Minnesota Second Judicial District
Juvenile and Family Division

Guide for Handling:

ORDERS FOR PROTECTION
AND
HARASSMENT RESTRAINING ORDERS

Second Judicial District
Family Violence Coordinating Council

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Harassment Restraining Orders

I. PREFACE AND INTRODUCTION

A. PREFACE

The Second Judicial District Family Violence Coordinating Council was formed as an interdisciplinary working group, as were similar councils in every judicial district throughout the state, on recommendation of the Minnesota Conference on Family Violence and the Courts, held in November 1993. The Council has met regularly since that time to work on improving Ramsey County's handling of domestic violence cases in all parts of the system.

In 1997, the Minnesota Legislature passed into law Minn. Stat. §484.79, establishing Family Violence Coordinating Councils (FVCC). "A judicial district may establish a Family Violence Coordinating Council for the purpose of promoting innovative efforts to deal with family violence issues. A coordinating council shall establish and promote interdisciplinary programs and initiatives to coordinate public and private legal and social services and law enforcement, prosecutorial and judicial activities."

The chief judge appoints the members of the FVCC with representatives from judges, court administrators, probation; domestic abuse advocates and social services; health care and mental health care providers; law enforcement and prosecutors; public defenders and legal aid; educators and child protection works; and public officials and other public organizations.

Since 1997, the Second Judicial District Family Violence Coordinating Council (FVCC) has continued as an interdisciplinary working group pursuant to the statute. The original *Guide for Handling Orders for Protection and Harassment Restraining Orders* was prepared by the FVCC and working subcommittee with adoption by the bench on April 19, 2008. The FVCC has been responsible to periodically update the *Guidelines* with a working subcommittee, approval by the FVCC, and subsequent approval by the bench. The Second Edition was approved by the bench on May 26, 2009. The Third Edition was approved by the bench on February 22, 2011. The Fourth Edition was approved by the bench on December 9, 2013. The Fifth Edition was approved by the bench on June 9, 2015. Through the years, the guidelines have served everyone working on domestic violence cases in Ramsey County as a tool for interdisciplinary training, assisting in identification of weaknesses in the system and ways to improve systemic handling of domestic abuse, developing protocols when needed, and coordinating proceedings involving family violence issues in keeping with Minn. Stat. §484.79, Subd. 3.

This Sixth Edition of the *Guide for Handling Orders for Protection and Harassment Restraining Orders* was drafted by a subcommittee and approved by the FVCC on June 11, 2019 except for the use of victim in the section related to U-Visa. The current subcommittee consists of the following members: Joseph Ambroson (Southern Minnesota Regional Legal Services), Shuree Arett (St. Paul Intervention Project), Anna Christie (Ramsey County Attorney's Office), Jennifer Dickinson (Tubman), Robin Dietz-Mayfield (St. Paul Intervention Project), Amanda Jameson (Court Administration), Lori Lukasik (St. Paul Intervention Project), Judge Timothy Mulrooney, Luis Rangel (Neighborhood Justice Center), John Riemer (Public Defender), Cmdr Roy Robbins (Ramsey County Sheriff), Referee Rebecca Rossow, Referee Christy Snow-Kaster, Referee James Street, Liz de la Torre (Sexual Violence Services of Ramsey County) and Nykee Younghans (Court Administration).

Changes were reviewed and input was provided from all members of the FVCC. The Guide was reviewed by the Juvenile and Family Court bench. The Second Judicial District Court bench approved the Sixth Edition of *Guide for Handling Orders for Protection and Harassment Restraining Orders* on October 25, 2019. The Sixth Edition incorporates statewide legislative, case law developments, and local procedural changes for the handling of Orders for Protection and Harassment Restraining Orders.

Members of the 2019 Second Judicial District Family Violence Coordinating Council:

Judge Timothy Mulrooney, Second Judicial District Court
Referee Christy Snow-Kaster, District Court
Melia Garza, State Court Administration
Amanda Jameson, District Court
Jan Peterson, District Court
Jason Rudolph, Corrections
Robert Sierakowski, Corrections
Shuree Arett, St. Paul Intervention
Jennifer Dickinson, Tubman
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Laura Miles, Guardian Ad Litem Office
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B. INTRODUCTION

The Domestic Abuse Act is found at Minn. Stat. §518B.01 and was enacted as means to protect victims of domestic abuse[1] by providing an efficient remedy for victims of abuse[2].

The Act is a substantive statute that is complete in itself, carefully drafted to provide limited types of relief to persons at risk of further abuse.[3] It is also a remedial statute, and as such receives liberal construction in favor of the injured person.[4] It gives law enforcement a tool to protect a victim of domestic violence by providing authority for immediate arrest of respondent without needing evidence of physical violence.

The *Harassment Restraining Order Statute* provides relief for victims of repeated, unwanted acts or single incidents of physical or sexual assault. There is no familial or dating relationship required for protection under this Act.

The *Domestic Abuse Act* provides for relief to be granted on an *expedited* basis. Thus, the rights and obligations of the parties are contained within the Act itself, and should not be tied to unnecessary external requirements. [5]

The specialized process of Domestic Abuse Court is designed to permit parties to proceed *pro se***.** The process is governed by the Rules of Civil Procedure, including the lower civil burden of proof by a fair preponderance of the evidence.[6] In 2012, the Rules of General Practice were amended effective May 1, 2012, and specifically state that they apply to Orders for Protection.[7]

The underlying purpose of Orders for Protection is to provide safety to victims.[8] There are situations where the potential for further violence is extreme. Danger assessment tools have been developed by researchers to attempt to identify warning signs for potential lethality. A copy of lethality assessment tools used by St. Paul and suburban Ramsey County law enforcement are included with this manual for easy reference. [9]

Recognize that each case is different and there are still cases in which a homicide occurs that was not foreseeable. However, there are certain warning signs that are important to know.

This guide was developed from a consensus on domestic abuse court procedure as it is practiced by the Ramsey County District Court Bench. Its purpose is to make the practice smoother for judicial officers as well as more predictable for parties and attorneys.

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[1] *Burkstrand v. Burkstrand*, 632 N.W.2d. 206, 211 (Minn. 2001)
[2] *State v. Errington*, 310 N.W.2d. 681, 682 (Minn. 1981)
[3] *Baker v. Baker,* 494 N.W.2d 282, 285 (Minn. 1992)
[4] *Swenson v. Swenson,* 490 N.W.2d 668, 670 (Minn. Ct. App. 1992)
[5] *Baker* at 286
[6] Minn. Stat. §518B.01, subd. 5(e)
[7] Minn Rule Gen. Prac. 301.01 (b)3
[8] *Baker v. Baker,* 494 N.W.2d 282, 285 (Minn. 1992) and *Burkstrand v. Burkstrand,* 632 N.W.2d 206 (Minn. 2001)
[9] See Appendix A

HELPFUL HINT

To move from the Table of Contents to a particular section in this Guide, simply highlight the section you want, hit "Ctrl" and click your mouse and you will move to that section.

ORDERS FOR PROTECTION

II. SERVICE AND COST

A. Personal Service

The petition and any order other than Orders for Dismissal shall be served on the respondent personally by peace officers licensed by the State of Minnesota, corrections officers, court service officers, parole officers, and employees of jails or correction facilities.[10]

The filing fees for an Order for Protection are waived for the petitioner and respondent.[11]

The respondent may also be served a "short form" notification in lieu of personal service if the respondent is located by a law enforcement officer who determines that there is an existence of an unserved Order for Protection.[12] This form gives notice to the respondent of the order, how to get a copy of the full order, and that the Order for Protection is now enforceable.

