corpus Christi, Aug. 21, 2008, no pet.) (mem. op.). A Texas court properly dismissed a suit to modify a prior Taiwanese child custody order because the child had never resided in Texas (so Texas was not the child's home state) and there was no evidence that the Taiwan court declined to exercise jurisdiction.

In re SKB, No. 02-07-054-CV, [2008 Tex. App. Lexis 4769](#) (Tex. App.--Fort Worth, June 26, 2008, no pet.). Trial court did not err by declining jurisdiction and granting the mother's special appearance because the record showed that at the time the motion to enforce was filed, the mother and the child lived in Japan, the father lived in Connecticut, and the parents' petitions concerning child custody were pending in Japan.

In re YMA, [111 S.W.3d 790](#) (Tex. App.--Fort Worth 2003, no pet.). The custody action was filed first in Egypt so the Texas court lacked jurisdiction.

- **Commencement** means the filing of the first pleading in a proceeding.
- **Court** means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.
- **Home state** means the state where the child was born (if less than six months of age) or where the child lived (i.e., was physically located)⁶³¹ with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding, or at least six months before any child custody proceeding is filed; **AND** where a parent continues to reside.
- **Initial determination** means the first child custody determination for which enforcement is sought under this chapter.
- **Issuing state** means the state in which a child custody determination is made.
- **Legal custody** means the managing conservatorship of a child.
- **Modification** means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.
- **Person acting as a parent** means a person, other than a parent, who has or for the six months prior to commencement of the child custody proceeding had physical custody of the child **OR** who has been awarded legal custody by a court or claims legal custody under Texas law.

⁶³¹ *Powell v. Stover*, [165 S.W.3d 322, 323](#) (Tex. 2005). With regard to determining a child’s home state under the UCCJEA, the term “lived” strongly connotes physical presence and the physical location of the child is the central factor to be considered when determining child’s home state.

In re Tieri, [283 S.W.3d 889](#) (Tex. App.--Tyler 2008)(orig. proceeding). New Jersey, not Texas, was the child’s home state because the child did not live in Texas for six consecutive months before the custody case was filed.

In re KY, [273 S.W.3d 703,707](#) (Tex. App.--Houston [14th Dist.] 2008, no pet.). A child’s frequent trips out of Texas during six month period before custody case was filed did not divest Texas of home state jurisdiction.

In re Burk, [252 S.W.3d 736, 740](#) (Tex. App.--Houston [14th Dist.] 2008) (orig. proceeding). To be the child’s home state, Texas must have been the child’s home at some time within the six months before the child custody case was filed.

- **Physical custody** means the physical care and supervision of a child.
- **Temporary emergency jurisdiction** means the child is physically present in the state and has either been abandoned or the child or its sibling or parent is threatened with or subjected to mistreatment or abuse.
- **Tribe** means an Indian tribe or band, or Alaskan Native Village, that is recognized by federal law or formally acknowledged by a state.
- **Visitation** means possession of or access to a child.
- **Warrant** means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

([Tex. Fam. Code § 152.102](#); [Tex. Fam. Code § 152.204](#))

15.3 *Determining initial jurisdiction.*

A Texas court can assert jurisdiction if Texas is: the child’s home state, a state with which the child has significant connections, or under a “last resort” claim. If a Texas court can exercise jurisdiction as a home state or a significant connections state, it will not need to claim last resort jurisdiction to issue a temporary emergency order of protection for a child under [Tex. Fam. Code § 152.204](#).

15.3.1 Home state.

Home state jurisdiction refers to the state where the child has lived for at least six consecutive months immediately prior to the filing of the case. A court with home state jurisdiction has continuing jurisdiction over the child as long as one parent continues to live in the state. For an original or initial custody order, Texas will be the child’s home state if:

- the child lived in Texas:
 - since birth (for a child under 6 months of age)

OR

- for at least six months before the custody suit commences;⁶³²

AND

- a parent or a person acting as a parent lives in Texas;⁶³³

AND

- another state does not have home jurisdiction;

OR

- the home state declined to exercise jurisdiction because it has determined Texas to be the more appropriate forum.

15.3.2 Significant connections.

Texas will have significant connections with the child if:

- the child and at least one parent or a person acting as a parent have a significant connection with Texas (aside from mere physical presence);⁶³⁴

⁶³² *Powell*, [165 S.W.3d at 323](#); *Lemly v. Miller*, [932 S.W.2d 284](#) (Tex. App.--Austin 1996, no pet.). A child's temporary 10-month absence from Texas due to his stepparent's military service did not prevent Texas from being the child's home state because the period out of state counted as Texas residency for purposes of jurisdiction in child custody order modification.

⁶³³ *In re Oates*, [104 S.W.3d 571](#) (Tex. App.--El Paso 2003) (orig. proceeding). The Texas court's jurisdiction ended with death of petitioner-father and paternal grandparents could not continue lawsuit to gain access to grandchildren when grandparents had not attained status of persons acting as parents and did not have physical custody of children in the six consecutive months immediately before filing suit. After the death of the petitioner, Texas lost significant connection jurisdiction over children.

In re SJA, [272 S.W.3d 678](#) (Tex. App.--Dallas 2008, no pet.). The Texas trial court had jurisdiction to modify a child custody determination made by Louisiana, pursuant [Texas Fam. Code Ann. § 152.201\(a\)\(2\)](#), in part, because no parent or child continued to live in Louisiana, and the children and their mother had a "significant connection" with Texas. Although the children had resided with their stepmother in Florida for many years, the Louisiana decree had never been modified by a Florida court, and the stepmother was not a person acting as a parent when the Texas lawsuit was filed.

⁶³⁴ *In re Marriage of Daulton*, [2006 Tex. App. Lexis 10286](#) (Tex. App.—Waco, Nov. 29, 2006, no pet.). In a child custody case, the Texas trial court correctly held it lacked jurisdiction over the children because Illinois was the children's home state and because physical presence of father in Texas was insufficient to establish a significant connection in Texas under [Texas Family Code Ann. § 152.201\(a\)\(2\)\(A\)](#).

In re Barnes, [127 S.W.3d 843](#) (Tex. App.--San Antonio 2003) (orig. proceeding). Even if the child had no home state, the child did not have the required significant connections for a Texas court to make an

AND

- substantial evidence is available in Texas concerning the child's care, protection, training, and personal relationships;

AND

- there is no home state;⁶³⁵

OR

- all other states having home jurisdiction have declined to exercise it;⁶³⁶

initial custody determination because the child had never resided in Texas and the only proof of a connection was that father currently resided there.

⁶³⁵ *In re Brilliant*, [86 S.W.3d 680](#) (Tex. App.--El Paso 2002, no pet.). When the child had no home state, the Texas court could exercise jurisdiction to make initial child custody determination under the significant connection criteria.

Davis v. Guerrero, [64 S.W.3d 685](#) (Tex. App.--Austin 2002, no pet.). A child did not have a home state when the custody suit was commenced; almost two years had passed since the child last lived in a single state for six consecutive months. Under [Tex. Fam. Code Ann. § 152.203](#), a Texas court could modify an order affecting the parent-child relationship from another state because Texas would have had jurisdiction to make an original determination under [Tex. Fam. Code Ann. § 152.201](#)(a)(2) where there was a significant connection with Texas in that both biological parents lived in Texas and the child had lived in Texas for 37 of the first 70 months of her life.

In re Presley, [166 S.W.3d 866, 868](#) (Tex. App.--Beaumont 2005)(orig. proceeding). In a child custody case, where the child had no home state and suit filed first in Florida, Texas court was required to communicate with the Florida court and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re Brown, [203 S.W.3d 888, 891](#) (Tex. App.--Fort Worth 2006) (orig. proceeding). Even though wife filed for divorce in Missouri, if Texas was the oldest child's home state, then Missouri should not be exercising jurisdiction over the oldest child because Texas home state jurisdiction trumps all other possible bases for jurisdiction. However, when youngest child had no home state, had significant connections with Missouri, and Missouri court entered first child custody order, Texas court could not take jurisdiction for youngest child unless the Missouri court declined to do so.

⁶³⁶ *In re Lewin*, [149 S.W.3d 727](#) (Tex. App.--Austin 2004)(original proceeding). A foreign court's erroneous conclusion that the Texas court had "home state" jurisdiction did not constitute a determination that it "declined to exercise jurisdiction" on the ground that another court was the more appropriate forum to determine custody, and thus did not free the Texas court to consider whether it had "significant connection" jurisdiction pursuant to the [Texas Fam. Code Ann. § 152.201](#)(a).

Seligman-Hargis v. Hargis, [186 S.W.3d 582](#) (Tex. App.--Dallas 2006, no pet.). When it is established that a foreign court has home state jurisdiction in child custody proceeding and there was no evidence that court had declined to exercise that jurisdiction, the issue of where the Texas court had significant connections jurisdiction is moot.

OR

- a party is seeking a temporary emergency order in Texas.

15.3.3 Last resort jurisdiction.

This type of jurisdiction applies if:

- no other state has home state jurisdiction;
- no other state has exercised significant connections jurisdiction;
- all other states having jurisdiction decline to exercise it;

OR

- the court is exercising temporary emergency jurisdiction to protect the child or a parent or sibling of the child.

NOTE: Where the lawsuit is originally filed is not necessarily determinative of home state jurisdiction because the UCCJEA

Accord, *In re Brown*, [203 S.W.3d 888](#) (Tex. App.--Fort Worth 2006)(orig. proceeding). Texas court had home state jurisdiction over oldest child, which trumped any possible basis for Missouri court to take jurisdiction. See also, *Ruffier v. Ruffier*, [190 S.W.3d 884](#) (Tex. App.--El Paso 2006, no pet.). In child custody case, home state jurisdiction that has not been declined trumps any need to consider other basis for jurisdiction.

In re McCoy, [52 S.W.3d 297](#) (Tex. App.--Corpus Christi 2001) (orig. proceeding). Texas court did not have "significant connection" jurisdiction over custody issues under [Texas Fam. Code Ann. § 152.201\(a\)\(2\)](#) because, although one foreign state had declined "home state" jurisdiction, the children's current home state had not.

Waltenberg v. Waltenberg, [270 S.W.3d 308, 316](#) (Tex. App.--Dallas 2008, no pet.). When the child was less than six month old and had resided in Texas from birth, Texas, not Arizona, was not the child's home state for purposes of child custody, even though father had filed divorce petition in Arizona seeking custody of unborn child before divorce suit was filed in Texas court.

In re Burk, [252 S.W.3d 736](#) (Tex. App.--Houston [14th Dist.] 2008) (orig. proceeding). Where child was born in Texas but taken to live in Colorado when 5 months old, the Texas court had home state jurisdiction in child custody case even though parents had married and spent most of the marriage in Colorado.

In re Calderon-Garza, [81 S.W.3d 899](#) (Tex. App.--El Paso 2002) (orig. proceeding). In a child custody case between Mexican citizens, because the child was born in Texas and no other jurisdiction could claim to be its home state, Texas had home state jurisdiction over the child.

Annotation of cases where home state and significant connections jurisdiction was litigated can be found at [52 ALR 6th 433](#) (2010).

trumps all other possible bases for jurisdiction.⁶³⁷ So the fact that a party and a child resided in Texas for six months prior to filing and child custody in action in Texas does not divest a foreign court of home state jurisdiction.⁶³⁸

[\(Tex. Fam. Code § 152.201; Tex Fam. Code § 152.202\)](#)

15.4 Temporary emergency order of protection for a child.

[Tex. Fam. Code ch. 152](#) does not specifically state what procedure is to be used to obtain a temporary emergency order of protection that supersedes a foreign child custody determination. After jurisdiction is established under [Tex. Fam. Code § 152.204](#), the court uses the procedures in [Tex. Fam. Code Title 4](#) to enter the temporary *ex parte* protective order.⁶³⁹

15.4.1 Jurisdiction.

Texas courts can exercise temporary emergency jurisdiction over a child in Texas needing protection from mistreatment or abuse, or threats thereof, even if the child is subject to a custody order from another state.

15.4.1.1 Over the child to be protected.

A Texas court may exercise temporary emergency jurisdiction over a child *even if it lacks standing as a home state or a significant-connections state*. Exercise of the temporary emergency jurisdiction is justified if:

- the child is physically present in Texas;⁶⁴⁰

⁶³⁷ *In re Brown*, [203 S.W.3d 888, 891](#) (Tex. App.--Fort Worth 2006) (orig. proceeding). Even though wife filed for divorce in Missouri, if Texas was the child's home state, then Missouri should not be exercising jurisdiction because Texas UCCJEA trumps all other possible bases for jurisdiction.

⁶³⁸ *Saavedra v. Schmidt*, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002, no pet.).

⁶³⁹ See *In re MGM*, [163 S.W.3d 191, 196-98](#) (Tex. App.--Beaumont, no pet.). In a protective order application under [Tex. Fam. Code Title 4](#), made while a foreign custody lawsuit was pending, the appellate court held that Title 4 had a more general application to the issues before the trial court, while [Tex. Fam. Code ch. 152](#) had a more specialized and comprehensive application to the same issues. The Texas court derived its jurisdiction over children whose home state was Michigan solely from [Tex. Fam. Code § 152.204\(a\)](#), but to issue temporary *ex parte* protective order to protect the children, the trial court had the authority to utilize the provisions of [Tex. Fam. Code Title 4](#).

⁶⁴⁰ *In re JCB*, [209 S.W.3 821, 824 n. 4](#) (Tex. App.--Amarillo 2006, no pet.). For temporary emergency orders under [Texas Fam. Code Ann. § 152.204\(a\)](#), there is no requirement that the child have resided in the state for at least six months prior to filing the petition.

AND

- the child has been abandoned;⁶⁴¹ **OR** the child, a sibling, or a parent of the child needs protection from abuse or threats of abuse or mistreatment.⁶⁴²

NOTE: Temporary emergency jurisdiction may be used only for protection and does not include jurisdiction to permanently modify a child custody determination.⁶⁴³

[\(Tex. Fam. Code § 152.204\)](#)

15.4.1.2 Over a parent or guardian.

A child custody determination by a Texas court with jurisdiction binds all persons:

- in Texas who have been served with notice as required by Texas law;
- outside Texas who have been served with notice as required by Texas law or as required by the law of the jurisdiction in which service is accomplished.

⁶⁴¹ **NOTE:** The following case was decided under the now-repealed Texas UCCJA. *Huffstutlar v. Koons*, [789 S.W.2d 707](#) (Tex. App.--Dallas 1990) (orig. proceeding). The Texas court did not have emergency jurisdiction over the father's motion to modify the custody portion of a Texas divorce decree under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act because the Oklahoma resident mother had not abandoned the child by giving it to the father.

⁶⁴² **NOTE:** The following cases were decided under the now-repealed UCCJA. *Soto-Ruphy v. Yates*, [687 S.W.2d 19](#) (Tex. App.--San Antonio 1984) (orig. proceeding); *Milner v. Kilgore*, [718 S.W.2d 759](#) (Tex. App.--Corpus Christi 1986) (orig. proceeding); and *Ex parte McDonald*, [737 S.W.2d 102](#) (Tex. App.--Corpus Christi 1987) (orig. proceeding). In all the foregoing cases, the Texas trial court erred in assuming jurisdiction under § 3(a)(3)(ii) of the UCCJA to modify an original Texas custody decree, since there was no finding in the trial court's temporary orders or evidence in the record that a serious and immediate question concerning the physical or emotional welfare of the child existed.

Garza v. Harney, [726 S.W.2d 198](#) (Tex. App.--Amarillo 1987) (orig. proceeding). Under Texas UCCJA (former [Tex. Code Ann. § 11.53\(a\)](#)), if evidence is presented that a child has been beaten and emergency jurisdiction is requested of the court to protect the child, the court may exercise temporary jurisdiction over a custody matter, even though the divorce is pending before a foreign court.

⁶⁴³ *Saavedra v. Schmidt*, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002, no pet.). The duty of a state to recognize and enforce the custody determinations of another state must yield if circumstances require temporary emergency orders to protect the child. The trial court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify another state's child custody determination.

[\(Tex. Fam. Code § 152.106; Tex. Fam. Code § 152.108\)](#)

15.4.2 Required disclosures.

A party:

- seeking the child custody determination (including in a temporary emergency order proceeding) is required to disclose in its pleadings if a foreign tribunal has exercised jurisdiction over the child custody issue;
- involved in a child custody proceeding must inform the court of any orders with child custody provisions;
- must disclose information regarding the child's present and past addresses;

AND

- may, upon allegation made under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, request the court to seal the information otherwise required to be disclosed.

[\(Tex. Fam. Code § 152.209\)](#)

15.4.3 Interstate discovery.

To assist in creating an evidentiary record in a child custody case (and to avoid putting a party in danger by having to return to another jurisdiction), a Texas court may request that a foreign tribunal:

- hold an evidentiary hearing;
- order a person to produce evidence;
- order an evaluation be made related to a pending proceeding;

- order a party to the proceeding to appear with or without the child;

OR

- forward a copy of the transcript of the proceeding, the evidence produced, or the evaluation performed to the requesting court.

[\(Tex. Fam. Code § 152.112\)](#)

15.4.4 Duration of temporary emergency order of protection.

The duration of a temporary emergency order of protection for a child depends on whether there was a previous child custody determination in the home or significant connection state:

- if there is no prior child custody determination made in another state with jurisdiction and no action is brought in the other state, then the temporary order lasts until:
 - the other state issues an order;

OR

- the other state declines to act based on inconvenience of the forum;

OR

- there is no child custody determination action brought in the other state within six months of the child's leaving that state. In the last two situations, the temporary order becomes a final custody determination and Texas becomes the home state.⁶⁴⁴
- if there was a prior child custody determination in another state having jurisdiction or an action for such determination is brought there, then the temporary emergency order must specify a date on

⁶⁴⁴ *In re JCB*, [209 S.W.3d 821](#) (Tex. App.--Amarillo 2006, no pet.). In parental rights' termination action, the Texas court had temporary emergency jurisdiction over case where the children of arrested Oklahoma resident were left in custody of State of Texas for fourteen months prior to the lawsuit.

which it will expire. The expiration date should give the party seeking relief sufficient time to seek an order from the other state.

15.4.5 Full faith and credit for child custody provisions in foreign protective orders.

VAWA's full faith and credit provision affords full faith and credit to all protective orders but the UCCJEA does not provide full faith and credit unless the foreign order was issued after notice and an opportunity to be heard. Under VAWA's full faith and credit provision ([18 U.S.C. § 2265](#) et seq.), the term "protective order" includes any support, child custody, or visitation provisions. ([18 U.S.C. § 2266\(5\)\(B\)](#)). The UCCJEA (and the PKPA) also addresses when a custody determination in a foreign protective order is entitled to full faith and credit. Unlike [18 USC § 2265](#), the UCCJEA affords full faith and credit only to foreign orders issued after notice and an opportunity to be heard. ([Tex. Fam. Code § 88.003\(b\)](#)).

Pursuant to [Tex. Fam. Code § 88.003\(b\)](#), foreign protective order provisions regarding child custody issued in accordance with the foreign tribunal's jurisdictional requirements are entitled to full faith and credit. Because virtually all states have adopted the UCCJEA,⁶⁴⁵ which requires notice and an opportunity to be heard before the child custody order issues, the prior notice and an opportunity to be heard before the order issues is required for full faith and credit for almost any state's protective order.

([Tex. Fam. Code § 88.003\(b\)](#); [Tex. Fam. Code §152.204-152.205](#))

15.4.6 Communication with foreign tribunal required.

After it issues the temporary emergency order of protection for a child, the Texas court **MUST** communicate with the foreign tribunal that previously has exercised jurisdiction over the child custody case to resolve the emergency, secure the safety of the child and the parties, and

⁶⁴⁵ As of December 2010 (when New Hampshire's law took effect), only Massachusetts, Vermont, and Puerto Rico will have not adopted the UCCJEA.

determine the duration of the temporary order.⁶⁴⁶ The communication between the courts:

- may occur with or without notice to, or the presence of the parties;
- may be off the record and without notice to the parties for scheduling and other non-substantive procedural matters;
- must be on the record (whether or not the parties are notified or present) for all non-procedural discussions;

AND

- must include an opportunity for the parties to present facts and legal arguments before a decision is made.

NOTE: Upon learning of the existence of a foreign tribunal's temporary emergency order involving the parties, a Texas court exercising exclusive continuing jurisdiction over a custody determination **MUST** communicate with the foreign tribunal.

[\(Tex. Fam. Code § 152.110; Tex. Fam. Code § 152.204\(d\), Tex. Fam. Code § 152.209\)](#)

15.5 Continuing exclusive jurisdiction of the home state court.

As a home state court, a Texas court retains continuing exclusive jurisdiction over its child custody orders until:

- it determines that it lacks significant connections with the child and the parties (the parents or person acting as a parent);

⁶⁴⁶ *In re Presley*, [166 S.W.3d at 868](#) (Tex. App.--Beaumont 2005) (orig. proceeding). Where suit filed first in Florida, Texas court required to communicate with the Florida court and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re MGM, [163 SW3d 191](#) (Tex. App.--Beaumont 2005, no pet.). For a temporary emergency order of protection when Michigan was home state for original custody order, the Texas court could, to protect the child, prohibit husband from removing the child from wife's possession but once Texas court learned of Michigan proceeding, it had to communicate with Michigan court and, once satisfied that the Michigan court had issued an appropriate order, dismiss the Texas case.

AND

- it finds that it lacks substantial evidence concerning the child’s care, protection, training, and personal relationships;

OR

- it determines, along with the state seeking jurisdiction, that neither the child nor any party (parent or person acting as a parent) reside in Texas.⁶⁴⁷

[\(Tex. Fam. Code § 152.202\)](#)

15.6 Modification of a foreign tribunal’s custody determination.

Only the tribunal that had jurisdiction to and did issue the order can modify its custody determination unless:

- the motion to modify is filed in another state with jurisdiction to make an initial order (that is, the child has resided there for six months and a parent or person acting as a parent resides there);

AND

- the issuing state decides it no longer has exclusive jurisdiction;

OR

- the issuing state decides the other state is a more convenient forum;

⁶⁴⁷ *In re Forlenza*, [140 S.W.3d 373, 379](#) (Tex. 2004). Where Texas court made original custody determination, possessory conservator father resided in Texas, and children had significant connection, Texas should not relinquish jurisdiction for custody modification because mother’s residence is now in Mississippi. A court’s exclusive jurisdiction continues as long a significant connection exists or substantial evidence is present.

Saavedra v. Schmidt, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002, no pet.). The trial court’s finding that the mother and children resided in Texas for more than six months prior to filing of petition for temporary emergency order had no bearing on Texas court’s jurisdiction to modify another state’s child custody determination. The Texas court had no jurisdiction to modify a California decree unless the California court declined jurisdiction.

Lemly v. Miller, [932 S.W.2d 284](#) (Tex. App.--Austin 1996, no pet.). A child’s temporary 10-month absence from Texas due to his step-parent’s military service did not prevent Texas from being the child’s home state because the period out of state counted as Texas residency for purposes of jurisdiction in child custody order modification.

OR

- the issuing state and the other state agree that neither party nor the child live in the issuing state.⁶⁴⁸

[\(Tex. Fam. Code § 152.203\)](#)

15.7 *Inconvenient forum factors.*

Upon motion of a party or the court's own motion, or upon request by another court, a Texas court may consider whether it is an inconvenient forum. When considering when to exercise or decline to exercise jurisdiction on the grounds of inconvenient forum, the Texas court must consider:

- whether domestic violence has occurred between the parties and is likely to continue;
- which state can best protect the child and the parties;
- how long the child has lived outside the home state;
- the distance between the home state court and the court where the motion is pending;
- the parties' relative financial situations;
- whether the parties have any agreements regarding jurisdiction;

⁶⁴⁸ *In re SJA*, [272 S.W.3d 678](#) (Tex. App.--Dallas 2008, no pet.). The Texas trial court had jurisdiction to modify a child custody determination made by Louisiana, pursuant [Texas Fam. Code Ann. § 152.201\(a\)\(2\)](#), in part, because no parent or child continued to live in Louisiana, and the children and their mother had a "significant connection" with Texas even though the children had only been in Texas a few weeks when the lawsuit was filed.

Davis v. Guerrero, [64 S.W.3d 685](#) (Tex. App.--Austin 2002, no pet.). Child did not have a home state when the custody suit was commenced because almost two years had passed since the child last lived in a single state for six consecutive months. Under [Tex. Fam. Code Ann. § 152.203](#), a Texas court could modify an order affecting the parent-child relationship from another state because Texas would have had jurisdiction to make an original determination under [Tex. Fam. Code Ann. § 152.201\(a\)\(2\)](#) where there was a significant connection with Texas in that both biological parents lived in Texas and the child had lived in Texas for 37 of the first 70 months of her life.

- the nature and location of relevant evidence (including the child’s testimony);
- the courts’ relative abilities to hear and decide the matter expeditiously;

AND

- the courts’ relative familiarity with the facts and issues in the pending litigation.

The best interests of the child is **NOT** a factor in this determination.⁶⁴⁹

NOTE: A declaratory judgment action is an appropriate vehicle for determining an inconvenient forum challenge.⁶⁵⁰

[\(Tex. Fam. Code § 152.207\)](#)

15.8 Declining jurisdiction.

A Texas court can decline jurisdiction if it determines that:

- Texas is an inconvenient forum;

OR

- the party seeking relief engaged in “unjustifiable conduct.” A court should decline to accept jurisdiction if the change of jurisdiction is contested by a party or the home state based on unjustifiable conduct of the party seeking the change.⁶⁵¹ Thus, an abusive party who takes the child to another state should not be able to get that state to assert jurisdiction because the party has engaged in unjustifiable conduct. However, an abused party who takes

⁶⁴⁹ *Hart v. Kozik*, [242 S.W.3d 102](#) (Tex. App.--Eastland 2007, no pet.).

⁶⁵⁰ *Monk v. Pomberg*, [263 S.W.3d 199, 206](#) (Tex. App.--Houston [1st Dist.] 2007, no pet.). Declaratory judgment is available for inconvenient forum challenge in child custody case.

⁶⁵¹ *In re SLP*, [123 S.W.3d 685, 689](#) (Tex. App.--Fort Worth 2003, no pet.). Purpose of the unjustifiable conduct rule for child custody cases is to prevent a parent from benefitting from acting reprehensively by removing, secreting, retaining, or restraining the child.

In re Lewin, [149 S.W.3d 727, 740-41](#) (Tex. App.--Austin 2004) (orig. proceeding). Mandamus granted because Texas court should have declined jurisdiction over child custody when father had abducted child from jurisdiction of Canadian court, which had already litigated custody issues, and come to Texas in search of a more favorable forum.

the child to another state to escape abuse would have a justifiable reason for the change of jurisdiction.

[\(Tex. Fam. Code § 152.207; Tex. Fam. Code § 152.208\)](#)

Subchapter B International Child Custody Orders; The Hague Convention

15.9 *International child abduction.*

As a party to the Hague Convention,⁶⁵² the United States has implemented its provisions regarding international child abduction in the federal International Child Abduction Remedies Act (ICARA). Under ICARA:

- state courts share jurisdiction with federal district courts;
- the U.S. courts must afford full faith and credit to orders of a court of a party nation regarding access to a child(or denial thereof);⁶⁵³
- a court may take measures authorized by state or federal law:
 - to protect the well-being of the child involved;
 - to prevent the child's further removal or concealment pending the disposition of a petition for relief under the Act;

OR

- to order a person to surrender physical custody of a child if required by the applicable state law.

[\(42 U.S.C. § 11603-11604; 22 CFR Part 94; Tex. Fam. Code § 152.303\)](#)

⁶⁵² Not all countries are parties to the Hague Convention. For a list of nations currently parties to the Hague Convention, see <http://www.jcics.org/hague.htm>.

⁶⁵³ *In re Lewin*, [149 S.W.3d 727, 740-41](#) (Tex. App.--Austin 2004) (orig. proceeding). Mandamus granted because Texas court should have declined jurisdiction over child custody when father had abducted child from jurisdiction of Canadian court, which had already litigated custody issues, and come to Texas in search of a more favorable forum. The Texas court abused its discretion in failing to enforce a Canadian child custody order as required by the Hague Convention.

In re YMA, [111 S.W.3d 790](#) (Tex. App.--Fort Worth 2003, no pet.). The custody action was filed first in Egypt so the Texas court lacked jurisdiction. Once a mother had an Egyptian child custody order and she filed her motion for expedited enforcement under [Tex. Fam. Code Ann. § 153.308](#); the Texas court was then bound by [Tex. Fam. Code Ann. § 152.303](#) to recognize and enforce the order where the Egyptian court exercised jurisdiction in conformity with the Texas jurisdictional requirements.

15.10 Domestic violence considerations in Hague Convention.

There are several provisions in the Hague Convention that allow for a court to consider the impact of domestic violence on the child’s return to the petitioning party.⁶⁵⁴

15.10.1 Grave risk exception.

The Hague Convention contains an exception for situations where return of the child poses a “grave risk” to the child. Article 13(b) of the Convention states:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to psychological harm or otherwise place the child in an intolerable situation. . . .

15.10.2 Evaluation of “wrongful removal” element.

Articles 14-19 discuss how the court determines whether the removal of the child was “wrongful.” These Articles discuss standards that may be analogized to the “unjustifiable conduct” standard for declining jurisdiction under the UCCJEA. (See [Tex. Fam. Code § 152.208](#)).

15.10.3 Fundamental protections.

Article 20 states that the return of the child may be refused if the return would not be permitted “by the fundamental principles” of the requested state relating to the protection of human rights and fundamental freedoms.

15.11 Emergency orders for international child custody cases.

⁶⁵⁴ See *Garza v. Harney*, [726 S.W.2d 198, 203](#) (Tex. App.--Amarillo 1987) (orig. proceeding). The Texas court was bound by the UCCJA to uphold the Mexican child custody decree but had jurisdiction to grant short-term emergency relief until steps were taken in Mexico to protect the child.

Subchapter D of [Texas Family Code Chapter 152](#) sets out the procedures for enforcing a child custody determination that is entitled to full faith and credit under the Hague Convention (which only applies to court orders from foreign nations).⁶⁵⁵

15.11.1 Warrant to take immediate physical custody of the child.

Upon filing of a petition seeking enforcement of a foreign nation's child custody determination, the petitioner can also file a verified application for a warrant for immediate physical custody of the child. To issue the warrant, the court must find that, pending disposition of the petition, the child is likely:

- to suffer serious physical harm;
OR
- to be removed from Texas.

15.11.2 Forcible entry.

Upon showing by a sworn affidavit or upon testimony that a less intrusive remedy will not be effective, the court can authorize that law enforcement forcibly enter private property at any hour of the day to take physical custody of the child.

[\(Tex. Fam. Code § 152.310; Tex. Fam. Code § 152.311\)](#)

15.11.3 Hearing.

The warrant must state the date for the hearing on the petition. A hearing on the petition must be held the next day after service that the judge is at the courthouse.

[\(Tex. Fam. Code § 152.308\(c\)\)](#)

15.11.4 Placement of the child.

⁶⁵⁵ *Saavedra v. Schmidt*, [96 S.W.3d 533, 543](#) (Tex. App.--Austin 2002, no pet.). Party's agreement to be bound by the Hague Convention could not serve as basis for Texas court's assumption of jurisdiction when the jurisdictional issues were between courts of different states, not between a U.S. court and the court of a foreign country.

A warrant **MUST** provide for placement of the child pending the disposition of the petition. The court may place the child with a parent or family member only if the person has significant ties to the jurisdiction. Otherwise, the court must order the child delivered to the Department of Family and Protective Services as under Texas Family Code § 262.007(c).

[\(Tex. Fam. Code § 152.308\(b\); Tex. Fam. Code § 152.311\)](#)

15.11.5 Award of costs, fees, and expenses.

- **Mandatory.** In a contested case, the court **SHALL** award the prevailing party (including the state) necessary expenses, costs (travel, child care, communication), and fees (attorney's, investigative, witness).
- **Discretionary.** When public officials or law enforcement have been used to locate a child, the court **MAY** award all direct expenses and costs incurred by the officials or law enforcement if the respondent is not the prevailing party.

[\(Tex. Fam. Code § 152.312; Tex. Fam. Code § 152.317\)](#)

15.12 Central authority.

The Hague Convention requires every party to designate a central authority to process applications for the return of and access to a child. In the U.S., the federal State Department's Office of Children's Issues is the central authority for children removed from the U.S. after being abducted. The National Center for Missing and Exploited Children is the central authority for children who are abducted and brought into the U.S.⁶⁵⁶

15.13 Federal Parent Locator Service.

The Federal Parent Locator Service is a database used to locate a parent or child. Under federal law, a court may use the Service to enforce the laws regarding

⁶⁵⁶ The U.S. Central Authority's telephone contact number is 202-736-7000. See also the National Center for Missing and Exploited Children's website:

http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US

and the website of the Office of Children's Issues: http://travel.state.gov/abduction/abduction_580.html

unlawful taking or restraint of a child or to make or enforce a child custody or visitation order.

[\(42 U.S.C. §§ 653 and 663\)](#)

15.14 *Avoidance of harm in risk assessment for international child abduction.*

Under [Tex. Fam. Code § 153.502](#), in a child custody determination, the court must use specific factors to assess the risk of international parental abduction of a child but must also consider whether a parent's plan to flee was motivated by the need to avoid imminent harm to the child.

CHAPTER 15—PART II: COMMENTS

15.15 *Overview of the law.*

Texas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which delineates when a Texas court may: (1) enforce a child custody order from another state; (2) take primary jurisdiction over a child custody case that originated in another state; and (3) modify another state’s child custody order.⁶⁵⁷ Subject matter jurisdiction under the UCCJEA cannot be waived and can be raised at any time.⁶⁵⁸ Child custody awards in out-of-state orders are entitled to full faith and credit only if issued in accordance with the UCCJEA and/or the Parental Kidnapping Prevention Act (PKPA)⁶⁵⁹ See Ch. 13 of this Benchbook.

When a child in Texas needs protection from family violence but is already the subject of child custody order from an out-of-state tribunal, the UCCJEA allows a Texas court to issue a temporary emergency order to protect the child or its parent or sibling from mistreatment or abuse or the threat thereof.

Pursuant to the International Child Abduction Remedies Act (ICARA) ([42 U.S.C. §§ 11601-11610](#)) and [Texas Family Code § 152.301-.317](#), in Texas, international child custody determinations are subject to the Hague Convention on the Civil Aspects of International Child Abduction, which requires the return of a child who is illegally removed or retained from a foreign country. In child custody determinations, Texas law requires the court to use specific factors to assess the risk of international abduction of a child by a parent. ([Tex. Fam. Code § 153.502](#))

The courts enforcing a state or federal law regarding unlawful taking or restraint of a child or making or enforcing a child custody or visitation order may use the

⁶⁵⁷ Texas adopted the UCCJEA in 1999. The UCCJEA differs from its predecessor (the Uniform Child Custody Jurisdiction Act) primarily in that the UCCJEA (1) gives jurisdictional priority to the child’s “home” state; (2) awards continuing exclusive jurisdiction to the first court that enters a child custody determination; and (3) eliminated “bests interests of the child” as a criteria for determining whether a court has jurisdictionally significant connections with parties to a custody case

⁶⁵⁸ *Alfonso v. Skadden*, [251 S.W.3d 52](#) (Tex. 2008).

⁶⁵⁹ The UCCJEA incorporates the standards in the federal PKPA ([28 U.S.C. § 1738A](#)), so the full faith and credit provision of the PKPA is rarely invoked separately.

Federal Parent Locator Service ([42 U.S.C. § 663](#)) to obtain information about the whereabouts of a child or parent.

15.15.1 Uniform Child Custody Jurisdiction and Enforcement Act ([Tex. Fam. Code ch. 152](#)).

Texas has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which: requires Texas courts to afford full faith and credit to child custody orders from other states⁶⁶⁰ and territories and from a foreign country; and recognizes that continuing and exclusive jurisdiction for child custody determinations vests in:

- the courts of a child's home state;
- the court issuing the initial child custody or support order;

OR

- in the absence of a home state, in the state with significant connections with the child and a parent and where there is substantial evidence relevant to the child custody determination.

The UCCJEA does not govern adoption proceedings or proceedings pertaining to authorization of emergency medical care for a child. ([Tex. Fam. Code § 152.103](#))

Temporary emergency orders. Under the UCCJEA, Texas courts may issue a temporary emergency order of protection of a child (i.e., a temporary protective order with child custody provisions) that temporarily supersedes a foreign child custody order if the temporary emergency order is necessary to protect the safety of a child or its sibling or parent.

In case of a conflict, the UCCJEA controls over other Texas law.⁶⁶¹ ([Tex. Fam. Code § 152.002](#)) Under the UCCJEA, a Texas court must

⁶⁶⁰ See *Perry v. State*, [727 S.W.2d 781](#) (Tex. App.--Austin 1987, pet. ref'd). In a prosecution for interference with child custody, the defendant's violation of a Missouri custody decree violated [Tex. Penal Code § 25.03](#)(a)(1).

⁶⁶¹ *In re Bellamy*, [67 S.W.3d 482, 484](#) (Tex. App.--Texarkana 2002, no pet.), disapproved on other grounds, [140 S.W.3d, 373](#) (Tex. 2004). Where there is a conflict between a provision in [Texas Family Code chapter 152](#) (Uniform Child Custody Jurisdiction and Enforcement Act) and other Texas law, the

enforce a child custody order or order to return a child made by a foreign nation that is a party to the Hague Convention as if it were a child custody determination.⁶⁶² ([Tex. Fam. Code § 152.105](#); [Tex. Fam. Code §§ 152.201-210](#); [Tex. Fam. Code § 152.302](#))

Jurisdiction. A Texas court can assert jurisdiction over a child if it is either the child's home state; a state with significant connections to the child; or as a matter of last resort.

Home state. Home-state jurisdiction refers to the state where the child has lived for at least six consecutive months immediately prior to the filing of the case. ([Tex. Fam. Code § 152.201](#))

A court with home state jurisdiction has continuing jurisdiction over the child as long as one parent continues to live in the state. For an original or initial custody order, Texas will be the child's home state if: the child lived in Texas since birth (for a child under 6 months of age) or for at least six months before the custody suit commences;⁶⁶³ and a parent or a person acting as a parent lives in Texas;⁶⁶⁴ and another state does not

former controls. Accord, *In re McCormick*, [87 S.W.3d 746](#) (Tex. App.--Amarillo 2002) (orig. proceeding).

⁶⁶² *In re JH*, No. 13-07-0373-CV, [2008 Tex. App. Lexis 6379](#) (Tex. App.--Corpus Christi, Aug. 21, 2008, no pet.) (mem. op.). A Texas court properly dismissed a suit to modify a prior Taiwanese child custody order because the child had never resided in Texas (so Texas was not the child's home state) and there was no evidence that the Taiwan court declined to exercise jurisdiction.

In re SKB, No. 02-07-054-CV, [2008 Tex. App. Lexis 4769](#) (Tex. App.--Fort Worth, June 26, 2008, no pet.). Trial court did not err by declining jurisdiction and granting the mother's special appearance because the record showed that at the time the motion to enforce was filed, the mother and the child lived in Japan, the father lived in Connecticut, and the parents' petitions concerning child custody were pending in Japan.

In re YMA, [111 S.W.3d 790](#) (Tex. App.--Fort Worth 2003, no pet.). The custody action was filed first in Egypt so the Texas court lacked jurisdiction.

⁶⁶³ *Powell v. Stover*, [165 S.W.3d 322, 323](#) (Tex. 2005). With regard to determining a child's home state under the UCCJEA, the term "lived" strongly connotes physical presence and the physical location of the child is the central factor to be considered when determining child's home state.

Lemly v. Miller, [932 S.W.2d 284](#) (Tex. App.--Austin 1996, no pet.). A child's temporary 10-month absence from Texas due to his step-parent's military service did not prevent Texas from being the child's home state because the period out of state counted as Texas residency for purposes of jurisdiction in child custody order modification.

⁶⁶⁴ *In re Oates*, [104 S.W.3d 571](#) (Tex. App.--El Paso 2003) (orig. proceeding). The Texas court's jurisdiction ended with death of petitioner-father and paternal grandparents could not continue lawsuit to gain access to grandchildren when grandparents had not attained status of persons acting as parents and did not have physical custody of children in the six consecutive months immediately before filing suit. After the death of the petitioner, Texas lost significant connection jurisdiction over children.

have home jurisdiction or declined to exercise jurisdiction because it has determined Texas to be the more appropriate forum.

As a home-state court, a Texas court retains continuing exclusive jurisdiction over its child custody orders until it: determines that it lacks significant connections with the child and the parties (the parents or person acting as a parent); finds that it lacks substantial evidence concerning the child's care, protection, training, and personal relationships; or determines, along with the state seeking jurisdiction, that neither the child nor any party (parent or person acting as a parent) reside in Texas.⁶⁶⁵ ([Tex. Fam. Code § 152.202](#))

Where the lawsuit is originally filed is not necessarily determinative of home-state jurisdiction because the UCCJEA trumps all other possible bases for jurisdiction.⁶⁶⁶ So just because a party and the child resided in Texas for six months prior to filing a child custody action in Texas, the home state is not divested of jurisdiction over the custody determination.⁶⁶⁷ ([Tex. Fam. Code §§ 152.201-152.202](#))

In re SJA, [272 S.W.3d 678](#) (Tex. App.--Dallas 2008, no pet.). The Texas trial court had jurisdiction to modify a child custody determination made by Louisiana, pursuant [Texas Fam. Code Ann. § 152.201\(a\)\(2\)](#), in part, because no parent or child continued to live in Louisiana, and the children and their mother had a "significant connection" with Texas. Although the children had resided with their stepmother in Florida for many years, the Louisiana decree had never been modified by a Florida court and the stepmother was not a person acting as a parent when the Texas lawsuit was filed.

⁶⁶⁵ *In re Forlenza*, [140 S.W.3d 373, 379](#) (Tex. 2004). Where Texas court made original custody determination, possessory conservator father resided in Texas, and children had significant connection, Texas should not relinquish jurisdiction for custody modification because mother's residence is now in Mississippi. A court's exclusive jurisdiction continues as long a significant connection exists or substantial evidence is present.

Saavedra v. Schmidt, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002, no pet.). The trial court's finding that the mother and children resided in Texas for more than six months prior to filing of petition for temporary emergency order had no bearing on Texas court's jurisdiction to modify another state's child custody determination. The Texas court had no jurisdiction to modify a California decree unless the California court declined jurisdiction.

Lemly v. Miller, [932 S.W.2d 284](#) (Tex. App.--Austin 1996, no pet.). A child's temporary 10-month absence from Texas due to his stepparent's military service did not prevent Texas from being the child's home state because the period out of state counted as Texas residency for purposes of jurisdiction in child custody order modification.

⁶⁶⁶ *In re Brown*, [203 S.W.3d 888, 891](#) (Tex. App.--Fort Worth 2006) (orig. proceeding). Even though wife filed for divorce in Missouri, if Texas was the child's home state, then Missouri should not be exercising jurisdiction because Texas UCCJEA trumps all other possible bases for jurisdiction.

⁶⁶⁷ *Saavedra v. Schmidt*, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002 no pet.).

Significant connections. Texas will have significant connections with the child: if the child and at least one parent or a person acting as a parent have a significant connection with Texas (aside from mere physical presence)⁶⁶⁸ and substantial evidence is available in Texas concerning the child’s care, protection, training, and personal relationships; and there is no home state,⁶⁶⁹ or if all other states having home jurisdiction have declined to exercise it;⁶⁷⁰ or if a party is seeking a temporary emergency order of protection in Texas. ([Tex. Fam. Code § 152.201](#))

Last-resort jurisdiction. This type of jurisdiction applies if: no other state has home state jurisdiction; no other state has exercised significant connections jurisdiction; all other states having jurisdiction decline to exercise it; or the court is exercising temporary emergency jurisdiction

⁶⁶⁸ *In re Marriage of Daulton*, [2006 Tex. App. Lexis 10286](#) (Tex. App.—Waco, Nov. 29, 2006, no pet.). In a child custody case, the Texas trial court correctly held it lacked jurisdiction over the children because Illinois was the children's home state and because physical presence of father in Texas was insufficient to establish a significant connection in Texas under [Texas Family Code Ann. § 152.201\(a\)\(2\)\(A\)](#).

In re Barnes, [127 S.W.3d 843](#) (Tex. App.--San Antonio 2003) (orig. proceeding). Even if the child had no home state, the child did not have the required significant connections for Texas court to make an initial custody determination because the child had never resided in Texas and the only proof of a connection was that father currently resided there.

⁶⁶⁹ *In re Brilliant*, [86 S.W.3d 680](#) (Tex. App.--El Paso 2002, no pet.). When child had no home state, the Texas court could exercise jurisdiction to make initial child custody determination under the significant connection criterion.

Davis v. Guerrero, [64 S.W.3d 685](#) (Tex. App.--Austin 2002, no pet.). A child did not have a home state when the custody suit was commenced, almost two years had passed since the child last lived in a single state for six consecutive months. Under [Tex. Fam. Code Ann. § 152.203](#), a Texas court could modify an order affecting the parent-child relationship from another state because Texas would have had jurisdiction to make an original determination under [Tex. Fam. Code Ann. § 152.201\(a\)\(2\)](#) where there was a significant connection with Texas in that both biological parents lived in Texas and the child had lived in Texas for 37 of the first 70 months of her life.

In re Presley, [166 S.W.3d 866, 868](#) (Tex. App.--Beaumont 2005)(orig. proceeding). In a child custody case, where the child had no home state and suit filed first in Florida, Texas court required to communicate with the Florida court and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re Brown, [203 S.W.3d 888, 891](#) (Tex. App.--Fort Worth 2006) (orig. proceeding). Even though wife filed for divorce in Missouri, if Texas was the oldest child’s home state, then Missouri should not be exercising jurisdiction because Texas home state jurisdiction trumps all other possible bases for jurisdiction. However, when youngest child had no home state, had significant connections with Missouri, and Missouri court entered first child custody order, Texas court could not take jurisdiction for youngest child unless the Missouri court declined to do so.

⁶⁷⁰ See note 217.

to protect the child or a parent or sibling of the child. ([Tex. Fam. Code § 152.201](#))

Inconvenient forum factor—domestic violence. Upon motion of a party or the court’s own motion, or upon request by another court, a Texas court may consider whether it is an inconvenient forum. In making that determination, the Texas court must consider whether domestic violence has occurred and is likely to continue. ([Tex. Fam. Code § 152.207](#))

Unjustifiable conduct. A court may decline to exercise jurisdiction if the party requesting the court take jurisdiction has engaged in unjustifiable conduct. Unjustifiable conduct includes wrongful conduct that is used to invoke the court’s jurisdiction.⁶⁷¹ ([Tex. Fam. Code § 152.208](#))

15.15.2 Temporary emergency order of protection for a child.

[Texas Family Code Chapter 152](#) does not specifically state what procedure is to be used to obtain a temporary emergency order that supersedes a foreign child custody determination, but the procedures available in [Tex. Fam. Code Title 4](#) can be used.⁶⁷²

Jurisdiction. Texas courts can exercise temporary emergency jurisdiction over a child in Texas needing protection from mistreatment or abuse, or threats thereof, even if the child is subject to a custody order from another state and even if Texas is not the child’s home state or a state with significant connections to the child if: the child is physically present in Texas⁶⁷³ and has been abandoned; or the child is in Texas and the child, a sibling, or a parent of the child needs protection from abuse or threats of abuse or mistreatment. Temporary emergency jurisdiction may be used only for protection and does not include jurisdiction to

⁶⁷¹ *In re Lewin*, [149 S.W.3d 727, 740](#) (Tex. App.—Austin 2004) (orig. proceeding). The Texas court was required to decline jurisdiction invoked by father who had abducted child from Canada and sought custody order in Texas court.

⁶⁷² See *In re MGM*, [163 S.W.3d 191, 196-98](#) (Tex. App.—Beaumont, no pet.). In exercising temporary emergency jurisdiction under [Texas Family Code ch. 152](#), the trial court should have tailored the provisions of [Texas Family Code § 85.022\(b\)](#) specifically to the facts presented.

⁶⁷³ *In re JCB*, [209 S.W.3 821, 824 n. 4](#) (Tex. App.—Amarillo 2006, no pet.). For a temporary emergency order of protection of a child under [Texas Fam. Code Ann. § 152.204\(a\)](#), there is no requirement that the child have resided in the state for at least six months prior to filing the petition.

permanently modify a child custody determination.⁶⁷⁴ ([Tex. Fam. Code § 152.204](#))

A child custody determination by a Texas court with jurisdiction binds all persons in Texas who have been served with notice as required by Texas law or outside of Texas who have been served with notice as required by Texas law or as required by the law of the jurisdiction in which service is accomplished. ([Tex. Fam. Code § 152.106](#); [Tex. Fam. Code § 152.108](#))

Duration. The duration of a temporary emergency depends on whether there was a previous child custody determination in the home or significant connection state.

- (1) If there is no prior child custody determination made in another state with jurisdiction and no action is brought in the other state, then the temporary order lasts until: the other state issues an order; the other state declines to act based on inconvenience of the forum; or there is no child custody determination action brought in the other state within six months of the child's leaving that state. In the last two situations, the temporary order becomes a final custody determination and Texas becomes the home state.⁶⁷⁵
- (2) If there was a prior child custody determination in another state having jurisdiction or an action for such determination is brought there, then the temporary emergency order must specify a date on which it will expire. The expiration date should give the party seeking relief sufficient time to seek an order from the other state. ([Tex. Fam. Code § 152.204](#))

Required disclosures. A party seeking the child custody determination (including in a temporary emergency order proceeding) is required to disclose in its pleadings if a foreign tribunal has exercised jurisdiction over the child custody issue. A party involved in a child custody

⁶⁷⁴ *Saavedra v. Schmidt*, [96 S.W.3d 553, 544](#) (Tex. App.--Austin 2002 no pet.). The duty of a state to recognize and enforce the custody determinations of another state must yield if circumstances require temporary emergency orders to protect the child. The trial court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify another state's child custody determination.

⁶⁷⁵ *In re JCB*, [209 S.W.3d 821](#) (Tex. App.--Amarillo 2006, no pet.). In a parental rights' termination action, the Texas court had temporary emergency jurisdiction over case where the children of arrested Oklahoma resident were left in custody of State of Texas for fourteen months prior to the lawsuit.

proceeding must inform the court of any orders with child custody provisions and must disclose information regarding the child's present and past addresses; and may request, upon allegation made under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the court to seal the information otherwise required to be disclosed. ([Tex. Fam. Code § 152.209](#))

Interstate discovery. To assist in creating an evidentiary record in a child custody case (and to avoid putting a party in danger by having to return to another jurisdiction), a Texas court may request that a foreign tribunal: hold an evidentiary hearing; order a person to produce evidence; order an evaluation be made related to a pending proceeding; order a party to the proceeding to appear with or without the child; or forward a copy of the transcript of the proceeding, the evidence produced, or the evaluation performed to the requesting court. ([Tex. Fam. Code §§ 152.111-152.112](#))

Communication with foreign tribunal. After it issues the temporary emergency order or learns that a foreign court has issued a temporary emergency order affecting a preexisting Texas custody order, the Texas court **MUST** communicate with the foreign tribunal to resolve the emergency, secure the safety of the child and the parties, and determine the duration of the temporary order.⁶⁷⁶ The communication between the courts: may occur with or without notice to, or the presence of, the parties; may be off the record and without notice to the parties for scheduling and other non-substantive procedural matters; must be on the record (whether or not the parties are notified or present) for all non-procedural discussions; and must include an opportunity for the parties to present facts and legal arguments before a decision is made. ([Tex. Fam. Code § 152.110](#); [Tex. Fam. Code § 152.204\(d\)](#); [Tex. Fam. Code § 152.209](#))

⁶⁷⁶ *In re Presley*, [166 S.W.3d 866, 868](#) (Tex. App.--Beaumont 2005) (orig. proceeding). Where suit filed first in Florida, Texas court required to communicate with the Florida court and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re MGM, [163 SW3d 191](#) (Tex. App.--Beaumont 2005 no pet.). For a temporary emergency order of protection for a child when Michigan was home state for original custody order, the Texas court could, to protect the child, prohibit husband from removing child from wife's possession but once Texas court learned of Michigan proceeding, it had to communicate with Michigan court and, once satisfied that the Michigan court had issued an appropriate order, dismiss the Texas case.

Full faith and credit for child custody provisions in protective orders. The UCCJEA and the PKPA, rather than VAWA's full faith and credit provisions ([18 U.S.C. § 2265](#)), control the full faith and credit to be accorded child custody determinations, even if those determinations are contained in a protective order. Before full faith and credit can be afforded a child custody provision in an order, the UCCJEA requires the parent to have had notice and an opportunity to participate in the proceeding. ([Tex. Fam. Code § 88.003\(b\)](#); [Tex. Fam. Code § 152.204](#); [Tex. Fam. Code § 152.205](#))

15.15.3 International Child Custody Orders and the Hague Convention.

As a party to the Hague Convention,⁶⁷⁷ the United States has implemented its provisions regarding international child abduction in the federal International Child Abduction Remedies Act (ICARA).

Under ICARA state courts share jurisdiction with federal district courts, and the courts must afford full faith and credit to orders of a court of a party nation regarding access to (or denial thereof) a child.⁶⁷⁸

ICARA authorizes the courts: to take measures authorized by state or federal law to protect the well-being of the child involved; to prevent the child's further removal or concealment pending the disposition of a petition for relief under the Act; and to order a person to surrender physical custody of a child if required by the applicable state law. ([42 U.S.C. §§ 11603-11604](#); [22 CFR Part 94](#); [Tex. Fam. Code § 152.303](#))

Domestic violence considerations in Hague Convention. There are several provisions in the Hague Convention that allow for a court to

⁶⁷⁷ Not all countries are parties to the Hague Convention. For a list of nations currently parties to the Hague Convention, see <http://www.jcics.org/hague.htm>.

⁶⁷⁸ *In re Lewin*, [149 S.W.3d 727, 740-41](#) (Tex. App.--Austin 2004),(orig. proceeding). Mandamus granted because Texas court should have declined jurisdiction over child custody when father had abducted child from jurisdiction of Canadian court, which had already litigated custody issues, and come to Texas in search of a more favorable forum. The Texas court abused its discretion in failing to enforce a Canadian child custody order as required by the Hague Convention.

In re YMA, [111 S.W.3d 790](#) (Tex. App.--Fort Worth 2003, no pet.). The custody action was filed first in Egypt so the Texas court lacked jurisdiction. Once a mother had an Egyptian child custody order and she filed her motion for expedited enforcement under [Tex. Fam. Code Ann. § 153.308](#); the Texas court was then bound by [Tex. Fam. Code Ann. § 152.303](#) to recognize and enforce the order where the Egyptian court exercised jurisdiction in conformity with the Texas jurisdictional requirements.

consider the impact of domestic violence on the child’s return to the petitioning party.⁶⁷⁹

Grave risk. Under the “grave risk” exception, in Article 13(b) of the Convention, a court may decline to order the return of the child if it finds that the return poses a grave risk of psychological harm to the child or will otherwise place the child in an intolerable situation.

Wrongful removal element. Articles 14-19 discuss how the court determines whether the removal of the child was “wrongful.” These Articles discuss standards that may be analogized to the “unjustifiable conduct” standard for declining jurisdiction under the UCCJEA. See [Tex. Fam. Code § 152.208](#).

Fundamental protections. Article 20 states that the return of the child may be refused if the return would not be permitted “by the fundamental principles” of the requesting state relating to the protection of human rights and fundamental freedoms.

Emergency orders for international child custody cases. Subchapter D of [Texas Family Code ch. 152](#), which sets out the procedures for enforcing a child custody determination from a court of a foreign nation under the Hague Convention,⁶⁸⁰ provides that a Texas court may act upon a verified application to issue a warrant for immediate physical custody of a child if the applicant shows that the child is likely to suffer physical harm or to be removed from Texas pending the disposition of the child custody petition. ([Tex. Fam. Code § 152.310](#)). The warrant must provide for placement of the child. ([Tex. Fam. Code § 311](#)). Upon a showing of necessity, the court may authorize use of forcible entry to gain possession of the child. ([Tex. Fam. Code § 152.311](#)). A hearing must be held the next day after service that the judge is in the courthouse. ([Tex. Fam. Code §§ 152.308](#)). The prevailing party in an action brought under the Hague Convention is entitled to costs, necessary expenses, and fees. ([Tex. Fam. Code § 152.312](#)). If involved

⁶⁷⁹ See *Garza v. Harney*, [726 S.W.2d 198, 203](#) (Tex. App.--Amarillo 1987) (orig. proceeding). The Texas court was bound by the UCCJA to uphold the Mexican child custody decree but had jurisdiction to grant short-term emergency relief until steps were taken in Mexico to protect the child.

⁶⁸⁰ *Saavedra v. Schmidt*, [96 S.W.3d 533, 543](#) (Tex. App.--Austin 2002, no pet.). Party’s agreement to be bound by the Hague Convention could not serve as basis for Texas court’s assumption of jurisdiction when the jurisdictional issues were between courts of different states, not between a U.S. court and the court of a foreign country.

in locating or securing possession of a child, public officials or law enforcement may be awarded direct expenses and costs. ([Tex. Fam. Code § 152.317](#))

Central authority and parent locator service. For children abducted from the United States, the U.S. State Department’s Office of Children’s Issues is the central authority in the U.S. For children abducted and brought into the U.S., the National Center for Missing and Exploited Children is the central authority.

The Federal Parent Locator Service. The Federal Parent Locator Service is a database used to locate a parent or child. Under federal law, a court may use the Service to enforce the laws regarding unlawful taking or restraint of a child or to make or enforce a child custody or visitation order. ([42 U.S.C. §§ 653 and 663](#))

15.16 Parental kidnapping.

The term “parental kidnapping” encompasses the taking, retention, or concealment of a child by a parent, other family member, or their agent in derogation of the custody rights, including visitation rights, of another parent or family member.⁶⁸¹

15.16.1 Incidence.

In 2002 (the latest figures available), the estimated annual rate of kidnapping by a family member was over 200,000 cases.⁶⁸²

15.16.2 Motivations.

The main reasons given for parental kidnapping are:

(1) punitive (removal of a child by an abusive parent to further abuse the other parent and/or the child); and

⁶⁸¹ See, the American Bar Association, *Parental Kidnapping: Prevention and Remedies*, (ABA 2000); <http://www.abanet.org/child/pkprevrem.pdf>.

⁶⁸² *Children Abducted by Family Members: National Estimates and Characteristics*, National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Programs, October 2002

<http://www.ncjrs.gov/pdffiles1/ojjdp/196466.pdf>

(2) protective (removal by an abused parent to protect the child from the abusive spouse).

15.16.3 Considerations in custody awards.

If the court knows or has reason to believe that the parental kidnapping was motivated by protective reasons (to protect the child or abducting spouse), the court may want to refrain from making custody decisions based solely on the fact of the abduction or without obtaining information from the abductor-parent or about the other parent's history of domestic violence.⁶⁸³

15.16.4 Abduction and jurisdiction.

15.16.4.1 Abduction before custody order issues.

If no pre-abduction child custody order exists, the court of the child's home state can exercise jurisdiction over an abducted child for up to six months after the child has been taken from the state. The UCCJEA allows for notice by publication, which may be the only viable option in an abduction situation.

15.16.4.2 Abduction after custody order issues.

The court with continuing jurisdiction over the child custody determination is the only court with jurisdiction to modify its custody determination, even if the child has been abducted from that jurisdiction.

15.16.4.3 Domestic violence/temporary emergency jurisdiction.

When a parent flees abuse by coming to Texas from another state, a Texas court can provide a temporary "safe haven" for child custody. That temporary safe haven jurisdiction can "ripen" into home-state jurisdiction if the Texas court specifically finds in an order that there is no prior custody order; **AND** no custody determination by the child's home state for six months after the child's departure from that state.

NOTE: Under Texas law, taking a child to avoid family violence against the child or the child's parent does not constitute the crime of interference with child custody. [Tex. Penal Code § 25.03](#)

⁶⁸³ See, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 *Juv. & Fam. Ct. J.* (National Council of Juvenile and Family Court Judges, Fall 2002)

15.17 International child abduction.⁶⁸⁴

15.17.1 Screening for risk.⁶⁸⁵

Texas law requires the court to consider the following characteristics or action by a parent in screening for risk of taking the child out of the United States:

- previous abduction or threat to abduction a child;
- unstable marital history;
- express or implied lack of respect for judicial authority;
- lack of confidence in legal system, particularly when expressed as feeling of disenfranchisement;
- ties to nation that is not a Hague Convention party;
- denigration of the other parent’s ability to care for the child;
- history of mental illness;
- age of child (younger children more at risk);
- lack of strong ties to the child’s home state;
- strong support network in another jurisdiction;
- few financial ties in child’s home state and/or strong financial ties or support in foreign jurisdiction;

AND

- activities indicating preparation for flight: quitting a job, selling property, closing bank accounts, “maxing out” credit, hiding or destroying documents, applying for a passport, or altering physical appearance.

⁶⁸⁴ For case law analysis of cases brought under the Hague Convention on child abduction, see <http://www.incadat.com/>

⁶⁸⁵ Adapted from P. Hoff, *Parental Kidnapping: Prevention and Remedies*, ABA Center on Children and the Law (December 2000). Available at: <http://www.abanet.org/child/pkprevrem.pdf>

[\(Tex. Fam. Code § 153.502\)](#)

15.17.2 Preventive measures.⁶⁸⁶

If removal of the child from the United States is a concern, the court may order that:

- the child cannot be removed from the United States without a court order. This type of order can help prevent issuance of a passport for the child;⁶⁸⁷
- the child's passport be relinquished to the custodial parent;
- the child's passport be registered in the United States Department of State's Children's Passport Issuance Alert Program;⁶⁸⁸
- the child's passport be placed in escrow;
- the parent post a performance bond, forfeitable in favor of the other parent, to cover the costs of attorney's fees and other costs if the child is removed from the United States in violation of the court order;
- the parent's visitation with the child be in designated locations and be supervised;
- a copy of the order be provided to passport agencies with the request that the parents be notified if a passport application is made for the child;

AND

- neither parent be permitted to request travel documents (visas or passports for the child) without the court's written permission.

15.17.3 Alien exclusion.

A non-U.S. citizen may be denied entry into the U.S. if that person has violated a child custody order issued in the U.S. by detaining, retaining,

⁶⁸⁶ *Id.*

⁶⁸⁷ [22 CFR § 51.27](#). The court order should be sent to the Office of Citizenship Appeals and Legal Assistance of the U.S. State Department.

⁶⁸⁸ Available at: http://travel.state.gov/abduction/prevention/passportissuance/passportissuance_554.html

or holding the child outside the U.S. in a country that is not a party to the Hague Convention.

([8 U.S.C. 1182 § 212\(a\)\(10\)\(C\)](#))

15.18 Incidence of children exposed to domestic violence.

According to statistical information gathered by the Family Violence Prevention Fund,⁶⁸⁹ 15.5 million children in the United States live in families in which partner violence occurred at least once in the past year, and 7 million children live in families in which severe partner violence occurred.⁶⁹⁰ In a national survey of more than 6,000 American families, 50% of the men who frequently assaulted their wives also frequently abused their children.⁶⁹¹

Slightly more than half of female victims of intimate violence live in households with children under age 12.⁶⁹² The majority of non-fatal intimate partner victimizations of women (2/3) in the United States occur at home.⁶⁹³ Children under age 12 are residents of the households experiencing intimate partner violence in 38% of incidents involving female victims.⁶⁹⁴

Studies suggest that between 3.3 and 10 million children witness some form of domestic violence annually.⁶⁹⁵ In a single day in 2008, 16,458 children were living in a domestic violence shelter or transitional housing facility. Another 6,430 children sought services at a non-residential program.⁶⁹⁶

⁶⁸⁹ Adapted from the Family Violence Prevention Fund, *Facts on Domestic Violence*, available at: http://endabuse.org/content/action_center/detail/754

⁶⁹⁰ C. Whitfield, R. Anda, S. Dube, and V. Felittle, *Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessment in a Large Health Maintenance Organization*, 18 *Journal of Interpersonal Violence* 166 (2003).

⁶⁹¹ M. Strauss, R. Gelles, and C. Smith, *Physical Violence in American Families; Risk Factors and Adaptations to Violence*, 8 *Families* 145 (Transaction Publishers 1990).

⁶⁹² U.S. Department of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* (March 1998).

⁶⁹³ S. Catalano, *Intimate Partner Violence in the United States*. U.S. Department of Justice, Bureau of Justice Statistics (2007) <http://www.ojp.usdoj.gov/bjs/intimate/ipv.htm>.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ B. Carlson., *Children's observations of interpersonal violence*, in A.R. Roberts (ed.) *Battered women and their families* (pp. 147-167) (Springer Publications 1992).

Children as witnesses to marital violence: A risk factor for lifelong problems among a nationally representative sample of American men and women. Report of the Twenty-Third Ross Roundtable. Columbus, OH: Ross Laboratories.

⁶⁹⁶ The National Network to End Domestic Violence. 2009. *Domestic Violence Counts 2008: A 24-hour Census of Domestic Violence Shelters and Services*.

<http://www.nnedv.org/resources/census/67-census-domestic-violence-counts/232-census2008.html>.

15.19 Child safety issues in custody hearings.

The National Center for State Courts has published a guide entitled “A Judicial Guide to Child Safety in Custody Cases.”⁶⁹⁷ The Guide suggests the court:

- assess the risks to the child or parent of physical, emotional, or psychological abuse keeping in mind that:
 - a child of an abused parent is at increased risk of being abused;
 - abuse or threatened abuse of a child is a powerful tool for control;⁶⁹⁸
 - risk of child abuse increases after the parents separate;⁶⁹⁹ and
 - expressions of love by the child for the abusive parent are not uncommon despite the parent’s abusive behavior.⁷⁰⁰
- when reviewing the evidence, make the child’s safety the primary focus by evaluating:
 - the abusive parent’s courtroom demeanor for patterns of coercion or control;⁷⁰¹
 - the abused parent’s courtroom demeanor for fear, depression, anxiousness, or distress;
 - the context in which cross-allegations of abuse arose (self-defense or in response to forced isolation, financial deprivation, sexual abuse, or humiliation) and the levels of harm from the alleged abuse.
- evaluate safety risks at each stage of the proceeding by considering allegations or evidence that:

⁶⁹⁷ See: <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/judicial%20guide.pdf>

⁶⁹⁸ A. Appel and G.W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 *Journal of Family Psychology* 578 (1998); Ross, S., *Risk of Physical Abuse to Children of Spouse-Abusing Parents*, 20 *Child Abuse & Neglect* 589 (1966).

⁶⁹⁹ L. Bancroft & G. Silverman, *Assessing the Risk to Children From Batterers* (2002), http://www.lundybancroft.com/pages/articles_sub/JAFFE.htm.

⁷⁰⁰ L. Bancroft & J. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 39-40 (2002).

⁷⁰¹ Examples include inappropriate attitudes toward the other parent (blaming, belittling, patronizing), towards the court (arrogance, insubordination, patronizing), or towards the child (expecting the child to meet the parent’s needs).

- a parent’s behavior is inappropriate for the child to witness or endangers the child;
- a parent has abused the child, the other parent, or a new or former partner;
- a parent is a sex offender or exposes the child to a sex offender;
- a parent abuses illegal or controlled substances or alcohol;
- a parent has a history of being abused or witnessing abusive behavior;
- a parent withholds financial support needed by the child or other parent;

OR

- a parent’s immigration status or disability renders the other parent more suitable to be the child’s primary custodian.
- control the litigation process to minimize abuse of process by the abusive parent and threatening communications between the parties by:
 - ordering the parent bringing excessive motions to pay attorney’s fees and costs of the other parent or excuse the non-movant parent from in-person appearances at hearings;
 - limiting the use of discovery tools so that one parent cannot gain physical access to the other party during discovery (for instance, ordering the abusive parent NOT to attend depositions);
 - denying motions to change orders regarding safety of the child or a parent unless the change enhances the safety of a party or the child;
 - denying any motion to delay resolution of issues concerning the safety of the child or a party;

AND

- scrutinizing all settlements and agreements for indications of coercion such as:
 - granting sole custody to the abusive parent or to a parent who has not historically been the primary caretaker (requests to sole custody are a red flag for coercion or attempts to protect against abuse);

- unequal access to counsel;
- unequal support or visitation provisions;

AND

- other provisions that do not appear to promote the child's best interest.
- make findings of fact and conclusions of law that explain and prioritize safety concerns and address:
 - all statutory presumptions;
 - the history of the intra-family relationships and its impact on the child's welfare;
 - the history of the child's education, health, and exposure to risky behavior;
 - the history of the child's financial support;
 - the pattern or history of abuse in the family;
 - the impact of the abuse on the child's best interest;

AND

- the child's extra-familial support system.
- draft custody and visitation orders that maximize family safety by stating:
 - the type of custody awarded to each parent;
 - the type of visitation the parent without primary custody is to have;
 - how the child is to be exchanged for visitation (when; where; who will be present);
 - whether supervised exchange or visitation is required and who will pay costs of the supervision;
 - the third party supervisor for exchange or visitation;
 - the length of the waiting period before visitation will be cancelled because the parent did not appear;

- how the parties may reschedule visitation missed due to an emergency;
- the holiday and vacation visitation schedules;
- the circumstances under which a parent may remove the child temporarily from the jurisdiction of the court (e.g., travel restrictions);
- how any special needs (medical, educational, etc.) of the child will be met;
- how the parties are to communicate with one another regarding the child;

AND

- the date of a compliance review.

CHAPTER 16—PERSONS WITH LIMITED ENGLISH PROFICIENCY (LEP)—PART I: STATUTES AND CASE LAW

[\(42 U.S.C. § 2000d; 28 CFR § 42.104\(b\)\(2\);](#)
[Tex. Civ. Prac. & Rem. Code ch. 21;](#)
[Tex. Code Crim. Proc. art. 38.30;](#)
[Tex. Gov't Code ch. 57\)](#)

Summary:

“Limited English proficiency” (LEP) is the phrase used to describe persons who do not speak English with sufficient fluency to effectively participate in a particular setting, including legal proceedings, without the aid of an interpreter.

NOTE: The law concerning interpretation for deaf or hard-of-hearing persons is discussed in Chapter 17.

U.S. Census Bureau data from 2008 found that about 2.7 million Texans identify themselves as not speaking English well or at all. According to the 2000 Department of Justice survey, over 300 languages are spoken in the United States.⁷⁰² It is estimated that in Texas in 2008, about 20,000 LEP persons were the victims of family violence.

For civil legal proceedings, Texas law requires that LEP persons (a party or witness or juror) be provided access to interpreters upon request of a party or witness or at the court’s own motion. However, in a civil legal proceeding in Texas, the interpreter must be licensed only if the case is filed in a county with a population of 50,000 or more. In counties of less than 50,000, a person may interpret in a court case if the person is: over 18 years of age; not a party to the proceeding; qualified as an expert; and able to swear an oath to interpret truthfully.

Federal regulations require that recipients of federal financial assistance adopt guidelines to fulfill their responsibility to ensure meaningful access to their programs and activities by LEP persons.

NOTE: The law regarding costs of interpretation in civil legal proceedings is in flux. Although the current Texas law, set out in this chapter, allows a party to be charged for

⁷⁰² Spanish is the most-common non-English language spoken in the U.S., followed by Mandarin, Foo Chow, Creole, Arabic, Russian, Armenian, Albanian, Punjabi, French, Indonesian, Portuguese, Urdu, Fulani, Somali, and Amharic.

interpretation services in civil cases, as of August 2010, the U.S. Attorney General's Office put state courts on notice that federal funding could be jeopardized unless all interpretation was provided free of charge for all services connected with legal proceedings. See § 16.1.3. To date, there has been no change in statutes, rules of procedure, or other Texas law in reaction to the federal pronouncement.

16.1 Federal laws, regulations, and guidelines.

Any organization or individual that receives federal financial assistance (e.g., FVPSA, VOCA, STOP, HUD) either directly or indirectly, through a grant, contract, or subcontract, must comply with several federal civil rights laws, including Title VI of the Civil Rights Act of 1964 ("Title VI") and the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act") as amended. These laws prohibit discrimination on the basis of race, color, religion, national origin, or sex in the delivery of services. National origin discrimination includes discrimination on the basis of limited English proficiency.

Title VI applies to the recipients of aid from federal agencies, not the federal agencies themselves.

16.1.1 Discrimination based on national origin prohibited.

Section 601, Title VI of the Civil Rights Act of 1964, [42 U.S.C. § 2000](#), prohibits discrimination against persons on the ground of race, color, or national origin in the administration of any program or activity receiving federal aid.

16.1.2 Disproportionate effect on LEP persons.

A law, regulation, or policy that has a disproportionate adverse effect on LEP persons constitutes discrimination based on national origin.⁷⁰³

16.1.3 Executive Order 13166.

⁷⁰³ *Lau v. Nichols*, [414 U.S. 563](#) (1974).

In *Alexander v. Sandoval*, [532 U.S. 275](#) (2001), the United States Supreme Court held there is no private right of action under Title VI against a state agency that had a policy with a disparate impact on LEP because driver's license tests were offered only in English. The Department of Justice contends that the case did not address the validity of Title VI's disparate impact prohibition or Executive Order 13166, which remains in effect.

