

EMERGENCY PROTECTIVE ORDERS - DOES A FATHER HAVE RIGHTS?

The issuance of Emergency Protective Orders (EPOs) under Article 17.292 Texas Code of Criminal Procedure are a common occurrence for magistrates who set bonds for inmates at the local jails every morning. That encounter is usually very brief, and probably the last time the magistrate will see either of the parties involved in the incident that resulted in the arrest. But after the EPO is issued, there are far reaching ramifications in the criminal and family law arenas for the parties and the children. The family violence accusations often occur in a context in which the parties are either married and/or have children together. When the magistrate sees the couple at the jail the morning after one of them has been arrested for prevention of family violence and assault, it is a good bet that some kind of family law litigation has already begun, or will shortly thereafter. After a divorce or Suit Affecting the Parent Child Relationship (SAPCR) case has been filed, there is usually a temporary hearing in which the trial court determines the primary residence of the parties and children, and sets the child support and visitation with the absent parent. The existence of an EPO gives the mother a huge stick with which to figuratively beat up the father at the next court hearing.

The public policy of the State of Texas is that children should have continuing and frequent contact with their parents FC 153.001(a). This is, of course, conditioned on the parent providing a safe, stable, and nonviolent environment for the child. The best interest of the child is always the court's primary consideration (FC 153.002). It is presumed that a parent should be appointed a joint managing conservator (JMC) of his/her child (FC 153.131). JMC will give the absent parent the right to make many important decisions for the child, and usually results in restrictions on the custodial parent being allowed to relocate with the child to cities far away from the absent parent FC 156.136. Both the father and the mother have equal legal standing when it comes to getting custody of the children FC 153.003.

The Standard Possession Order (SPO) visitation is presumed to be the minimum that a parent should receive (FC 153.252). The SPO, when all alternative visitation periods are elected, results in the children having some meaningful contact with the non-custodial parent almost 200 days out of the year. Court orders pertaining to possession and access to the abuser's children are restricted by FC Section 153.004(c)). If there is evidence of family violence within a two year period, the court is directed to consider that evidence in deciding whether to make the parties JMCs. If the court finds that there has been abuse, it is prohibited from making the parents JMCs of the children FC 153.004(b). This effectively eliminates the abuser (almost always the father) from any chance of obtaining custody of the children. The court is further directed to make findings concerning access to the children by the abuser. The court can either (a) find that access would not endanger the children (not very likely), (b) enter an order completely eliminating visitation with the abuser (not too likely), or (c) render an order that includes supervised visitation, exchange of the children in a protective setting, alcohol counseling and battering prevention classes, just for starters (very likely). These orders are difficult on all the parties and their children, and dramatically reduce visitation with the absent parent.

When a divorce is filed, the ex parte temporary order may not kick the spouse out of the house without a hearing, unless there is also a protective order FC 6.502. Under the Family Code, an ex parte kick out order is difficult to get from a divorce judge. Affidavits must be prepared and filed, the family violence must be recent, the victim must appear before the judge in person, and the court may recess the hearing to contact the respondent FC 83.006, 83.007. This is big hassle. If the wife is of a mind to abuse the system to get a leg up in the litigation, or to overturn an adverse ruling in a previous hearing, the EPO is very quick, cheap and effective.

In the criminal context, a Texas resident is not eligible for a license to carry a concealed handgun if the person is restricted by a court protective order, or subject to a restraining order affecting the spousal relationship. Penal Code Section 46.06(6) prohibits a person from purchasing a handgun while under a protective order (Section 411.172(a)(13) of the Government Code). But the big net is cast by 18 U.S.C Sec 922(g)(8), which states:

"(g) It shall be unlawful for any person- (8) who is subject to a court order that- (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) 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; ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Once the person is under a protective order, mere possession of ammunition subjects that person to prosecution, the 2nd amendment notwithstanding (United States v. Emerson, 270 F.3rd 203).

One cannot underestimate the pressures that magistrates face when there is a request for an EPO by a person who claims they were abused. The last thing the magistrate needs is to have a correspondent from the *Dallas Morning News* call for a comment after a request for an EPO was denied, and the applicant was promptly killed by the abuser. But at the same time, family law litigants are becoming more savvy to the leverage an EPO provides. Most magistrates are poorly equipped to deal with the request for issuance of an EPO at the jail the morning after an arrest. The victim has obviously convinced the police officer that some action was necessary, but the police officer is rarely available, and the respondent invariably has had no opportunity to consult with an attorney or produce witnesses.

What can the family law attorney do when the client is caught in the vice? The odds of dad's attorney being notified of the EPO hearing at the jail are very low. The statute only requires the defendant's presence in jail to issue the EPO. It can be issued on the magistrate's own motion, the request of a police officer, the victim or attorney representing the state (17.292(a)), and violation of the protective order is punishable by a year in jail and a \$4,000.00 fine. Talking the magistrate into delaying the hearing a few hours for dad's attorney to come to the jail is highly unlikely. The EPO supercedes any child custody orders obtained prior to the EPO, and not only gives momma the EPO, but custody of the kids, and keeps your client from coming within 200 yards of the residence, job and school. The case of *Ex parte Roberto Flores*, No. 08-01-00213-CR, gives some hope for an advocacy hearing. Mr. Flores was an assistant principal at an elementary school. The El Paso police officer who arrested him stated that Martha was distraught, and based on his observations, arrested Enrique. Since the magistrate can modify "all or part" of the order (17.292(j)), dad's attorney should ask the judge to hold a hearing as soon as possible after the order is entered. The appellate court also suggested that Enrique had available to him the ability to file a writ of habeas corpus and request an adversary hearing, which the appellate court stated "ameliorates the ex parte nature of the procedure." So if the magistrate who entered the order at the jail will not consider any evidence, filing a writ of habeas corpus looks like the only remedy available if your client is unjustly accused of family violence and is subject to an EPO.

Robert J. Gradel
Lampasas Municipal Judge
Board Certified, Family Law, Texas Board of Legal Specialization
June 19, 2004

D:\gradel\emergency_protective_orders.wpd June 19, 2004