B. Service by Publication

If personal service cannot be made upon the respondent, the Court may order service by publication, in which publication must be made as in other actions.[13]

The moving party must file an Affidavit and Order for Alternate Service or Publication. The Affidavit must state that an attempt at personal service made by a sheriff or other law enforcement or corrections officer was unsuccessful because the respondent is avoiding service by concealment or otherwise, and that a copy of the petition and notice of hearing has been mailed to the respondent at the respondent's last known address or the residence is not known to the petitioner. An attempt to serve by law enforcement is necessary even if there is no known address for respondent. The Court can then order service by alternate service, which must include service by publication and continue the hearing for another initial hearing once publication has been completed.[14] In the State approved template application for alternative service, there are two separate boxes from which the petitioner must choose – either that the attempt at personal service was unsuccessful and a copy of the required paperwork was mailed to the party or an attempt was unsuccessful and the

[10] Minn. Stat. §518B.01, subd. 8 and 9a
[11] Minn. Stat. §518B.01, subd. 3a
[12] Minn. Stat. §518B.01, subd. 8a
[13] Minn. Stat. §518B.01, subd. 8(c)
[14] *Ayala v. Ayala*, 749 N.W.2d 817 (Minn. Ct. App. 2008)

respondent's address is unknown. It is reversible error for a Court to order alternative service if neither box is checked.[15]

If the petitioner is proceeding under the "No Hearing" provisions as described below[16], then service by publication may be made by one week published notice. Service is complete 7 days after publication.

If an affidavit by the petitioner alleging the need for service by publication is not filed within 14 days of the issuance of an *ex parte* order, the order expires. If the personal service or service by publication is not completed within 28 days of the issuance of the *ex parte* Order for Protection, the order expires.[17]

C. Safe at Home

1. General Information

Safe at Home is a statewide address confidentiality program administered by the Office of the Minnesota Secretary of State and governed by Minnesota Statutes, Chapter 5B and Minnesota Rules Chapter 8290.

It was designed in collaboration with local victim service providers and law enforcement. This program became effective September 1, 2007 and is designed to help survivors of domestic violence, sexual assault, stalking, or others who fear for their safety maintain a confidential address.

The intent of Safe at Home is to allow its participants to go about their lives, interacting with public and private entities, without leaving traces of where they can typically be located, such as their residential address, a school address, or an employment address, in an attempt to keep their aggressor from locating them.

Because program participants use a PO Box address assigned to them, Safe at Home provides a mail forwarding service. Safe at Home forwards a participant's First Class Mail to them at their actual physical address. The actual physical address remains under security with the Safe at Home office. In addition to being the participant's agent to receive mail, the Office of the Minnesota Secretary of State is a participant's agent to receive service of process.

2. Service of Process

- **Service by Mail**

Service on the secretary of state of any such summons, writ, notice, demand, or process must be made by mailing the summons, writ, notice, demand, or process to the designated address. If an

[15] *Hensley v. Hall,* 2014 WL 2565658 (June 9. 2014)(unpublished)
[16] Minn. Stat. §518B.01, subd. 7
[17] Minn. Stat. §518B.01, subd. 7(d)

envelope enclosing the summons, writ, notice, demand, or process is clearly labeled as service of process on the outside of the envelope and is served by first class or certified mail on the secretary of state, the secretary of state shall forward the service to the program participant no later than the next business day.

- **Personal Service**

In the event that personal service of any document is required by law, that document may be served by delivering the document to any public counter of the Office of the Secretary of State. The secretary of state must forward the service to the program participant no later than the next business day. As the secretary of state is the agent for service of process, an affidavit of service on the secretary of state constitutes proof of service on the program participant and commences the time in which responsive pleadings must be filed.

3. FAQs

- **Who must accept the Safe at Home address?**

All public and private entities in the state of Minnesota must accept a participant's assigned Safe at Home address (PO Box) as the participant's actual address of residence, school address, and address of employment. This requirement is mandated by Minnesota Statutes, Chapter 5B.

- **What does a Safe at Home address look like?**

All Safe at Home participants share the same post office box, but each household is assigned a unique lot number. Occasionally, different adults within the same household will be assigned different lot numbers. A Safe at Home address is not complete without the lot number. A Safe at Home address looks like:

Participant's Name
Lot ###
PO Box 17370
Saint Paul, MN 55117-0370

Every Safe at Home address is a Saint Paul address, no matter where a participant lives in Minnesota. The only Safe at Home post office box is the one indicated above.

4. Miscellaneous Information

- **5B.11 LEGAL PROCEEDINGS; PROTECTIVE ORDER.**

If a program participant is involved in a legal proceeding as a party or witness, the court or other tribunal may issue a protective order to prevent disclosure of information that could reasonably lead to the discovery of the program participant's location.

III.ONE JUDGE, ONE FAMILY

The combined Family, Civil Harassment, Juvenile and Probate Jurisdiction, which is often referred to as "One Judge, One Family," suspends the District Court review and referee findings may be appealed directly to the Court of Appeals.[18]

- The protocols of One Judge, One Family are predicated on the first case drives if/when the next case is blocked.
- Judges will hear all post judgment family matters related to cases they are/were blocked to during the years they are assigned to Juvenile and Family Court.
- Open cases from an outgoing judge will be reassigned to an incoming judge.
- Post judgments from a family case of a judge or referee that is no longer in Juvenile and Family Court will be rotationally assigned, unless there are other case types blocked to an individual judge or referee.
- New CHIPS matters or re-opened CHIPS matters filed after the assigned judge or referee is no longer in Juvenile and Family Court will be assigned as a new case and not according to a judicial lineage (e.g., motions to re-open jurisdiction).
- OFP and HRO cases are only blocked when there is a companion Dissolution, Custody, Transfer of Legal Custody, Paternity, or CHIPS case assigned to a Judicial Officer. Individual Judicial Officers decide whether or not a Harassment case will be blocked.

IV. EX PARTE ORDERS FOR PROTECTION

A. Judicial Notice When Considering Ex Parte Relief

The Court sometimes needs to review other court cases when reviewing petitions for ex parte orders[19]. This may be to determine whether there is a DANCO in another case or determine if there is a family court action which addresses custody or parenting time. The Court may take judicial notice of an adjudicative fact if the fact is not subject to reasonable dispute and the parties are given an opportunity to be heard.[20] The Minnesota Board of Judicial Standards has issued an advisory opinion which recommends that if the Court relies on a court record in another case, the Court

[18] Minn. R. Gen. Pract. 312.01

[19] A petition must identify the existence of any pending family court action or existing order for protection matters between the parties and court administration must verify the terms of any existing order governing the parties. Minn. Stat. §518B.01, subd. 4d.

[20] Minn. R. Evid. 201

should give the parties an opportunity to be heard on the propriety of taking judicial notice of that court record after issuing the ex parte order.[21]

B. Jurisdictional Requirements[22]

Although the statute headnote says "Court Jurisdiction", these provisions are conditions for venue and therefore may be waived.[23]

- Either party lives in Ramsey County; or
- If there is pending or completed Family Court proceedings in Ramsey County involving the parties or their minor children; or
- The alleged domestic abuse occurred in Ramsey County.

For purposes of interpreting the Long Arm Statute in order to determine whether the Court has personal jurisdiction over a non-resident this prong is satisfied if "damage from the alleged tortious conduct results in Minnesota".[24] In this case, the Court of Appeals affirmed a trial court which found that Minnesota had personal jurisdiction over the respondent in an order for protection involving a minor child because the child was present in Minnesota even though the respondent had never lived in, owned property, transacted business, or visited Minnesota and the assault of the child occurred in Ohio.