In August 2000, federal Executive Order 13166 was issued. Unlike Title VI, the Order directly affected every federal agency and department by requiring them to publish guidance on how the recipients of federal aid can provide meaningful access to LEP persons.

By letter dated August 17, 2010, addressed to the chief justices and court administrators of all the states, the Assistant Attorney General for the Civil Rights Division of the Department of Justice clarified that Title VI and Executive Order 13166 require each state judiciary to provide interpretation services, notwithstanding conflicting state or local laws or court rules, without charge to participants in all court and court-annexed matters where interpretation is necessary for the meaningful access to the courts.⁷⁰⁴ The letter instructs the courts to treat interpretation costs as basic, essential operating expenses, rather than ancillary cost.

16.1.4 Department of Justice 2001 Guidelines.

In 2001, the U.S. Department of Justice issued a regulation ([28 CFR 42.104\(b\)\(2\)](#)) that requires all federal agencies to promulgate guidelines for recipients of federal funds to provide meaningful access to programs and services for LEP persons.

16.1.5 Definitions.

For purposes of the DOJ guidelines:

- federal financial assistance includes: grants, training, use of equipment, donations of surplus property, and other assistance provided by a federal agency;
- recipient includes: the entity receiving the financial assistance and any sub-entity to which federal funds are passed through (pass-through funds);
- all parts of the recipient's program or activity must accommodate LEP persons, even if only one part receives the federal funds or provides services or benefits to LEP persons;

⁷⁰⁴ A copy of the letter is available at: http://www.lep.gov/final_courts_ltr_081610.pdf

- a limited English proficiency person is an individual who does not speak English as a primary language and who has limited ability to read, write, speak, or understand English;

AND

- language services should be provided to LEP persons participating in a court system.

16.1.6 Title VI in state courts.

Pursuant to Title VI of the Civil Rights Act, the legal obligations detailed above apply to all state, county and municipal courts receiving federal funding. A court is covered by Title VI if it:

- is a direct recipient of federal funding;
- receives federal funding as a sub-recipient from another state agency or nonprofit;⁷⁰⁵

OR

- is part of a unified court system, any part of which receives federal funding.⁷⁰⁶

[\(42 U.S.C. § 2000d et seq; 45 CFR § 80.1 et seq; 28 CFR 42.101-42.112\)](#)

⁷⁰⁵ Types of federal funding commonly directed to state, county and municipal courts:

Department of Health and Human Services grants including: Adult Treatment Drug Assistance; Children’s Justice Act; Court Improvement Program; Promoting Safe and Stable Families Act; Substance Abuse and Mental Health Services Administration funds; Targeted Grant to Increase the Well-Being of, and to Improve the Permanency Outcomes for Children Affected by Methamphetamine or Other Substance Abuse; Temporary Assistance to Needy Families; and Title IV-D Child Support Enforcement funds.

Department of Justice grants including: Drug Court Discretionary Grant Program; Edward Byrne Memorial Justice Assistance Grant Program; Juvenile Accountability Block Grant; National Criminal History Improvement Program; NICS Act Record Improvement Program; and Violence Against Women Act.

Department of Transportation grants including National Highway Traffic Safety Administration funding; or **State Justice Institute** grants.

Excerpted from the Brennan Center for Justice, *Language Access in State Courts*, Appendix C (July 2009).

⁷⁰⁶ Texas does not have a unified court system.

16.1.7 Obligation to provide LEP services.

To assess how to balance the need for meaningful access to services with the need to avoid undue burdens, the DOJ guidelines assess four criteria:

- the number or proportion of LEP persons who would be excluded from participation in the program or service due to lack of language proficiency;
- the frequency with which LEP individuals come in contact with the program;
- the nature and importance of the program, activity, or service provided to people's lives;

AND

- the resources available to the grantee/recipient and costs of LEP services.

16.1.8 LEP services.

The DOJ guidelines recognize that:

- interpretation services may be provided on-site or remotely (via telephone, etc.);⁷⁰⁷
- the availability of interpretation services can vary. Only critical services in areas with high-volume of LEP clientele would be expected to be have expedited interpretation services;
- competency of interpretation services is a paramount concern and should be judged by the interpreter's:
 - demonstrated proficiency in communicating in both languages;

⁷⁰⁷ Examples of oral language service options: hiring bilingual staff for client contact positions, hiring staff interpreters, contracting for interpreter services, engaging community volunteers, and contracting with a telephone interpreter service.

- knowledge of specialized terms in both languages;
- demonstrated truthfulness;
- accuracy in interpretation;
- ability to remain impartial;

AND

- ability to maintain confidentiality.
- services should be provided in a manner that avoids the effective denial of the service or benefit being sought;

AND

- the use of friends, family members and other untrained interpreters is discouraged. Interpretation by friends or family of domestic violence victims is particularly problematic and can potentially put the interpreter in harm's way.

16.1.9 Prohibited practices that may violate Title VI:⁷⁰⁸

- providing services to LEP persons that are more limited in scope or are lower in quality than those provided to other persons, or limiting the type of proceeding in which interpretation services are provided without charge;
- subjecting LEP persons to unreasonable delays in the delivery of services;
- limiting participation in a program or activity on the basis of English proficiency;
- providing services to LEP persons that are not as effective as those provided to those who are proficient in English;

⁷⁰⁸ Adapted from the Washington State Coalition Against Domestic Violence's *Model Protocol on Services for Limited English Proficient Immigrant & Refugee Victims*.

- charging interpreter costs to one or more parties;
- restricting language services to courtroom proceedings or failing to ensure effective communication with courthouse staff (including court clerks, information service providers, and courthouse security staff);

OR

- failing to inform LEP persons of the right to receive free interpreter services and/or requiring LEP persons to provide their own interpreter.

16.2 Requirements to provide interpreters under Texas law.

By statute, a Texas court:

- **shall** appoint a licensed court interpreter in a court proceeding upon request of a party or witness or juror in a civil or criminal proceeding;⁷⁰⁹
- **may** appoint a licensed court interpreter on its own motion;⁷¹⁰

⁷⁰⁹ For Class C criminal cases or proceeding before a magistrate, an interpreter licensed by the state or federal government may provide services via telephone. [Tex. Code Crim. Proc. art. 38.30\(a-1\)](#).

Reyes v. State, [190 S.W.3d 124, 125](#) (Tex. Crim. App. 1945). A witness who speaks more than one non-English language may choose which language to use while testifying.

There is a split of authority about whether [Tex. Gov't Code § 57.002\(a\)](#) (requiring interpreter in a criminal case to be licensed) controls over [Tex. Code Crim. Proc. art. 38.30](#) (which does not require licensure). The Fifth Court of Appeals held that [Tex. Gov't Code § 57.002\(a\)](#) applies to criminal cases only if the defendant files a motion asking for appointment of a licensed interpreter. See, *Hernandez v. State*, No. 05-03-0107-CR, [2003 Tex. App. Lexis 7322](#) (Tex. App.—Dallas, Aug. 27, 2003, no pet.).

But other courts have relied on a Texas Attorney General's Opinion to hold that Chapter 57 controls [Tex. Code Crim. Proc. art. 38.30](#) and requires appointment of a license interpreter. See *Ridge v. State*, [205 S.W.3d 591](#) (Tex. App.—Waco 2006, pet. ref'd). [Tex. Gov't Code Chapter 57](#) controls [Tex. Code Crim. Proc. art. 38.30](#) so that the interpreter appointed in a criminal case must be licensed unless the exception in [Tex. Gov't Code § 57.002\(c\)](#) applies (citing Op. Tex. Att'y Gen. No. JC-0584 (2002)).

But see *Montoya v. State*, 811 S.2d 671, 672-3 (Tex. App.—Corpus Christi 1991, no pet.) In a criminal case, any person with the requisite language interpretation skills may serve as an interpreter under [Tex. Code Crim. Proc. art. 38.30](#).

⁷¹⁰ *Cheng v. Wang*, No. 05-08-1707-CV, [2010 Tex. App. Lexis 4669](#) (Tex. App.—Dallas 2010, no pet.). In a civil case, the court has discretion under [Tex. Gov't Code § 57.002](#) about whether or not to appoint an interpreter.

- **may** select the interpreter;

AND

- **may** fix the interpreter’s reasonable compensation except that in criminal cases, the county shall pay the interpreter at a rate of not less than \$15 and not more than \$100 a day or at a rate set by the county commissioners.

[\(Tex. R. Civ. P. 183; Tex. Civ. Prac. & Rem. Code §§ 21.001-21.002; Tex. Code Crim. Proc. art. 38.30; Tex. Gov’t Code § 57.002\)](#)

16.2.1 Definitions.

- **Court proceeding** includes an arraignment, deposition, mediation, court-ordered arbitration, or other form of alternative dispute resolution.
- **LEP person** is a person who is unable to understand and speak English well enough to meaningfully participate in a legal proceeding. Additionally, in criminal cases, an LEP person is one

Montoya v. State, 811 S.2d 671, 672-3 (Tex. App.—Corpus Christi 1991, no pet.). In a criminal case, any person with the requisite language interpretation skills may serve as an interpreter under [Tex. Code Crim. Proc. art. 38.30](#).

But see Tex. Govt’ Code 57.002 (a court shall appoint a certified or licensed interpreter upon motion in a civil or criminal proceeding).

Baltierra v. State, [586 S.W.2d 553, 557](#) (Tex. Crim. App. 1979). A criminal defendant has, as a part of the constitutional right to confrontation, a right to have the trial proceedings interpreted into a language he can understand. Accord, *Kan v. State*, [4 S.W.3d 38, 41](#) (Tex. App.—San Antonio, pet. ref’d). A criminal defendant has a due process right to have the proceedings interpreted into a language that she understands.

Hernandez v. State, [986 S.W.2d 817](#) (Tex. App.—Austin 1999, pet. ref’d). An interpreter should be appointed if there is a possibility that the defendant will not be able to understand the proceedings.

Garcia v. State, [149 S.W.3d 135](#) (Tex. Crim. App. 2004). Unless the right to an interpreter under [Tex. Code Crim. Proc. art. 38.30](#) is expressly waived, an LEP criminal defendant has a right to have the proceedings interpreted.

Woo v. State, No. 05-07-1519-CR, [2009 Tex. App. Lexis 384](#) (Tex. App.—Dallas Jan. 22, 2009, no pet.). Absent a showing that the unlicensed interpreter did not interpret accurately or that the defendant’s right to confrontation was impeded by the use of the unlicensed interpreter, when the court found that a licensed interpreter was not available, use of the unlicensed interpreter was not reversible error.

whose inability to understand or speak English interferes with his constitutional right to effective assistance of counsel.⁷¹¹

- **Licensed court interpreter** is an individual who is licensed by the Texas Department of Licensing and Regulation to interpret in court proceedings for individuals who can hear but who do not comprehend or communicate in English.
- **Qualified interpreter** is an interpreter who is not licensed by the state or federal government, is not a party to a proceeding, is over the age of 18, takes the interpreter's oath or affirmation, and is sufficiently proficient to interpret from a foreign language into English for a legal proceeding.
- **Qualified telephone interpreter** is a court interpreter either licensed by the state or certified as a federal interpreter.

[\(Tex. Code Crim. Proc. art. 38.30\(a-1\); Tex. Gov't Code § 57.001 \(1, 5, and 7\); Tex. Gov't Code § 57.002\)](#)

16.2.2 Licensed v. qualified interpreters.

The type of court interpreter required varies according to the population of the county where the court is located:

16.2.2.1 Under 50,000 in population.

A court interpreter is not required to be licensed but must be qualified in counties with less than 50,000 in population.

16.2.2.2 Population of 50,000 or more.

In counties with populations of 50,000 or more, a court interpreter must be licensed except when:

- the foreign language is not Spanish;

⁷¹¹ *Martin Sanchez v. State*, [122 S.W.3d 347](#) (Tex. App.—Texarkana 2003, pet. ref'd). A criminal defendant's right to effective assistance of counsel may require the appointment of an interpreter.

Abdygapparova v. State, [243 S.W.3d 191, 204](#) (Tex. App.—San Antonio 2007, pet. ref'd). A trial court's decision to appoint or not appoint an interpreter for a criminal defendant is reviewed under the abuse of discretion standard.

AND

- the court finds that there is no licensed interpreter for that foreign language who is within 75 miles of the proceeding and available to interpret.

[\(Tex. Gov't Code § 57.002\)](#)

16.2.3 Minimum requirements for non-licensed (qualified) interpreter.

Unless licensed, the interpreter :

- must be qualified as an expert under the Texas Rules of Evidence;
- must be at least 18 years of age;

AND

- must **not** be a party to the proceeding.⁷¹²

NOTE: Spanish-English interpreters must be “well-versed in and competent to speak” those languages. But failure to object at trial to the interpreter’s competency waives error.⁷¹³

⁷¹² *Rivera v. State*, [981 S.W.3d 336](#) (Tex. App.—Houston [14th Dist.] 1998, no pet.). When the defendant’s attorney was sworn in as an interpreter, the trial court did not have to appoint another interpreter.

Aleman v. State, [957 S.W.2d 592](#) (Tex. App.—El Paso 1997, no pet.). Allowing the prosecutor to interpret to take plea from a criminal defendant was reversible error.

Reymundo v. State, No. 05-02-1813-CR, [2003 Tex. App. Lexis 9103](#) (Tex. App.—Dallas, Oct. 27, 2003, pet. ref’d). Failure to timely object to swearing in of interpreter (who was the defendant’s attorney) waived error.

⁷¹³ *Montoya v. State*, 811 S.2d 671, 672-3 (Tex. App.—Corpus Christi 1991, no pet.). Failure to timely object to the interpreter’s competency waives error.

Whether or not an attorney should interpret for his client is a matter of debate. See, T. Morales and N. Wong, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion*, 37 St. Mary’s L.J. 1123 (2006); and D. Cochrane, *Como Se Dice: the Civil Litigant’s Right to a Court Appointed Interpreter In Texas*, 12 Scholar 47 (Fall 2009).

[\(Tex. Civ. Prac. & Rem. Code § 21.023; Tex. Gov't Code § 57.001; Tex. Gov't Code § 57.002\(c-d\)\)](#)

16.2.4 Oath and code of ethics.

An interpreter is required to take an oath or affirmation to make a true translation.⁷¹⁴

[\(Tex. R. Evid. 604; Tex. Civ. Prac. & Rem. Code § 21.005\)](#)

A licensed court interpreter must abide by the code of ethics and professional responsibility promulgated by the Texas Department of Licensing and Regulation.

[\(16 Tex. Admin. Code § 80.100\)](#)⁷¹⁵

16.2.5 Payment.

16.2.5.1 Civil proceedings.

In civil proceedings, the court may tax the cost of interpretation services against one or more of the parties or award interpreter costs for good cause.⁷¹⁶ However, because a protective order applicant may not be taxed with costs, even if the interpreter is needed solely by the applicant, the applicant should not be assessed the interpretation costs.

[\(Tex. Civ. Prac. & Rem. Code § 31.007\(b\)\(4\); Tex. R. Civ. P. 131; Tex. R. Civ. P. 141; Tex. R. Civ. P. 183; Tex. Fam. Code § 81.002- 81.003\)](#)

NOTE: For comments about the federal directive about who should pay the costs of interpretation, see § 16.1.3 of this Benchbook.

16.2.5.2 Criminal proceedings.

⁷¹⁴ *Guzman v. State*, [697 S.W.2d 404, 407](#) (Tex. Crim. App. 1985). A court interpreter must interpret the witness's statements literally.

⁷¹⁵ Available at: <http://www.license.state.tx.us/court/lcirules.htm#80100>

⁷¹⁶ See *Weeks Marine, Inc., v. Barrera*, No. 04-08-00681-CV, 2010 Tex. App. Lexis 438 (Tex. App.— San Antonio, Jan. 27, 2010, pet. den., 2010 Tex. Lexis 813, Oct. 22, 2010).

In criminal cases, the interpreter will be paid by the county at either a rate set by the county commissioners or at a rate set by the judge, which will not be less than \$15 nor more than \$100 a day. Appointment of an interpreter for a criminal defendant is required upon motion and showing of need for interpretation; no showing of indigency is required.⁷¹⁷

[\(Tex. Code Crim. Proc. art. 38.30\(b-c\)\)](#)

16.2.5.3 Quasi-criminal proceeding.

Indigent persons who face a loss of physical liberty as a result of a legal proceeding (e.g., juveniles, persons accused of contempt, persons facing civil commitment) may be entitled to be provided language interpreters without charge under the same circumstances as those that require appointment of counsel.

16.2.6 Admissibility of interpreted or translated statements.

An interpretation or translation of an otherwise admissible out-of-court statement is not rendered inadmissible hearsay by virtue of its interpretation or translation.⁷¹⁸ However, it is error to admit evidence that has not been translated by an interpreter who has been sworn.⁷¹⁹

[\(Tex. R. Evid. 801\(e\)\(2\)\)](#)

⁷¹⁷ *Garcia v. State*, [210 S.W.2d 574, 579](#) (Tex. Crim. App. 1948). A showing of need for interpretation and a motion for appointment is all that is required under [Tex. Code Crim. Proc. art. 38.30](#).

Villareal v. State, [853 S.W.2d 170](#) (Tex. App.—Corpus Christi 1993, no pet.). [Tex. Code Crim. Proc. art. 38.30](#) does not require a finding that the defendant is indigent before an interpreter may be appointed.

⁷¹⁸ *Saavedra v. State*, [297 S.W.3d 342](#) (Tex. Crim. App. 2009). In a prosecution for aggravated sexual assault, the trial court did not err in admitting interpreter's translation of the defendant's statements to a police officer. For an otherwise admissible out-of-court assertion by a party, if the party makes an interpreter his agent to communicate, the translation of the assertion rendered by the interpreter is not inadmissible hearsay by virtue of its status as an interpreter or translated statement. The out-of-court interpreted statement was admissible under TRE 801(e)(2). But see, *Giron v. State*, [695 S.W.2d 292, 294](#) (Tex. App.—Houston [1st Dist.] 1985, no pet.). An interpretation of the witness's statement is inappropriate after an objection to the statement is sustained.

⁷¹⁹ *Leal v. State*, [782 S.W.2d 844](#) (Tex. Crim. App. 1989). In a murder prosecution, the tape recording in Spanish was not translated by a sworn interpreter so there was no evidence in the record that constituted an accurate translation. The court committed reversible error by failing to comply with Tex. Code Crim. Proc. art. 38.30 and by using the State's unsworn translation of the tape to aid the jury.

16.3 *Staff interpreters in district courts in certain counties.*

If requested by a district judge, the county commissioners shall appoint a Spanish-English interpreter for court functions in a county that:

- is part of two or more judicial districts, has two or more district courts with regular terms, and that is part of a district in which a county borders on the international boundary of the United States and the Republic of Mexico;
- borders on the international boundary of the United States and the Republic of Mexico, and that is in a judicial district composed of four counties;
- borders on the international boundary of the United States and the Republic of Mexico, and that has three or more district courts or judicial districts wholly within the county;

OR

- borders on the Gulf of Mexico and that has four or more district courts or judicial districts of which two or more courts or districts are wholly within the county.

[\(Tex. Civ. Prac. & Rem. Code § 21.021\)](#)

16.3.1 Qualifications.

The interpreter, who may be designated by the district judge requesting the appointment, shall be well-versed in and competent to speak the English and Spanish languages.

16.3.2 Fee.

The court clerk shall collect an interpreter fee of \$3 as a court cost in each civil case in which an interpreter is used.

[\(Tex. Civ. Prac. & Rem. Code § 21.022- 21.023; Tex. Civ. Prac. & Rem. Code § 21.051\)](#)

16.4 *Interpreters in county courts-at-law.*

The judge of a county court-at-law may appoint an official interpreter for that court and may terminate that interpreter's employment at any time.

16.4.1 Duties.

The duties of the official interpreter shall be prescribed by the commissioner's court.

16.4.2 Oath.

The official interpreter for a county court must take:

- the constitutional oath of office;

AND

- an oath to faithfully interpret all testimony given in court.⁷²⁰

16.4.2.1 Sample Oath.

Sample oath to administer to interpreter: "Do you solemnly swear that you will well and truly and to the best of your ability discharge the duties of interpreter and translate from English into Spanish, and from Spanish into English, such questions and answers as shall be put to the witness and received from the witness in the case now pending before the Court?"

⁷²⁰ See footnote 295 *infra*.

16.4.2.2 Sample Instructions.

Sample instructions for the judge to give to all participants: “We will be using a Spanish interpreter today who is at a remote site. The interpreter will communicate with [name of Spanish-speaking participant]. It is important to speak clearly and at a moderate speed so that our voices will be heard through the microphone located [place]. The interpretation will be consecutive so the speaker must pause every ten seconds or so. If we speak too fast or for too long, the interpreter will have to ask for repetitions to make sure [he/she] conveys the exact same information in the other language. Please direct all questions and statements to the Spanish-speaker rather than to the interpreter. For example, phrase the question as ‘What is your marital status?’ rather than as ‘Ask her what her marital status is.’ The interpreter will then speak from the perspective of the person for whom [he/ she] is interpreting.”

16.4.3 Fee.

The court clerk shall collect an interpreter fee of \$3 as a court cost in each civil case in which an interpreter is used.

16.4.4 Waiver of costs for indigent party.

An indigent party (defined as a person presently receiving government entitlement based on indigency or any other person who has no ability to pay costs) must file an affidavit to establish inability to pay costs.

[\(Tex. Civ. Prac. & Rem. Code § 21.031-21.032; Tex. Civ. Prac. & Rem. Code §, 21.051; Tex. R. Civ. P. 145\)](#)

CHAPTER 16—PART II: COMMENTS

16.5 *Overview of the law.*

Because Texas state courts are part of a system that receives federal funds under Title VI of the federal Civil Rights Act, Texas courts must provide services to persons with limited English proficiency in a non-discriminatory manner.

Federal laws and guidelines. Federal law prohibits any organization that receives, directly or indirectly, federal funds from discriminating in delivery of services against persons who lack proficiency in English. ([42 U.S.C. § 2000](#))

Under Title VI of the federal Civil Rights Act, a state court must provide services to LEP persons in a non-discriminatory manner if the court is a direct recipient or a sub-recipient of federal funding.

The U.S. Department of Justice (DOJ) has issued guidelines for providing meaningful access to programs and services for persons with limited English proficiency (LEP). ([28 CFR 42.104\(b\)\(2\)](#))

The DOJ Guidelines define an LEP person as an individual who does not speak English as a primary language and who has limited ability to read, write, speak, or understand English. The Guidelines balance the importance of the service to the LEP person with the resources available to determine the extent of the obligation to provide LEP services. The Guidelines also specify that language services be provided to LEP persons participating in a court system; use of a party's family member or friend or other non-licensed interpreters is strongly discouraged.

In 2010, the DOJ issued an advisory letter clarifying that the courts are required to provide LEP services without charge in all court proceedings. By letter dated August 17, 2010, addressed to the chief justices and court administrators of all the states, the Assistant Attorney General for the Civil Rights Division of the Department of Justice clarified that Title VI and Executive Order 13166 require the state judiciary to provide interpretation services without charge to participants in all court and court-annexed matters where interpretation is necessary for the meaningful access to the courts.⁷²¹ To date, there has been no change in Texas law in response to the DOJ's directives.

Texas law. Upon request of a party or witness or on its own motion in a civil or criminal proceeding, a court shall appoint an interpreter who is licensed to

⁷²¹ A copy of the letter is available at: http://www.lep.gov/final_courts_ltr_081610.pdf

interpret court proceedings. The court may choose the interpreter and set reasonable compensation for the service. ([Tex. Gov't Code § 57.002](#); [Tex. R. Civ. P. 183](#)) Costs for interpretation may normally be taxed against a party in a civil suit but in a protective order hearing, the applicant may not be taxed with costs, even if the interpreter is needed solely for the applicant. ([Tex. R. Civ. P. 183](#); [Tex. Fam. Code § 81.002](#); [Tex. Fam. Code § 81.003](#))

In criminal cases, an interpreter must be appointed for a defendant or witness who does not speak English. ([Tex. Code Crim. Proc. art. 38.30](#)) In criminal cases, the court can use “any person” to interpret under the “same rules and penalties as are provided for witnesses,” as long as the interpretation skills are “adequate.” The statute specifically mentions proficiency in “slang” as a factor to judge the interpreter’s adequacy. An interpreter should be qualified as an expert in interpretation under [Tex. R. Evid. 702](#). The cost of interpretation is borne by the county and is not to exceed \$100 a day. ([Tex Code Crim. Proc. art. 38.30](#))

If the proceeding is in a county with less than 50,000 in population and the language to be interpreted is Spanish, the court interpreter must be *qualified* but does not have to be *licensed*. For any size county, if the interpretation need is for a language other than Spanish, the interpreter does not have to be licensed (just qualified) if the court finds there is no licensed interpreter available in that language within 75 miles of the proceeding. ([Tex. Gov't Code § 57.002](#))

To be qualified to interpret, a non-licensed person must be qualified as an expert in the language under the [Tex. R. Evid. 702](#), be at least 18 years old, and not be a party to the proceeding. ([Tex. Gov't Code § 57.001](#); [Tex. Gov't Code § 57.002](#))

Both licensed and qualified interpreters must take an oath or affirmation administered by the court to truly and accurately interpret the proceeding. ([Tex. R. Evid. 604](#)) A licensed court interpreter must abide by the code of ethics and professional responsibility promulgated by the Texas Department of Licensing and Regulation. (16 Tex. Admin. Code § 80.100)⁷²² Communication via an interpreter does not destroy confidentiality of an otherwise privileged communication. See § 17.2.6 of this Benchbook.

District courts and county courts-at-law in certain counties bordering Mexico and the Gulf of Mexico are entitled to have Spanish language interpreters appointed to serve in the court. ([Tex. Civ. Prac. & Rem. Code § 21.021](#))

Any county court at law may appoint an official interpreter. ([Tex. Civ. Prac. & Rem. Code § 21.031](#))

⁷²² Available at: <http://www.license.state.tx.us/court/lcirules.htm#80100>

16.6 *Right to an interpreter.*

16.6.1 Criminal cases.

Under [Tex. Code Crim. Proc. art. 38.30](#) and [Tex. Gov't Code § 57.002](#), a court must appoint an interpreter if:

- a party files a motion or on court's own motion because
- the defendant or witness does not understand or speak English.

16.6.2 Civil cases.

[Tex. Gov't Code 57.002](#) states a court must appoint an interpreter in civil case:

- if a motion is filed by a party;

OR

- if requested by a witness.

16.7 *Licensed interpreter requirement in criminal cases.*

[Tex. Code Crim. Proc. art. 38.30](#) does not require the interpreter in a criminal proceeding to be licensed but [Tex. Gov't Code § 57.002](#) does.

The intermediate appellate courts have been divided about whether [Tex. Gov't Code Chapter 57](#) controls [Tex. Code Crim. Proc. art. 38.30](#) so that use of licensed interpreter is required for Spanish language interpretation in counties of 50,000 or more in population.

According to a Texas Attorney General's opinion,⁷²³ licensed interpreters are required in criminal cases. In a recent case on that issue, the Waco Court of Appeals followed the Attorney General Opinion and held interpreters in criminal proceedings must be licensed unless the exception in [Tex. Gov't Code 57.002\(c\)](#) applies.⁷²⁴

The statutes governing interpretation services are compared below:

⁷²³ Op. Tex. Att'y Gen. No. JC-0584 (2002).

⁷²⁴ *Ridge v. State*, [205 S.W.3d 591](#) (Tex. App.—Waco 2006, pet. ref'd).

Statute	Type of case	Who can request	Licensed interpreter required?	Qualifications
Code Crim. Proc. art. 38.30	Criminal	The defendant or witness	No	1) Competency in both languages 2) Familiar with slang
Gov't Code § 57.002(a)	Civil or criminal	Party, witness, or court	Yes, for counties 50,000 and over in population	1) In counties 50,000 and over-must be licensed; 2) In counties under 50,000, must be qualified as an expert in the language
Gov't Code § 57.002(d)	Civil or criminal in counties 50,000 and over in population	Party, witness, or court	For non-Spanish interpretation only: no license required if no licensed interpreter available within 75 miles	Must be qualified as an expert in the language
Gov't Code § 57.002(c) and (e)	Civil or criminal but only in counties under 50,000 in population	The defendant or witness	No	Must be qualified as an expert in the language

16.8 Costs of interpretation services.

16.8.1 Criminal cases.

The cost of the interpreter is borne by the county whether or not the person needing the interpreter is indigent. The rate is set between \$15-\$100 per day or at the rate set by the county within that range.

Under [Tex. Code Crim. Proc. art. 38.30\(b\) and \(c\)](#), costs of an interpreter for a party or witness in a criminal case are paid for by the county:

- without considering whether the defendant is indigent;

AND

- at a non-discretionary rate of not less than \$15 nor more than \$100 a day or at rate set by county commissioners.

16.8.2 Civil cases.

Under current Texas law, the cost of the interpreter can be taxed to a party except that a protective order applicant cannot be taxed any costs, even if the applicant is the reason an interpreter is needed. See § 16.1.3. Chapter 57 of the Texas Government Code does not alter preexisting law on the payment of appointed court interpreters.⁷²⁵

In county courts and some district courts the clerk can also collect a \$3 fee for interpreters. The interpreter's pay rate is determined by the court and must be reasonable.

Indigence of the parties may be a consideration for the court in assessing costs. For instance, in civil proceedings that are quasi-criminal (where one possible result of the proceeding is the loss of liberty of a party such as in juvenile, contempt, or commitment proceedings) and the party is indigent, the court may have to appoint an interpreter despite the party's inability to pay for that service. Also, the court must consider whether failure to provide an interpreter to an indigent party in a civil lawsuit will violate federal anti-discrimination laws.

The relevant statutes are:

[Tex. R. Civ. P. 183:](#)

- applies only to civil cases;
- allows court to select interpreter;
- allows court to fix interpreter's reasonable compensation;

AND

- permits cost of interpreter to be taxed to a party as costs.

[Tex. Fam. Code § 81.002](#) and [Tex. Fam. Code § 81.003:](#)

- applies only to protective order cases;
- an applicant cannot be taxed costs so cannot be taxed cost of interpreter;

AND

⁷²⁵ Tex. Att'y Gen. Op. No. JC-0584 (2002)

- costs can only be taxed to person found to have committed family violence so cost of interpreter in protective order case can **only** be taxed to a respondent.

Tex. Civ. Prac. & Rem. Code §§ 21.021, 21.031, 21.032, 21.051:

- applies only to civil cases in district or county courts-at-law;
- applies only to Spanish language interpretation in district courts on the Gulf of Mexico or the Mexican border and in any county court regardless of location;

AND

- allows clerk to assess \$3 in court costs as fee for interpreter.

NOTE: Tex. Gov't Code Chapter 57 is silent on who pays for the interpreter or how to set the rate.

16.9 *Determining the need for an interpreter.*⁷²⁶

When a party does not appear to understand English but has not requested an interpreter, judges are advised to ask the following questions to determine if an interpreter may be necessary:

- Can you please tell the court your name?
- How old are you?
- How did you come to court today?
- What kind of work do you do?
- How comfortable are you proceeding with this matter in English?
- Would you like the court to provide you with a free interpreter?

⁷²⁶ Adapted from, the National Center for State Courts, Court Interpretation in Protection Order Hearings Judicial Benchcard, available at:

http://www.ncsconline.org/D_Research/Documents/LEP_AttachM_Benchcard-Final.pdf

16.10 Determining if an interpreter is qualified.⁷²⁷

Relevant questions to help determine if person who is not a licensed interpreter qualifies to interpret in a legal proceeding, include:

- What training or credentials do you have as an interpreter?
- Are you licensed in the State of Texas?
- Are you familiar with the Code of Ethics and Professional Responsibility for Interpreters? What are its main points?
- How did you learn English?
- How did you learn [the *non-English language to be interpreted*]?
- Do you have any potential conflicts of interest in this case?

16.11 LEP victims of family violence.

In 2006, the National Center for State Courts issued a report entitled “Serving Limited English Proficiency Battered Women” based on its survey of how courts across the U.S. were addressing need for interpretation services in domestic violence cases.⁷²⁸

The report recommended that courts take the following steps to improve provision of interpretation services for to LEP victims of domestic violence:

- Know the major non-English languages and ethnicities of individuals in the jurisdiction who seek protection orders.
- Create a court environment that encourages LEP individuals to access the court’s services.
- Ensure the quality and professionalism of court interpretation.
- Work collaboratively with community-based organizations to achieve a coordinated community response to the language assistance and service needs of LEP communities served by the court.

⁷²⁷ [*ibid.*](#)

⁷²⁸ The report is available at:http://www.ncsconline.org/d_research/Documents/LEP_NIJFinalReport.pdf

- Participate in and use national networks to expand resources for providing appropriate language assistance services.

16.12 Department of Justice tips for LEP services.

The DOJ has also promulgated a document with recommendations for identifying and addressing LEP needs in legal proceedings.⁷²⁹

With regard to LEP services, the DOJ recommends that the court:

- Assess the court system’s language capability to identify the existing barriers for LEP individuals seeking court services. Services that are helpful include a dedicated telephone line manned by bilingual staff, use of telephonic interpreter services, “I speak” cards for language identification (available at www.LEP.gov), and signs and other material translated into other languages.
- When working with an interpreter, use short simple, idiom-free sentences that avoid compound phrases, double negatives, rambling phrases, colloquialisms, etc.; address the LEP individual, not the interpreter; avoid engaging in long stretches of conversation that are not interpreted; do not expect the interpreter to explain or elaborate if the person does not understand a question or comment; try to group hearings that require an interpreter; and give the interpreter frequent breaks;
- In trials or hearings that require an interpreter, instruct the parties to speak clearly and slowly, have counsel prepare the interpreter with background information; inform the parties how to raise a challenge to the interpretation (e.g., request a bench conference); instruct the jury on the function of the interpreter; instruct the interpreter how to ask for a break or for permission to clarify a statement; ensure that the interpreter has no bias or affinity towards a party; and instruct the witness on how to request clarification.

⁷²⁹ Adapted from the Department of Justice’s “Executive Order 13166: Limited English Proficiency Resource Document”; available http://www.lep.gov/resources/tips_and_tools-9-21-04.htm

CHAPTER 17—ACCOMMODATING PERSONS WITH DISABILITIES; INTERPRETERS FOR DEAF AND HARD-OF-HEARING PERSONS; ACCOMMODATING PERSONS USING ASSISTANCE ANIMALS—PART I: STATUTES AND CASE LAW

(Americans With Disabilities Act,
Title II, [42 U.S.C. § 12141](#) et seq.;
Rehabilitation Act of 1973,
[29 U.S.C. § 790](#) et seq;
[28 CFR Part 35](#);
[Tex. Civ. Prac. & Rem. Code ch. 21](#);
[Tex. Code Crim. Proc. art. 38.31](#);
[Tex. Gov't Code ch. 57](#);
[Tex. Hum. Res. Code ch. 121](#))

Summary:

Under federal law, all services, programs, and activities provided or made available by public entities, including courts, must be accessible to persons with disabilities.⁷³⁰

To provide accessibility, federal law requires that auxiliary aids (such as certified interpreters for deaf persons and material printed in Braille for a visually impaired person) be provided. In particular, public entities must ensure that persons with disabilities are provided the means to communicate effectively. This provision extends even to persons who are spectators to court proceedings.⁷³¹

In Texas state court legal proceedings, a court must appoint, upon request or its own motion, a certified interpreter for persons who are deaf and hard of hearing. Courts must also permit use of assistance animals in the courtroom.

17.1 *Disability defined.*

17.1.1 Federal law.

The Americans with Disabilities Act and the Rehabilitation Act of 1973 requires state courts to provide accommodations so a person with special needs or disabilities can communicate in court proceedings.

⁷³⁰ The term “disability: is used in this section because that term is defined and used in statutes.

⁷³¹ See, DOJ advisory opinion letter dated May 21, 1992; available at: <http://www.justice.gov/crt/foia/tal073.txt>.

Disability defined. A disability is a physical or mental impairment that substantially limits one or more of life's major activities, including orthopedic, visual, speech, and hearing impairments.

[\(29 U.S.C. §§ 790; 29 U.S.C. § 794; 42 U.S.C. § 12141, 28 CFR § 35.130 et seq.\)](#)

17.1.2 Texas law.

It is the policy of the State of Texas to enable persons with disabilities to use all public facilities within the state. Persons with disabilities have the same right as the able-bodied to the full use and enjoyment of any public facility in the state.

- **Person with a disability** means a person who has a mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services.
- **Public facility** means a public building maintained by any unit or subdivision of government or a building to which the general public is invited.

[\(Tex. Hum. Res. Code §§ 121.001-121.003\)](#)

17.2 *Deaf and hearing impaired persons.*

17.2.1 Interpreters required.

The law requires that upon request, a certified interpreter will be appointed for a deaf or hard-of-hearing person in either civil or criminal court proceeding. The court:

- **shall** appoint a certified court interpreter in a court proceeding upon request of a party or witness;
- **shall** appoint a certified interpreter for a deaf criminal defendant following the filing of an indictment, information, or complaint;
- **may** appoint a certified court interpreter on its own motion;
- **shall** not start the proceedings until the interpreter is in the courtroom not more than 10 feet from and in full view of the deaf person;

- **may** order a video recording of a deaf person’s testimony and the interpretation thereof to use in verifying the transcription of the reporter’s notes.

[\(Tex. Civ. Prac. & Rem. Code § 21.004; Tex. Civ. Prac. & Rem. Code § 21.007; Tex. Code Crim. Proc. art. 38.31; Tex. Gov’t Code § 57.002\)](#)

17.2.2 Definitions.

- **Certified court interpreter** means an individual who is qualified as an interpreter, as defined in [Tex. Code Crim. Proc. art. 38.31](#), [Tex. Civ. Prac. & Rem. Code § 21.003](#), or by the Department of Assistive and Rehabilitative Services..
- **Court proceeding** includes an arraignment, deposition, examining trial, hearing, trial, mediation, court-ordered arbitration, or other form of alternative dispute resolution.
- **Deaf person** means an individual who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of proceedings or communication with others.

[\(Tex. Civ. Prac. & Rem. Code § 21.001; Tex. Civ. Prac. & Rem. Code § 21.003; Tex. Code Crim. Proc. art. 38.31\(g\); Tex. Gov’t Code § 57.001 \(1\) and \(7\)\)](#)

17.2.3 Language choices.

Legal proceedings must be interpreted in a language, including sign language, that the deaf person can understand.

[\(Tex. Civ. Prac. & Rem. Code § 21.002; Tex. Code Crim. Proc. art. 38.31\(a-b\)\)](#)

17.2.4 Oath.

The interpreter shall take an oath that the interpreter will:

- make a true interpretation to the deaf person of all the case proceedings in a language that the deaf person understands;

- repeat the deaf person's answers to questions to counsel, court, or jury in the English language, using the interpreter's best skill and judgment;

AND

- if interpreting for a juror, the interpreter must also swear or affirm that the interpreter will not participate in any manner in the deliberations of the jury, communicate with any member of the jury regarding the deliberation (except to make a literal translation of a juror's remarks made during deliberation), or disclose any of the deliberations.

[\(Tex. Civ. Prac. & Rem. Code § 21.005; Tex. Code Crim. Proc. art. 38.31\(e\); Tex. R. Evid. 604\)](#)

17.2.5 Fees and expenses.

The fees and expenses of a certified interpreter are to be determined by the court and paid from the county's general fund and include:

- a reasonable fee for services (in accord with recommendations of Texas Commission for Deaf and Hard of Hearing);

AND

- actual travel, lodging, and meal expenses (at same rate as for state employees).

[\(Tex. Civ. Prac. & Remedies Code § 21.006; Tex. Code Crim. Proc. art. 38.31\(f\); Tex. R. Civ. P. 183\)](#)

17.2.6 Interpreter's privilege.

A communication does not lose its privileged status because it is communicated via an interpreter.

[\(Tex. Civ. Prac. & Rem. Code § 21.008; Tex. Code Crim. Proc. art. 38.31\(b\)\)](#)

17.3 Assistance (service) animals.

A person may not be denied access to or use of a public facility because the person uses an assistance animal.

Assistance animal means an animal that is specially trained or equipped to help a person with a disability and that is used by a person with a disability who has satisfactorily completed a specific course of training in the use of the animal; and has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide animals with training of this type.

[\(Tex. Hum. Res. Code § 121.002; Tex. Hum. Res. Code § 121.003\(c\)\)](#)

CHAPTER 17—PART II: COMMENTS

17.4 *Overview of the law.*

With regard to the full use and enjoyment of public facilities, state and federal laws do not permit a distinction between persons with disabilities⁷³² and persons without disabilities; both groups are entitled to full use and enjoyment of any of the state's public facilities. ([Tex. Hum. Res. Code §§ 121.001-121.003](#))

Deaf and hard-of-hearing persons. The court must appoint a certified interpreter⁷³³ for a deaf or hard-of-hearing person:⁷³⁴ (1) upon filing of an indictment, information, or complaint in a criminal case; or (2) upon motion of a party or the court's own motion in other cases.⁷³⁵ The court may not start the proceeding⁷³⁶ until the interpreter is in the courtroom and within 10 feet of the person needing interpretation services. Interpretation must be into a language the deaf person understands. ([Tex. Civ. Prac. & Rem. Code § 21.004](#); [Tex. Civ. Prac. & Rem. Code § 21.007](#); [Tex. Code Crim. Proc. art. 38.31](#); [Tex. Gov't Code § 57.002](#))

Duties of certified interpreter. The interpreter must take an oath to accurately interpret into a language that the person being served understands, to use best skill and judgment in interpreting, and if interpreting for a juror, not influence the deliberations. The communications between the interpreter and the person

⁷³² The Americans with Disabilities Act defines "disability" as a physical or mental impairment that substantially limits one or more of life's major activities, including orthopedic, visual, speech and hearing impairments. ([42 U.S.C. §§ 12141](#); [29 U.S.C. §§ 790 and 794](#); [28 CFR § 35.130 et seq.](#)). Texas law defines a person with a disability as a person who has a mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services. ([Tex. Hum. Res. Code §§ 121.001-121.003](#)).

⁷³³ Certified court interpreter means an individual who is qualified as an interpreter, as defined in [Tex. Code Crim. Proc. art. 38.31](#), [Tex. Civ. Prac. & Rem. Code § 21.003](#), or by the Department of Assistive and Rehabilitative Services, for hearing impaired individuals.

⁷³⁴ Deaf person means an individual who has a hearing impairment, regardless of whether the person also has a speech impairment, that inhibits the person's comprehension of proceedings or communication with others.

⁷³⁵ Atty. Gen. Op. No. JM-113 (1984). A court, when notified that a deaf person is appearing as a defendant or witness, does not have discretion as to whether an interpreter should be appointed, but does have discretion as to an appropriate method of communication for a specific deaf person. Failure to comply with the statutes requiring interpreters for deaf persons may result in a denial of constitutional rights.

⁷³⁶ Court proceeding includes an arraignment, deposition, examining trial, hearing, trial, mediation, court-ordered arbitration, or other form of alternative dispute resolution.

served are privileged. ([Tex. Civ. Prac. & Rem. Code § 21.005](#); [Tex. Civ. Prac. & Rem. Code § 21.008](#); [Tex. Code Crim. Proc. art. 38.31\(e\)](#); [Tex. R. Evid. 604](#))

Fees. The interpreter's fees are to be paid out of the general fund of the county in which the service is provided. Reimbursement is to be at a reasonable rate and include travel, meals and lodging, paid at the same rate as for state employees. ([Tex. Civ. Prac. & Remedies Code § 21.006](#); [Tex. Code Crim. Proc. art. 38.31\(f\)](#); [Tex. R. Civ. P. 183](#))

Assistance animals. A person may not be denied access to or use of a public facility because the person uses an assistance animal.⁷³⁷ ([Tex. Hum. Res. Code § 121.002](#); [Tex. Hum. Res. Code § 121.003\(c\)](#)). A service animal should not be touched, fed, or otherwise distracted while working. The owner and the animal should be kept together. The owner can be asked to keep the animal under control.⁷³⁸

17.5 *Victims with disabilities.*

One in five women is limited in a major life activity by a disability, and one in ten have a serious disability, according to the U. S. Census.⁷³⁹ In 2009, approximately 2.7 million Texas (11.5% of the population) had a disability and were living outside of institutions.⁷⁴⁰

Women with disabilities experience one of the highest rates of intimate partner violence of any identified demographic group.⁷⁴¹ In some studies, nearly 40% of women with disabilities report being the victims of domestic violence, a percentage far higher than the general population.⁷⁴² For minor females who are deaf, the incidence of sexual abuse is around 50%.⁷⁴³

⁷³⁷ Assistance animal means animal that is specially trained or equipped to help a person with a disability and that is used by a person with a disability who has satisfactorily completed a specific course of training in the use of the animal; and has been trained by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide animals with training of this type.

⁷³⁸ See the U.S. Department of Justice brochure at: <http://www.usdoj.gov/crt/ada/animal.htm>.

⁷³⁹ J. McNeil, *Americans with Disabilities: 1997*, U.S. Census Bureau, Current Population Reports P70-73, Washington D.C., March 2001 (revised August 2002).

⁷⁴⁰ U.S. Census Bureau, 2009 American Community Survey. http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US48&-

⁷⁴¹ W. Abramson et al, eds., *Feature Issue on Violence Against Women with Developmental or other Disabilities*, 13 Impact 133 (2000); available at: <http://ici.umn.edu/products/impact>

⁷⁴² M. Nosek, & C. Howland, C., *Abuse and women with disabilities* (February 1997); cited at: <http://vaw.umn.edu/documents/inbriefs/domesticviolence/domesticviolence.html#nosek1998>

Acts of domestic violence against individuals with disabilities include withholding needed medications and assistive technologies. Disabled stalking victims are particularly vulnerable because they may depend on social services (e.g., subsidized housing) that cannot be easily replaced if the victim needs to radically alter living conditions to avoid the stalker.⁷⁴⁴

17.6 *Sensory and cognitive disabilities.*

There are different types of disabilities that interfere with communication and that may adversely affect a person's ability to participate in a legal proceeding.⁷⁴⁵

17.6.1 Hearing impairment.

Hearing can be diminished or destroyed by different causes and at different life-stages. When and how the person became hard-of-hearing or deaf may affect how the person communicates with hearing persons.

- **Loss after acquiring language skills.** Persons in this group lost all or partial hearing after learning to speak a language. Typically, this person will communicate using a spoken, rather than sign, language. Often the person uses an augmentative device (hearing aid, assisted listening, etc.) or an interpreter, or lip-reads.

L. Powers, et al, *Interpersonal Violence and Women with Disabilities: A Research Update*, National Online Resource Center on Violence Against Women (citing a published peer-reviewed study (Brownridge 2006)); available at: http://new.vawnet.org/category/Main_Doc.php?docid=2077

See also, 2007 statistics on crimes against persons with disabilities, available at:

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2022>

⁷⁴³ C. Hoog, *Enough and yet not enough: An Educational Resource Manual on Domestic Violence Advocacy for Persons with Disabilities in Washington State*, Minnesota Center Against Violence and Abuse (rev. 2003) (citing various peer-reviewed studies);

available at: http://www.wscadv.org/docs/Enough_and_Not_Enough.htm

⁷⁴⁴ See Stalking Resource Center, *Victims with Disabilities Face Unique Challenges*, 6 *The Source* (Winter 2006); available at:

<http://www.ncvc.org/src/main.aspx?dbName=DocumentViewer&DocumentI>

⁷⁴⁵ The information in § 17.7 was adapted from: Vera Institute, *Etiquette Tips for Working with Deaf/Hard of Hearing Individuals*; available at:

http://new.vawnet.org/Assoc_Files_VAWnet/EtiquetteTips-Deaf.pdf

United Spinal Association; *Disability Etiquette: Tips for Dealing with People with Disabilities*, available at: <http://www.unitedspinal.org/pdf/DisabilityEtiquette.pdf>

Georgia Commission on Access and Fairness in the Courts, *A Handbook for Georgia Court Officials on Courtroom Accessibility for Individuals with Disabilities*; available at:

http://www.georgiacourts.gov/files/ADAHandbk_MAY_05_800.pdf

- **Loss before language skills acquired.** Persons who are born with hearing loss or who lose hearing before learning to speak may or may not have some residual hearing, but their language skills may be limited to sign language. They may use lip-reading, augmentative devices, sign language, or a combination thereof.
- **Loss of hearing and vision.** A person who lacks spoken language skills may rely on tactile sign language, finger-spelling, or print-in-palm. Hard-of-hearing persons who also have limited vision may need visual proximity to the judge. For written communications, the person may want to use Braille.
- **Lack of language skills.** For hard-of-hearing persons who prefer to use gestural communications, the services of a certified deaf interpreter (a special type of interpreter-not the same as the state-certified interpreter for the deaf) may be needed.

NOTE: For a deaf or hard-of-hearing person a smile and nod may signify a lack of understanding rather than comprehension.⁷⁴⁶

17.6.2 Speech and language impediments.

17.6.2.1 Distortion of spoken sounds.

Stuttering, garbling sounds, or an inability to speak can result from physical impediments or unknown causes, including strokes or other brain injuries, accidents, surgery, mental deficiencies, or drug use. The disorders can be in fluency (stuttering), motor speech (physical inability to make the sound), or voice (hoarseness).

17.6.2.2 Language disorders.

A person with a language disorder can speak but lacks facility with the rules of the language so the person is unable to accurately express a thought (expressive disorder) or understand another's expression of a thought (receptive disorder).

⁷⁴⁶ Gretchen Waech, *Deaf Culture and Domestic Violence*, Justice for Deaf Victims National Coalition (March 2009); available at: http://new.vawnet.org/Assoc_Files_VAWnet/DeafCultureDV. PowerPoint Slide 17: When interacting with a Deaf/deaf person.

17.6.3 Cognitive disorders.

Any disability that impairs mental processes can interfere with a person's ability to participate in a legal process. Accommodation for a person with a cognitive disorder should be assessed on a case-by-case basis because impairments can be mild (attention deficit disorder) or severe (profound cognitive impairment).

17.6.4 Impaired vision.

Blindness⁷⁴⁷ or visual impairment may require special accommodations, such as a Braille reader, to allow a visually-impaired person to participate in a legal proceeding. The court can facilitate the participation of a visually impaired person by:

- identifying who is speaking and who is being spoken to;
- providing someone to guide the person in, out, and around the courtroom or courthouse and have the guide identify approaching obstacles (e.g., stairs);
- reading written information aloud;
- providing written information in Braille, on tape, or in large print;
- accommodating assistance animals;
- describing the courtroom's physical arrangement;

AND

- allowing the person access to assistive devices (e.g., do not move the person's cane out of reach).

17.7 Improving communication.

To facilitate communication with a person who has a condition that impairs communication skills, the court may:

- ascertain the manner in which the person prefers to communicate (e.g., through an interpreter, lip-reading, etc.);

⁷⁴⁷ Legal blindness is defined as a visual acuity of 20/200 or worse with the best possible correction. Someone with a visual acuity of 20/200 can see at 20 feet what someone with normal sight can see at 200 feet.

- face the person and keep eye contact with the person when speaking;
- make sure the lighting is adequate;
- be sure the person's attention is engaged before speaking;
- write down information for the person if necessary;
- speak clearly in a normal tone of voice;
- avoid directing communications to the interpreter instead of the deaf person;
- use short sentences that break information into distinct parts;
- use symbols, pictures, or gestures to underscore meanings;
- ask questions that are open-ended;
- rephrase sentences when the recipient shows a lack of comprehension;
- allow extra time for the recipient to indicate comprehension;

AND

- provide information in an easily reviewed format (e.g., audiotape).

17.8 *Mobility impairments.*

A person who does not have or who has lost full use of a limb, whether from disease, trauma, or a congenital condition, may need special accommodation to get to and maneuver in a courthouse. To aid a person who has impaired mobility, the court should:

- ensure that a mobility impaired person can enter and exit rooms safely and has adequate time to do so before, during, and after hearings;
- not touch or move any assistive device (e.g., wheelchair) without the person's permission;
- provide a place to sit and a writing surface, if necessary to participate in the proceeding;
- make eye contact at the person's level;

AND

- provide access to services that are out of the person's reach.

CHAPTER 18—DYNAMICS OF FAMILY VIOLENCE

18.1 *Ten Things to Consider About Family Violence*

If you would judge, understand. Lucius Seneca

- 1. What family violence is.** Statutory definitions aside, the term “family violence” commonly refers to a *pattern*⁷⁴⁸ of systematic and sustained abuse, often criminal, by a perpetrator against a victim with whom the perpetrator has a specific type of intimate or familial relationship (spouse, intimate partner, dating, household member, etc.). The violence is used to coerce or control the victim.⁷⁴⁹ Family violence is learned behavior that is repeated when it produces the desired results. In resolving a family issue, the court should consider both the overt and the covert efforts of the perpetrator to control the victim.
- 2. What family violence is not.** Family violence is not the use of physical force in self-defense, the reasonable discipline of a minor child, or retaliatory aggression (force used as “payback” for prior abuse). When the defense to family violence is “mutual combat,” the court should carefully assess whether the “mutual combatant” was acting in self-defense or truly has a pattern of unprovoked aggression and was actually the aggressor in the incident at issue. Family violence is sometimes explained as the by-product of a cultural norm or moral mandate. The law does not accept either characterization as a valid defense to the criminal or tortious conduct that comprises family violence.
- 3. Family violence has high social costs.** Family violence is a societal, not just an individual or familial, problem. Responding to family violence takes multiple community resources: law enforcement (police, victim counselors);

⁷⁴⁸ With regard to the legal definition of “history” or “pattern” of family violence, Texas courts have not reached a consensus. See: *Pena v. Pena*, [986 S.W.2d 696](#) (Tex. App.—Corpus Christi 1999) pet. denied *per curiam* [8 S.W.3d 639](#) (In the *per curiam* opinion, the Supreme Court specifically disapproved the factors used by the court of appeals to determine if a pattern of family violence existed.); *Long v. Long*, No. 03-97-073-CV, [1997 Tex. App. Lexis 5986](#) (Tex. App.—Austin, Nov. 20 1997, no pet) (The Long court notes that pattern is not defined by statute.); *Interest of RTH*, [175 S.W.3d 519](#) (Tex. App.—Fort Worth 2005, no pet.) (In a SAPCR, a sole incident of family violence can constitute a history or pattern of abuse.); *In re BRP*, No. 11-07-0255-CV, [2009 Tex. App. Lexis 3302](#) (Tex. App.—Eastland, May 14, 2009, no pet.) (In a SAPCR case, evidence that the father used physical discipline on his minor children and hit the mother once was not sufficient to establish a pattern or history of abuse under [Tex. Fam. Code § 153.004.](#)); *Danklefs v. Danklefs*, No. 04-01-0849-CV, [2003 Tex. App. Lexis 6718 *5-6](#)(Tex. App.—San Antonio, Aug. 6, 2003, pet. denied) (The term “history or pattern of abuse” is not defined in Tex. Fam. Code so the court used its ordinary meaning.)

⁷⁴⁹ See *The Problem*, National Coalition of Domestic Violence at <http://www.ncadv.org/learn/TheProblem.php>

emergency medical treatment providers, legal (prosecutors, judges, and juries), mental health treatment providers, and social welfare services. It is estimated that each year in the United States, 8 million work-hours (the equivalent of 32,000 full time jobs) are lost due to injuries from family violence.⁷⁵⁰ Over a third of women seeking emergency room treatment need treatment for family violence injuries.⁷⁵¹ The cost of family violence crimes is estimated to be \$5.8 billion annually, most of which is for medical treatment.⁷⁵² Far from being only a personal or “family” concern, family violence has high costs for both the victim and the community.

- 4. Family violence is an intentional behavior, not an unintentional reaction to a stimulus.** Family violence is a learned behavior that is used and repeated because it produces a desired result—victim compliance. Although the two frequently coincide, there is no established direct correlation between family violence and substance abuse of family violence and mental illness (i.e., intoxicated persons have not been shown to be more likely to be violent with family than non-family members). A mentally ill person typically does not intentionally choose a victim or use violence to control the behavior of a particular person. As a putative reaction to stress or anger, family violence is no more excusable than any other crime. Most significantly, the victim’s acts or omissions do not incite family violence.⁷⁵³
- 5. In family violence, the criminal and non-criminal abuse are interwoven.** In the context of the intimate or familial relationship, family violence can encompass any behavior that uses coercive or degrading means to exert control over the victim. Some behavior is clearly criminal (assault, threats to harm, damage to property or pets, stalking, harassment, etc.) but non-criminal conduct (degrading comments, emotional manipulation, withholding access to resources, controlling the victim’s time and activities) is often involved as well. Non-criminal family violence may enhance the impact of the criminal behavior by diminishing the victim self-defense mechanisms (e.g., causing the victim to be too scared of reprisals to report criminal conduct to law enforcement). In evaluating the type of abuse reported, the court should be sensitive to the interplay between physical force and psychological abuse. Lack of recent physical violence may indicate that the perpetrator has lately been able to control the victim solely with psychological abuse.

⁷⁵⁰ *Cost of Intimate Partner Violence Against Women in the United States*, Centers for Disease Control and Prevention (2003).

⁷⁵¹ M. Rand, *Violence-related Injuries Treated in Hospital Departments*, Bureau of Justice Statistics, Special Report (Department of Justice 1997).

⁷⁵² *Costs of Intimate Partner Violence Against Women in the United States*,. Centers for Disease Control and Prevention (2003).

⁷⁵³ N. Jacobson et al, *Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with Violent Husbands*,” 62 *Journal of Consulting and Clinical Psychology* 982 (1994). The data suggests that the batterer would have acted violently regardless of who the intimate partner or spouse was.

6. **Victim-perpetrator bonds may complicate resolutions.** Bonds between the victim and the perpetrator transcend the legal system and will affect both the victim's and the perpetrator's reactions to legal process. The victim of family violence is seldom able to cleanly cut all ties to the abuser, who commonly has continued access to or control over the victim or the victim's children or a household member.⁷⁵⁴ Unlike "stranger" violence where the victim does not know and has no links to the perpetrator, the family violence victim not only knows the perpetrator but has economic, emotional, legal, psychological, or religious bonds with the perpetrator. Crafting an effective resolution of a family violence issue requires the court to accurately evaluate these victim-perpetrator bonds.
7. **The legal system is only one victim survival strategy.** Victims of family violence use multiple strategies to avoid violence. Experts have categorized these as personal (compliance, pleading, short absences, physical resistance), informal (seeking aid or shelter with friends and family, community interventions with the batterer, religious or secular counseling), and formal (calling the police, seeking protective orders, initiating divorce proceedings).⁷⁵⁵ Victims may use the strategies sequentially or simultaneously. For pragmatic reasons, one strategy may be abandoned suddenly for another. Thus, a victim may pursue a formal strategy (filing a criminal complaint) but later decide that an informal strategy (concealment) offers a better outcome.⁷⁵⁶ The court should recognize that the decision

⁷⁵⁴ Empirical data suggests that the "average" victim tries seven times before finally ending the abusive relationship. The motivating factor that prompts the final break has been described as a "turning point." A turning point is a dramatic shift in the victim's beliefs and perceptions of self, the partner, and the relationship that alters the victim's willingness to tolerate the situation and motivate a change. One study⁷⁵⁴ categorized the motivational turning points by theme as:

- (1) protective—the need or desire to protect others from the abuse;
- (2) increased danger based on escalation of severity of physical abuse or emotional humiliation;
- (3) education and access—increased awareness of options and better access to supportive services;
- (4) fatigue and recognition that the abuser is not going to change and the victim's suffering is not going to end; and
- (5) partner betrayal and infidelity.

⁷⁵⁵ M. Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, [21 Hofstra L. Rev. 1225](#) (1993).

⁷⁵⁶ Experts estimate that somewhere between 80-90% of domestic violence complainants fail to cooperate with the prosecution at some point in the criminal proceeding. See, D. Beloof & J. Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, [11 Colum. J. Gender & L. 1, 3](#) (2002) (90% rate); and L. DeSancitis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, [8 Yale J.L. & Feminism 359, 367](#) (1996) (80-90% rate).

The reasons why victims refuse to cooperate with the prosecution include:

- the risk of retaliation (feared in as many as half of all cases; an actuality in about 30 percent of criminal cases);

whether or not to participate in a legal process is a survival-driven strategic choice for the victim.

- 8. Psychological coercion reinforces physical force.** In family violence, the relationship between physical force and psychological control is profound. When the victim believes that the perpetrator will carry out threats to harm, the perpetrator gains an additional coercive tool. The victim correctly reads an implied threat into the perpetrator's verbal statements and non-verbal conduct. Once psychological dominance is established, the perpetrator may be able to threaten the victim with a glance, a motion, or an oblique verbal reference. The perpetrator may control the victim by intermittent acts of kindness, even indulgences. For those perpetrators who will admit their controlling behavior is wrong, promises at reformation commonly accompany these kind or indulgent acts. However many perpetrators either deny their conduct constitutes abuse or claim that what the victim perceives as abuse is simply a rationale reaction to the victim's misbehavior.
- 9. Lethality increases after the victim leaves.** Much empirical data supports the idea that the most dangerous time for the victim is the period (days, weeks, or months) immediately after the victim leaves the abusive relationship. Among the other factors that increase lethality are that the perpetrator has: threatened harm to others or to self; access to a firearm; and tried to strangle the victim in the past.⁷⁵⁷ In evaluating a family violence case, the court should be sensitive to the increased danger of lethality while the victim participates in the legal process and immediately thereafter.
- 10. The pertinent inquiry.** A commonly asked question about family violence is why the victim stays in the relationship. Another common inquiry is why the perpetrator engages in family violence. As "natural" as these inquiries may be, the answers, if any could be had, would add little to the court's resolution of a family violence issue. In the context of legal relief, perhaps the more pertinent questions are: (1) what can be done to assist the victim in

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- economic dependence (fifty percent of victims are left below the federal poverty line after leaving their abuser and slightly less than half are threatened with loss of income for aiding the prosecution of the abuser);
 - emotional attachment,
 - family and community pressures;
 - religious and cultural views;
 - fear of losing of custody of children'
 - fear of deportation;
 - trauma-induced "learned helplessness"; and
 - a genuine belief that no crime has occurred.

⁷⁵⁷ J. Campbell et al, *Risk Factors for Femicide In Abusive Relationships: Results from a Multisite Case Control Study*, 93 American Journal of Public Health 1089 (July 2003).

avoiding further abuse?; and (2) what can be done to deter the perpetrator from committing more abusive acts?

Summary. Family violence is pattern of intentional abusive behavior that the perpetrator uses to exert control over an intimate or dating partner or a family or household member. Physical force is often reinforced with psychological abuse. The costs of family violence are great for society as well as for the individual victim.

Legal proceedings are just one possible survival strategy that may be used by a family violence victim. Because the victim of family violence knows the perpetrator and usually has extra-legal ties with that person, even the unambivalent victim may have trouble ending the relationship. The perpetrator usually tries to exploits all ties (legal, economic, emotional, familial) and will use psychological abuse as well as physical force to regain or maintain control over the victim.

For family violence victims, the period immediately after leaving the perpetrator is the most deadly. The victim's levels of cooperation with the court process may be affected by the level of perceived danger. In assessing the proper legal remedy, the court should consider victim safety as the paramount issue during this period.

SPECIAL ACKNOWLEDGEMENT by OCA Administrator Director Carl Reynolds:

The Texas Family Violence Benchbook is the result of a grant partnership between the Office of Court Administration and the Texas Council on Family Violence. In 2008, OCA Deputy Director Mary Cowherd suggested the partnership to TCFV's Executive Director Gloria Terry, who helped make the suggestion a reality. Ms. Terry chose TCFV Policy Director Aaron Setliff and Policy Manager Tracy Grinstead-Everly to lead the TCFV team dedicated to this project. The support of the TCFV team helped take the Benchbook from a concept to a reality.

As part of her contribution, Ms. Grinstead-Everly, who has spent her entire legal career advocating for family violence victims, authored the following Introduction to the Dynamics of Family Violence. Her article draws on her many years of experience as a legal advocate for victims, her comprehensive knowledge of state and federal domestic violence laws, and her insights into the problems facing the judge handling a family violence issue. The contributions of Ms. Terry, Mr. Setliff, Ms. Grinstead-Everly, and the rest of the TCFV team to the Benchbook project are gratefully acknowledged by OCA.

18.2 The Dynamics of Family Violence

By Tracy Grinstead-Everly, J.D.

Family violence permeates our society. Annually, it costs society billions of dollars in medical expenses, lost wages and productivity, law enforcement/prosecutorial/incarceration expenses, and other related costs. Every year it costs hundreds of thousands of Texans great psychological pain, physical harm and, too many times, their lives.

**In 2009, 111 Texas women were murdered by an intimate partner –
killed by someone who said they loved them.**

Despite a sometimes disparate number of accused batterers with specific characteristics, this crime touches people of all ages, races, religions, economic groups, and sexual orientations. Some cultural factors add barriers which make it difficult for victims to come forward but that does not mean that violence in that culture is condoned or can be used as an excuse for the abusive behavior. Stereotypes can reinforce silence about this crime, so a neutral and unbiased justice system is crucial.

Family violence cases are more intricate than other crimes due to the nature of the relationship of the parties. Successful work to thwart this type of violence requires a coordinated community response. Judges have an opportunity to develop an atmosphere in which crime victims can feel safe, while maintaining due process. These two concepts are not at odds. Demanding offender accountability for a crime is a cornerstone of the American justice system. A paradigm of intolerance of this crime must be developed and maintained in every courtroom. A judge is in a unique position to send a message of zero tolerance for family violence. This message must be heard by the victim, the offender, and the community.

There are many avenues through which a family violence victim may reach out for help. Sometimes she⁷⁵⁸ may have a healthy support network of family and friends, or access to an advocate. Other times, the first intervention involves the criminal justice system. National experts explain that establishing a judicial philosophy in family violence cases is crucial, and those who claim that taking a stand against family violence can lead to the appearance of impropriety are mistaken. Discussions about how to improve the system do not interfere with impartiality. Judges may be knowledgeable about family violence (FV) and still objective on the bench. As with any crime, a well-educated judge can make more just decisions. Understanding the

⁷⁵⁸ This chapter will use the term “victim” because it is commonly used and understood. However, “victim” and other current labels are inadequate descriptions of those experiencing family violence. Because most victims are women abused by a male, this paper will use “she” and “woman” when referring to a victim of family violence but the author recognizes that all victims deserve safety, financial security and advocacy including those in same-sex relationships and male victims abused by female partners.

dynamics of family violence is necessary to maintain the effectiveness of the justice system.

Family violence is about power and control. Experts define family violence as a pattern of assaultive and coercive behaviors through which threats and violence are used to maintain power and control over the other partner. Abusive behaviors include physical, sexual, psychological, emotional, financial abuse, as well as isolation, and stalking. Though the violence often escalates, underlying forms of control persist. Survivors often experience several concurrent types of abusive behavior, which may change at any time.

Criminal family violence is abuse which has risen to a dangerous level. Most violent relationships begin with much more subtle controlling behavior, such as emotional, psychological, and spiritual manipulation. It often progresses to financial control and isolation to keep the victim without outside resources. Once the justice system is involved, the abuse has risen to a much higher level. The justice system can only respond to illegal behavior. The victim may view it as a last resort to stop the violence. The judicial response in the case can affect her decision to leave or return to the violence.

Family violence has many underlying methods, but only one cause. The focus of the batterer is to obtain and retain power and control over his intimate partner in any way possible. He will often employ only as much abuse as is necessary to maintain control, so as to avoid suspicion and criminal consequences. Types of abusive behavior include:

- *Intimidation:* Batterers can cause fear in their victims by a simple look, gesture, or violence toward something other than the victim directly. Often not a word need be said and what could be overlooked by an outside person or viewed as harmless can serve as a reminder of a past beating or threat of physical abuse in the future. Even more overt threats can be accomplished by otherwise legal action, such as destruction of joint property or cleaning a gun in front of her.
- *Emotional abuse:* The batterer causes the victim to feel bad about herself through constant name-calling, and “put-downs.” Emotional abuse can lower the victim’s self-esteem to the point that she believes the batterer’s implicit assertion that she deserves the abuse.
- *Isolation:* Victims can be isolated directly by moving the victim to a location where there is no access to services or even a neighbor to hear the beatings. More subtle isolation includes limiting outside contact with certain people, places, and activities. Jealousy can serve as a justification for this behavior, which leaves the victim without a support system.

- Minimizing, denying and blaming: Batterers often make light of their behavior and do not take the victim's concerns about it seriously. They use the victim's actions as justification for their abuse.
- Using the children: One of the most common methods of abuse of power is using the children against the victim. This can be accomplished by threatening to hurt the children if the victim does not comply. The scariest idea to any mother is the thought of losing her children. The batterer can make false allegations of abuse against the victim and involve CPS. He can threaten to refuse to return the children from visitation. These very real threats often result in the victim returning to the abuser. To help avoid this dangerous response, the judge must make clear that such use of the children to further abuse the victim is unacceptable. The law requires that credible evidence of family violence must be taken into consideration for purposes of conservatorship and possession, and that batterers cannot be given joint possession. Possession by a batterer must be supervised unless it is in the best interest of the children. Unsupervised visitation can provide a perfect opportunity to harass the victim by conveying a clear message that unless the victim returns to the batterer, the victim and her children are at greater risk.
- Economic abuse: Financial dependence is another means to make the victim remain in the abusive relationship. The batterer may keep the victim from obtaining education or a job or take whatever money she makes. Controlling the money completely, or only giving the victim an allowance, can keep her feeling trapped. Even if she does leave the relationship, a lack of resources can significantly hamper her situation in civil court. A batterer with a job and housing may appear to offer a more stable home for the children than an unemployed mother forced into shelter. More money for attorney fees puts the abuser at a distinct advantage, particularly in light of limited low-cost legal aid resources. Texas' three Legal Aid agencies must set priorities for case acceptance, and clients in immediate physical danger are accepted over many other victims, whose situations, though dire, are not currently deadly. Batterers whose resources are so limited can abuse the system by accelerating court costs, harassing the client through discovery and requesting excessive continuances. All of these matters must be taken into account by the judge handling the divorce.
- Male privilege: In our society, there is great pressure to find a partner, particularly when children are involved. Some women are taught that any man is better than having no man, reinforcing the need to stay in a relationship,

regardless of abuse. Batterers are known for warping traditional values and abusing religious tenants by defining male and female roles in such a manner that the woman is subservient.

- Coercion and threats: Batterers' threats to hurt the victim and/or the children are often enough to make her stay. Threats to deport immigrant victims are particularly scary if the victim has children who are U.S. citizens and would perhaps remain in the country with the abuser.

The abuser will often blame exacerbating factors. A batterer may blame other problems as the root cause of his behavior, which he claims should cause his actions to be excused. Such factors cited by a batterer may include:

- Mental illness
- Drug and alcohol abuse
- Anger control issues
- Financial difficulties
- Childhood abuse

It is important to remember that battering is always a choice. While the above factors can contribute to making poor choices and exacerbate a person's already abusive tendencies, every person is responsible for his/her own actions. These other issues may need to be addressed, but must be viewed in the context of the abusive relationship. A batterer who claims that he just has anger control problems, but only abuses his partner, should not be treated in the same way as someone who fights with strangers. The appropriate counseling for batterer is a batterer's intervention and prevention program, not an anger management program.

Offenders are master manipulators. A batterer, who will be adept at controlling his victim, may try to use the courtroom as a "playground." They often control the finances and have superior knowledge about the justice system. The batter will attempt to use potential judicial outcomes and delays to frighten and wear down the victim until the batterer achieves his ultimate goal—the victim's acquiescence and resumption of the abusive relationship. Understanding common offender behaviors will enable judges to recognize such tactics and help minimize the victim's fears of the court's collusion with the batterer.

Victims are not perfect and do not always present well in court. Everyone has factors in their lives that make them imperfect in the eyes of the justice system. Compared to batterers, victims may appear defensive, disorganized, or unreasonable. They may not be forthcoming about details of their situation, and be unwilling to work with the batterer. Among the many abuse-related problems that the victim may have are: (1) using or abusing of alcohol or drugs, to self-medicate in dealing with the turmoil and fear in which they live; or (2) engaging in illegal activities used to obtain financial resources to survive or to support children. Abuse can deprive victims of stability in many areas of life. A judicial response which provides them with resources such as child and spousal support and housing can help alleviate these problems, strengthening a victim’s healthy relationship with their children.

Some victims will return to the abuser. Many survivors do not want to end the relationship with the abuser. Rather, the victim just wants the violence to stop. There are many ties between the parties, which can explain the reason why victims may return to the abuser. Though every situation is different, there are common reasons why victims stay or return:

- **Fear**—The abuser has made explicit or implicit, realistic threats of future harm or death. These threats are often made regarding the victim’s family or children as well, if that is more likely to manipulate the victim. Sometimes the victim may correctly perceive that it is more dangerous to leave than to stay.
- **Faith**—Clergy and religious communities can exert a great deal of pressure to stay in the relationship. Victims can be significantly harmed through spiritual abuse by those misquoting scripture and core values, such as “for better or for worse,” “shalom bayit” (“peace in the home”), ideas related to forgiveness, or abuse being related to punishment for their unrelated sins.
- **Family**—Pressure can be put on the victim to keep the family together and provide a father for the parties’ children.
- **Finances**—Economic dependence is all the more compelling when jobs are difficult to find or the victim has no work history, education, or trade.
- **Distrust of the system**—The justice system can be confusing, overwhelming, and intimidating, especially if the abuser has experience with or insight about how the legal system works. A prior judicial response that the victim found inadequate may discourage future participation in legal proceedings.
- **Isolation**—Victims often make repeated unsuccessful attempts to end the abusive relationship before finally “making the break.” Family and friends often

give up on the victim after so many tries to help. Victims who live in rural areas, remote from social services, and immigrant victims are particularly prone to isolation. Even in more urban settings, victims are often isolated from the “outside world” and are not aware of available social service resources for family violence victims.

