

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

### (Tex. Fam. Code Title 4)

**Note: 2013 legislative changes are noted in red.**

#### **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;<sup>1</sup>
- a prosecuting attorney in the county where venue is proper;

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<sup>1</sup> *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.

NOTE: As of June 14, 2013, per [Tex. Fam. Code § 81.0075](#), a prosecutor is not precluded from representing a party in a proceeding in Tex. Fam. Code Title 4 cases and the Department of Family and Protective Services in another action involving the party, regardless of whether the protective order proceeding occurs before, concurrently with, or after the other action involving the party.

**OR**

- the Department of Family and Protective Services.

([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:<sup>2</sup>

- 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.

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<sup>2</sup> *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.

**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.<sup>3</sup>

[\(Tex. Fam. Code § 71.002\)](#)

### 3.1.3 Venue.

The protective order application may be filed in:

- the county where the applicant resides;
- the county where the respondent resides;
- **For applications filed on or after June 14, 2013: any county in which the family violence is alleged to have occurred.** [Tex. Fam. Code § 82.003](#)
- 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.<sup>4</sup> Those elements are: (1) a fixed place of abode;

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<sup>3</sup> [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.

<sup>4</sup> *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.

(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;
- a request for one or more protective orders.

**AND**

- **For applications filed on or after September 1, 2013:** whether an applicant is receiving services from the Title IV-D agency in connection with a child support case, if known, the case number for each open case. [Tex. Fam. Code § 82.004](#)

**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).<sup>5</sup>

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<sup>5</sup> [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

[\(Tex. Fam. Code § 82.041\)](#)

### **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.**

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;<sup>6</sup>

**AND EITHER**

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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.”

<sup>6</sup> [Tex. Fam. Code § 83.006](#)(b)(1) and (2).

- 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.<sup>7</sup>

([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;<sup>8</sup>

**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.**

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<sup>7</sup> [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](#).

<sup>8</sup> [Tex. Fam. Code § 82.010](#). See Section 3.2.7 regarding confidentiality of an application in Harris County.

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.”<sup>9</sup> The temporary order should:

- 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](#);

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<sup>9</sup> 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.

- 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<sup>10</sup>](#) (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

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<sup>10</sup> 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.”

separate document and should include 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](#));<sup>11</sup> 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 his residence, the court shall, upon request, issue an order requiring the appropriate law enforcement agency to:

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<sup>11</sup> 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.

- 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.<sup>12</sup>

[\(Tex. Fam. Code § 83.002\)](#)

### **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;
- 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.

[\(Tex. Fam. Code § 83.004\)](#)

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<sup>12</sup> *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.

### 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.<sup>13</sup> See Chapter 7.

[\(Tex. Fam. Code §83.005\)](#)

## 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;

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<sup>13</sup> *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.

- 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.<sup>14</sup>

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<sup>14</sup> *Williams v. Williams*, [19 S.W.3d 544](#) (Tex. App.—Fort Worth 2000 pet. den.)

### 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.<sup>15</sup>

### 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 of the applicant's representative, be set no later than the 20<sup>th</sup> 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](#))

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<sup>15</sup> *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.

### 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.<sup>16</sup>

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

### 3.5 *Answer.*

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:<sup>17</sup>

- 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).

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<sup>16</sup> *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.

<sup>17</sup> See *Polley v. State*, No. 11-03-0340-CR, 2004 Tex. App. 11317 (Tex. App.—Eastland, Dec. 16, 2004, no pet.).

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

**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.<sup>18</sup>
- Evidence of past abuse can support an inference that the abusive party will continue abusive behavior in the future.<sup>19</sup> Only exception to this permissible inference might be if the past abuse was a single, isolated act.<sup>20</sup>
- Harassment alone may or may not be sufficient to establish a threat of violence or actual physical violence.<sup>21</sup>
- 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:

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<sup>18</sup> *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.

<sup>19</sup> *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.

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

<sup>21</sup> *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.

- 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 violence<sup>22</sup> 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;<sup>23</sup>
- 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 payment<sup>24</sup>;
- 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);

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<sup>22</sup> 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.

<sup>23</sup> *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, 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.]

<sup>24</sup> 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).

- 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

**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)<sup>25</sup> 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](#)))

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<sup>25</sup> 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.

**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 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 **or actual or constructive care** of a person named in the order;

**OR**

- paying child support.<sup>26</sup>

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.

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<sup>26</sup> See footnotes 72–73.

### 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 § 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.<sup>27</sup> 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;<sup>28</sup> surrendering firearms, or surrendering a concealed handgun license;

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<sup>27</sup> *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.

<sup>28</sup> 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, 80<sup>th</sup> Legislature, bill analysis, available at:

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

**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.

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and House Research Organization bill analysis for SB 44, available at:  
<http://www.hro.house.state.tx.us/pdf/ba80r/sb0044.pdf#navpanes=0>

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.<sup>29</sup>

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

### 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, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A

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<sup>29</sup> *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.

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;<sup>30</sup>
- (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);
- 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.

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<sup>30</sup> *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.

### 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 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](#));
- 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 equivalent<sup>31</sup> (see § 19.11);
- 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:

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<sup>31</sup> See the form in the Supreme Court Task Force's Protective Order Kit, available at: [www.TexasLawHelp.org](http://www.TexasLawHelp.org)

- 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;<sup>32</sup>

**AND**

- **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.**

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<sup>32</sup> *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.

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.<sup>33</sup>

([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.<sup>34</sup>

- 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](#))

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<sup>33</sup> *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.

<sup>34</sup> *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 limited to modification.

### **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.<sup>35</sup> 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.

#### **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.

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<sup>35</sup> *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.

**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.<sup>36</sup> 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.

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

### **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.

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

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<sup>36</sup> *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.

**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.<sup>37</sup> Until the divorce is final, a mandamus action is required to seek relief for a protective order issued under [Tex. Fam. Code § 6.504](#).<sup>38</sup>

([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)<sup>39</sup> 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](#))

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<sup>37</sup> *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.

<sup>38</sup> *Ruiz v. Ruiz*, [946 S.W.3d 123](#) (Tex. App.—El Paso 1997, no writ).

<sup>39</sup> 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](http://www.TexasLawHelp.org).

- **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.

[\(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.

[\(Tex. Fam. Code § 15.112\)](#)

