



Family Law News

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Protective Order Litigation: Consequences in a Changing World

By: Rene Sandler, Esquire

INTRODUCTION

Practitioners representing a party in protective order proceedings must understand the law of domestic violence and be skilled in identifying collateral legal issues which may impact their client. To effectively represent an individual in a protective order proceeding, a practitioner must be able to recognize collateral issues applicable to the particular client and be thoughtful about how best to minimize the effect of the process. In some situations it is also important to understand those issues affecting the opposing party as well. Practitioners should understand the interplay between family, criminal, juvenile, immigration, and administrative laws as well as the rules of evidence before accepting a protective order case. Each case requires an investigation and strategy and is handled on an accelerated timeframe due to the emergency nature of the relief sought.

A protective order hearing can bring into play consequences for the individual and the family in the areas of criminal law, child protective services, CINA, immigration, employment, security clearance, and affect one's professional license. It is important for a practitioner to identify a client's objectives in a protective order matter. The stigma associated with the issuance of a protective order is real and must be utilized only where the need for protection is clear and to ensure protection against future harm. *Katsenellenbogen v. Katsenellenbogen*, 365 Md., 122 (2001, see also *Coburn v. Coburn*, 342 Md. 244 (1996) past abuse relevant to determine what protection should be ordered. Practitioners should never use the protective order process for posturing in a domestic case and should discourage this process where a client indicates the purpose to be anything other than those specifically enumerated under Family Law Article §4-501. A person's motivation in seeking a protective order is relevant and important to understand so as to provide proper advice to the client.

WHAT IS A PROTECTIVE ORDER?

Protective orders are civil in nature; however a violation of a protective order carries criminal consequences punishable of up to ninety (90) days in jail and/or a \$1000 fine for a first offense with enhanced penalties for a subsequent violation Family Law Article § 4-509. State's Attorney's Offices throughout the State have "domestic violence dockets" each week at which violations of protective orders and other cases involving domestic violence are regularly prosecuted. Protective orders have received widespread attention in the State of Maryland over the past several years. Some of those cases involved the denial of a protective order followed by egregious acts of domestic violence committed against the individual who sought

the order. Other cases involved serious acts of domestic violence during the pendency of the protective order. Protective order proceedings involve bench trials only, never a jury, and require a comprehensive presentation of evidence, generally with a week's notice for the Respondent and less time for an attorney representing a Petitioner after an act of domestic violence. The burden of proof in a temporary protective order hearing is reasonable grounds, with the burden in a final protective order hearing requiring clear and convincing evidence.

SEVEN DAYS TO BE PREPARED

Protective Orders are fast paced cases often beginning and ending within seven (7) days however carrying far reaching consequences for the parties involved. Case preparation includes not only a comprehensive client interview but may also include more than one court appearance, issuing subpoenas both for individuals to appear in court and to produce documents, witness interviews, and retrieval and review of relevant documents from your client and third parties.

Being prepared for trial is essential for representation of a protective order client, whether representing a Petitioner or Respondent. An attorney should never accept a protective order case with the belief that a party will "consent" to the order. Certainly, consent is an option for a Respondent after careful consideration and proper advice. Considering whether to consent to an entry of a protective order without a factual finding when representing a Respondent should only be considered after a thorough review of all collateral consequences; and with appreciation that any right of appeal is lost with consent to the entry of an order. *Suter v. Stuckey*, 2007 WL 3355486. This loss of right to appeal must be thoroughly reviewed on a case by case basis.

In December, 2002, the law was modified to allow victims of domestic violence to obtain an Interim Protective Order twenty four hours a day, seven days a week from a District Court Commissioner. An Interim Protective Order is only effective until the 2nd business day after the Court reopens at which time a Temporary Protective Order Hearing (formerly called "Ex Parte Order") is held. For example, if a person obtains an Interim Protective Order on a Saturday, the Order is only in effect until Tuesday.

All Temporary Hearings are held in the District Court. The Commissioner's findings are not binding upon the District Court judge. The burden of proof in a Temporary Protective Order is "reasonable grounds" and if issued is issued for a

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seven (7) day period at which time a Final Protective Order Hearing is held.

A Temporary Order may be extended by the District Court judge for up to thirty (30) days. Under these circumstances, the parties often utilize this time period to either work towards a broader resolution of issues between them or to prepare their respective cases for trial. Occasionally, if a report was ordered by the court to be completed by the Department of Social Services, they will require additional time to complete the investigation. This can also be a helpful "cooling off" period for the parties in some cases. Practitioners may use this available time to negotiate through a Consent Order issues related to custody, visitation and support. Practitioners must understand that this Consent Order is simply an Addendum to the Protective Order and cannot be entered without entry of a protective order itself.

A Final Protective Order may be issued for up to a year and may be extended for an additional six (6) months. The standard at a Final Protective Order Hearing is clear and convincing evidence. Attorneys must demonstrate an understanding of the different standards of proof in the protective order process and be prepared to argue and apply the facts of their case to such standards before the court.