- Embarrassment—Full disclosure of abuse is embarrassing and sometimes disbelieved or discounted. The thought of disclosing very personal experiences in open court can be frightening, especially if the victim has been repeatedly told that she was not credible. They will often have to face the abuser in court, which can result in even more humiliation. Disclosure of sexual abuse may be especially painful and embarrassing.
- Cultural norms—Cultural values can work against victims. Social acceptance of violence may be strong and amplified by stereotypes held by those in the majority populations.
- Other considerations—Additional barriers exist for certain populations of victims. Gay, lesbian, transgendered and bisexual victims have added burdens of disclosing their sexual identity to a sometimes unwelcoming community. Victims with disabilities must also find alternate caregivers when leaving their abusers.

Family violence is relevant in all areas of the law. Civil law is invoked as much, if not more, than criminal law to provide relief for victims of family violence. Most abusers are not arrested and most commissions of family violence fall into the categories above and do not rise to the level of physical and/or sexual violence. Criminal court may be the more obvious place to see family violence as a factor, but even then the court must look beyond the family violence assault cases and investigate whether it exists in any crime, to adequately address victim safety and offender accountability. The existence of family violence is relevant in civil law in divorces, custody and even probate cases. The issue must always be a determination as to whether the parties have an equal level of power in negotiation and participation in the court process.

Many victims may not participate in criminal court. Lack of victim participation may occur for a number of reasons, including: fear of retribution; lack of childcare or transportation; lack of confidence in the legal system (exacerbated by an indifferent reaction from the court and court staff); inability to leave work to attend legal proceedings, fear of embarrassment; fear of being disbelieved; and distrust of the legal system based on a prior bad experience.

Victims often drop divorce cases. Many types of fear cause victims to withdraw divorce petitions:

- *Fear of facing the batterer in court.* The decision to leave an abusive relationship is a very difficult one which escalates the danger for the victim. Facing the batterer, in an unfamiliar and sometimes daunting setting, can cause the victim great apprehension. Establishing a protective courtroom atmosphere can support the victim and reinforce that the decision to take action to make her and her children safer was a wise one.
- *Fear of losing custody.* A batterer's desperation to keep control of his victim takes many forms. They often file for custody even in cases in which they have had little interest in the children or involvement in their lives, simply to make the victim continue the marriage. A batterer's threats to take the children echo in a victim's mind when she files for custody.
 - *Economics:* A victim who has not been allowed to work or get an education will likely have difficulty getting a job once she leaves. This can leave family violence shelters or temporarily staying with family or friends the only option for housing. Without a job, money, or housing, some judges erroneously view the victim as a less stable placement for the children, especially in cases without allegations of physical abuse of the children.
 - *Fear for the children's safety:* Victims often fear for the children, now living with a batterer without the mother there to deflect and absorb the abuse. Even the act of public disclosure of the abuse can sometimes work to a victim's disadvantage, and not only in the context of physical danger.
 - *Fear of state involvement:* If a report to child protective services is generated, it could result in a charge of neglectful supervision or failure to protect against the victim, in which case the children could be placed in the custody of the state. Even in most optimal situations, it takes a long time to complete this process, which can affect the victim's employment, housing, and other factors which she needs to become self-sufficient. Any hint of the risk of losing the children can cause a victim to return to her abuser.

- *Fear of joint custody.* The legal presumption of joint custody is intended for situations in which the parties can maintain a parenting relationship based on equal decision-making. Cases of family violence by definition involve an imbalance of power. The batterer will attempt to control the victim in any way possible. The idea of forced, regular interaction to discuss decisions about the children can cause the victim fear of the batterer and frustration with the system. Such contact provides routine opportunities for the batterer to have contact with the victim. This is particularly dangerous when a protective order's no contact provision has been modified to allow for parenting conversations.
- *Fear for their children during unsupervised visitation.* Unsupervised visitation is routinely ordered, despite statutory language allowing supervision in cases in which credible evidence of family violence is proven. Abuse of the children is not required to invoke supervised visitation orders. This option should be seriously considered.
- *Fear of abusive interaction when exchanging the children.* Batterers commonly use visitation exchanges as an opportunity to harass, disparage, and threaten the victim, often in front of the children. Supervised exchanges in neutral locations, with explicit directions about interaction are an option.
- *Fear of mediation.* Mediation provides another avenue for batterers to frighten and abuse their victims. A seemingly innocuous phrase or gesture can serve as a direct threat. Fear can lead the victim to negotiate away much that is rightfully hers, just to escape the relationship. Although mediation can be waived in divorce cases involving family violence, *pro se* victims often do not know to request this. Most family violence cases involve an unequal level of power, which violates the theory of mediation. Judges should consider foregoing the mediation process when family violence issues exist.
- *Fear that the case will never end.* Once a victim has made the difficult decision to end the relationship, it is in the batterer's self-interest to request continuances and intense discovery to drag the case out as long as possible. This lack of closure is unhealthy for the victim and the children. Judges should consider the impact of continuances on both parties.

Victims often request dismissal of protective orders. Some reasons that victims request dismissal of a protective order application include:

- Fear of and coercion by the batterer or someone on his behalf;

- Need for economic assistance of batterer;
- Abuser’s promises to change, which the victim wants to believe; and
- Desire to maintain the parent-child bond between the abuser and his children.

Before granting a dismissal, a judge should review the application to see if severe abuse is alleged. If so, the court should consider offering a modification instead of full dismissal. There are ways to allow the batterer to have contact, or even return to the residence, for example, and still protect the victim from further abuse.

Batterers hurt their children by harming the mother. Over half of men who abuse their partners also abuse their children. Even those children who are not directly abused are aware of the violence against their mother. The impact on children exposed to family violence includes psychological and emotional reactions, and higher incidence of drug and alcohol abuse and suicide attempts. Children may often emulate the behavior to which they are exposed: girls from abusive households often grow up to be abuse victims and boys often grow up to be abusers. However, a negative role-model can be counteracted by keeping the children with the non-offending parent. Judges can help victims overcome the barriers victims face in doing so by invoking legal protections, such as holding offenders accountable in criminal court actions, granting protective orders, and ordering sole custody of children to victims with only supervised visitation with the abuser.

Proper judicial responses can empower family violence victims.

- **Use of community resources, including training.** As with any special area of the law, additional training helps inform the court’s decisions. This can come from a number of sources, including working with local or statewide family violence programs. These programs can provide free information and volunteers to assist court staff (for instance, volunteers to observe the parties before and after the hearing). Every state-funded advocacy program has a legal advocate, whose job involves assisting victims participating in the civil and criminal justice systems. The legal advocates explain the process and accompany their clients to court. Judges who work with the legal advocate serving their jurisdiction have found that the support they offer can increase the likelihood that victims will take advantage of legal remedies to help keep them and their children safer.

- **Make the courthouse a safe place.** Enhanced courthouse security can include: a safe waiting place for victims before and after court proceedings; presence of armed courtroom security; offers of armed escort from the courthouse; staggered departure times (order the abuser to remain in the courtroom for 15 minutes after the proceeding); and constant monitoring of the parties by court staff. Establishing a safe, non-judgmental courtroom environment will send a message to victims that they are welcome to return whenever judicial relief is needed.
- **Hold offenders accountable.** A batterer who shows open disregard for orders of the court presents a greater risk of harm to the victim. The court can attempt to reduce this harm by making compliance reviews a part of the legal process. During show cause hearings, probation status hearings, or other proceedings regarding violations, the court should focus on what will enhance victims safety. The victim's insights about this subject can help the court tailor the appropriate relief.
- **Communicate a message of zero tolerance for family violence.** Judges' position of power in their communities impacts both parties significantly. Every word from the judge will have strong implications, and must clearly reinforce that the offender's behavior is unacceptable and will be punished. Batterers are experts at manipulation and will quote anything available to reinforce their position. Victims need affirmation of their position as well, and will listen carefully for messages that they are not the ones at fault and that the offender is responsible for his own actions. How the judge addresses the parties and the message conveyed by the judge can have significant impact on realignment of power between the parties.
- **Participate in a coordinated community response to family violence in your jurisdiction.** Many communities have found case or fatality reviews to be an important part of responding to family violence in the justice system. Victim safety can be enhanced when agencies frankly discuss what worked, didn't work and what can be changed to improve outcomes.
- **Economic relief.** A common way in which an abuser exerts control is by means of financial abuse- deliberately restricting one's partner from access and options in regards to money, employment, or education. For this reason, including economic relief within civil orders and/or providing clear and accurate information pertaining to resources for survivors can be critical to ongoing safety and stability of survivors and enhance the efficacy of orders. One such

form of relief / resource is child support. Child support can provide significant needed income to survivors and their children. Further, the Office of the Attorney General, Texas' IV-D agency, has protections in place that can assist survivors as they navigate this system. See [*Summary of OAG-CSD Policies Related to Family Violence*](#) for more information about the OAG's policies regarding child support and family violence. Survivors can visit www.getchildsupportsafely.org for more information on this process as well as recommended safety precautions.

A victim's decision to invoke legal protections to sever an abusive relationship is a brave one. Allegations of family violence must be taken seriously. Educating yourself by using this book as a reference and resource is a good beginning. Reaching out to professionals to develop a wrap-around system in which all aspects of your community respond in a manner which prioritizes victim safety is crucial. The judge's role in the justice system proves a unique opportunity to aid in the effort to end against family violence.

SECTION VII—RESOURCES AND INDICIES

CHAPTER 19—RESOURCES

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NOTE: The peer-reviewed articles listed in this abstract are included as representative, but not definitive, of the published works of experts in selected fields. The purpose of this abstract is to foster and aid further research. The opinions expressed in these articles are those of the authors and do not reflect the opinions of the Office of Court Administration or the State of Texas.

A

AUTHOR: Linda Askowitz and Michael Graham
JOURNAL: [15 Cardozo L. Rev. 2027](#) (April 1994)

ARTICLE: THE RELIABILTY OF EXPERT PSYCHOLOGICAL TESTMONY IN CHILD SEXUAL ABUSE PROSECUTIONS

ABSTRACT: This article urges that courts to take a more active role in ensuring the reliability of expert psychological testimony admitted in child sexual abuse prosecutions. It describes three major problems that courts must recognize and squarely address.

Part I posits four classifications of expert psychological testimony offered in child sexual abuse prosecutions and describes the conceptual models on which each classification of testimony is based: the child sexual abuse accommodation syndrome, the psychiatric diagnosis of post-traumatic stress disorder, techniques of statement validation, and the child sexual abuse syndrome. It describes the general pattern of admissibility of testimony based on each theory and discusses the limitations of each theory that may counsel against considering such a theory sufficiently reliable to form the basis for the expert's psychological testimony.

Part II describes the common law "screening devices" and the impact of the Federal Rules of Evidence on the ability of courts to sift through evidence and exclude unreliable information. This Part also explores the Frye test and other alternatives employed to "screen" novel scientific evidence to ensure sufficient reliability and to assess the potential impact of Daubert.

Part III describes problems with research conducted in this field and, accordingly, the adequacy of the bases employed by experts in the field. This Part also highlights the need for research on the public's knowledge about the dynamics of child sexual abuse in order to determine whether expert testimony actually assists the jury, and for research on whether expert testimony unduly influences the jury's decision-making process in a child sexual abuse prosecution. This research would help courts better to determine the purposes for which expert testimony on child sexual abuse is appropriate.

Conclusion: This Article concludes that expert psychological testimony can play an important and legitimate role in many child sexual abuse prosecutions. It cautions, however, that the abhorrence of the crime does not justify brushing aside reliability considerations. Rather, the stakes for the child, the defendant, and the integrity of the criminal judicial system counsel for a heightened scrutiny of this testimony.

AUTHOR: Michelle Aulivola
JOURNAL: 42 Family Court Review 162 (2004)

ARTICLE: OUTING DOMESTIC VIOLENCE: AFFORDING APPROPRIATE PROTECTIONS TO GAY AND LESBIAN VICTIMS

ABSTRACT: This article defines and outline issues specific to the topic, such as worries about outing, isolation, questionable safety in shelters, and sodomy statutes. The note then discusses the differences same-sex and heterosexual couples face in criminal and civil cases of domestic violence and when dealing with the police. Following a current report on the status of domestic violence statutes in the states, the author tackles the problem of common misconceptions regarding the application of state domestic violence statutes to gays and lesbians.

B

AUTHOR: Donna D. Bloom
JOURNAL: 36 St. Mary's L. Journal 717 (2005)

**ARTICLE: "UTTER EXCITEMENT" ABOUT NOTHING: WHY DOMESTIC
VIOLENCE EVIDENCE-BASED PROSECUTION WILL SURVIVE**
CRAWFORD v. WASHINGTON

ABSTRACT: This Comment outlines and summarizes the use of evidence-based prosecution of domestic violence offenses, examining the history of and reliance upon the excited utterance hearsay exception.

It also outlines and summarizes the law as it stood before Crawford and how it was used to support the strategy of evidence-based prosecution of domestic violence offenses.

It then explores theoretical framework of the Crawford decision and its implications for future use of an evidence-based strategy, specifically reporting what lower courts have determined to this point concerning the excited utterance hearsay evidence exception.

Finally, this Comment attempts to resolve the conflict among Texas appellate courts by examining the significant decisions in excited utterance exception case law in Texas and suggesting that this doctrine and should inform any Crawford analysis involving police-the victim interaction and the admissibility of any hearsay statements that result from that exchange.

This Comment concludes by showing that the reasoning used and conclusion reached by one Texas court in conflict is a misapplication of the testimonial doctrine of Crawford that threatens to destroy the foundation of evidence-based prosecution in Texas.

AUTHOR: Katherine G. Breitenbach
JOURNAL: [71 Albany L. Rev. 1255](#) (2008)

**ARTICLE: BATTLING THE THREAT: THE SUCCESSFUL PROSECUTION
OF DOMESTIC VIOLENCE AFTER *DAVIS V. WASHINGTON***

ABSTRACT: This note examines the progression of Confrontation Clause jurisprudence from *Ohio v. Roberts* to *Crawford v. Washington* to the recent Supreme Court decision in *Davis*. In particular, this note will focus on the effect of *Davis* and its predecessors on the prosecution of domestic violence.

Part I discusses the problems involved in the prosecution of domestic violence prior to the *Crawford* decision, namely the impact of the Confrontation Clause and the emergence of evidence-based prosecution.

Part II details the *Crawford* decision and its influence on the prosecution of domestic violence.

Part III carefully examines *Davis*, its newly articulated standard, and the factual contexts of the dual-decision.

Part IV compares the application of the *Davis* standard in domestic violence cases around the country.

Part V discusses the effect of *Davis* on the future of domestic violence prosecution and outlines potential solutions for the continued success of such prosecution.

AUTHOR: Carol Bruch
JOURNAL: [35 Fam. L. Q. 527](#) (2001).

**ARTICLE: PARENTAL ALIENATION SYNDROME AND PARENTAL
ALIENATION: GETTING IT WRONG IN CHILD CUSTODY CASES**

ABSTRACT: This article discusses methodological concerns about the research on parental alienation syndrome and suggests that the term is often too loosely applied to any situation in which a child is reluctant to visit a parent.

AUTHOR: Sarah Buel
JOURNAL: 28 Colorado Lawyer 19 (1999)

**ARTICLE: FIFTY OBSTACLES TO LEAVING, A.K. A.,
WHY ABUSE VICTIMS STAY**

ABSTRACT: This article lists some of the possible reasons that victims of domestic violence remain in an abusive relationship.

AUTHOR: A. Burgess, T. Baker and R. Halloran
JOURNAL: 12 J. of Fam. Violence 389 (December 1997)

ARTICLE: STALKING BEHAVIORS WITHIN DOMESTIC VIOLENCE

ABSTRACT: An examination of data from 120 male and female batterers of varied age and marital, educational, and economic status, who attended group treatment for batterers or who were charged with domestic violence from January to February 1996 in a district court setting, produced the following findings:

Stalkers tended to live alone, were less likely to be married, were not living with children, and used more alcohol than non-stalkers. They also tended to have had a history of prior stalking offenses and of being abused themselves.

Factor analysis found three stalking groupings: one in which discrediting was the key, a second revolving around love turning to hate, and a third with violent confrontation with the ex-partner.

AUTHOR: John M. Burman
JOURNAL: 9 Michigan Gender & Law 207 (2003)

**ARTICLE: LAWYERS AND DOMESTIC VIOLENCE:
RAISING THE STANDARD OF PRACTICE**

ABSTRACT: This article strives to shed some light on the profound effect domestic violence has on law and law practice, as well as the profound effect lawyers and the legal system can have on domestic violence.

Part II of this article demonstrates the extent and pervasiveness of domestic violence.

Part III describes how domestic violence will affect a lawyer's practice.

Part IV provides guidance on what a lawyer should do to determine if a prospective client or a current client is involved in domestic violence, and, if so, how the lawyer should assist the prospective client or client in taking measures to protect against future violence.

Part V addresses a lawyer's duty to warn non-clients of possible domestic violence by a client. This article is, in sum, about what a reasonable lawyer should know about domestic violence and what that reasonable lawyer should do with that knowledge.

C

**AUTHOR: J. Campbell, D. Webster, J. Koziol-McLain , et al.
JOURNAL: 93 Am J. Public Health 1089 (2003)**

**ARTICLE: RISK FACTORS FOR FEMICIDE IN ABUSIVE
RELATIONSHIPS: RESULTS FROM A MULTISITE CASE CONTROL
STUDY**

ABSTRACT:

Objectives. This 11-city study sought to identify risk factors for femicide in abusive relationships.

Methods. Proxies of 220 intimate partner femicide victims identified from police or medical examiner records were interviewed, along with 343 abused control women.

Results. Pre-incident risk factors associated in multivariate analyses with increased risk of intimate partner femicide included perpetrator's access to a gun and previous threat with a weapon, perpetrator's stepchild in the home, and estrangement, especially from a controlling partner. Never living together and prior domestic violence arrest were associated with lowered risks. Significant incident factors included the victim having left for another partner and the perpetrator's use of a gun. Other significant bivariate-level risks included stalking, forced sex, and abuse during pregnancy.

Conclusions. There are identifiable risk factors for intimate partner femicides.

AUTHOR: John Castellanos
JOURNAL: LEXIS EMERGING ISSUES

**ARTICLE: THE LEGAL SIGNIFICANCE AND PRACTICAL IMPACT OF
*GILES V. CALIFORNIA***

ABSTRACT: In *Giles v. California*, 554 U.S. 353, [128 S.Ct. 2678](#), [171 L.Ed.2d 488](#) (2008), the Supreme Court resolved a split of authority on a critical issue concerning the scope of the doctrine of forfeiture by wrongdoing, under which a defendant may lose his right to confront a prosecution witness if he is responsible for that witness's absence at trial. The Court determined that the prosecution must establish not merely that the defendant caused the witness's unavailability but that he acted with the design or purpose of preventing the witness from giving evidence against him. This ruling overturned a series of state and federal cases under which a wrongful act resulting in the witness's absence even the very act for which the defendant is on trial had been held sufficient grounds to admit the witness's prior statements.

The decision also left many other important issues unresolved, such as how the doctrine will be applied, as a practical matter, in ordinary domestic violence cases, in which the victims frequently refuse to appear to testify; what standard of proof is required to satisfy the showing of design or purpose mandated by *Giles*; and whether hearsay from the victim can be used to establish the reason for the victims absence. Strategies for addressing these questions, along with the legal significance and practical impact of *Giles*, are discussed.

Available at:

http://www.lexis.com/research/retrieve?_m=64dceebfc272e486e5a031314be64878&csvc=le&cform=byCitation&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVtz-zSkAl&_md5=8299cf3903b7d692d3263d5914815404

AUTHOR: J. Chang et al.

JOURNAL: 19 Journal of Women's Health 251 (January 2010)

**ARTICLE: UNDERSTANDING TURNING POINTS IN INTIMATE PARTNER
VIOLENCE: FACTORS AND CIRCUMSTANCES LEADING WOMEN
VICTIMS TOWARD CHANGE**

ABSTRACT: The authors examined various factors and situations associated with female domestic violence victims' decisions to leave violent relationships. The study used seven focus groups and multiple interviews with 61 individuals. The subjects identified specific "turning points" that motivated the decision to end the violence relationship. Each turning point resulted in a dramatic shift in the way the victim perceived herself, her violent partner, and their relationship. Thematically the turning points involved: (1) need to protect others from the abuse, (2) escalation of the severity of the abuse or humiliation; (3) increased awareness of options or access to support services; (4) fatigue or recognition that the violence was going to continue, and (5) infidelity or other betrayal by the partner.

AUTHOR: Andrew Cohen
JOURNAL: [74 Geo. L. J. 429](#) (1985)

**ARTICLE: THE UNRELIABILITY OF EXPERT TESTIMONY ON THE
TYPICAL CHARACTERISTICS OF SEXUAL ABUSE VICTIMS**

ABSTRACT: This article presents analysis of the reliability of expert testimony on the typical characteristics of sexual abuse victims.

Part I: The article explores the few cases that have addressed this issue. The note will then examine whether such evidence meets the Federal Rules of Evidence test for admissibility of expert testimony.

Part II: The article briefly considers the courts' treatment of expert testimony on related syndromes and will consider two authors' relatively detailed descriptions of "sexual abuse syndrome."

Conclusion: The article concludes that since expert testimony on the typical characteristics of sexual abuse victims may mislead juries, such testimony should only be admitted in unusual cases, no matter how urgent society's interest in protecting children.

AUTHOR: Patricia Cole and Sarah Buel
JOURNAL: 7 Georgetown J. on Poverty L. and Pol’y 307 (2000)

**ARTICLE: SAFETY AND FINANCIAL SECURITY FOR BATTERED
WOMEN; NECESSARY STEPS FOR TRANSITIONING
FROM WELFARE TO WORK**

ABSTRACT: The authors discuss family violence and its impact upon the transition from welfare to work under the Temporary Assistance for Needy Families program established by the 1996 welfare.

This article highlights many aspects of domestic violence, including its relation to race and poverty, and presents a number of recommendations as to how women in poverty who suffer from domestic abuse should be treated.

This article also discusses the Family Violence Option which allows states to exempt TANF recipients from workforce participation if such participation would escalate domestic violence, impede escape from domestic violence, or result in sanctions against women as a result of domestic violence.

The authors discuss the effectiveness of domestic violence services and make a number of recommendations as to how these services.

AUTHOR: F. Coleman
JOURNAL: 12 J. of Interpersonal Violence 420 (1997)

**ARTICLE: STALKING BEHAVIOR AND
THE CYCLE OF DOMESTIC VIOLENCE**

ABSTRACT: The study's purpose was to refine the behavioral definition of stalking, to investigate the role stalking plays in the cycle of domestic violence, and to develop demographic profiles of stalkers and their victims.

A total of 141 female undergraduates completed a questionnaire designed to assess the occurrence of threatening or violent behaviors in former heterosexual, romantic relationships. Subjects were placed in a control, harassed, or stalked group based on their responses to several questions modeled on Florida's anti-stalking law.

The Conflict Tactics Scale was used to assess the presence of domestic violence during the relationships, and the Stalking Behavior Checklist was used to measure the occurrence of stalking behaviors after the relationships had ended.

Results showed that subjects who reported significantly more verbal and physical abuse during the relationships were more likely to be stalked by their former partners after the relationships ended.

AUTHOR: Dana Conner
JOURNAL: [79 Temple L. Rev. 877](#) (Fall 2006)

ARTICLE: TO PROTECT OR TO SERVE: CONFIDENTIALITY, CLIENT PROTECTION, AND DOMESTIC VIOLENCE

ABSTRACT: The goal of this Article is to provide information about the ethical realities of representing battered women.

Part II of this Article begins with a brief overview of the unique characteristics of the victim-client and provides basic information to help counsel make informed decisions in representing her.

Part III discusses circumstances under which ethical dilemmas may arise and provides concrete examples such as when the victim-client returns to or remains in the abusive relationship.

Part IV considers the special and unique relationship that can exist between the victim-client and her counsel, which is not typically found in other areas of practice.

Part V discusses the duty of confidentiality and how the rules that guide our profession must be adapted to serve the victim-client.

Part VI will focus on the potential reaction of courts and disciplinary bodies to issues of protection and confidentiality. The issue is not just a question of client protection but also a matter of ensuring that the attorney's decisions will not be subject to review.

Part VII will focus on the complex process of predicting harm to the client and provides examples of potentially useful risk assessment tools.

Part VIII discusses the limitations on the attorney's duty to pursue the client's best interests and the need to empower the client.

Part IX discusses the role of client autonomy.

Part X is designed to provide the practicing attorney with examples of how risk assessment tools and other techniques can be used to enhance representation, minimize the number of times the dilemma arises, and help the client make better choices.

The **Conclusion** suggests education and training, as well as changes to the Model Rules, to help guide the attorney to make better choices and to protect the attorney under those limited circumstances when he or she may need to act to save a human life.

AUTHOR: Mark Correro
JOURNAL: [45 S. Tex. L. Rev. 419](#) (Spring 2004)

**ARTICLE: GET A DIVORCE—BECOME A FELON:
*U.S. V. EMERSON***

ABSTRACT: This note contends that the Fifth Circuit's analysis of the Second Amendment, though incomplete, was correct in concluding that it does protect an individual's right to keep and bear arms. However, the court's application of [18 U.S.C. 922\(g\)\(8\)](#) to Mr. Emerson as sufficient to support the deprivation of this right, even without an express finding of danger, is incorrect and grossly simplistic in light of current Tenth Amendment jurisprudence. Specifically, in *Printz v. United States*, the Supreme Court held unconstitutional another section of this statute, 922(s)(2), because it violated principles of "dual sovereignty" by impressing state officers into the service of the federal government.

Part II examines the Supreme Court's interpretations of the Second Amendment.

Part IV examines *United States v. Emerson* and argues that although the court's analysis of the Second Amendment is correct, it oversimplified the issue because Mr. Emerson failed to raise a Tenth Amendment argument.

Part V views 922(g)(8) under the lens of both the Tenth Amendment and the Court's ruling that the Second Amendment protects an individual right to bear arms. Considering these together, it is clear that the statute unconstitutionally usurps the state's authority in family law matters.

Part VI concludes this note by suggesting that future courts should always consider the limiting nature of the Tenth Amendment when examining challenges to federal statutes under the Second Amendment.

D

AUTHOR: Lynn Davis, et al.

JOURNAL: 7 Harv. Latino L. Rev. 1 (2004)

ARTICLE: The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation

ABSTRACT: Language interpreters overcome the barriers and cultural misunderstandings that can render criminal defendants virtually absent from their own proceedings. Interpreters also eliminate the misinterpretation of witnesses' statements made to police or to triers of fact during court proceedings. This Article focuses primarily on the criminal justice system, but appellate criminal case law analysis arguably may apply to civil, probate, and administrative proceedings as well. Interpreters are extremely beneficial, perhaps even necessary, in civil matters that involve complex issues such as the termination of parental rights, adoptions, and the terms and conditions of divorce settlements.

AUTHOR: Laurie Dore
JOURNAL: [56 Ohio St. L.J. 665](#) (1995)

**ARTICLE: DOWNWARD ADJUSTMENT AND THE SLIPPERY SLOPE:
THE USE OF DURESS IN DEFENSE OF BATTERED OFFENDERS**

ABSTRACT: This article explores whether the "battered woman defense," as currently formulated in the self-defense context, comports with the present parameters and underlying rationale of duress itself.

Part I concludes that excusing battered offenders in non-traditional cases of alleged coercion would require either an explicit or implicit downward adjustment in the ordinarily stringent requirements of classic duress. Such a modification would further require that the principles of criminal responsibility themselves be altered to speak in a more caring and individualistic voice attuned to the plight of a much broader class of defendants than battered women alone. Absent such adjustments, consideration of the coercion undoubtedly experienced by many battered offenders must be relegated to sentencing, where duress and the battered woman syndrome should play a prominent role in mitigation of punishment.

Part II considers the potential ramifications of expanding duress to excuse battered offenders. Given the prevalence of domestic violence, as well as the dramatic increase in the arrest and imprisonment rates for women, duress constitutes a much broader and more legally significant defense for battered women than self-defense, on which virtually all legal commentary currently focuses.

Notwithstanding its potentially greater significance, however, the duress asserted by battered offenders relies heavily upon the psychological and legal theories utilized in battered women's self-defense work.

Part III briefly examines the nature of the battered woman syndrome and the role it currently plays in circumventing the obstacles that battered women often encounter under traditional self-defense doctrine.

Parts IV examines the traditional elements of duress and the roadblocks currently confronting battered offenders under that classic formulation.

Part V explores possible means of circumventing those obstacles, whether through the explicit or implicit modification of duress itself, or via increasing sentencing discretion.

Parts VI and VII conclude by examining which, if any, of those options comport with the underlying nature of duress, as well as principles of criminal responsibility.

AUTHOR: Kevin Douglas and Donald Dutton
JOURNAL: 6 Aggression and Violent Behavior 519 (2000)

**ARTICLE: ASSESSING THE LINK BETWEEN STALKING AND
DOMESTIC VIOLENCE**

ABSTRACT: This article evaluates the potential link between stalking and domestic violence. The authors propose that stalkers of ex-intimate partners display the same personality characteristics as borderline/clinic domestic violence batterers: emotional volatility, attachment dysfunction; primitive defenses, weak egos, jealousy, anger, substance abuse, and early childhood trauma.

AUTHOR: Mary Ann Dutton
JOURNAL: [21 Hofstra L. Rev. 1191](#) (1993)

**ARTICLE: UNDERSTANDING WOMEN'S RESPONSES
TO DOMESTIC VIOLENCE: A REDEFINITION OF
BATTERED WOMAN'S SYNDROME**

ABSTRACT: This article proposes to redefine battered woman syndrome; to provide a conceptual framework for examining, in the context of the legal system, the diversity of women's responses to violence; and to provide a review of the current related social science literature.

Each of the four parts begins by discussing one of the components of the conceptual framework, posed as questions to be considered in an expert witness evaluation of a battered woman. The information gathered in each of these key areas must then be interpreted within the framework of current scientific knowledge and the expert witness' experience concerning these issues. The scientific literature concerning battered women's experiences is both informed by and applied to the phenomenological experience of battered women. Thus, each section concludes with a review of the relevant scientific literature.

E

AUTHOR: Deborah Epstein
JOURNAL: 11 Yale J. of Law and Feminism 3 (1999)

**ARTICLE: EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE
CASES: RETHINKING ROLES OF PROSECUTORS, JUDGES, AND THE
COURT SYSTEM**

ABSTRACT:

Part I documents that battering by husbands, ex-husbands, or lovers is the single largest cause of injury to women in the United States, and accounts for approximately 30% of all murders of women.

Part II examines why, although during the last 30 years every state has enacted civil laws designed to protect the victims of family violence and Congress has appropriated considerable funding of further efforts to combat the problem, the states' responses to domestic violence remains inadequate.

Part III discusses why the criminal justice system's response to domestic violence still requires substantial improvement, despite the recent enactment of some reforms. For instance, a survivor may now be forced to assist in the criminal prosecution of an abusive partner, regardless of her physical danger from retaliation assault, her cultural and religious misgivings about breaking up the family, her economic vulnerability to the loss of spousal support, and her individual need for agency and control.

Part IV explores how the piecemeal nature of the traditional court system presents further obstacles for battered women seeking justice.

Part V suggests ways to root out the long-standing hostility exhibited by court personnel and judges toward domestic violence complainants.

F

AUTHOR: David Faigman and Amy Wright

JOURNAL: [39 Ariz. L. Rev. 67](#) (1997)

ARTICLE: THE BATTERED WOMAN SYNDROME IN THE AGE OF SCIENCE

ABSTRACT: This article chronicles the rise and fall of the battered woman syndrome.

Part I: The battered woman syndrome has no basis in science and has received its main support from the politics it was believed to advance. There are thus two sound reasons for expecting it to pass from the courtroom stage. First, as courts begin to apply a more sophisticated understanding of science to evaluations of the admissibility of expert testimony, the syndrome's pseudoscientific nature will become obvious. Second, as the anti-feminist implications of the syndrome's use become more apparent, advocates for battered women will increasingly abandon it.

Part II discusses the scientific research that actually supports syndrome theory and finds that it is largely wanting. The doctrinal disarray surrounding the case law is partly attributable to the vacuity of the research program supporting theory.

Part III provides a detailed overview of the many uses now made of the syndrome.

Part IV addresses the often-stated proposition that research on domestic violence cannot be expected to be very good, given the difficulty in conducting it. This section argues that when science is hard to do, bad science is not the solution.

Part V explores the future of this area of the law. Most courts now follow the United States Supreme Court's recently crafted standard for scientific evidence which requires that scientific expert testimony be based on research that employed the scientific method. The battered woman syndrome will fare poorly under this standard. Given the lack of a scientific basis for theory, and the fact that theory is essentially inimical to the women it was designed to serve, the syndrome should eventually be abandoned. Its passing should not be mourned by either advocates of battered women or those who cherish scientific integrity.

AUTHOR: Rosemary Flint
JOURNAL: [23 Am. J. Crim. L. 171](#) (Fall 1995)

**ARTICLE: CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME:
ADMISSIBILITY REQUIREMENTS**

ABSTRACT: This article addresses the appropriateness of a ban on Child Sexual Abuse Accommodation Syndrome testimony in light of changing standards regarding novel scientific evidence. Because many states model their evidentiary standards after the Federal Rules of Evidence, the admissibility of CSAAS testimony is analyzed in accordance with the applicable federal rules.

The article evaluates approaches taken by courts that allow limited use of CSAAS testimony. This article argues that the role of CSAAS testimony in the courtroom should be limited to providing insights into how the behavior of sexually abused children may differ from jurors' expectations of how such victims would act, so that actions that would otherwise be seen as impeaching the credibility of the witness are more accurately interpreted. However, to forbid the prosecution from introducing CSAAS testimony unless the defense has explicitly challenged the credibility of the victim is an unworkable requirement that should not be implemented.

The article concludes that CSAAS evidence should be admissible for limited purposes regardless of the strategy advanced by the defense.

G

AUTHOR: Raquel Gabriel

JOURNAL: [43 California Western L. Rev. 417](#) (2007)

**ARTICLE: INTIMATE PARTNER VIOLENCE IN THE GLBT
COMMUNITIES: A SELECTED ANNOTATED BIBLIOGRAPHY**

ABSTRACT: The selected readings and sources are a primer on the issues facing GLBT individuals who become the victims of intimate partner violence. Compared to other minority groups, the available information in the legal and social sciences field is steadily growing in terms of examining the cause of intimate partner violence in the gay and lesbian communities. Such scholarship also highlights the need to include the bisexual and transgendered when investigating the roots of relationship violence.

AUTHOR: Deborah Goelman
JOURNAL: 13 Colum. J. Of Gender & L. 101 (2004)

**ARTICLE: SHELTER FROM THE STORM: USING JURISDICTIONAL
STATUTES TO PROTECT VICTIMS OF DOMESTIC VIOLENCE AFTER
THE VIOLENCE AGAINST WOMEN ACT**

ABSTRACT:

Part I begins with an examination of how the United States legal system has historically addressed domestic violence and then discusses the current responses of the criminal and civil justice systems, and also provides readers with a contemporary overview of issues related to domestic violence survivors' flight across state lines. These include the dangers of separation violence when the victims leave their abusers, the impact of domestic violence on children, and the potential protection that relocation offers many victims.

Part II of the article surveys custody litigation in domestic violence cases, first examining batterers' use of litigation to control the victims and also sets forth the procedural vehicles through which custody and visitation orders may be entered. In particular, the article summarizes how orders are issued under domestic relations and protection order statutes.

Part III of the article reviews the jurisdictional statutes that may be involved in such cases, providing specific examples of statutory provisions that could be used to assist domestic violence survivors.

Part IV uses a hypothetical fact pattern to demonstrate how these jurisdictional laws may be applied in practice to safeguard the victims.

Part V concludes that courts and family law attorneys currently do not utilize these laws in ways that protect domestic violence survivors. Furthermore, it recommends that training on jurisdictional laws and education designed to correct misconceptions about domestic violence could lead to necessary cultural change.

AUTHOR: Leigh Goodman
JOURNAL: [23 St. Louis U. Pub. L. Rev. 7](#) (2004)

**TITLE: THE LEGAL RESPONSE TO DOMESTIC VIOLENCE: PROBLEMS
AND POSSIBILITIES**

ABSTRACT: This article examines the legal interventions most frequently employed by battered women and their advocates and details the problems faced by battered women as a result of reliance on these strategies and urges lawyers to think beyond the legal system when responding to domestic violence.

AUTHOR: Amy Gottlieb
JOURNAL: 227 N. J. Law 18 (April 2004)

**ARTICLE: THE VIOLENCE AGAINST WOMEN ACT:
REMEDIES FOR IMMIGRANT VICTIMS
OF DOMESTIC VIOLENCE**

ABSTRACT: This article surveys the laws applicable to the concerns of immigrant victims of domestic violence.

AUTHOR: S. Graham-Bermann and J. Seng
JOURNAL: 146 Journal of Pediatrics 309

**ARTICLE: VIOLENCE EXPOSURE AND TRAUMATIC STRESS
SYMPTOMS AS ADDITIONAL PREDICTORS OF
HEALTH PROBLEMS IN HIGH-RISK CHILDREN**

ABSTRACT:

OBJECTIVE: To test the hypotheses that both violence and traumatic stress symptoms are associated with negative health status among poor preschool children.

STUDY DESIGN: This cross-sectional analysis of a Head Start preschool age cohort (n = 160) studied health outcomes parallel to those assessed in the 2001 National Health Interview Survey of child health (asthma, allergy, attention deficit hyperactivity disorder, global appraisal) as well as two stress-related somatic complaints, gastrointestinal problems and headache. Risk factors include socio-demographics, mothers' health factors, extent of exposure to violence and maltreatment, and mother- and teacher-reported traumatic stress symptoms.

RESULTS: Compared with poor children in the National Health Interview Survey and their Head Start peers, children exposed to violence and those with high levels of traumatic stress had significantly worse outcomes in a dose-response relation. Being abused, being exposed to domestic violence, and having a mother using substances were associated with a higher number of health problems. The hierarchical model established the mother's own poor physical health and the child's level of traumatic stress as the strongest predictors of poor child health.

CONCLUSIONS: These two risk factors are amenable to intervention by health care providers who treat children.

H

AUTHOR: Cheryl Hanna

JOURNAL: [109 Harv. L. Rev. 1849](#) (June 1996)

**ARTICLE: NO RIGHT TO CHOOSE: MANDATED VICTIM
PARTICIPATION IN DOMESTIC VIOLENCE PROSECUTIONS**

ABSTRACT: This article examines the tensions that arise when the state uses its powers to compel women to assist in the prosecution of their batterers.

AUTHOR: Anna Hanson
JOURNAL: [63 Ark. L. Rev. 177](#) (2010)

ARTICLE: THE U VISA: IMMIGRATION LAW'S BEST KEPT SECRET

ABSTRACT: This note contains an overview of the U visa, including its history, the requirements for eligibility, and the application and appeals process. It will also compare the U visa with the S and T visas, its sister legislation.

AUTHOR: G. M. Herek et al.
JOURNAL: 12 Journal of Interpersonal Violence 195 (1997).

**ARTICLE: HATE CRIME VICTIMIZATION AMONG
LESBIAN, GAY, AND BISEXUAL ADULTS**

ABSTRACT: Although violence based on sexual orientation is now widely recognized as a serious problem in the United States, social science data concerning the prevalence and consequences of such crimes are limited. In the present study, questionnaire data about the victimization experiences were collected from 147 lesbians, gay men, and bisexuals (74 females, 73 males) in the Sacramento area. In addition, 45 of the respondents participated in a follow-up interview. Forty-one percent reported experiencing a bias-related criminal victimization since age 16, with another 9.5% reporting an attempted bias crime against them. The distribution of bias-related victimization and harassment experiences in the sample resembled patterns reported in other U.S. surveys with similar samples. Compared to other respondents, bias-crime survivors manifested higher levels of depression, anxiety, anger, and symptoms of post-traumatic stress. Methodological and substantive issues in empirical research on hate crimes against lesbians and gay men are discussed.

AUTHOR: G.M. Herek, J.R. Gillis, & J.C. Cogan
JOURNAL: 67 J. Consulting and Clinical Psychology 945 (1999)

**ARTICLE: PSYCHOLOGICAL SEQUELAE OF HATE CRIME
VICTIMIZATION AMONG LESBIAN, GAY, AND BISEXUAL ADULTS**

ABSTRACT: To examine the correlation between sexual orientation and becoming a hate crime victim, this study surveyed 2,259 lesbian, gay men, and bisexual persons in the Sacramento area.

The participants revealed that: 20% of lesbians and 25% of gay men had been the victim of a hate crime since age 16 and the majority had been victimized in the preceding 5 years.

When compared to the population of non-hate crime victims who had the same sexual orientation, the lesbian and gay men hate-crime victims displayed significantly more signs of psychological damage.

AUTHOR: C. Quince, E. Hopkins, et al.
JOURNAL: [23 St. Louis U. Pub. L. Rev. 289](#) (2004)

**ARTICLE: APPLYING RESTORATIVE JUSTICE TO ONGOING INTIMATE
VIOLENCE: PROBLEMS AND POSSIBILITIES**

ABSTRACT:

Part I identifies the problem as being the limited existing remedies for domestic violence.

Part II explains what restorative justice is.

Parts III and IV assess feminist theories and particular critiques of the application of restorative justice to intimate violence, identifying them as primarily empirical ones.

Part V asserts that restorative justice succeeds when traditional prosecution does not.

Part VI urges that the application of restorative justice concepts in the context of domestic violence be carefully studied and evaluated.

J

AUTHOR: Carol Jordan
JOURNAL: [38 Brandeis L. J. 513](#) (2000)

**ARTICLE: STALKING: CULTURAL, CLINICAL, AND LEGAL
CONSIDERATIONS**

ABSTRACT: This article examines statistical data about stalking and the research on the personality types of stalkers.

K

AUTHOR: M. Kernic, et al.

JOURNAL: 27 Child Abuse & Neglect 1231 (November 2003)

**ARTICLE: BEHAVIORAL PROBLEMS AMONG CHILDREN
WHOSE MOTHERS ARE ABUSED
BY AN INTIMATE PARTNER**

ABSTRACT:

OBJECTIVES: To determine the association between children's exposure to maternal intimate partner violence (IPV) and behavior problems as measured by the parent report version of the Child Behavior Checklist (CBCL).

METHODS: The study population was comprised of 167 2- to 17-year-old children of Seattle women with police-reported or court-reported intimate partner abuse. The CBCL normative population served as the comparison group. Risk of behavior problems was calculated among the exposed children, in the presence and absence of a history of reported child maltreatment, relative to the normative population. Multiple logistic regression served as the primary method of analysis.

RESULTS: Children exposed to maternal IPV were more likely to have borderline to clinical level scores on externalizing (i.e., aggressive, delinquent) behavior (RR=1.6, 95% CI: 1.2, 2.1) and total behavioral problems (RR=1.4, 95% CI: 1.1, 1.9) compared to the CBCL normative sample after adjusting for age and sex. Children who were exposed to maternal IPV and were the victims of child maltreatment were more likely to receive borderline to clinical level scores on internalizing (i.e., anxious, depressed) behaviors (RR=2.6, 95% CI: 1.5, 3.6), externalizing (i.e., aggressive, delinquent) behaviors (RR=3.0, 95% CI: 1.9, 4.0) and total behavioral problems (RR=2.1, 95% CI: 1.2, 3.2) compared to the CBCL normative sample after adjusting for age and sex.

CONCLUSIONS: Exposure to maternal IPV is significantly associated with child behavioral problems both in the presence and absence of co-occurring child maltreatment. Appropriate attention to the mental health of children living in households with IPV is needed.

AUTHOR: Laurie Kohn
JOURNAL: [29 Hastings Const. L. Q. 1](#) (2001)

**ARTICLE: WHY DOESN'T SHE LEAVE?:
THE COLLISION OF FIRST AMENDMENT RIGHTS
AND EFFECTIVE COURT REMEDIES
FOR VICTIMS OF DOMESTIC VIOLENCE**

ABSTRACT: The article examines victim's motivation for staying in an abusive relationship when the batterer possesses truthful confidential information about the victim that could be harmful if publicly disclosed. The article examines the constitutional problems with a court-ordered ban on disclosure of such information.

L

AUTHOR: Lemon, Nancy

JOURNAL: 21 Berkeley J. Gender, L., & Justice 38 (2006)

ARTICLE: Access to Justice: Can Domestic Violence Courts Better Address the Need of Non-English Speaking Victims of Domestic Violence?

ABSTRACT: The article looks at the need for free professional interpreters in civil domestic violence cases in the U.S. as an access to courts issue

AUTHOR: Lieberman, Alicia F., et al.
**JOURNAL: 14 J. Am. Academy of Child Adolescent
Psychiatry 1241 (2005)**

**ARTICLE: TOWARD EVIDENCE BASED TREATMENT:
CHILD-PARENT PSYCHOTHERAPY WITH PRE-SCHOOLERS EXPOSED
TO MARITAL VIOLENCE**

ABSTRACT:

Objective: Treatment outcome for preschool-age children exposed to marital violence was assessed, comparing the efficacy of Child-Parent Psychotherapy (CPP) with case management plus treatment as usual in the community.

Method: Seventy-five multiethnic preschool mother dyads from diverse socioeconomic backgrounds were randomly assigned to (1) CPP or (2) case management plus community referral for individual treatment. CPP consisted of weekly parent-child sessions for one year monitored for integrity with the use of a treatment manual and intensive training and supervision. Parents completed the Child Behavior Checklist and participated in the Structured Clinical Interview for DC:0-3 to assess children's emotional and behavioral problems and posttraumatic stress disorder (PTSD) symptoms. Mothers completed the Symptom Checklist-90 and the Clinician Administered PTSD Scale interview to assess their general psychiatric and PTSD symptoms.

Results: Repeated-measures analysis of variance demonstrated the efficacy of CPP with significant group X time interactions on children's total behavior problems, traumatic stress symptoms, and diagnostic status, and mothers' avoidance symptoms and trends toward significant group X time interactions on mothers' PTSD symptoms and general distress.

Conclusions: The findings provide evidence of the efficacy of CPP with this population and highlight the importance of a relationship focus in the treatment of traumatized preschoolers.

AUTHOR: Tom Lininger
JOURNAL: [54 Hastings L. J. 525](#) (March 2003)

ARTICLE: A BETTER WAY TO DISARM BATTERERS

ABSTRACT: This article argues that the effective enforcement of [18 U.S.C. §§ 922\(g\)\(8\)](#) and [922\(g\)\(9\)](#) (the federal Gun Control Act) will require revision of these statutes, the Brady law, and the applicable sentencing guidelines.

Part I will examine the background of section 922(g)(8) and section 922(g)(9) and analyze their legislative history, their provisions, and their constitutionality.

Part II will focus on the practical hindrances that have limited the effectiveness of these statutes.

Part III will suggest reforms that will improve enforcement of the gun ban for domestic abusers.

AUTHOR: Tom Lininger
JOURNAL: [91 Va. L. Rev. 747](#) (May 2005)

ARTICLE: PROSECUTING BATTERERS AFTER *CRAWFORD*

ABSTRACT: This article suggests legislative reforms that would adapt the states' evidence codes to the new constitutional requirements in order to facilitate effective prosecutions of domestic violence.

Part I analyzes *Crawford* against the backdrop of the Supreme Court's confrontation jurisprudence over the prior two decades.

Part II focuses on the unique challenges posed by prosecutions of domestic violence, and the necessity for admitting hearsay in these prosecutions.

Part III offers suggestions for legislative reforms, and will consider possible objections to those proposals.

AUTHOR: Tom Lininger
JOURNAL: [85 Tex. L. Rev. 271](#) (December 2006)

TITLE: RECONCEPTUALIZING CONFRONTATION AFTER DAVIS

ABSTRACT: This article will recommend that states promptly seize the opportunity to legislate confrontation policy. State legislation, of course, cannot deviate from the Supreme Court's constitutional interpretation. In no event could a state provide fewer confrontation rights than the U.S. Constitution. At most, states can establish a more graduated calibration of confrontation law within the parameters set by Sixth Amendment jurisprudence. State legislation can also address ancillary issues. For example, states can equip police and prosecutors to investigate crimes and present evidence at trial in a manner that respects confrontation rights without compromising effective law enforcement.

Part I explores the evolution of the Supreme Court's confrontation jurisprudence and will consider the implications of this jurisprudence for particular categories of prosecutions.

Part II analyzes the arguments for and against a legislative role in confrontation policy, taking account of extra-constitutional norms that could inform such policy.

Part III presents legislative proposals that states should adopt in the wake of *Davis*. Part III urges an expansion of statutory hearsay law to allow the introduction of statements by absent declarants, especially the victims of violence, whose unavailability is excusable as a constitutional matter. Part III will also advocate a limited statutory right of confrontation for the defendants against whom the government offers non-testimonial hearsay.

AUTHOR: T. Logan and R. Walker.
JOURNAL: 24 J. Interpersonal Violence 675 (2009)

TITLE: CIVIL PROTECTIVE ORDER OUTCOMES: VIOLATIONS AND PERCEPTIONS OF EFFECTIVENESS

ABSTRACT: The study followed 698 women who received protective orders for a year. Three-fifths of these women experienced on-going violence during the period but the majority of the women perceived the protective order as effective. Risk factors are discussed as well as the need for enforcement.

M

AUTHOR: Marc McAllister

JOURNAL: [59 Case W. Res. 393](#) (Winter 2009).

**ARTICLE: DOWN BUT NOT OUT:
WHY GILES LEAVES FORFEITURE BY WRONGDOING
STILL STANDING**

ABSTRACT: This article discusses *Giles v. California* in which the United States Supreme Court significantly limited the scope of the forfeiture by wrongdoing exception to the Sixth Amendment right to confrontation of witnesses. The United States Supreme Court ruled that the accused must have intended to silence the would-be witness before forfeiture would apply.

Part I summarizes the facts of *Giles*, the state court opinions, and the various opinions authored by the Supreme Court justices.

Part II demonstrates why the concerns of the *Giles* dissenters are valid and will trickle down to post-*Giles* decisions. With courts now unable to apply the forfeiture doctrine in future cases where the equities demand it but where obvious intent evidence is lacking.

Part III examines the two primary methods by which lower courts will avoid *Giles*'s grasp, thereby achieving what many jurists will deem a more equitable result. This Part contends that courts will evade *Giles* by easing the burden of proving its requisite intent, and by broadening the definition of "non-testimonial," thereby removing the disputed evidence from *Crawford*'s reach.

AUTHOR: J. McClennen
JOURNAL: 20 J. Interpersonal Violence 149 (2005)

**ARTICLE: INTIMATE PARTNER VIOLENCE BETWEEN
SAME-GENDER PARTNERS:
RECENT FINDINGS AND FUTURE RESEARCH**

ABSTRACT: Empirical literature about same-gender domestic violence was relatively nonexistent until the past 20 years, and conducting research with this population about a sensitive topic remains a daunting endeavor. Existing studies reveal similarities between opposite- and same-gender domestic violence in prevalence, types of abuse, and various dynamics, as well as dispel myths and establish a theoretical basis on which to conduct future research. Differences are evident in areas such as help-seeking behaviors and correlates, thus demanding unique assessment and intervention strategies. This article presents further explanation of the latest research, recommendations for future studies, and effective as well as problematic methodological practices about same-gender domestic violence.

AUTHOR: Judith McFarlane, et al.
JOURNAL: 94 Am. J. Public Health 613 (April 2004)

**ARTICLE: PROTECTION ORDERS AND
INTIMATE PARTNER VIOLENCE:
AN 18-MONTH STUDY OF 150 BLACK, HISPANIC,
AND WHITE WOMEN**

ABSTRACT:

Objectives. The study compared types and frequencies of intimate partner violence experienced by women before and after receipt of a two-year protection order.

Methods. Participants were 150 urban English- and Spanish-speaking Black, Hispanic, and White women who qualified for a two-year protection order against an intimate partner.

Results. 149 women completed all interviews. Results showed significant reductions in threats of assault, physical assault, stalking, and worksite harassment over time among all women, regardless of receipt or non-receipt of a protection order.

Conclusions. Abused women who apply and qualify for a two-year protection order, irrespective of whether they are granted the order, report significantly lower levels of violence during the subsequent 18 months.

AUTHOR: Judith McFarlane, et al
JOURNAL: 112 Pediatrics 202 (September 2003).

**ARTICLE: BEHAVIORS OF CHILDREN WHO ARE EXPOSED
AND NOT EXPOSED TO INTIMATE PARTNER VIOLENCE:
ANALYSIS OF 330 BLACK, WHITE,
AND HISPANIC CHILDREN**

ABSTRACT:

OBJECTIVE: The study compared the behaviors of black, white, and Hispanic children who were 18 months to 18 years of age and exposed to intimate partner violence with an age- and ethnically similar sample of children who were not exposed to violence and to compare both exposed and non-exposed children to normative samples.

METHODS: As part of a study on treatments for abused women in primary care public health clinics and Women, Infants and Children clinics in a large urban area, 258 abused mothers completed the Child Behavior Checklist (CBCL) on one of their randomly selected children between the ages of 18 months and 18 years. An ethnically similar sample of 72 non-abused mothers also completed the CBCL. The CBCL is a standardized instrument that provides a parental report of the extent of a child's behavioral problems and social competencies. The CBCL consists of a form for children 18 months to 5 years and a version for ages 6 to 18 years.

RESULTS: Overall, children of abused mothers had significantly higher internalizing (58.5 +/- 12.1), externalizing (55.5 +/- 12.4), and total behavior problems (57.6 +/- 12.3) scores than the internalizing (52.9 +/- 13.7), externalizing (49.7 +/- 10.6), and total behavior problems (51.0 +/- 13.0) scores exhibited for children of non-abused mothers. Most comparisons of children from the abused women to the referred and non-referred norms are significant. The mean internal, external, and total behavior problem scores from children of abused women were significantly higher than the non-referred norms and significantly lower than the referred norms. In contrast, all comparisons for children from non-abused women were not significantly different from the non-referred norms.

CONCLUSIONS: Children ages 6 to 18 years of abused mothers exhibit significantly more internalizing, externalizing, and total behavior problems than children for the same age and sex of non-abused mothers. The data demonstrate that children of abused mothers have significantly more behavioral problems than the non-clinically referred norm children but also, for most children, display significantly fewer problems than the clinically referred children. These children of abused mothers are clearly suspended above normal and below deviant, with children ages 6 to 18 being at the greatest risk. If abused mothers can be identified and treated, then perhaps behavior problems of their children can be arrested and behavioral scores improved. The American Academy of Pediatrics Committee on Child Abuse and Neglect recommends routine screening of all

women for abuse at the time of the well-child visit and implementation of a protocol that includes a safety plan for the entire family.

AUTHOR: Melanie L. Mecka
JOURNAL: [29 Rutgers L. J. 607](#) (Spring 1998)

**ARTICLE: SEIZING THE AMMUNITION FROM
DOMESTIC VIOLENCE:
PROHIBITING THE OWNERSHIP OF FIREARMS
BY ABUSERS**

ABSTRACT: This note examines the increasing changes and stricter standards in domestic violence laws, in imposing penalties on offenders at both the state and federal level.

Part II specifically evaluates New Jersey's current legislative position on gun seizure and forfeiture and the state's proposals to ban firearms to further maximize the protection of its citizens.

Part III explores New Jersey's current judicial position on seizure and forfeiture, how the courts have chosen to interpret the language of the Act in support of forfeitures, and whether the courts' ideologies will aid in enforcing a ban of firearms ownership by domestic violence offenders.

Part IV takes a general look at how the country is moving in the direction of legislation requiring the mandatory forfeiture of weapons and firearms by individuals with domestic violence convictions.

Part V examines the Lautenberg Act, which prohibits the ownership or possession of firearms if convicted of domestic violence and will explore the overwhelming response to this law.

The **Conclusion** explores whether the federal regulatory approach adopted under the Lautenberg Act is the most effective and efficient way of achieving the goal of a universal firearm ban for those convicted of domestic violence offenses.

AUTHOR: Kristian Miccio
JOURNAL: [58 Albany L. Rev. 1087](#) (Spring 1995).

**ARTICLE: IN THE NAME OF MOTHERS AND CHILDREN:
DECONSTRUCTING THE MYTH OF
THE PASSIVE BATTERED MOTHER AND
THE PROTECTED CHILD IN CHILD NEGLECT PROCEEDINGS**

ABSTRACT: Abuse and neglect statutes have codified these beliefs into a system of laws that punishes mothers and fails to protect children from abusive fathers or paramours. Nothing illustrates this more clearly than the application of child protective statutes in cases where states have brought charges against abused mothers, via theory of failure to protect, for failing to stop the abuse to themselves.

AUTHOR: Linda G. Mills
JOURNAL: [113 Harv. L. Rev. 550](#) (December 1999).

**ARTICLE: KILLING HER SOFTLY: INTIMATE ABUSE AND
THE VIOLENCE OF STATE INTERVENTION**

ABSTRACT: This commentary argues that there is a need to reconsider the feminist position that mandatory interventions in domestic violence cases, including mandatory arrest, prosecution, and reporting, serve the best interests of all battered women. In an effort to alter these abusive dynamics and promote a more respectful relationship between state actors and battered women, the author proposes a Survivor-Centered Model that relies on clinical methods that engage the battered woman, foster her healing, and promote her safety.

AUTHOR: Nichole M. Mordini
JOURNAL: [52 Drake L. Rev. 295](#) (Winter 2004).

**ARTICLE: MANDATORY STATE INTERVENTIONS FOR DOMESTIC
ABUSE CASES:
AN EXAMINATION OF THE EFFECTS ON VICTIM
SAFETY AND AUTOMONY**

ABSTRACT: This note addresses the effects that legislatively mandated and policy-driven interventions have on victim safety and autonomy and present recommendations for a system that can hold perpetrators accountable while still respecting a victim's right to make decisions regarding her family and her safety.

Part II of this note will provide a working definition of domestic abuse.

Part III provides an in-depth description of the dynamics of domestic abuse.

Part IV will trace the history of domestic violence policy and laws addressing domestic violence victims and perpetrators.

Part V will describe Minneapolis's experiment with mandatory arrest for domestic violence perpetrators.

Part VI will discuss different types of mandatory state interventions, their efficacy, and the effects that such policies have on domestic violence victims' safety and autonomy.

AUTHOR: Deborah A. Morgan
JOURNAL: [54 Am. U. L. Rev. 485](#) (December 2004)

**ARTICLE: ACCESS DENIED: BARRIERS TO REMEDIES UNDER THE
VIOLENCE AGAINST WOMEN ACT FOR
LIMITED ENGLISH PROFICIENT BATTERED IMMIGRANT WOMEN**

ABSTRACT: This comment argues that United States Citizenship and Immigration Service (U.S.C.I.S) violates Executive Order 13,166 and due process by continuing its English-only administration of VAWA in a manner that fails to provide LEP battered immigrant women with meaningful access to remedies and excludes from protection the very individuals that Congress intended VAWA to embrace.

Part I provides an overview of U.S.C.I.S.'s VAWA and language access obligations and how May, an LEP battered immigrant woman, is unable to access VAWA remedies because of language barriers.

Part II outlines due process requirements and argues that U.S.C.I.S.'s current failure to provide language-accessible services violates LEP battered immigrant women's heightened due process rights to access VAWA remedies.

Part III argues that U.S.C.I.S.'s administration of VAWA remedies fails to provide meaningful access for LEP battered immigrant women such as May, and reviews May's options for enforcing U.S.C.I.S.'s obligations to her under Executive Order 13,166 and the Equal Protection Clause.

Part IV recommends ways in which U.S.C.I.S. could improve LEP battered immigrant women's access to VAWA and suggests how Congress could strengthen U.S.C.I.S.'s compliance.

Conclusions: (1) U.S.C.I.S.'s current administration of VAWA is constitutionally inadequate because it deprives LEP battered immigrant women of their liberty interest in VAWA remedies without due process; (2) U.S.C.I.S. violates Executive Order 13,166 because its policies fail to provide meaningful access to LEP women; (3) even though U.S.C.I.S.'s actions constitute intentional discrimination against LEP applicants, it is unclear if May has a means to enforce U.S.C.I.S.'s obligations under Executive Order 13,166; and (4) Congress should act to close the loophole whereby U.S.C.I.S. can evade judicial enforcement of its obligations to LEP battered immigrant women.

AUTHOR: Adele M. Morrison
JOURNAL: [39 U. C. Davis L. Rev. 1061](#) (March 2006)

**ARTICLE: DECONSTRUCTING THE IMAGE REPERTOIRE OF
WOMEN OF COLOR:
CHANGING THE DOMESTIC VIOLENCE (DIS)COURSE:
MOVING FROM WHITE VICTIM TO MULTI-CULTURAL SURVIVOR**

ABSTRACT: This Article addresses the interconnectedness of the battered woman's identity as white victim, the racialized empowerment continuum, the use of the victim in legal practice, and how each impacts women, particularly women of color, seeking to escape the abuse in their lives.

Part I explains the history and meaning of a racialized domestic violence legal discourse and then discusses the construction and racialization of the three discursive elements: identity, process, and practice.

Part II explains how the three elements of identity, process, and practice can be reconstructed to change the current discourse, effectively making it less white-focused and more multi-cultural.

AUTHOR: Hiroshiri Motomura
JOURNAL: [59 Duke L. J. 1723](#) (2010)

**ARTICLE: THE RIGHTS OF OTHERS:
LEGAL CLAIMS AND IMMIGRATION
OUTSIDE THE LAW**

ABSTRACT: This article analyzes the rights of unauthorized migrants and elucidates how these noncitizens are incompletely but importantly integrated into the U.S. legal system.

Part I discusses the recent efforts of numerous states and cities to address the arrival of unauthorized migrants by enacting laws intended to drive them out. Immigrants' rights advocates have brought lawsuits challenging these state and local laws, which this article sometimes refers to as sub-federal laws.

Part II examines legal issues that emerge from the essential role of unauthorized workers in many U.S. industries and occupations. The question has naturally arisen whether these workers are protected by the laws that address labor organizing, safety and health, discrimination, wages, and other aspects of the workplace.

Part III analyzes the ability of unauthorized migrants to invoke Fourth Amendment protections against unlawful searches and seizures. These issues have arisen from the raids on worksites, homes, and other venues that have become a significant part of immigration law enforcement.

Part IV looks at the right to effective counsel in immigration court. Though much less visible in public politics, this issue has been the focus of heated controversy between the federal government and advocacy groups.

AUTHOR: Jane C. Murphy
JOURNAL: [11 Am. U. J. Gender Soc. Pol'y & L. 499](#) (2003).

**ARTICLE: ENGAGING WITH THE STATE:
THE GROWING RELIANCE ON LAWYERS AND JUDGES
TO PROTECT BATTERED WOMEN**

ABSTRACT: The passage of the federal Violence Against Women Act of 2000 ("VAWA II") marked an important milestone in the evolution of the domestic violence movement. VAWA II created, among other things, a complex system for state and federal funding in all 50 states to provide civil legal assistance to battered women. Its passage completed a process that began in the early 1980s when domestic violence advocates shifted their focus from grass roots efforts to help battered women and their children leave abusive partners to building alliances with government and advocating for legal remedies to assist battered women.

This paper looks at the impact of this dramatic shift on both battered women and domestic violence programs. It draws on empirical data examining women's experiences using these new legal remedies to raise some preliminary questions about the broader issue of how well the strategy of "engaging with the state" serves the interests of battered women.

N

AUTHOR: C. Nicolaidis, M. Curry, Y. Ulrich, et al.
JOURNAL: 18 *J. Gen. Intern. Med.* 788–94 (2003)

**ARTICLE: COULD WE HAVE KNOWN?
A QUALITATIVE ANALYSIS OF DATA FROM WOMEN
WHO SURVIVED AN ATTEMPTED HOMICIDE
BY AN INTIMATE PARTNER**

ABSTRACT:

OBJECTIVE: To examine in-depth the lives of women whose partners attempted to kill them, and to identify patterns that may aid in the clinician’s ability to predict, prevent, or counsel about femicide or attempted femicide.

DESIGN: Qualitative analysis of 30 in-depth interviews.

SETTING: Six U.S. cities.

PARTICIPANTS: Thirty women, aged 17–54 years, who survived an attempted homicide by an intimate partner.

RESULTS: All but two of the participants had previously experienced physical violence, controlling behavior, or both from the partner who attempted to kill them. The intensity of the violence, control, and threats varied greatly, as did the number of risk factors measured by the Danger Assessment, defining a wide spectrum of prior abuse. Approximately half (14/30) of the participants did not recognize that their lives were in danger. Women often focused more on relationship problems involving money, alcohol, drugs, possessiveness, or infidelity, than on the risk to themselves from the violence. The majority of the attempts (22/30) happened around the time of a relationship change, but the relationship was often ending because of problems other than violence.

CONCLUSIONS: Clinicians should not be falsely reassured by a woman’s sense of safety, by the lack of a history of severe violence, or by the presence of few classic risk factors for homicide. Efforts to reduce femicide risk that are targeted only at those women seeking help for violence-related problems may miss potential victims.

Q

P

AUTHOR: Janet Parrish
JOURNAL: 11 Wis. Women's L. J. 75 (1996)

**ARTICLE: TREND ANALYSIS: EXPERT TESTIMONY ON BATTERING
AND ITS EFFECTS IN CRIMINAL CASES**

ABSTRACT: This analysis shows that, since the mid-1980s the courts increasingly recognize the relevance of expert testimony on battering and its effects to support battered women's defense claims. Yet many battered women continue to face monumental hurdles when they come before the court system as defendants. Although the vast majority of states now allow expert testimony in support of battered women's defense claims, some women still are unable to present an expert witness to testify about the effects of abuse on their beliefs, experiences, and perceptions.

Due to the fact that expert testimony about battering and its effects — as well as additional evidence about battering from other sources—is not being properly integrated into already existing jurisprudence, battered women's homicide cases are reversed on appeal at a rate significantly higher than the national average for homicide appeals.

This research will help practitioners and researchers alike better understand the true goals and purposes of introducing expert testimony, so that battered women defendants — like all defendants — will have an opportunity to introduce all relevant evidence at their trials. Justice is best served when the jurors have an opportunity to hear all of the relevant evidence in order to fairly evaluate the case before them.

AUTHOR: Laurie Pompa
JOURNAL: [16 Tex. J. Women & L. 241](#) (Spring 2007)

**ARTICLE: THE FAMILY VIOLENCE OPTION IN TEXAS:
WHY IT IS FAILING TO AID DOMESTIC VIOLENCE VICTIMS
ON WELFARE AND WHAT TO DO ABOUT IT**

ABSTRACT: The purpose of this paper is to explore the reasons behind the low usage of the Family Violence Option in Texas and to determine what should be done to increase its usage.

Part II outlines the relationship between poverty and domestic violence. The section focuses on the high level of economic control batterers exert over domestic violence victims and the reliance of many victims on the welfare system.

Part III outlines the general welfare system as laid out by federal law and Texas state law, specifically looking at the limitations of the system to aid domestic violence victims.

Part IV introduces the Family Violence Option and assesses its ability to help victims meet or waive welfare requirements.

Part V proposes recommendations on how to better utilize the Family Violence Option to help domestic violence victims achieve economic independence.

Q

AUTHOR: Nicole Quester
JOURNAL: [40 Akron L. Rev. 391](#) (2007)

**ARTICLE: REFUSING TO REMOVE AN OBSTACLE
TO THE REMEDY:
THE SUPREME COURT'S DECISION IN
*TOWN OF CASTLE ROCK V. GONZALES***

ABSTRACT: In *Town of Castle Rock v. Gonzales*, the Supreme Court reiterated that the State has little or no responsibility in protecting women from abuse, even when mandated by a court order.

R

AUTHOR: Myra Raeder
JOURNAL: [67 U. Colo. L. Rev. 789](#) (1996).

**ARTICLE: PROVING THE CASE:
BATTERED WOMAN AND BATTERER SYNDROME:
THE DOUBLE-EDGED SWORD: ADMISSIBILITY OF BATTERED WOMAN
SYNDROME BY AND AGAINST BATTERERS IN CASES IMPLICATING
DOMESTIC VIOLENCE**

ABSTRACT: This essay focuses on a number of issues concerning Battered Woman Syndrome ("BWS") that were suggested by the Simpson trial and other prosecutions of alleged batterers for domestic-violence-related offenses.

Part I details the lack of a social science framework in Simpson and offers an explanation of the dynamics of domestic violence.

Part II describes BWS and discusses the various critiques and reworkings of the doctrine to fit women who are not passive or do not otherwise match the BWS criteria.

Part III addresses the relationship between BWS and prohibited character evidence, distinguishing the typical use of BWS by prosecutors to rebut a defense attack on the credibility of a live witness from its proposed rationale in Simpson to disabuse jurors of domestic violence myths where the victim's credibility was not in issue.

Conclusion: The thesis of this essay is that jurors need background evidence about the dynamics of domestic violence in order to make rational decisions about the significance of the evidence presented at trial.

AUTHOR: Jody Raphael
JOURNAL: 11 Am. U. J. Gender Soc. Pol'y & L. 367 (2003)

**ARTICLE: BATTERING THROUGH THE LENS OF CLASS
REAUTHORIZATION ACT**

ABSTRACT: The author argues that viewing domestic violence through the lens of class does not pose profound contradictions but instead allows us as feminists to observe even more clearly how domestic violence is strategically employed by men to subordinate women.

AUTHOR: Thomas C. Riney and Christopher D. Wolek
JOURNAL: [41 S. Tex. L. Rev. 315](#) (Spring 2000)

**ARTICLE: HIPPOCRATES ENTERS THE NEW MILLENIUM:
TEXAS MEDICAL PRIVILEGES IN THE YEAR 2000**

ABSTRACT:

Part I traces the development of the medical privileges.

Part II begins with the physician-patient privilege and other privileges that arise in the treatment of patients, then discusses the self-critical analysis privilege, progressing through the Health Care Quality & Improvement Act (HCQIA) that spurred additional statutory privileges enacted in Texas.

Part III highlights selected issues that arise when seeking the protection of the medical privileges and proposes an update to the current statutory privileges to shield thought processes, establish better guidelines for applying exceptions, and clarify waiver issues.

Part IV provides practical applications of the peer review privileges.

Part V concludes by encouraging courts and practitioners to apply the medical privileges with an eye toward enforcing the Hippocratic ideals underlying those privileges.

AUTHOR: Audrey Rogers
JOURNAL: 8 Columbia J. of Gender & L. 67 (1998-99)

**ARTICLE: PROSECUTORIAL USE OF
EXPERT TESTIMONY IN DOMESTIC VIOLENCE CASES:
FROM RECANTATION TO REFUSAL TO TESTIFY**

ABSTRACT: This article discusses the use of expert testimony in prosecuting those charged with domestic abuse.

Part I provides a background on the need and nature of expert testimony in domestic violence cases and the requirements for the admission of such expert testimony.

Part II discusses the appellate cases that have addressed the admissibility and scope of expert testimony offered by the prosecution in domestic abuse cases.

Part III applies the existing case law to the uncharted issue of whether the courts should allow expert testimony to explain a complainant's outright refusal to testify.

Conclusion: The developing trend of prosecutorial use of expert testimony is an appropriate and necessary tool in successfully prosecuting domestic violence cases.

AUTHOR: Joanna Rohrpaugh
JOURNAL: [44 Fam. Ct. Rev. 287-299](#) (April 2006).

ARTICLE: DOMESTIC VIOLENCE IN SAME-GENDER RELATIONSHIPS

ABSTRACT: The purpose of this article is to sensitize divorce professionals to the existence of same-gender domestic violence and to make them aware of the major features and causes of this phenomenon. There are many complex factors that make same-gender domestic violence different from cross-gender domestic violence. These complexities and differences make it essential for attorneys, mental health professionals, and judges to seek expert consultation before undertaking a case involving domestic violence in a same-gender couple.

AUTHOR: Ralph Ruebner and Eugene Goryynov
JOURNAL: 40 U. Tol. L. Rev. (Spring 2009)

**ARTICLE: *GILES V. CALIFORNIA*: SIXTH AMENDMENT
CONFRONTATION RIGHT, FORFEITURE BY WRONGDOING, AND A
MISGUIDED DEPARTURE FROM THE COMMON LAW AND THE
CONSTITUTION**

ABSTRACT: In this article, the authors contend that the common law does not support including the element of intent in the forfeiture analysis under the Confrontation Clause.

Part II of this article examines the development of the doctrine of forfeiture by wrongdoing in common law, concluding that the common law did not include an intent element.

Part III discusses the U.S. Supreme Court's recognition of the forfeiture doctrine and examines the differences between forfeiture and waiver.

Part IV surveys different jurisdictions' approaches to the forfeiture doctrine, focusing on whether the jurisdictions include an intent element. Some courts, like the California Supreme Court, do not require a showing of intent in applying the forfeiture doctrine, while others, like the Illinois Supreme Court, do.