C. Relationship[25]

The parties must be:

- Married/formerly married; or
- Living/lived together; or
- Have a child/unborn child together; or
- Have/had significant sexual/romantic relationship; or
- Related by blood

The Court of Appeals clarified that parties who shared common kitchen and living areas with separate sleeping areas, but had no romantic or blood relationship were still covered under the Act.[26] In *Sperle v. Orth*[27], the Court of Appeals held that past relationships qualify as a "significant sexual or romantic relationships" and that a petitioner who had recently ended a three-year relationship was a family or household member within the statutory definition.

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[21] Minn. Bd. Jud. Cond. Adv. Opin. 2016-2 at 5
[22] Minn. Stat. §518B.01, subd. 3
[23] *Hicks v. Hicks,* 2017 WL 4767097 October 23, 2017 (unpublished)
[24] *Hughs, o/b/o Praul v. Cole,* 572 N.W.2d. 747, 750 (Minn. Ct. App. 1997)
[25] Minn. Stat. §518B.01, subd. 2(b)
[26] *Elmasry v. Verdin,* 727 N.W.2d 163 (Minn. Ct. App. 2007)
[27] *Sperle v. Orth,* 763 N.W.2d 670 (Minn. Ct. App. 2010)

D. Allegations of Domestic Abuse

If the matter concerns a first-time request by the petitioner for an Order for Protection (see Order for Protection Subsequent Orders and Extensions section), the judicial officer must determine if the Affidavit and Petition alleges an act of domestic abuse. The statute defining domestic abuse is written so each separate basis for the Court to define domestic abuse is disjunctive.[28] Before the Court may enter an order, the Court must find that domestic abuse occurred under one of the possible definitions. If the Court finds that one of the definitions has been satisfied, then the Court has the discretion whether to issue the order.[29] Domestic abuse means the following, if committed against a family or household member by a family or household member[30]:

- Physical harm or bodily injury or assault[31]**.** There is no specific timing requirement for when a physical assault must have occurred. The Supreme Court in *Thompson v. Schrimsher* overruled some Court of Appeals decisions which previously imposed a showing of present harm or an intention on the part of the respondent to do present harm. This logic would also seem to eliminate the requirement for the Court to find imminent fear when the Court has found that physical harm, bodily injury or assault has occurred[32]; or
- Infliction of fear of imminent physical harm or bodily injury or assault. The Court looks to the totality of the circumstances to determine whether there was an intent to inflict fear of imminent physical harm.[33]; or
- Terroristic threats: "threatening directly or indirectly to commit any crime of violence with the purpose to terrorize another or in reckless disregard of the risk of causing such terror." In an unpublished Court of Appeals decision, the Court of Appeals held that attempted suicide is not a "crime of violence" as described in Minn. Stat. §609.713 (referring to crimes listed in Minn. Stat. §609.1095, subd. 1(d), which defines crimes of violence). However, the Court

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[28] *Thompson and o/b/o the minor child v. Schrimsher,* _____ N.W.2d _____ (Minn. 2018), 2018 WL 627092 (January 31, 2018).

[29] *Id.* at _____.

[30] Minn. Stat. §518B.01, subd. 2

[31] Domestic abuse does not include neglect involving inappropriate hygiene and medical care for child, inadequate supervision, active chemical dependency and overall pattern of behavior endangering the physical well-being of the child. *Chosa v. Tagliente,* 693 N.W.2d 487 *Minn. Ct. App. 2005) Domestic abuse against parent does not include abuse to child by parent's partner. *Hudson v. Hudson,* 2013 WL 4504457 (August 26, 2013)(unpublished) If there is physical harm, there is no mens rea requirement as there is in a criminal assault case. Boecker v. Lorenz, 2015 WL 7201644 (November 16, 2015)(unpublished)

[32] *Thompson and o/b/o the minor child v. Schrimsher,* _____ N.W.2d _____ (Minn. 2018), 2018 WL 627092 (January 31, 2018). This seems to overrule *Bjergum v. Bjergum,* 392 N.W.2d 604, 606 (Minn. Ct. App.1986)(reversing OFP because abuse occurring nearly two years prior to the petition was too remote to establish abusing party's present intent to inflict harm or fear of harm); and explicitly overrules *Kass v. Kass,* 355 N.W.2d 335, 337 (Minn. Ct. App.1984)(reversing OFP because there was a four-year gap between the incident of abuse and the petition, concluding that "the record is devoid of any showing of [the abusing party]'s present intention to do harm or inflict fear of harm") to the extent these decisions impose a time frame in which the physical abuse must have occurred.

[33] *See Pechovnik v. Pechovnik,* 765 N.W.2d 94, 99 (Minn. Ct. App.2009).

affirmed the issuance of the order finding the respondent demonstrated "reckless disregard of the risk of causing such terror;"[34] [35] or

- Criminal sexual conduct (first through fifth degrees)[36]; or
- Interference with an emergency call. To establish the elements of this crime, the state must establish that an emergency existed at the time of the call which is defined as a "serious event that demands immediate action" and is not limited to threats of violence, violence or an underlying criminal event.[37]
- There is no specific timing requirement for when a threat of imminent physical harm to the petitioner must occur.[38] A finding of present harm or intention to inflict fear of imminent harm may be supported by the totality of the circumstances.[39]

E. Ex Parte Options

When considering a request for an ex parte order, the judicial officer should determine whether or not the Affidavit and Petition alleges an immediate danger of domestic abuse.

1. Grant Ex Parte Order Without Hearing

A hearing is not required unless the petitioner requests relief beyond the relief allowed in Minn. Stat. §518B.01, subd. 7(a).

2. Grant Ex Parte Order With a Hearing Date

A hearing is required if the petitioner requests one or if petitioner requests relief beyond Minn. Stat. §518B.01, subd. 7(a).

a. Court Grants the Relief Requested

b. Court Declines to Order Some of the Relief Requested

When the judicial officer modifies the relief requested then a hearing must be held within 7 days.[40]

3. Deny Ex Parte Order

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[34] Minn. Stat. §609.713, subd. 1

[35] The Court could find that the respondent inflicted fear of imminent physical harm on the basis of a threat to attempt suicide and issue the order under a separate theory from "terroristic threat."

[36] Minn Stat. §609.342, §609.343, §609.344, §609.345, and §609.3451

[37] *State v. Brandes*, 781 N.W.2d 603(Minn. Ct. App. 2010) and Minn. Stat §609.78, subd. 2

[38] *Thompson and o/b/o the minor child v. Schrimsher,* _____ N.W.2d _____ (Minn. 2018), 2018 WL 627092 (January 31, 2018).

[39] *See Pechovnik v. Pechovnik,* 765 N.W.2d 94, 99 (Minn. Ct. App.2009). (affirming finding of present intent based on abusing party's gestures, persistent questioning, aggressive conversation, and controlling behavior in light of abusing party's history of threatening behavior); *Boniek v. Boniek,* 443 N.W.2d 196, 198 (Minn. Ct. App.1989) (affirming finding of present intent where abusing party delivered a mutilated marriage certificate to abused party's doorstep and was physically violent to a third party in abused party's presence); *Hall v. Hall,* 408 N.W.2d 626, 629 (Minn. Ct. App.1987) (affirming the issuance of an OFP based on verbal threats that placed the petitioner in fear of imminent physical harm, in light of past abuse), *review denied* (Minn. Aug. 19, 1987).

[40] Minn. Stat. §518B.01, subd. 5(c)

a. Issue Order Denying Petition for Ex Parte Order for Protection

If the judicial officer denies the ex parte order, a hearing must still be scheduled within fourteen (14) days unless the Affidavit and Petition state that the petitioner does not want a hearing if an ex parte order is denied[41]

b. Grant Harassment Restraining Order

If the judicial officer decides not to issue the *ex parte* Order for Protection, s/he may indicate a willingness to issue a Harassment Restraining Order. The petitioner must file a petition and affidavit for one. See Harassment Restraining Orders section.