Attorneys must be prepared to respond to a Judge's inquiry as to whether the client will forego the Temporary Protective Order Hearing and move into a Final Protective Order Hearing on the first court appearance. The decision to skip the Temporary Hearing stage and commence the Final Protective Order Hearing should be made carefully with an emphasis in the shifting burden of proof and how that burden affects the prosecution or defense of your case. There is an obvious tension where a judge wants to go to a Final Hearing when parties and their respective counsel are all present. A practitioner must only consider this option after the attorney has thoroughly reviewed the case, including any defenses, before making the decision to move immediately into a final hearing.

COLLATERAL CONSEQUENCES OF A PROTECTIVE ORDER

Practitioners must be skilled in identifying collateral consequences that may flow from consent to or entry of a Final Protective Order. If a Temporary Protective Order is based upon allegations of injury to a child, the court may require an investigation and report from the Department of Social Services, Child Protective Services ("CPS") to be conducted between the Temporary and Final Hearing dates. Often CPS investigations are conducted by social workers from CPS in conjunction with police detectives. Investigators may interview a child at school, without prior notification to the child's parents. Strict

confidentiality laws prevent a parent from obtaining a copy of a child's statement to investigators. *

Depending on the nature of the allegations, CPS must commence an investigation within 24 hours of the report. CPS social workers have broad authority and discretion in how to proceed in an investigation. Safety of a child is the primary objective. In extreme cases a child may be determined to be a child in need of assistance ("CINA") with court intervention imminent for placement of the child.

Clients have Fifth Amendment rights not to incriminate themselves in such investigations. Attorneys must weigh any adverse consequences from a client's failure to talk during such investigation and likewise must be aware of potential use of any statement given during an investigation. Statements made by the client during the investigation may be used to develop probable cause for the client's arrest on child abuse, assault or other criminal charges and will also be used in the protective order hearing.

Criminal charges involving assault and child abuse are deportable offenses under Federal immigration laws. The effect of an underlying protective order proceeding containing allegations of domestic violence or assault on a child may also be reviewed by immigration officials. Attorneys must identify and appreciate the interplay between the consequences for some individuals triggered by the protective order process. Consultation with immigration counsel should be recommended both for the client and practitioner and should take place before any tactical decisions are made in the protective order case.

The findings of a CPS investigation may impact the outcome of a protective order hearing. CPS findings are subject to an internal Central Registry which is part of the Maryland Department of Human Resources computer database now known as Maryland CHESSIE. CHESSIE contains information about child abuse and neglect investigations conducted by the Department. CPS investigations may result in one of three findings; indicated, unsubstantiated or ruled out. Indicated or unsubstantiated may be appealed within sixty (60) days to the Office of Administrative Hearings. When the Department makes a finding of "indicated" child abuse or neglect, information related to the investigation is stored in CHESSIE. Information stored in Maryland CHESSIE is confidential with no access allowed except for Child Welfare Services personnel on a limited basis. Some limited disclosures are permitted. The public cannot access the Central Registry on the internet. Maryland does not provide the information from the Central Registry to any national database.

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Mark Your Calendars...

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ings, explore and share best practices in different modalities (including mediation, collaborative law, parenting coordination, parenting education) for transforming custody litigation and potential litigation into alternative forms of dispute resolution. A key focus will be on developing effective strategies for managing parental conflict in child custody matters.

Keynote Speaker: Andrew I. Shepard, Professor of Law, Hofstra University School of Law, Director of the Hofstra University's Center for Children, Families and the Law; author of *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families*; Editor in Chief of the *Family Court Review*, which is sponsored by the Association of Family and Conciliation Courts.

Who should attend: family law attorneys of all experience levels, judges, mediators, mental health professionals, school counselors, court and private custody evaluators, and educators.

Cost: \$175 regular registration after 4/1/09; \$150 early registration before 4/1/09; \$95 students, county or state agency staff, nonprofit staff.

Choose one of three 2-hour morning presentations: A. Resolving the Impasse Issues of Relocation; B. Parenting 101-The missing high-school AP course - a necessary support to successful ADR; C. Developing Successful Parenting Plans -- Theory and Practice

Choose two from six 1.5-hour afternoon presentations: D. Overnights for Young Children -- Don't Paint by the Numbers; E. "I won't go!" -- What to do when the child rejects an access schedule; F. Custody Evaluations -- Help or Harm?; G. Parenting Coordinators -- What are they and how can they help?; H. Get it from the web: parenting tools available on the internet; I. Learning Disabilities and ADD in Parenting Plans.

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An indicated finding of abuse or neglect is maintained indefinitely by the Department of Social Services and cannot be expunged, however an unsubstantiated finding will be expunged five (5) years after the matter was first reported so long as no other report was made, and a ruled out finding will be removed from the Central Registry and file destroyed after 120 days from the day the matter was first reported if no other reports are received.