Part V analyzes the U.S. Supreme Court's recent decision in *Giles v. California*, which misguidedly resolved the split in favor of requiring a showing of intent.

Part VI clarifies the difference between the confrontation rights of the Sixth Amendment and the residual exception to hearsay under the Federal Rules of Evidence.

Conclusion: Requiring an element of intent in forfeiture analysis is inconsistent with the common law at the time of the nation's founding.

S

AUTHOR: Emily Sack
JOURNAL: 98 Nw. U. L. Rev. (Spring 2004)

**ARTICLE: DOMESTIC VIOLENCE ACROSS STATE LINES:
THE FULL FAITH AND CREDIT CLAUSE,
CONGRESSIONAL POWER, AND INTERSTATE ENFORCEMENT
OF PROTECTION ORDERS**

ABSTRACT: This article attempts to answer the following questions: Does the Constitution's Full Faith and Credit Clause require that the states grant full faith and credit to sister-state protection orders? If the Constitution itself does not require this level of full faith and credit, does Congress have the authority under the Effects Clause to require states to grant this full faith and credit recognition?

Part II explains the nature of domestic violence protection orders, in order to understand how the implementation of full faith and credit impacts their interstate enforcement.

Part III reviews the history of the drafting of the Full Faith and Credit Clause and then examines the case law interpreting the Clause in several key areas.

Part IV examines the validity of the VAWA full faith and credit provision.

Conclusion: Congress does not have plenary power either to dilute or expand full faith and credit beyond what the Court has delineated as the Constitution's mandate. VAWA's full faith and credit provision, under this analysis of congressional authority, is a constitutional exercise of congressional power.

AUTHOR: Joan Schroeder
JOURNAL: [76 Iowa L. Rev. 553](#) (1991)

**ARTICLE: USING BATTERED WOMAN SYNDROME EVIDENCE
IN THE PROSECUTION OF A BATTERER**

ABSTRACT: This article is intended to provide prosecutors with guidelines to introduce evidence about the battered woman syndrome.

Part I presents background on the mate-abuse problem, describes theories underlying the battered woman syndrome, describes the general behavior of the battered woman, and relates the need for expert evidence to help the jury understand the unusual behavior of battered women.

Part II discusses the general admissibility of the battered woman syndrome and offers analogous precedent from rape and child sexual abuse cases for its use in a prosecution of a batterer.

Part III explains the various forms of evidence about battered women that could be offered in the prosecution of a batterer. Both the form of the evidence and the purpose for which it is offered are discussed to determine whether the evidence should be admissible.

Conclusion: Evidence about the battered woman syndrome offered by the state in the prosecution of a batterer is admissible in a limited form.

AUTHOR: Malinda Seymore
JOURNAL: [2 Tex. Wesleyan L. Rev. 239](#) (Fall 1999)

**ARTICLE: AGAINST THE PEACE AND DIGNITY OF THE STATE:
SPOUSAL VIOLENCE AND SPOUSAL PRIVILEGE**

ABSTRACT:

Part I of this article discusses the profiles of batterers and victims as a predicate for analyzing applications of the spousal immunity privilege in Texas.

Part II briefly explores the origin and nature of the spousal privileges.

Part III examines the history of the spousal privilege and spousal crime exception in Texas, and the recent statutory change.

Part IV discusses the application of similar exceptions in other states.

Part V briefly explores the application of the spousal crime exception to the communications privilege.

Part VI suggests how Texas courts should properly apply this new rule of evidence in domestic violence cases.

AUTHOR: John Skakun III
JOURNAL: [75 U. Chi. L. Rev. 1833](#) (Fall 2008).

ARTICLE: VIOLENCE AND CONTACT: INTERPRETING "PHYSICAL FORCE" IN THE LAUTENBERG AMENDMENT

ABSTRACT: A circuit split has recently developed over what conduct constitutes the use of "physical force" for the purposes of the Lautenberg Amendment. This comment seeks to resolve the split.

Part I explains the statutory scheme in greater detail and provides additional context by describing [18 U.S.C. § 16](#), a similar provision that was likely the model for the Lautenberg Amendment.

Part II surveys both sides' arguments.

Part III argues that "physical force" should be interpreted to require violence and exclude *de minimis* contact. It presents several arguments that have not been considered by either side of the split and analyzes flaws in the contact courts' arguments.

**AUTHOR: N. J. Sokoloff and I. Dupont,
JOURNAL: 11 Violence Against Women 38 (2005)**

**ARTICLE: DOMESTIC VIOLENCE AT THE INTERSECTIONS OF RACE,
CLASS, AND GENDER:
CHALLENGES AND CONTRIBUTIONS
TO UNDERSTANDING VIOLENCE AGAINST
MARGINALIZED WOMEN IN DIVERSE COMMUNITIES**

ABSTRACT: This article provides a comprehensive review of the emerging domestic violence literature using a race, class, gender, sexual orientation intersectional analysis and structural framework fostered by women of color and their allies to understand the experiences and contexts of domestic violence for marginalized women in U.S. society.

Part I lays out a series of challenges that an intersectional analysis grounded in a structural framework provides for understanding the role of culture in domestic violence.

Part II points to major contributions of such an approach to feminist methods and practices in working with battered women on the margins of society.

AUTHOR: Sarah L. Solon, Ed.
JOURNAL: 10 Geo. J. Gender & Law 369 (2009)

**ARTICLE: TENTH ANNUAL REVIEW OF GENDER AND SEXUALITY:
CRIMINAL LAW CHAPTER: DOMESTIC VIOLENCE**

ABSTRACT:

Part I outlines the historical treatment of domestic violence, showing the ways in which common law condoned domestic violence—a legal structure victims’ rights activists have dedicated much work to undoing.

Part II examines the current state of domestic violence law, first depicting developments in federal law relating to domestic violence, and then tracing developments in state law relating to domestic violence.

Part III examines the weaknesses in current domestic violence law, from its truncated proceedings to its limited focus on abuse in heterosexual relationships.

AUTHOR: R. L. Stotzer,
JOURNAL: 14 Aggression and Violent Behavior 171 (2009)

**ARTICLE: VIOLENCE AGAINST TRANSGENDER PEOPLE: A REVIEW OF
UNITED STATES DATA**

ABSTRACT: This article found that transgendered individuals are discriminated against in their family, school, and workplace environments. These conditions are risk factors for depression, isolation, and suicide. In this study the authors analyzed the suicide thoughts and attempts in a long-term follow up of a transgender group who applied to a psychiatry clinic.

Method: The authors investigated transgendered individuals who applied to Istanbul Faculty of Medicine, Psychiatry Department. They are followed up with both individual and group psychotherapy for two years. Also, family counseling meetings are conducted twice a year.

In these groups the topics family relationships, medical problems, relationships, work problems, financial issues, religious concerns, the transgender image reflected in the media. Groups also serve as self-help groups, the process of self-acceptance and opening up is accelerated.

Findings: High rates of life time suicide thoughts (44,2%) and attempts (24,7%) have been observed. In some cases suicide attempts were the reason of their application to clinic and can be seen as a help seeking behavior. No suicide attempt was reported within the follow up period and after the sex reassignment surgery.

Discussion: The societies that sexuality is still a taboo, the transgendered individuals are being exposed to discrimination. These conditions may cause isolation, a reason to estrange themselves from social life, and suicide attempts.

The group experience is very helpful in the process of self-acceptance and to learn problem-solving, as it enables transgender people who hide their true identities in their daily lives to get together with other people who go through the same things as they do.

AUTHOR: Lindsay Strauss
JOURNAL: 19 Cornell J. L. & Pub. Pol’y 495 (Spring 2010)

**ARTICLE: ADULT DOMESTIC TRAFFICKING AND THE WILLIAM
WILBERFORCE TRAFFICKING VICTIMS PROTECTION
REAUTHORIZATION ACT**

ABSTRACT: The article discusses the most recent reauthorization of the federal Trafficking Victims Protection Reauthorization Act (TVPA)—the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008) and suggests improvements for the next iteration of the TVPA. The author notes that the Act largely fails to address adult domestic the victims of human trafficking.

**AUTHOR: Roland Summit,
JOURNAL: 7 Child Abuse & Neglect 177 (1983)**

ARTICLE: THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

ABSTRACT: The most typical reactions of children are classified in this paper as the child sexual abuse accommodation syndrome.

The syndrome is composed of five categories, of which two define basic childhood vulnerability and three are sequentially contingent on sexual assault: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction.

The accommodation syndrome is proposed as a simple and logical model for use by clinicians to improve understanding and acceptance of the child's position in the complex and controversial dynamics of sexual victimization. Application of the syndrome tends to challenge entrenched myths and prejudice, providing credibility and advocacy for the child within the home, the courts, and throughout the treatment process.

The paper also provides discussion of the child's coping strategies as analogs for subsequent behavioral and psychological problems, including implications for specific modalities of treatment.

T

AUTHOR: Margaret Tepo

JOURNAL: 91 American Bar Assn. J. 42 (September 2005)

ARTICLE: WHEN HOME COMES TO WORK: EXPERTS SAY EMPLOYERS SHOULD SEEK A BALANCED APPROACH IN DEALING WITH WORKERS FACING DOMESTIC VIOLENCE

ABSTRACT: This article examines the intersection of domestic violence and employment law. The author suggests that domestic violence cases are a painful illustration of the reality that home and the workplace are seldom very far from each other, no matter how long or short the commute might be. When an employee is victimized by domestic violence, the employer often finds itself at a troubling intersection where concerns about the victim and the company's larger interests can collide.

AUTHOR: Melissa Trepiccione
JOURNAL: [69 Fordham L. Rev. 1487](#) (March 2001)

**ARTICLE: AT THE CROSSROADS OF LAW AND SOCIAL SCIENCE: IS
CHARGING A BATTERED MOTHER WITH FAILURE
TO PROTECT HER CHILD AN ACCEPTABLE SOLUTION
WHEN HER CHILD WITNESSES DOMESTIC VIOLENCE?**

ABSTRACT: This note examines whether the policy of removing witnessing children from their victimized mothers is acceptable from both a social science viewpoint and a constitutional law perspective.

Part I reviews the foundations of this policy in case law and in various state statutes. This part also examines social science literature concerning the effects of witnessing domestic violence on children and highlights the results and flaws in this body of research.

Part II discusses the conflict at the heart of this policy by considering the clashing interests and rights of the parties affected by this practice —the battered mother, the child, and the state.

Part III argues that this practice must be carefully re-examined because its constitutionality is questionable.

Conclusion: The current policy of charging a mother with failure to protect in domestic violence cases should be re-examined in light of numerous, less burdensome alternatives to "across the board" removal.

AUTHOR: James Truss
JOURNAL: 26 St. Mary's L. J. 1149 (1995).

**ARTICLE: THE SUBJECTION OF WOMEN:
STILL UNFULFILLED PROMISES OF PROTECTION
FOR WOMEN VICTIMS OF DOMESTIC VIOLENCE**

ABSTRACT: This comment examines the dynamics of power and control that define the battering relationship and discusses legislative enactments designed to remedy domestic violence in Texas. Building upon a recent report, this comment advances three discrete amendments to Texas Family Code Title IV designed to increase the effectiveness of protective orders. Finally, this comment examines the ignorance manifest in an often non-responsive judicial system and urges fulfillment of the Texas Legislature's promises to educate and protect.

U

V

AUTHOR: Jerry von Tralge
JOURNAL: 27 W. St. U. L. Rev. (1999/2000)

**ARTICLE: VICTIMIZATION DYNAMICS:
THE PSYCHO-SOCIAL AND LEGAL IMPLICATIONS
OF FAMILY VIOLENCE DIRECTED TOWARD WOMEN
AND THE IMPACT ON CHILD WITNESSES**

ABSTRACT: This article explores the emotional, social, and legal impact on women and children when violence is directed towards women, in order to promote multidisciplinary strategies that reduce both the risk and the impact of family violence.

W

AUTHOR: Lenore Walker

JOURNAL: 6 Notre Dame J. L. Ethics & Pub. Pol'y 321 (1992)

ARTICLE: BATTERED WOMEN SYNDROME AND SELF-DEFENSE

ABSTRACT: This article explores the application of psychological theory to the battered woman syndrome and the battered woman self-defense defense. The battered woman self-defense defense has been introduced by attorneys on behalf of clients to demonstrate to the judge and jury that living in domestic violence has such a major impact on a woman's state of mind that it could make an act of homicide justifiable, even when the first look at the facts does not appear to be traditional confrontational self-defense. To get to this point, there has been general acceptance of expert witness testimony in the trial courts, usually by psychologists trained in the understanding of the psychology of battered women and the effects on someone's state of mind from being an abuse victim. Included in the article is a discussion of the dynamics of battering relationships.

AUTHOR: Byron Warnken
JOURNAL: [37 U. Balt. L. Rev. 203](#) (Winter 2008)

**ARTICLE: "FORFEITURE BY WRONGDOING" AFTER
CRAWFORD V. WASHINGTON:
MARYLAND'S APPROACH BEST PRESERVES
THE RIGHT TO CONFRONTATION**

ABSTRACT: This article focuses on how courts resolve prosecutorial allegations of "forfeiture by wrongdoing" and the extent to which *Crawford* itself may dictate the procedure for forfeiture/waiver determinations. Maryland is the only jurisdiction that takes a defense-oriented, pro-confrontation position on all three major components of a "wrongdoing" determination, requiring: (1) a hearing, (2) strict rules of evidence, and (3) clear and convincing evidence of wrongdoing.

AUTHOR: Richard Warshack
JOURNAL: [37 Fam. L. Q. 273](#) (2003)

**ARTICLE: BRINGING SENSE TO PARENTAL ALIENATION:
A LOOK AT THE DISPUTES AND THE EVIDENCE**

ABSTRACT: This article examines the scientific literature on the existence and treatment of parental alienation syndrome.

AUTHOR: Deborah Weissman
JOURNAL: [2007 B.Y.U. L. Rev. 387](#) (2007)

**ARTICLE: THE PERSONAL IS POLITICAL—AND ECONOMIC:
RETHINKING DOMESTIC VIOLENCE**

ABSTRACT: This article seeks to expand the scope of the domestic violence discourse beyond the parameters of criminal justice to include the political economy of everyday experiences of households.

Part II provides an overview of the development of domestic violence advocacy and examines the promises and problems of the current state of scholarship and practice.

Part III expands the parameters of the debate and situates domestic violence in the context of global economic transformations that have produced chronic unemployment and economic uncertainty.

Part IV examines the ways that economic uncertainty and exploitative working conditions, made all the more egregious in the age of globalization, contribute to domestic violence.

Part V identifies the gains offered by a paradigm shift that includes analyses of the structural causes of domestic violence within a larger context of global economic instabilities.

Conclusion: By calling attention to the possibilities for developing new alliances, as the shared agendas and common concerns between labor organizations, critical globalization activists, and feminists are set in relief by this paradigm shift.

AUTHOR: A. Weisz, R. Tolman, D. Saunders
JOURNAL: 15 J. Interpers. Violence 75 (2000)

**ARTICLE: ASSESSING THE RISK OF
SEVERE DOMESTIC VIOLENCE:
THE IMPORTANCE OF SURVIVORS' PREDICTIONS**

ABSTRACT: The findings of this study contribute to the discussion about the best method for predicting the recurrence of severe domestic violence. The findings are from a secondary data analysis comparing the accuracy of 177 domestic violence survivors' predictions of re-assault to risk factors supported by previous research. The survivors' predictions were associated with recurrence of severe violence in a bi-variate analysis. These predictions also added significantly to the accuracy of established risk factors in two multivariate equations predicting severe re-assault within a 4-month period. Although not all of the survivors made accurate predictions, this research supports the use of survivors' predictions as an important element that should be included in risk prediction.

AUTHOR: R. Whitaker, S. Orzol, and R. Kahn
JOURNAL: 63 Archive of General Psychiatry 551 (2000)

**ARTICLE: MATERNAL MENTAL HEALTH, SUBSTANCE ABUSE, AND
DOMESTIC VIOLENCE IN THE YEAR AFTER DELIVERY
AND SUBSEQUENT BEHAVIOR PROBLEMS IN CHILDREN
AT AGE 3 YEARS**

ABSTRACT:

CONTEXT: Mental health disorders, substance use, and domestic violence often occur together. However, studies examining the impact of these conditions in mothers on the well-being of their children have focused only on isolated conditions.

OBJECTIVE: To examine the cumulative effect of maternal mental health disorders, substance use, and domestic violence on the risk of behavior problems in young children.

DESIGN: A birth cohort (1998-2000) followed up to age 3 years.

SETTING: Eighteen large US cities.

PARTICIPANTS: At 3 years, 2,756 (65%) were followed up from the population-based birth cohort of 4,242. Thirty-six percent had annual incomes below the poverty threshold.

MAIN OUTCOME MEASURES: One year after delivery, mothers were asked questions about conditions in three categories: (1) mental health (major depressive episode and generalized anxiety disorder), (2) substance use (smoking, binge drinking, and illicit drug use), and (3) domestic violence (emotional and physical). At 3 years, mothers completed questions from the Child Behavior Checklist.

RESULTS: Fifty percent of mothers had a condition in at least one of the three categories. The prevalence of child behavior problems increased with the number of categories (0, 1, 2, or 3) in which the mother reported a condition: respectively, 7%, 12%, 17%, and 19% for aggression ($P<.001$); 9%, 14%, 16%, and 27% for anxious/depressed ($P<.001$); and 7%, 12%, 15%, and 19% for inattention/hyperactivity ($P<.001$). This graded risk persisted after adjustment for socio-demographic and prenatal factors and for paternal mental health and substance use.

CONCLUSIONS: The risk of child behavior problems increased with the number of areas—mental health, substance use, or domestic violence—in which the mother reported difficulties. Preventing behavior problems in young children requires family-oriented strategies that address the needs of both parents and their children.

AUTHOR: C Whitfield, R. Anda, S Dube, and V. Felittle
JOURNAL: 18 Journal of Interpersonal Violence 166 (2003)

**ARTICLE: VIOLENT CHILDHOOD EXPERIENCES
AND THE RISK OF INTIMATE PARTNER VIOLENCE IN ADULTS:
ASSESSMENT IN A LARGE HEALTH MAINTENANCE ORGANIZATION**

ABSTRACT: Information about the relationship of experiencing abuse or witnessing domestic violence in childhood to the risk of intimate partner violence (IPV) in adulthood is scant. The relationship of childhood physical or sexual abuse or growing up with a battered mother to the risk of being a victim of IPV for women or a perpetrator for men was studied among 8,629 participants in the Adverse Childhood Experiences Study conducted in a large HMO. Each of the three violent childhood experiences increased the risk of the victimization or perpetration of IPV approximately two-fold. A statistically significant graded relationship was found between the number of violent experiences and the risk of IPV. Among persons who had all three forms of violent childhood experiences, the risk of victimization and perpetration was increased 3.5-fold for women and 3.8-fold for men. These data suggest that as part of risk assessment for IPV in adults, screening for a history of childhood abuse or exposure to domestic violence is needed.

AUTHOR: V. Wu, et al.
JOURNAL: 11 Trauma, Violence, & Abuse 71 (April 2010)

**ARTICLE: PATTERN OF PHYSICAL INJURY ASSOCIATED
WITH INTIMATE PARTNER VIOLENCE
IN WOMEN PRESENTING TO THE EMERGENCY DEPARTMENT:
A SYSTEMATIC REVIEW AND META-ANALYSIS**

ABSTRACT:

OBJECTIVE: This study examined patterns of physical injury associated with intimate partner violence (IPV) among women presenting to emergency room departments.

DATA SOURCES: Systematic searches of Medline, EMBASE, and CINAHL electronic databases from their earliest entries up to February, 2008. Reference lists from the studies included from the electronic database search were reviewed for published and unpublished studies. The authors contacted study authors regarding published and unpublished information.

REVIEW METHODS: After titles and abstracts were initially screened by a single reviewer, two reviewers screened the remaining full-text articles for inclusion into the review. Studies were included if they pertained in whole or in part to women who presented to an emergency department because of IPV and reported the location or type of injuries. Studies without comparison groups of non-IPV women and case series/case reports were excluded. The authors performed a meta-analysis of the available data using the random effects model.

RESULTS: The authors identified 262 potentially relevant titles and abstracts, of which 7 articles were included in the review. The association between head, neck, or facial injuries and IPV was higher among studies that excluded women with verifiable injuries such as witnessed falls or motor vehicle collisions (pooled odds ratio (OR) 24 (95% CI [15, 38])). Thoracic, abdominal, or pelvic injuries were nonspecific for IPV (pooled OR 1.07 (95% CI [0.89, 1.29])). Injuries in the upper extremities were suggestive of non-IPV etiology (pooled OR 0.51 (95% CI [0.41, 0.54])), as were lower extremity injuries (pooled OR 0.15 (95% CI [0.04, 0.56])).

CONCLUSIONS: Among women presenting to emergency room departments, unwitnessed head, neck, or facial injuries are significant markers for IPV. Conversely, extremity injuries are less likely to have been the consequence of IPV.

A summary of this article is available at:
<http://www.ncbi.nlm.nih.gov/pubmed/20430799>

X, Y, Z

AUTHOR: Scott Young
JOURNAL: [37 Tex. Tech L. Rev. 327](#) (Winter 2005)

**ARTICLE: A PRESUMPTION FOR
SUPERVISED VISITATION
IN TEXAS:
UNDERSTANDING AND STRENGTHENING
FAMILY CODE SECTION 153.004(e)**

ABSTRACT: This article addresses four questions vital to the understanding of [Texas Family Code § 153.004](#)(3).

Part II compares the behavior described in subsection (e) to that mentioned in the statutory definition of "family violence."

Part III addresses the definition of a history or pattern.

Part IV argues for a new understanding of present abuse.

Part V discusses the important terms of supervision.

Part VI makes recommendations for each of the problems identified.

AUTHOR: Lauren Zykorie
JOURNAL: [11 Tex. J. Women & L. 275](#) (Spring 2002)

**ARTICLE: CAN A DOMESTIC VIOLENCE ADVOCATE
TESTIFY AS AN EXPERT WITNESS?
FOLLOW THE ABC'S OF EXPERT TESTIMONY
STANDARDS IN TEXAS COURTS:
ASSIST THE TRIER OF FACT, BE RELEVANT, AND RELIABLE
CREDENTIALS MUST BE ESTABLISHED**

ABSTRACT: This paper explores the rules of evidence as they relate to the admissibility of victim advocate expert testimony on domestic violence.

Part II of this paper briefly explores the history of expert testimony standards in Federal and Texas courts.

Part III addresses the specifics of what courts require to admit expert testimony generally; and more particularly, it is focused on admissibility requirements for nonmedical, experience based expert testimony such as that given by a domestic violence victim advocate.

Part IV surveys Texas case law to demonstrate that not only are such experts being used but also that their testimony is being successfully admitted.

Part V explores the positive and negative consequences of using domestic violence expert testimony because the use of expert testimony should not be assumed.

Part VI addresses other considerations when using domestic violence victim advocates in an attempt to offer practitioners some useful approaches to the substance of the evidence rules as well as their procedural requirements.

Conclusion: The author offers general recommendations concerning expert testimony and how to use it successfully in the courtroom.

19.3 [Texas cases summarized.](#)

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[A](#)

Acevedo v. State, [255 S.W.3d 162, 169-170](#) (Tex. App.—San Antonio 2008, pet. ref'd).

Expert witness testimony of medical doctor that was based solely on hypotheticals unrelated to the facts negated the probative value of the expert witness's testimony.

Alexander v. Rogers, [247 S.W.3d 757](#) (Tex. App. —Dallas 2008, no pet.).

In a divorce case, the husband was not statutorily barred from being appointed sole managing conservator of the children despite the wife's evidence that husband had a history or pattern of physical abuse of the wife because the jury was free to reject the wife's evidence.

Allen v. Mancini, [170 S.W.3d 167](#) (Tex. App. —Eastland 2005, pet. denied).

In a SAPCR, the court did not err in finding that a material and substantial change had occurred since rendition of custody decree or in finding that the mother had interfered with the child's relationship with the father by telling the child that the father did not love child.

Allen v. State, [218 S.W.3d 905](#) (Tex. App. —Beaumont 2007, no pet.).

In a prosecution for stalking, the jury could have reasonably found that evidence that the defendant had called the victim (his girlfriend) hundreds of times shortly before she spent the night with him was probative of her fear of him and that he had subjective awareness that his conduct caused the victim to fear bodily injury by him. Under TRE 405, the prosecution was entitled to rebut a witness's testimony about the defendant's good conduct with evidence that he had violated a protective order and assaulted his wife.

Almendarez v. State, [153 S.W.3d 727, 728](#) (Tex. App. —Dallas 2005, no pet.).

The only privilege that can be invoked to exclude evidence in a proceeding for child abuse or neglect is the attorney-client privilege.

Amegnisso-Tossou v. Afiwa dela Ocloo-Kualumenasah, No. 03-02-0436-CV, [2003 Tex. App. Lexis 278](#) (Tex. App. —Austin, Jan. 16, 2003, no pet.).

The trial court did not err in dismissing with prejudice the husband’s petition against his ex-wife for “unlawful conduct” as legally and factually groundless, brought in bad faith, or for harassment.

Anderson v. Rogers, [247 S.W.3d 757](#) (Tex. App. —Dallas 2008, no pet.).

In determining managing conservatorship, issuance of a protective order is a consideration but is not completely dispositive.

Anderson v. State, No 05-08-00864-CR, [2009 Tex. App. Lexis 8640](#) (Tex. App. —Dallas, Nov. 10, 2009, no pet.).

In an aggravated assault prosecution, modification of the judgment to include a finding of family violence was proper because the evidence supported the finding that complainant was the defendant’s ex-wife.

Anderson v. State, No. 10-07-00294-CR, [2008 Tex. App. Lexis 6132](#) (Tex. App. —Waco, Aug. 13, 2008, no pet.).

In a prosecution for a violation of a protective order, the trial court did not abuse its discretion by not reducing length of sentence when probation revoked due to the defendant’s commission of another family violence assault.

Amir-Sharif v. Hawkins, [246 S.W.3d 267](#) (Tex. App. —Dallas 2007, pet. dismiss’d w/oj).

A respondent has right to confront the accuser despite failure to appear at hearing after timely notice; an *ex parte* order can be extended multiple times pending respondent’s competency evaluation because the statute allowing the extension is procedural rather than jurisdictional.

Apolinar v. State, [155 S.W.3d 184](#) (Tex. Crim. App. 2005).

In an aggravated robbery prosecution, statements of the victim made four days after event were admissible as excited utterances because in period between exciting event and utterances, the victim had been in hospital under heavy medication.

Archuleta v. State, No. 05-96-1880-CR, [1998 Tex. App. Lexis 1731](#) (Tex. App. — Dallas Mar. 20, 1998, pet. ref'd).

In a prosecution for retaliation, the defendant's threat to burn down her ex-boyfriend's home (which subsequently burned) after she was arrested for burglary of his home was sufficient to convict her of retaliation.

Atkins v. State, [919 S.W.2d 770](#) (Tex. App. —Houston [14th Dist.] 1996, no pet.).

The court did not err in giving the jury an instruction on the officer's duties under [Tex. Code Crim. Proc. art. 5.04](#) in a family violence situation because the instruction did not require the jury to impermissibly assume that every arrest for family violence is lawful.

Avila v. State, [954 S.W.2d 830, 839](#) (Tex. App. —El Paso 1997, pet. ref'd).

Texas courts exclude as speculative and unreliable any testimony, other than that of the accused, concerning the accused's mental state at the moment he committed the crime. Such testimony is considered speculative and unreliable. The Texas Court of Criminal Appeals created a narrow exception for expert testimony concerning the mental state of a defendant at the time of a killing where the defendant was a victim of domestic violence.

B

Babb v. State, No. 09-08-258-CR, [2009 Tex. App. Lexis 9079](#) (Tex. App. — Beaumont, Nov. 25, 2009, no pet.).

In a felony family violence assault prosecution, the evidence was insufficient to establish the prior conviction because the witness did not have personal knowledge of the defendant's prior criminal history and could not identify the defendant as the person named in the prior assault judgment.

Ballard v. State, [161 S.W.3d 269](#) (Tex. App. —Texarkana 2005) affirmed, [193 S.W.3d 916](#) (Tex. Crim. App. 2006).

In an aggravated kidnapping prosecution, the defendant was not entitled to lesser punishment because leaving his victim (his girlfriend) alone in a car with opportunity to escape was not the functional equivalent of releasing her in a safe place.

Banargent v. Brent, No. 14-05-0574-CV, [2006 Tex. App. Lexis 1561](#), (Houston [14th Dist.] Feb. 28, 2006, no pet.).

In a family violence protective order case, the evidence of prior family violence, including repeated stabbing of the applicant by the respondent, was sufficient to support a finding of the likelihood of future family violence because although the respondent had received a life sentence in the criminal assault case, he had not yet been incarcerated when the protective order was issued.

Barnard v. Barnard, [133 S.W.3d 782](#) (Tex. App.—Fort Worth 2004, no pet.).

In a divorce case in which the trial court issued a protective order, there was full, clear, and satisfactory evidence to support a finding of cruelty by respondent-husband and to enter the protective order but the evidence was insufficient to support the property division.

Battles v. State, [45 S.W.3d 694](#) (Tex. App.—Tyler 2001, no pet.).

In a prosecution for stalking, element of “conduct” includes speech within the definition of acts. The stalking statute is not facially invalid for failure to define the phrase “pursuant to the same scheme or course of conduct.” Between the Tex. Penal Code’s definition of conduct and the commonly understood meaning of “scheme” and “pursuant to,” the statute gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

BC v. Rhodes, [116 S.W.3d 878](#) (Tex. App.—Austin 2003, no pet.).

In a protective order application based on dating violence, in the absence of other pending litigation, the protective order was a final, appealable order. The trial court had jurisdiction to issue the protective order on behalf of a minor in a dating relationship because any adult may file for protective order on behalf of child for family violence and dating violence is included within the definition of family violence. An adult may not file for protective order to protect another adult for dating violence (rape). Even when consent is disputed in a date rape allegation, a subsequent hostile messages sent indirectly to the victim is legally and factually sufficient to support protective order. The trial court's jurisdiction during first year of a protective order is limited to modification.

Bedinghaus v. Adams, No. 02-08-096-CV, [2009 Tex. App. Lexis 765](#) (Tex. App.—Fort Worth Feb.5, 2009, no pet.) (mem. op.).

In a dating protective order case, evidence that the respondent (ex-boyfriend) sent the applicant 600-800 emails, made threats to her, hired a private investigator to watch her, and sent derogatory statements about applicant to her relatives, friends, neighbors, and employer was sufficient to support a finding that family violence was likely to occur in the future. Dating violence includes a threat even without actual physical violence.

Billodeau v. State, [263 S.W.3d 318](#) (Tex. App.—Houston [1st Dist.] 2007), rev'd on other grounds and remanded, [277 S.W.3d 34](#) (Tex. Crim. App 2009).

In a prosecution for aggravated sexual assault of a child, the defendant and complainant could not have been legally married in Texas because both were males.

Billodeau v. State, [277 S.W.3d 34](#) (Tex. Crim. App. 2009).

In a prosecution for sexual assault of a child, the trial court erred in excluding evidence of the complainant's threats to neighbors to falsely accuse neighbors of sexual molestation. Even though the threats occurred after the alleged incident on trial, the statements were admissible under TRE 613(b) to show bias or motive.

Bilyeau v. Bilyeau, [86 S.W.3d 278](#) (Tex. App.—Austin 2002, no pet.).

In a divorce case with motion for a protective order, the court has discretion as to whether to transfer a protective order case to a court with pending a SAPCR; actions may proceed simultaneously in separate

courts; receiving court has same jurisdiction to modify order as originating court; protective order granted in pending divorce action is not appealable.

Black v. State, No. 02-05-38-CR, [2006 Tex. App. Lexis 7823](#) (Tex. App.—Fort Worth, Aug. 31, 2006, pet. ref'd).

In a prosecution for aggravated assault with a deadly weapon and violation of a protective order, evidence that the defendant-husband threatened his wife and children with a knife was sufficient to support the conviction on each count.

Blaylock v. State, No. 05-03-617-CR, [2004 Tex. App. Lexis 9440](#) (Tex. App.—Dallas, Oct. 27, 2004, no pet.).

In a prosecution for retaliation, violation of a protective order, and assault, evidence that the defendant hit and pulled the hair of his live-in girlfriend after she reported his violation of the protective order to the police was sufficient to establish retaliation and assault.

Bradley v. State, No. 07-05-281-CR, [2007 Tex. App. Lexis 2128](#) (Tex. App.—Amarillo, Mar. 20, 2007, no pet.).

In a prosecution for criminal trespass, evidence showed that the defendant was present at his ex-girlfriend's property after being warned to keep off, so the evidence was sufficient to support a conviction.

Brenneman v. State, [45 S.W.3d 729](#) (Tex. App.—Corpus Christi 2000, no pet.).

In a prosecution for assault, [Tex. Code Crim. Proc. art. 42.014](#) was not void for vagueness and the finding that the defendant committed the crime due to bias against homosexuals was proper.

Brown v. State, No. 06-09-18-CR, [2009 Tex. App. Lexis 6485](#) (Tex. App.—Texarkana, July 31, 2009, no pet.).

In a prosecution for criminal trespass, evidence that the defendant remained on his father-in-law's property after being told to leave at least twice was sufficient to support a conviction, even though the defendant did not verbally refuse to leave and eventually left the property before law enforcement arrived.

Bufkin v. State, [207 S.W.3d 779](#) (Tex. Crim. App. 2006).

In a prosecution for family violence assault, the defendant was entitled to a defensive jury instruction because consent is a defense if the bodily

injury is not serious and at trial the victim recanted her allegations that the defendant struck her without provocation in the face and bit her on her body and testified that the defendant struck her in self-defense and the bites were consensual “love bites.”

Buggs v. State, Nos. 05-07-0676-CR, 05-0-0677-CR, 05-07-00749-CR, [2008 Tex. App. Lexis 1499](#) (Tex. App.—Dallas, Feb. 29, 2008, pet. ref’d).

In a prosecution for trafficking of persons, aggravated kidnapping, and compelling prostitution, the evidence was factually sufficient to support the jury’s finding that the defendant took a minor female to his residence, physically abused her, restrained her movement, had her engage in prostitution, and took her earnings as the jury was the sole arbiter of the credibility of the witnesses.

Burns v. Burns, [116 S.W.3d 916](#) (Tex. App.—Dallas 2003, no pet.).

In a SAPCR, the trial court did not abuse its discretion in appointing the father joint managing conservator of the child despite evidence that the father had been restrained by a protective order. The evidence did not establish that said order contained a finding of family violence and there was conflicting testimony in the SAPCR as to the alleged incident of violence.

Busby v. State, No. 08-04-155-CR, [2005 Tex. App. Lexis 4636](#) (Tex. App.—El Paso, June 16, 2005, no pet.).

In a prosecution for retaliation, evidence that the defendant struck the victim (his common-law wife) after she admitting speaking to a detective who was investigating the defendant and, after she told the defendant she could not provide him an alibi, was sufficient to prove the crime.

Butler v. State, [162 S.W.3d 727](#) (Tex. App. —Fort Worth 2005), aff’d, [189 S.W.3d 299](#) (Tex. Crim. App. 2006).

In a prosecution for Class A misdemeanor assault that resulted in a judgment with a finding of family violence, the familial relationship was established by law so the defendant had sufficient notice of the state’s intent to seek the finding and because the finding did not enhance punishment beyond the prescribed statutory maximum, the finding did not violate due process.

C

Cabrera v. State, [647 S.W.2d 654](#) (Tex. Crim. App. 1983).

In a prosecution for interference with child custody, the evidence was insufficient to convict the defendant because the custody order was not specific enough to put the defendant on notice that she had lost custody or that taking the child would be a crime.

Capello v. State, No. 03-05-0553-CR, [2006 Tex. App. Lexis 7551](#) (Tex. App. — Austin, Aug. 25, 2006, pet. ref'd).

Under TRE 702, a licensed professional counselor was qualified as an expert witness to explain the emotional and behavioral patterns typical of battered women and explained why some victims of domestic violence do not immediately report the abuse.

Carbajal-Morales v. State, No. 05-01-1749-CR, [2003 Tex. App. Lexis 4256](#) (Tex. App. — Dallas, May 19, 2003, no pet.).

In a prosecution for burglary of a habitation, evidence that the defendant entered his ex-wife's home and assaulted her by threatening bodily injury with a gun was sufficient to support the conviction.

Carter v. State, [150 S.W.3d 230](#) (Tex. App. —Texarkana 2004, no pet.).

In a prosecution for felony family violence assault, despite the victim's recantation at trial, evidence from a police officer of the victim's statement just after assault that the defendant pushed and dragged her and her physical appearance at the scene (busted lip, bloody shirt, dirty clothes) established probable cause to arrest the defendant. The victim's statements at the scene were admissible as excited utterances.

Castaneda v. State, No. 08-02-00381-CR, [2004 Tex. App. Lexis 2300](#) (Tex. App. —El Paso, Mar. 11, 2004, no pet.).

In a prosecution for a violation of a protective order, the jury charge was proper because the abstract portion of the charge properly listed all the elements of the charge and the application portion stated that finding of guilt required finding that the defendant knowingly or intentionally committed an act of family violence against a protected person.

Cepeda v. State, No. 04-04-205-CR, [2006 Tex. App. Lexis 2143](#) (Tex. App.—San Antonio, Mar. 22, 2006, no pet.).

In a prosecution for aggravated assault with a deadly weapon, the defendant was not entitled to jury instruction on lesser included offense because the knife used to stab the victim (the defendant's wife) was *per se* a deadly weapon.

Champion v. State, No. 06-04-141-CR, [2005 Tex. App. Lexis 3733](#) (Tex. App. — Texarkana May 17, 2005, no pet.).

In a prosecution for terroristic threat, evidence that the defendant threatened to shoot the victim (his ex-wife), cut off her head, and kill her was sufficient to support conviction.

Chapa v. State, [747 S.W.2d 561](#) (Tex. App. — Amarillo 1988, pet. ref'd).

In a prosecution for injury to a child, the evidence was sufficient to convict the defendant, who was the victim's managing conservator, based on the failure to seek medical attention for her niece who had been repeatedly beaten by the defendant's husband, who also sometimes beat the defendant.

Charlton v. State, No. 05-05-1043-CR, [2008 Tex. App. Lexis 1989](#) (Tex. App. — Dallas, Mar, 19, 2008, no pet.).

In a prosecution for interference with child custody, evidence that the defendant took the child out of Texas without the father's or a court's permission was sufficient to support the conviction.

Chatmon v. State, No. 14-97-1422-CR, [1999 Tex. App. Lexis 7643](#) (Tex. App. — Houston [14th Dist.] Oct. 14, 1999, no pet.).

In a prosecution for harassment, evidence that the defendant called his aunt who was in Texas and threatened to kill her and her family was sufficient to prove the offense occurred in Texas because call was received in the state.

Childress v. State, [285 S.W.3d 544](#) (Tex. App. — Waco 2009, pet. ref'd).

In a prosecution for aggravated assault and dating violence assault, the dating violence assault was not a lesser-included offense of the aggravated assault because the former is not established by proof of the same or less than all the facts required to establish the commission of the aggravated assault. Evidence that the defendant and the victim had a sexual relationship and were dating coupled with evidence that the defendant set the victim on fire was sufficient to support the convictions.

Clark v. Funk, No. 08-97-00634-CV, [2000 Tex. App. Lexis 8730](#), 2000 WL 1203942 (Tex. App. — El Paso, Aug. 24, 2000, no pet.).

In awarding husband joint managing conservatorship status, the trial court did not abuse its discretion because as the trier-of-fact the trial court was free to find the wife's claim of physical abuse by husband lacked credibility and so court was not bound to deny husband joint managing conservatorship status under [Tex. Fam. Code 153.004\(b\)](#).

Clark v. State, No. 14-07-00276-CR, [2008 Tex. App. Lexis 6620](#) (Tex. App. — Houston [14th Dist.] Sept. 2, 2008, pet. ref'd).

In a prosecution for violation of [Tex. Penal Code § 25.07](#), the trial court did not have to grant probation when the defendant had prior family violence assault conviction and received the minimum sentence.

Clements v. Haskovec, [251 S.W.3d 79, 83-84](#) (Tex. App. — Beaumont 2008, no pet.) (orig. proceeding).

An expired protective order was not moot under the collateral consequences doctrine because an expired protective order containing a finding of family violence carries a social stigma even after the order expires; finding of future violence can be based on proof of past violence. On appeal, the sufficiency of the evidence in a protective order case was reviewed under the standards for legal and factual sufficiency.

Clements v. State, [19 S.W.3d 442](#) (Tex. App.—Houston [1st Dist.] 2000, no pet.).

In a stalking prosecution, the statute was not unconstitutionally vague nor overbroad and did not impermissibly restrict freedom of speech. Evidence of other instances of bad conduct not pled in the indictment were admissible because those incidents established the victim's state of mind with regard to her fear of the defendant. Even if "saving" his marriage was the true motive for the defendant's conduct that conduct is not constitutionally protected so that restrictions on it require close scrutiny.

Cockerham v. Cockerham, [218 S.W.3d 298](#) (Tex. App. —Texarkana 2007, no pet.).

In a protective order case, after finding both the father and daughter committed family violence, the trial court had no authority to enter protective order *sua sponte* against the daughter because father had not applied for protective order against her.

Coleman v. Coleman, [109 S.W.3d 108](#) (Tex. App.—Austin 2003, no pet.).

In a divorce case, the trial court did not err in appointing husband joint managing conservator of children despite the wife's allegations of history or pattern of sexual abuse when evidence failed to establish that husband was barred from being joint managing conservator under [Tex. Fam. Code § 153.004\(b\)](#).

Collins v. State, [955 S.W.2d 464](#) (Tex. App. —Fort Worth 1997, no pet.).

The criminal enforceability of a protective order not adversely affected by lack of information in order even if that lack would undermine a civil contempt proceeding. A minimum distance to be maintained need only be set out if there is such a minimum distance.

Colvin v. Colvin, No. 03-03-0234-CV, [2004 Tex. App. Lexis 3534](#) (Tex. App.—Austin, Apr. 22, 2004, no pet.).

In a post-divorce protective order proceeding, the trial court did not err in considering the respondent-husband's pre-divorce violent behavior (that included punching applicant-wife) in conjunction with post-divorce outbursts and drug overdose to support conclusion that family violence had occurred and was likely to occur in the future.

Conner v. State, No. 12-06-311-CR, [2008 Tex. App. Lexis 1510](#) (Tex. App.—Tyler, Feb. 29, 2008, no pet.).

In a prosecution for harassment of wife, evidence that the defendant told the wife in a telephone conversation that once he got out of jail, he was going to assault her was sufficient to prove the offense.

Conner v. State, No. 03-04-306-CR, [2005 Tex. App. Lexis 6448](#) (Tex. App.—Austin, Aug. 11, 2005, pet. ref'd).

In a prosecution for terroristic threat and assault, the evidence was sufficient to show that the defendant was a member of the victim's household because the defendant had been living with the victim for three weeks, had a sexual relationship with the victim, had no other place to stay, and had paid to have a phone connected at the residence.

Cook v. State, [940 S.W.2d 344](#) (Tex. App.—Amarillo 1997, pet. ref'd).

In a prosecution for terroristic threat, evidence was sufficient to support conviction even though the threats by the defendant were left on the victim's voicemail when the victim (a former employee of the defendant) was out of town.

Cooke v. Cooke, [65 S.W.3d 785](#) (Tex. App.—Dallas 2001, no pet.).

A post-divorce protective order was appealable because similar to a permanent injunction; although statute required that the post-divorce protective order be filed in the divorce court, the protective order did not have to be heard by that court and could be transferred or reassigned.

Cooke v. State, Nos. 02-08-026-CR, 02-08-027-CR, and 02-08-212-CR, [2009 Tex. App. Lexis 7539](#) (Tex. App.—Fort Worth 2009, no pet.).

In a prosecution for felony family violence assault, the enhancement of the offense to a felony based on a 1999 family violence assault conviction did not violate the prohibition on *ex post facto* laws.

Cooks v. State, [169 S.W.3d 288](#) (Tex. App.—Texarkana 2005, pet. ref'd).

In an aggravated kidnapping prosecution, the defendant was not entitled to mitigation of punishment for voluntarily releasing the victim (his girlfriend) when he took her to the hospital for medical care because the defendant had gun and tried to prevent the defendant from speaking to hospital staff, who rescued her.

Cox v. Simmons, No. 07-07-0320-CV, [2007 Tex. App. Lexis 6847](#) (Tex. App.—Amarillo Sept. 5, 2007, pet. disp'd).

The appointment of counsel to represent a protective order respondent is within court's discretion.

Crawford v. State, No. 12-05-00293-CR, [2006 Tex. App. Lexis 6520](#) (Tex. App.—Tyler, July 26, 2006, no pet.).

In a prosecution for felony family violence assault, where the state was unable to prove its enhancement paragraph by showing either that the court had made a finding of family violence or that the prior assault involved family violence, the judgment had to be reformed to reflect a conviction for a Class A, rather than a felony, assault.

Criswell v. State, No. 08-03-090-CR, [2004 Tex. App. Lexis 1502](#) (Tex. App.—El Paso, Feb. 12, 2004, no pet.).

In stalking prosecution, evidence that the defendant made 34 calls to the victim's (his ex-wife) residence over two days, followed the victim and waited outside her home was factually sufficient to prove the offense.

Cuellar v. State, [70 S.W.3d 815](#) (Tex. Crim. App. 2002)

For purposes of [Tex. Penal Code § 46.04](#) (felon in possession of a firearm), a person does not have a felony conviction if the judge has set aside the conviction, dismissed the indictment, and released the person from all penalties and disabilities flowing from the conviction.

D

Danklefs v. Danklefs, No. 04-01-0849-CV, [2003 Tex. App. Lexis 6718 * 5-6](#) (Tex. App. —San Antonio, Aug. 6, 2003, pet. denied).

While the trial court is given wide latitude in determining custody issues, the Texas Family Code places certain restrictions on the trial court's discretion when there are allegations of abuse. [Tex. Fam. Code § 153.004](#) provides that the trial court is to consider evidence of the intentional use of abusive physical force by a party against the party's spouse, and further provides that the trial court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present physical abuse by one parent directed against the other parent. [Tex. Fam. Code § 153.004\(b\)](#). The term "history or pattern" is not defined in the Texas Family Code; therefore, the court gave the term its ordinary meaning. [Tex. Gov't Code § 311.011](#).

Nothing in the record undisputedly shows a history or pattern of violence. Excluding the interested parties' testimony, no evidence was presented that credibly indicated even one instance of physical abuse, much less a history or pattern. The trial court could have determined that the wife's testimony regarding the history of physical abuse was not credible. Therefore, the trial court was not required to exclude the husband from joint managing conservatorship under section 153.004.

Daugherty v. Southern Pacific Transp., [772 S.W.2d 81, 82](#) (Tex. 1989).

No pleading is required for the court to take judicial notice of another state's laws under TRE 202.

Davidson v. State, No. 08-03-34-CR, [2005 Tex. App. Lexis 371](#) (Tex. App. —El Paso, Jan. 19, 2005, no pet.).

In a prosecution for harassment by making threatening and harassing calls to ex-wife, evidence that the content of the calls was vulgar and contained threats to file felony charges against ill son was sufficient to prove the victim was alarmed, annoyed, and terrified, thus proving the crime.

Davila v. State, No. 08-07-00041-CR, [2009 Tex. App. Lexis 554](#) (Tex. App. —El Paso, Jan. 29, 2009, no pet.).

In a prosecution for family violence assault, evidence that the defendant choked the victim (his wife) until she agreed to reconcile with him was sufficient to establish the offense even in absence of the victim's in-

court identification of the defendant as her assailant. The manner and means paragraphs of the jury charge, which described alternate means of committing the offense, did not cause the jury to render a less than unanimous verdict. The trial court did not err in allowing the prosecution to read to the jury the defendant's stipulation that he had a prior conviction for a family violence assault. The stipulated evidence was admissible under TRE 404.

Davis v. Davis, No. 06-07-059-CV, [2007 Tex. App. Lexis 4298](#) (Tex. App.—Texarkana, June 1, 2007, no pet.) (mem. op.).

The appeal of a protective order issued separately from a divorce decree was properly dismissed because appellant-husband failed to timely perfect the appeal, which became final before the separately docketed divorce order became final.

Davis v. Guerrero, [64 S.W.3d 685](#) (Tex. App.—Austin 2002, no pet.).

A child did not have a home state when the custody suit was commenced; almost two years had passed since the child last lived in a single state for six consecutive months. Under [Tex. Fam. Code Ann. § 152.203](#), a Texas court could modify an order affecting the parent-child relationship from another state because Texas would have had jurisdiction to make an original determination under [Tex. Fam. Code Ann. § 152.201\(a\)\(2\)](#) where there was a significant connection with Texas in that both biological parents lived in Texas and the child had lived in Texas for 37 of the first 70 months of her life.

Davis v. State, [961 S.W.2d 156](#) (Tex. Crim. App. 1998).

A defendant who invoked the Fifth Amendment right against self-incrimination is not entitled to introduce his prior testimony under TRE 804.

Davis v. State, No. 05-05-01694-CR, [2007 Tex. App. Lexis 352](#) (Tex. App. —Dallas, Jan. 8, 2007, no pet.).

In a prosecution for aggravated sexual assault, although the victim (the defendant's wife) recanted at trial, her statements to witnesses immediately after the assault were admissible as excited utterances. The baseball bat used in the assault was a deadly weapon. The trial court did not err in allowing the state to impeach the victim with a prior inconsistent statement about how she broke her nose prior to the alleged offense. The impeachment evidence was admissible under TREs 404(b) and 613.

Davis v. State, 799 S.W.2d 398 (Tex. App.—El Paso 1990, pet. ref'd).

In a prosecution for criminal trespass, there was no implied consent by virtue of the marital relationship that gave the defendant the right to enter his estranged wife's apartment that she had rented after their separation, to which he did not have a key, and where he had never lived.

DeJesus Gipson v. Huerta, No 13-02-0490-CV, [2003 Tex. App. Lexis 6204](#) (Tex. App.—Corpus Christi July 17, 2003, no pet.) (mem. op.).

In protective order proceeding, the trial court erred in finding there was a likelihood of future family violence because the record lacked any evidence to support such a finding. The applicant's affidavit in support of *ex parte* relief was not in evidence nor did applicant testify at the hearing.

DelaParra v. DeFranyvutti, No. 04-02-786-CV, [2003 Tex. App. Lexis 9558](#) (Tex. App.—San Antonio, Nov. 12, 2003, no pet.).

In divorce suit with a protective order application, respondent-husband waived his right to have at least 45 days prior notice of trial setting and to object to the consolidation of the divorce and protective order hearings by not timely objecting.

Delapaz v. State, [297 S.W.3d 824](#) (Tex. App.—Eastland 2009, no pet.).

In a prosecution for sexual assault of a child, evidence that another person had previously sexually assaulted the child was properly excluded during punishment phase because it was irrelevant under TRE 609 and did not fit any exceptions under TRE 412 (the rape shield law).

De Los Santos v. State, [219 S.W.3d 71](#) (Tex. App.—San Antonio 2006, no pet.).

In a prosecution for aggravated sexual assault of children, the trial court did not err in admitting testimony of two victims because both children had the capacity to narrate events, understood the difference between the truth and a lie, had the ability to intelligently recall and narrate events, and understood their moral obligation to tell the truth. The child witnesses were competent to testify under TRE 601.

Dempsey v. Dempsey, [227 S.W.3d 771](#) (Tex. App.—El Paso 2006, no pet.).

In protective order proceeding, the evidence that respondent-husband attempted to force applicant-wife to have sex and had pushed her on one occasion was sufficient to support the finding that family violence had occurred and was likely to occur in the future.

Dixon v. State, No. 10-06-411-CR, [2008 Tex. App. Lexis 2581](#) (Tex. App.—Waco, Apr. 9, 2008, pet. ref'd).

In a prosecution for terroristic threat, evidence that the defendant told the victim (his girlfriend) that she would be found floating in the lake if she ever lied to him again was sufficient to support conviction.

Dolkart v. State, [197 S.W.3d 887](#) (Tex. App.—Dallas 2006, pet. ref'd).

For purposes of the jury charge, assault by threat and assault by injury are separate offenses.

Dominguez v. Hughes ex. rel. CTH, [225 S.W.3d 272](#) (Tex. App.—El Paso 2006, no pet.).

Evidence of injuries to child during “horseplay” sufficient to support issuance of protective order requested by father against mother’s brother.

Dotson v. State, No. 12-06-123-CR, [2007 Tex. App. Lexis 4399](#) (Tex. App.—Tyler June 6, 2007, pet. ref'd).

In a prosecution for aggravated assault with a deadly weapon, the victim’s (the defendant’s girlfriend) testimony that the defendant cut her face with a knife, coupled with description of the knife, was sufficient to support a deadly weapon finding.

Duckett v. State, [797 S.W.2d 906](#) (Tex. Crim. App. 1990).

In a prosecution for sexual assault of a child, evidence of Child Sexual Abuse Accommodation Syndrome may be admitted because it enabled the trier of fact to better comprehend the full significance of the evidence. In this case, expert testimony on CSAAS was admissible to rebut defensive evidence of inconsistent statements and denial or non-disclosure of abuse. Such evidence was not improper bolstering because it was introduced only after the child witness had been impeached.

Dues v. State, [634 S.W.2d 304](#) (Tex. Crim. App. 1982).

In a prosecution for terroristic threat, the offense is complete once the defendant threatened the victim with some act and intended to place the victim in fear of serious bodily injury regardless of whether the victim or anyone else was actually placed in fear of serious bodily harm or whether the defendant was capable of carrying out the threat.

Dukes v. State, [239 S.W.3d 444](#) (Tex. App.—Dallas 2007, pet ref'd).

In a violation of protective order case, the defendant's knowledge of his wife's residential address was sufficient to prove that the defendant knowingly and intentionally violated the order by going within 500 feet of the location, even though the order had the wrong address for the wife's residence.

Dunnington v. State, [740 S.W.3d 896, 898](#) (Tex. App.—El Paso 1987, pet. ref'd).

In a child sexual assault prosecution, it was not error to exclude expert testimony about belated outcry, spousal denial of abuse, and the general characteristics of pedophiles because the probative value of such evidence is substantially outweighed by its prejudicial effects.

Duran v. State, No. 13-07-659-CR, [2008 Tex. App. Lexis 6853](#) (Tex. App.—Corpus Christi, Feb. 28, 2008, pet. ref'd).

In family violence assault prosecution, evidence that the defendant and his victim (his wife) were observed struggling, that the victim had a swollen eye, and that a belligerent defendant threatened the responding officers was sufficient to support conviction.

E

Earthman's Inc. v. Earthman, [526 S.W.2d 192, 206](#) (Tex. App.—Houston [1st Dist.] 1975, no writ).

Communications prior to or after the marriage dissolved were not inadmissible under the spousal confidential communications privilege.

Easter v. McDonald, [903 S.W.2d 887, 890](#) (Tex. App.—Waco 1995) (orig. proceeding).

TRE 510 did not apply in case where the stepfather's claim that the father sexually abused child put the father's mental condition in issue.

Edison v. Edison, [253 S.W.3d 303](#) (Tex. App.—Beaumont 2008, no pet.).

In a third degree felony family violence assault prosecution, the defendant's judicial confession that he had a prior family violence assault conviction was sufficient to establish the offense was a felony.

Erlewine v. Erlewine, No. 03-06-308-CV, [2007 Tex. App. Lexis 7256](#) (Tex. App.—Austin, Aug. 29, 2007, no pet.) (mem. op.).

In a protective order proceeding, respondent-ex-wife's challenges to validity of prior protective orders were untimely as she failed to appeal those final orders and her challenge to a temporary order was moot because the temporary order was superseded by a final order. The evidence supported the issuance of a subsequent protective order because she had violated prior orders prohibiting communication with her son.

Estate of Ella v. Mask, No.04-07-0667-CV, [2008 Tex. App. Lexis 7790](#) (Tex. App.—San Antonio, Oct. 15, 2008, pet. denied).

There was no evidence to establish lack of testamentary capacity when the expert witness testified based solely on a review of the testator's hospital and pharmacy records and without personal observation or examination of the testator.

Estep v. State, No. 05-940584-CR, [1997 Tex. App. Lexis 3056](#) (Tex. App.—Dallas, June 12, 1997, pet. ref'd).

In a prosecution for harassment, evidence that the defendant telephoned the mother of his child and told her she was going to die when she

reported his child abuse to the authorities was sufficient to prove the crime.

Escobedo v. State, [202 S.W.3d 844, 848](#) (Tex. App.—Waco 2006, pet. ref'd).

Crimes of moral turpitude are crimes involving dishonesty, fraud, deceit, misrepresentation, or deliberate violence; crimes involving matters of personal morality; crimes committed knowingly and contrary to justice, honesty, principle, or good morals; crimes involving baseness, vileness, or depravity; conduct that is immoral in itself; or conduct that is willful, flagrant, or shameless and shows moral indifference.

Ex parte Boyd, [58 S.W.3d 134](#) (Tex. Crim. App. 2001).

The trier of fact (in this case, the jury) must decide, using the beyond a reasonable doubt standard, whether the crime was motivated by bias or prejudice under [Tex. Code Crim. Proc. art. 42.014](#). Citing *Apprendi v. New Jersey*, [530 U.S. 466](#) (2000), the court held that it is unconstitutional for a legislature to remove from the jury the assessment of facts (other than the fact of a prior conviction) that increase the prescribed range of penalties to which a criminal the defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Ex parte Flores, [130 S.W.3d 100](#) (Tex. App.—El Paso 2003, pet. ref'd).

Expiration of a magistrate's order for emergency protection did not render order moot under "capable of repetition yet evading review" and "collateral consequences" doctrines because the order carried a stigma and legal consequences; [Tex. Code Crim. Proc. art. 17.292](#) is constitutional despite its *ex parte* nature and did not violate the husband's rights to jury trial, counsel, compulsory process, due course of law, confrontation of witnesses or right to petition for redress of grievances.

Ex parte Jackman, [663 S.W.2d 520](#) (Tex. App.—Dallas 1983) (orig. proceeding).

In a contempt proceeding, the relator-ex-husband had sufficient notice of the permanent injunction and of the hearing on the relator's alleged violation of the injunction to support finding of contempt of court against the relator.

Ex parte Johnson, [654 S.W.2d 415](#) (Tex. 1983) (orig. proceeding).

A contempt proceeding was quasi-criminal and penal in nature so trying the relator in absentia violated his right to be present at the hearing and

right to confront witnesses, absent a finding that the relator had voluntarily absented himself from the hearing.

Ex parte McDonald, [737 S.W.2d 102](#) (Tex. App.—Corpus Christi 1987) (orig. proceeding).

The Texas trial court erred in assuming jurisdiction under § 3(a)(3)(ii) of the UCCJA to modify an original Texas custody decree, since there was no finding in the trial court's temporary orders or evidence in the record that there was a serious and immediate question concerning the physical or emotional welfare of the child

Ex parte Miller, No. AP-76,167, [2009 Tex. Crim. App. Lexis 1486](#) (Tex. Crim. App. Oct. 28, 2009).

In a prosecution for homicide, the defendant was entitled to offer reputation or opinion testimony or evidence of specific prior acts of violence to show the victim's character for violence or aggression. When the defendant perceives the victim is dangerous (regardless of whether the perception is accurate) based on demonstrated violent tendencies, the "communicated character" is admissible to prove the defendant's defensive state of mind. Also, the defendant may offer "uncommunicated character evidence," in the form of reputation and opinion testimony, of the victim's violent character to prove that the victim was the first aggressor.

Ex parte Pool, [71 S.W.3d 462](#) (Tex. App.—Tyler 2002, no pet.).

No double jeopardy when defendant pled guilty of violation of protective order hoping to escape prosecution for burglary stemming from same incident.

Ex parte Quintero, No. 03-08-00463-CR, [2009 Tex. App. Lexis 117](#) (Tex. App.—Austin, Jan. 8, 2009, no pet.).

In a writ of *habeas corpus* after a conviction for family violence assault, although charging instrument listed the offense as family violence assault and judgment contained finding of family violence, the admonishment and waiver of rights signed by the pro se the defendant did not mention family violence so the defendant was entitled to *habeas corpus* relief.

Ex parte Shields, [779 S.W.2d 99](#) (Tex. App.—Houston [1st Dist.] 1989)(orig. proceeding).

In contempt action, an order for *capias* was not void because the order stated that the commitment term was “pending further order of the court.”

Ewing v. Ewing, No. 04-96-00323, 97 Tex. App. Lexis 2667 (Tex. App.—San Antonio, May 21, 1997, no writ).

In a divorce proceeding, a presumption in favor of joint conservatorship of child was rebutted by evidence of tumultuous relationship between the parents. The trial court did not err in excluding the father’s evidence of the mother’s violent past. The mother’s murder of a man who was assaulting her had occurred 20 years earlier and the records of that case were sealed.

F

Feldman v. State, Nos. 11-02-00339-CR to 11-02-00344-CR, [2004 Tex. App. Lexis 1094](#) (Tex. App.—Eastland, Feb. 5, 2004, pet. ref'd).

In multiple prosecutions for violations of a protective order, there was insufficient evidence to show that the defendant communicated with his son because the ex-wife, not the son, read the letters the defendant sent in violation of the order and there was no pleading that the defendant violated the order by communicating with a member of the son's family or household. The evidence was insufficient to support a jury verdict on the charge of violating the order by communicating with the son. The trial court also erred by failing to give a jury instruction on the issue of notice and in failing to include the requisite mental state in the charge.

Fielder v. State, [756 S.W.2d 309, 320](#) (Tex. Crim. App. 1988).

In a homicide prosecution, it was reversible error to exclude expert witness to explain why, as a battered woman, the defendant could both fear the deceased and continue to live with him. The law recognizes the fact that future conduct may reasonably be inferred from past conduct.

Fierro v. State, No. 03-05-0266-CR, [2007 Tex. App. Lexis 2160](#) (Tex. App.—Austin, Mar. 22, 2007, pet. ref'd).

In a prosecution for injury to a child, the trial court did not err in excluding evidence of child's prior accusation of abuse. Under TRE 608, specific instances of conduct of a witness, other than proof of a criminal conviction, may not be introduced to support or attack the witness's credibility except to expose bias, correct affirmative misrepresentations made on direct examination or to demonstrate lack of capacity. Absent proof that the prior accusation was false or that the prior and current accusations were similar, the evidence of the prior accusation has too little probative value to outweigh the danger that it would confuse a jury.

Fife v. State, No. 05-05-0868-CR, [2006 Tex. App. Lexis 4564](#) (Tex. App.—Dallas, May 26, 2006, pet. ref'd).

In an aggravated assault with a deadly weapon prosecution, family violence is not a required element, and so a challenge to the constitutionality of [Tex. Code Crim. Proc. art. 42.013](#) will not render criminal judgment void.

Flores v. State, No. 11-06-00088-CR, [2007 Tex. App. Lexis 5670](#) (Tex. App.—Eastland, July 19, 2007, no pet.).

In capital murder prosecution, there was sufficient evidence to support jury finding that the defendant had kidnapped his girlfriend before he shot her because the evidence showed that the defendant approached the victim with a shotgun, shot at officers trying to rescue her, and continued to restrain her until she died.

Flores v. State, [245 S.W.3d 432](#) (Tex. Crim. App. 2008).

In a prosecution for murder of fetuses, the defendant was not entitled to a jury instruction on the lesser included offense of deadly conduct because the defendant did not present some evidence that he was only guilty of the lesser offense.

Ford v. Harbour, No. 14-07-0832-CV, [2009 Tex. App. Lexis 1796](#) (Tex. App.—Houston [14th] Mar. 17, 2009, no pet.).

In a protective order proceeding, the appellate court lacked jurisdiction to consider a challenge to a temporary order and the evidence was legally and factually sufficient to support a finding of family violence.

Freeman v. State, [786 S.W.3d 56, 59](#) (Tex. App.—Houston [1st Dist.] 1990, no pet.).

An ex-wife's testimony that her ex-husband carried weapons with him all the time during their marriage did not violate the spousal communications privilege.

Fullylove v. State, No. 13-0-169-CR, [2001 Tex. App. Lexis 8009](#) (Tex. App.—Corpus Christi, Nov. 29, 2001, no pet.).

In a prosecution for harassment, an offense under [Tex. Penal Code Title 9](#), the court was not authorized to, and did not, make a finding of family violence in the judgment, because that type of finding is limited to offenses under [Tex. Penal Code Title 5](#).

G

Garcia v. State, [172 S.W.3d 270](#) (Tex. App.—El Paso 2005, no pet.).

In a prosecution for interference with child custody, despite having legal custody as the child’s managing conservator, the defendant could be convicted of the offense for failing to allow the possessory conservator access to the child as required by the court order.

Garcia v. State, [212 S.W.3d 877](#) (Tex. App.—Austin 2006, no pet.).

In a prosecution for aggravated assault with a deadly weapon, family violence felony assault, violation of a protective order, and endangering a child, [Tex. Penal Code § 25.07](#) is not facially overbroad or void for vagueness because it prohibits harassing communications. The restriction on speech was limited to the parties subject to the order and necessary due to prior violent or criminal conduct. The term “harass” in the statute includes a course of conduct directed at a specific person or persons causing or tending to cause substantial distress that has no legitimate purpose. The defendant’s Sixth Amendment right of confrontation was not violated when officer testified about the victim’s (the defendant’s wife) out-of-court statements because, even though the wife failed to appear at trial to testify, the statements were made when the wife was asking police to recover her abducted child and were thus excited utterances and not testimonial in nature.

Garcia v. State, [201 S.W.3d 695](#) (Tex. Crim. App. 2006).

In homicide prosecution when the relationship between the defendant and the deceased is a material issue, evidence of prior domestic violence is admissible under Tex. Code Crim. Proc. 38.36(a) and TRE 404(b). The latter does not bar all relationship evidence.

Garcia v. Tautenhahn, [314 S.W.3d 541](#) (Tex. App.—Corpus Christi 2010, no pet.).

In an application for a protective order by a sexual assault victim, evidence that the respondent had expressed an interest in seeing the child conceived during the sexual assault and that the respondent’s sister had contacted the victim was not sufficient to establish a threat of further harm under Tex. Code Crim. Proc. [7A.03](#).

Garcia-Hernandez v. State, No. 05-08-00735-CR, [2009 Tex. App. Lexis 2177](#) (Tex. App.—Dallas, Mar. 31, 2006, no pet.).

In the appeal of an assault conviction, because the record affirmatively showed the assault involved family violence, the appellate court had the authority to reform the judgment to include the required finding of family violence.

Gardner v. State, No. 05-05-00750-CR, [2006 Tex. App. Lexis 4417](#) (Tex. App.—Dallas May 24, 2006, no pet.).

In a prosecution for violation of protective order, evidence that the defendant drove past prohibited location (ex-girlfriend's house) was sufficient to support conviction.

Garza v. Garza, [217 S.W.3d 538](#) (Tex. App.—San Antonio 2006, no pet.).

In a SAPCR, the trial court did not err in admitting the mother's medical and mental health records because the issue of who should be the children's managing conservator required a determination of the children's best interests, which in turn required an assessment of the mother's personality and bipolar disorders.

Garza v. Harney, [726 S.W.2d 198](#) (Tex. App.—Amarillo 1987) (orig. proceeding).

Under Texas UCCJA (former [Tex. Fam. Code Ann. § 11.53\(a\)](#)), if evidence is presented that a child has been beaten and emergency jurisdiction is requested of the court to protect the child, the court may exercise temporary jurisdiction over a custody matter, even though the divorce is pending before a foreign court.

George v. State, [841 S.W.2d 544](#) (Tex. App.—Houston [1st Dist.] 1992) affirmed, [890 S.W.2d 73](#) (Tex. Crim. App. 1994).

In a prosecution for terroristic threat, evidence that the defendant, in a telephone conversation, threatened to kill the victim (his estranged wife) was sufficient to convict, but the conviction was reversed because the trial court failed to give jury instruction that evidence of extraneous offenses could not be considered unless the jury believed, beyond a reasonable doubt, that the appellant committed those offenses.

Gharbi v. State, [131 S.W.3d 481](#) (Tex. Crim. App. 2003).

In a prosecution for violation of a protective order, variance between the indictment's allegation that the defendant went to the house of his former spouse and proof that prohibited location was the daughter's house was held immaterial.

Gibbons v. State, [794 S.W.2d 887, 893](#) (Tex. App.—Tyler 1990, no pet.).

The spouse of the accused has a privilege not to be called to testify, which means the testifying spouse holds the spousal immunity privilege.

Gil v. State, No. 05-03-1622-CR and 05-03-1623-CR, [2004 Tex. App. Lexis 9028](#) (Tex. App.—Dallas, Oct. 13, 2004, pet. ref'd).

In a prosecution for stalking and attempted capital murder, evidence that the defendant threatened, pushed, and shot the victim (his wife) was legally and factually sufficient to establish the offenses.

Gillenwaters v. State, No. 03-04-77-CR, [2007 Tex. App. Lexis 8525](#) (Tex. App.—Austin, Oct. 25, 2007, pet. ref'd).

In a prosecution for harassment of his ex-wife, evidence that the defendant called the ex-wife's work place repeatedly for 7 straight hours, and up to 40 times an hour during that period, and did not stop after being requested to do so was sufficient to prove the offense.

Girdy v. State, [175 S.W.3d 877](#) (Tex. App.—Amarillo 2005, pet. ref'd).

In an aggravated kidnapping prosecution, evidence that the defendant poked the victim (his girlfriend) with a knife, threatened to kill her, and forced her into his car was sufficient to establish his intent to inflict bodily injury.

Giron v. State, [695 S.W.2d 292, 294](#) (Tex. App.—Houston [1st Dist.] 1985, no pet.).

An interpretation of the witness's statement is inappropriate after an objection to the statement is sustained.

Givens v. Givens, No. 05-06-01582-CR, No. 05-06-01583-CR, [No. 05-06-01584-CR, 2008 Tex. App. Lexis 3606](#) (Tex. App.—Dallas, May 20, 2008, pet. ref'd).

In an aggravated assault case, the defendant admitted that he knew his hands could be a deadly weapon in context of choking the victim, so his claim that his guilty plea to aggravated assault with a deadly weapon was not voluntary or knowing was unfounded.

Glover v. State, [102 S.W.3d 754](#) (Tex. App.—Texarkana 2002, pet. ref'd).

In a prosecution for the sexual assault of a child, statements by 14-year-old victim to her mother admitting the child had sex with an adult male were not admissible as excited utterances but were admissible under TRE 803(24) (statements against social interest).

Godfrey v. Godfrey, No. 03-07-0220-CV, [2008 Tex. App. Lexis 6022](#) (Tex. App.—Austin, Aug. 8, 2008, no pet.).

In a protective order proceeding, the trial court was free to reject respondent-husband's claim that applicant-wife fabricated claims of family violence to gain advantage in child custody proceeding.

Godfrey v. State, No. 14-04-670-CR, [2005 Tex. App. Lexis 4050](#) (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

In a prosecution for aggravated assault with a deadly weapon, the defendant's verbal threats, the distance between the defendant and the victim (a household member), and the witnesses' descriptions of the knife supported the jury's finding that the defendant used a knife as a deadly weapon.

Gomez v. State, [183 S.W.3d 86](#) (Tex. App.—Tyler 2005, no pet.).

In a family violence assault prosecution, the defendant's constitutional rights were not violated when police testified as to statements made by complainant implicating the defendant in assault because the defendant had multiple opportunities to cross-examine the complainant.

Gonzalez v. Galvan, No. 13-08-488-CV, [2009 Tex. App. Lexis 2788](#) (Tex. App.—Corpus Christi, Feb. 23, 2009, no pet.) (mem. op.).

In protective order application, proof of past violent conduct can be sufficient to support an inference that the person will be violent in the future and support issuance of a protective order.

Gonzalez v. Rangel, No. 13-05-641-CV, [2006 Tex. App. Lexis 7254](#) (Tex. App.—Corpus Christi, Aug. 17, 2006, no pet.) (mem. op.).

In a protective order proceeding, the evidence was insufficient to support a finding of family violence because the respondent's statement that she would ruin applicant's career, her admission that she had shot another person, and her statement that the applicant would die if he did not come home from Iraq were not enough to show imminent threat to applicant's safety.

Gonzales v. State, [929 S.W.2d 546, 549](#) (Tex. App.—Austin 1996, pet. ref'd).

A witness's character may be attacked by opinion or reputation evidence or by proof certain of a criminal conviction. Other than proof of a criminal conviction, the witness's character for truthfulness may not be attacked by evidence of specific conduct.

Goodwin v. State, [91 S.W.3d 912](#) (Tex. App.—Fort Worth 2002, no pet.).

Although trial court did not make a finding of family violence in a prior assault case, in prosecuting a separate case, the state could use extrinsic evidence to prove the prior case involved a family violence assault.

Gould v. State, No. 07-00-0018-CR, [2000 Tex. App. Lexis 5135](#) (Tex. App.—Amarillo, Aug. 2, 2000, no pet.).

In a protective order violation prosecution, evidence that the defendant called the victim collect over 25 times in a 2-hour period was sufficient to prove that the defendant violated the order by communicating with the victim in a threatening or harassing manner.