F. Length of Time Ex Parte Order for Protection Is Effective

If the petitioner has selected an order through the "No Hearing" option under Minn. Stat. §518B.01, subd. 7, relief granted by the Order for Protection shall be for a period not to exceed two years, except when the Court determines a longer period is appropriate.

In all other situations, the *ex parte* order remains in effect until a hearing is held, or the order expires, or a new order is issued.

If the respondent is not served the *ex parte* order within 14 days, the order expires.[42]

V. Relief

An Order for Protection may include the following relief:

A. No Abuse

An Order for Protection (whether *ex parte* or following hearing) prohibits the respondent from committing acts of domestic abuse upon the petitioner and/or the minor child(ren).[43]

B. No Contact

An Order for Protection (whether *ex parte* or following hearing) orders the respondent to have no contact with the petitioner whether in person, by telephone, mail, e-mail, through electronic devices, or through a third party.[44]

On rare occasion, a petitioner will ask that this provision not be included, or that exceptions be listed. Such a provision or exception to no contact may be requested and ordered.

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[41] Minn. Stat. §518B.01, subd. 5(a)
[42] Minn. Stat. §518B.01, subd. 7(d)
[43] Minn. Stat. §518B.01, subd. 7(a)
[44] Minn. Stat. §518B.01, subd. 7(a)

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The Order for Protection form allows for exceptions to no contact. Use these exceptions sparingly. Any exceptions can cause extreme enforcement issues and should be rarely used. When used, be specific.

C. Exclusion from Residence

An Order for Protection (whether *ex parte* or following hearing) may exclude the respondent from the dwelling that the parties share or from the residence of the petitioner.[45]

This provision does not decide ownership of property and it is not the same as dissolution's "occupancy of the homestead." Those decisions are properly made within the dissolution proceeding, and the domestic abuse proceeding is not a substitute for that. If the petitioner moves, the new dwelling or residence of the petitioner will be protected under the provision.

The Court has authority to exclude the respondent from the dwelling, but not the petitioner.[46]

D. Exclusion from Employment

The Order for Protection (whether *ex parte* or following hearing) may exclude the respondent from the petitioner's place of employment or otherwise limit access to petitioner by the respondent at the petitioner's place of employment.[47]

E. Exclusion of Specific Distance Surrounding Residence

The Order for Protection (whether *ex parte* or following hearing) may exclude the respondent from a reasonable area surrounding the dwelling or residence, which area shall be described specifically in the order.[48]

The format of the order has been suggested by Ramsey County Bench policy to state, "2 city blocks or ¼ mile in all directions, whichever distance is greater."

F. Custody and Parenting Time

The Order for Protection (whether *ex parte* or following hearing) may grant temporary custody or establish temporary parenting time with regard to minor children of the parties on a basis that gives primary consideration to the safety of the victim and the children. In addition to the primary safety considerations, the Court may consider particular best interest factors that are found to be relevant to the temporary custody and parenting time award. The Court's decision on custody and parenting

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[45] The petitioner's right to apply for this relief is not affected by her/his leaving the residence to avoid abuse. An Order for Protection can be issued to allow the petitioner to return to the residence and the respondent be excluded. Minn. Stat. §518.B.01, subd. 10(a)

[46] *Swenson v. Swenson*, 490 N.W.2d 668 (Minn. Ct. App. 1992)

[47] Minn. Stat. §518B.01, subd. 7(a)

[48] Ibid

time shall in no way delay the issuance of an Order for Protection granting other relief.[49]

Child custody and parenting time in an Order for Protection are always temporary until order of the Family Court.

1. No Marriage, No Custody/Parenting Time Order

- Mother Petitioner: In most domestic abuse situations, the child is placed in the custody of the mother (petitioner) where the parties are not married and there is not a previous custody order.
- Father Petitioner: If the parties were never married and the father is the petitioner and there is no adjudication of paternity or recognition of parentage, the order should remain silent as to custody and/or parenting time.

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In order to make custody clear, the "other" box should be marked and the statement "Paternity has not been decided by a Court, and the Court is not addressing issues of custody, parenting time (visitation), and support." (Under Minn. Stat. 257.541, subd. 1, where paternity has not been decided, sole physical and legal custody of a child is with the biological mother.) Without this, an enforcement problem often arises, as police, day care, and/or schools may not assist the mother with custody if the order does not say this.[50]

2. Prior Order Gives Joint Custody or Parties Are Married and No Order

If the children were born during the marriage, and there is no court order, they have equal rights to the children.

If parties have joint physical custody through a court order, then access is governed by that order. In this situation, the petitioner could be granted custody; however, the question of temporary custody shall consider the safety of the victim and children given the facts alleged in the petition.

3. Prior Order Gives Petitioner Sole Physical Custody

Petitioner should continue to have sole custody in the Order for Protection (*ex parte* and after hearing).

4. Prior Order Gives Respondent Sole Physical Custody

Just because the respondent has custody does not mean the petitioner should not get an Order for

[49] Minn. Stat. §518B.01, subd. 6

[50] The Court of Appeals affirmed a trial court which checked this box without making any best interest findings for custody because the parties had never married and the respondent never established paternity, "the district court accurately reflected the circumstances of this matter on the OFP and did not make any ruling concerning custody". *Welter v. Blackwell,* 2018 WL 414323 (January 16, 2018) (unpublished).

Protection. However, granting the petitioner custody in an *ex parte* order should be done cautiously. It is best to have clear, specific allegations that would show risk to the safety of the petitioner and the children.

Some helpful questions for this rare situation: Are there previous or current Orders for Protection? Is there a criminal matter? A Juvenile Court matter? Advice from a prior bench book is to proceed with caution. In matters involving specific or direct allegations of domestic abuse to children the Court has the authority to issue an order on behalf of children that could override previous custody orders.

5. Petitioner Is Not a Parent of Protected Child(ren)

There is no explicit statutory authority authorizing the Court to grant custody or parenting time to a non-parent. Minn. Stat. 518B.01, subd. 6 allows the court to award temporary custody or establish temporary parenting time with regard to minor children of the *parties*. There are occasions when the Court is confronted with a non-parent petitioner seeking custody and there are serious allegations that raise grave concerns for the safety of the child in the parent's care. The Court should proceed cautiously and make specific findings to support the decision.

BEST PRACTICE

In cases where the petitioner is not the parent of the protected child(ren) and there is a concern for the child's safety, the Court should order the respondent to not commit acts of domestic abuse to the child and to have no contact with the child and stay silent on the issue of temporary custody. At the hearing, the petitioner may be directed to family court to initiate a third party custody proceeding under Minn. Stat. 257C..

6. Child Retrieval

Ordering law enforcement to retrieve minor child(ren) from a party (child retrieval orders)

Child retrieval is typically requested by a petitioner when the minor child(ren) is in the respondent's physical care, and the petitioner alleges this may cause a safety concern for the petitioner and/or the minor child(ren) or the Respondent has no legal right to the child. The minor child(ren) do not need to be a protected party to order a child retrieval.

BEST PRACTICE

The following factors should be assessed when deciding whether or not to order a child retrieval:

1) *Possible impact on the petitioner's and child(ren)'s safety*
   a) *Are there allegations of child abuse?*
   b) *If the child(ren) remained in the care of the respondent could this have an impact on the petitioner's safety should s/he attempt to retrieve/exchange the child(ren) without a court order and assistance from law enforcement?*
2) *Current custody status of the minor child(ren)*

a) *Does the petitioner already have custody pursuant to Minn. Stat. §257.541 Subd. 1 – Mother's right to custody or Recognition of Parentage (Minn. Stat. §257.75 Subd. 3)?*
b) *Does the petitioner have custody through a court order?*
c) *Does Respondent have any legal rights to the child(ren)?*

If child retrieval is ordered, specific language should be placed in the order. The following language was created in collaboration with the Ramsey County Sheriff's Department and the Ramsey County Violence Coordinating Council and approved by the 2nd Judicial District Court Bench:

"With the full force of the county, law enforcement shall retrieve the child(ren) (specify name and date of birth of each child) from the Respondent and turn the child(ren) over to the Petitioner."