At the final protective order hearing, statements included in the CPS investigative report will be reviewed by the judge. If there is a pending criminal charge initiated contemporaneous with the issuance of a temporary protective order or if criminal charges are likely, in only the rarest of circumstances should the client testify at the protective order hearing. Attorneys must understand the implications of a client's testimony under oath. There is little good to come from a client with pending or impending criminal charges testifying in a protective order proceeding. Judges will often advise an individual of the use of incriminating statements against the individual in a subsequent prosecution. It is not up to the judge to advise the client, it is up to the attorney to identify this collateral issue in advance and advise accordingly. The resulting damage from a person's testimony in a protective order hearing in a subsequent criminal case is devastating. Attorneys must recognize that such testimony will be used in the subsequent proceeding and may seriously damage the ability to negotiate a favorable result in the subsequent criminal process. Attorneys must concentrate on a strategy to

proceed absent the client's testimony. This will require time and thoughtfulness, but can be done effectively.

One of the more difficult but typical scenarios caused by the initiation of a protective order is one where one parent obtains a Temporary Protective Order with an underlying allegations of abuse of children over a period of time by the other parent. In this scenario, a CPS investigation is ordered by the court to be completed between the temporary and final hearings. Importantly, should a CPS investigation be conducted, both parents will be asked to participate in the investigation. An investigation may reveal a pattern of conduct which amounts to abuse by a parent over a prolonged period of time. The investigation may turn to the non-offending parent who had knowledge of the conduct that constituted abuse. The CPS investigation may then additionally include one of neglect for the non-offending parent, who initiated the protective order in the first place. Both parents are now under a microscope and both require representation. Depending on the particular allegations, the children could become CINA or a safety plan may be required of the non-offending parent in order for the children to remain in the home. Both parents are now subject to CPS "findings." All CPS cases are conferenced with the local family crimes division of the police department and State's Attorney's Offices to decide whether to formally charge a case. In this scenario, each parent now has separate administrative rights for their re-

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spective findings from the CPS investigation. This scenario is important to illustrate because practitioners must make the appropriate inquiry of their client in an initial meeting to understand the family history.

An often overlooked consequence of the protective order process is simply which boxes are checked when a Petitioner fills out the protective order forms. Nowadays we are a country of online public access to court proceedings and documents. Maryland Judiciary Case Search includes docket entries for protective order and other cases in Maryland courts. If the box for "child abuse" is checked off on the protective order form either intentionally or accidentally the Respondent may be labeled as such in the database. There is no expungement process available to remove a protective order filing from the court records like there is in criminal cases.

All of the above consequences are compounded if an individual is a noncitizen. To protect the practitioner and client, retainer agreements should reflect the recognition of the client's specialized status and a recommendation for separate, independent counsel from an immigration attorney should be recorded in the agreement. Check your local bar associations for an immigration section and become familiar with those that regularly practice immigration law in your area.

Clients who have security clearances or who require use of a firearm in the course of their employment face other consequences should a protective order issue against them. The issuance of a protective order against a person requires the relinquishment of firearms. Protective Orders with findings of facts surface on background checks, including abuse, being the basis for denial of clearance or other employment advancement. The stigma associated with being labeled an abuser is serious. Counsel should recognize this stigma and discuss this with the client so that the client is informed fully.

Practitioners should know the practice of the particular judge handling the protective order hearing. Each judge has a different practice and interpretation of evidentiary standards applicable in a protective order proceeding. Some judges adhere to more formal rules of evidence while others loosely apply the rules allowing hearsay and documents without the custodian into evidence. Do your homework on the judge, the judge's practice, and the jurisdiction so that you are informed and advised in advance while you are preparing your case. These cases are emotional for the parties often with a long history of issues in the family. The cases are taken very seriously by judges and will be given careful attention during a hearing.

Do not advise your client to consent to the entry of an order simply because you do not like the judge. This is malpractice.

Consenting to an order in a District Court Final Protective Order Hearing gives up your client's right to appeal the order. The same applies to a negotiated Consent Order between the parties which expands the relief and specifies additional terms. Judges can only enter a negotiated Consent Order as an Addendum to the Final Protective Order. If there is a pending domestic matter in the Circuit Court any District Court protective order may be transferred and consolidated with that Circuit Court case. This may not be the desired place for the protective order and counsel should be certain to advise the client of this procedural maneuver by a party.

CONCLUSION

Domestic violence is a serious problem in this country. Often times, the need for protection from domestic violence is necessary and court intervention is required. Practitioners representing individuals in the protective order process, must understand the interrelationship between laws and possess the requisite competence to advise clients of collateral consequences that will affect them or the opposing party so that the client can both identify their own individual objectives and those that are best for their family.

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Footnote:

* Discovery in a contested hearing in which the decision of DSS is appealed allows for records to be obtained, however often times such records are heavily redacted.