Grant v. State, [218 S.W.3d 225](#) (Tex. App.—Houston 2007, pet. ref'd).

In an aggravated robbery prosecution, it was harmless error to admit testimonial statements contained in the defendant's high school disciplinary records into evidence over his Confrontation Clause objection.

Green v. State, [881 S.W.2d 27](#) (Tex. App.—San Antonio 1994, pet. ref'd).

In a kidnapping prosecution, the defendant was not entitled to a jury instruction because he failed to present evidence that his sole intent was to assume lawful control of the abducted child.

Griffith v. State, [983 S.W.2d 282, 287](#) (Tex. Crim. App. 1998).

If the expert witness does not tie the facts of the case to his expert testimony, the testimony is neither helpful nor admissible.

Grover v. State, No. 14.04-672-CR, [2005 Tex. App. Lexis 10821](#) (Tex. App.—Houston [14th Dist.], Dec. 15, 2005, pet ref'd).

In a prosecution for family violence aggravated assault by threat with a deadly weapon, although the victim (the defendant's wife) recanted at trial, evidence of the size and shape of the knife the defendant used to threaten his family supported deadly weapon finding.

Guillot v. Guillot, No. 01-06-01039-CV, [2008 Tex. App. Lexis 4831](#) (Tex. App.—Houston [1st Dist] June 26, 2008, no pet.).

In a divorce case, spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation.

Guzman v. State, [697 S.W.2d 404, 407](#) (Tex. Crim. App. 1985).

A court interpreter must interpret the witness's statements literally.

H

Haigood v. State, [814 S.W.3d 262](#) (Tex. App.—Austin 1991, pet. ref'd).

In a prosecution for harassment of ex-wife by repeated telephone calls, evidence that the defendant called his ex-wife 26 times in 8 minutes and ignored her repeated requests to stop calling was sufficient to prove the offense. Because the calls were received in Travis County, the offense occurred in that county.

Hamel v. Hamel, [161 S.W.3d 736](#) (Tex. App.—Beaumont 2005, no pet.).

Appellate court lacked jurisdiction over appeal of protective order issued in divorce suit because final decree of divorce had not been issued.

Hammer v. State, [296 S.W.3d 555](#) (Tex. Crim. App. 2009).

In a prosecution for indecency with a child, the trial court abused its discretion in excluding evidence regarding the complainant's prior false allegations against the defendant because such evidence, barred by TRE 608(b), was admissible under TRE 404(b) to show bias, pattern, or plan.

Hansen v. State, [224 S.W.3d 325](#) (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

In a prosecution for stalking, even though the indictment named the mother as the victim, evidence that the defendant entered the victim's property without permission and left inappropriate material for the victim's child was sufficient to prove the offense. The defendant was "in pursuit" for purposes of the stalking statute even though his conduct was directed at someone other than the person named as the victim in the indictment.

Hardy v. State, [187 S.W.3d 232](#) (Tex. App.—Texarkana 2006, pet. ref'd).

In a sexual assault prosecution, the trial court properly took judicial notice under TRE 202 of the defendant's prior sexual assault conviction in California and submitted the enhancement issue to the jury for during the punishment phase.

Harris v. State, [133 S.W.3d 760](#) (Tex. App.—Texarkana 2004, pet. ref'd).

In a murder prosecution, the trial court did not err in admitting the victim's statements to co-worker and state's attorney about her fears that the defendant's family violence would lead to the victim's death. The statements were admissible as excited utterances.

Harris v. State, [164 S.W.3d 775](#) (Tex. App.—Houston [14th] 2005 pet. ref'd).

In a burglary prosecution, the defendant was not subject to double jeopardy because he had previously been punished for same conduct in a contempt order for violating a protective order by the victim-girlfriend.

Hart v. Kozik, [242 S.W.3d 102](#) (Tex. App.—Eastland 2007, no pet.).

In a motion to modify a child custody order, the trial court did not err in declining jurisdiction because a finding of the child's best interest is not required for a Texas court to decline jurisdiction to modify an out-of-state child custody order.

Hart v. State, No. 06-04-050-CR, [2004 Tex. App. Lexis 11439](#) (Tex. App.—Texarkana, Dec. 21, 2004, pet. ref'd).

In a prosecution for retaliation, evidence that the defendant called the victim (his elderly, blind aunt) from jail and threatened to assault her because she reported his criminal trespass to the police was sufficient to support the conviction.

Hartfield v. State, [28 S.W.3d 69](#) (Tex. App.—Texarkana 2000, pet ref'd).

In a prosecution for murder and retaliation, evidence that the defendant publicly threatened to kill his wife if he ever got out of jail for sexual assault charge she had brought against him and that he subsequently strangled her after he was acquitted was sufficient to prove the crime of retaliation.

Harvey v. State, [78 S.W.3d 368, 373](#) (Tex. Crim. App. 2002).

In protective order violation case, jury charge did not need to contain a finding that the defendant knowingly violated the protective order to be sufficient. The defendant had received sufficient notice of the order that he would have been reckless to proceed without informing himself of its terms. As long as he was given the resources to learn the provisions of the order (a copy of the order), the respondent's choice not to read it was not a defense to prosecution for its violation. The jury charge did need to include a definition of the term "in violation of an order issued under"

the applicable statutes and stating how the defendant was on notice of the terms of the violated order. A violation of [Tex. Penal Code § 25.07](#) requires intent or knowledge when performing an act prohibited by the protective order.

Hastings v. Hastings, No. 03-00-00524-CV, [2001 Tex. App. Lexis 3160](#) (Tex. App.—Austin, May 17, 2001).

In a divorce, the trial court did not err in terminating the father’s parental rights in light of evidence that he was physically and psychologically abusive and was willing to give up his rights for monetary gain.

Haynes v. State, [254 S.W.3d 446](#) (Tex. App.—Houston [1st] 2007), aff’d, [2008 Tex. Crim. App. Lexis 569](#) (2008).

In a prosecution for third-degree felony assault, the evidence was insufficient to prove that the defendant’s victim was a member of the defendant’s household because the victim and the defendant’s sole relationship was that of former roommates, a status that did not enhance the offense to a third-degree felony. The Family Code definition of “member of household” (at § 71.006) did not apply to Penal Code § 22.01(b).

Heard v. State, No. 08-02-0253-CR, [2004 Tex. App. Lexis 3254](#) (Tex. App.—El Paso, Apr. 8, 2004, pet. ref’d).

In murder prosecution, evidence of the relationship between the defendant and the victim (in this case, prior instances of domestic violence between them) was admissible under [Tex. Code Crim. Proc. art. 38.36](#) and TRE 404 because it was evidence relating to the defendant’s state of mind at the time of the offense.

Heath v. Boyd, [175 S.W.2d 214](#) (Tex. 1943).

Peace officer’s ability to effect a warrantless arrest is not enlarged by [Tex. Code Crim. Proc. art. 6.05](#).

Heiskell v. Kendrick, No. 14.-06-0972-CV, [2007 Tex. App. Lexis 8347](#) (Tex. App.—Houston [14th] Oct. 23, 2007, no pet.).

In divorce case, there was sufficient evidence to support finding of family violence that barred father’s appointment as joint managing conservator of children under [Texas Family Code § 153.004](#)(b).

Henderson v. State, [208 S.W.3d 593](#) (Tex. App.—Austin 2006, pet. ref’d).

In an assault prosecution, the judgment's finding of family violence did not enhance punishment and so did not violate the defendant's Sixth Amendment rights.

Hermosillo v. Saxton, No. 14-01-0374-CV, [2001 Tex. App. Lexis 5912](#) (Tex. App.—Dallas, Aug. 29, 2001, no pet.).

Appeal of protective order was mooted when the order expired; an award of attorney's fees against respondent was vacated for insufficient evidence.

Hernandez v. State, [53 S.W.3d 742](#) (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

In a prosecution for sexual assault of a child, the expert witness was qualified to testify to "child abuse accommodation syndrome" by virtue of experience as a child abuse investigator and child protection advocate.

Hernandez v. State, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1st Dist.] July 17, 2003, pet. ref'd).

In a protective order violation case, whether he chose to read it or not, the defendant was responsible for knowing contents of the protective order when his signature on order showed his receipt thereof; eyewitness testimony of officers who responded to assault call established the defendant's identity as person subject to the order.

Hernandez v. State, No. 14-05-00181-CR, [2006 Tex. App. Lexis 6231](#) (Tex. App.—Houston [14th Dist.] 2006, no pet.).

In a prosecution for family violence assault, the defendant was not entitled to a self defense instruction in the jury charge because he did not admit to committing the assault.

Hernandez v. State, [205 S.W.3d 555](#) (Tex. App.—Amarillo 2006, pet. ref'd).

In a prosecution for murder of a minor child, the defendant's wife did not have a spousal privilege not to testify under TRE 504(b) because the victim was a child.

Hernandez v. State, [280 S.W.3d 384](#) (Tex. App.—Amarillo 2008, no pet.).

In a family violence assault prosecution, the court did not err in making a finding of family violence after conviction because the victim testified that she was living with the defendant at the time of the assault.

Hicks v. State, No. 01-04-0919-CR, [2005 Tex. App. Lexis 4818](#) (Tex. App.—Houston [1st Dist.] June 23, 2005, no pet.).

In a family violence assault prosecution, the evidence was factually sufficient to establish that the defendant was not acting in self-defense when he gave a black eye to a member of his household.

Hinkle v. Hinkle, [223 S.W.3d 773](#) (Tex. App.—Dallas 2007, no pet.).

In a divorce case, the trier-of-fact could have reasonably found that the father had not threatened the mother with physical harm and thus he was not disqualified under [Tex. Fam. Code § 153.004](#) from being appointed sole managing conservator of the child.

Holloway v. State, [583 S.W.2d 376](#) (Tex. Crim. App. 1979).

In a prosecution for criminal trespass, the defendant was convicted based on evidence that he entered his father-in-law's house without consent and demanded to know where his estranged wife was. The conviction was reversed for failure to include a culpable mental state of knowingly or intentionally in the jury charge. The culpable mental state of intentionally, knowingly, or recklessly, although not included in [Tex. Penal Code § 30.05](#), is implied in [Tex. Penal Code § 6.05](#).

Hopkins v. Hopkins, [853 S.W.2d 134](#) (Tex. App.—Corpus Christi 1993, no writ).

In a divorce proceeding, the trial court entered contradictory findings as to father's suitability to be possessory conservator so the case was remanded to determine the children's best interests. A person with rights of "access to" children may approach them, communicate with them and visit with them but may not take possession or control of the children away from the managing conservator. A person with rights to "possession of" children may exercise possession and control of the children, to the exclusion of all other persons including the managing conservator, during periods of possession. A person with rights of possession of children also has rights and responsibilities toward their care and behavior.

Houston Crushed Concrete Inc. v. Concrete Recycling Corp., [879 S.W.2d 258](#) (Tex. App.—Houston [14th Dist.] 1994, no writ).

By appearing personally to contest lack of service, the defendant waived any requirement of personal service.

Hudson v. State, [179 S.W.3d 731](#) (Tex. App.—Houston [14th Dist.] 2005, no pet.).

In a prosecution for family violence assault, the jury instruction should have included statutory definitions for “consanguinity” and “affinity” but the error was harmless because the evidence established the defendant was the victim’s spouse so the familial relationship was established. The trial court did not err in admitting hearsay evidence because the victim was visibly shaken and highly upset at the time she told EMS and police officers how she sustained her visible injuries; it was irrelevant that the victim was intoxicated when she made the statements.

Huffstutlar v. Koons, [789 S.W.2d 707](#) (Tex. App.—Dallas 1990) (orig. proceeding).

The Texas court did not have emergency jurisdiction over the father's motion to modify the custody portion of a Texas divorce decree under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (now repealed) because the Oklahoma resident mother had not abandoned the child by giving it to the father.

Hughes v. State, [4 S.W.3d 1](#) (Tex. Crim. App. 1999).

In a prosecution for indecency with a child by contact, the state called the victim as a witness knowing that she would deny her prior allegations against the defendant and with the intent of impeaching her with her prior statements. Lack of surprise is an element to be analyzed under TRE 403, not TRE 607. It would be an abuse of discretion for a trial court to allow the state to admit impeachment evidence for the primary purpose of placing otherwise inadmissible evidence before the jury when the state’s purpose is to have the jury misuse it by considering for the truth of the matter asserted.

I

In re A, No. 09-06-0471-CV, [2006 Tex. App. Lexis 11108](#) (Tex. App.—Beaumont, Dec. 28, 2006) (orig. proceeding).

In a SAPCR, the trial court did not err in requiring production of some of the father’s treatment records for substance abuse. The public policy of Texas is to protect and promote the child’s best interest. Consideration of the child’s best interest requires determination of whether the parent can meet the child’s needs. A parent’s dependence on alcohol or drugs affects the best interests determination.

In re ALR, No. 04-96-0455-CV, [1997 Tex. App. Lexis 3427](#) (Tex. App.—San Antonio 1997, no writ).

In a SAPCR, the trial court erred in finding lack of family violence by the father or that the mother had removed child from state, but its order was supported by entirety of the record so that appointment of father as sole managing conservator of the child was not reversible error.

In re ASB and NRB, No. 09-08-00471-CV, [2009 Tex. App. Lexis 6270](#) (Tex. App.—Beaumont, July 8, 2009, no pet.).

In a family violence protective order application, the evidence was legally insufficient to support a finding of family violence by respondent against his wife and adult stepdaughter but was legally sufficient to support a finding that respondent was likely to commit a future act of family violence against minor stepdaughter because the credible evidence proved respondent had sexually abused the child. The protective order prohibitions against contact with the wife and adult stepdaughter were appropriate in light of the finding of likelihood of future family violence against minor stepdaughter.

In re Barnes, [127 S.W.3d 843](#) (Tex. App.—San Antonio 2003) (orig. proceeding).

In child custody case, even if the child had no home state, the child did not have the required significant connections for Texas court to make an initial custody determination because the child had never resided in Texas and the only proof of a connection was that father currently resided there. Significant connections jurisdiction analysis is only appropriate if Texas is not the home state.

In re Bellamy, [67 S.W.3d 482, 484](#) (Tex. App.—Texarkana 2002, no pet.) (disapproved on other grounds, [140 S.W.3d 373](#) (Tex. 2004)).

Where there is a conflict between a provision in [Texas Family Code chapter 152](#) (Uniform Child Custody Jurisdiction and Enforcement Act) and other Texas law, the former controls.

In re Blevins, No. 06-03-00078-CV, [2004 Tex. App. Lexis 3799](#) (Tex. App.—Texarkana, Apr. 30, 2004, pet. denied).

In a SAPCR, the appellate court lacked jurisdiction over appeal of temporary order.

In re Brilliant, [86 S.W.3d 680](#) (Tex. App.—El Paso 2002, no pet.).

When child had no home state, the Texas court could exercise jurisdiction to make initial child custody determination under the significant connection criterion.

In re Brown, [203 S.W.3d 888, 891](#) (Tex. App.—Fort Worth 2006) (orig. proceeding).

In divorce case, even though wife filed for divorce in Missouri, if Texas was the child's home state, then Missouri should not be exercising jurisdiction because Texas home state jurisdiction trumps all other possible bases for jurisdiction. However, when youngest child had no home state, had significant connections with Missouri, and Missouri court entered first child custody order, Texas court could not take jurisdiction for youngest child unless the Missouri court declined to do so.

In re BRP, No. 11-07-0255-CV, [2009 Tex. App. Lexis 3302](#) (Tex. App.—Eastland, May 14, 2009, no pet.).

In a SAPCR, evidence that the father used physical discipline on minor children and hit the mother once was not sufficient to establish pattern or history of physical abuse under [Tex. Fam. Code Ann. § 153.004](#) or abuse of child resulting in substantial harm under [Tex. Fam. Code §§ 71.004](#) or 261.001.

In re Burk, [252 S.W.3d 736](#) (Tex. App.—Houston [14th Dist.] 2008) (orig. proceeding).

Where child was born in Texas but taken to live in Colorado when 5 months old, the Texas court had home state jurisdiction in child custody case even though parents had married and spent most of the marriage in Colorado. To be the child's home state, Texas must have been the child home at some time within the six months before the child custody case was filed.

In re Calderon-Garza, [81 S.W.3d 899](#) (Tex. App.—El Paso 2002) (orig. proceeding).

In paternity suit involving parents who were Mexican citizens, because the child was born in Texas and no other jurisdiction could claim to be its home state, Texas had home state jurisdiction over the child.

In re Commitment of Tolleson, No. 09-08-0338-CV, [2009 Tex. App. Lexis 3660](#) (Tex. App.—Beaumont, May 28, 2009, no pet.).

In a case to civilly commit an alleged sexually violent predator, the trial court did not err in allowing the expert witness to disclose, on direct examination, the basis of his opinion even though the “underlying facts and data” cited were otherwise inadmissible hearsay.

In re Compton, [117 S.W.3d 548](#) (Tex. App.—Texarkana 2003) (orig. proceeding).

In mandamus action, the appellate court declined to prohibit the district court with jurisdiction over pending divorce from relitigating issues tried in county court-at-law protective order case because the relator had an adequate remedy at law. The county court-at-law had discretion over whether to transfer jurisdiction over protective order case to district court where SAPCR was pending; the actions could proceed simultaneously in separate courts.

In re Cummings, [13 S.W.3d 472, 475](#) (Tex. App.—Corpus Christi 2000, no pet.).

Whether a protective order is appealable depends on whether all issues are disposed of in the order. The collateral consequences doctrine applies to an expired protective order containing a finding of family violence because such finding carries a social stigma even after the order expires.

In re DR, [177 S.W.3d 574](#) (Tex. App.—Houston [1st Dist.] 2005, no pet.).

In a SAPCR, the jury charge that let jury decide whether the father could be sole managing conservator was improper because it suggested he was not eligible due to a history of family violence in his home.

In re Epperson, [213 S.W.3d 541, 543-544](#) (Tex. App.—Texarkana 2007, no pet.).

In a protective order proceeding, past violent conduct can be competent evidence which legally and factually sufficient to sustain a protective order. Threats alone can be sufficient to support issuance of protective order. On appeal of a protective order, sufficiency of the evidence was reviewed under an abuse of discretion standard.

In re Forlenza, [140 S.W.3d 373, 379](#) (Tex. 2004).

In a SAPCR, where Texas court made original custody determination, the possessory conservator father resided in Texas, and children had significant connection, Texas should not relinquish jurisdiction for custody modification because the mother's residence is now in Mississippi. A court's exclusive jurisdiction continues as long a significant connection exists or substantial evidence is present.

In re JAG, No. 03-05-4-CV, [2006 Tex. App. Lexis 3531](#) (Tex. App.—Austin, Apr. 28, 2006, no pet.).

In a prosecution for interfering with an emergency telephone call, evidence that a police officer found the juvenile defendant's grandmother upset and that at scene the grandmother admitted being intimidated by juvenile and that she fled her home to call 911 after the juvenile disconnected her first 911 call was sufficient to prove offense.

In re JAT, No. 13-04-0477-CV, [2005 Tex. App. Lexis 6618](#) (Tex. App.—Corpus Christi, Aug. 18, 2005) (mem. op.).

In a protective order application proceeding, the evidence (that the father pulled the mother, who was holding a child, towards him) was legally insufficient to support protective order because it did not establish that family violence was likely to occur in the future.

In re JCB, [209 S.W.3d 821](#) (Tex. App.—Amarillo 2006, no pet.).

In a SAPCR parental rights termination action, the Texas court had temporary emergency jurisdiction over case where the children of arrested Oklahoma resident were left in custody of State of Texas for 14 months prior to the lawsuit. For temporary emergency orders under [Texas Fam. Code Ann. § 152.204](#)(a), there is no requirement that the child had to have resided in the state for at least 6 months prior to filing the petition.

In re JCS, No. 06-04-085-CV, [2005 Tex. App. Lexis 2939](#) (Tex. App.—Texarkana, Apr. 18, 2005, no pet.).

In a SAPCR, issuance of protective order based on the father's threat to the mother did not require that the father be denied joint managing conservator status under [Tex. Fam. Code § 153.004](#)(b) because that decision was within trial court's discretion.

In re JH, No. 13-07-0373-CV, [2008 Tex. App. Lexis 6379](#) (Tex. App.—Corpus Christi, Aug. 21, 2008, no pet.) (mem. op.).

The Texas court properly dismissed a suit to modify a prior Taiwanese child custody order because the child had never resided in Texas (so Texas was not the child's home state) and there was no evidence that the Taiwan court declined to exercise jurisdiction.

In re JRP, [55 S.W.3d 147](#) (Tex. App.—Corpus Christi 2001, pet. denied).

In a SAPCR, a court can consider history of violence and substance abuse in the home of the family where placement considered. The court can also consider physical threats posed by visitors to the home.

In re KSL, [109 S.W.3d 572](#) (Tex. App.—Tyler 2003, no pet.).

A protective order is not a final judgment when it is granted during the pendency of a divorce.

In re KY, [273 S.W.3d 703,707](#) (Tex. App.—Houston [14th Dist.] 2008, no pet.).

In a SAPCR, the child's frequent trips out of Texas during 6-month period before custody case was filed did not divest Texas of home state jurisdiction.

In re Lewin, [149 S.W.3d 727, 740-41](#) (Tex. App.—Austin 2004) (orig. proceeding).

Mandamus granted because the Texas court should have declined jurisdiction over child custody when father had abducted child from jurisdiction of Canadian court, which had already litigated custody issues, and come to Texas in search of a more favorable forum. The Texas court abused its discretion in failing to enforce a Canadian child custody order as required by the Hague Convention.

In re Lewis, No. 11-04-075-CV, [2005 Tex. App. Lexis 6308](#) (Tex. App.—Eastland, Aug. 11, 2005, no pet.).

In a protective order application, the trial court erred in including mother as person protected by the order because there was no evidence that there had been any threats or violence towards her.

In re McCoy, [52 S.W.3d 297](#) (Tex. App.—Corpus Christi 2001) (orig. proceeding).

In a SAPCR, the Texas court did not have "significant connection" jurisdiction over custody issues under [Texas Family Code Ann. § 152.201\(a\)\(2\)](#) because although the foreign state had declined "home state" jurisdiction, the children's current home state had not.

In re MGM, [163 S.W.3d 191](#) (Tex. App.—Beaumont 2005, no pet.).

In a protective order application under [Tex. Fam. Code Title 4](#), made while a foreign custody lawsuit was pending, the appellate court held that Title 4 had a more general application to the issues before the trial court, while [Tex. Fam. Code ch. 152](#) had a more specialized and comprehensive application to the same issues. The Texas court derived its jurisdiction over the children (whose home state was Michigan) solely from [Tex. Fam. Code § 152.204\(a\)](#). After assuming jurisdiction, to issue temporary ex parte protective order to protect the children, the trial court had to utilize the provisions of [Tex. Fam. Code Title 4](#). Once the Texas court learned of Michigan proceeding, it had to communicate with Michigan court and, once satisfied that the Michigan court had issued an appropriate order, dismiss the Texas case.

In re MR, [975 S.W.2d 51](#) (Tex. App.—San Antonio 1998, pet. denied).

In conservatorship modification proceeding, the trial court erred in excluding evidence of domestic violence against mother.

In re Marriage of Daulton, No. 10-06-00180-CV, [2006 Tex. App. Lexis 10286](#) (Tex. App.—Waco, Nov. 29, 2006, no pet.).

In child custody case, the Texas trial court correctly held it lacked jurisdiction over the children because Illinois was the children's home state and because physical presence of father in Texas was insufficient to establish a significant connection in Texas under [Texas Family Code Ann. § 152.201\(a\)\(2\)\(A\)](#).

In re Marriage of Edwards, [79 S.W.3d 88](#) (Tex. App.—Texarkana 2002, no pet.).

In a divorce with a protective order application, the protective order was not rendered unenforceable just because it was not a separate document from the divorce judgment.

In re Marriage of Stein, [153 S.W.3d 485](#) (Tex. App.—Amarillo 2004, no pet.).

In a SAPCR where evidence of physical abuse by the father was uncontested, the trial court erred in appointing the father joint managing conservator in violation of [Tex. Fam. Code § 153.004\(b\)](#).

In re Meiwes, No. 07-08-0239-CV, [2008 Tex. App. Lexis 6880](#) (Tex. App.—Amarillo Sept. 5, 2008) (orig. proceeding).

In contempt action for violation of divorce protective order, the relator was not entitled to relief because he had committed contempt and was not necessarily entitled to a jury trial on the alleged contempt.

In re McCormick, [87 S.W.3d 746](#) (Tex. App.—Amarillo 2002) (orig. proceeding).

In a SAPCR, where there is a conflict between a provision in [Texas Family Code chapter 152](#) (Uniform Child Custody Jurisdiction and Enforcement Act) and other Texas law, the former controls. Texas retained jurisdiction over father and son living in Kansas.

In re McCoy, [52 S.W.3d 297](#) (Tex. App.—Corpus Christi 2001) (orig. proceeding).

In a SAPCR, a Texas court did not have "significant connection" jurisdiction over custody issues under [Texas Fam. Code Ann. § 152.201\(a\)\(2\)](#) because, although one foreign state had declined "home state" jurisdiction, the children's current home state had not.

In re Oates, [104 S.W.3d 571](#) (Tex. App.—El Paso 2003) (orig. proceeding).

In a SAPCR, after death of petitioner-father, the paternal grandparents could not continue lawsuit in Texas court to gain access to grandchildren when grandparents had not attained status of persons acting as parents and did not have physical custody of children in the six consecutive months immediately before filing suit. After death of petitioner, Texas did not have significant connection to exercise jurisdiction over the children.

In re Ortman, No. 14-07-1022-CV, [2009 Tex. App. Lexis 5280](#) (Tex. App.—Houston [14th Dist.] Jul. 9, 2009, no pet.) (mem. op.).

In SACPR, the mother did not have standing to apply for protective order under [Tex. Code Crim. Proc. art. 7A](#) for 17-year-old daughter.

In re Presley, [166 S.W.3d 866, 868](#) (Tex. App.—Beaumont 2005) (orig. proceeding).

In child custody case, where the child had no home state and suit filed first in Florida, Texas court required to communicate with the Florida court and to dismiss the proceeding unless the Florida court determined that the Texas court was the more convenient forum.

In re RTH, [175 S.W.3d 519](#) (Tex. App.—Fort Worth 2005, no pet.).

In a proceeding to modify conservatorship, family violence by the joint managing conservator-mother was not enough to justify changing primary residence to that of the joint managing conservator father.

In re Salgado, [53 S.W.3d 752](#) (Tex. App.—El Paso 2001, no pet.) (orig. proceeding).

In a mandamus action seeking relief from a [Tex. Fam. Code Title 4](#) protective order, the respondent-father waived his claim of improper venue by not alleging in the protective order trial court that the child was not a resident of the county where the protective order application was filed. The trial court did not have to be the court with continuing SAPCR jurisdiction over child to issue the protective order. In accord with the statutory provision for transfer of protective orders to the SAPCR court, a Title 4 final protective order prevails over a conflicting valid pre-existing custody order. In dicta, the appeals court stated that when child's residence not clearly established, venue should be evaluated under criteria in general civil venue statute: a fixed place of abode within the party's possession that is occupied or intended to be occupied consistently over a substantial period of time; and which is permanent rather than temporary.

In re SAP, No. 07-06-0045-CV, [2007 Tex. App. Lexis 7523](#) (Tex. App.—Amarillo, Sept. 14, 2007, no pet.).

In a prosecution for kidnapping, the defendant was not guilty of kidnapping for keeping child from visiting father when he had not performed required drug tests because the defendant was the sole managing conservator of the alleged the victim (her child) and had authority to condition father's supervised visits with the child based on the results of his drug and alcohol tests.

In re Skero, [253 S.W.3d 884](#) (Tex. App.—Beaumont 2008) (orig. proceeding).

In protective order cases, the trial court can assess attorney's fees as costs and the award was enforceable by contempt.

In re SJA, [272 S.W.3d 678](#) (Tex. App.—Dallas 2008, no pet.).

The Texas trial court had jurisdiction to modify a child custody determination made by Louisiana, pursuant to [Tex. Fam. Code Ann. § 152.201](#)(a)(2), in part, because no parent or child continued to live in Louisiana. Additionally, the children and their mother had a "significant connection" with Texas, even though the children had only been in Texas for a few weeks when the suit was filed. The stepmother, with whom the children had lived in Florida for many years, was not a person acting as a parent when the lawsuit was filed.

In re SKB, No. 02-02-0540CV, [2008 Tex. App. Lexis 4769](#) (Tex. App.—Fort Worth, June 26, 2008, no pet.).

Trial court did not err by declining jurisdiction and granting the mother's special appearance because the record showed that at the time the motion to enforce was filed, the mother and the child lived in Japan, the father lived in Connecticut, and the parents' petitions concerning child custody were pending in Japan.

In re SLP, [123 S.W.3d 685, 689](#) (Tex. App.—Fort Worth 2003, no pet.).

Purpose of the unjustifiable conduct rule for child custody cases is to prevent a parent from benefitting from acting reprehensively by removing, secreting, retaining, or restraining the child.

In re SNA, No. 02-07-349-CV, [2008 Tex. App. Lexis 8721](#) (Tex. App.—Fort Worth, Nov. 20, 2008, no pet.).

In a SAPCR, the father's right to introduce proof that Canadian law should apply was waived by his failure to comply with TRE 203 by giving timely notice of his intent to use the foreign law or to provide copies of that law to the court or the opposing party.

In re SS, [217 S.W.3d 685](#) (Tex. App.—Eastland 2007 no pet.).

Ex-wife was entitled to attorney's fees award after ex-husband lost appeal of protective order.

In re Tieri, [283 S.W.3d 889](#) (Tex. App.—Tyler 2008)(orig. proceeding).

New Jersey, rather than Texas, was the child's home state because the child did not live in Texas for six consecutive months before the custody case was filed.

In re YMA, [111 S.W.3d 790](#) (Tex. App.—Fort Worth 2003, no pet.).

The custody action was filed first in Egypt so the Texas court lacked jurisdiction. Once the mother had an Egyptian child custody order and she filed her motion for expedited enforcement under [Tex. Fam. Code Ann. § 153.308](#), the Texas court was then bound by [Tex. Fam. Code Ann. § 152.303](#) to recognize and enforce the order where the Egyptian court exercised jurisdiction in conformity with the Texas jurisdictional requirements.

Interest of BP, No. 02-07-251-CV, [2008 Tex. App. Lexis 5061](#) (Tex. App.—Fort Worth, July 3, 2008, no pet.).

In a SAPCR conservatorship award, a court could find that access would not endanger the child but that possession might endanger the child. Thus, if the court found that appointment of the parent as possessory conservator would not be in the best interests of the child and that possession would endanger the child, the court would not be compelled to appoint the parent as possessory conservator, even if it found, as in this case, that access would not endanger the child. A finding either expressly or implicitly that access would not endanger the child's physical or emotional welfare does not entirely preclude the court's discretion in appointing a possessory conservator because the court could find that possession would endanger the child's physical or emotional welfare.

Interest of DR, [177 S.W.3d 574](#) (Tex. App.—Houston [1st] 2005, pet. denied).

In a SAPCR, the jury charge erroneously stated that father could not be sole managing conservator under [Tex. Fam. Code § 153.004\(b\)](#) if the jury found there had been family violence in the home. A finding of family violence did not preclude father's appointment.

Interest of IEW, No. 13-09-0216-CV, [2010 Tex. App. Lexis 404](#) (Tex. App.—San Antonio, Jan. 21, 2010, no pet.) opinion withdrawn and replaced by, *Interest of IEW*, No. 13-09-00216-CV, 2010 Lexis 7163 (Tex. App.—Corpus Christi, Aug. 27, 2010) (mem. op.).

A protective order lacking specific findings as to the likelihood of family violence and restricting the father's access to the child violated [Tex. Fam. Code §§ 85.001](#) and 153.193.

Agreed protective orders are subject to the approval of the trial court and the trial court is strictly prohibited from approving any agreement that requires an applicant to do or refrain from doing an act under [Tex. Fam. Code § 85.022](#).

There is no presumption that by agreeing to an agreed protective order that lacks findings that family violence has occurred or is likely to occur in the future, the respondent has agreed that he committed family violence or is likely to do so in the future.

In denying a motion to vacate a protective order on the ground it was no longer needed, the trial court did not err because it could have reasonably found that fact that no family violence had occurred since order was entered was due to the order's deterrent effect and that without the order, the child would be exposed to the potential danger the order sought to eliminate.

NOTE: In this case, even though the protective order was entered by agreement as permitted by [Tex. Fam. Code § 85.005](#), the court of appeals analyzed the validity of the order as if it had been issued after a hearing and subject to [Tex. Fam. Code §§ 85.001](#) and 85.022. In other words, the opinion fails to recognize that an agreed order under [Tex. Fam. Code § 85.005](#) can prohibit the respondent from doing acts listed in [Tex. Fam. Code § 85.022](#) but is not subject to the requirements in [Tex. Fam. Code §§ 85.001](#) and 85.022, regarding the required finding that the person restrained by the order committed family violence.

Interest of KLR, [162 S.W.3d 291, 305](#) (Tex. App.—Tyler 2005, no pet.).

Evidence of arrests is admissible for the purpose of determining what is in the child's best interest.

Interest of MR, [975 S.W.2d 51](#) (Tex. App.—San Antonio 1998, pet. denied).

In a SAPCR, the trial court erred in failing to consider evidence of intentional use of family violence by the father when it appointed him managing conservator in violation of [Tex. Fam. Code § 153.004\(a\)](#). The Tex. Fam. Code mandates that evidence of a prior conviction be admitted for another purpose — in order to establish what is in the best interests of the child. The wife was not trying to prove that the husband committed acts in conformity with a prior act of violence. Instead, she was trying to establish that the husband's violent act made it less in the best interest of the child that he be named sole managing conservator.

Interest of RTH, [175 S.W.3d 519](#) (Tex. App.—Fort Worth 2005, no pet.).

In a SAPCR, a sole incident of family violence can constitute a history or pattern of abuse for purposes of [Tex. Fam. Code § 153.004\(b\)](#).

J

Jackson v. State, [17 S.W.3d 664, 670](#) (Tex. Crim. App. 2000).

The proponent of scientific evidence has the burden to demonstrate by clear and convincing evidence that the evidence is reliable.

Jackson v. State, No. 14-03-945-CR, [2005 Tex. App. Lexis 3631](#) (Tex. App.—Houston [14th Dist.] May 5, 2005, no pet.).

In a prosecution for criminal trespass, evidence that the defendant refused to leave his estranged wife's apartment, where he had never lived and for which he had never paid rent, after arguing with her was sufficient to support the conviction. Under TRE 504(b), the trial court did not err in ordering wife to testify after she claimed her spousal privilege.

Jackson v. State, [287 S.W.3d 346](#) (Tex. App.—Houston [14th Dist.] 2009, no pet.).

In a prosecution for interference with an emergency telephone call, evidence that the defendant knocked the telephone out of his live-in girlfriend's hand after she had announced intention to call police to get him to leave the residence was sufficient to convict.

Jaimes v. State, No. 03-03-257-CR, [2004 Tex. App. Lexis 775](#) (Tex. App.—Austin, Jan. 29, 2004, no pet.).

In a prosecution for criminal mischief, evidence that the defendant caused between \$500 and \$1,500 in damages by running his pickup truck into his ex-wife's car was sufficient to support conviction.

Jakobe v. Jakobe, No. 02-04-068-CV, [2005 Tex. App. Lexis 1722](#) (Tex. App.—Fort Worth, Mar. 3, 2005, no pet.).

In protective order application case, post-divorce order that disposed of all issues in the case was final and appealable. Evidence that the husband intentionally tried to infect his wife with HIV virus, harassed wife and her son, and threatened to kill wife and her dog was legally and factually sufficient to support granting of the protective order.

James v. Hubbard, [985 S.W.2d 516, 560](#) (Tex. App.—San Antonio 1998, no pet.).

A permanent injunction is an appealable order. A divorce terminates relationships established only by marriage (such as mother-in-law) so a family violence protective order not available against a son-in-law after daughter's divorce. An expired temporary protective order is generally

considered moot, but the collateral consequences doctrine applies to an expired protective order containing a finding of family violence because such finding carries a social stigma even after the order expires. A protective order is a permanent injunction that may be reviewed, opened, vacated, or modified by the trial court upon a showing of changed circumstances.

Jarrell v. State, No. 01-03-0836-CR, [2004 Tex. App. Lexis 9342](#) (Tex. App.—Houston [1st Dist.] Oct. 21, 2004, pet. ref'd).

In felony family violence assault case, evidence that the defendant and the victim had a common-law marriage (they lived together, had a child in common, and held themselves out as married) was factually sufficient to prove that the victim was a member of the defendant's family when the assault occurred.

Jaynes v. State, [216 S.W.3d 839, 846](#) (Tex. App.—Corpus Christi 2006, no pet.).

In a prosecution, enhancement under the Texas Hate Crimes Act may be proven based on circumstantial evidence as long as the causal link between the crime and the bias or prejudice is established. It is not enough for the state to show that the defendant has a bias or prejudice; it must also show that the offense charged was primarily motivated by the bias or prejudice.

Jenkins v. State, [248 S.W.3d 291](#) (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

In a prosecution for aggravated kidnapping, evidence that the defendant broke into his former girlfriend's apartment and held several people at gunpoint was sufficient to show that the defendant took hostages as that term is used in [Tex. Penal Code § 20.04](#).

Johnson v. State, [803 S.W.2d 272, 281](#) (Tex. Crim. App. 1990) (en banc).

The spouse of the accused has a privilege not to be called to testify, which means the testifying spouse holds the spousal immunity privilege.

Johnston v. State, [917 S.W.2d 135](#) (Tex. App.—Fort Worth 1996, pet. ref'd).

In a prosecution for retaliation as a habitual criminal, the defendant's threat to blow his son's head off if the son called parole officer again after the son had reported prior threat to parole officer was sufficient to convict. The prosecutor's failure to disclose an arrest warrant for son was reversible error.

Jones v. State, [859 S.W.2d 537](#) (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd), citing *United States v. Archer*, [733 F.2d 354, 359](#) (5th Cir. Tex) *cert denied*, [469 U.S. 861](#) (1984).

Neither a defendant nor his spouse may exclude an out-of-court statement by the spouse when offered against the defendant in a writing or through a third party witness.

Juan A. v. Dallas Co. Child Welfare, [726 S.W.2d 241, 245-56](#) (Tex. App.—Dallas 1987, no writ).

In a SAPCR, evidence of incarceration is admissible to determine best interests of the child.

K

Kahara v. State, No. 01-05-00414-CR, [2006 Tex. App. Lexis 10984](#) (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.).

In a prosecution for stalking, evidence that the defendant vandalized the victim's (his ex-girlfriend) vehicle, repeatedly drove by the victim's house, followed her, and demanded she talk to him, was legally and factually sufficient to prove the offense.

Karenev v. State, 2009 Tex. Crim. App. 961 (Tex. Crim. App. 2009), on remand, [2009 Tex. App. Lexis 7533](#) (Tex. App.—Fort Worth, Sept. 24, 2009).

In a prosecution for harassing his estranged wife, the defendant could not raise unconstitutionality of statute for first time on appeal. On remand, evidence that the defendant's harassing emails, which concerned the divorce settlement were, at least, annoying was sufficient to support the conviction.

Kelt v. Kelt, [67 S.W.3d 364](#) (Tex. App.—Waco 2001 no pet.).

Protective order issued after a divorce became final is appealable.

Kennell v. Rogers, No. 03-08-0282-CV, [2008 Tex App. Lexis 8754](#) (Tex. App.—Austin, Nov. 20, 2008, no pet.).

In protective order application case, evidence was sufficient to support granting of the protective order because it established that respondent hit applicant, choked her, and left bruises on her back and arms.

Kenny v. State, [292 S.W.3d 89](#) (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

In a prosecution for kidnapping, evidence that the defendant assaulted and placed a rope around his victim's neck that briefly interfered with the victim's ability to breath and threatened to torture the victim (his girlfriend) was sufficient to establish the defendant used deadly force to kidnap the victim.

King v. State, No. 03-01-00531-CR, [2003 Tex. App. Lexis 8499](#) (Tex. App.—Austin, Oct. 2, 2003, pet. ref'd).

In an assault prosecution, in the absence of an affirmative finding in the prior judgment, testimony was sufficient to prove, for enhancement of punishment, that prior conviction was for family violence.

Kingsbury v. State, [14 S.W.3d 405](#) (Tex. App.—Waco 2000, no pet.).

In a prosecution for terroristic threat and deadly conduct, evidence that the defendant threatened to burn his house up with the victim (his wife) inside and tried to set the victim on fire was sufficient to support the convictions.

Knight v. Knight, No. 01-02-1016-CV, [2003 Tex. App. Lexis 3141](#) (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, pet. dismiss'd).

In a SAPCR with an associated protective order application, the protective order was final and appealable because it was unrelated to the still pending child support issue.

Kramer v. State, [605 S.W.2d 861](#) (Tex. Crim. App 1980).

In a prosecution for harassment, the evidence was insufficient to prove offense because the offending communication, sent to the wife of the defendant's former boyfriend, could not be tied to the defendant as the only connection was a typewritten name on the letter that was the same as the defendant's first name.

L

Lane v. State, [151 S.W.3d 188, 191](#) (Tex. Crim. App. 2004).

In a family violence assault prosecution, hands and feet were properly found to be deadly weapons so the charge was properly raised to aggravated assault.

Lane v. State, [111 S.W.3d 203](#), (Tex. App.—Eastland 2003), affirmed [151 S.W.3d 188, 191](#) (Tex. Crim. App. 2004).

The victim's statements to hospital personnel were admissible as excited utterances and under the medical diagnosis exception to the hearsay rule.

LaPointe v. State, [196 S.W.3d 831](#) (Tex. App.—Austin 2006) aff'd, *La Pointe v. State*, [2007 Tex. Crim. App. Lexis 505](#) (Tex. Crim. App., Apr. 25, 2007).

In an aggravated kidnapping, sexual assault, and assault family violence prosecution, the defendant was not entitled to use evidence of his victim's (the mother of his child) sexual history or alleged mental illness nor was he entitled to exclude evidence of sexual assault of the victim during the kidnapping just because that assault occurred in another county.

Ledet v. State, No. 14-04-0739-CR, [2006 Tex. App. Lexis 1556](#) (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. ref'd).

In family violence assault case, the defendant's ex-wife was still a member of the defendant's family under [Tex. Fam. Code § 71.003](#). Although the indictment charged the defendant with assault on a member of his household, the plea contained word "family" instead of "household" and judicial confession was for assault on a family member so the judgment was not void. The prosecution was permitted to use extrinsic evidence that the assault was on a family member.

Leal v. State, 782 S.W.2d 844 (Tex. Crim. App. 1989).

In a murder prosecution, the tape recording in Spanish was not translated by a sworn interpreter so there was no evidence in the record that constituted an accurate translation. The court committed reversible error by failing to comply with Tex. Code Crim. Proc. art. 38.30 and by using the State's unsworn translation of the tape to aid the jury.

Lee v. State, [799 S.W.2d 750](#) (Tex. Crim. App. 1990).

An agreed protective order was criminally enforceable despite lack of command language from court.

Lemaire v. State, No. 05-97-00290-CR, [1999 Tex. App. Lexis 801](#) (Tex. App.—Dallas, February 9, 1999, pet. ref'd).

Failure to define “directly” in the jury charge was not reversible error in a prosecution for a violation of a family violence protective order. The defendant’s telephone call to the protected person was sufficient to establish that the defendant violated the order by directly communicating with a protected person in a threatening manner.

Lemly v. Miller, [932 S.W.2d 284](#) (Tex. App.—Austin 1996, no pet.) .

A child’s temporary 10-month absence from Texas due to his stepparent’s military service did not prevent Texas from being the child’s home state because the period out of state counted as Texas residency for purposes of jurisdiction in child custody order modification.

Lewelling v. Lewelling, [796 S.W.2d 164](#) (Tex. 1990).

In a SAPCR, evidence that the mother was the victim of spousal abuse was not by itself sufficient to establish that awarding custody to abused parent would significantly impair the child’s welfare. The evidence was insufficient to show that the appointment of the paternal grandparents, rather than the mother, as managing conservators, was in the child’s best interest.

Lewis v. State, [88 S.W.3d 383](#) (Tex. App.—Fort Worth 2002, pet ref’d) *cert. denied*, [540 U.S. 815](#) (2003).

In stalking case, the statute is not unconstitutionally vague because the defendant had notice of proscribed conduct and had no constitutional right to communicate a threat of bodily harm. Evidence that the defendant left threatening messages for the victim, knocked on her bedroom window, and followed her was sufficient to prove the offense.

Lewis v. State, No. 09-06-047-CR, [2007 Tex. App. Lexis 6097](#) (Tex. App.—Beaumont, Aug. 1, 2007, no pet.).

In a prosecution for stalking, evidence that over a span of several years, the defendant trespassed on the victim’s (ex-girlfriend) property, beat on walls and doors of her residence, threatened to kill her, and pushed her was factually sufficient to prove the offense.

Licea v. State, No. 13-01-0849-CR, [2004 Tex. App. Lexis 9464](#) (Tex. App. Lexis 9464 (Tex. App.—Corpus Christi, Oct. 28, 2004) (mem. op.)).

In a prosecution for sexual assault of a child, the trial court did not err in admitting the defendant's written confession, made to a social worker, because the social worker was not treating him for substance abuse or depression so the exception in TRE 509(b) did not apply.

Liggins v. State, [50 S.W.3d 657](#) (Tex. App.—Ft. Worth 2001, pet. ref'd).

In a prosecution for robbery by threat, statements by unidentified store employees were admissible as excited utterances.

Linville v. Lillard, No. 01-09-0367-CV, [1991 Tex. App. Lexis 364](#) (Tex. App.—Houston [1st Dist.] Feb. 14, 1991, no pet.).

In a post-divorce protective order application proceeding, the trial court did not abuse its discretion in denying the order because there was no evidence that respondent-husband harmed applicant on the one occasion that he threatened her.

Long v. Long, No. 03-97-00073CV, [1997 Tex. App. Lexis 5986](#) (Tex. App.—Austin, Nov. 20, 1997, no pet.).

In a divorce case, the trial court did not abuse its discretion in finding there was no history or pattern of abuse that would preclude the husband's appointment as a joint managing conservator under [Tex. Fam. Code § 153.004](#)(b). The phrase "history or pattern" is not defined in the Family Code, nor did the court find case law defining "history or pattern" as it is used in the Code. The court therefore gave the terms their ordinary meaning. *See* Code Construction Act, [Tex. Gov't Code Ann. § 311.011](#) (West 1988). The instance of contact raised by the wife's evidence (alleging the husband struck the wife on one occasion) were not enough to conclusively prove a history or pattern of abuse so as to overcome the presumption in favor of appointing the parents as joint managing conservators.

Looney v. Ramirez, No. 01-06-08154-CV, [2007 Tex. App. Lexis 5490](#) (Tex. App.—Houston [1st Dist.] July 12, 2007, no pet.).

In post-divorce protective order application, the respondent-husband waived his right to challenge the constitutionality of [Tex. Fam. Code chs. 82](#) and 84 because he failed to raise those issues at the trial court and unlike in criminal cases, constitutional challenges in civil cases are waived if not raised in the trial court.

Lopes v. State, No. 05-04-216-CR, [2004 Tex. App. Lexis 3642](#) (Tex. App.—Dallas, Apr. 26, 2004, no pet.).

In a bond hearing for a stalking charge, a bond of \$100,000 was not oppressive given evidence that the defendant threatened to cut off the victim's (his former lover) head, had a machete, maps of the victim's house, and had information about the victim, her boyfriend, and her lawyer.

Lopez v. State, [18 S.W.3d 220, 223](#) (Tex. Crim. App. 2000).

In a prosecution for sexual offense, there is no exception under the Sixth Amendment Confrontation Clause to TRE 608's prohibition on impeachment with specific instances that would render admissible evidence of witness's prior false accusations of abuse.

Lovell v. State, No. 12-04-0291-CR, [2006 Tex. App. Lexis 6062](#) (Tex. App.—Tyler, July 12, 2006, pet. ref'd).

In a prosecution for interference with child custody, the trial court committed harmless error in allowing a police officer to state his opinion as to the defendant's guilt or innocence. Such testimony is inadmissible under TRE 701.

Ludwig v. State, [812 S.W.2d 323, 325](#) (Tex. Crim. App. 1991).

For purposes of [Tex. Code Crim. Proc. art. 17.15\(5\)](#), "the victim" means only the complainant in the charged offense. [NOTE: This holding ignores [Tex. Code Crim. Proc. art. 56.02\(a\)\(2\)](#) (crime victim's rights)].

Lugo v. State, [923 S.W.2d 598](#) (Tex. App.—Houston [1st Dist.] 1995, no pet.).

In a prosecution for kidnapping, despite the fact that the defendant was the biological parent and had a valid birth certificate for the child, the defendant was not entitled to a jury instruction based on mistake of fact based on his belief he was the parent of the abducted child and so was entitled to assert control of the child.

M

Magill v. Sheffield, [612 S.W.2d 677](#) (Tex. App.—Dallas 1981, no writ).

[Texas Family Code Title 4](#) controls protective order venue rather than statute governing continuing jurisdiction for SAPCR order.

Maharaj v. Mathis, No. 14-99-0505-CV, [2001 Tex. App. Lexis 2594](#) (Tex. App.—Houston [14th] Apr. 19, 2001, pet denied) (plurality op.) [NOTE: The 14th Court of Appeals reversed this decision in *Ulmer v. Ulmer*, [130 S.W.3d 294](#) (Tex. App.—Houston [14th Dist.] 2004)].

In protective order application, award of attorney's fees to applicant-former husband was not appealable because the protective order was not a final order.

Maldonado v. State, [59 S.W.3d 251, 253](#) (Tex. App.—Corpus Christi 2001, pet. ref'd).

Communications to a clergy person made during a disciplinary or administrative meeting were not privileged under TRE 505.

Manning v. State, [112 S.W.3d 740](#) (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

In a family violence assault prosecution, a conviction that predated the effective date of [Tex. Penal Code § 22.01\(b\)\(2\)](#) could be used to enhance the sentence and extrinsic evidence could be used to prove family violence element of prior conviction in a subsequent proceeding.

Manuel v. State, No. 01-04-00282-CR, [2005 Tex. App. Lexis 3502](#) (Tex. App.—Houston [1st Dist.] May 5, 2005, pet. ref'd).

In a prosecution for assault, the finding that prior assault used for enhancement involved family violence could be based on evidence extrinsic to the prior judgment.

Marston v. State, No. 11-05-358-CR, [2007 Tex. App. Lexis 8671](#) (Tex. App.—Eastland, Nov. 1, 2007, pet. ref'd).

In stalking prosecution, evidence that the defendant made repeated telephone calls to the victim (his ex-girlfriend), attempted to break into her house, and violated a protective order was sufficient to prove the offense.

Martin v. State, No. 06-03-0139-CR, [2004 Tex. App. Lexis 7142](#) (Tex. App.—Texarkana, Aug. 11, 2004, no pet.).

In a prosecution for retaliation, the trial court erred in admitting police officer's testimony that interpreted the meaning of the defendant's statement because such testimony stated a legal conclusion from the facts and thus expressed an opinion of mixed law and fact in violation of TRE 701.

Martinez v. Martinez, [52 S.W.2d 429](#) (Tex. App.—Fort Worth 2001, pet. denied).

In divorce protective order application, the court erred when it granted the respondent's motion for continuance solely to accommodate his discovery request because that is not one of the bases listed in the statute. The court had no authority to require respondent's attorney to pay for and report to court on the defendant's participation in a batterer's program.

Martinez v. State, No. 03-04-495-CR, [2005 Tex. App. Lexis 7476](#) (Tex. App.—Austin, Sept. 9, 2005, pet. ref'd).

In a prosecution for stalking, the defendant's knowledge that reasonable person would perceive his conduct as threatening was inferred from his conduct. The defendant followed the victim repeatedly and telephoned her repeatedly to state that he was watching and videotaping her. Under TRE 404, evidence of the defendant's prior murder conviction was admissible because it was relevant to the reasonableness of the victim's fear of the defendant.

Martinez v. State, [980 S.W.2d 662](#) (Tex. App.—San Antonio 1998, pet. ref'd).

To enhance punishment for a crime motivated by bias or prejudice, the state need only prove that the defendant perceived the victim to be a member of a group, not that the victim was actually a member.

Mason v. State, [905 S.W.3d 570](#) (Tex. Crim. App. 1995).

In murder prosecution, the evidence established that the defendant kidnapped the victim (his wife), whom he restrained with bonds and gags, placed in his car trunk, and drove to a remote location before killing her.

Matlock v. State, No. 12-05-413-CR, [2006 Tex. App. Lexis 6753](#) (Tex. App.—Tyler, July 31, 2006, no pet.).

In a prosecution for interference with an emergency telephone call, because there was no direct evidence that the wife feared the defendant, the evidence was insufficient to establish the emergency nature of the call even though the defendant entered his estranged wife's apartment through a window and grabbed the telephone from her hand after she dialed 911.

Mayer v. State, [274 S.W.3d 898](#) (Tex. App.—Amarillo 2008) affirmed, *Mayer v. State*, [2010 Tex. Crim. App. Lexis 100](#) (Tex. Crim. App., Mar. 24, 2010).

In an aggravated kidnapping prosecution, the defendant was not entitled to the jury charge on a lesser included offense of unlawful restraint because the evidence proved, rather than negated, that the defendant abducted his wife.

Mazumder v. State, No. 05-04-01866-CR, [2006 Tex. App. Lexis 5235](#) (Tex. App.—Dallas, June 20, 2006, pet. ref'd).

In a prosecution for unlawful restraint, the defendant was not entitled to an instruction on the necessity defense because he did not admit to the offense and because there was no evidence that he restrained his victim (his girlfriend) in her house to prevent imminent harm to her. The victim's statements to her daughter and to police immediately after the defendant released her were admissible as excited utterances.

McBride v. State, No. 01-06-400-CR, [2008 Tex. App. Lexis 3937](#) (Tex. App.—Houston [1st Dist.], May 29, 2008, pet. ref'd).

In a prosecution for harassment of ex-girlfriend by repeated telephone calls, unwanted gifts, and other communications, evidence that the defendant continued to call and attempted to communicate with the victim after being repeatedly asked to stop was sufficient to prove the offense.

McCarty v. State, [257 S.W.3d 238](#) (Tex. Crim. App. 2008).

In a prosecution for indecency with a child, the victim's statement qualified as an excited utterance even though it was made well after the assault occurred and under a different stimulus (being tickled by another person). An excited utterance is not a present sense impression and therefore the startling event could produce an excited utterance that related to a much earlier incident.

McCrorry v. State, No. 05-06-1163-CR, [2007 Tex. App. Lexis 4200](#) (Tex. App.—Dallas, May 30, 2007, pet ref'd).

In a prosecution for family violence assault, the trial court did not err by not allowing the defendant-husband to cross-examine the victim-wife regarding a case in which she was charged with assaulting the defendant-husband. Although TRE 609 prohibits admission of unadjudicated crimes to show bad character for truthfulness, a party may cross-examine a witness regarding an unadjudicated offense to show bias because of vulnerability to prosecution, not to discredit the witness or to show any bias or interest to testify in the state's behalf. However, the defendant failed to preserve error by showing that he intended to use the unadjudicated offense to show bias, interest, or vulnerability to prosecution.

McEuen v. State, No. 03-08-0707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, no pet.).

In a prosecution for violation of protective order, evidence in the form of testimony and photographs established the defendant violated the order by twice going within 200 yards of prohibited place (the victim's residence).

McGiffin v. State, No. 13-03-094-CR, [2004 Tex. App. Lexis 6305](#) (Tex. App.—Corpus Christi, July 15, 2004, no pet.) (mem. op.).

In a prosecution for violation of a protective order, evidence that the respondent went to his wife's home was legally and factually sufficient to prove that he violated the order's provision that he stay at least 500 feet away from that location.

McGregor v. State, No. 05-02-0993-CR, [2003 Tex. App. Lexis 9270](#) (Tex. App.—Dallas, Oct. 30, 2003, pet. ref'd).

In a prosecution for violating a protective order, evidence that the protective order that recited the defendant has received copy of order and that was signed by the defendant as acknowledging receipt of it was sufficient to establish the defendant's knowledge of the order.

McIntosh v. State, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#) (Tex. App.—San Antonio, Nov. 18, 2009, pet. ref'd).

In a prosecution for a protective order violation, it was not a defense to prosecution for being at a prohibited location that the defendant and the victim were living together.

McNeely v. State, No. 05-98-879-CR, [1999 Tex. App. Lexis 7863](#) (Tex. App.—Dallas, Oct. 22, 1999, pet. ref'd).

In a prosecution for retaliation, evidence that the defendant's threat to kill his common-law wife after he was arrested for assaulting her, which was overheard by a jailer while the defendant was talking on the telephone to someone, was sufficient to prove the crime even though the wife could not remember the threat.

Medellin v. State, No. 08-04-363-CR, [2006 Tex. App. Lexis 7867](#) (Tex. App.—El Paso, Aug. 31, 2006, no pet.).

In a prosecution for stalking, the jury charge did not have to contain the phrase “by following the victim” because that phrase describes a manner of committing crime and is not a required element of the offense.

Mendoza v. State, No. 07-06-0200-CR, [2007 Tex. App. Lexis 8275](#) (Tex. App.—Amarillo, Oct. 18, 2007, no pet.).

In a prosecution for aggravated kidnapping, evidence that the defendant lured the victim (his girlfriend) into his car by false representations and without her consent drove to another county was sufficient to establish restriction of the victim's liberty and prove the lesser offense of unlawful restraint.

Mercer v. State, No. 13-07-0412-CV, [2008 Tex. App. Lexis 5794](#) (Tex. App.—Corpus Christi, July 31, 2008, no pet.) (mem. op.).

In protective order application, the only relevant issue is whether family violence occurred and is likely to occur in the future. The trial court did not err in excluding evidence about applicant's violation of her DWI probation because that evidence was irrelevant to issue of whether respondent committed dating violence against applicant.

Merrell v. State, No. 14-08-0782-CR, [2009 Tex. App. Lexis 5518](#) (Tex. App.—Houston [14th Dist.] July 16, 2009, no pet.).

In an assault prosecution, a finding of family violence could be made based on extrinsic evidence of the defendant's confession, which also constituted corroboration for the guilty plea.

Messenger v. State, No. 02-070270-CR, [2008 Tex. App. Lexis 4357](#) (Tex. App.—Fort Worth, June 12, 2008, no pet.).

In an aggravated sexual assault prosecution, evidence that the victim (the defendant's step-daughter) was asleep at the time of the assault was sufficient to prove the element of lack of consent.

Miles v. State, Nos. 05-06-0668-CR and 05-96-0669-CR, [1998 Tex. App. Lexis 5299](#) (Tex. App.—Dallas, Aug. 24, 1998, no pet.).

In a prosecution for violation of a protective order, the state was entitled to plead multiple alternative manners in which the offense could have been committed so fact that divorce was not pending at time of offense did not preclude jury finding that the defendant committed the offense in another of the manners pled.

Milner v. Kilgore, [718 S.W.2d 759](#) (Tex. App.—Corpus Christi 1986) (orig. proceeding).

The Texas trial court erred in assuming jurisdiction under § 3(a)(3)(ii) of the UCCJA to modify an original Texas custody decree, since there was no finding in the trial court's temporary orders or evidence in the record that a serious and immediate question concerning the physical or emotional welfare of the child.

Mollett v. State, No. 05-08-728-CR, [2009 Tex. App. Lexis 2178](#) (Tex. App.—Dallas, Mar. 31, 2009, pet. ref'd).

In a prosecution for stalking, evidence that on multiple occasions the defendant threatened to kill the victim (who had dated the defendant briefly) was sufficient to support a conviction for a third degree felony.

Moore v. Moreno, [897 S.W.2d 439](#) (Tex. App.—Corpus Christi 1995, no pet.).

In a family violence protective order case brought under the former [Texas Family Code chapter 71](#), the trial court lacked the authority to issue a single, mutual protective order (which included an order against the applicant) because the respondent had not filed a separate application for relief against the applicant and the parties had not agreed to entry of a mutual order.

Monk v. Pomberg, [263 S.W.3d 199, 206](#) (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In a SAPCR, a declaratory judgment was available for an inconvenient forum challenge.

Montana v. State, [1997 Tex. App. Lexis 1534](#) (Tex. App.—Amarillo, Mar. 27, 1997, no pet.).

In a prosecution for bail jumping and failure to appear, evidence that the defendant's course of conduct intentionally prevented him from

receiving notice of hearing was sufficient to prove he intentionally or knowingly failed to appear.

Montgomery v. State, [810 S.W.2d 372](#) (Tex. Crim. App. 1991).

In a prosecution for indecency with a child, evidence of extraneous bad acts (that the defendant had exposed himself to children in the household on other occasions) was admissible under TRE 404(b) to show the defendant intended to gratify himself sexually when he touched the child.

Morales v. State, [32 S.W.3d 862, 866](#) (Tex. Crim. App. 2000).

In evaluating expert testimony, the trial court must assess whether the expert made an adequate effort to tie the relevant facts of the case to the scientific principles about which he testified.

Moreno v. Moore, [892 S.W.2d 439](#) (Tex. App.—Corpus Christi 1995, no writ).

In pre-1997 recodification case, a mutual protective order was void and not enforceable because it did not conform to [Texas Family Code §§ 71.12-71.121](#).

Moreno v. State, No. 04-02-00727-CR, [2003 Tex. App. Lexis 5998](#) (Tex. App.—San Antonio, July 16, 2003, no pet.).

In a prosecution for protective order violation, proof that defendant knew of the order when he left a threatening voice mail message for the protected person.

Moreno v. State, No. 09-02-490-CR, [2003 Tex. App. Lexis 8846](#) (Tex. App.—Beaumont, Oct. 15, 2003, no pet.).

In a prosecution for aggravated sexual assault, evidence from expert witness nurse's report of examination of the victim (the defendant's minor daughter) was admissible because the report was made for the purpose of diagnosis.

Morgan v. Morgan, [657 S.W.2d 484](#) (Tex. App.—Houston [1st Dist.] 1983, writ. dismissed w.o.j.).

In a divorce case, the expert was qualified to give the basis of his opinion if that basis relied on sources customarily and usually relied upon by experts in that field.

Morimoto v. State, No. 2-04-272-CR, [2005 Tex. App. Lexis 2906](#) (Tex. App.—Fort Worth, Apr. 14, 2005, pet. refused).

In a misdemeanor assault prosecution, the trial court did not have to submit the family violence issue to the jury because the court did not increase the sentence beyond the statutory maximum. The charging instrument's caption provided the defendant sufficient notice that the state intended to seek a finding of family violence.

Morris v. State, No. 08-02-432-CR, [2004 Tex. App. Lexis 3256](#) (Tex. App.—El Paso, Apr. 8, 2004, pet ref'd) *cert. den.*, [2005 U.S. Lexis 2483](#) (Mar. 21, 2005).

In a prosecution for aggravated family violence assault with a deadly weapon, the defendant was not subject to double jeopardy when the trial court acquitted him of aggravated assault but convicted him of the lesser included offense of deadly conduct for assault on his wife because the defendant was not subject to two prosecutions for the same offense.

Mozon v. State, [991 S.W.3d 841, 846](#) (Tex. Crim. App. 1999).

In a prosecution for aggravated assault, a victim's character for violence was admissible under TRE 404(a)(2) to show the victim was the first aggressor. The victim's extraneous acts of violence are also admissible under TRE 404(b) to show the defendant's state of mind. But evidence of the victim's violent acts, admissible under 404, is still subject to exclusion under TRE 403 as being more prejudicial than probative.

Murray v. Tex. Dep't of Family & Protective Servs., [294 S.W.3d 360, 368](#) (Tex. App.—Austin 2009, no pet.) citing *Holley v. Adams*, [544 S.W.2d 367, 371-72](#) (Tex. 1976).

In a parental rights termination case, evidence relevant to the best-interests determination includes but is not limited to: (1) the desires of the child; (2) the current and future emotional needs of the child; (3) the current and future emotional and physical dangers to the child; (4) the parental abilities of those seeking custody; (5) the programs available to assist those individuals in caring for the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) any acts or omissions by the parent indicating that the existing parent-child relationship is improper; and (9) any excuse for the acts and omissions by the parent.

N

Nolen v. State, No. 13-08-526-CR, [2009 Tex. App. Lexis 9054](#) (Tex. App.—Corpus Christi, Nov. 24, 2009, no pet.).

In a prosecution for interfering with emergency telephone call, evidence that the defendant broke into his estranged wife’s house, was enraged, caused the wife to fear for her safety, and grabbed telephone out of her hands before she could dial 911 was sufficient to convict.

Normand v. Fox, [940 S.W.2d 401](#) (Tex. App.—Waco 1997, no pet.) [**NOTE:** Superseded by Family Code chapter 88 and overruled by *Kelt v. Kelt*, [67 S.W.3d 364](#)].

Protective order issued after divorce final was not a “final order” for purposes of full faith and credit under [18 U.S.C. 2265](#) and not appealable.

Nunez v. Jimenez, No. 04-07-0403-CV, [2007 Tex. App. Lexis 9647](#) (Tex. App.—San Antonio, Dec. 12, 2007, no pet.).

Child abandonment or endangerment occurs when: (1) a person having custody, care, or control of a child younger than 15 years intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm; or (2) a person intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment. Tex. Penal Code Ann. § 22.041(b) and (c).

O

Ochs v. Martinez, [789 S.W.2d 949, 958](#) (Tex. App.—San Antonio 1990, writ denied).

In a SAPCR, it was not error to allow a mental health expert witness to testify about criteria that are used to assess a child's claim of sexual abuse as long as the expert witness does not give an opinion as to the child's truthfulness.

Some decisions excluding testimony about credibility indicate that testimony about general characteristics of child-victims is admissible, or that experts might be permitted to testify that a child sexual abuse victim's behavior is consistent with the behavior of other such victims. (*Allison v. State*, 179 Ga. App. 303, 346 S.E.2d 380, 382-84 (Ga. App. 1986)). Child psychiatrist and Columbia University professor Richard A. Gardner, M.D., has developed the "Sex Abuse Legitimacy Scale" in which he has identified certain criteria as being valuable in differentiating between genuine and fabricated sex abuse when interviewing a child.⁴ These criteria include alienation from the child's parents; a reluctance to talk about the incident; an ability to recount the incident in great detail; accuracy of the child's description; fear; and guilt. . . . A mental health expert does not invade the province of the jury when he refers to the presence of such criteria as being consistent with a child's claims of having been sexually abused. . . . A mental health expert, however, may not venture beyond this point by summarily stating his opinion as to whether a child is telling the truth about having been sexually abused.

Ojo v. State, No. 01-05-998-CR, [2006 Tex. App. Lexis 9938](#) (Tex. App.—Houston [1st Dist.] Nov. 16, 2006, pet. ref'd).

In a prosecution for terroristic threat, evidence that the defendant threatened the victim (his wife) that he was finished with her, that she would be crawling on her knees, and that he would treat her like the woman who was drug to her death behind a truck was sufficient to support conviction.

Olivas v. State, [203 S.W.3d 341](#) (Tex. Crim. App. 2006).

In an aggravated assault by threat and stalking prosecution, evidence that the victim (the defendant's ex-girlfriend) noticed two popping sounds as if rocks had hit her truck after the defendant shot at her was sufficient to establish the offense. The statute did not require that the victim instantaneously perceive or receive the threat of imminent bodily

injury as the actor is performing it. It was sufficient that the victim felt endangered upon realizing that shots had been fired at her.

Ossorio v. Leon, [705 S.W.3d 219, 222](#) (Tex. App.—San Antonio 1985, no writ).

In rule of law cases dealing with ownership of personal property, as between spouses, the rule of domicile prevails. When spouses who domiciled in Mexico but placed money in bank account in Texas under a contract giving each other right of survivorship to funds, Mexican law controlled ownership of the Texas account proceeds.

Othman v. State, No. 14-09-444-CR, [2010 Tex. App. Lexis 5746](#) (Tex. App.—Houston [14th Dist.] July 22, 2010, no pet.) (mem. op.).

In the judgment of conviction for aggravated assault with a deadly weapon, a separate, specific finding of family violence under [Tex. Code Crim. Proc. art. 42.013](#) was required. The trial court’s judgment which listed the offense as “Aggravated Assault-Family Member” was reformed to conform with [Tex. Code Crim. Proc. art. 42.013](#) so that it properly reflected the defendant was convicted of aggravated assault with a deadly weapon under [Tex. Penal Code § 22.02\(b\)\(1\)](#) with a finding of family violence.

Owen v. State, No. 06-07-153-CR, [2008 Tex. App. Lexis 2315](#) (Tex. App.—Texarkana, Mar. 4, 2008, no pet.).

In a prosecution for harassment, evidence that the defendant repeatedly called his ex-girlfriend and told the ex-girlfriend that he would continue to telephone her mother until the mother had a heart attack was sufficient to prove the offense.

Owens v. State, No. 02-06-00145-CR, [2006 Tex. App. Lexis 5756](#) (Tex. App.—Fort Worth, June 29, 2006, no pet.).

In a criminal prosecution, a defendant had a valid appellate issue because he was sentenced for a protective order violation when he had been indicted for a different offense—assault.

P

Palmer v. State, [222 S.W.3d 92, 95](#) (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

In a prosecution for aggravated sexual assault of a child and indecency with a child by exposure, the defendant had to prove the prior allegation was false as threshold to impeaching witness with prior false allegation.

Patterson v. State, [121 S.W.3d 22](#) (Tex. App.—Houston [1st Dist.] 2003 pet. ref'd).

In an aggravated kidnapping prosecution, the defendant was entitled to have punishment reduced to lesser felony because although he premised release of children upon his wife's promise she had not called the police, "voluntary release" can include a release premised upon the act of another.

Patton v. State, [835 S.W.2d 684](#) (Tex. App.—Dallas 1992, no pet.).

In a prosecution for violation of an agreed protective order, the court could reasonably infer that exclusion of confidential information (the wife's work address) was intentional; omission of the address was not a defense to prosecution for violation of the order where the husband did not have his wife's work address. The state bound itself to prove cause number of violated order because it included that unnecessary fact in the charging instrument.

Pena v. Garza, [61 S.W. 3d 529](#) (Tex. App.—San Antonio 2001, no pet.).

A protective order is a permanent injunction and so is appealable.

Pena v. Pena, [986 S.W.2d 696](#) (Tex. App.—Corpus Christi 1999, pet. denied).

In a SAPCR, evidence that husband hit wife on two occasions and drug her on one did not establish history or pattern of abuse sufficient to prohibit husband's appointment as joint managing conservator under [Tex. Fam. Code § 153.004](#); in conservatorship, the best interests of the child is paramount consideration. A pattern requires more than merely repeated instance of prohibited conduct. It must include some relationship among the separate instances that tends to connect them and to show a threat of continuing violations. [NOTE: Disapproved in *Pena v. Pena*, [8 S.W.3d 639](#) (Tex. 1999) (*per curiam*)].

Pena v. Pena, [8 S.W.3d 639](#) (Tex. 1999) (*per curiam*).

The Supreme Court disapproved of the following language in the court of appeals' opinion:

In the present case, the two hitting incidents left Diana with a black eye each time. However, Diana's testimony only vaguely connects the two hitting incidents as both having been precipitated by arguments over Omar's ex-wife and daughters. We do not know who initiated the arguments, whether the hittings were provoked in any manner, or what other factors may have contributed to either or both incidents, or any other relevant details that may show a relationship, connection or predictable "pattern" of physical abuse. [986 S.W.2d 696, 699](#).

These considerations are not relevant to determining whether there was physical abuse or a history or pattern of domestic violence under the statute.

Perez v. State, No. 03-08-715-CR, Tex. App. Lexis 8963 (Tex. App.—Austin, Nov. 20, 2009, no pet.).

In a prosecution for aggravated assault of a family member with a deadly weapon, evidence that the defendant fractured his pregnant wife's wrist by beating or kicking her was sufficient to support the conviction.

Perkins v. State, [698 S.W.2d 762](#) (Tex. App.—Austin 1985, pet. ref'd).

The spousal immunity privilege applies only to bar spousal testimony about marital communications. Where a wife repeated the husband's statements about having murdered two men and the wife's statements were used as basis for issuance of arrest warrant for the husband, the wife's out-of-court statements did not constitute testimony that was subject to the privilege.

Perry v. State, [727 S.W.2d 781](#) (Tex. App.—Austin 1987, pet. ref'd).

In a prosecution for interference with child custody, the defendant's violation of a Missouri custody decree violated [Tex. Penal Code § 25.03\(a\)\(1\)](#).

Perry v. State, [236 S.W.3d 859, 865](#) (Tex. App.—Texarkana 2007, no pet.).

Evidence of mental illness or disturbance can be used to impeach credibility under TRE 608.

Phillips v. Phillips, No. 01-97-01035CV, [1999 Tex. App. Lexis 9369](#) (Tex. App.—Houston [1st Dist.] Dec. 16, 1999, pet. denied).

In divorce cases, the trial court has broad discretion over child custody, control, possession, support and visitation matters, and its orders will only be overturned on appeal upon a showing of an abuse of discretion. In this case, evidence that father did not always properly care for children was sufficient to support naming the mother as the “primary” parent.