Occasionally, parties may go back-and-forth, filing emergency motions requesting the Court to order law enforcement to retrieve the minor child(ren) from the other party. Once a child retrieval has been ordered, reversing this decision in an ex parte emergency order should be done cautiously, if at all. In addition to possible safety risks and the stress this can place on the victim and the minor child(ren), it also takes a tremendous amount of resources from the Sheriff's Departments to execute these orders. In lieu of reversing the original order, the Court may choose to push up or add a Court hearing to address the safety and custody of the minor child(ren).

G. Protection of Pets or Companion Animals

The 2010 Minnesota Legislature expanded jurisdiction for the Court to direct the care of a companion animal owned, possessed or kept by either party or either party's child in an Order for Protection (whether *ex parte* or following hearing).[51]

Jurisdiction was also expanded to allow the Court to restrain a party from injuring or threatening to injure a companion animal in the other party's residence as an indirect means of threatening the other party.[52]

H. On Behalf Of (OBO) Minor Child(ren)

A petitioner may seek an Order for Protection (whether *ex parte* or following hearing) on his/her own behalf, solely on behalf of minor child(ren), or on behalf of him/herself and minor child(ren). Orders on behalf of minor child(ren) are granted when there are allegations of domestic abuse to the child(ren).

The order may not be issued on behalf of a child if the respondent has not committed acts of domestic abuse to the child.[53] If the order is issued on behalf of a minor child, the relief on behalf of

[51] Minn. Stat. §518B.01, subd. 6 and 7
[52] Minn. Stat. §518B.01, subd. 7
[53] *Schmidt v Coons*, 818 N.W.2d 523 (Minn. 2012)

the minor child applies only until the child reaches the age of 18.[54] Arguably, the order on behalf of a child expires once the child is no longer a minor.

If the Order for Protection is issued on behalf of a minor child, the Court should make an explicit finding of domestic abuse against the minor child.[55] The Minnesota Court of Appeals reversed the trial court when the trial court issued an OFP on behalf of a minor child when the respondent "wrench[ed] the child's arm and [took] the child from [the petitioner] 'by . . . physical force'". The Court of Appeals required a showing of "physical harm or bodily injury" to the child as a result of the respondent's actions.[56] The trial court did not rely upon a claim that the actions caused "the infliction of fear of imminent physical harm, bodily injury or assault" to the child.[57]

Usually, Orders for Protection on behalf of child(ren) require the respondent to have no contact with the child(ren) and place the child(ren) in the custody of the petitioner until a hearing is held or the order expires. Orders for Protection on behalf of child(ren) issued following a hearing will usually place the child(ren) in the custody of the petitioner but may make a provision for contact between the respondent and the child(ren), giving primary consideration to the safety of the petitioner and the child(ren) (e.g. supervised parenting time, etc.).

If the order is issued on behalf of a child and the Court has reason to believe that the minor child is a victim of domestic child abuse[58] or neglect[59] as defined by statute[60], the statute requires the Court to appoint a Guardian ad Litem if custody or parenting time is at issue. (Go here for more information on Guardians ad Litem.)

The following circumstances should be taken into consideration when a petitioner is seeking an Order for Protection on behalf of minor child(ren):

1. Relief to Protect Child

Even if the Order is not issued on behalf of the child, the court may still order relief to protect the child such as supervised parenting time. Primary consideration must be given to the safety of the victim and the children.[61]

2. Domestic Abuse Versus Reasonable Force to Restrain or Correct a Child

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[54] *Rew v. Bergstrom,* 845 N.W.2d 764, 782 (Minn. 2014)

[55] *See Klammer v. Klammer,* 2016 WL 281355 (January 25, 2016)(unpublished)(reversing order o/b/o a child where there were no findings of abuse to the child); *Tawyea v. Tawyea,* 2015 WL 648501 (February 27, 2015.)(unpublished)(noting there was no finding but affirming because there was substantial evidence in the record to support an order on behalf of the child).

[56] *Hall v. Arend,* 2016 WL 6570233 (November 7, 2016)(unpublished)

[57] *Id.* F.N. 1

[58] Minn. Stat. §260C.007

[59] Minn. Stat. §626.556

[60] Minn. Stat. §518.165

[61] Minn. Stat. §518B.01, subd.6(a)(4) and *Baker v. Baker,* 494 N.W.2d 282, 285 (Minn. 1992)

In situations where the respondent is the other parent and an Order for Protection on behalf of a child is sought on the basis of domestic abuse to the child-, the judicial officer must determine whether the acts of respondent constitute domestic abuse or whether they constitute the reasonable use of force by a parent to restrain or correct a child.[62] There is some question as to whether the Court should apply the standards for domestic child abuse found in Minn. Stat. §626.556, subd. 2(d); the form order promulgated by the Council of Chief Judges contains this notation.

The Minnesota Supreme Court has held that the use of corporal punishment in the form of using a paddle to strike a teenage son was not abuse in the context of determining whether child abuse occurred for child protection purposes.[63]

3. No Custody or Parenting Time If No Adjudication of Parentage or Recognition of Parentage.

The Court does not have the authority to grant an unadjudicated father custody of a child in an Order for Protection even ifthe Order for Protection is on behalf of a child.

BEST PRACTICE
I In cases where the petitioner has not been adjudicated the father of a child but there is a concern for the child's safety, the Court should order the respondent to not commit acts of domestic abuse to the child and to have no contact with the child and stay silent on the issue of temporary custody or parenting time. At the hearing, the petitioner may be directed to family court to initiate a paternity proceeding.

However, the Minnesota Supreme Court held that a Respondent father in an Order for Protection who had not been to court to establish his custody or parenting time rights, but had executed a valid Recognition of Parentage, could be granted supervised parenting time over the objections of the mother.[64] A valid Recognition of Parentage has the same legal effect as an adjudication of paternity. The decision does not change the requirement that the Court focus on the safety of the victim and child when determining custody and parental access[65], nor does it require the Court to award parenting time.

I. Continuation of Insurance Coverage

The Order for Protection (*ex parte* or after hearing) may require the respondent to continue all currently available insurance coverage without change in coverage or beneficiary designation.

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[62] Minn. Stat. §609.06(b)

[63] *In the Matter of Children of N.F.,* 749 N.W.2d 802 (Minn. 2008)

[64] *Beardsley v. Garcia*, 753 N.W.2d 735 (Minn. 2008)

[65] Minn. Stat. §518B.01, subd. 6(a)(4)

VI. Additional Relief That Requires Hearing

A. Child Support

Temporary child support can be ordered following a hearing. Temporary child support is in effect until the Family Court makes a subsequent order or the Order for Protection expires. Child support may be ordered on the same basis as is provided in Minnesota Statute 518A. The temporary child support should be ordered to be automatically withheld from the income of the person obligated to pay pursuant to Chapter 518A.53[66]

If the information is available either through documentary or testimonial evidence, it is important for Petitioner to be able to receive immediate child support as part of a larger plan to stay safe. The child support calculator can be used to determine what the child support award should be under the Guidelines under the current law. To access the web calculator, click on the icon that should be on your desktop or go to the State of Minnesota's Child Support Calculator.

If the information is not available, there are a number of options, most of which have consequences that may impact the victim.