Pickett v. State, No. 02-03-00373-CR, [2004 Tex. App. Lexis 7307](#) (Tex. App.—Fort Worth, Aug. 12, 2004, no pet.).

In a prosecution for protective order violation, evidence that the defendant tried to hit the victim’s car with his car and broke the victim’s car window was sufficient to support a conviction.

Pierce v. State, No. 04-02-0749-CR, [2003 Tex. App. Lexis 9799](#) (Tex. App.—San Antonio, Nov. 19, 2003, pet ref’d).

In a prosecution for family violence assault, despite the victim-wife’s recantation of allegation, evidence was sufficient to support conviction because the photographs of the wife’s injury, her statements to police immediately after the injury that she suffered pain, and the defendant’s admission that he pushed wife proved the assault.

Plascencia v. State, Nos. 05-08-242-CR and 05-08-243-CR, [2009 Tex. App. Lexis 8546](#) (Tex. App.—Dallas, Nov. 5, 2009, no. pet.).

In a prosecution for sexual assault of a child and retaliation, evidence that the defendant threatened to kill his wife and minor stepdaughter (the victim) after he was arrested for sexually assaulting the stepdaughter by placing his penis in her vagina was sufficient to prove both offenses.

Ploeger v. State, [189 S.W.3d 799](#) (Tex. App.—Houston [1st Dist.] 2006, no pet.).

In stalking prosecution in which two manner and means of committing the offense were pled, the trial court committed reversible error when it failed to charge the elements of each manner and means in the conjunctive but rather mixed the two manner and means in the disjunctive in the application paragraph.

Polk v. State, No. 02-02-038-CR, [2003 Tex. App. Lexis 4415](#) (Tex. App.—Fort Worth, May 22, 2003, no pet.).

In a prosecution for violation of a protective order, the defendant was not allowed to collaterally attack the protective order (by challenging the adequacy of the description of the prohibited location) after he had violated it. Additionally, the defendant's challenge to the trial court's decision to continue the case in his absence was unfounded. [Tex. Code Crim. Proc. art. 33.03](#) allows a continuance of a jury trial if the defendant voluntarily absents himself from the trial after selecting the jury.

Pollard v. State, [277 S.W.3d 25](#) (Tex. Crim. App. 2009).

In a prosecution for retaliation by threat, the trial court erred in admitting evidence of prior murder conviction because that evidence was not necessary to explain the charged offense.

Polley v. State, No. 11-03-0340-CR, [2004 Tex. App. Lexis 11317](#) (Tex. App.—Eastland, Dec.16, 2004, pet. ref'd).

In a prosecution for a protective order violation under [Tex. Penal Code § 25.07](#), the offense was proven because the defendant assaulted the protected person by striking her in the head with his hand.

Pope v. State, [695 S.W.2d 341](#) (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).

A peace officer's authority to effect a warrantless arrest is not enlarged by [Tex. Code Crim. Proc. art. 6.05](#).

Poteet v. State, [957 S.W.2d 165](#) (Tex. App.—Fort Worth 1997, no writ).

In protective order application, by appearing at the hearing on the final order hearing, the respondent waived service.

Poteet v. Sullivan, [218 S.W.3d 780](#) (Tex. App.—Fort Worth 2007, pet. denied).

In a civil rights action brought under [42 U.S.C. § 1983](#), the court held that [Tex. Code Crim. Proc. art. 5.045](#) did not authorize the officers to use force beyond that reasonably necessary to keep the peace (the officers physically restrained and threatened to jail the plaintiff) while providing affirmative aid to plaintiff's ex-girlfriend as she gathered her personal property. The summary judgment evidence raised a fact question as to whether the officers violated the plaintiff's constitutional right against unreasonable searches so summary judgment was inappropriate.

Powell v. Stover, [165 S.W.3d 322, 323](#) (Tex. 2005).

With regard to determining a child's home state under the UCCJEA, the term "lived" strongly connotes physical presence and the physical location of the child is the central factor to be considered when determining child's home state.

Prescott v. State, [123 S.W.3d 506](#) (Tex. App.—San Antonio 2003, no pet.).

In a prosecution for reckless injury to a child by omission, evidence that the victim, the defendant's 4-year-old daughter, had on several prior occasions before her drowning death in apartment complex pool been found wandering unsupervised around the complex was admissible under TRE 404 to show the defendant's recklessness as the child's ability to get out of the apartment.

Q

Quintana v. State, No. 14-08-0965-CR, [2009 Tex. App. Lexis 2901](#) (Tex. App.—Houston [14th Dist.], Apr. 28, 2009, pet. ref'd).

In revocation of probation for aggravated assault conviction, the defendant's violation of a protective order obtained by his victim (his wife) was sufficient to show the defendant had violated a law of the state for purposes of revoking his probation.

R

Ramirez v. State, No. 08-07-00207-CR, [2008 Tex. App. Lexis 6195](#) (Tex. App.—El Paso, Aug. 14, 2008, no pet.).

In a prosecution for a protective order violation, the defendant impermissibly collaterally attacked the protective order by asserting the variance between the cause number on the notice of hearing and on the final order adversely affected the order's enforceability.

Ramos v. State, [923 S.W.2d 196](#) (Tex. App.—Austin 1996, no writ).

In a prosecution for violation of a protective order, the defendant's plea of guilt to a prior violation of the order was sufficient to establish that he had notice of the order.

Ramos v. State, No. 13-06-00646-CR, [2009 Tex. App. Lexis 7837](#) (Tex. App.—Corpus Christi, Oct. 8, 2009, no pet.).

In a prosecution for trafficking of a person, the evidence that the defendant forced the victim, an undocumented worker, to work as the defendant's maid without pay under threat of reporting the victim to immigration authorities was sufficient to establish the offense.

Rangel v. State, No. 14-06-090-CR, [2007 Tex. App. Lexis 4761](#) (Tex. App.—Houston [14th Dist.] June 14, 2007, pet. ref'd).

In a prosecution for sexual assault of a child, the trial court did not err in excluding the defendant's evidence of "parental alienation syndrome" because the victim was the defendant's niece by marriage, not his child so there was no parental or blood relationship between the victim and appellant, nor did he cite any authority for its application in such circumstances. In sum, the trial court did not prevent appellant from attempting to show that the victim's parents influenced her to fabricate allegations of sexual abuse.

Rangel v. State, [199 S.W.3d 523](#) (Tex. App.—Fort Worth 2006, pet. dism'd).

In a prosecution for aggravated sexual assault of a child, indecency with a child, and attempted indecency with a child, statements of 4-year-old witness were testimonial despite lack of showing that the child understood the statements could be used against the defendant in a criminal case because the child gave the statements, not to address an ongoing emergency, but to describe a past event.

Reese v. State, No. 05-06-392-CR, [2007 Tex. App. Lexis 3137](#) (Tex. App.—Dallas, Apr. 25, 2007, pet. ref'd).

In a prosecution for aggravated sexual assault, evidence that the defendant's semen, proved by DNA analysis, was on the victim's (the defendant's daughter's) underwear after assault was sufficient to support the conviction.

Rendon v. State, No. 03-07-616-CR, [2008 Tex. App. Lexis 8139](#) (Tex. App.—Austin, Oct. 24, 2008, no pet.).

In a prosecution for harassment, evidence that the defendant left a recorded telephone message for her stepmother stating that the stepmother was a whore who could only charge 50 cents and used the standard euphemism for sexual intercourse was sufficient to prove the offense.

Reyes v. Reyes, No. 04-02-0758-CV, [2003 Tex. App. Lexis 8458](#) (Tex. App.—San Antonio, Oct. 1, 2003, no pet.).

In post-divorce protective order application, evidence that respondent-husband had violated prior protective order on four occasions, was convicted of felony assault on ex-wife-victim, had fired gun at her, and vandalized her automobile was sufficient to support issuance of second protective order. The protective order was not void for lack of a bond or a good cause waiver of bond.

Reyes v. State, [190 S.W.3d 124, 125](#) (Tex. Crim. App. 1945).

A witness who speaks more than one non-English language may choose which language to use while testifying.

Ricondo v. State, [475 S.W.2d 793, 796](#) (Tex. Crim. App. 1971).

An excited utterance statement is considered trustworthy hearsay because it represents an event "speaking through the person rather than the person speaking about the event."

Rider v. State, No. 04-08- 00542-CR, [2009 Tex. App. Lexis 8840](#) (Tex. App.—San Antonio, Nov. 18, 2009, no pet.).

In kidnapping prosecution, the defendant had the burden of proof on the affirmative defenses available under [Tex. Penal Code § 20.03](#)(b).

Riley v. State, [849 S.W.2d 902, 903](#) (Tex. App.—Austin 1993, pet. ref'd).

For purposes of TRE 504, “member of the household” uses the same definition as [Tex. Fam. Code § 71.005](#).

Rios v. State, [230 S.W.3d 252](#) (Tex. App.—Waco 2007, pet. ref’d).

In a prosecution for aggravated kidnapping, evidence that the defendant restrained his girlfriend in a car was sufficient to prove he held her in a place where she was unlikely to be found.

RK v. Ramirez, [887 S.W.2d 836, 843](#) (Tex. 1994).

Under TREs 509 and 510, a condition is part of a party’s claim or defense if the information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party’s claim or defense.

Robbins v. State, [88 S.W.3d 256, 259](#) (Tex. Crim. App. 2002).

Evidence of a person’s bad character may be admissible when it is relevant to a non-character conformity material to an issue such as establishing intent or rebutting a defensive theory.

Roberts v. Healey, [991 S.W.2d 873](#) (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

In a lawsuit for gross negligence by attorneys who failed to obtain a protective order for wife in a divorce case, murder of the children by their unstable father was proximate cause of the injury to wife, not the attorney’s failure to obtain a protective order against the husband.

Robertson v. State, [175 S.W.3d 359](#) (Tex. App.—Houston [1st Dist.] 2004, pet. ref’d).

In a prosecution for violation of a protective order, evidence that the defendant threatened to “get” the victim and waived a box-cutter at her outside the barred window of her home was sufficient to establish he threatened her with imminent bodily injury. Omission of the words “with a deadly weapon” from the jury charge was not a material variance from the indictment.

Robinson v. City of San Antonio, [72 S.W.2d 40](#) (Tex. App.—San Antonio 1987, writ ref’d n.r.e.).

In action for negligence based on police officer’s failure to act after being notified that father had taken minor daughter in violation of a protective order, the protective order was not tangible property and

would not support an action by the wife-mother under [Tex. Civ. Prac. & Rem. Code § 101.021](#).

Rodriguez v. State, No. 01-05-00589-CR, [2006 Tex. App. Lexis 6416](#) (Tex. App.—Houston [1st Dist.] July 20, 2006, no pet.).

In a prosecution for Class A assault, after the jury convicted the defendant of Class C assault by contact, the trial court did not err in entering a finding of family violence because the finding was supported by the evidence, did not conflict with the jury verdict, and did not enhance punishment for the underlying offense.

Rodriguez v. State, No. 14-07-0307-CR, [2008 Tex. App. Lexis 1162](#) (Tex. App.—Houston [14th Dist.] Feb. 19, 2008, no pet.).

In a prosecution for murder of a minor child, the defendant's wife did not have a spousal privilege not to testify under TRE 504(b) because the victim was a child.

Rodriguez v. State, [274 S.W.3d 760](#) (Tex. App.—San Antonio 2008, no pet.).

In a prosecution for assault, statements by the victim to officer during emergency were not testimonial, but the victim's later statements were testimonial because they occurred after detention of the defendant and described how the injuries occurred. However, admission of testimonial statements was harmless error.

Rogers v. State, [28 S.W.3d 725](#) (Tex. App.—Texarkana 2001, pet. ref'd).

In a prosecution for aggravated assault by threat, the defendant, who shot into his girlfriend's car without hitting her, was not entitled to a jury instruction on deadly conduct because that offense is not a lesser included offense of aggravated assault by threat.

Rogers v. State, [183 S.W.3d 853](#) (Tex. App.—Tyler 2005, no pet.).

In murder prosecution, error in admitting the victim's unsigned, unnotarized statements about domestic violence by the defendant was harmless because cumulative of other evidence. Under state of mind exception in TRE 803(d) it was not error to admit the victim's tape recorded phone calls to third persons that implicated the defendant.

Rohrscheib v. State, [934 S.W.2d 909](#) (Tex. App.—Houston [1st Dist.] 1996, no pet.).

In a prosecution of a protective order case, it was a material and fatal variance for the state to plead a violation of a 1993 order and prove a violation of a 1995 order.

Rue v. State, [288 S.W.3d 107](#) (Tex. App.—Houston [1st Dist.] 1996, pet ref'd).

In an aggravated assault with a deadly weapon prosecution, the defendant was entitled to a jury instruction on the right to use deadly force to prevent aggravated kidnapping of his child.

Ruffier v. Ruffier, [190 S.W.3d 884](#) (Tex. App.—El Paso 2006, no pet.).

In child custody case, home state jurisdiction that has not been declined trumps any need to consider other basis for jurisdiction. Texas was not the home state where child had lived in Belarus for six months prior to filing of lawsuit.

Ruiz v. Ruiz, [946 S.W.3d 123](#) (Tex. App.—El Paso 1997 no writ) (*per curiam*).

Protective order granted in pending divorce action is an interlocutory order and not appealable; until the divorce is final a mandamus action is required to seek relief from protective over issued under [Tex. Fam. Code § 6.504](#).

Rousseau v. State, [171 S.W.3d 871, 880](#) (Tex. Crim. App. 2005).

In a murder prosecution, admission of prior prison disciplinary records violated the Confrontation Clause because the record of the defendant's infractions contained testimonial statements. Generally, a statement is "testimonial" if it is a solemn declaration made for purposes of establishing some fact.

Russell v. State, No. 02-05-00346-CR, [2006 Tex. App. Lexis 8866](#) (Tex. App.—Fort Worth, Oct. 12, 2006, no pet.).

In a prosecution for a protective order violation, evidence from map established that the defendant was within 200 feet of the victim's residence supported a conviction.

S

Saavedra v. Schmidt, [96 S.W.3d 553, 544](#) (Tex. App.—Austin 2002, no pet.).

The duty of a state to recognize and enforce the custody determinations of another state must yield if circumstances require temporary emergency orders to protect the child. The trial court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify another state's child custody determination. The Texas court had no jurisdiction to modify a California decree unless the California court declined jurisdiction.

Saavedra v. State, [297 S.W.3d 342](#) (Tex. Crim. App. 2009).

In a prosecution for aggravated sexual assault, the trial court did not err in admitting interpreter's translation of the defendant's statements to a police officer. For an otherwise admissible out-of-court assertion by a party, if the party makes an interpreter his agent to communicate, the translation of the assertion rendered by the interpreter is not inadmissible hearsay by virtue of its status as an interpreter or translated statement. The out-of-court interpreted statement was admissible under TRE 801(e)(2).

Salazar v. State, No. 01-04-01190-CR, [2005 Tex. App. Lexis 9600](#) (Tex. App.—Houston [1st Dist.] Nov. 17, 2005, pet. ref'd).

In a prosecution for family violence assault, evidence that the defendant had lived with the victim for several weeks or months several years before the assault was sufficient to establish that the defendant was a member of the victim's household for purposes of [Tex. Penal Code § 22.01\(b\)\(2\)](#) and [Tex. Fam. Code § 71.006](#). In punishment phase the state was allowed to use extrinsic evidence to prove up family violence nature of prior assault despite fact that prior judgment had "n/a" marked next to family violence finding.

Salguero v. State, No. 01-01-00508-CR, [2002 Tex. App. Lexis 9104](#) (Tex. App.—Houston [1st Dist.] Dec. 19, 2002, pet. ref'd).

In an assault prosecution, although the prior judgment being used for enhancement did not have a finding of family violence, the court's jurisdiction was established because the state properly used extrinsic evidence to prove the prior assault involved family violence.

Sam v. State, No. 14-08-00407-CR, [2009 Tex. App. Lexis 5121](#) (Tex. App.—Houston [14th Dist.] June 30, 2009, no pet.).

In a prosecution for violation of a family violence protective order, proof that the victim suffered pain when the defendant prevented her from breathing and proof that the defendant threatened the victim by holding a knife to her throat was sufficient to prove crime.

Sanchez v. State, No. 03-08-00707-CR, [2009 Tex. App. Lexis 7044](#) (Tex. App.—Austin, Aug 31, 2009, no pet.).

In a prosecution for violation of a protective order, evidence that the defendant entered a prohibited place (his ex-wife's home) was sufficient to support a conviction.

Sapp v. State, No. 14-06-00268-CR, [2007 Tex. App. Lexis 4790](#) (Tex. App.—Houston [14th Dist.], June 21, 2007, pet. ref'd).

In a prosecution for attempted aggravated sexual assault, the application for protective order filed by the victim against the defendant (her ex-boyfriend) was admissible to show that the victim wanted to limit her contact with the defendant.

Scantlin v. State, No. 14-06-0314-CR, [2007 Tex. App. Lexis 5175](#) (Tex. App.—Houston [14th Dist.] July 3, 2007, no pet.).

In felony family violence assault prosecution, under TRE 403, the state was entitled to use prior convictions and bad acts to refute defense theory that the victim was not afraid of the defendant.

Schaban-Maurer v. Maurer-Schaban, [238 S.W.3d 815, 822-824](#) (Tex. App.—Fort Worth 2007, no pet.).

In a divorce protective order application, a finding of future family violence can be based on proof of past violence because proof of past violence can be sufficient to support an inference that the person will be violent in the future. The collateral consequences doctrine applies to an expired protective order containing a finding of family violence because such a finding carries a social stigma even after the order expires.

Schmidt v. State, [232 S.W.3d 66](#) (Tex. Crim. App. 2007).

In a prosecution for retaliation, evidence that the defendant struck the victim (his girlfriend) in retaliation for her services as a prospective witness was sufficient to show that the defendant threatened to harm the victim while he was actually hitting her. The beating that the victim sustained was enough to show that she felt threatened. The threat of harm and the actual harm can arise from the same act and occur simultaneously; the threat need not precede the initial harm.) [NOTE:

On remand, the Court of Appeals found reversible error because the defendant did not receive jury charge on assault and assault by threat. The Court of Criminal Appeals affirmed the court of appeals' second decision.]

Schutz v. State, [957 S.W.2d 52, 69-70](#) (Tex. Crim. App. 1997).

Under TRE 608, an attack on general capacity of a witness to ascertain the truth can include evidence that the witness is: generally the sort of person who is easily manipulated; shows signs or symptoms of being manipulated; or was subject to manipulation by acts or words of a third party. Rebuttal evidence can include evidence that the witness: is not the sort of person who is easily manipulated; does not display signs or symptoms of manipulation; or was not subject to manipulative words or acts of a third party.

Scott v. State, No. 14-06-00860-CR, [2007 Tex. App. Lexis 9273](#) (Tex. App.—Houston [14th Dist.] Nov. 29, 2007, pet. ref'd).

In a prosecution for family violence assault where the defendant had dated the victim, it was not error to use a prior assault judgment with a finding of family violence that did not specify the familial relationship to elevate the offense from a misdemeanor to felony.

Scott v. State, [222 S.W.3d 820](#) (Tex. App.—Houston [14th Dist.] 2007, no pet.).

In a prosecution for aggravated sexual assault of a child, the trial court did not err in allowing the witness to testify as to the witness's opinion about the complainant's reputation for truthfulness. In dicta, the court notes that TRE 608 does not permit a witness to testify as to whether someone is telling the truth or lying in a particular instance.

Scott v. State, Nos. PD-1069-09 and PD-1070-09, [2010 Tex Crim. App. Lexis 1249](#) (Tex. Crim. App., Oct. 6, 2010).

In a prosecution for harassment of ex-wife by leaving repeated voice messages, the criminal portion of the defendant's conduct (repeated use of telephone to inflict emotional distress by invading another's privacy) did not implicate free speech and was not shown to be unduly vague as to the defendant's conduct.

Scott v. State ex. Tabler, No. 12-04-041-CV, [2005 Tex. App. Lexis 4198](#) (Tex. App.—Tyler, May 31, 2005, no pet.).

In protective order application case, the trial court did not abuse its discretion in entering protective order that required respondent to stay

away from applicant's residence because [Tex. Fam. Code § 85.021\(2\)](#) authorizes an award of exclusive possession of a residence to an applicant who is an owner or lessee of the property.

Scugoza v. State, [949 S.W.2d 360, 363](#) (Tex. App.—San Antonio 1997, no pet.).

Evidence admissible under TRE 702 may include testimony which compares general or classical behavioral characteristics of a certain type of victim with the specific victim's behavior patterns. The trial court did not err in admitting expert testimony from licensed professional counselor as to the “cycle of abuse” in domestic violence cases.

Seligman-Hargis v. Hargis, [186 S.W.3d 582](#) (Tex. App.—Dallas 2006, no pet.).

When it is established that a foreign court has home state jurisdiction in a child custody proceeding and there was no evidence that court had declined to exercise that jurisdiction, the issue of whether the Texas court had significant connections jurisdiction is moot. Germany was home state of children so Texas court lacked jurisdiction in child custody case.

Sheffield v. State, No. 06-07-00116-CR, [2008 Tex. App. Lexis 3517](#) (Tex. App.—Texarkana, May 21, 2008, no pet.).

In a prosecution for stalking, evidence that the defendant left several threatening messages on the victim's (his ex-girlfriend) telephone answering machine and banged on door of her workplace was legally and factually sufficient to support the conviction.

Sheppard v. State, [5 S.W.3d 338](#) (Tex. App.—Texarkana 1999, no pet.).

In a conviction for felony family violence assault, the prior conviction used for enhancement purposes was not an element of the felony charge so it was immaterial that the prior convictions occurred before the amendment to the statute allowing enhancement took effect.

Siegert v. Flannery, No. 04-03-0487-CV, [2004 Tex. App. Lexis 6989](#) (Tex. App.—San Antonio, Aug. 4, 2004, no pet.).

In a post-divorce protective order application case, evidence that the ex-husband had been physically violent and threatening before the divorce and continued to invade his ex-wife's house after the divorce was sufficient to find that family violence had occurred and would occur again.

Silverman v. Johnson, No 03-08-0271-CV, 2009 Tex. App. Lexis 7176 (Tex. App.—Austin, Aug. 26, 2009, no pet.).

In a SAPCR, the trial court did not err in determining that it was in the best interests of the child to restrict the father's access to the child. Evidence from three mental health professionals established that his contact with the child should be limited. The trial court was presented with substantial evidence that the child exhibited behaviors and responses indicative of parental alienation by the father, as well as testimony regarding the negative effect of the father's influence on the child's demeanor, attitude, and behavior and the father's questionable ability to interact with the child appropriately.

Simon v. State, No. 05-080399-CR, [2009 Tex. App. Lexis 2928](#) (Tex. App.—Dallas, Apr. 30, 2009, no pet.).

In a prosecution for burglary of a habitation, evidence established that the defendant broke into his ex-girlfriend's home, kicked and beat her, and took her car keys, which was sufficient to show that the defendant broke into the house intending to commit an assault and there was no evidence that the defendant was only guilty of criminal trespass.

Sisk v. State, [74 S.W.3d 893](#) (Tex. App.—Fort Worth 2002, no pet.).

In a prosecution for violation of protective order by stalking, evidence that the defendant followed the victim (his ex-wife), knew of the protective order, and knew the victim had made complaints to the police about him was sufficient to establish that he knew or reasonably believed the victim would regard his following her as a threat of bodily injury.

Slim v. State, No. 05-96-01261-CR, [1998 Tex. App. Lexis 2691](#) (Tex. App.—Dallas, May 7, 1998, pet. ref'd).

To prove a criminal violation of a protective order, the prosecution did not have to prove that the protective order was issued in full compliance with the Texas Family Code provisions.

Small v. State, [809 S.W.2d 253](#) (Tex. App.—San Antonio 1991, pet ref'd).

Where no evidence that the defendant knew of the protective order or its contents, the state was unable to prove that the defendant knowingly and intentionally violated the "stay away" provision by going to spouse's residence.

Smallwood v. State, No. 02-02-438-CR, [2003 Tex. App. Lexis 7167](#) (Tex. App.—Fort Worth, Aug. 21, 2003, no pet.).

In a prosecution for harassment, evidence that the defendant called her children’s stepmother seven times in one day ranting and using foul language was sufficient to establish the calls annoyed the stepmother, and proving the crime.

Smelley v. State, No. 09-05-256-CR, [2006 Tex. App. Lexis 6583](#) (Tex. App.—Beaumont 2006, pet. ref’d).

In a prosecution for assault, because the law requires that court enter a finding of family violence if the defendant was convicted, because the defendant knew the victim was his mother-in-law, and because the finding did not enhance punishment, the defendant had sufficient notice of the finding to satisfy due process.

Smith v. Smith, No. 11-04-023-CV, [2005 Tex. App. Lexis 1983](#) (Tex. App.—Eastland, Mar. 17, 2005, no pet.).

In a post-divorce protective order application case, the protective order was final and appealable. Based on evidence of past assaults and threat by the husband to make the wife “pay” for her actions, there was sufficient evidence to support findings that family violence had occurred and was likely to occur in the future.

Sohail v. State, [264 S.W. 3d 251](#) (Tex. App.—Houston [14th Dist.] 2008, pet ref’d).

In a prosecution for misdemeanor domestic violence assault, the trial court committed harmful error in excluding evidence that the complainant had told her sister that the alleged assaultive contact was an accident because the evidence was admissible under TRE 613(a).

Solis v. State, No. 01-02-01069-CR, No. 01-02-01070-CR, [2004 Tex. App. Lexis 2717](#) (Tex. App.—Houston [1st Dist.] Mar. 25, 2004, no pet.).

In an aggravated kidnapping prosecution, the defendant’s 4-year-old son could not acquiesce to being held hostage by the defendant who had a gun in one hand and son in his lap during standoff with police after the defendant had shot another person.

Soto-Ruphy v. Yates, [687 S.W.3d 19](#) (Tex. App.—San Antonio 1984) (orig. proceeding).

In a SAPCR, the Texas trial court erred in assuming jurisdiction under § 3(a)(3)(ii) of the UCCJA to modify an original Texas custody decree,

since there was no finding in the trial court's temporary orders or evidence in the record that a serious and immediate question existed concerning the physical or emotional welfare of the child.

Soto v. State, No. 08-05-0227-CR, 2007 Tex. App. 9321 (Tex. App.—El Paso, Nov. 29, 2007, no pet.).

In a prosecution for stalking, evidence that the defendant went to places where he knew the victim would be and engaged in conduct he knew would place her in fear (following her, making inappropriate comments, and grabbing her) was sufficient to prove he followed her and committed the offense.

Spencer-Auber v. State, No. 05-03-01259-CR, [2004 Tex. App. Lexis 1723](#) (Tex. App.—Dallas, Feb. 23, 2004, pet. dismiss'd).

In a prosecution for violation of a protective order, testimony from the victim and witness that the defendant was at a prohibited place (the victim's residence) was sufficient evidence of violation.

Standifer v. State, Nos. 05-06-078-CR and 05-06-079-CR, [2006 Tex. App. Lexis 9358](#) (Tex. App.—Dallas, Oct. 30, 2006, no pet.).

In a prosecution for violation of a protective order, evidence was sufficient to convict because the state's evidence showed the defendant had knowledge of the order when he told arresting officers that he knew he should not have broken into wife's house.

State v. Cagle, [77 S.W.3d 344](#) (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

In a family violence assault, notation of "n/a" on judgment was not sufficient to negate a showing by extrinsic evidence of a family violence finding in a prior assault case.

State ex rel. Cockerham v. Cockerham, [218 S.W.3d 298, 308](#) (Tex. App.—Texarkana 2007, no pet.).

In a protective order case, lack of pleadings by the respondent and the statutory prohibition against issuing mutual protective orders in a single document deprived the trial court of authority to issue a protective order against the applicant. An expired protective order is subject to review due to collateral consequences doctrine; a protective order can only be issued to protect a person who filed an application.

State v. Eakins, [71 S.W.3d 443, 444](#) (Tex. App.—Austin 2002, no pet.).

In a prosecution for Class A assault, the absence of a finding of family violence does not preclude a later determination based on extrinsic evidence that the prior conviction was for assault of a family member.

State v. Mireles, [904 S.W.2d 885, 890](#) (Tex. App.—Corpus Christi 1995, pet. ref'd).

In a criminal prosecution where the spousal communication privilege was asserted, the wife may testify about the husband's actions she observed, but not about the husband's statements made to her during marriage.

State v. Newsom, [64 S.W.3d 478](#) (Tex. App.—El Paso 2001, no pet.).

In a prosecution for stalking, the trial court did not err in not using prior probated conviction for stalking to enhance a subsequent stalking charge to a third-degree felony. Under [Tex. Penal Code § 12.42](#), to be used for enhancement purposes, the prior conviction had to be a final one, not a probated one.

State v. Parson, [988 S.W.2d 264](#) (Tex. App.—San Antonio 1998, no pet.).

In a prosecution for a protective order violation, exigent circumstances were not required for warrantless arrest for a violation in presence of peace officer.

State v. Seibert, [156 S.W.3d 32](#) (Tex. App.—Dallas 2004, no pet.).

In a prosecution for stalking, [Tex. Penal Code § 42.072](#) is not unconstitutionally vague because the word “following” as used in the statute was not so broad as to encompass non-criminal activities.

Stephenson v. State, [255 S.W.3d 652](#) (Tex. App.—Fort Worth 2008, pet. ref'd).

In a prosecution for aggravated kidnapping, aggravated assault and retaliation, evidence that the defendant burned the victim (his girlfriend) with a torch (which was deadly weapon), assaulted her, locked her in trunk, and threatened her children was sufficient to support convictions.

Sterling v. State, [814 S.W.2d 261](#) (Tex. App.—Austin, 1991, pet. ref'd) (*per curiam*).

The spousal communication privilege under TRE 504 applies to utterances, not acts. Thus, a defendant cannot successfully invoke the privilege to prevent a spouse from testifying about the defendant's acts.

Stoker v. State, No. 03-02-00137-CR, [2003 Tex. App. Lexis 1704](#) (Tex. App.—Austin, Feb. 21, 2003, no pet.).

In an assault prosecution, absence of finding of family violence in prior judgment did not preclude extrinsic proof of nature of the assault.

Striedel v. Striedel, [15 S.W.3d 163](#) (Tex. App.—Corpus Christi 2000, no pet.).

Protective order proceeding under [Tex. Fam. Code Title 4](#) is a quasi-criminal proceeding; the right to counsel in a protective order hearing is appealable issue. The trial court erred in denying the respondent the opportunity to present his evidence at the hearing.

Stucki v. Stucki, [222 S.W.3d 116](#) (Tex. App.—Tyler 2006, no pet.).

In a divorce case, the evidence did not establish a history or pattern of family violence that would rebut the presumption that the parents should be joint managing conservators, and mother failed to rebut presumption in [Tex. Fam. Code § 8.053\(a\)](#), so she was not entitled to an award of spousal maintenance.

Stuyvesant v. State, No. 13-05-00664-CR, [2006 Tex. App. Lexis 5512](#) (Tex. App.—Corpus Christi, June 29, 2006, no pet.).

In a prosecution for a protective order violation, the defendant violated the order by sending recorded messages delivered to the victim by telephone, which were communications prohibited by the order.

T

Taherzadeh v. Ghaleh-Assadi, [108 S.W.3d 927](#) (Tex. App.—Dallas 2003, pet. denied).

In a protective order application case, the trial court did not abuse its discretion in denying the respondent's request for a continuance in order to obtain counsel.

Thomas v. State, [150 S.W.3d 887](#) (Tex. App.—Dallas 2004), *cert. denied*, [74 U.S. 3207](#) (2005).

In an assault prosecution, the court was required to make family violence finding based on the evidence. The defendant had sufficient notice that the state intended to seek a finding of family violence because the record established that the defendant knew the victim was his ex-wife and mother of his child.

Thomas v. State, No. 13-03-655-CR, [2005 Tex. App. Lexis 5990](#) (Tex. App.—Corpus Christi, July 28, 2005, no pet.).

In a prosecution for stalking, evidence that over the span of 24 years, the defendant continually followed, threatened, assaulted, made harassing telephone calls, and imposed unwanted attention on the victim (his ex-wife) was legally and factually sufficient to prove the offense.

Thompson v. Thompson-O'Rear, No. 06-03-00129-CV, [2004 Tex. App. Lexis 5033](#) (Tex. App.—Texarkana, June 8, 2004, no pet.)(mem. op.).

Evidence of harassing behavior that did not include threat of violence or actual physical violence was insufficient to support a finding that respondent threatened the victim in such a manner as to cause the victim to reasonable fear imminent physical harm or bodily injury. On appeal of a protective order, the sufficiency of the evidence was review under the abuse of discretion standard.

Todd v. State, No. 08-05-011-CR, [2006 Tex. App. Lexis 8145](#) (Tex. App.—El Paso, Sept. 14, 2006, no pet.).

In a prosecution for family violence assault, despite the victim's recantation at trial and denial of bodily injury, the evidence from responding officers and the victim's taped statement after the assault was sufficient to show that the defendant bit and hit the victim in the nose.

Torres v. State, No. 08-03-00084-CR, [2005 Tex. App. Lexis 1333](#) (Tex. App.—El Paso, Feb. 17, 2005, no pet.).

In a family violence assault prosecution, the trial court's affirmative finding of family violence in a prior assault case could be used to enhance assault to a third degree felony.

Torres v. State, No. 02-03-520-CR, [2004 Tex. App. Lexis 7534](#) (Tex. App.—Fort Worth, Aug. 19, 2004, no pet.).

In a prosecution for protective order violation, the defendant's admission that he went to the victim's apartment, a prohibited place, was sufficient to support a conviction for the offense.

Tovar v. State, No. 05-08-00424-CR, [2009 Tex. App. Lexis 678](#) (Tex. App.—Dallas, Feb. 3, 2009, no pet.).

In a protective order violation prosecution, the defendant's threats to kill and assault the victim were sufficient to establish a criminal violation of a family violence protective order.

Tyman v. Tyman, [855 S.W.2d 619](#) (Tex. 1993).

In a tort claim brought in a divorce case, there was no cause of action for negligent infliction of emotional distress, but the wife was entitled to a trial on recognized cause of action on intentional infliction of emotional distress.

U

Ulmer v. Ulmer, [130 S.W.3d 294](#) (Tex. App.—Houston [14th Dist.] 2004, no pet.).

In a post-divorce protective order application case, the protective order was final and appealable.

V

Vasquez v. State, Nos. 04-99-567-CR and 04-99-568-CR, [2000 Tex. App. Lexis 1538](#) (Tex. App.—San Antonio, Mar. 8, 2000, pet. denied).

In providing standby assistance to a family violence the victim under [Tex. Code Crim. Proc. art. 5.04\(a\)](#), police officers did not violate the Fourth Amendment of the U.S. Constitution by engaging in unreasonable search and seizure.

Vernon v. City of Dallas, [638 S.W.2d 5](#) (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

The scope of the authority of a peace officer to use force to prevent a crime about to be committed in the officer's presence is limited by Tex. Code Crim. Proc. arts. 6.05, 6.06, and 6.07.

Villareal v. State, Nos. 03-05-0100-CR and 03-05-0101-CR, [2006 Tex. App. Lexis 6304](#) (Tex. App.—Austin, July 21, 2006, pet. ref'd) (mem. op.).

In a prosecution for felony family violence assault, the trial court did not err in admitting police officer's testimony about the victims' statements because the victims testified at the trial and the statements were excited utterances.

Villareal v. State, [286 S.W.3d 321](#) (Tex. Crim. App. 2009).

The trial court did not err by instructing jury on terms "dating violence" and "dating relationship" as those terms affect the meaning of family violence element of protective order violation offense. The evidence was legally sufficient to support finding that the defendant violated protective order by assaulting girlfriend although order prohibited family violence rather than dating violence.

Vinson v. State, [221 S.W.3d 256](#) (Tex. App.—Houston [14th Dist.] 2006), rev'd on other grounds, [252 S.W.3d 336](#) (Tex. Crim. App. 2008).

In a prosecution for interference with an emergency telephone call and assault, evidence from responding police officer that he responded to a "hang-up 911" call and that at the scene the defendant's girlfriend stated the defendant had assaulted her and knocked the telephone out of her hand when she tried to call 911 was sufficient to prove interference with emergency call offense.

Vinson v. State, [252 S.W.3d 336, 340-41](#) (Tex. Crim. App. 2008).

In a prosecution for interference with an emergency telephone call, the victim's statements identifying the defendant were not testimonial, but her statement that the defendant knocked the telephone out of her hand after she dialed 911 was testimonial. The police officer's testimony as to the latter statement violated the defendant's rights under the Sixth Amendment Confrontation Clause because the victim did not testify.

Vongontard v. Tippit, [137 S.W.3d 109](#) (Tex. App.—Houston [1st Dist.] 2004, no pet.).

In an application for a protective order, a finding of dating violence could be based on three incidents of pushing and continuing threats of violence. On appeal, the sufficiency of the evidence in a protective order case was reviewed under the standards for legal and factual sufficiency.

W

Walker v. State, No. 14-02-00716-CR, [2003, Tex. App. Lexis 4304](#) (Tex. App.—Houston [14th Dist.] May 22, 2003, pet. ref'd).

In an assault prosecution, the absence of a finding of family violence in a judgment did not preclude a determination based on extrinsic evidence that the prior conviction constituted assault of a family member.

Walker v. State, No. 14-05-00692-CR, [2006 Tex. App. Lexis 7104](#) (Tex. App.—Houston [14th Dist.] Aug. 10, 2006, pet. ref'd).

In an aggravated kidnapping prosecution, evidence that the defendant threatened his girlfriend with a gun and forced her to go with him in his car was legally and factually sufficient to support conviction.

Wallace v. State, No. 05-07-0484-CR, [2008 Tex. App. Lexis 1981](#) (Tex. App.—Dallas, Mar. 19, 2008, no pet.) (mem. op.).

In felony aggravated assault prosecution, there was no reversible error in fact that the state pled various relationships between the defendant and the victim in order to establish family violence element of case.

Waltenberg v. Waltenberg, [270 S.W.3d 308, 316](#) (Tex. App.—Dallas 2008, no pet.).

In a SAPCR, when child was less than 6 months old and had resided in Texas from birth, Texas, not Arizona, was the child's home state for purposes of child custody, even though father had filed divorce petition in Arizona seeking custody of unborn child before divorce suit was filed in Texas court.

Webb v. State, [991 S.W.2d 408](#) (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

In a prosecution for retaliation, the defendant's challenge to the statute as unconstitutionally vague failed. The defendant's threat to a witness was not protected speech.

Weeks Marine, Inc. v. Barrera, No. 04-08-00681-CV, 2010 Tex. App. Lexis 438 (Tex. App.—San Antonio, Jan. 27, 2010, pet. den., 2010 Tex. Lexis 813, Oct. 22, 2010).

The trial court did not abuse its discretion by awarding interpreter's costs under Tex. R. Civ. P. 131 and Tex. Civ. Prac. & Rem. Code § 31.007(b).

West v. State, Nos. 02-08-173-CR through 02-08-177-CR, [2009 Tex. App. Lexis 3573](#) (Tex. App.—Fort Worth, May 21, 2009, no pet.).

In a criminal prosecution, where the record showed that the defendant understood the consequences of a guilty plea and entered the plea voluntarily and intelligently and was not subject to deportation as a result of the plea, it was harmless error for trial court to fail to admonish him about deportation as a consequence of a guilty plea.

Wheaton v. State, [129 S.W.3d 267](#) (Tex. App.—Corpus Christi 2004, no pet.).

In a prosecution for deadly conduct, evidence that the defendant shot through a wall into a room where his wife was present and could have been hit, along with his threats to kill her, and his admission the shot could have killed her was sufficient to support the conviction.

White v. Blake, [859 S.W.2d 551](#) (Tex. App.—Tyler 1993, no writ).

Jurisdiction to issue a protective order exists even if child subject to custody order issued in another state.

White v. State, [201 S.W.3d 233](#) (Tex. App.—Fort Worth 2006, pet. ref'd).

In a prosecution for family violence assault, the defendant was not entitled to a jury charge on defense of a third person based on his assertion that he struck the victim (his wife) to protect her because she endangered herself by interfering with his driving. The victim-wife's statements were admissible as excited utterances and for purposes of TRE 607, her statements were not proffered by the state solely for the purpose of introducing otherwise inadmissible hearsay.

White v. State, No. 01-05-514-CR, [2006 Tex. App. Lexis 4463](#) (Tex. App.—Houston [1st Dist.] May 25, 2006, pet ref'd).

In a prosecution for harassment of his ex-wife with repeated telephone calls, evidence that the defendant called incessantly (up to 2 calls per minute and 329 over 8 days) and would not stop when asked was sufficient to prove the offense.

Williams v. State, No. 10-03-132-CR, [2004 Tex. App. Lexis 8742](#) (Tex. App.—Waco, Sept. 29, 2004, pet. ref'd).

In a prosecution for deadly conduct, evidence that the defendant used his car to intentionally bump the victim's (his ex-wife) car into oncoming traffic was sufficient to prove the crime.

Williams v. State, [216 S.W.3d 44](#) (Tex. App.—Waco 2007, no pet.).

In family violence assault prosecution, the defendant was entitled to acquittal after the victim (his wife) recanted and there was no evidence establishing the defendant intentionally, knowingly, or recklessly committed an assault by pulling the victim’s hair as she attempted to drive away.

Williams v. State, No. 03-07-733-CR, [2008 Tex. App. Lexis 8854](#) (Tex. App.—Austin, Nov. 26, 2008, no pet.).

In a prosecution for aggravated assault and deadly conduct with a deadly weapon, the victim (the defendant’s ex-girlfriend who had a protective order against him) was able to identify the defendant as the person who shot, then hit her, based on his clothing, his posture, his gait, and the gun, which was left at the scene. The victim’s identification was factually sufficient to support the conviction.

Williams v. State, No. 01-08-872-CR, [2009 Tex. App. Lexis 8387](#) (Tex. App.—Houston, [1st Dist.] 2009, pet. ref’d).

In a prosecution for dating-relationship aggravated assault with a deadly weapon, the victim’s testimony that the defendant (her boyfriend) beat her with a deadly weapon was sufficient to support deadly weapon finding even though weapon itself was never found.

Williams v. Williams, [19 S.W.3d 544](#) (Tex. App.—Fort Worth 2000, pet. denied).

In a protective order application, there is no right to jury trial. Whether to issue a protective order is for court to decide. For purposes of an application, a court is defined in [Tex. Fam. Code Title 4](#).

Winsett v. Edgar, [122 S.W.3d 510](#) (Tex. App.—Fort Worth 1999, no pet.) (*per curiam*).

A protective order is appealable when it becomes a final order.

Woodson v. State, [191 S.W.3d 280](#) (Tex. App.—Waco 2006, pet. ref’d).

In a prosecution for stalking, the statute was not unconstitutionally vague because it incorporated the “reasonable person” standard or because the statute does not require the course of conduct be completed within a specific time period.

Word v. State, No. 11-03-00403-CR, [2005 Tex. App. Lexis 3256](#) (Tex. App.—Eastland, Apr. 28, 2005) aff’d, [206 S.W.3d 646](#) (Tex. Crim. App. 2006).

In a prosecution for family violence assault, evidence that the defendant “stayed” at the victim’s house five out of seven nights a week, helped pay the victim’s bills, and came “home” drunk to the victim house was sufficient to establish the defendant was a member of the victim’s household.

Worley v. State, No. 01-03-329-CR, [2004 Tex. App. Lexis 3271](#) (Tex. App.—Houston [1st Dist.], Apr. 8, 2004, pet. ref’d).

In a prosecution for unlawful possession of a firearm, evidence from the defendant that he had been arrested after a fight with his wife was sufficient to corroborate the judgment of conviction and establish that he was the same person whose deferred adjudication probation for family violence assault was revoked, thus proving an element of the offense.

Wynn v. State, No. 02-04-00394-CR, [2005 Tex. App. Lexis 5155](#) (Tex. App.—Fort Worth, June 30, 2005, no pet.).

In a prosecution for a protective order violation, the testimony of the victim and witness to assault was sufficient evidence to convict the defendant of the offense.

X,Y,Z

Young v. State, [774 S.W.2d 66](#) (Tex. App.—Beaumont 1989, no pet.).

In a prosecution for reckless conduct with a deadly weapon, improper jury argument caused reversal of conviction based on evidence that the defendant aimed a shotgun at the victim (his girlfriend) while the victim stood in the drive-in window of the restaurant where she worked.

Zavala v. State, No. 03-05-00051-CR, [2007 Tex. App. Lexis 361](#) (Tex. App.—Austin, Jan. 22, 2007, no pet.).

In a prosecution for felony family violence assault, although the jury did not make a finding of family violence, the court did not err in sentencing the defendant for a felony because a finding of family violence is only one method of proving up the offense was a felony. Because the state proved up the enhancement with proof of a prior assault, it did not have to prove that the assault being tried involved family violence.

Zuiliani v. State, [97 S.W.3d 589, 595](#) (Tex. Crim. App. 2003).

To be admissible as an excited utterance hearsay exception, the critical determination is whether the declarant was still dominated by emotions, excitement, fear, or the pain of the event or condition at the time of the statement.

19.4 [Federal cases summarized.](#)

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [XYZ](#)

[A](#)

Apprendi v. New Jersey, [530 U.S. 466](#) (2000).

The defendant shot into the home of an African-American family, whom he did not want in the neighborhood. The New Jersey statute, which allowed enhanced punishment if the judge found by a preponderance of the evidence that the crime was racially motivated, violated due process. The United States Supreme Court ruled that it is unconstitutional for a legislature to remove from the jury the assessment of facts [other than the fact of a prior conviction] that increase the prescribed range of penalties to which a criminal defendant is exposed. Such facts must be established by proof beyond a reasonable doubt. Under the Sixth and Fourteenth Amendments, to enhance punishment, the issue of motivation had to be proven beyond a reasonable doubt to the jury.

[B](#)

Beecham v. U.S., [511 U.S. 368](#) (1994).

A state's restoration of convicted felon's civil rights does not remove the disability of firearm possession imposed by federal law as a result of a federal conviction. For purposes of [18 U.S.C. 921\(a\)\(20\)](#), the convicting jurisdiction (federal in this case) must restore the felon's civil liberties before the ban on firearms possession will be lifted.

Buster v. United States, [447 F.3d 1130](#) (8th Cir. 2006).

Discussing definition of "as a spouse" for purposes of Gun Control Act violation.

[C](#)

Crawford v. Washington, [541 U.S. 36](#) (2004).

Where wife claimed spousal privilege and would not testify against husband to corroborate her prior statement to police that the person whom the husband had stabbed was unarmed, the introduction of the wife's statement at trial violated the husband's right to confront the

witness against him because the wife’s statement was “testimonial” in nature.

D

Davis v. Washington, [547 U.S. 813](#) (2006).

Admission of wife’s statement to 911 operator that husband was beating her did not violate Sixth Amendment right to confrontation because statement was not testimonial—it was made to summon help during or near time of crime, not to aid in investigation or prosecution of crime.

E

F

Fraternal Order of Police v. U.S., [173 F.3d 898](#) (D.C. Cir. 1999).

In a constitutional challenge to [18 U.S.C. § 922\(g\)\(9\)](#), the ban on possession of even government-issued firearms by a domestic violence misdemeanor was not unconstitutional violation of equal protection clause, Second Amendment, or Tenth Amendment.

G

Giles v. California, 554 U.S. 353 , [128 S.Ct. 2678](#) (2008).

The defendant killed his former girlfriend, claiming self-defense, but objected to the admission of the victim’s statements to police three weeks before the murder about a prior episode of abuse at the hands of the defendant. A majority of the Supreme Court concluded that the defendant did not forfeit his right of confrontation simply by murdering the victim, and that the prosecution was required to show that the wrongful act was done with the purpose or design of rendering the witness unavailable. The Supreme Court ruled that to constitute an act of forfeiture by wrongdoing, the wrongful act that caused the witness to be unavailable (in this case, the murder) had to occur simultaneously with an intent (a purpose or design) to prevent the witness from testifying. Thus, when invoking the forfeiture by wrongdoing doctrine, the state must prove not only the wrongful act but also the specific contemporaneous intent to prevent the witness from testifying.

Gillespie v. City of Indianapolis, [13 F. Supp. 2d 811](#) (S.D. Ind. 1998), aff’d, [185 F.3d 693](#) (7th Cir. 1999).

Police officer convicted of misdemeanor offense of domestic violence unsuccessfully challenged the constitutionality of the Lautenberg Amendment [[18 U.S.C. 922\(g\)\(1\)](#)] that rendered it illegal for him to carry a gun.

Gonzalez v. City of Peoria, [722 F.2d 468](#) (9th Cir. 1983).

Under federal law, police have no duty to inquire into immigration status of a victim, witness, or arrestee.

Gonzalez-Garcia v. Gonzales, [166 Fed. Appx. 740, 744](#) (5th Cir. 2006).

In a removal case, a conviction under [Tex. Pen. Code § 22.01\(a\)\(3\)](#) (assault by contact a.k.a. offensive touch) was not a removal offense because the crime was not necessarily based on a use of “force” in the required sense of “destructive or violent force.” In *United States v. Rodriguez-Guzman*, [56 F.3d 18, 20 n. 8](#) (5th Cir. 1995 Tex.), the Fifth Circuit found that “force,” as used in the statutory definition of a crime of violence is “synonymous with destructive or violent force.” In *United States v. Sanchez-Torres*, [136 Fed. Appx. 644](#) (5th Cir. 2005 Tex.), the Fifth Circuit ruled that “while a ‘harmful’ touching likely involves as an element the use, attempted use, or threatened use of destructive or violent force against the person of another necessary to qualify for a crime of violence sentence enhancement . . . an offensive touching may not involve such an element.” Because “offensive or provocative contact” does not necessarily involve the use of physical force, subsection (a)(3) of the Texas assault statute does not constitute a crime of violence and the defendant was not removable for that offense.

H

Hammon v. Indiana, [547 U.S. 813](#) (2006) (decided and announced with sister case *Davis v. Washington*).

Admission of the wife’s affidavit stating husband assaulted her, given to police at scene but after assault ended, violated Sixth Amendment right to confront witness because statement was testimonial as it was made in response to police questioning.

Hernandez v. Ashcroft, [345 F.3d 824, 839](#) (9th Cir. 2003).

With regard to immigrant victims of domestic violence, the Ninth Circuit held that “Congress clearly intended extreme cruelty to indicate nonphysical aspects of domestic violence. Defining extreme cruelty in the context of domestic violence to include acts that ‘may not initially

appear violent but that are part of an overall pattern of violence' is a reasonable construction of the statutory text"

I J K L M N O

P

Padilla v. Kentucky, ___ U.S. ___, [130 S. Ct. 1473](#) (2010)

The U.S. Supreme Court ruled that criminal defense attorneys do have an obligation to inform their clients if a guilty plea carries a risk of deportation. The Court held that under longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less. The lower court's ruling was therefore reversed, and the case remanded.

R

R.A.V. v. City of St. Paul, [505 U.S. 377](#) (1992).

The defendants, who burned a cross on the lawn of an African-American family, were charged with violation of a city ordinance that prohibited displays on public or private property of any symbol or object (such as a burning cross) that one knows arouses anger, alarm, or resentment in others based on race, color, creed, religion, or gender. The Supreme Court held the ordinance was invalid because it prohibited speech solely based on its content or method.

S

Small v. U.S., [544 U.S. 385](#) (2005).

Phrase "convicted in any court" in Gun Control [Act 18 U.S.C. § 922\(g\)\(1\)](#) encompasses only domestic, not foreign, convictions.

T

Thurston v. Torrington, [595 F.Supp. 1521](#) (D. Conn. 1984).

The City of Torrington police department violated the domestic violence's victim's Fourteenth Amendment right to equal protection by treating domestic violence assaults less seriously than assaults by strangers. The plaintiff had been repeatedly stabbed and beaten by her husband but the responding police officers took no action until after the

husband threatened his immobile, wounded wife and threw their child on top of her.

Town of Castle Rock v. Gonzales, [545 U.S. 748](#) (2005).

There is no constitutionally protected property right to have police enforce a state law restraining order when probable cause exists to believe the order has been violated.

U

U.S. v. Al-Zubaidy, [283 F.3d 804, 811](#) (6th Cir. 2002).

VAWA's prohibition on interstate stalking is constitutional.

U.S. v. Banks, [339 F.3d 267](#) (5th Cir. 2003).

In a prosecution in Texas for possessing a firearm while restrained by a protective order in violation of [18 U.S.C. § 922\(g\)\(8\)](#), the fact that the protective order was entered based on an agreement of the parties rather than after a hearing did not prevent a prosecution for [18 U.S.C. § 922\(g\)\(8\)](#) violation. The defendant had actual notice of and a chance to participate in the hearing which satisfied the requirements of [18 U.S.C. § 922\(g\)\(8\)](#) with regard to the hearing.

U.S. v. Beavers, [206 F.3d 706, 709](#) (6th Cir. 2000), *cert. denied*, [529 U.S. 1121](#) (2000).

The Lautenberg Amendment ([18 U.S.C. 922](#)) does not unconstitutionally violate the Fifth Amendment right to due process.

U.S. v. Bell, [303 F.3d 1187](#) (9th Cir. 2002).

Male victims of interstate stalking are protected by [18 U.S.C. § 2261A](#).

U.S. v. Belless, [338 F.3d 1063](#) (9th Cir. 2003).

The Wyoming battery statute's failure to include a domestic relationship as an element of the crime did not mean it could not serve as a predicate offense for a conviction under § 922(g)(9). However, as the battery statute encompassed less violent behavior than the "use or attempted use of physical force" as set forth in [18 U.S.C. § 921\(a\)\(33\)\(A\)\(ii\)](#), it was too broad to qualify as a "misdemeanor crime of domestic violence." "Physical force" under [18 U.S.C. § 921\(a\)\(33\)\(A\)\(ii\)](#) was the violent use of force against the body of another individual, but mere touching could constitute a violation of the battery statute.

U.S. v. Bledsoe, [728 F.3d 1094](#) (8th Cir. 1984).

The defendant who killed a man in a city park in Missouri because the victim was black and perceived to be homosexual was sentenced to life imprisonment under [18 U.S.C. § 245](#) for interfering with the victim's right to enjoy and use the state park. The Court of Appeals rejected the defendant's arguments that Congress cannot, through the Fourteenth Amendment, regulate private, as opposed to state, actions.

U.S. v. Bostic, [168 F.3d 718, 722-23](#) (4th Cir. 1999).

In a case brought in Washington State, the court found that Lautenberg Amendment ([18 U.S.C. 922](#)) does not unconstitutionally violate the Fifth Amendment right to due process.

U.S. v. Calor, [340 F.3d 428](#) (6th Cir. 2003).

In a prosecution in Kentucky for illegal possession of a firearm, while restrained by an extensive of a temporary protective order, in violation of [18 U.S.C. § 922\(g\)\(8\)](#), the defendant had waived his right to participate in the hearing by requesting and receiving a continuance of the hearing date.

U.S. v. Dixon, [265 Fed. Appx. 383](#) (5th Cir. 2008).

Under federal sentencing guidelines, enhancement based on prior conviction for "generic" violation of [Tex. Penal Code § 22.05](#) was improper because the conviction was not shown to be for a crime of domestic violence.

U.S. v. Dowd, [417 F.3d 1080](#) (9th Cir. 2005).

In a Washington State case, for the purposes of [18 U.S.C. § 2262\(a\)\(2\)](#), the court held that whether the victim was subject to coercion or duress or had a reasonable opportunity to escape must be evaluated from the perspective of a reasonable person in the victim's position, considering all the circumstances, including the victim's gender.

U.S. v. Emerson, [270 F.3d 203](#) (5th Cir. 2001).

In divorce proceedings, a Texas judge issued a temporary order which enjoined the husband from, among other things, threatening his wife or causing bodily injury to her or their child. It did not include an express finding that the husband posed a future danger to anyone. Later the husband was indicted for unlawfully possessing a firearm while subject to the order, in violation of [18 U.S.C. § 922\(g\)\(8\)](#). The court held that

under Texas law such an order could not have been properly issued unless the issuing court concluded, based on adequate evidence at a hearing, that the party restrained would have otherwise posed a realistic threat of imminent physical injury to the protected party. In such a case, the court concluded that the nexus between firearm possession by the husband and the threat of lawless violence was sufficient, though likely barely so, to support the deprivation while the order remained in effect of the husband's Second Amendment rights. Neither could the husband collaterally attack the predicate order in the § 922(g)(8) prosecution where the order was not so transparently invalid as to have only a frivolous pretense to validity.

U.S.v. Fuller, [584 F.3d 132](#) (3d Cir. 2009).

For a prosecution in New Jersey, the court held that the interstate stalking provisions of [18 U.S.C. § 2261A](#) applied to an activist who was convicted of stalking individuals associated with animal testing.

U.S. v. Griffith, [455 F.3d 1339](#) (11th Cir. 2006) (*cert. denied*), [2007 U.S. Lexis 4020](#) (Apr. 16, 2007).

In a Florida case, the court held that under the plain meaning rule, the "physical contact of an insulting or provoking nature" made illegal by the Georgia battery statute satisfied the "physical force" requirement of [18 U.S.C. § 921\(a\)\(33\)\(A\)\(ii\)](#), which was defined into [18 U.S.C. § 922\(g\)\(9\)](#).

U.S. v. Hancock, [231 F.3d 557](#) (9th Cir. 2000).

In a California prosecution for violation of [18 U.S.C. § 922\(g\)](#), the government did not have to prove that the defendant had actual knowledge that he was prohibited from possessing firearms.

U.S. v. Hayes, ___ U.S. ___, [129 S.Ct. 1079](#) (2009).

In a prosecution for illegal possession of a firearm, proof that the defendant had a child in common with and lived with the victim at the time of the predicate crime (battery) was sufficient to establish the domestic relationship between the defendant and the victim for purposes of showing that the defendant was disqualified from possessing a firearm under federal law due to conviction for a domestic violence offense.

U.S. v. Heckenliable, [446 F.3d 1048](#) (10th Cir. 2006).

For purposes of a prosecution in Utah under [18 U.S.C. § 922\(g\)\(9\)](#), domestic violence does not have to be an element of the offense.

U.S. v. Hernandez-Rodriguez, [467 F.3d 492](#) (5th Cir. 2006).

Enhancement was proper under federal sentencing guidelines because the defendant's prior conviction for deadly conduct ([Tex. Penal Code § 22.05\(b\)\(1\)](#)) was a crime of violence as the conscious choice to discharge a firearm in the direction of another person constituted a real threat against the person.

U.S. v. Lippman, [369 F.3d 1039](#) (8th Cir. N.D. 2004).

In a case brought in North Dakota, the court found that the Lautenberg amendment to federal firearms law is constitutional.

U.S. v. Miles, [2006 U.S. Dist. Lexis 27123](#) (5th Cir. 2006).

In a Louisiana case, the court held that to be prosecuted under § 922(g)(8)(A), a respondent need only have notice of the protective order hearing and an opportunity to be heard at the hearing. There is no requirement that he have notice of the issuance of the final protective order.

U.S. v. Mitchell, [209 F.3d 319](#) (4th Cir. Va. 2000).

In a Virginia prosecution for violation of [18 U.S.C. § 922\(g\)\(9\)](#), the government did not have to prove that the defendant knew that possessing a firearm was illegal after he was convicted for a misdemeanor crime of domestic violence.

U.S. v. Morrison, [529 U.S. 598](#) (2000).

Federal civil remedy in [42 U.S.C.A. § 13981](#) for the victims of gender-motivated violence unconstitutional because the remedy is outside Congressional authority.

U.S. v. Nason, [269 F.3d 10](#) (1st Cir. 2001).

All convictions under the Maine statute necessarily involved, as a formal element, the use of physical force. Accordingly, any conviction predicated thereon that involved persons in the requisite relationship status qualified as a predicate offense (a misdemeanor crime of domestic violence) sufficient to trigger the proscriptions of [18 U.S.C. § 922\(g\)\(9\)](#). Also, the court rejected the defendant's contention that [18 U.S.C. § 922\(g\)\(9\)](#) was unconstitutionally vague.

U.S. v. Nedd, [262 F.3d 85](#) (1st Cir. 2001).

In a Massachusetts case, the court held that interstate violation of protective order criminal provisions of [18 U.S.C. § 2262](#) apply to a man who violated an order protecting both a man and a woman.

U.S. v. Page, [167 F.3d 325](#) (6th Cir. 1999) (concurrency).

In an Ohio case, the concurring opinion noted that VAWA’s criminal provisions are gender-neutral.

U.S. v. Quilling, [261 F.3d 707, 712](#) (7th Cir. 2001).

In an Illinois case, the court upheld a conviction for constructive, not actual, possession of a firearm in violation of protective order. “Constructive possession” defined as when a person knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly, or through others.

U.S. v. Robinson, [370 F. Supp. 2d 331, 336](#) (D. Me. 2005).

In a prosecution under [18 U.S.C. § 2262](#), fact that the victim “consented” to spouse’s violation of protective order did not make the crime “victimless” for purposes of federal sentencing guidelines because the court held the victim did not have power to consent to violate the order.

U.S. v. Skuban, [175 F. Supp. 1253, 1254-55](#) (D. Nev. 2001).

In a prosecution for violation of [18 U.S.C. 922\(g\)\(9\)](#) (possession of firearm by a person convicted of misdemeanor crime of domestic violence), the court reversed the defendant’s conviction because the predicate crime was not proved to be a domestic violence assault of his mother. The predicate crime did not qualify as crime of domestic violence because an assault by an adult child on his parent was not one of domestic violence.

U.S. v. Smith, [171 F.3d 617](#) (8th Cir. 1999).

The Iowa simple misdemeanor assault conviction, to which appellant pled guilty after signing a waiver of right to counsel, had an element of physical force within the meaning of [18 U.S.C. § 921\(a\)\(33\)\(A\)\(ii\)](#) so the predicate conviction was domestic violence within the meaning of the federal Gun Control Act.

U.S. v. Spruill, [292 F.3d 207](#) (5th Cir. 2002).

In a Texas prosecution for illegal possession of a firearm under [18 U.S.C. § 922\(g\)\(8\)](#), the predicate agreed protective order, which issued

without prior actual notice of the hearing to the defendant, failed to satisfy federal criminal statute’s “after a hearing” requirement.

U.S. v. White, [258 F.3d 374](#) (5th Cir. 2001).

In a prosecution in Texas for violation of the Gun Control Act (possession of a firearm by a person convicted of a misdemeanor crime of domestic violence under [18 U.S.C. § 922\(g\)\(9\)](#)), neither of the predicate convictions alleged (for reckless conduct ([Tex. Penal Code § 22.05](#)) and for terroristic threat ([Tex. Penal Code § 22.07](#)) was a crime of domestic violence as required by [18 U.S.C. § 921\(a\)\(33\)\(A\)](#) because neither crime had the use or attempted use of physical force or threatened use of a deadly weapon as an element.

U.S. v. Wills, [346 F.3d 476](#) (4th Cir. 2003).

In a Virginia prosecution for interstate kidnapping and interstate stalking, the indictment tracked the language of the statute so it was facially valid with regard to alleging the fear element of the stalking offense.

U.S. v. Young, [458 F.3d 998](#) (9th Cir. 2006) *cert. denied*, 2007 Lexis 2428 (Feb. 20, 2007).

In a Washington State case, the court held that for purposes of [18 U.S.C. § 922\(g\)\(8\)\(A\)](#), the terms “hearing,” “actual notice,” and “opportunity to be heard” should be given their ordinary meaning and do not require a full due process hearing.

W

Wisconsin v. Mitchell, [508 U.S. 476](#) (1993).

Biased speech that is manifested in criminal conduct can be penalized under hate crime statutes without violating the First Amendment. Wisconsin hate crime statute that allowed enhanced punishment for criminal conduct if the victim was chosen based on race was not invalid under the First Amendment. In this case, the defendant incited a group of black youths to attack a white youth based on the latter’s race. The Supreme Court upheld the statute that enhanced the defendant’s punishment based on the jury’s finding that the offense was motivated by the victim’s race.

X,Y,Z

19.5 Texas statutes relating to family violence.

[CONSTITUTION](#)
[BUSINESS & COMMERCE](#)
[CIVIL PRACTICES & REMEDIES](#)
[CODE OF CRIMINAL PROCEDURE](#)
[EDUCATION](#)
[ELECTION](#)
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[INSURANCE](#)
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[PROPERTY](#)
[TAX](#)
[TEXAS RULES OF CIVIL PROCEDURE](#)
[TEXAS RULES OF EVIDENCE](#)
[TRANSPORTATION](#)

Listed by code (alphabetical), section (numeric), and descriptor

TEXAS CONSTITUTION

Article 1, § 11c after being served with the order, respondent may be arrested for violation of temporary protective order

BUSINESS & COMMERCE

35.151 protection of customer telephone records
35.153 unauthorized or fraudulent procurement, sale, or receipt of telephone records
48.01 et seq. consumer protection against spyware act

CIVIL PRACTICE & REMEDIES CODE

21 ch. interpreters for deaf and Spanish-speakers (in counties bordering Mexico or Gulf of Mexico)
71.001 civil remedy for death of unborn child
85 ch.. civil liability for stalking, harassment, battery, emotional distress

CRIMINAL PROCEDURE.

- 2.211 clerk's duty to report hate crime findings
- 2.30 free police report for the victims of threats (assault or terroristic)

- 5.01 legislative statement on family violence
- 5.03 no exception to official duties for family/household relationship
- 5.04 peace officer's duties
- 5.045 standby assistance on family violence calls
- 5.05 duty to report violation of protective order
- 5.05(f) free police report to family violence the victims
- 5.06 duties of prosecutors and courts
- 5.07 venue for protective order violations
- 5.08 mediation in family violence criminal prosecution not permitted

- 6.01 magistrate's duty to inform law enforcement of threat to harm
- 6.02 magistrate's duty to issue arrest warrant for threat to life of another
- 6.03 magistrate's duty to address threat to injure another or property
- 6.05 peace officer's duty to address threat
- 6.06 peace officer's duty to prevent injury
- 6.08 protective order against offense caused by bias or prejudice

- 7.15 magistrate's order of protection for person or property

- 7A protective orders for the victims of sexual assault

- 14.01-14.05 basis for warrantless arrest
- 14.03(c) peace officer's duty to maintain the peace at scene of alleged family violence

- 15.051 polygraph exam of complainant prohibited

- 17.091 notice to prosecutor of certain bail reductions required
- 17.152 denial of bail for violation of certain court orders or conditions of bond in family violence cases
- 17.152 denial of bail for violation of certain bond conditions relating to safety
- 17.27 commitment of arrested person if security not given
- 17.29 attempted notification of the victim prior to the defendant's release on bond
- 17.291 extended hold for family violence arrests
- 17.292 magistrates order of emergency protection
- 17.293 delivery of magistrate's order to other persons
- 17.40 bond conditions related to the victim or community safety
- 17.46 bond conditions related to stalking offenses
- 17.49 bond conditions for family violence offenses

18.09	seizure of property identified in search warrant
18.19(a)	required seizure of weapon used in or connection with an offense
26.13(a)(6)	pre-plea warning on prohibition on possession of firearm for perpetrators of family violence
29.14	continuances require reason stated on the record and impact on the victim must be considered
36.03	court instruction to witness (“invoking the rule”)
36.10	order of trial
38.10	spousal adverse testimony privilege exception
38.22	use of accused’s written statements in court
38.30	interpreter for criminal the defendant
38.31	interpreter for deaf criminal the defendant
38.36(b)	homicide defense of justification-admissibility of the decendant’s history of family violence
42.013	finding of family violence required in Penal Code Title 5 judgments
42.0131	prohibition on possession of firearms: required notice to persons convicted of misdemeanor family violence
42.014	finding that offense caused by bias or prejudice
42.0191	finding regarding human trafficking or other abuse
42.12(11)	basic conditions of community supervision
42.12(11)(h)	family violence shelter fee: required assessment on offender
42.12(14)	battering intervention program for child abusers and family violence offenders
42.141	battering intervention and prevention program completion deadlines
42.21	notice to the victims of release of family violence offenders
42.23	convicting court must notify SAPCR court of family violence conviction
46.06	prohibition on transfer to possession of firearm by family violence perpetrator
56.02	crime the victim’s rights regarding bail: required consideration of the victim safety
56.03	the victim impact statement
56.045	forensic medical exams—right to presence of advocate or representative
56.07	notice of the victims’ rights
56.11	notice to the victim required of escape or release of the defendant
56.12	notification of escape or transfer
56.15	computerized database; the defendant release information
56.31	crime the victims’ compensation
56.32	limits on crime the victim compensation

- 56.54 crime the victim compensation funds
- 56.541 excess funds for other crime the victims' assistance
- 56.81 confidentiality of the victim information (family violence, sexual assault, stalking)

- 57.01 et seq confidentiality of identifying information of family violence the victims

- 223 general duties law enforcement

EDUCATION

- 37.0831 dating violence policy required for school districts

ELECTION

- 13.002 confidentiality of address for voter's registration

- 18.005 confidentiality of identifying information for voter
- 18.0051 confidentiality of voter's information when voting early

- 82.007 voter address confidentiality program)

- 84.0021 application for voter address confidentiality program

FAMILY

Title 1 Marriage

- 1.104 capacity of spouse

- 2.501 duty to support spouse

- 3.001 separate property of spouse
- 3.002 community property of spouses
- 3.003 presumption of community property

- 6.404 information regarding protective orders in divorce
- 6.501 divorce temporary restraining order
- 6.501(b) divorce temporary restraining order-no exclusion from residence
- 6.502 divorce temporary injunction to protect a party
- 6.504 divorce protective order under Title 4
- 6.602(d) divorce mediation-objection based on history of family violence

- 8.051 spousal alimony or maintenance-eligibility

Title 2 Child in relation to the family

42 et seq. interference with possessory interest in child

Title 3 Juvenile justice code

56.01 et seq. family violence the victims—address confidentiality program

57.01 et seq. family violence the victims—confidentiality of identifying information

Title 4 Family violence protective orders

Definitions

71.002 court defined
71.0021 dating violence defined
71.003 family defined
71.004 family violence defined
71.005 household defined
71.006 member of household defined
71.007 prosecuting attorney defined

Protective order general provisions

81.001 family violence finding required to issue protective order
81.002 fees: assessment against applicant prohibited
81.003 fees: assessment against perpetrator of family violence permitted
81.004 non-payment of fees punishable by contempt
81.005 attorney's fees
81.006 payment of attorney's fees
81.007 prosecuting attorney's responsibilities
81.0075 prosecuting attorney's duties in subsequent actions
81.008 relief cumulative
81.009(a) appeal of protective order

Protective order applications

82.001 initiation
82.002 standing to apply
82.003 venue
82.004 contents
82.005 in conjunction with divorce or SAPCR
82.006 after dissolution of marriage
82.0007 child subject to continuing jurisdiction
82.008 after expiration of prior protective order
82.009 before expiration of prior protective order
82.010 confidentiality of application

- 82.021 answer not required
- 82.022 respondent's application
- 82.041 notice of application
- 82.042 issuance of notice of application
- 82.043 service of notice of application

Temporary *ex parte* protective order

- 83.001 required finding to issue; scope of order; *ex parte* nature
- 83.002 duration; extension
- 83.003 bond not required
- 83.004 motion to vacate
- 83.005 conflicting orders
- 83.006 exclusion from party's residence
- 83.007 hearing recess to contact respondent

Protective order hearings

- 84.001 hearing setting: deadline
- 84.002 hearing setting: deadline in district courts in some counties
- 84.003 resetting hearing for lack of service
- 84.004 resetting hearing for insufficient notice
- 84.005 legislative continuance

Protective orders

- 85.001 required findings and orders
- 85.002 violation of expired protective order exception
- 85.003 mutual orders prohibited
- 85.004 title of divorce protective order
- 85.005 agreed protective order
- 85.006 default order
- 85.007 confidentiality of information
- 85.021 civilly enforceable orders pertaining to either party: child support, custody or visitation; possession or use of personal or real property
- 85.022 criminally enforceable orders applying only to a perpetrator of family violence
- 85.023 effect on right to real property
- 85.024 enforcement of counseling requirement
- 85.025 duration
- 85.026(a) required written warning
- 85.041 delivery to respondent
- 85.042 delivery to other persons
- 85.061 delay or dismissal based on divorce/SAPCR prohibited
- 85.062 application during pendency of divorce/SAPCR
- 85.063 application after disposition of divorce/SAPCR

- 85.064 transfer of protective order
- 85.065 effect of transfer

Duties of law enforcement

- 86.001 adoption of procedures by law enforcement for protective orders
- 86.0011 statewide information system (protective order registry)
- 86.002 provision of information to firearms dealers
- 86.003 temporary order: exclusion of respondent from residence
- 86.004 permanent order: exclusion of respondent from residence
- 86.005 dissemination of information on out-of-state protective orders

Modification of protective orders

- 87.001 modification
- 87.002 modification to extend order duration prohibited
- 87.003 notice of motion
- 87.004 change of address or telephone number in order

Full faith and credit: enforcement of foreign protective orders (Uniform Interstate Protective Order Enforcement Act)

- 88.001 short title
- 88.002 definitions
- 88.003 judicial enforcement of foreign protective order
- 88.004 non-judicial (law enforcement) enforcement of foreign order
- 88.005 registration of foreign order with law enforcement
- 88.006 official capacity immunity for acts to enforce order
- 88.007 other remedies available
- 88.008 uniformity

Reporting family violence

- 91.001 definitions
- 91.002 reporting of family violence by witness encouraged
- 91.003 medical professional's duty to aid the victims with information
- 91.004 duty to report child abuse not affected

Immunity for reporting family violence

- 92.001 immunity

Title 5 SAPCR

- 101.003 definitions: adult, child

- 105.0011 information regarding protective orders and temporary orders
- 109.002 appeal of SAPCR orders
- 151.001 parental rights and duties: abuse exception for reasonable discipline

Uniform Child Custody Jurisdiction and Enforcement Act

- 152.102 definitions
- 152.103 inapplicable to adoption proceedings or authorization of emergency medical care
- 152.105 international application
- 152.106 effect of child custody determination
- 152.107 priority in child custody determinations
- 152.110 communication between courts
- 152.111 taking testimony in another state
- 152.112 cooperation between courts; preservation of records

- 152.201 initial child custody jurisdiction
- 152.202 exclusive continuing jurisdiction
- 152.203 jurisdiction to modify determination
- 152.204 temporary emergency jurisdiction (to protect a child or its parent or sibling)
- 152.207 inconvenient forum
- 152.208 unjustifiable conduct (jurisdiction declined by reason of conduct)

- 152.301 enforcement definitions
- 152.302 enforcement under Hague Convention
- 152.303 duty to enforce
- 152.304 temporary visitation
- 152.305 registration of child custody determination
- 152.306 enforcement of registered determination
- 152.307 simultaneous proceedings
- 152.308 expedited enforcement
- 152.309 service of order and petition
- 152.310 hearing and order
- 152.311 warrant to take physical custody of child
- 152.312 costs, fees, and expenses
- 152.313 recognition and enforcement
- 152.314 appeals
- 152.315 role of prosecutor or public official
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Child custody: conservatorship, possession and access

- 153.001 public policy for child custody

- 153.004 managing conservatorship: rebuttable presumption against appointment of family violence offender
- 153.004(2) access to child: counseling required
- 153.0071(f) mediation: objection to
- 153.010 family violence counseling order
- 153.015(e) access to child by electronic communication

- 153.131 managing conservatorship: appointment of parent presumed

- 153.191 possessory conservatorship: appointment of parent presumed
- 153.193 access to child: restrictions only to protect the best interest of the child
- 153.251 possessory conservatorship: policy and general guidelines

- 153.501 prevention of international parental child abduction
- .503

Child support orders

- 154.001 parental duty to support child
- 154.011 child support not conditioned on possession or access

- 156.104 modification of order
- 156.1045 modification of order: automatic after conviction or probation imposed for party's criminal sexual offenses

Uniform Interstate Family Support Act

- 159.312 domestic violence the victim's right to keep information confidential in child support proceeding
- 159.316 right to participate in child support proceeding without being physically present at the hearing

Child support Title IV-D

- 231.108(e) prohibition on release of information in child support cases
- 231.301 state parent locator service authorized

- 233.015 issuance of child support review order

Child protection

- 261.001 abuse defined

- 262.102 emergency order authorizing possession of child
- 262.104 taking possession of a child if danger
- 262.201 full adversary hearing

GOVERNMENT

- 22.011 judicial education related to family violence, sexual assault, and child abuse
- 22.110 judicial education related to family violence, sexual assault and child abuse and neglect

- 41.110 training on family violence for prosecutors

- 51.961 family protection fee

- 57.002 limited English proficiency

- 411.042 protective order registry with DPS
- 411.046 hate crimes statistical information

- 552.132 confidentiality of crime the victim or claimant information
- 552.1325 confidentiality of certain the victim impact statement information
- 552.138 confidentiality of family violence shelter and sexual assault program information: public information exception

- 573.022 consanguinity: determining and computing
- 573.024 affinity: determining and computing

HEALTH & SAFETY

- 44.051 advocates for survivors of sexual abuse

- 571.017 limited English proficiency

- 672.001 fatality review and investigations
- 672.002(d)(9) fatality review team: counseling representative

HUMAN. RESOURCES

- 31.065 welfare benefits eligibility: 3 year limit
- 31.0128 coordinated interagency plan
- 31.0322 Family Violence Option—waiver of welfare eligibility restrictions

- 51.275 confidentiality of information provided to HHSC

- 54.002 DPRS' standing to apply for protective order

- 61.047 violence prevention and conflict resolution education for juvenile probation officers

- 121 (ch.) Persons with disabilities-use of assistance animals
- 141.0431 violence prevention and conflict resolution training including domestic violence issues for juvenile probation officers

INSURANCE

- 544.153(c) discrimination in insurance policy against domestic violence victims prohibited

LABOR

- 204.022(11) exclusion of charge-backs for family violence the victims
- 207.046 unemployment compensation for family violence the victims

OCCUPATIONS

- 1701.253 school: law enforcement training on family violence

PENAL

- 1.07(a)(8) bodily injury defined
- 1.07(a)(17) deadly weapon defined
- 1.07(a)(26) individual defined (includes unborn child)
- 1.07(a)(46) serious bodily injury defined
- 12.21-12.23 misdemeanor punishment ranges
- 12.32-12.35 felony punishment ranges
- 12.42 punishment range for repeat/habitual offenders
- 12.47 enhancement of punishment for crimes motivated by bias or prejudice

Title 5--Offenses against the person

- 19.01 et seq. homicide
- 20.01 et seq. unlawful restraint
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- [20A.02](#) trafficking of persons
- 21.02 continuous sexual abuse of a young child
- 22.01 assault (includes dating violence)
- 22.02 aggravated assault
- 22.011 sexual assault

- 22.021 aggravated sexual assault
- 22.04 injury to a child, elderly or disabled person
- 22.041 abandoning or endangering a child
- 22.05 deadly conduct
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Title 6--Offenses against the family

- 25.03 interference with child custody
- 25.031 agreement to abduct child from custody
- 25.07 violation of certain court orders (protective orders) or conditions of bond
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Title 7--Offenses against property

- 28.02 arson
- 28.03 criminal mischief
- 28.08 graffiti

- 30.05(b)(3) criminal trespass (includes shelter)

- 33.07 online harassment

Title 8—Offenses against the public administration

- 36.06 obstruction or retaliation

- 38.112 violation of protective order for sexual assault the victim

Title 9—Offenses against public order and decency

- 42.062 interference with emergency telephone use by the victim
- 42.07 harassment
- 42.072 stalking

- 43.25 sexual performance by a child

- 46.04 unlawful possession of a firearm
- 46.06(5) unlawful transfer of certain weapons

PROBATE

- 115 spousal right to control deceased's remains—limitation on

- 665A limited English proficiency

PROPERTY

- 92.015 tenant's right to police or emergency assistance
- 92.016 right to vacate and avoid liability following family violence or sexual assault that occurred on the leased premises

TAX

- 25.025 confidentiality of certain home address information
- 25.026 confidentiality of violence shelter center and sexual assault program address information

TEXAS RULES OF CIVIL PROCEDURE

- 21 service of counter-claim
- 145 waiver of costs of interpretation for indigent party
- 183 costs of interpretation services taxed to a party
- 299 findings of fact required in protective orders
- 308 civil enforcement of judicial decrees
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- 680 issuance and service of notice of protective order

TEXAS RULES OF EVIDENCE

- 201-203 proof of foreign laws

- 404 character evidence

- 504 spousal privilege
- 505 clergy privilege
- 509 physician-patient privilege
- 510 mental health information privilege

- 601 witness competency
- 607 impeachment of witnesses
- 608 impeachment with evidence of character or conduct
- 609 impeachment with evidence of criminal conviction

- 701-705 expert witness testimony

- 801-804 hearsay

TRANSPORTATION

- 521.275 change of driver's license or personal identification number with family violence-related court order
- 547.615 recording device in motor vehicle

19.6 Federal statutes relating to domestic violence and hate crimes.

Acts by popular name

Battered Immigrant Women Protection Act of 2000 (VAWA 2000)

[Pub. L. 106-386](#), div. B, title V, Oct. 28, 2000, 114 Stat. 1518

Short title, see [8 U.S.C. A. § 1101 \(note\)](#)

Battered Women’s Testimony Act of 1992

[Pub. L. 102-527](#), Oct. 27, 1992, 106 Stat. 3459

[42 U.S.C.A § 10702 \(note\)](#)

Campus Hate Crimes Right to Know Act, [20 U.S.C. § 1092](#)(f)(1)(F)(ii)

Gun Control Act of 1968, 1994

[Pub. L. 90-618](#), Oct. 22, 1968, 82 Stat. 1213

Short title, see [18 U.S.C.A. § 921 \(note\)](#)

Hate Crimes Act, [18 U.S.C. § 245](#)

Hate Crimes Prevention Act (aka Matthew Shepard-James Byrd, Jr., Hate Crimes Prevention Act), [18 U.S.C. § 249](#)

Hate Crimes Sentencing Enhancement Act, [28 U.S.C. § 994](#)

[Pub. L. 103-322](#), title XXVIII, § 280003, Sept. 13, 1994,

[108 Stat. 2096](#); [Pub. L. 111-84](#), div. E, § 4703(a), Oct. 28, 2009,

[123 Stat. 2836](#).—Hate crimes

Hate Crimes Statistics Act, [28 U.S.C. § 534](#)

Immigration Marriage Fraud Amendments of 1986

[Pub. L. 99-639](#), Nov. 10, 1986, 100 Stat. 3537

Short title, see [8 U.S.C.A. § 1101 \(note\)](#)

International Marriage Broker Regulation Act (IMBRA) of 2005

Public Law 109-162

119 Stat. 2960, Title VIII, Subtitle D of HR 3402

[8 U.S.C. § 1375a](#)

Parental Kidnapping Prevention Act of 1980

Pub. L. 96-611, §§6-10, Dec. 28, 1980, 94 Stat. 3568-3573

Short title, see [42 U.S.C.A. § 1305 \(note\)](#)

Trafficking Victims Protection Act of 2000 (VAWA 2000)⁷⁵⁹

[Pub. L. 106-386](#), div. A, Oct. 28, 2000, 114 Stat. 1466 ([22 U.S.C. 7101](#) et seq.)
Short title, see [22 U.S.C.A. § 7101 \(note\)](#)

Violence Against Women Act of 1994 (VAWA 1994)

[Pub. L. 103-322](#), title IV, Sept. 13, 1994, 108 Stat. 1902
Short title, see [42 U.S.C.A. § 13701 \(note\)](#)

Subtitle A	Safe Streets for Women ⁷⁶⁰
Subtitle B	Safe Homes for Women ⁷⁶¹
Subtitle C	Civil Rights for Women ⁷⁶²
Subtitle D	Equal Justice for Women in Courts Act ⁷⁶³
Subtitle E	Violence Against Women Act Improvements ⁷⁶⁴
Subtitle F	National Stalker and Domestic Violence Reduction Act ⁷⁶⁵
Subtitle G	Protections for Battered Immigrant Women and Children ⁷⁶⁶

⁷⁵⁹ This statute creates criminal penalties and other measures designed to combat the trafficking of women and girls, including sex trafficking.

⁷⁶⁰ Subtitle A subjects perpetrators of certain federal sex crimes to increased prison sentences and mandatory restitution; provides grants to improve state and local law enforcement, prosecution, and the victim services in cases of violent crimes against women; requires states, in order to be eligible for such grants, to incur costs of forensic medical exams for rape the victims and to pay filing costs and service fees for domestic violence the victims; authorizes appropriations to improve safety in public parks and on public transportation; and allows federal funds to be used for rape prevention and education programs. Subtitle A also amends the Federal Rules of Evidence to restrict admissibility of evidence of a the victim's sexual behavior or sexual predisposition in both civil and criminal cases.

⁷⁶¹ Subtitle B provides federal funding for a national toll-free domestic violence hotline; creates federal criminal penalties for domestic violence committed across state lines and interstate violations of protection orders; requires states to give full faith and credit to protection orders issued in other states; furnishes increased federal funding for battered women's shelters; and establishes grant programs to encourage arrests in domestic violence cases, to provide young people with domestic violence education, and to improve coordination of local domestic violence services. Subtitle B also directs the federal government to undertake research and data collection efforts involving sexual and domestic violence.

⁷⁶² Subtitle C, which was held unconstitutional in *United States v. Morrison*, [528 U.S. 598](#) (2000), created a groundbreaking federal civil rights remedy for acts of gender-motivated violence.

⁷⁶³ Subtitle D authorizes grants to educate judges and other court personnel on rape and domestic violence and to study gender bias in the federal courts.

⁷⁶⁴ Subtitle E contains a variety of measures concerning penalties for federal sex offenses, testing for sexually transmitted diseases for the victims of sexual assault, federal studies on various aspects of sexual assault and domestic violence, and other topics.

⁷⁶⁵ Subtitle F focuses on improving federal, state, and local record-keeping and information sharing on domestic violence and stalking offenses.

⁷⁶⁶ Subtitle G is designed to enable battered immigrant women to obtain lawful immigration status without having to seek the assistance of an abusive partner.

One of the significant shortcomings of VAWA If's immigrant provision was its self-petition process for battered women seeking permanent residency status. The implementation of the self-petitioning process established under VAWA I created four significant problems for immigrant women seeking help: (1) the battered immigrant woman bore the burden of proving her abuser's status as a U.S. citizen or lawful

Violence Against Women Act of 2000 (VAWA 2000)⁷⁶⁷

[Pub. L. 106-386](#), div. B, Oct. 28, 2000, 114 Stat. 1491

Short title, see [42 U.S.C.A. § 13701 \(note\)](#)

Violence Against Women and Department of Justice Reauthorization Act of 2005

(VAWA 2005), Pub. L. 109-162, 119 Stat. 2960, [42 U.S.C. 13701](#)

The victims of Crime Act of 1984

Pub. L. 98-473, title II, ch. XIV (§1401 et seq.), Oct. 12, 1984, 98 Stat. 2170

([42 U.S.C. 10601](#) et seq.)

Short title, see [42 U.S.C.A. § 10601 \(note\)](#)

The victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000)

[Pub. L. 106-386](#), Oct. 28, 2000, 114 Stat. 1464

Short title, see [22 U.S.C.A. § 7101 \(note\)](#)

The victims' Rights and Restitution Act of 1990

[Pub. L. 101-647](#), title V, Nov. 29, 1990, 104 Stat. 4820

Short title, see [42 U.S.C.A. § 10601 \(note\)](#)

Violent Crime Control and Law Enforcement Act of 1994 (VAWA 1994) [Pub. L. 103-](#)

[322](#), Sept. 13, 1994, 108 Stat. 1796

Short title, see [42 U.S.C.A § 13701 \(note\)](#)

resident, something that was often difficult when the abuser controlled her actions and his own paperwork; (2) the good-faith marriage clause prevented the victims from divorcing their batterers and forced them to ascertain whether their spouses had lawfully terminated all previous unions; (3) the good moral character requirement had procedural problems because it was difficult for a woman to prove her good moral character and the Immigration and Nationalization Service (INS) favored supplementary material, such as paperwork, over oral testimony of the victim or her friends and family; and (4) the extreme hardship requirement was almost impossible to prove without the same, difficult to obtain paperwork. VAWA II removes the requirement that the battered immigrant be married to her abuser at the time of her self-petition and modifies the "good moral character" provision by *de facto* considering her to be of good moral character so long as she has "never been the primary perpetrator of violence in the relationship." The Attorney General also has the discretion to waive the good moral character requirement in certain circumstances, allowing even some battered women who have been arrested for, convicted of, or pled guilty to an abuse-related crime to be considered of "good moral character."

⁷⁶⁷ VAWA 2000 reauthorizes and expands federal funding for programs to combat violence against women; amends the provisions concerning the crimes of interstate stalking, interstate domestic violence, and interstate violation of a protection order; strengthens the requirements for granting full faith and credit to protection orders; and provides for additional federal studies of various aspects of violence against women. Included in the Violence Against Women Act of 2000 is the Battered Immigrant Women Protection Act, which restores and enhances the protections afforded to battered immigrant women by VAWA of 1994.

FEDERAL STATUTES BY CITATION NUMBER

[8 U.S.C.](#) [10 U.S.C.](#) [18 U.S.C.](#) [20 U.S.C.](#) [22 U.S.C.](#) [28 U.S.C.](#) [29 U.S.C.](#) [42 U.S.C.](#)
[47 U.S.C.](#) [CFR](#)

UNITED STATES CODE

8 U.S.C.

Marriage Brokers Act

[8 U.S.C. § 831-834](#) International Marriage Broker Regulation Act (regulates companies that link U.S. citizens with foreign nationals for purposes of marriage)

Violence Against Women Acts

[8 U.S.C. §1101](#) VAWA 2000 (Battered Immigrant Women Protection Act of 2000)⁷⁶⁸

[8 U.S.C. §1101](#)
(a)(51) VAWA 2005 (VAWA self-petitioner defined)⁷⁶⁹

[8 U.S.C. § 1101](#) VAWA 2000 (creation of U visa non-immigrant status (a)(15) for abused immigrants who are material witnesses)

[8 U.S.C. § 1105a](#) VAWA 2005 (right to work for certain immigrant the victims of domestic violence)

[8 U.S.C. § 1154](#) VAWA 1994 and 2000 (self-petitioning for battered spouses and children)

[8 U.S.C. § 1182](#) VAWA 2000 (battered immigrant waiver)
VAWA 2005 (immigrant the victims of severe forms of trafficking)

⁷⁶⁸ T visas are for the victims of trafficking; U-visas are for the victims of certain abuse from criminal activity.

⁷⁶⁹ A self-petitioner is an alien, or a child of an alien, who qualifies for relief under specified provisions of a variety of immigration-related legislation including: Immigration and Nationality Act, the Cuban Adjustment Act, the Haitian Refugee Immigration Fairness Act of 1998, the Nicaraguan Adjustment and Central American Relief Act, or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Under Title VIII, "exceptional circumstances" now include battery or extreme cruelty to the alien or her child. Each of these aforementioned acts regarding legislation is also amended to include provisions granting remedy to aliens or children of aliens who have suffered extreme cruelty or battery. 10 Geo. J. Gender & L. 369 at 388.

[8 U.S.C. § 1184\(d\)](#) VAWA 2005 (access to VAWA protection regardless of manner of entry)

[8 U.S.C. § 1184\(o\)](#) VAWA 2005 (duration of T visas)

[8 U.S.C. § 1184\(p\)](#) VAWA 2005 (duration of U visas)

Immigration and nationality ([8 U.S.C. ch. 12](#))

[8 U.S.C. § 1227](#) VAWA 2000 (waiver for the victims of domestic violence)

[8 U.S.C. § 1229b](#) VAWA 1994 and 2000 (improved access to cancellation of removal and suspension of deportation)

[8 U.S.C. § 1254](#) VAWA 1994 (suspension of deportation for battered immigrant spouses)

[8 U.S.C. § 1255](#) VAWA 2000 (removing barriers to adjustment of status to domestic violence the victims)

Miscellaneous

[8 U.S.C. § 1357](#) VAWA 2005 (protection of abused juveniles)

[8 U.S.C. § 1357\(g\)](#) [aka § 287(g)] deputization of local law enforcement to enforce immigration laws

[8 U.S.C. § 1375a](#) International Marriage Brokers Regulation Act of 2005 (regulating “fiancée” visas for foreign nationals)

[8 U.S.C. § 1430](#) VAWA 2000 (access to naturalization for divorced the victims of abuse)

10 U.S.C.

Military protective orders

[10 U.S.C. § 841](#) delivery of (military) offenders to civil authorities

[10 U.S.C. § 1561a](#) full faith and credit for civilian protective orders extended to military bases

18 U.S.C.

Hate crimes

[18 U.S.C. § 245](#) hate crime defined
[18 U.S.C. § 249](#) Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009

Gun Control Act

[18 U.S.C. § 16](#) “Crime of violence” defined for GCA and other federal statutory schemes

[18 U.S.C. § 921](#) et seq. Violent Crime Control and Law Enforcement Act of 1994 (Gun Control Act)

[18 U.S.C. § 921](#) (a) VAWA 1994 (definitions for GCA)

[18 U.S.C. § 922](#)(d) VAWA 1994 (amending GCA to prohibit possession of firearms by persons who have committed domestic abuse)

[18 U.S.C. § 922](#)(g) VAWA 1994 (amending GCA to prohibit persons who have committed domestic violence from receiving firearms)

[18 U.S.C. § 922](#)(d)(8) prohibition on transfer of a firearm to a person restrained by a protective order

[18 U.S.C. 922](#)(d)(9) transfer of a firearm to a person restrained by a protective order

[18 U.S.C. § 922](#)(g)(8) prohibition on possession of a firearm while restrained by a protective order

[18 U.S.C. § 922](#)(g)(9) ban on possession of firearm after conviction for domestic violence crime (Lautenberg Amendment 1996)

[18 U.S.C. § 922](#)(s) Brady statement

[18 U.S.C. § 924](#)
(a)(2) criminal sanction—up to 10 years imprisonment

[18 U.S.C. § 924](#)
(d)(1) VAWA 1994 (amending GCA regarding return of firearms after restraining order ends)

[18 U.S.C. § 925](#) law enforcement official duty exception to possession prohibition

[18 U.S.C. § 926](#)(a) VAWA 1994 (amending GCA regarding storage of firearms)

Parental kidnapping

[18 U.S.C. § 1073](#) Parental Kidnapping Prevention Act of 1980 provision (regarding flight to avoid prosecution specifically applies to parental kidnapping cases)

Human trafficking

[18 U.S.C. § 1584](#) VAWA 2005 (The victims of Trafficking and Violence Protection Act)

[18 U.S.C. § 2241](#) VAWA 1994 (sentencing guidelines for aggravated sexual abuse)

[18 U.S.C. § 2242](#) VAWA 1994 (sentencing guidelines for sexual abuse)

[18 U.S.C. § 2248](#) VAWA 1994 (mandatory restitution for the victims of sex crimes)

[18 U.S.C. § 2259](#) VAWA 1994 (mandatory restitution for child the victims of sexual exploitation)

Domestic violence and stalking offenses

[18 U.S.C. § 2261](#) VAWA 1994 (interstate domestic violence-interstate travel)
VAWA 2000 (forcing the victim across interstate lines)⁷⁷⁰

⁷⁷⁰ *Section 2261: Forcing The victim Across Interstate Lines.* VAWA II also clarified [18 U.S.C.A. § 2261](#), which helped to prevent abusers from forcing the victims across interstate lines. Before the changes made by VAWA II, under section 2261, it was a federal crime for an individual to travel in interstate or foreign commerce "with the intent to kill, injure, harass, or intimidate a spouse or intimate partner" if the individual then actually does "commit or attempt to commit a crime of violence against" that person. Furthermore, a person cannot make the spouse or intimate partner travel across interstate or foreign lines "by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence" against that person." Part (b) of section 2261 outlines the penalties for violation of section 2261(a).

Prior to changes made by VAWA II, the statute reached only violence that occurred "in the course of or as a result of such travel." This phrasing caused confusion as to whether violence inflicted before the interstate travel satisfied the "in the course of" requirement. Congress amended the language of [18 U.S.C.A. § 2261](#)(a) in VAWA II to eliminate any future question of whether violence inflicted before causing the victim to travel across interstate lines was covered by the statute. The statute now reads, "a person who causes a spouse or intimate partner to travel . . . in the course of, as a result of, or to facilitate such conduct or travel" is subject to federal criminal charges as according to the statute. Therefore, violence linked in any way with the interstate travel is covered by section 2261. VAWA II also eliminated language from section 2261 requiring that the crime of violence lead to "bodily harm," and that the violence be completed. 10 *Geo. J. Gender* 369, 382-384.

- [18 U.S.C. § 2261A](#) VAWA 1994, 2000, 2005 (interstate stalking and cyber stalking)
- [18 U.S.C. § 2262](#) VAWA 1994 and 2000 (interstate travel to violate a protective order)
- [18 U.S.C. § 2263](#) VAWA 1994 (pretrial release of the defendant-right of the victim to be heard at bail hearing)
- [18 U.S.C. § 2264](#) VAWA 1994 (restitution for domestic violence the victims)

Full faith and credit for protective orders

- [18 U.S.C. § 2265](#) VAWA 1994 (full faith and credit for protective orders issued in another jurisdiction)
- [18 U.S.C. § 2265\(c\)](#) VAWA 1994 provision (restricting full faith and credit for mutual protective orders)
- [18 U.S.C. § 2265\(d\)](#) VAWA 2000 (notification and registration of protective orders not required for full faith and credit)
VAWA 2005 (limits on internet publication of protective order information)
- [18 U.S.C. § 2266](#) VAWA 1994 and 2000 (defines-protective order by excluding custody orders)
VAWA 2005 (definition of protective order)

Restitution enforcement

- [18 U.S.C. § 3663](#) VAWA 1994 (enforcement of restitution orders through suspension of federal benefits)

Crime victims' rights

- [18 U.S.C. § 3771](#) Crime Victims' Rights Act

20 U.S.C.

Campus hate crimes

- [20 U.S.C. § 1092](#) Campus Hate Crimes Right to Know Act
(f)(1)(F)(ii)

22 U.S.C.

Human Trafficking Victims Protection Act

[22 U.S.C. § 7101](#) et seq. VAWA 2000 (Trafficking Victims Protection Act)

28 U.S.C.

Hate crimes databases and statistics

[28 U.S.C. § 534](#) VAWA 1994 and 2005 (Hate Crimes Statistics Act-access to federal criminal information)

[28 U.S.C. § 534](#) Authorization for courts to use national crime
(e)(1) databases in domestic violence and stalking cases

[28 U.S.C. § 534](#)(f)(1) court authority to search crime databases

[28 U.S.C. § 994](#) VAWA 1994 (Hate Crime Sentencing Enhancement Act)

Parental kidnapping

[28 U.S.C. § 1738A](#) Full faith and credit for child custody determinations

Child support-full faith and credit

[28 U.S.C. § 1738B](#) Full Faith and Credit for Child Support Orders Act

The victim's sexual history

[28 U.S.C. § 2074](#) VAWA 1994 (evidentiary rules regarding sexual history of the victims in civil and criminal cases; e.g., [FRE 412](#))

Social service benefits

[28 U.S.C. § 7105](#) VAWA 2000 (eligibility of immigrant victims of severe trafficking for federal social service benefits)

[29 U.S.C. § 794](#) Rehabilitation Act of 1973 (provision prohibiting discrimination based on disability by program or activity receiving federal financial assistance)

42 U.S.C.

[42 U.S.C. § 280g-4](#) VAWA 2005 (Congressional findings on domestic violence related health care costs)

Welfare

- [42 U.S.C. § 601](#) Temporary Assistance for Needy Families (TANF)
- [42 U.S.C. § 602](#) Family Violence Option (waiver of welfare restrictions)
(a)(7)

Child support

- [42 U.S.C. § 651](#) Social Security Act Title IV-D (child support and establishment of paternity)
- [42 U.S.C. § 653](#) Federal Parent Locator Service for child custody (including unlawful restraint) and support cases (part of the PKPA 1980)
- [42 U.S.C. § 654](#)(26) confidentiality of domestic violence or child abuse victim's information in child support proceedings
- [42 U.S.C. § 654](#)(29) good cause waiver of duty to cooperate with state's enforcement of child support order
- [42 U.S.C. § 663](#) Federal Parent Locator Service; (used to enforce child custody orders and the Hague Convention)
- [42 U.S.C. § 666](#)(321) Personal Responsibility and Work Opportunity Act (part of the Uniform Interstate Family Support Act)

Discrimination

- [42 U.S.C. § 1981](#) Equal rights under the law
- [42 U.S.C. § 2000d](#) Civil Rights Act of 1964, Title VI-prohibiting discrimination based on ethnicity, race, or national origin (including limited English proficiency)

Crime control

- [42 U.S.C. § 3712d](#) Omnibus Crime Control and Safe Streets Act of 1968
- [42 U.S.C. § 3796gg](#) VAWA 1994-(grants to combat violence against women)
- [42 U.S.C. § 3796gg-1](#) VAWA 1994 (state grants)
- [42 U.S.C. § 3786gg-2](#) VAWA 2000 (dating violence defined)
- [42 U.S.C. § 3796gg-4](#) VAWA 1994 (payment for forensic medical exams (rape kits))

[42 U.S.C. § 3796gg-4](#)(e) VAWA 2005 (STOP grantees required to certify that courts notify domestic violence offenders of firearms prohibition under [18 U.S.C. § 922](#))

[42 U.S.C. § 3796gg-5](#) VAWA 1994 and 2000 (no filing costs to domestic violence victims for criminal charges)

[42 U.S.C. § 3796gg-6](#) VAWA 2000 (legal assistance for the victims of domestic violence, sexual assault, or stalking)

[42 U.S.C. § 3796gg-8](#) VAWA 2005 (polygraph testing of sexual assault victims prohibited)

[42 U.S.C. § 3796hh](#) VAWA 1994 (grants to encourage arrest policies)

Child abduction

[42 U.S.C. § 5771](#) Missing Children’s Search Assistance Act (establishes the National Center for Missing and Exploited Children)

Violence against women statutes

[42 U.S.C. § 10409](#) VAWA 1994 (grants for battered women’s shelters)

[42 U.S.C. § 10410](#) VAWA 1994 (Family Violence Prevention and Services Act)

[42 U.S.C. § 10416](#) VAWA 1994 (national domestic violence hotline)

[42 U.S.C. § 10417](#) VAWA 1994 (youth education and domestic violence)

[42 U.S.C. § 10418](#) VAWA 1994 (establishment of community programs on domestic violence)

[42 U.S.C. § 10420](#) VAWA 2000 (safe havens for children-safe visitation and exchange of child in domestic violence cases)

[42 U.S.C. § 10603](#) The victims of Crime Act

[42 U.S.C. § 10702](#) Battered Women’s Testimony Act

[42 U.S.C. § 13701](#) VAWA 1994 (Safe Homes for Women Act of 1994)
VAWA 2005 (Violence Against Women and Department of Justice Reauthorization Act of 2005)

[42 U.S.C. § 13925](#) VAWA 2005 (improving services for the victims of domestic violence, dating violence, sexual assault and stalking)

42 U.S.C. § 13925 (b)(8)	VAWA 2005 (VAWA protections apply to male victims)
42 U.S.C. § 13942	VAWA 1994 (development of model legislation for confidentiality of counselor-victim communications)
42 U.S.C. § 13951	VAWA 1994 (confidentiality of abused person’s address)
42 U.S.C. § 13962	VAWA 1994 (state databases on incident of sexual and domestic violence)
42 U.S.C. § 13971	VAWA 1994 (rural domestic violence and child abuse enforcement assistance)
42 U.S.C. § 13981	VAWA 2000 (providing a civil remedy for a violation-[NOTE: declared unconstitutional in <i>U.S. v. Morrison</i> , 529 U.S. 598 (2000)]
42 U.S.C. § 13991	VAWA 1994 (education and training for judges and court personnel)
42 U.S.C. § 14011	VAWA 1994 (payment of costs of testing for sexually transmitted diseases)
42 U.S.C. § 14012	VAWA 1994 (national baseline study on campus sexual assault)
42 U.S.C. § 14013	VAWA 1994 (report on battered woman’s syndrome)
42 U.S.C. § 14014	VAWA 1994 (report on confidentiality of addresses for the victims of domestic violence)
42 U.S.C. §14043a-3	VAWA 1994 (court training and improvements)
42 U.S.C. § 14043e	VAWA 2005 (Congressional findings on the relationship between homelessness and domestic violence)
42 U.S.C. § 14045a	VAWA 2005 (enhancing culturally and linguistically specific services for the victims of domestic violence, dating violence, sexual assault, and stalking)

International child abduction

42 U.S.C. § 11601 --11610	International Child Abduction Remedies Act (ICARA) incorporating the Hague Convention on the Civil Aspects of International Child Abduction
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[42 U.S.C. § 11604](#) International Child Abduction Remedies Act provision (requiring U.S. courts to give full faith and credit to court orders from countries who are signatories to the Hague Convention)

Americans with disabilities

[42 U.S.C. § 12101](#) Americans with Disabilities Act
[42 U.S.C. § 12131](#) ADA Title II—prohibition on discrimination in provision of public services based on disability

[42 U.S.C. ch.67](#) Keeping Children and Families Safe Act of 2003 reauthorizing Child Abuse Prevention and Treatment Act (CAPTA), the Adoption Opportunities Act, the Abandoned Infants Assistance Act, and the Family Violence Prevention and Services Act [P.L. 108-36](#)

47 U.S.C.

Cyberstalking

[47 U.S.C. § 223](#)(h)(1) VAWA 2000 and 2005 (Communications Act of 1934—prevention of cyberstalking)

CODE OF FEDERAL REGULATIONS

[8 CFR § 214.11](#) T visa criteria
(a)-(p)

[22 CFR § 51.27](#) issuance of passport for minor child

[28 CFR § 42.101](#) limited English proficiency
--112

[28 CFR § 90.15](#) prohibits assessment of fees to the victims
(a)(1)

[29 CFR Part 35](#) regulations prohibiting discrimination by public entities based on disability

[45 CFR § 80.1](#) limited English proficiency in the Title VI Civil Rights Act of 1964

[65 CFR § 50121](#)

Exec. Order 13166 (Aug. 16, 2000) requiring federal agencies to promulgate guidelines for financial aid recipients to avoid discrimination against persons with limited English proficiency

19.7 *Online resources and hotlines.*

[Online](#)
[Miscellaneous](#)
[Hotlines](#)
[Topical index to resources](#)

19.7.1 Online resources.

Abuse, Rape, and Domestic Violence Aid and Resource Collection

<http://www.aardvarc.org/>

American Bar Association

Center on Children and the Law

<http://www.abanet.org/child/>

Civil Law Manual: Protection Orders and Family Law Cases, 3rd ed.

<http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=3480008>

Commission on Domestic Violence

<http://www.abanet.org/domesticviolence/Pages/default.aspx>

Domestic Violence in the LGBT Community: bibliography

http://www.abanet.org/irr/enterprise/lgbt/Bibliography_updated.pdf

Domestic violence safety tips (available in English, Spanish, Chinese, Japanese, Korean, and Vietnamese)

<http://www.abanet.org/tips/publicservice/DVENG.pdf>

Human Trafficking Cases: How and Why to Use an Expert Witness

http://www.abanet.org/domviol/pdfs/DV_Trafficking.pdf

Human Trafficking Victims: An introduction for domestic violence attorneys and advocates

http://www.abanet.org/domviol/pdfs/DV_Trafficking.pdf

The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook, 2nd ed.

<http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5480020>

Judicial checklist for domestic violence cases

<http://www.abanet.org/abastore/index.cfm?fm=Product.AddToCart&pid=348001>

Lawyers' Domestic Violence Handbook

<http://www.abanet.org/domviol/lawyershandbooktoc.pdf>

Parental Kidnapping Prevention and Remedies

<http://www.abanet.org/child/pkprevrem.pdf>

Screening tools for attorneys for domestic violence

<http://www.abanet.org/domviol/screeningtoolcdv.pdf>

Screening tool for civil attorneys representing victims of domestic and dating violence, sexual assault, and stalking

http://www.abanet.org/domviol/pdfs/Issue_Spotting_FINAL.pdf

Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault, and Stalking in Civil Protection Order Cases

<http://www.abanet.org/domviol/docs/StandardsofPracticeCommentaryFinal82707.pdf>

State-by-state statutory summary chart

<http://new.abanet.org/domesticviolence/Pages/StatutorySummaryCharts.aspx>

VAWA 2005 Guide for Attorneys

<http://www.abanet.org/domviol/docs/VAWA2005forAttorneys.pdf>

American Psychological Association

Hate crimes

<http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf>

American Probation and Parole Association

Community Corrections Response to Domestic Violence: Guidelines for Practice (2009). Guidelines for community corrections officers taking a proactive approach to supervision of domestic violence offenders.

<http://www.appa-net.org/eweb/docs/APPA/pubs/CCRDV.pdf>

Responding to Stalking-a guide for community corrections officers

<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=47528>

Asian and Pacific Islanders Institute on Domestic Violence

<http://www.apiidv.org/>

Asian Task Force Against Domestic Violence

<http://www.atask.org/site/>

Bureau of Alcohol, Tobacco, and Firearms-

Firearms forms

<http://www.atf.gov/forms/firearms/>

Brochure on “Information needed to enforce the firearm prohibition: misdemeanor crimes of domestic violence”

<http://www.fbi.gov/hq/cjisd/nics/medvbrochure.pdf>

Bureau of Justice Statistics-

Criminal Victimization in the U.S., 2007 Statistical Tables

<http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf>

Family Violence Statistics (2005)

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=828>

<http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs06.pdf>

Female Victims of Violence (2009)

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2020>

Intimate Partner Violence

<http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=971>

<http://www.ojp.usdoj.gov/bjs/intimate/ipv.htm>

Profile of Intimate Partner Violence Cases in Large Urban Counties

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2024>

Publications and Products Overview

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbo>

Stalking statistics

<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=45862>

Stalking Victimization in the United States (2009)

<http://www.ojp.usdoj.gov/bjs/pub/pdf/svus.pdf>

State Court Processing of Domestic Violence Cases (criminal) (2008)

<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1201>

Statistics lists

<http://www.ojp.usdoj.gov/bjs/pubalp2.htm#vvc>

Center for Court Innovation

<http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=550&documentTopicID=38>

Center for Disease Control

Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence. 2008. Morbidity and Mortality Weekly Report (February 2008) <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm>

Adverse Childhood Experiences Study
<http://www.cdc.gov/NCCDPHP/ACE/index.htm>

Costs of Intimate Partner Violence Against Women in the United States (2003)
http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf

The Effects of Childhood Stress on Health Across the Lifespan.
http://www.cdc.gov/ncipc/pub-res/pdf/Childhood_Stress.pdf

Dangerassessment.org (Dr. Jacqueline Campbell)

Intimate partner violence risk assessment
<http://www.dangerassessment.org/WebApplication1/pages/product.aspx>

Danger assessment questionnaire for victim
<http://www.dangerassessment.org/WebApplication1/pages/da/DAEnglish2010.pdf>

Department of Health and Human Services

Child victims of human trafficking
http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm

Children and domestic violence
<http://www.childwelfare.gov/pubs/factsheets/domesticviolence.cfm>

Department of Justice

Guidelines for Non-discrimination of services to LEP persons

<http://www.justice.gov/crt/cor/lep/DOJLEPGuidApr122002.php>

Limited English Proficiency Resource Document

http://www.lep.gov/resources/tips_and_tools-9-21-04.htm

Misdemeanor Crimes of Domestic Violence-Information Needed to Enforce
Firearm Prohibition

<http://www.fbi.gov/about-us/cjis/nics/general-information/mcdvbrochure.pdf/view>

Missing and Exploited Children's Program

<http://ojjdp.ncjrs.org/missing>
(202) 616-3637

Stalking in America: Findings from the National Violence Against Women
Survey

<http://www.ncjrs.gov/pdffiles/169592.pdf>

Teaching Domestic Violence Legal Issues in the Law Schools

<http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/advan.htm>

Office of Victims of Crime

<http://www.ojp.usdoj.gov/ovc/>

Family Violence Prevention Fund

Collaborating to Help Human Trafficking Survivors

<http://www.endabuse.org/userfiles/file/ImmigrantWomen/Collaborating%20to%20Help%20Trafficking%20Survivors%20Final.pdf>

Facts on Children and Domestic Violence

http://www.endabuse.org/userfiles/file/Children_and_Families/Children.pdf
http://endabuse.org/userfiles/file/PublicPolicy/facts_children_dv.pdf

Facts on Domestic Violence

<http://www.lessonsfromliterature.org/docs/DomesticViolence.pdf>

Facts on Domestic, Dating and Sexual Violence

http://www.endabuse.org/userfiles/file/Children_and_Families/DomesticViolence.pdf

Facts on Immigrant Women and Domestic Violence

http://www.endabuse.org/userfiles/file/Children_and_Families/Immigrant.pdf

Power and Control Tactics Used Against Immigrant Women

<http://www.endabuse.org/userfiles/file/ImmigrantWomen/Collaborating%20to%20Help%20Trafficking%20Survivors%20Final.pdf>

Federal Bureau of Investigation

Hate Crime Statistics 2004 (Washington, DC: GPO, 2005)
<http://www.fbi.gov/ucr/hc2004/openpage.htm>.

Hate Crime Statistics 2007 (Washington, DC: GPO, 2008)
<http://www.fbi.gov/ucr/hc2007/index.html>

Ford Foundation Innovation in Government Award winners

(List of finalists and winners including those whose programs focused on family violence, child abuse, elder abuse, and juvenile justice)
www.innovations.harvard.edu

Immigrant Survivor's Legal Aid

Summary of U visa requirements
<http://www.islabay.org/uvisa.html>

Institute on Domestic Violence in the African American Community

www.dvinstitute.org/
(Located at the University of Minnesota School of Social Work)

International Child Abduction Database

<http://www.incadat.com/>

Judicial Education Center—domestic violence evidence chart

http://jec.unm.edu/resources/benchbooks/dv/hearsay_chart/index.htm

Legal Momentum

National Immigrant Victim Service Provider Resource Directory
http://www.legalmomentum.org/help-center/national-resources-for.html#Legal_Momentums_Immigrant_Women_Program

<http://www.legalmomentum.org/assets/pdfs/wwwuvisafactsheet.pdf>

Minnesota Center Against Violence and Abuse

Results of studies of families where both mothers and children are abused

<http://www.mincava.umn.edu/pages/link>

National Center for Missing and Exploited Children

<http://www.missingkids.com>

1-800-843-5678

National Center on Protection Orders and Full Faith and Credit

(Information and training on full faith and credit, firearms, inter-jurisdictional child custody issues, federal laws relating to domestic violence and stalking)

Home

http://www.bwjp.org/ncffc_home.aspx

Key Provisions of the UCCJA, PKPA, UCCJEA and ICWA for battered women

<http://www.bwjp.org/files/bwjp/files/Child%20Custody%20Flow%20Chart.pdf>

Interstate Child Custody: A practitioner's guide to the PKPA

<http://www.bwjp.org/publications.aspx>

Interstate Child Custody: a practitioner's guide to the UCCJEA

<http://www.bwjp.org/publications.aspx>

Model Law Enforcement Policy: protective orders and firearms in domestic violence cases

<http://www.bwjp.org/files/bwjp/files/ModelLEPolicyFINAL.pdf>

National Center on Domestic and Sexual Violence

Information on domestic violence and sexual assault , including in the military

http://www.ncdsv.org/ncd_about.html

National Center for State Courts

Benchcard for interpreters in protective order hearings

http://www.ncsconline.org/D_Research/Documents/LEP_AttachM_Benchcard-Final.pdf

Domestic Violence Resource Guide

<http://www.ncsconline.org/wc/courttopics/ResourceGuide.asp?topic=famvio>

Leveraging Technology to Meet the Needs for Interpreters

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=184>

Limited English Proficiency and Access to Protection Orders (video)
<http://www.ncsconline.org/interpreting-dv-po/index.asp>

Model Policies and Procedures-Judge's Guide to Standards for Interpreted Proceedings
http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter6Pub.pdf

Serving Limited English Proficiency Battered Women
http://www.ncsconline.org/D_Research/past_projects.htm#LEP

National Center for Victims of Crime

Resource Library
http://www.ncvc.org/ncvc/main.aspx?dbID=DB_ReportsStudies213

Responding to Stalking
<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=47528>

Victim assistance for Lesbian, Gay, Bisexual, Transgender and Queer Victims of Hate Violence & Intimate Partner Violence
<http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=47632>

National Coalition Against Domestic Violence

www.ncadv.org

National Coalition of Anti-Violence Programs

Report on hate crimes against lesbian, gay, bisexual, and transgender people (2009)
http://ncavp.org/common/document_files/Reports/2008%20HV%20Report%20smaller%20file.pdf

National Council of Juvenile and Family Court Judges

www.ncjfcj.org/domviol

Civil Protection Orders: A Guide for Improving Practice (2010)
http://www.ncjfcj.org/images/stories/dept/fvd/pdf/cpo_guide.pdf

Family Violence Improving Court Practice (1990)
<http://www.ncjfcj.org/images/stories/dept/fvd/pdf/improvingcourtpractice.pdf>

Family Violence Department
1-800-527-3223

Guide for Effective Intervention in Domestic Violence & Child Maltreatment Cases (the Green Book) (1999)

<http://www.thegreenbook.info/documents/Greenbook.pdf>

Guide for Effective Issuance and Enforcement of Protection Orders (the Burgundy Book) (2005)

http://www.ncjfcj.org/images/stories/dept/fvd/pdf/burgundy_book_final.pdf

Judicial Guide to Child Safety in Child Custody Cases

<http://www.ncjfcj.org/images/stories/dept/fvd/pdf/judicial%20guide.pdf>

Model Code on Domestic Violence

<http://www.aardvarc.org/programs/modelcodeondv.pdf>

Navigating Custody & Visitation Evaluation in Cases with Domestic Violence: A Judge's Guide

http://www.ncjfcj.org/images/stories/dept/fvd/pdf/navigating_cust.pdf

Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence

http://www.ncjfcj.org/images/stories/dept/fvd/pdf/reasonable%20efforts%20checklist_web2010.pdf

National Crime Victims Law Institute

www.lclark.edu/org/ncvli/ncvlilibrary.html

(Located at Lewis & Clark Law School, Portland, OR)

National Institute of Justice-

Best Practices Institute—Family Violence

<http://www.ncsconline.org/WC/Publications/BestPrac/BPFamVio.htm#judges>

Center for Family Violence and the Courts

<http://www.ncsconline.org/famviol/index.html>

Domestic Violence Courts

<http://www.ojp.usdoj.gov/nij/topics/courts/domestic-violence-courts/welcome.htm>

“The Kentucky Civil Protective Order Study: A Rural and Urban

Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs.” T. Logan, NCJ Publication no. 228350 (Washington, DC: National Institute of Justice, U.S. Department of Justice, 2009)

<http://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf>.

Practical Implications of Current Domestic Violence Research for Law Enforcement, Prosecutors, and Judges

<http://nij.gov/nij/topics/crime/intimate-partner-violence/practical-implications-research/toc.htm>

Serving Limited English Proficient Battered Women

<http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=26>

Violence Against Women and Family Violence Program

<http://www.ojp.usdoj.gov/nij/topics/crime/violence-against-women/welcome.htm>

National Network to End Domestic Violence

<http://www.nnedv.org/>

National Online Resource Center on Violence Against Women

Home

<http://www.vawnet.org/>

Interpersonal Violence and Women with Disabilities: A research update

http://new.vawnet.org/category/Main_Doc.php?docid=2077

Violence in the Lives of Persons who are Deaf or Hard of Hearing

http://new.vawnet.org/category/index_pages.php?category_id=966

National Sexual Violence Resource Center

<http://www.nsvrc.org/publications/nsvrc-publications>

Office of Violence Against Women (Dept. of Justice)

<http://www.ovw.usdoj.gov/overview.htm>

Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking and Child Abuse Enforcement Assistance Program
http://www.raconline.org/info_guides/public_health/domesticviolence.php

Stalking: 2001 Report to Congress
<http://www.ncjrs.gov/pdffiles1/ojp/186157.pdf>

Workplaces Respond to Domestic and Sexual Violence: A National Resource Center
www.workplace.org

Rape, Abuse, & Incest National Network (for local sexual assault centers)

Hotline 1-800-656-4673

Social Security Administration

New Social Security numbers for domestic violence victims
<http://www.ssa.gov/pubs/10093.html>

Stalking Resource Center

http://ncvc.org/src/main.aspx?dbID=dash_Home

Stalking by a High Tech Guy
<http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=41389>

State Department

Children's Passport Issuance Alert System (aka Passport Lookout System)
http://travel.state.gov/abduction/prevention/passportissuance/passportissuance_554.html

Family Abductors: Descriptive Profiles and Preventative Interventions
<http://www.ncjrs.gov/pdffiles1/ojjdp/182788.pdf>

Office of Children's Issues
http://travel.state.gov/abduction/abduction_580.html
(202) 736-7000

Trafficking in Persons Report (2008)
<http://www.state.gov/documents/organization/105501.pdf>

Texas Association Against Sexual Assault

<http://www.taasa.org/>
512-474-7190

Texas Council on Family Violence

www.tcfv.org

National Domestic Violence Hotline: 1-800-799-7233

Battering intervention programs directory

<http://www.tcfv.org/service-directory/battering-intervention-and-prevention-programs/>

Shelter and victim services directory

<http://www.tcfv.org/service-directory-results/>

Texas Health and Human Services Commission

Temporary Assistance for Needy Families (TANF)

http://www.hhsc.state.tx.us/help/financial/temporary_assistance.html

Texas Law Help

<http://www.texaslawhelp.org/TX/index.cfm>

Texas Municipal Court Education Center

Magistrate's order of emergency protection form

<http://www.tmcec.com/tmcec/public/files/File/Resources/Final%20Website%20Forms%20Book/PDF/05%20Magistrate%20Duties.pdf>

Texas State Agencies

Adult Protective Services

www.dfps.state.tx.us/Adult_Protection/AboutAdultProtectiveServices

Attorney General

Access and Visitation Hotline (rights of non-custodial parents)

<http://www.lanwt.org/txaccess/>

Child Support Division

1-800-252-8014

<http://www.oag.state.tx.us/cs/about/index.shtml>

Child Support-Understanding the Court Process (video)

http://www.oag.state.tx.us/media/videos/play.php?image=understanding_court_process&id=334

Child Support Application-Family Violence and Non-disclosure of Information

https://childsupport.oag.state.tx.us/wps/portal!/ut/p/c/04_SB8K8xLLM9MSSzPy8xBz9CP0os_ggLx_XUGcjI0N3F1cnA0-DED_PwJAgAwMnI30_j_zcVP2CbEdFAAIYXYA!/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfUkpMRVVDMjIxR0RFQjBJMFROSVFUUjAwUjY!/

Child support process

The Texas Council on Family Violence and the Office of the Attorney General collaborated to create a website that explains the child support process, available protections, the court process, and navigating the child support system as a respondent.

www.getchildsupportsafely.org

Child support safety options posters

The Texas Council on Family Violence and the Office of the Attorney General collaborated to create posters that advertise the safety precautions available to those who are seeking child support and need protections as well as those who are required to seek child support as a condition of receiving public assistance.

The Duluth Model is an abuse intervention that highlights the role power and control plays in abusive, intimate partner relationships.

<http://www.theduluthmodel.org>

Crime Victims Compensation

www.oag.state.tx.us/victims/cvc.shtml

Sexual Assault Prevention and Crisis Services

www.oag.state.tx.us/victims/sapcs.shtml

Child Protective Services

www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/

Department of Criminal Justice Victims Services Division

www.tdcj.state.tx.us/victim/victim-home.htm

Notification registration for offenders in prison or on supervised release

<http://www.tdcj.state.tx.us/victim/victim-home.htm>

Online Resource Directory for Victims

<http://www.tdcj.state.tx.us/victim/victim-home.htm#RESOURCE>

Restitution and Fees Section,

P.O. Box 4019, Huntsville, Texas, 77342

<http://www.tdcj.state.tx.us/publications/finance/B&F%20-%20ABS%20Restitution%20Brochure.pdf>

Victims Services Division Publications (English and Spanish)

<http://www.tdcj.state.tx.us/publications/publications-home.htm#VICTIM>

Department of Family and Protective Services

http://www.dfps.state.tx.us/contact_us/report_abuse.asp

Abuse Hotline: 1-800-252-5400

www.txabusehotline.org

Department of Health—Council for Sex Offender Treatment

www.dshs.state.tx.us/csot/default.shtm

Department of Public Safety—Crime Statistics

www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm

Health and Human Services Commission

Temporary Assistance for Needy Families

http://www.hhsc.state.tx.us/help/financial/temporary_assistance.html

Department of Human Services Office of Immigration and Refugee Affairs

www.dhs.state.tx.us/programs/refugee/

Office of Court Administration

Domestic Violence Resource Program

<http://www.courts.state.tx.us/oca/DVRA/dvra-home.asp>

Legal Information V. Legal Advice

<http://www.courts.state.tx.us/pubs/LegalInformationVSLegalAdviceGuidelines.pdf>

Office of the Governor Criminal Justice Division

www.governor.state.tx.us/divisions/cjd

University of Texas Libraries

<https://login.ezproxy.lib.utexas.edu/>

(Access to all UT libraries-requires login)

University of Texas Tarlton Law Library Catalogue

<http://tallons.law.utexas.edu/>

(Access to many journals and resources not available on Westlaw or Lexis)

Violence Against Women On-line Resources

<http://www.vaw.umn.edu/>

WomensLaw.org

http://www.womenslaw.org/simple.php?sitemap_id=9

19.7.2 Miscellaneous resources.

Department of Family and Protective Services

For reporting abuse against children, people with disabilities or the elderly
Abuse/Neglect Hotline
1-800-252-5400

Institute on Domestic Violence and Assault (Univ. of Texas)

Statewide Prevalence of Intimate Partner Violence in Texas (2011)
<http://www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/DV-Prevalence.pdf>

International Marriage Broker Regulation Act

Opinion upholding the constitutionality of the IMBRA with detailed explanation of domestic violence and mail-order spouses
<http://www.usaimmigrationattorney.com/JudgeCooperDecision.pdf>

National Domestic Violence Hotline

Crisis intervention, safety planning and referrals to local domestic violence programs

1-800-799-SAFE (7233)
1-800-787-3224 (TTY) for the Deaf

Parenting Software

www.OurFamilyWizard.com
www.ParentingTime.net
www.JointParents.com
www.FamilyCrossing.com
www.CustodyToolbox.com
www.Cozi.com

State sexual assault protective order statutes

http://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legal-resources/sa_cpo_chart.pdf

Texas Advocacy Project

Information and referrals regarding legal issues.
Family Violence Legal Line

1-800-374-HOPE (4673)

Univ. of New Hampshire, Carsey Institute

Civil Protective Orders Effective in Stopping or Reducing Partner Violence:
Challenges Remain in Rural Areas with Access and Enforcement
<http://www.carseyinstitute.unh.edu/publications/IB-Logan-Civil-Protective-Order.pdf>

Welfare benefits-waiver of time limits

Family Violence Option—Tex. Hum. Res. Code § 31.0322; [42 U.S.C. § 602\(a\)\(7\)](#)

19.7.3 Hotlines.

Abuse/Neglect Hotline (DPRS)

1-800-252-5400

Family Violence Legal Line

1-800-374-HOPE (4673)

Missing and Exploited Children’s Program (U.S. DOJ)

(202) 616-3637

National Center for Missing and Exploited Children

1-800-843-5678

**National Council of Juvenile and Family Court Judges
Family Violence Department**

1-800-527-3223

National Domestic Violence Hotline: Crisis intervention, safety planning and referrals to local domestic violence programs

1-800-799-SAFE (7233)
1-800-787-3224 (TTY) for the Deaf

Rape, Abuse, & Incest National Network (for local sexual assault centers)

1-800-656-4673

State Department Office of Children's Issues (International Child Abductions)

(202) 736-7000

Texas Association Against Sexual Assault-Sexual Assault Hotline

1-800-656-HOPE

Texas Attorney General-Child Support Division

1-800-252-8014

19.8 A family violence victim's legal calendar.

In connection with the comment in § 3.27 (An applicant's journey through the legal system), the following timeline illustrates how the pursuit of legal redress may impact the victim.

NOTE: This calendar was created by, and is used with permission of, Aaron Setliff for the Texas Council on Family Violence.

Criminal Court

As victim

Family Violence Misdemeanor Assault [1/1/11]
Magistrate's Order of Protection [1/1/11]
[Meet with offender's attorney – 1/2/11]
Bond hearing [1/3/11]
[Meet with offender's attorney – 1/5/11]
Arrest [1/7/11]
Motion to decrease bond [1/10/11 → gets re-set]
Motion to decrease bond [1/11/11]
Go to the prosecutor's office to meet with victim's assistance [1/17/11]
Go to the prosecutor's office to meet with the assistant district attorney [1/21/11]
Pre-trial hearing [2/4/11]
Meet with prosecutor in preparation for Evidence Motion [3/18/11]
Evidence motion [3/21/11 → gets re-set]
Meet with victim's assistant in prosecutor's office / police department [3/28/11]
Pre-trial hearing [3/31/11]
Meet with prosecutor in preparation for Evidence Motion [4/14/10]
Evidence motion [4/15/10]
Pre-trial hearing [4/29/11]
Plea [5/27/11 → the defendant decides not to plead guilty]
Pre-trial hearing [6/6/11]
Final Pre-trial hearing [7/11/11]
Meet with prosecutor in preparation for trial [7/25/11]
1st Trial Setting [7/26/11 to 7/29/11 needs to be blocked off, but it doesn't go to trial]
Pre-trial Hearing [8/12/11]
Final Pre-trial Hearing [8/31/11]
2nd Trial Setting [9/7/10 to 9/10/10, but does not go to trial]
Pre-trial hearing [9/13/10]
Final Pre-trial Hearing [10/3/11]
3rd Trial Setting [10/4/11 to 10/7/11]
Sentencing [11/12/10]
Probation Pre-admonishment hearing [2/21/11]

Admonishment Hearing [4/11/11]
Pre-revocation hearing [6/6/11]
Revocation hearing [8/1/11 – postponed]
Pre-revocation hearing [8/13/11]
Revocation hearing [9/20/11]

Victim arrested (cross arrest)

Family Violence Misdemeanor Assault [1/1/11]
Bond Hearing [1/3/11 – stays in jail because isolated from family finances]
Arraignment [1/4/11 – lawyer *not* appointed because her income is too high; stays in jail]
Jail Magistrate Hearing [1/5/11 – allowed out on PR Bond]
Register with Probation for PR Bond [1/12/11]
Report to Probation for PR Bond
 2/9/11
 3/9/11
 4/13/11
 5/11/11
 6/8/11
 7/6/11
 8/10/11
Meet with criminal defense attorney [2/7/11]
Meet with batterer’s criminal defense attorney with her attorney present [2/25/10]
Pre-trial Hearing [2/11/11]
Meet with defense attorney paralegal to prepare for Evidence Motion Hearing [2/25/11]
Evidence Motion Hearing [3/14/11 → gets re-set]
Pre-trial Hearing [4/20/10]
Meet with defense attorney paralegal to prepare for Evidence Motion Hearing [5/9/11]
Evidence Motion Hearing [5/10/11]
Pre-trial hearing [6/17/11]
Plea [8/1/11 → 12 month probation]
Report to Adult Probation
 [Second Wednesday each month for four months]
Perform Community Service [40 hours]
 9/1/11 through 7/1/12 → two hours a week for 40 weeks]

Civil Courts

Protective Order(s)

Family Violence Misdemeanor Assault [1/1/11]
Magistrate's Temporary Order of Protection [1/1/11 → victim may or may not be involved]
Meet with advocate / paralegal in prosecutor's office [1/14/11]
Temporary *Ex parte* Order hearing [1/19/11]
Meet with advocate / paralegal in prosecutor's office [2/1/11]
Meet with advocate / paralegal or prosecutor to prepare for hearing [2/18/11]
Two-year protective order hearing [2/21/11 → re-set]
Meet with advocate / paralegal or prosecutor to prepare for hearing [3/1/11]
Two year protective order hearing [3/2/11]
Meet with sheriff's department re the "kick out" portion of the order [3/8/11]
Kick-out [3/9/11]
Criminal Violation of protective order [5/20/10 – day before the defendant was set to plead guilty] [a whole new criminal case goes forward with new and different dates, etc.]
Civil contempt violation of protective order pre-trial hearing [7/5/11]
Contested civil contempt hearing [11/14/11]

Divorce

Meet with a divorce attorney (might be the same as victim's criminal lawyer) [6/3/11]
Meet with attorney to work on petition [6/28/11]
File petition [7/11/11]
Service of petition [9/23/11]
Signing of temporary orders [9/30/11]
Meet with attorney to prepare for the pre-trial hearing [10/24/11]
Pre-trial hearing [11/1/10]
Admonishment regarding failure to abide by temporary orders [11/30/11]
Meet with attorney to generating discovery [11/16/10]
Meet with attorney to answer discovery [1/7/12]
Status hearing [2/2/12]
Meet with attorney to prepare for hearing on custody [4/5/12]
Hearing on custody [4/6/12]
Agreed judgment of divorce / division of property / child custody [6/10/12]
Meet with attorney re complaint re court's orders [7/28/12]
Modification of divorce decree [7/29/12]

CPS

[only for a victim who was not charged as a the defendant]

Family Violence Misdemeanor Assault – children were present & officers at the scene called CPS; children taken into custody [1/5/10]
Move to shelter without children [1/6/10]

Meet with CPS case worker [1/20/11]
Weekly meetings at CPS [1/27/11 to 5/19/11]
CPS Hearing; temporary parenting plan including offender in visits, etc.
[1/28/11]
Status hearing [2/22/11]
Supervised visit with youngest child [2/24/11]
Offender has supervised visit with youngest child [2/25/11]
Supervised visit with oldest child [2/26/11]
Offender has supervised visit with oldest child [3/3/11]
Weekend visit with oldest child [3/19/10 to 3/20/10]
Weekend visit by offender with oldest child [3/26/11 to 3/28/11]
Day-long visit with youngest child [4/11/11]
Day-long visit by offender with youngest child [4/12/11]
Weekend visit with youngest child [4/30/10-5/1/10]
Weekend visit by offender with youngest child [5/7/10]
Hearing [5/13/11]
Victim obtains custody of oldest child [5/14/10]
VPO with oldest child present [5/20/10]
Oldest child removed [5/21/10]
Supervised visit with oldest child [6/10/10]
Supervised visit with youngest child [6/11/10]
CPS Hearing [6/28/10]
New Parenting plan hearing [7/11/10]
Etc.
Take oldest child to weekly counseling [6/31/10 onward]

OTHER/MISC.

1/07/10 Victim registers her 2 older children at the school closer to the shelter. She hasn't ever placed her youngest (a 2-year-old) into day care before.

1/15/10 (assuming the victim is in shelter and is aware that she needs to find alternative housing within the next 30 days) Victim goes to Public Housing Authority and submits an application for public housing. This takes about two hours to complete. She is informed that she will have to wait a minimum of six months before a unit will become open. The Section 8 waiting list, which she would prefer, is currently closed.

1/16/10 Victim meets with case worker and informs her she applied for public housing, but the wait is at least six months. Case worker prints out a list of 30 apartment complexes to try. Case worker tells the victim that she should consider applying for public benefits. She has never received public assistance before.

1/17/10 Victim goes to the HHSC office. After waiting one hour to talk with a person behind a window, she is given an application to complete. It takes her one and a half hours to complete the application. She waits another 30 minutes before the lady behind

the window calls her name to accept the application. She is given an interview date in one week. She is told she needs to bring a list of documentation such as children's birth certificates to the interview.

1/19/10 Victim goes to the Bureau of Vital Statistics to get replacement birth certificates for her three children. This takes about three hours total. It costs her \$66 to obtain the three certified copies.

1/20/10 Victim begins calling apartment complexes from the list. Most complexes say they have vacancies, but she needs to submit an application before they will tell her if they would rent to her. Many of the complexes charge \$10-\$20 to submit an application.

1/24/10 Victim has interview at HHSC. She applies for food stamps (SNAP) and Medicaid for her children. She is told that she qualifies for food stamps, but she won't receive her Lone Star card for another two weeks. The children all qualify for Medicaid. She is told that she must apply for child support and that she is required to participate in 20 hours/week of education and training activities to keep her food stamps. Also, her three children are due for check-ups, so she needs to find a Medicaid provider and have their well checks within the next 30 days.

1/31/10 Victim receives child support application in the mail. It takes her about two hours to complete. She has questions about what protections exist for victims of family violence. She calls the 1-800 number and waits on hold for over an hour before she is told to just check the box and go to her local office to complete the form to withhold her address.

02/1/10 Victim goes to local child support office and completes a Form of Non-Disclosure in order to keep her address off of court papers. She is told she will have to go to court in the next month to determine support and conservatorship.

02/02/10 Victim looks for a child care program that will accept CMS so that she can begin to attend her required E and T classes for food stamps. Her orientation is next week. She finds one place that she likes that has space, but it is 20 minutes away from the workforce center where her classes will be.

19.9 Address confidentiality program.

The Address Confidentiality Program (ACP), which is administered by the Office of the Attorney General's Crime Victim Services Division, is a program to help survivors of family violence, sexual assault, and stalking keep their addresses confidential. ([Tex. Code Crim. Proc. art. 56.81 et seq.](#))

The ACP provides a substitute post office box address that ACP participants use in place of an actual residential, business, or school address. A free mail forwarding service is also provided for ACP participants. The participant may then use the substitute address to receive first class mail and legal papers. The program will forward all first-class mail and legal service of process promptly.

A survivor of family violence must apply for ACP services through any of the following:

- domestic violence shelter;
- sexual assault center;
- law enforcement agency; or
- prosecution staff member.

The advocate submits the application to the OAG's Crime Victim Services Division. The OAG does not accept an application directly from a survivor of family violence.

19.10 Attorney General Office Child Support Division-policies related to family violence.

Pursuant to Tex. Fam. Code § 234.001 and 42 U.S.C. § 654(b), the Child Support Division of the Texas Attorney General's Office can administratively process child support orders made in protective order cases.

The following section includes an *abbreviated* version of the Office of the Attorney General – Child Support Division policies related to family violence.

Family Violence Indicator

The mechanism used to document that a party or child is a survivor of family violence is the family violence indicator, referred to as FVI. The FVI is used to report both domestic violence and child abuse.

The FVI is entered in the computer system either:

- manually by authorized field staff; **or**

- automatically through either the DFPS protective order interface process or the DSHS–Vital Statistics Unit interface process.

Authorized staff must enter the FVI in the computer system when either:

- A party claims family violence has occurred *and* requests that identifying information be omitted from pleadings and orders by completing an "Affidavit in Support of Nondisclosure of Information in Exceptional Circumstances";
- A party provides the OAG with a copy of a current protective order;
- A judge approves a party's request in court for nondisclosure of personal identifying information; **or**
- An oral request is made by the party when exceptional circumstances exist and staff believe the party is in immediate danger.

When the FVI is present:

- The case involving the survivor and the abuser is not eligible for the administrative Child Support Review Process and is scheduled for court.
- Certain confidential information is omitted from automatically generated legal forms. The OAG must ask that the personal information addressed above be excluded from the order in an effort to protect the survivor. If a court denies the request to omit the information from the order, the data must be added before the documents are finalized. ([Tex. Fam. Code § 105.006](#) (a)(2) & (c))
- The computer system inserts a paragraph into legal petitions that requests the court make appropriate orders concerning the disclosure of a party's address and accompanying orders that address the court's findings.
- A family violence warning message displays on the docket report or sheet for each case that has been identified as a family violence case.

Courtroom Best Practices in Regards to Child Support

Court staff should receive training and information about family violence, especially as it relates to the role that power and control play in abusive relationships and the potential for abusers to use child support as a means of further economic control ([The Duluth Model](#)).⁷⁷¹

⁷⁷¹ Available at: www.theduluthmodel.org

A survivor of family violence should attend court only when necessary. Instead of mandating appearance, place the survivor of family violence "on call" telephonically or by video conference.

If the docket sheet states "**Family Violence for the following case and cause,**" the Office of the Attorney General should inform court security of the situation before the court date.

Take special care to ensure that the survivor is aware that when child support is ordered as part of a protective order, the child support order expires when the protective order expires and that a subsequent order would be necessary in order for support to continue.

Consider educating the survivor about the availability of free IV-D services.

Consider that the courtroom may be the first time the abuse survivor has seen her/his abuser in a significant amount of time. Appearing in court with an abuser can be a frightening experience for an abuse survivor. She/he may benefit from having a friend, family member, or advocate present.

In court, contact between parties should be minimized:

- Arrange for separate entrances/exits.
- Allow for parties to be in separate rooms for any negotiations.
- Allow for late or early arrivals/departures.
- Allow court security staff to escort the survivor to his/her car after the proceeding.
- Never leave parties alone in same room.
- Inform the survivor about the OAG's Address Confidentiality Program (see § 19.9
- Provide family violence referral information.

In visitation orders, provide for the exchange of children at a safe exchange house or via a *neutral* third party, if possible.

Consider displaying posters developed by The Texas Council on Family Violence and the Office of the Attorney General in the courthouse that advise of safety precautions for abuse survivors entering in to the Child Support process. (This poster is available from The Texas Council on Family Violence or Office of the Attorney General – Child Support Division-see the Online Resources section of this Benchbook.)

19.11 Protective Order—Identifying Data for Respondent.

The protective order itself lacks the demographic and identifying information needed for an entry into the Texas Criminal Information Center (TCIC) system, which is the statewide law enforcement database for protective orders. Therefore, additional

information must be gathered and provided to the law enforcement agency doing the data entry for each protective order. Failure to supply a completed data entry sheet may prevent the protective order from being entered into the database, which in turn prevents law enforcement officers from being able to confirm the existence and terms of the protective order.

By statute (Tex. Fam. Code § 85.042(a) and Tex. Gov't Code § 411.042(b)(6)), the applicant or the applicant's attorney is to provide the following information to the clerk of the court:

- (A) the name, sex, race, date of birth, personal descriptors, address, and county of residence of the person to whom the order is directed;
- (B) any known identifying number of the person to whom the order is directed, including the person's social security number or driver's license number;
- (C) the name and county of residence of the person protected by the order;
- (D) the residence address and place of employment or business of the person protected by the order, unless that information is excluded from the order under Section 85.007, Family Code;
- (E) the child-care facility or school where a child protected by the order normally resides or which the child normally attends, unless that information is excluded from the order under Section 85.007, Family Code;
- (F) the relationship or former relationship between the person who is protected by the order and the person to whom the order is directed; and
- (G) the date the order expires.

In order for a protective order to be entered into the Protective Order Registry by law enforcement, the clerk of the court must provide law enforcement with the completed Protective Order Data Entry Sheet (or its functional equivalent) and with the protective order.

DPS has a form for submission of the necessary data. (See § 19.12). Additionally, the functional equivalent of the DPS form can be found in the Texas Supreme Court's Protective Order Task Force Protective Order Kit, available at: www.TexasLawHelp.org.

19.12 DPS Protective Order Data Entry Form.

PROTECTIVE ORDERS

Data Entry Form for TEXAS CRIME INFORMATION CENTER (TCIC)

The intent of this form is to aid court clerks with the collecting and providing to local law enforcement agencies pertinent information regarding protective orders for the purpose of entry into TCIC.

To be filled out by Criminal Justice/Law Enforcement Official:

ORI: _____	(check one) PROTECTIVE ORDER: _____	EMERGENCY PROTECTIVE ORDER: _____
OCA: _____	PROTECTIVE ORDER NO: _____	COURT IDENTIFIER: _____
ISSUE DATE: _____	DATE OF EXPIRATION: _____	DATE OF DISMISSAL: _____

*** RESPONDENT INFORMATION ***

Items in ALL UPPERCASE LETTERS must be answered to allow entry into TCIC.

NAME OF RESPONDENT: _____ SEX: (circle one) M F

RACE: (circle one) Indian Asian Black White Unknown Ethnicity: (circle one) Hispanic Non-Hispanic Unknown

Place of Birth: _____ CTZ: _____ DATE OF BIRTH: _____ HEIGHT: _____ WEIGHT: _____

Skin: (circle one) Albino Black Dark Dk Brown Fair Light Lt Brown Medium Med Brown Olive Ruddy Sallow Yellow Unknown

EYE COLOR: (circle one) Black Blue Brown Gray Green Hazel Maroon Pink Multi-Colored Unknown

HAIR COLOR: (circle one) Black Blond Brown Gray Red White Sandy Bald Unknown

Scars, Marks and/or Tattoos: (please describe in detail): _____

Caution and Medical Conditions: (circle all that apply) 00 – Armed and Dangerous 05—Violent Tendencies 10—Martial Arts Expert
15—Explosive Expertise 20—Known to abuse drugs 25—Escape risk 30—Sexually violent predator 50—Heart condition
55—Alcoholic 60—Allergies 65—Epilepsy 70—Suicidal 80—Medication Required 85—Hemophiliac 90—Diabetic 01--Other

PROTECTION ORDER CONTIONS (PCO): (circle all that apply)

- 01—Respondent is restrained from assaulting, threatening, abusing, harassing, following, interfering with or stalking the protected person and/or child of the protected person.
- 02—Respondent may not threaten a member of the protected person’s family/household.
- 03—The protected person is granted exclusive possession of the residence/household.
- 04—Respondent is required to stay away from the residence, property, school or place of employment of the protected person or other family or household member.
- 05—Respondent is restrained from making any communication with the protected person including, but not limited to, personal, written, or phone contact, or their employers, employees or fellow workers, or other whom the communication would be likely to cause annoyance or alarm.
- 06—Respondent is awarded temporary custody of the children named.
- 07—Respondent is prohibited from possessing and/or purchasing a firearm or other weapon.
- 08—See miscellaneous field for comments regards terms and conditions of the protection order.
- 09—The protected person is awarded temporary exclusive custody o the child(ren) named.