- The parties could be required to return to court for a review hearing with the necessary documents.
- The parties could be required to file a motion for child support accompanied with the proper documentation in the Order for Protection.
- The parties could be referred to Family Court to address this matter, but this referral requires the parties to pay additional filing fees, which could be a barrier for the victim.
- The parties could be referred to Ramsey County for IV-D (Child Support Enforcement Services), but this also takes time depending on the County's schedule and may create another barrier for the victim.
- Other options include keeping the record open for the parties to bring in the documentation so that the judicial officer can make the calculations and issue a separate order. This option requires the obligor to bring in documents with little incentive to do so.
- If there is no information about a party's income, the statute permits the Court to assign potential income according to one of the following three methods:
    - A party's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community;
    - The actual amount of unemployment compensation or workers' compensation benefit received; or
    - The amount of income a party could earn working 30 hours per week at 100% of the

[66] Minn. Stat. §518B.01, subd. 6(5) and Minn. Stat. §518A.53

current federal or state minimum wage, whichever is higher. [67]

B. Spousal Maintenance

Temporary spousal maintenance can be ordered following a hearing. Any temporary spousal maintenance in an Order for Protection is in effect until the Family Court makes a subsequent order or the Order for Protection expires. Spousal maintenance may be ordered on the same basis as is provided in Minnesota Statutes 518.552.

C. Restitution

An Order for Protection may order the respondent to pay restitution to the petitioner and is enforceable as civil judgment.[68] A separate Order for Restitution should be issued.[69]

D. Treatment or Counseling for Domestic Abuse and/or Chemical Dependency

An Order for Protection following hearing may order a respondent to participate in treatment or counseling services, including requiring a respondent to successfully complete a domestic abuse counseling program or educational program under Minn. Stat. §518B.02.[70]

Enforcement of these provisions can be accomplished by setting of a review hearing, and requiring the respondent to appear at the review hearing with written verification of program completion.

The statute allows for the *abusing party* to be ordered to participate in treatment or counseling[71]. There is no statutory authority to order petitioners to participate in treatment programs.

E. Counseling or Other Social Services for the Parties

Upon request of the *petitioner*, the Court may order after hearing, counseling or other social services for the parties, if married, or if there are minor children.[72] Typically these services, if ordered, are provided separately to the parties.

F. Award Use and Possession of Property

An Order for Protection following hearing may address the temporary use and possession of property and restrain one or both parties from transferring, encumbering, concealing, or disposing of property except in the usual course of business or for the necessities of life. The Court may order one or both parties to account for all such transfers, dispositions, and expenditures made after the order is served or communicated to the party restrained in open court.[73]

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[67] Minn. Stat. §518A.32, subd. 2(

[68] Minn. Stat. §518AB.01, subd. 6(f)

[69] Minn. Stat §518B.01, subd. 6(a)(11)

[70] Minn. Stat. §518B.01, subd. 6(a)(7)

[71] Minn. Stat. §518B.01, subd. 6(a)(7)

[72] Minn. Stat. §518B.01, subd. 6(a)(6)

[73] Minn. Stat. §518B.01, subd. 6(a)(8)

Any temporary property provision in an Order for Protection is in effect until the Family Court makes a subsequent order or the Order for Protection expires.

G. Firearms

The 2014 Domestic Violence Firearm Act (HF 3238, Session Law Chapter 213, also called the Firearms Transfer/Surrender Act) went into effect August 1, 2014. This act makes it MANDATORY for judges to order the "transfer or surrender" of firearms if the act applies. There is *no exception* for military or law enforcement in the Minnesota Statute.

1. Cases Where Surrender/Transfer Is Required

Qualifying Orders for Protection (OFPs);
Qualifying Domestic Child Abuse Orders;
Domestic Assault Convictions;
Stalking Convictions.

2. Cases Where Surrender/Transfer Is Not Required

Ex parte orders;
Final order that have automatically converted without a hearing;
No notice to abusing party;
No opportunity for the abusing party to be heard;
Harassment Restraining Orders.

3. Meaning of Firearms

The statutes governing the requirement to transfer firearms do not define "firearms". Recent cases interpreting the meaning of a firearm where the underlying statute has not defined the term have relied upon the plain meaning of the term. These cases have found a firearm to be a weapon that uses explosive force[74] which excludes a BB gun which uses compressed air.

4. Requirements for Qualifying Orders for Protection[75]

Firearms ***must*** be surrendered/transferred when issuing an OFP where:

- The OFP is issued after a hearing of which the abusing party received actual notice and had the opportunity to participate, **AND**
- The OFP informs the abusing party of their responsibilities under the order, **AND**

[74] *State v. Hayward,* 886 N.W.2d 485 (Minn. 2016) and *State v. Yang,* 887 N.W.2d 40 (Minn. Ct. App. 2016)
[75] Minn. Stat. §518B.01, subd. 6 (g); Minn. Stat. §260c.201, subd.3 (d)

- The OFP restrains the abusing party from harassing, stalking, or threatening the protected party ***OR*** engaging in other conduct that would place the protected party in reasonable fear of bodily injury, **AND**
- The language in the OFP must include a finding that the abusing party represents a credible threat to the physical safety of the petitioner; ***OR*** prohibits the abusing party from using, attempting to use, or threatening to use physical force against the petitioner.

5. **Imminent Risk Process for Immediate Surrendering/Transferring Firearms for OFPs**[76]

- If the court determines that an abusing party ***poses an imminent risk*** of causing another person ***substantial bodily harm***, the court shall order that the local law enforcement agency take ***immediate possession*** of all firearms in the abusing party's possession.
- The local law enforcement must file all affidavits or proofs of transfer with the court within ***2 business days*** of the immediate transfer/surrender.
- The firearms will be surrendered/transferred for the length of time the OFP is in effect.
- Surrender/transfer may be permanent or temporary.

6. **Non-Imminent Risk Process for Surrendering/Transferring Firearms**[77]

The court shall order the abusing party to transfer any firearms that the person possesses within **3 business days** to one of the following:

- A law enforcement agency, who must provide the abusing party a "proof of transfer." Law enforcement ***is not required*** to take immediate possession of firearms.
- A federally licensed firearms dealer, who must provide the abusing party a "proof of transfer."
- A third party who may lawfully receive them and does not reside with the abusing party, who must sign a statutorily approved affidavit under oath before a notary public.
- The abusing party must file "proof of transfer" or "affidavit" to the court within ***2 business days*** of transfer/surrender, which will be sealed by the court.
- Surrender/transfer may be permanent or temporary.

7. **Additional Information**

- The statute does not address petitioners/victims surrendering/transferring firearms.

[76] Minn. Stat. §518B.01, subd. 6(i)
[77] Minn. Stat. §518B.01, subd. 6(g)

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- The penalty for possessing firearms while ineligible is a gross misdemeanor offense. Minn Stat 624.713, subd 2

BEST PRACTICE

After issuing a qualifying OFP, it is helpful to read the applicable firearm provision aloud in court and state that there is a criminal consequence if the Respondent is in possession of a firearm so it is clear to the Respondent that these statements apply.

Upon issuance of an Order for Protection Following Hearing, judicial officers should consider follow-up related to firearms, including a potential review hearing, to ensure the Affidavit/Proof of Transfer of Firearms OFP108 is filed or, in the alternative, consider providing the respondent an Affidavit of No Ownership/Possession of Firearms OFP109.

H. Duration of Order for Protection Following Hearing

An Order for Protection shall be issued for a period not to exceed two years, except when the Court determines a longer period is appropriate.[78]

The order granting relief becomes effective upon the judicial officer's signature.[79]

VII. Interface With Other Court Actions

A. Family Court

The provision in an Order for Protection ordering the abusing party not to commit acts of domestic abuse cannot be vacated or modified during a dissolution of marriage or legal separation proceeding but the court may hear a motion for modification of an order for protection concurrently with a proceeding for dissolution of marriage upon notice of motion and motion and notice cannot be waived.[80]

In a subsequent custody proceeding the Court must consider a finding of domestic abuse.[81]

If the Court orders child support, insurance, parenting time, etc., it may be helpful to remind the parties that the decisions on these collateral issues are in effect only until the Family Court issues an order.

[78] Minn. Stat. §518B.01 subd. 6(b)
[79] *Id.*
[80] Minn. Stat. §518B.01, subd. 6 (c)
[81] Minn. Stat. §518B.01, subd. 17

If the parties have a pending Family Court case in another district, it may be appropriate to consider whether venue[82] of the order for protection should be changed. The change of venue order should make findings according to Minn. Stat. §542.11(4). It is not judicial misconduct for the two judicial officers to discuss the logistical issues as long as the discussion is disclosed to the parties and no substantive issues including credibility of the parties are discussed.[83]

1. Case Management Options in the Family Law Cases

Mediation cannot be required when domestic abuse is alleged.

If, at a hearing, it appears that a family law case is going to be initiated or a post-decree motion filed, the judicial officer should consider making an exception to the no contact provision of the Order for Protection to permit contact with *court-ordered* alternative dispute resolution between the parties.

This avoids the necessity of the Family Court judicial officer from later amending the Order for Protection should that be necessary, and still adds the protection to the victim as most alternative dispute resolution alternatives are voluntary, especially when domestic abuse has been alleged between the parties.

2. Different Legal Standards

Depending on the type of proceeding that is held, the Court has different authority in terms of: jurisdiction, venue, service of process, necessary pleadings, notice including time line for hearing, available relief before and after a hearing, and enforceability of the order.

Some judicial officers emphasize that some provisions are only in effect until a final order is determined by Family Court by adding “pending further order of the Family Court” to applicable provisions in the Order for Protection.

B. Juvenile Court

1. Referral to Human Services

Petitions for Orders for Protection which include allegations of child abuse or neglect (OBO orders) include a provision in the *ex parte* Order for Protection: "As required by law, a copy of the petition and this order shall be forwarded to the Child Protection Agency of Ramsey County.” Court staff forwards a copy of the order to the Ramsey County Human Services (RCCHSD) Intake for review.RCCHSD applies their established criteria and determines whether or not an investigation or services are necessary.

2. Custody and Parenting Time

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[82] Minn. Stat. §542.11 and §518.09

[83] ~~In an unpublished case a~~ A trial court judge in one district presiding over the Order for Protection who consulted with a judge in a different district who had a custody trial under advisement to determine which district should handle the order for protection proceeding did not violate the respondents due process rights or the judicial code of ethics. *Knight v. Knight*, 2014 WL 3700975 (July 28, 2014)(unpublished).

Juvenile Court has "original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services, or neglected and in foster care."[84] The Court of Appeals held that family court lacked concurrent jurisdiction to consider a third party custody action when there was a CHIPS action pending in juvenile court.[85] The same logic applies to custody and parenting time in an Order for Protection matter The court does not have jurisdiction to address custody and parenting time if there is an open Juvenile Protection matter.

C. Criminal Court

1. Effect of Criminal and Civil Orders

There are often situations where both a Domestic Abuse No Contact Order (DANCO) issued through a Criminal Court proceeding, as well as an Order for Protection issued through a Civil Court proceeding, are in effect independent of one another. Modifications of the orders should be handled in the corresponding court.

The civil Order for Protection or Harassment Restraining Order is effective and enforceable once personal service is made or the respondent knows of the existence of the order.[86]

2. Differences between an OFP and a DANCO

It is a misconception that if a protected party has a Criminal DANCO then there is no need for an OFP. Criminal DANCOs end upon court order, dismissal or acquittal of the criminal case, imprisonment of the defendant, or at the conclusion of the defendant's probation.
OFPs, on the other hand, are issued for a fixed period of time and the petitioners can request the court to extend an existing OFP or, if the petitioner has had an order in the past that is no longer in effect, issue a new (subsequent) OFP upon a showing lower standard (see Order for Protection Subsequent Orders and Extensions section).

If a victim only had a DANCO in the past, the victim does not qualify for a subsequent OFP. Additionally the OFP statute provides for relief not available as part of Criminal DANCOs. See Order for Protection Relief section.

3. Discovery When Criminal Proceedings Are Pending

See Order for Protection Hearings section.

4. Fifth Amendment Issues

See Order for Protection Hearings section.

[84] Minn.Stat. § 260C.101, subd. 2
[85] *Stern v. Stern,* 839 N.W.2d 96, 104 (Minn. Ct. App. 2013)
[86] Minn. Stat. §518B.01, subd. 14 (b)

D. Harassment Restraining Orders v. Orders for Protection

There may be times when a petitioner, who seemingly would qualify for an OFP, will choose to file a HRO instead. This may be a deliberate decision to not address issues of custody and parenting time. The HRO statute does not give the court authority to order custody and parenting time as the OFP statute does; therefore, petitioners may decide that this is a safer option to request a HRO so these issues cannot be raised.

E. Immigration Court (U-Visa)

1. What is the U-Visa

Under the Violence Against Women Act (VAWA) Congress created a U-visa for victims (applicant) of domestic abuse. The U-visa statute allows Federal, State or local judge, or a local official (e.g., prosecutor, law enforcement officer), to certify U-Visa applications if four requirements are met:

(1) the applicant has been physically or mentally abused by criminal activity;
(2) the applicant possesses information about the criminal activity;
(3) The applicant has been, is, or will be helpful in a criminal investigation or prosecution; and,
(4) has been the victim of criminal activity.

The purpose of the law is to encourage immigrants to report criminal activity.

2. Process

Requests are made by immigration attorneys, nonprofits, legal service corporations, or clinics, for judicial certifications. For purposes of the Family Division, the qualifying crimes include domestic violence, rape, sexual assault; and, the applicant does not need to be the spouse; and, the perpetrator does not need to be a United States citizen or have any legal status in the United States. Requests for certification will be submitted in Form I-918 Supplement B. Useful information may include Affidavits for the Order for Protection, Domestic Assault complaints, or testimony before the Judge in family or civil case.Although the certification is required to establish eligibility for U-visa status, an applicant must also meet other eligibility requirements and only U.S. Citizenship and Immigration Services has authorization to grant the U-visa. The applicant may receive U-visa status for up to four years.

3. Judicial Certification

Judges are specifically identified in the statute as U-visa certifiers. Under the federal regulations, Judges can certify as having “detected” criminal activity in their courtrooms. Domestic violence, sufficient to issue an OFP, is criminal activity within the meaning of the VAWA. A Judge can also certify cases in custody order, spousal support, child abuse or neglect, violations of the OFP, involving family violence. There does not have to be successful prosecution of the underlying criminal activity.

Certification simply should state the applicant has been helpful in detecting, investigating or prosecuting of the criminal activity. Comments indicate that investigation or prosecution has, and should be broadly interpreted in certifications.
For more information: http://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges or http://niwaplibrary.wcl.american.edu/immigration/u-visa/tools/judges or http://www.bjs.state.mn.us/advisory-opinions

VIII. HEARINGS

A. Participants and Their Roles

1. District Court Clerk

The Ramsey County Domestic Abuse/Harassment clerk provides courtroom support to the judicial officer presiding over the master calendars. Domestic Abuse/Harassment hearings scheduled on a judicial officer's block calendar will be clerked by the judicial officer's law clerk.

Judicial support includes:

- Ensures the MNCIS record is complete;
- Arranges transportation if a party is in custody;
- Orders interpreters if requested by a party;
- Provides a calendar electronically to the judicial officer, court reporter and deputies;
- Checks on service of orders;
- Arranges for service of orders;
- Provides parties with paperwork to request alternate service;
- Communicates with attorneys regarding possible agreements;
- Keeps judicial officer informed of appearances;
- Calls cases into the courtroom;
- Administers oaths to witnesses and interpreters;
- Drafts orders immediately following the hearing;
- Provides copies of orders to parties and attorneys following the hearing; and
- Other judicial support as requested.