BRADY RECORD INDICATOR (BRD): N—Respondent is NOT disqualified Y—Respondent is disqualified U--Unknown

RELATIONSHIP TO PROTECTED PERSON: _____

(PLEASE INCLUDE THE FOLLOWING NUMERIC IDENTIFIERS, IF AVAILABLE):

Texas I.D. No: _____ Misc I.D. No: _____ Social Security No: _____

Driver's License No: _____ Driver's License State: _____ Date of Expiration: _____

Respondent's Address:

STREET: _____ **CITY:** _____ **STATE:** _____ **ZIP:** _____ **COUNTY:** _____

Respondent's Vehicle Information:

License Plate No: _____ L.P. State: _____ L.P. Year Of Expiration: _____ L.P. Type: _____

Vehicle I.D. #: _____ Year: _____ Make: _____ Model: _____ Style: _____ Color: _____

***** PROTECTED PERSON INFORMATION *****

NAME OF PROTECTED PERSON: _____ SEX: (circle one) M F

RACE: (circle one) Indian Asian Black White Unknown Ethnicity: (circle one) Hispanic Non-Hispanic Unknown

DATE OF BIRTH: _____ SOCIAL SECURITY NO. (PSN): _____

Street: _____ City: _____ State: _____ Zip: _____ COUNTY: _____

Protected Person Employment Information: (use additional pages if necessary)

Place of Employment Name: _____ Address: _____

_____ City: _____ State: _____ Zip: _____

Place of Employment Name: _____ Address: _____

_____ City: _____ State: _____ Zip: _____

***** PROTECTED CHILD INFORMATION *****
(Use additional pages if necessary)

Name of Protected Child: _____ Sex: (circle one) M F

Race: (circle one) Indian Asian Black White Unknown Ethnicity: (circle one) Hispanic Non-Hispanic Unknown

Date of Birth: _____ Child Care or School Facility Name: _____

Address: _____ City: _____ State: _____ Zip: _____

Name of Protected Child: _____ Sex: (circle one) M F

Race: (circle one) Indian Asian Black White Unknown Ethnicity: (circle one) Hispanic Non-Hispanic Unknown

Date of Birth: _____ Child Care or School Facility Name: _____

Address: _____ City: _____ State: _____ Zip: _____

Name of Protected Child: _____ Sex: (circle one) M F

Race: (circle one) Indian Asian Black White Unknown Ethnicity: (circle one) Hispanic Non-Hispanic Unknown

Date of Birth: _____ Child Care or School Facility Name: _____

Address: _____ City: _____ State: _____ Zip: _____

To be filled out by Criminal Justice/Law Enforcement Official:

SID #: _____ FBI #: _____ FPC: _____ MNU: _____

CHAPTER 20—INDICES, CROSS REFERENCES, ACRONYMS, AND CITATION REFERENCES

20.1 *Indices list.*

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Benchbook

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[Statutes](#)

[All statutes by topic](#)

[Federal statutes by citation](#)

[Texas statutes by citation](#)

[Texas statutes—guide to citation abbreviations](#)

Topical Index

20.2 [Online resources by topic.](#)

<u>TOPIC</u>	<u>ORGANIZATION</u>
Children	American Bar Assn. Dept. of Justice Family Violence Prevention Fund Internat'l Child Abduction Database Nat'l Ctr. For Missing and Exploited Children Nat'l Council of Juvenile and Family Court Judges State Department
Courts	Center for Court Innovation Nat'l Ctr. For State Courts Nat'l Council of Juvenile and Family Court Judges Nat'l Institute of Justice-
Crime statistics	Bureau of Justice Statistics Federal Bureau of Investigation Nat'l Coalition of Anti-Violence Programs Nat'l Crime Victims Law Institute State Department
Deaf or hard of hearing Women	Nat'l Online Resource Ctr. on Violence Against Women
Domestic violence	Abuse, Rape, Domestic Violence Aid and Resource Collection American Bar Assn. American Probation and Parole Assn. Family Violence Prevention Fund Ford Foundation Nat'l Ctr. For State Courts Nat'l Coalition against Dom. Viol. Nat'l Coalition of Anti-Violence Programs Nat'l Council of Juvenile and Family Court Judges Nat'l Crime Victims Law Institute Nat'l Institute of Justice- Nat'l Network to End Domestic Violence Nat'l Online Resource Ctr. on Violence Against
Women	Office of Violence Against Women Texas Council on Family Violence Violence Against Women On-line Resources WomensLaw.org

Firearms	Bureau of Alcohol, Tobacco, and Firearms Dept. of Justice
Hate crimes	American Psychological Assn.
Health	Center for Disease Control
Human trafficking	American Bar Assn. Dept. of Health and Human Services Family Violence Prevention Fund Internat'l Child Abduction Database Nat'l Ctr. For Missing and Exploited Children State Department
Immigrants	Family Violence Prevention Fund
Interpreters, see LEP	
Judiciary	American Bar Assn. Judicial Education Center Nat'l Ctr. For State Courts Nat'l Council of Juvenile and Family Court Judges Nat'l Institute of Justice-
Lawyers	American Bar Assn.
Lesbian, Gay, Bisexual, Transgendered, see Minorities	
Lethality	Dangerassessment. org
Limited English Proficiency	Dept. of Justice Nat'l Ctr. For State Courts Nat'l Institute of Justice-
Minorities	Asian and Pacific Islanders Institute on Dom. Viol. Asian American Task Force on Dom. Viol. Institute Dom. Viol. In African-American Community Nat'l Ctr. For Crime Victims Resource Library Nat'l Coalition of Anti-Violence Programs Nat'l Online Resource Ctr. on Violence Against
Women	
Parental kidnapping	American Bar Assn. International Child Abduction Database Nat'l Ctr. For Missing and Exploited Children

Protective orders	American Bar Assn. Nat'l Ctr. On Protection Orders-Full Faith and Credit Texas Municipal Court Education Center
Rape	Abuse, Rape, Domestic Violence Aid and Resource Collection
Stalking	Stalking Resource Center
Victim safety	American Bar Assn.

20.3 Abstract of journal articles by author.

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [XYZ](#)

A

AUTHOR: Linda Askowitz and Michael Graham
JOURNAL: [15 Cardozo L. Rev. 2027](#) (April 1994)

ARTICLE: THE RELIABILILTY OF EXPERT
PSYCHOLOGICAL TESTMONY IN CHILD SEXUAL ABUSE
PROSECUTIONS

AUTHOR: Michelle Aulivola

ARTICLE: OUTING DOMESTIC VIOLENCE: AFFORDING
APPROPRIATE PROTECTIONS TO GAY AND LESBIAN
VICTIMS

B

AUTHOR: Donna D. Bloom
JOURNAL: 36 St. Mary's L. Journal 717 (2005)

ARTICLE: "UTTER EXCITEMENT" ABOUT NOTHING: WHY
DOMESTIC VIOLENCE EVIDENCE-BASED PROSECUTION
WILL SURVIVE *CRAWFORD v. WASHINGTON*

AUTHOR: Katherine G. Breitenbach
JOURNAL: [71 Albany L. Rev. 1255](#) (2008)

ARTICLE: BATTLING THE THREAT: THE SUCCESSFUL
PROSECUTION OF DOMESTIC VIOLENCE AFTER *DAVIS V.*
WASHINGTON

AUTHOR: Carol Bruch
JOURNAL: [35 Fam. L. Q. 527](#) (2001)

ARTICLE: PARENTAL ALIENATION SYNDROME AND
PARENTAL ALIENATION: GETTING IT WRONG IN CHILD
CUSTODY CASES

AUTHOR: Sarah Buel
JOURNAL: 28 Colo. Law 19 (1999)

ARTICLE: FIFTY OBSTACLES TO LEAVING, A.K. A., WHY ABUSE VICTIMS STAY

AUTHOR: John M. Burman
JOURNAL: 9 Michigan Gender & Law 207 (2003)

ARTICLE: LAWYERS AND DOMESTIC VIOLENCE: RAISING THE STANDARD OF PRACTICE

C

AUTHOR: Campbell JC, Webster D, Koziol-McLain J, et al.
JOURNAL: Am J. Public Health. 2003; 93:1089–97.

TITLE: RISK FACTORS FOR FEMICIDE IN ABUSIVE RELATIONSHIPS: RESULTS FROM A MULTISITE CASE CONTROL STUDY

AUTHOR: John Castellanos
JOURNAL: LEXIS EMERGING ISSUES

ARTICLE: THE LEGAL SIGNIFICANCE AND PRACTICAL IMPACT OF *GILES V. CALIFORNIA*

AUTHOR: Andrew Cohen
JOURNAL: [74 Geo. L. J. 429,443-48](#) (1985).

ARTICLE: THE UNRELIABILITY OF EXPERT TESTIMONY ON THE TYPICAL CHARACTERISTICS OF SEXUAL ABUSE VICTIMS

AUTHOR: Patricia Cole and Sarah Buel
JOURNAL: 7 Georgetown J. on Poverty L. and Pol’y 307 (2000)

ARTICLE: SAFETY AND FINANCIAL SECURITY FOR BATTERED WOMEN; NECESSARY STEPS FOR TRANSITIONING FROM WELFARE TO WORK

AUTHOR: Dana Conner
JOURNAL: [79 Temple L. Rev. 877](#) (Fall 2006)

ARTICLE: TO PROTECT OR TO SERVE: CONFIDENTIALITY, CLIENT PROTECTION, AND DOMESTIC VIOLENCE

AUTHOR: Mark Correro

JOURNAL: [45 S. Tex. L. Rev. 419](#) (Spring 2004)

ARTICLE: GET A DIVORCE—BECOME A FELON:
US V. EMERSON

D

AUTHOR: Laurie Dore

JOURNAL: [56 Ohio St. L.J. 665](#) (1995).

ARTICLE: DOWNWARD ADJUSTMENT AND THE SLIPPERY
SLOPE: THE USE OF DURESS IN DEFENSE OF BATTERED
OFFENDERS

AUTHOR: Kevin Douglas and Donald Dutton

JOURNAL: 6 *Aggression and Violent Behavior* 519 (2000).

ARTICLE: ASSESSING THE LINK BETWEEN STALKING AND
DOMESTIC VIOLENCE

AUTHOR: Mary Ann Dutton

JOURNAL: [21 Hofstra L. Rev. 1191, 1202](#) (1993).

ARTICLE: UNDERSTANDING WOMEN'S RESPONSES TO
DOMESTIC VIOLENCE: A REDEFINITION OF BATTERED
WOMAN'S SYNDROME

E

AUTHOR: Deborah Epstein

JOURNAL: 11 *Yale J. of Law and Feminism* 3 (1999)

ARTICLE: EFFECTIVE INTERVENTION IN DOMESTIC
VIOLENCE CASES: RETHINKING ROLES OF PROSECUTORS,
JUDGES, AND THE COURT SYSTEM

AUTHOR: David Faigman and Amy Wright

JOURNAL: [39 Ariz. L. Rev. 67](#) (1997)

ARTICLE: THE BATTERED WOMAN SYNDROME IN THE AGE
OF SCIENCE

F

G

AUTHOR: Raquel Gabriel
JOURNAL: [43 California Western L. Rev. 417](#) (2007)

ARTICLE: INTIMATE PARTNER VIOLENCE IN THE GLBT COMMUNITIES: A SELECTED ANNOTATED BIBLIOGRAPHY

AUTHOR: Deborah Goelman
JOURNAL: 13 Colum. J. Of Gender & L. 101 (2004)

ARTICLE: SHELTER FROM THE STORM: USING JURISDICTIONAL STATUTES TO PROTECT VICTIMS OF DOMESTIC VIOLENCE AFTER THE VIOLENCE AGAINST WOMEN ACT

AUTHOR: Leigh Goodman
JOURNAL: [23 St. Louis U. Pub. L. Rev. 7](#) (2004)

ARTICLE: THE LEGAL RESPONSE TO DOMESTIC VIOLENCE: PROBLEMS AND POSSIBILITIES

AUTHOR: Amy Gottlieb
JOURNAL: 227 N.J. Law 18 (April 2004)

ARTICLE: THE VIOLENCE AGAINST WOMEN ACT: REMEDIES FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

AUTHOR: S. Graham-Bermann and J. Seng
JOURNAL: Journal of Pediatrics. 146(3):309-10

ARTICLE: VIOLENCE EXPOSURE AND TRAUMATIC STRESS SYMPTOMS AS ADDITIONAL PREDICTORS OF HEALTH PROBLEMS IN HIGH-RISK CHILDREN

H

AUTHOR: Cheryl Hanna
JOURNAL: [109 Harv. L. Rev. 1849](#) (June 1996)

ARTICLE: NO RIGHT TO CHOOSE: MANDATED VICTIM PARTICIPATION IN DOMESTIC VIOLENCE PROSECUTIONS

AUTHOR: Anna Hanson
JOURNAL: [63 Ark. L. Rev. 177](#) (2010)

ARTICLE: THE U VISA: IMMIGRATION LAW'S BEST KEPT SECRET

AUTHOR: G. M. Herek et al.

JOURNAL: 12 Journal of Interpersonal Violence 19512, nos. 2, 4, (1997): 195-215

ARTICLE: HATE CRIME VICTIMIZATION AMONG LESBIAN, GAY, AND BISEXUAL ADULTS

AUTHOR: C. Quince E. Hopkins et al.

JOURNAL: [23 St. Louis U. Pub. L. Rev. 289](#) (2004)

ARTICLE: APPLYING RESTORATIVE JUSTICE TO ONGOING INTIMATE VIOLENCE: PROBLEMS AND POSSIBILITIES

I

J

AUTHOR: Carol Jordan

JOURNAL: [38 Brandeis L. J. 513](#) (2000)

ARTICLE: STALKING: CULTURAL, CLINICAL, AND LEGAL CONSIDERATIONS

K

AUTHOR: M. Kernic, et al.

JOURNAL: 27(11) Child Abuse & Neglect 1231 (November 2003).

ARTICLE: BEHAVIORAL PROBLEMS AMONG CHILDREN WHOSE MOTHERS ARE ABUSED BY AN INTIMATE PARTNER

L

AUTHOR: Lieberman, Alicia F., et al.

JOURNAL: Journal American Academy of Child Adolescent Psychiatry. 14(12): 1241-1248.

ARTICLE: 2005. TOWARD EVIDENCE BASED TREATMENT: CHILD-PARENT PSYCHOTHERAPY WITH PRE-SCHOOLERS EXPOSED TO MARITAL VIOLENCE.

AUTHOR: Tom Lininger

JOURNAL: [54 Hastings L. J. 525](#) (March 2003)

ARTICLE: A BETTER WAY TO DISARM BATTERERS

AUTHOR: Tom Lininger

JOURNAL: [91 Va. L. Rev. 747](#) (May 2005)

ARTICLE: PROSECUTING BATTERERS AFTER *CRAWFORD*

AUTHOR: Tom Lininger

JOURNAL: [85 Tex. L. Rev. 271](#) (December 2006)

ARTICLE: RECONCEPTUALIZING CONFRONTATION AFTER *DAVIS*

AUTHOR: Marc McAllister

JOURNAL: 59 Case W. Res. 393 (Winter 2009)

ARTICLE: DOWN BUT NOT OUT: WHY GILES LEAVES FORFEITURE BY WRONGDOING STILL STANDING

M

AUTHOR: J. McClennen

JOURNAL: Journal of Interpersonal Violence 20, (2005): 149

ARTICLE: INTIMATE PARTNER VIOLENCE BETWEEN SAME-GENDER PARTNERS: RECENT FINDINGS AND FUTURE RESEARCH

AUTHOR: Judith McFarlane, et al.

JOURNAL: 94(4) Am. J. Public Health 613 (April 2004)

ARTICLE: PROTECTION ORDERS AND INTIMATE PARTNER VIOLENCE: AN 18-MONTH STUDY OF 150 BLACK, HISPANIC, AND WHITE WOMEN

AUTHOR: Judith McFarlane, et al.

JOURNAL: 112 (3 Pt1) Pediatrics 202 (September 2003)

ARTICLE: BEHAVIORS OF CHILDREN WHO ARE EXPOSED AND NOT EXPOSED TO INTIMATE PARTNER VIOLENCE: AN ANALYSIS OF 330 BLACK, WHITE, AND HISPANIC CHILDREN

AUTHOR: Melanie L. Mecka
JOURNAL: [29 Rutgers L. J. 607](#) (Spring 1998)

ARTICLE: SEIZING THE AMMUNITION FROM DOMESTIC VIOLENCE: PROHIBITING THE OWNERSHIP OF FIREARMS BY ABUSERS

AUTHOR: Kristian Miccio
JOURNAL: [58 Albany L. Rev. 1087](#) (Spring 1995)

ARTICLE: IN THE NAME OF MOTHERS AND CHILDREN: DECONSTRUCTING THE MYTH OF THE PASSIVE BATTERED MOTHER

AUTHOR: Linda G. Mills
JOURNAL: [113 Harv. L. Rev. 550](#) (December 1999)

ARTICLE: KILLING HER SOFTLY: INTIMATE ABUSE AND THE VIOLENCE OF STATE INTERVENTION

AUTHOR: Nichole M. Mordini
JOURNAL: [52 Drake L. Rev. 295](#) (Winter 2004)

ARTICLE: MANDATORY STATE INTERVENTIONS FOR DOMESTIC ABUSE CASES: AN EXAMINATION OF THE EFFECTS ON VICTIM SAFETY AND AUTONOMY

AUTHOR: Deborah A. Morgan
JOURNAL: [54 Am. U.L. Rev. 485](#) (December 2004)

ARTICLE: ACCESS DENIED: BARRIERS TO REMEDIES UNDER THE VIOLENCE AGAINST WOMEN ACT FOR LIMITED ENGLISH PROFICIENT BATTERED IMMIGRANT WOMEN

AUTHOR: Adele M. Morrison
JOURNAL: [39 U.C. Davis L. Rev. 1061](#) (March 2006)

ARTICLE: DECONSTRUCTING THE IMAGE REPERTOIRE OF WOMEN OF COLOR: CHANGING THE DOMESTIC VIOLENCE (DIS)COURSE: MOVING FROM WHITE VICTIM TO MULTI-CULTURAL SURVIVOR

AUTHOR: Hiroshiri Motomura
JOURNAL: [59 Duke L. J. 1723](#) (2010)

ARTICLE: THE RIGHTS OF OTHERS: LEGAL CLAIMS AND IMMIGRATION OUTSIDE THE LAW

AUTHOR: Jane C. Murphy

JOURNAL: 11 Am. U.J. Gender Soc. Pol’y & L. 499 (2003)

ARTICLE: ENGAGING WITH THE STATE: THE GROWING RELIANCE ON LAWYERS AND JUDGES TO PROTECT BATTERED WOMEN

N

AUTHOR: Nicolaidis C, Curry MA, Ulrich Y, et al.

JOURNAL: J Gen Intern Med. 2003; 18:788–94

ARTICLE: COULD WE HAVE KNOWN? A QUALITATIVE ANALYSIS OF DATA FROM WOMEN WHO SURVIVED AN ATTEMPTED HOMICIDE BY AN INTIMATE PARTNER

O

P

AUTHOR: Janet Parrish

JOURNAL: 11 Wis. Women’s L.J. 75 (1996)

ARTICLE: TREND ANALYSIS: EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS IN CRIMINAL CASES

AUTHOR: Laurie Pompa

JOURNAL: [16 Tex. J. Women & L. 241](#) (Spring 2007)

ARTICLE: THE FAMILY VIOLENCE OPTION IN TEXAS: WHY IT IS FAILING TO AID DOMESTIC VIOLENCE VICTIMS ON WELFARE AND WHAT TO DO ABOUT IT

Q

AUTHOR: Nicole Quester

JOURNAL: [40 Akron L. Rev. 391](#) (2007)

ARTICLE: REFUSING TO REMOVE AN OBSTACLE TO THE REMEDY: THE SUPREME COURT’S DECISION IN *TOWN OF CASTLE ROCK V. GONZALES*

R

AUTHOR: Myra Raeder

JOURNAL: [67 U. Colo. L. Rev. 789](#) (1996)

ARTICLE: PROVING THE CASE: BATTERED WOMAN AND BATTERER SYNDROME: THE DOUBLE-EDGED SWORD: ADMISSIBILITY OF BATTERED WOMAN SYNDROME BY AND AGAINST BATTERERS IN CASES IMPLICATING DOMESTIC VIOLENCE

AUTHOR: Jody Raphael

JOURNAL: 11 Am. U. J. Gender Soc. Pol’y & L. 367 (2003)

ARTICLE: BATTERING THROUGH THE LENS OF CLASS REAUTHORIZATION ACT

AUTHOR: Thomas C. Riney and Christopher D. Wolek

JOURNAL: [41 S. Tex. L. Rev. 315](#) (Spring 2000)

ARTICLE: HIPPOCRATES ENTERS THE NEW MILLENIUM: TEXAS MEDICAL PRIVILEGES IN THE YEAR 2000

AUTHOR: Audrey Rogers

JOURNAL: 8 Columbia J. of Gender & L. 67 (1998-99)

ARTICLE: PROSECUTORIAL USE OF EXPERT TESTIMONY IN DOMESTIC VIOLENCE CASES: FROM RECANTATION TO REFUSAL TO TESTIFY

AUTHOR: Joanna Rohrpaugh

JOURNAL: 298 Family Court Review Vol. 44, No. 2, pp. 287-299 (April 2006)

ARTICLE: DOMESTIC VIOLENCE IN SAME-GENDER RELATIONSHIPS

AUTHOR: Ralph Ruebner and Eugene Goryynov

JOURNAL: 40 U. Tol. L. Rev. (Spring 2009)

ARTICLE: GILES V. CALIFORNIA: SIXTH AMENDMENT CONFRONTATION RIGHT, FORFEITURE BY WRONGDOING, AND A MISGUIDED DEPARTURE FROM THE COMMON LAW AND THE CONSTITUTION

S

AUTHOR: Emily Sack
JOURNAL: 98 Nw. U.L. Rev. (Spring 2004)

**ARTICLE: DOMESTIC VIOLENCE ACROSS STATE LINES:
THE FULL FAITH AND CREDIT CLAUSE, CONGRESSIONAL
POWER, AND INTERSTATE ENFORCEMENT OF PROTECTION
ORDERS**

AUTHOR: Joan Schroeder
JOURNAL: [76 Iowa L. Rev. 553](#) (1991)

**ARTICLE: USING BATTERED WOMAN SYNDROME
EVIDENCE IN THE PROSECUTION OF A BATTERER**

AUTHOR: Malinda Seymore
JOURNAL: [2 Tex. Wesleyan L. Rev. 239](#) (Fall 1999)

**ARTICLE: AGAINST THE PEACE AND DIGNITY OF THE
STATE: SPOUSAL VIOLENCE AND SPOUSAL PRIVILEGE**

AUTHOR: John Skakun III
JOURNAL: [75 U. Chi. L. Rev. 1833](#) (Fall 2008)

**ARTICLE: VIOLENCE AND CONTACT: INTERPRETING
"PHYSICAL FORCE" IN THE LAUTENBERG AMENDMENT**

AUTHOR: N. J. Sokoloff and I. Dupont,
JOURNAL: 11 Violence Against Women 38-64 (2005)

**ARTICLE: DOMESTIC VIOLENCE AT THE INTERSECTIONS
OF RACE, CLASS, AND GENDER: CHALLENGES AND
CONTRIBUTIONS TO UNDERSTANDING VIOLENCE AGAINST
MARGINALIZED WOMEN IN DIVERSE COMMUNITIES**

AUTHOR: Sarah L. Solon, Ed.
JOURNAL: 10 Geo. J. Gender & Law 369

**ARTICLE: TENTH ANNUAL REVIEW OF GENDER AND
SEXUALITY: CRIMINAL LAW CHAPTER: DOMESTIC
VIOLENCE**

AUTHOR: R. L. Stotzer
JOURNAL: 14 Aggression and Violent Behavior no. 3, P. 171 (2009)

**ARTICLE: VIOLENCE AGAINST TRANSGENDER PEOPLE: A
REVIEW OF UNITED STATES DATA**

AUTHOR: Lindsay Strauss

JOURNAL: 19 Cornell J. L. & Pub. Pol'y 495 (Spring 2010)

**ARTICLE: ADULT DOMESTIC TRAFFICKING AND THE
WILLIAM WILBERFORCE TRAFFICKING VICTIMS
PROTECTION REAUTHORIZATION ACT**

AUTHOR: Roland Summit

JOURNAL: 7 Child Abuse & Neglect 177 (1983)

**ARTICLE: THE CHILD SEXUAL ABUSE ACCOMMODATION
SYNDROME**

T

AUTHOR: Margaret Tepo

JOURNAL: [91 A.B.A.J. 42](#) (September 2005)

**ARTICLE: WHEN HOME COMES TO WORK: EXPERTS SAY
EMPLOYERS SHOULD SEEK A BALANCED APPROACH IN
DEALING WITH WORKERS FACING DOMESTIC VIOLENCE**

AUTHOR: Melissa Trepiccione

JOURNAL: [69 Fordham L. Rev. 1487](#) (March 2001)

**ARTICLE: AT THE CROSSROADS OF LAW AND SOCIAL
SCIENCE: IS CHARGING A BATTERED MOTHER WITH
FAILURE TO PROTECT HER CHILD AN ACCEPTABLE
SOLUTION WHEN HER CHILD WITNESSES DOMESTIC
VIOLENCE?**

AUTHOR: James Truss

JOURNAL: 26 St. Mary's L. J. 1149 (1995)

**ARTICLE: THE SUBJECTION OF WOMEN:
STILLUNFULFILLED PROMISES OF PROTECTION FOR
WOMEN VICTIMS OF DOMESTIC VIOLENCE**

U

V

AUTHOR: Jerry von Tralge
JOURNAL: 27 W. St. U. L. Rev. (1999/2000)

ARTICLE: VICTIMIZATION DYNAMICS: THE PSYCHO-SOCIAL AND LEGAL IMPLICATIONS OF FAMILY VIOLENCE DIRECTED TOWARD WOMEN AND THE IMPACT ON CHILD WITNESSES

W

AUTHOR: Byron Warnken
JOURNAL: [37 U. Balt. L. Rev. 203](#) (Winter 2008)

ARTICLE: "FORFEITURE BY WRONGDOING" AFTER CRAWFORD V. WASHINGTON: MARYLAND'S APPROACH BEST PRESERVES THE RIGHT TO CONFRONTATION

AUTHOR: Richard Warshack
JOURNAL: [37 Fam. L. Q. 273](#) (2003)

ARTICLE: BRINGING SENSE TO PARENTAL ALIENATION: A LOOK AT THE DISPUTES AND THE EVIDENCE

AUTHOR: Deborah Weissman
JOURNAL: [2007 B.Y.U. L. Rev. 387](#) (2007)

ARTICLE: THE PERSONAL IS POLITICAL - AND ECONOMIC: RETHINKING DOMESTIC VIOLENCE

AUTHOR: Weisz AN, Tolman RM, Saunders DG.
JOURNAL: 15 J. Interpers. Violence 75 (2000)

ARTICLE: ASSESSING THE RISK OF SEVERE DOMESTIC VIOLENCE: THE IMPORTANCE OF SURVIVORS' PREDICTIONS

AUTHOR: R. Whitaker, S. Orzol, and R. Kahn
JOURNAL: 63 Archive of General Psychiatry. 551 (2000).

ARTICLE: MATERNAL MENTAL HEALTH, SUBSTANCE USE, AND DOMESTIC VIOLENCE IN THE YEAR AFTER DELIVERY AND SUBSEQUENT BEHAVIOR PROBLEMS IN CHILDREN AT AGE 3 YEARS

AUTHOR: C Whitfield, R. Anda , S Dube, and V. Felittle
JOURNAL: 18(2) Journal of Interpersonal Violence. 166 (2003)

ARTICLE: VIOLENT CHILDHOOD EXPERIENCES AND THE RISK OF INTIMATE PARTNER VIOLENCE IN ADULTS ASSESSMENT IN A LARGE HEALTH MAINTENANCE ORGANIZATION

AUTHOR: V. Wu, et al.
JOURNAL: 11(2) Trauma, Violence, & Abuse 71 (April 2010)

ARTICLE: PATTERN OF PHYSICAL INJURY ASSOCIATED WITH INTIMATE PARTNER VIOLENCE IN WOMEN PRESENTING TO THE EMERGENCY DEPARTMENT: A SYSTEMATIC REVIEW AND META-ANALYSIS

X,Y,Z

AUTHOR: Scott Young
JOURNAL: [37 Tex. Tech L. Rev. 327](#) (Winter 2005)

ARTICLE: A PRESUMPTION FOR SUPERVISED VISITATION IN TEXAS: UNDERSTANDING AND STRENGTHENING *FAMILY CODE SECTION 153.004(e)*

AUTHOR: Lauren Zykorie
JOURNAL: [11 Tex. J. Women & L. 275](#) (Spring 2002)

ARTICLE: CAN A DOMESTIC VIOLENCE ADVOCATE TESTIFY AS AN EXPERT WITNESS? FOLLOW THE ABC'S OF EXPERT TESTIMONY STANDARDS IN TEXAS COURTS: ASSIST THE TRIER OF FACT BE RELEVANT AND RELIABLE CREDENTIALS MUST BE ESTABLISHED

20.4 Abstract of journal articles by topic.

<u>TOPIC</u>	<u>AUTHOR</u>
Attorney	
Representation of domestic violence victims	Burman Conner Goodman
Battered Woman Syndrome	
Child neglect	Miccio Trepiccione
Defense	Dore Raeder
Dynamics of victimization	Von Tralge
Employment issues	Tepo
Expert testimony	Dutton Parrish
Minority communities	Morrison
Prosecution tool	Schroeder
Recantation	Hanna
Theoretical flaws	Faigman
Batterers	
Battered woman syndrome in prosecution of	Raeder Schroeder
Disarming	Linger Mecka
Child	
Effect of having abused mother	Kernic McFarlane

Neglect	Miccio Trepiccione
Sexual abuse accommodation syndrome	Askowitz Flint Summit
Supervised visitation laws in Texas	Young
Witness	Von Tralge

Confrontation clause

Crawford v. Washington	Bloom Lininger Warnken
Davis v. Washington	Breitenbach
Giles v. California	Castellanos Ruebner

Domestic violence

Child custody (supervised visitation)	Young
Civil remedies	
Town of Castle Rock v. Gonzales	Quester
Criminal justice system's response to	Epstein Murphy Solon Truss
Economic and social issues	
Politics	Weissman
Public benefits	Cole Pompa Susman
Social class	Raphael

Federal laws addressing	Goelman Sack
Gay and lesbian victims	Aulivola Gabriel Rohrpaugh
Human trafficking	Strauss
Immigrant domestic violence victims	Hanson Morgan Strauss
Lethality assessments	Campbell
Mandatory arrest and prosecution	Hanna Mills Mordini
Minorities	
Lesbian, gay, bisexual, transgendered	Aulivola Gabriel Rohrpaugh
Women of color	Morrison Raphael
Representation of	Burman Conner
Restorative justice	Hopkins
Social and economic issues, see Economics	
Victims	
Minority	Aulivola Gabriel Morrison Rohrpaugh
Recantation	Hanna Rogers

Employment of battered women

Tepo

Ethical duties, see Attorneys

Evidence

Child witness

Von Tralge

Excited utterance

Crawford v. Washington

Bloom
Lininger
Warnken

Forfeiture by wrongdoing

Giles v. California

Castellanos
Lininger
Ruebner

Medical testimony privileges

Riney

Testimonial hearsay

Crawford v. Washington

Bloom

Davis v. Washington

Breitenbach
Lininger

Experts

Advocate as expert

Zykorie

Battered Woman Syndrome

Dore
Dutton
Faigman
Parrish
Raeder

Child sexual abuse accommodation syndrome

Askowitz
Flint
Summit

Sexual assault victims, characteristics of

Cohen

Firearms

Disarming batterers	Lininger Mecka
Lautenberg amendment	Skakun
U.S. v. Emerson	Correro
Full Faith and Credit, see Interstate enforcement	
Gun Control Act, see Firearms	
Human trafficking	Strauss
Immigration	
Battered immigrant women	Gottlieb Morgan
Legal rights	Motomura
Visas for domestic violence victims	Hanson
Interstate enforcement of domestic violence laws	Goelman Sack
Lawyer, see Attorney	
Limited English Proficiency	
Battered immigrant women	Morgan
Minority communities	
Lesbian, gay, bisexual, transgendered	Aulivola Gabriel
Women of color	Morrison
Parental alienation syndrome	Bruch Warschack
Prosecution of domestic violence crimes	
Confrontation clause issues	Bloom Breitenbach Castellanos Lininger

	Warnken
Lack of victim cooperation	Hanna Mills Mordini Rogers
Protective order effect on subsequent violence	McFarlane
Restorative Justice	Hopkins
Socio-economic issues, see Domestic violence, economics	
Stalking	Douglas Murphy, C.
Texas laws	
Advocate as expert witness	Zykorie
Child custody and supervised visitation	Young
Medical evidentiary privileges	Riney
Welfare (the Family Violence Option)	Pompa
Victim	
Child	
Neglect	Miccio Trepiccione
Sexual abuse accommodation syndrome	Summit
Witness	Von Tralge
Civil remedies	Quester
Dynamics of victimization	Von Tralge
Failure to cooperate with prosecution	Hanna Rogers
Employment of	Tepo

Human trafficking	Strauss
Immigrant	Hanson Morgan
Lethality assessments	Campbell
Minority	Aulivola Gabriel Morrison Rohrpaugh
Physical injury associated with battered women	Wu
Public benefits	Cole Pompa
Sexual assault	Cohen
Social class of	Raphael Weissman
Violence Against Women Act	Murphy

20.5 *Texas cases by topic.*

[A](#) [B](#) [C](#) [D](#) [E](#) [F](#) [G](#) [H](#) [I](#) [J](#) [K](#) [L](#) [M](#) [N](#) [O](#) [P](#) [Q](#) [R](#) [S](#) [T](#) [U](#) [V](#) [W](#) [X](#) [Y](#) [Z](#)

[A](#)

Abuse of discretion standard

Appointment of counsel for respondent

Cox v. Simmons, No. 07-07-0320-CV, [2007 Tex. App. Lexis 6847](#)
Striedel v. Striedel, [15 S.W.3d 163](#)

Conservatorship

Clark v. Funk, No. 08-97-00634-CV, [2000 Tex. App. Lexis 8730](#), 2000
WL 1203942
Ewing v. Ewing, No. 04-96-323-CV, [1997 Tex. App. Lexis 2667](#)
Phillips v. Phillips, No. 01-97-01035CV, [1999 Tex. App. Lexis 9369](#)

Credibility issues

Godfrey v. Godfrey, No. 03-07-0220-CV, [2008 Tex. App. Lexis 6022](#)

Divorce

Linville v. Lillard, No. 01-90-0367-CV, [1991 Tex. App. Lexis 364](#)

Divorce protective order

Godfrey v. Godfrey, No. 03-07-0220-CV, [2008 Tex. App. Lexis 6022](#)
Linville v. Lillard, No. 01-09-3067-CV, [1991 Tex. App. Lexis 364](#)
Long v. Long, No. 03-97-00073CV, [1997 Tex. App. Lexis 5986](#)

Exclusion of evidence

Ewing v. Ewing, No. 04-96-0343-CV, [1997 Tex. App. Lexis 2667](#)
Fierro v. State, No. 03-05-0266-CR, [2007 Tex. App. Lexis 2160](#)

Interpreters, appointment of

Abdygapparova v. State, [243 S.W.3d 191, 204](#)

Protective order issuance

Godfrey v. Godfrey, No. 03-07-0220-CV, [2008 Tex. App. Lexis 6022](#)
In re Barnes, [127 S.W.3d 843](#)
In re Salgado, [53 S.W.3d 752](#)
Scott v. State ex. Tabler, No. 12-04-041-CV, [2005 Tex. App. Lexis 4198](#)
Taherzadeh v. Ghaleh-Assadi, [108 S.W.3d 927](#)
Thompson v. Thompson-O’Rear, No. 06-03-00129-CV, [2004 Tex. App. Lexis 5033](#)

Award of exclusive possession of property

Scott v. State ex. Tabler, No. 12-04-041-CV, [2005 Tex. App. Lexis 4198](#)

SAPCR

Burns v. Burns, [116 S.W.3d 916](#)
In re JCS, No. 06-04-085-CV, [2005 Tex. App. Lexis 2939](#)

Sufficiency

In re Epperson, [213 S.W.3d 541](#)

Affinity

Hudson v. State, [179 S.W.3d 731](#)

Aggravated assault

Gonzales v. State, [929 S.W.2d 546](#)
Lane v. State, [111 S.W.3d 203](#)
Stephenson v. State, [255 S.W.3d 652](#)
Wallace v. State, No. 05-07-484-CR, [2008 Tex. App. Lexis 1981](#)

By threat

Rogers v. State, [28 S.W.3d 725](#)

Constitutionality

Fife v. State, No. 05-05-0868-CR, [2006 Tex. App. Lexis 4564](#)

Dating violence

Childress v. State, [285 S.W.3d 544](#)

Deadly weapon

Black v. State, No. 02-05-38-CR, [2006 Tex. App. Lexis 7823](#)
Dotson v. State, No. 12-06-123-CR, [2007 Tex. App. Lexis 4399](#)
Fife v. State, No. 05-05-0868-CR, [2006 Tex. App. Lexis 4564](#)
Garcia v. State, [212 S.W.3d 877](#)
Givens v. Givens, No. 05-06-01582-CR, No. 05-06-01583-CR,
No. 05-06-01584-CR, [2008 Tex. App. Lexis 3606](#)
Godfrey v. State, No. 14-04-670-CR, [2005 Tex. App. Lexis 4050](#)
Jaynes v. State, [216 S.W.3d 839, 846](#)
Lane v. State, [151 S.W.3d 188](#)
Morris v. State, No. 08-02-432-CR, [2004 Tex. App. Lexis 3256](#)
Perez v. State, No. 03-08-715-CR, [2008 Tex. App. Lexis 8963](#)
Rue v. State, [288 S.W.3d 107](#)
Stephenson v. State, [255 S.W.3d 652](#)
Williams v. State, No. 03-07-733-CR, [2008 Tex. App. Lexis 8854](#)

Enhancement

Cooke v. State, Nos. 02-08-026-CR, 02-08-027-CR, 02-08-212-CR,
[2009 Tex. App. Lexis 7539](#)

Family violence

Wallace v. State, No. 05-07-484-CR, [2008 Tex. App. Lexis 1981](#)

Jury instruction

Rogers v. State, [28 S.W.3d 725](#)
Rue v. State, [288 S.W.3d 107](#)

Lesser included offense

Childress v. State, [285 S.W.3d 544](#)
Morris v. State, No. 08-02-4320CR, [2004 Tex. App. Lexis 3256](#)
Rogers v. State, [28 S.W.3d 725](#)

Modification of judgment

Anderson v. State, No 05-08-00864-CR, [2009 Tex. App. Lexis 8640](#)

Revocation of probation

Quintana v. State, No. 14-08-965-CR, [2009 Tex. App. Lexis 2901](#)

Agreed protective order (see also Protective Order)

Interest of IEW, No. 13-09-0216-CV, [2010 Tex. App. Lexis 404](#)
Lee v. State, [799 S.W.3d 750](#)

Appeal

Divorce protective order

Ruiz v. Ruiz, [946 S.W.3d 123](#)
Ulmer v. Ulmer, [130 S.W.3d 294](#)

Protective order standard of review

Clements v. Haskovec, [251 S.W.3d 79](#)
In re Epperson, [213 S.W.3d 541](#)
Thompson v. Thompson-O’Rear, No. 06-03-129-CV, [2004 Tex. App. Lexis 5033](#)
Vongontard v. Tippit, [127 S.W.3d 109](#)

Reform of judgment

Garcia-Hernandez v. State, No. 05-08-00735-CR, [2009 Tex. App. Lexis 2177](#)

Standard of review

Abuse of discretion

In re Epperson, [213 S.W.3d 541](#)

Sufficiency of evidence

Thompson v. Thompson-O’Rear, No. 06-03-129-CV, [2004 Tex. App. Lexis 5033](#)

Arrest, warrantless

Pope v. State, [695 S.W. 341](#)
State v. Parson, [988 S.W.2d 264](#)

Assault

By threat

Carbajal-Morales v. State, No. 05-01-1749-CR, [2003 Tex. App. Lexis 4256](#)
Conner v. State, No. 03-04-306-CR, [2005 Tex. App. Lexis 6448](#)
Grover v. State, No. 14.04-672-CR, [2005 Tex. App. Lexis 10821](#)
Olivas v. State, [203 S.W.3d 341](#)
Rogers v. State, [28 S.W.3d 725](#)

Cross-examination

McCrory v. State, No. 05-06-1163-CR, [2007 Tex. App. Lexis 4200](#)

Deadly weapon

Carbajal-Morales v. State, No. 05-01-1749-CR, [2003 Tex. App. Lexis 4256](#)
Cepeda v. State, No. 04-04-205-CR, [2006 Tex. App. Lexis 2143](#)
Davis v. State, No. 05-05-1694-CR, [2007 Tex. App. Lexis 352](#)
Fife v. State, No. 05-05-868-CR, [2006 Tex. App. Lexis 4564](#)
Garcia v. State, [212 S.W.3d 877](#)
Givens v. Givens, No. 05-06-01582-CR, No. 05-06-01583-CR, No. 05-06-01584-CR, [2008 Tex. App. Lexis 3606](#)
Godfrey v. State, No. 14-04-670-CR, [2005 Tex. App. Lexis 4050](#)
Grover v. State, Ho. 14.04-672-CR, [2005 Tex. App. Lexis 10821](#)
Kingsbury v. State, [14 S.W.3d 405](#)
Lane v. State, [151 S.W.3d 188](#)
Morris v. State, No. 08-02-432-CR, [2004 Tex. App. Lexis 3256](#)
Rue v. State, [288 S.W.3d 107](#)
Williams v. State, No. 03-07-733-CR, [2008 Tex. App. Lexis 8854](#)

Defenses

Accident

Sohail v. State, [264 S.W. 3d 251](#)

Consent

Bufkin v. State, [207 S.W.3d 779](#)

Deadly force to prevent kidnapping

Rue v. State, [288 S.W.3d 107](#)

Necessity

White v. State, No.01-05-514-CR, [2006 Tex. App. Lexis 4463](#)

Self-defense

Hernandez v. State, No. 14-05-00181-CR, [2006 Tex. App. Lexis 6231](#)

Hicks v. State, No. 01-04-0919-CR, [2005 Tex. App. Lexis 4818](#)

Double jeopardy

Morris v. State, No. 08-02-432-CR, [2004 Tex. App. Lexis 3256](#)

Enhancement of punishment

Anderson v. State, No 05-08-00864-CR, [2009 Tex. App. Lexis 8640](#)

Butler v. State, [162 SW3d 727](#)

Cooke v. State, Nos. 02-08-026-CR, 02-08-027-CR, and 02-08-212-CR, [2009 Tex. App. Lexis 7539](#)

Crawford v. State, No. 12-05-00293-CR, [2006 Tex. App. Lexis 6520](#)

Edison v. Edison, [253 S.W.3d 303](#)

Goodwin v. State, [91 S.W.3d 912](#)

Hardy v. State, [187 S.W.3d 232](#)

Henderson v. State, [208 S.W.3d 593](#)

King v. State, No. 03-01-00531-CR, [2003 Tex. App. Lexis 8499](#)

Manning v. State, [112 S.W.3d 251](#)

Manuel v. State, No. 01-04-00282-CR, [2005 Tex. App. Lexis 3502](#)

Scott v. State, No. 14-06-00860-CR, [2007 Tex. App. Lexis 9273](#)

Sheppard v. State, [5 S.W.3d 338](#)

Torres v. State, No. 08-03-00084-CR, [2005 Tex. App. Lexis 1333](#)

Zavala v. State, No. 03-05-00051-CR, [2007 Tex. App. Lexis 361](#)

Evidence

Insufficient

Babb v. State, No. 09-08-258-CR, [2009 Tex. App. Lexis 9079](#)

Williams v. State, [216 S.W.3d 44](#)

Sufficient

Duran v. State, No. 13-07-659-CR, [2008 Tex. App. Lexis 6853](#)

Edison v. Edison, [253 S.W.3d 303](#)

Jarrell v. State, No. 01-03-0836-CR, [2004 Tex. App. Lexis 9342](#)

Perez v. State, No. 03-08-715-CR, [2009 Tex. App. Lexis 8963](#)

Quintana v. State, No. 14.-8-965-CR, [2009 Tex. App. Lexis 2901](#)

Stephenson v. State, [255 S.W.3d 652](#)

Todd v. State, No. 08-05-011-CR, [2006 Tex. App. Lexis 8145](#)

Vinson v. State, [221 S.W.3d 256](#)

Word v. State, No. 11-03-00403-CR, [2005 Tex. App. Lexis 3256](#)

Waiver of cross examination

Gomez v. State, [183 S.W.3d 86](#)

Extrinsic evidence

Defensive use of

McCrorry v. State, No. 05-06-1163-CR, [2007 Tex. App. Lexis 4200](#)

Family violence

Butler v. State, [162 SW3d 727](#)

Carter v. State, [150 S.W.3d 230](#)

Goodwin v. State, [91 S.W.3d 912](#)

King v. State, No. 03-01-00531-CR, [2003 Tex. App. Lexis 8499](#)

Ledet v. State, No. 14-04-0739-CR, [2006 Tex. App. Lexis 1556](#)

Manuel v. State, No. 01-04-00282-CR, [2005 Tex. App. Lexis 3502](#)

Merrell v. State, No. 14-08-0782-CR, [2009 Tex. App. Lexis 5518](#)

Pierce v. State, No. 04-02-0749-CR, [2003 Tex. App. Lexis 7307](#)

Salazar v. State, No. 01-04-1190-CR, [2005 Tex. App. Lexis 9600](#)

Salguero v. State, No. 01-01-00508-CR, [2002 Tex. App. Lexis 9104](#)

Scott v. State, No. 14-06-860-CR, [2007 Tex. App. Lexis 9273](#)

State v. Cagle, [77 S.W.3d 344](#)

State v. Eakins, [71 S.W.3d 443](#)

Stoker v. State, No. 03-02-137-CR, [2003 Tex. App. Lexis 1704](#)

Walker v. State, No. 14-02-00716-CR, [2003 Tex. App. Lexis 4304](#)

Mental state

Martinez v. State, No. 03-04-495-CR, [2005 Tex. App. Lexis 7476](#)

Family violence finding

Davila v. State, No. 08-07-041-CR, [2009 Tex. App. Lexis 554](#)
Duran v. State, [239 S.W.3d 444](#)
Fife v. State, No. 05-05-868-CR, [2006 Tex. App. Lexis 4564](#)
Garcia-Hernandez v. State, No. 05-08-00735-CR, [2009 Tex. App. Lexis 2177](#)
Goodwin v. State, [91 S.W.3d 912](#) **Henderson v. State**, [208 S.W.3d 593](#)
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Small v. State, [809 S.W.2d 253](#)

Knowing

Dukes v. State, [239 S.W.3d 444](#)
Harvey v. State, [78 S.W.3d 368](#)
Small v. State, [809 S.W.2d 253](#)
Standifer v. State, Nos. 05-06-078-CR and 05-06-079-CR, [2006 Tex. App. Lexis 9358](#)

Reckless

Harvey v. State, [78 S.W.3d 368](#)

Defenses

Collins v. State, [955 S.W.2d 464](#)
McIntosh v. State, No. 04-08-00713-CR and 04-08-00713-CR, [2009
Tex. App. Lexis 8845](#)
Patton v. State, [835 S.W.2d 684](#)

Double jeopardy

Ex parte Pool, [71 SW.3d 462](#)
Harris v. State, [164 S.W.3d 775](#)

Elements of offense

Dukes v. State, [239 S.W.3d 444](#)
Hernandez v. State, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#)
Slim v. State, No. 05-96-1261-CR, [1998 Tex. App. Lexis 2691](#)

Evidence

Mental state of victim

Sisk v. State, [74 S.W.3d 893](#)

Sufficiency of

Black v. State, No. 02-05-38-CR, [2006 Tex. App. Lexis 7823](#)
Blaylock v. State, No. 05-03-617-CR, [2004 Tex. App. Lexis
9440](#)
Dukes v. State, [239 S.W.3d 444](#)
Feldman v. State, Nos. 11.02-00339-CR to 11-02-00344-CR,
[2004 Tex. App. Lexis 1094](#)
Gardner v. State, No. 05-05-00750-CR, [2006 Tex. App. Lexis
4417](#)
Gould v. State, No. 07-00-0018-CR, [2000 Tex. App. Lexis 5135](#)
McGregor v. State, No. 05-02-0993-CR, [2003 Tex. App. Lexis
9270](#)
Moreno v. State, No. 04-02-00727-CR, [2003 Tex. App. Lexis
5998](#)
Nwankwo v. State, No. 05-03-0630-CR, [2004 Tex. App. Lexis
3953](#)
Pickett v. State, No. 02-03-00373-CR, [2004 Tex. App. Lexis
7307](#)
Polley v. State, No. 11-03-0340-CR, [2004 Tex. App. Lexis
11317](#)
Quintana v. State, No. 14.-8-965-CR, [2009 Tex. App. Lexis
2901](#)

Robertson v. State, [175 S.W.3d 359](#)
Sam v. State, No. 14-08-00407-CR, [2009 Tex. App. Lexis 5121](#)
Sanchez v. State, No. 03-08-00707-CR, [2009 Tex. App. Lexis 7044](#)
Sisk v. State, [74 S.W.3d 893](#)
Spencer-Auber v. State, No. 05-03-01259-CR, [2004 Tex. App. Lexis 1723](#)
Standifer v. State, Nos. 05-06-078-CR and 05-06-079-CR, [2006 Tex. App. Lexis 9358](#)
Stuyvesant v. State, No. 13-05-00664-CR, [2006 Tex. App. Lexis 5512](#)
Torres v. State, No. 02-03-520-CR, [2004 Tex. App. Lexis 7534](#)
Tovar v. State, No. 05-08-00424-CR, [2009 Tex. App. Lexis 678](#)
Wynn v. State, No. 02-04-00394-CR, [2005 Tex. App. Lexis 5155](#)

Guilty Plea

Ramos v. State, [923 S.W.2d 196](#)

Habeas corpus

Ex parte Quintero, No. 03-09-463-CR, [2009 Tex. App. Lexis 117](#)

Harassment

Garcia v. State, [212 S.W.3d 877](#)

Jury charge

Castaneda v. State, No. 08-02-00381-CR, [2004 Tex. App. Lexis 2300](#)
Feldman v. State, Nos. 11-02-00339-CR to 11-02-00344-CR, [2004 Tex. App. Lexis 1094](#)

Gharbi v. State, [131 S.W.3d 481](#)

Harvey v. State, [78 S.W.3d 368](#)

Notice, sufficiency of

Collins v. State, [955 S.W.3d 464](#)

Harvey v. State, [78 S.W.3d 368](#)

Hernandez v. State, No. 01-02-00986-CR, [2003 Tex. App. Lexis 6190](#)

McGiffin v. State, No. 13-03-094-CR, [2004 Tex. App. Lexis 6305](#)

McGregor v. State, No. 05-02-993-CR, [2003 Tex. App. Lexis 9270](#)

Moreno v. State, No. 04-02-00727-CR, [2003 Tex. App. Lexis 5998](#)

Ramos v. State, [923 S.W.2d 196](#)

Small v. State, [809 S.W.2d 253](#)

Standifer v. State, Nos. 05-06-078-CR and 05-06-079-CR, [2006 Tex. App. Lexis 9358](#)

Probation revocation

Anderson v. State, No. 10-07-00294-CR, [2008 Tex. App. Lexis 6132](#)
Quintana v. State, No. 14-08-965-CR, [2009 Tex. App. Lexis 2901](#)

Renewal

Sentencing

Anderson v. State, No. 10-07-0294-CR, [2008 Tex. App. Lexis 6232](#)
Clark v. State, No. 14-07-00276-CR, [2008 Tex. App. Lexis 6620](#)

Stalking

Reasonable to infer intent to cause victim to fear

Sisk v. State, [74 S.W.3d 893](#)

Stay away provisions

Collins v. State, [955 S.W.2d 464](#)
Gardner v. State, No. 05-05-750-CR, [2006 Tex. App. Lexis 4417](#)
McEuen v. State, No. 03-08-0707-CR, [2009 Tex. App. Lexis 7044](#)
McGiffin v. State, No. 13-03-094-CR, [2004 Tex. App. Lexis 6305](#)
McIntosh v. State, No. 04-08-00713-CR and 04-08-00713-CR, [2009 Tex. App. Lexis 8845](#)
Nwankwo v. State, No. 05-03-0630-CR, [2004 Tex. App. Lexis 3953](#)
Patton v. State, [835 S.W.2d 684](#)
Russell v. State, No. 02-05-00346-CR, [2006 Tex. App. Lexis 8866](#)
Sanchez v. State, No. 03-08-00707-CR, [2009 Tex. App. Lexis 7044](#)
Small v. State, [809 S.W.2d 253](#)
Torres v. State, No. 02-03-520-CR, [2004 Tex. App. Lexis 7534](#)

Proof of fact required even if pled unnecessarily

Patton v. State, [835 S.W.2d 684](#)

Threats

Tovar v. State, No. 05-08-424-CR, [2009 Tex. App. Lexis 678](#)

Variance between pleadings and proof

Gharbi v. State, [131 S.W.3d 481](#)
Miles v. State, Nos. 05-06-0668-CR and 05-96-0669-CR, [1998 Tex. App. Lexis 5299](#)
Owens v. State, No. 02-06-145-CR, [2006 Tex. App. Lexis 5756](#)
Ramirez v. State, No. 08-07-00207-CR, [2008 Tex. App. Lexis 6195](#)
Rohrscheib v. State, [934 S.W.2d 909](#)

Warrantless arrest for offense in view of officer

State v. Parson, [988 S.W.2d 264](#)

W

Witness

Child

De Los Santos v. State, [219 S.W.3d 71](#)
Ochs v. Martinez, [789 S.W.3d 949](#)

Expert (see Experts)

Impeachment

Palmer v. State, [222 S.W.3d 92](#)
Perry v. State, [236 S.W.3d 859](#)
Robbins v. State, [88 S.W.3d 256](#)
Schutz v. State, [957 S.W.2d 52](#)

Lay

Legal conclusion

Martin v. State, No. 06-03-0139-CR, [2004 Tex. App. Lexis 7142](#)

Mixed question of law and fact

Lovell v. State, No. 12-04-0291-CR, [2006 Tex. App. Lexis 6062](#)

Opinion testimony

Lovell v. State, No. 12-04-0291-CR, [2006 Tex. App. Lexis 6062](#)
Scott v. State, [222 S.W.3d 820](#)

Truthfulness

Scott v. State, [222 S.W.3d 820](#)

Zavala v. State, No. 03-05-00051-CR, [2007 Tex. App. Lexis 361](#)

XYZ

20.6 *Guide to citations to Texas statutes.*

STATUTE OR CODE	ABBREVIATION
Business and Commerce	Tex. Bus. & Comm. Code
Civil Practice and Remedies	Tex. Civ. Prac. & Rem. Code
Code of Criminal Procedure	Tex. Code Crim. Proc.
Constitution	Tex. Const.
Education	Tex. Educ. Code
Election	Tex. Elec. Code
Family	Tex. Fam. Code
Government	Tex. Gov't Code
Health and Safety	Tex. Health & Safety Code
Human Resources	Tex. Hum. Res. Code
Insurance	Tex. Ins. Code
Occupations	Tex. Occ. Code
Penal	Tex. Penal Code
Property	Tex. Prop. Code
Rules of Civil Procedure	Tex. R. Civ. P.
Rules of Evidence	Tex. R. Evid.

20.7 Acronyms.

<u>Acronym</u>	<u>Full Title</u>
ATF	Alcohol, Tobacco and Firearms Bureau (federal)
CJD	Criminal Justice Division (of the Office of the Governor of Texas)
DHS	Department of Homeland Security
DOJ	Department of Justice (federal)
FBI	Federal Bureau of Investigation
FFL	Federal Firearms Licensee
FORM 4473	ATF form required to be completed by anyone seeking to possess a firearm by transfer from a FFL
FPLS	Federal Parent Locator Service
GCA	Gun Control Act (federal-18 U.S.C. ch. 44 §§ 921-931)
IMBRA	International Marriage Broker Regulation Act (8 U.S.C. §§ 831-834)
MCDV	Misdemeanor Crime of Domestic Violence (GCA term)
NCCUSL	National Conference of Commissioners on Uniform State Laws
NCIC	National Crime Information Center
NCIC POF-	National Crime Information Center Protective Order File
NICS	National Instant Background Check System (of FBI)
NIJ	National Institute for Justice
OAG	Office of the Attorney General of Texas
OVW	Office of Violence Against Women (DOJ division)
PKPA	Parental Kidnapping Prevention Act
PRWOA	Personal Responsibility and Work Opportunities Act
TANF	Temporary Assistance for Needy Families
VAWA	Violence Against Women Act
UCCJA	Uniform Child Custody Jurisdiction Act
UCCJEA	Uniform Child Custody Jurisdiction Enforcement Act
UIEPOA	Uniform Interstate Enforcement of Protection Orders Act
UIFSA	Uniform Interstate Family Support Act
U.S.C.	United States Code

20.8 Statutes by topic.

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

ABBREVIATIONS FOR CITATIONS TO TEXAS LAW
ABBREVIATIONS FOR CITATIONS TO FEDERAL LAW

A

SUBJECT	STATUTE
Abuse	
Defined	FAM § 71.004; § 261.001
Reasonable discipline exception	FAM § 151.001
Access to child, minimal restrictions	FAM § 153.193
Abduction of child	FAM § 53.501-503
Adult, defined	FAM § 101.003
Advocates	
Sexual assault survivors	HSC § 44.051
Sexual assault examinations	CCP art. 56.045
Affinity	GOV'T 573.024
Appeals	
Divorce protective order	FAM § 6.507
Protective order (Title 4)	FAM § 81.009
SAPCR	FAM § 109.001
Arrest	
Family violence offenses, detention	CCP art. 17.291
Warrantless	CCP art. 14.01-14.05
Assistance animals, see Disabled persons	
Assault	

Aggravated	PEN § 22.02
Bodily injury	PEN § 1.07(a)(8)
Defined	PEN § 22.01
Serious bodily injury	PEN § 1.07(a)(46)

B

SUBJECT _____ **STATUTE**

Bail/bond

Denial	CCP art. 17.152;art. 17.152
Conditions	CCP art. 17.40; 17.49
Failure to post bond	CCP art. 17.27
Holds (further detention)	CCP art. 14.01-14.05
	CCP art. 17.291
Notice to prosecutors or victims	CCP art. 17.091; art. 17.29
Reduction	
Safety considerations	CCP art. 56.02

Battering intervention, see Probation

**Battered Immigrant Women Protection Act
Of 2000 (VAWA 2000)** [8 U.S.C.A § 1101](#) (note)

Battered women

Report on syndrome,
see Federal acts>VAWA 1994

Battered Women’s Testimony Act of 1992 [42 U.S.C.A § 10701](#) (note)

Bias or prejudice

Crimes motivated by Hate Crimes Statistics Act, see Federal Acts	CCP art. 42.014
Matthew Shepard-James Byrd Hate Crimes Prevention Act, see Federal acts	
Protective orders	CCP art. 6.08

Bodily injury, see Assault

C

SUBJECT _____ **STATUTE**

Child

Abandonment	PEN § 22.041
Abduction	
Internat'l Child Abduction Remedies Act, see Federal acts	
Parental kidnapping, see Federal acts	
Access, minimal restrictions	FAM § 153.193
Conservatorship, see Child>custody	
Continuous sexual assault, see Sexual Assault	
Custody	
Abduction, see Child>Custody>Interference	
Access, minimal restrictions	FAM § 153.193
Best interests standard	FAM § 153.131, § 153.191, § 153.193
Conservatorship	
Possessory	FAM § 153.193
Presumptions	FAM § 153.004 FAM § 153.131 FAM § 153.191 FAM § 153.193
Emergency order of protection	FAM § 152.204
Family violence, history	FAM § 153.004
Full faith and credit	FAM § 152.001 et seq.
Interference	FAM § 42.01 et seq. PEN § 25.03; § 25.031 FAM § 153.501-.503
Modification of order	FAM § 156.1045
Public policy	FAM § 153.001; § 153.251
Uniform Child Custody Jurisdiction Act	
Uniform Child Custody Jurisdiction and Enforcement Act	FAM § 152.001 et seq.

Uniform Interstate Family Support Act	FAM ch. 159
Visitation	FAM § 153.191 et seq.
Defined	FAM § 101.003
Duty to support	FAM § 154.001
Emergency orders to protect	FAM § 152.204
Family violence issues	
Counseling	FAM § 153.004(2)(D)
Electronic communication	FAM § 153.015(e)
Illegal sexual conduct with a child see Crimes>Illegal sexual conduct	
Injury to	PEN § 22.04
Missing and exploited, see Federal acts	
Passport for minor child	22 CFR § 51.27
Protective and Regulatory Services	HRC § 54.001
Restitution for victims of sexual exploitation, see Federal Acts>VAWA 1994	
SAPCR court,	
appeal of orders	FAM §109.002
arbitration,	FAM § 153.0071
notice after convictions	CCP art. 42.23
civil enforcement of decree	TRCP 308A
confidential information	FAM §105.0011
mediated settlement	FAM § 153.0071
Sexual performance by	PEN § 43.25
Support	
Confidentiality of information	FAM § 159.312
Full Faith and Credit see Federal acts	
Review order	FAM § 233.015
Temporary emergency order (child)	FAM § 152.204

Civil remedies	
Death of unborn child	CPRC § 71.001
Stalking, harassing, etc.	CPRC ch. 85
Civil Rights, see Federal acts	
Clerk of court	
Duty to report hate crime findings	CCP art. 2.211
Confidentiality	
Personal information	BCC § 35.151 BCC § 35.153 BCC § 48.01 et seq. CCP art. 56.81, art. 57.01 FAM. § 159.312 GOV'T § 552.132; § 552.1325; § 552.138 TAX §25.025 TRANS. § 521.275; § 547.615
Voting records	ELEC § 13.002 ELEC § 18.005 ELEC § 18.0051 ELEC § 82.007 ELEC § 84.0021
Consanguinity	GOV'T § 573.021-<u>.023</u>
Conservatorship, see Child>custody	
Contempt	TRCP 308 and 308A
Continuances	
Criminal proceedings	CCP art. 29.14
Protective order proceedings	FAM ch. 84
Convictions	
Notice to SAPCR	CCP art. 42.23
Required findings	CCP art. 42.1031
Required warnings	
Counseling	

Battering intervention	CCP art. 42.12(14)
Child custody	FAM § 153.004
Representative on adult fatality review	HSC § 672.002(d)(9)
Order for family violence	FAM § 153.010

Courts

Authority to search criminal databases	28 U.S.C. §534
Court Training and Improvement grants	see Federal acts>VAWA 2005

Crime of violence defined	18 U.S.C. § 16
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Crimes

Abandoning or endangering a child	PEN § 22.041
Arson	PEN § 28.02
Assault and aggravated assault, see Assault	
Continuous violence against the family	PEN § 25.11
Continuous sexual assault of a child, see Sexual Assault	
Crime motivated by bias or prejudice	CCP art. 6.08
Criminal mischief	PEN § 28.03
Criminal trespass	PEN § 30.05(b)(3)
Deadly conduct	PEN § 22.05
Family violence offenses	
Required findings	CCP art. 42.013
Possession of firearms	
Filing fees assessment of victims, see Federal acts>VAWA 1994, 2000	
Findings of family violence required	CCP art. 42.013
Graffiti	PEN § 28.08
Harassment	PEN § 2.07
Homicide	PEN § 19.01et seq.
Injury to a child, elderly or disabled person	PEN § 22.04
Interference with child custody see Child>custody>interference	
Interference with emergency telephone use	PEN § 42.062
Kidnapping	PEN § 20.03-20.04
Motivated by bias or prejudice	
Required findings	CCP § 42.014
Obstruction or retaliation	PEN § 36.06

Online harassment PEN § 33.07
Protective order violations,
 see Violation of a protective order
Retaliation, see Crimes>Obstruction
Sexual Assault and aggravated sexual assault,
 see Sexual Assault
Sexual performance by a child PEN § 43.25
Stalking, see main entry for Stalking
Terroristic threat PEN § 22.07
Trafficking of persons PEN § [20A.02](#)
Violations of bond conditions PEN § 25.07
Violation of a protective order
 see that term
Unlawful possession of a firearm
 see Firearms
Unlawful possession of a weapon
 see Weapon
Unlawful restraint PEN § 20.01 et seq.

Cyberstalking, see Stalking

D

<u>SUBJECT</u>	<u>STATUTE</u>
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DPRS, see Protective and Regulatory Services

Dating violence

Defined, see Federal acts>VAWA 2000
LEP victims
 see Federal acts> VAWA 2005
School districts EDUC § 37.0831

Disabled persons

Americans with Disabilities Act
 see Federal acts
Assistance animals HRC ch. 121
Deaf, see Deaf and Hard of Hearing
Discrimination prohibited,
 see Federal acts>Americans with Disabilities Act
Injury to, see Crimes
Rehabilitation Act of 1973, see Federal acts

Divorce

(see Child for child custody and other SAPCR proceedings)

Alimony (with family violence finding)	FAM § 8.051
Appeal	FAM § 6.507
Information about protective orders	FAM § 6.404
Mediation, objection to	FAM §6.602(d)
Protective order (divorce suit only)	FAM § 6.504
Temporary Injunction	FAM § 6.502
Temporary Restraining Order	FAM § 6.501
No “kick out” provision	FAM § 6.501(b)

Domestic violence

Continuous violence against the family, see Crimes
Homelessness see Federal acts>VAWA 2005
National hotline see Federal acts>VAWA 1994

DPRS, see Protective and Regulatory Services

Driver’s license information, confidentiality **TRANS § 521.275**

E

<u>SUBJECT</u>	<u>CODE</u>	<u>STATUTE</u>
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Electronic communication with child	FAM § 153.015	
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Evidence

Admissibility	
Prior relationship	CCP art. 38.36(b)
Privileges	
Spousal	CCP 38.10
Sexual history of sexual assault victim see Federal acts>VAWA 1994	
Texas Rules, see TRE	
Victim impact statement	CCP art. 38.22 CCP art. 56.03

F

SUBJECT

STATUTE

Family violence

Abuse

Continuous violence against the family, see Crimes

Criminal offenses

Admissibility of prior relationship CCP art. 38.36(b)

Continuances CCP art. 29.14

Finding of family violence required CCP art. 42.013

Polygraphs CCP art. 15.051

Warnings CCP art. 42.0131

Duty to report FAM § 91.003

Electronic communication with child FAM § 153.015

Employment of victims

Fees and costs

Family violence protection fee GOV'T § 51.961

Immunity FAM § 92.001

Insurance, non-discrimination INS. § 544.153(c)

Household FAM § 71.005

Legislative statement CCP art. 5.01

Mediation CCP art. 5.08

Modification of SAPCR FAM § 156.104, 156.1045

Offenses

Firearms possession warning CCP art. 26.13(a)(6)

Notice to SAPCR of conviction CCP art. 42.23

Order for counseling FAM § 153.010

Report from a witness FAM § 91.002

Tenant's rights and right to vacate residence PROP § 92.015

Welfare waver HRC § 31.0322

[42 U.S.C. § 602\(a\)\(7\)](#)

Fatality

Review and investigation HSC § 672.001

Counseling representative HSC § 72.002(d)(9)

Federal Acts

Americans with Disabilities Act [42 U.S.C. § 12101](#); [42 U.S.C. § 12131](#)

Battered Immigrant Women
Protection Act of 2000,
see Federal Acts>VAWA 2000

Battered Women’s Testimony Act	42 U.S.C. § 10702
Civil Rights Act of 1964 (Title VI)	42 U.S.C. § 2000d
Communications Act of 1934	
see Federal acts, VAWA 2000 and 2005	
Crime Victims’ Rights Act	18 U.S.C. § 3771
Courts’ authority to search criminal databases	42 U.S.C. § 534
Family Violence Option	HRC §31.0322
Family Violence Prevention and Services Act, see VAWA 1994	
Full Faith and Credit for Child Support Orders Act	28 U.S.C. § 1738B
Gun Control Act	
Official duty exception	18 U.S.C. § 925
Possession of firearm by Person convicted of crime of family violence protective order respondent	18 U.S.C. § 922(g) 18 U.S.C. § 922(g)
Return of firearm	P.L. 110-180
Transfer of firearm	CCP art. 46.06 18 U.S.C. § 922(d)
Internat’l Child Abduction Remedies Act (ICARA)	FAM § 153.501-503; 42 U.S.C. §§ 11601-11610 ; 42 U.S.C. § 11604
Internat’l Marriage Broker Regulation Act	8 U.S.C. § 1375a
Immigration and Nationality Act	8 U.S.C. ch. 12
Keeping Children Safe Act of 2003	42 U.S.C. ch. 67
Matthew Shepard and James Byrd Jr., Hate Crimes Prevention Act	18 U.S.C. § 249
Military	
Delivery of offenders to civilian authorities	10 U.S.C. § 841
Full faith and credit to civil orders	10 U.S.C. § 1561a
Missing Children’s Search Assistance Act	42 U.S.C. § 5771
Omnibus Crime Control and Safe Streets Act of 1968	42 U.S.C. § 3712d
Parental Kidnapping Prevention Act	18 U.S.C. § 1073 ; 28 U.S.C. § 1738A ; 42 U.S.C. §§ 653-655 ; 42 U.S.C. § 663
Rehabilitation Act of 1973	29 U.S.C. § 794
Safe Homes for Women Act of 1994, see VAWA 1994	

Trafficking Victims Protection Act, see VAWA 2000	
Victims of Crime Act	42 U.S.C. § 10603
Victims of Trafficking and Violence Protection Act, see VAWA of 2005	
Violence Against Women Act of 1994	
Arrest policies	42 U.S.C. § 3796hh
Bail hearing	
Battered women’s shelters	42 U.S.C. § 10409
Battered women’s syndrome	42 U.S.C. § 14013
Campus sexual assault data	42 U.S.C. § 14012
Community programs	42 U.S.C. § 10418
Confidentiality of victim information	CCP art. 56.81 CCP art. 57.01 CCP art. 57.01 42 U.S.C. § 13951
Confidentiality of victim-counselor communications	42 U.S.C. § 13942
Court Training and Improvement	42 U.S.C. § 14043a-3
Custody orders	18 U.S.C. § 2266
Definitions and grant provisions	42 U.S.C. § 13925
Domestic Violence Hotline	42 U.S.C. § 10416
Family Violence Prevention and Services Act	42 U.S.C. § 10410
Filing fees assessment prohibited	42 U.S.C. § 3796gg-5
Forensic medical examinations (free rape kits)	42 U.S.C. § 3796gg-4
Full faith and credit	18 U.S.C. § 2265
Grants to combat violence n	42 U.S.C. § 3796gg
Hate Crimes Statistics Act	28 U.S.C. § 534
Immigration cancellation	8 U.S.C. § 1229b
Interstate stalking; cyber stalking	18 U.S.C. § 2261A
Interstate travel to commit domestic violence	18 U.S.C. § 2261
Interstate travel to violate protective order	18 U.S.C. § 2262
Intimate partner violence	18 U.S.C. § 921(a)
Legal assistance for victims	8 U.S.C. § 1154
Mandatory restitution for child sex crime victims	18 U.S.C. § 2259
Mandatory restitution for sex crimes victims	18 § U.S.C. 2248
Mutual protective orders	18 U.S.C. § 2265(c)
Pretrial release	18 U.S.C. § 2263
Removal and suspension	

of deportation	<u>8 U.S.C. § 1254</u>
Restitution	<u>18 U.S.C. § 2264</u> ; <u>18 U.S.C. § 3663</u>
Rural domestic violence and child abuse enforcement assistance	<u>42 U.S.C. § 13971</u>
Safe Homes for Women Act	<u>42 U.S.C. § 13701</u>
Self-petitioning for victims	<u>18 U.S.C. § 1154</u>
Sentencing guidelines for aggravated sexual abuse	<u>18 U.S.C. § 2241</u> ; <u>28 U.S.C. § 994</u>
Sentencing guidelines for sexual abuse	<u>18 U.S.C. § 2242</u> ; <u>28 U.S.C. § 994</u>
Sexual history of sexual assault victims not admissible	<u>28 U.S.C. § 2074</u>
State databases on domestic violence and sexual assault	<u>42 U.S.C. § 13962</u>
Testing for sexually transmitted diseases	<u>42 U.S.C. § 14011</u>
Training of judges and court personnel	<u>42 U.S.C. § 13991</u>
Youth education and domestic violence	<u>42 U.S.C. § 10417</u>

Violence Against Women Act (VAWA) of 2000

Adjustment of status	<u>8 U.S.C. § 1255</u>
Battered immigrant waiver	<u>8 U.S.C. § 1182</u>
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Civil remedy for battering victims	<u>42 U.S.C. § 13981</u> ; see <i>U.S. v. Morrison</i> , <u>529 U.S. 598</u>
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ABBREVIATIONS FOR CITATIONS TO TEXAS LAW

STATUTE OR CODE	ABBREVIATION
Business and Commerce	BCC

Civil Practice and Remedies	CPRC
Code of Criminal Procedure	CCP
Constitution	CONST
Education	EDUC
Election	ELEC
Family	FAM
Government	GOV'T
Health and Safety	HSC
Human Resources	HRC
Insurance	INS
Labor	LAB
Occupations	OCC
Penal	PEN
Property	PROP
Rules of Civil Procedure	TRCP
Rules of Evidence	TRE.

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