2. Advocates

According to Minnesota law, "domestic abuse advocate" means an employee or supervised volunteer from a community-based battered women's shelter and domestic abuse program eligible to receive grants under Minn. Stat. §611A.32 that provides information, advocacy, crisis intervention, emergency shelter, or support to victims of domestic abuse and who is not employed by or under the

direct supervision of a law enforcement agency, a prosecutor's office, or by a city, county, or state agency.[87]

The Minnesota Supreme Court issued an order allowing domestic abuse advocates to assist victims in the preparation of petitions for Orders for Protection, attend and sit at counsel table, confer with the victim, and, at the judge's discretion, be heard by the judge[88]. The Court of Appeals has affirmed a trial court's permission for a domestic abuse advocate to address the court repeating general concerns about past abuse and recommending supervised parenting time.[89] When advocates assist victims as specified in that order, advocates are not engaged in the unauthorized practice of law. Advocates are not expected to give their name or their program's name on the record. Advocates should not be asked to mediate an agreement between the petitioner and the respondent.

Advocates do not give legal advice. They educate victims on the unique focus of the domestic abuse hearing and prepare them for the process and possible outcomes. Advocates focus on safety issues while explaining options and offering support and encouragement to victims who are often afraid or intimidated. Advocates also bring safety concerns to the attention of deputies outside of the courtroom. Consistency in Court proceedings is important to advocates in preparing victims for court.

A domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the Court. In determining whether to compel disclosure, the Court shall weigh the public interest and need for disclosure against the effect on the victim, the relationship between the victim and domestic abuse advocate, and the services if disclosure occurs.[90]

Domestic abuse advocates are mandated reporters under Minn. Stat. §626.556 and §626.557.

3. Interpreters

The Domestic Abuse/Harassment Office will schedule an interpreter for a party or a witness if the party makes such a request. In order to assure that all parties understand the role of the interpreter, it may be helpful to explain the following at the start of a court proceeding (taken from the Minnesota Judicial Branch Bench Card: Courtroom Interpreting):

- The interpreter can only interpret for one person at a time;
- The interpreter can only interpret testimony that is spoken so all responses must be verbal;
- Speak slowly and clearly;
- The interpreter must interpret everything that is said;
- The interpreter is not allowed to engage in any conversation with the litigant/witness;
- The interpreter is not allowed to give any legal advice or express personal opinions; and

[87] Minn. Stat. §595.02, subd. 1 (l)
[88] Supreme Court Order Regarding Domestic Abuse Advocates C2-87-1089
[89] *Henke v. Shulbe,*2015 WL 5089209(*(*August 31, 2015)(unpublished)
[90] Ibid

- The interpreter is expected to maintain confidentiality and not publicly discuss this case.

If concerns arise, questions you can ask to determine whether an interpreter is qualified along with other information can be found on the Minnesota Judicial Branch website, including voir dire questions.

4. Deputies

There should always be courtroom security in hearings where both parties are present. During a domestic abuse or harassment hearing, the deputy should be positioned so as to observe the behavior of the parties. This is different from the deputy's position at criminal/delinquency hearings, in which the risk is that the defendant will flee. In a domestic abuse hearing, the risk is that the respondent will violate the Order for Protection or intimidate the petitioner during the hearing. The placement of the deputy is for the deputy to decide, since courtroom security is his/her responsibility and s/he has the training and experience to make decisions concerning courtroom security.

5. Guardians ad Litem

The Court shall appoint a Guardian ad Litem (GAL) if custody and/or parenting time are at issue and the Court has reason to believe that a minor child is a victim of domestic child abuse or neglect, as those terms are defined in statute.[91] These appointments are mandatory. The Court may also appoint a GAL when there are not concerns about child abuse or neglect. These are permissive appointments.

The GAL shall represent the best interests of the child and advise the Court with respect to temporary custody and parenting time. It is not the GAL's role to determine whether domestic abuse occurred. Since an Order for Protection is temporary, the GAL should not be asked to make recommendations for permanent custody or parenting time. Those requests of the GAL should be made in the Family Court case, if one exists, and the same GAL can be appointed in the Family Court case.

The Court must make specific findings about whether the appointment is mandatory or permissive, and the Court must identify what information it seeks from the Guardian.

If the Court appoints a GAL in an Order for Protection proceeding in Ramsey County, a review hearing should be scheduled to review the recommendations of the GAL and Guardian will provide an oral report within 45 days. It is a best practice for a judicial officer who has heard an oral Guardian's report to be assigned administratively to preside over future hearings in the order for protection with those parties.

The Minnesota Supreme Court recently commented that Guardian reports contained in the Court's file are not necessarily part of the record on appeal citing Minn. R. Civ. App. P. 110.01[92]. The Supreme Court was concerned that the Guardian's report was not explicitly filed with the Court.

[91] Minn. Stat. §260C.007 and Minn. Stat. §626.556

[92] *Rew v. Bergstrom,* 845 N.W.2d 764, 785 (Minn. 2014)

BEST PRACTICE:

If the Court intends for a written guardian's report to be included as part of the record, the Court should explicitly make a finding to that effect.

B. Procedures

1. Mentally Ill Parties

A diagnosis of mental illness does not preclude a person from being the victim of domestic abuse or harassment nor from perpetrating domestic abuse or harassment.

2. Incompetent Parties

If the Court has concerns about a party's ability to understand the proceedings,a Guardian under Minnesota Courts Rules of Civil Procedure 17.02 should be appointed for that party This is different than the Guardian ad Litem program. The Second Judicial District has developed a procedure to appoint volunteer attorneys as Guardians ad Litem for Incompetent Persons. The Minnesota Supreme Court has held that a person who has power of attorney pursuant to Minn. Stat. Sec. 523.24 is not authorized as a party to bring a legal action on behalf of an incompetent person.[93]

3. Discovery When Criminal Proceedings Are Pending

There may be attempts to use the existence of a domestic abuse proceeding to engage in discovery for an overlapping criminal proceeding that might not otherwise be permitted in the criminal process. This leaves a victim with the dilemma of choosing between supporting a criminal prosecution and obtaining necessary relief in the Order for Protection. The Minnesota Supreme Court clarified in such situations it is appropriate to:

- Allow the State to permissively intervene in the domestic abuse proceeding for the limited purpose of seeking a protective order to preserve the integrity of the criminal process; and
- Issue a protective order to stay discovery including depositions in the domestic abuse proceedings pending the result of the criminal proceedings even if that means continuing the custody and no contact provisions of the Order for Protection until the hearing can be held.[94]

A request for a continuance may come from a party where there is concern that the defendant in a criminal case arising out of the same facts is using the domestic abuse proceeding as a means of deposing the witnesses; the request may also come from a defendant in a criminal case who is concerned that his or her testimony may be used for impeachment purposes in a criminal proceeding despite the language in Minn. Stat. §518B.01, subd. 15 that states any testimony offered by a respondent in an Order for Protection hearing is inadmissible in a criminal proceeding

4. Administrative Continuances

[93] *In re: Riebel,* 625 N.W.2d 480, 482 (Minn. 2001)
[94] *State v. Deal*, 740 N.W.2d 755 (Minn. 2007)

The Domestic Abuse/Harassment Office receives many requests to continue matters. The clerks instruct parties to submit their requests in writing and include the reason for the request, supporting documentation, the court file number/s, and party names. When the requests are received, the clerk forwards the request to continue the matter to the judicial officer assigned to hear the case.

Careful consideration should be made when deciding whether to grant or deny continuance requests without requiring appearances. Caution should be given before granting a request for a previously scheduled hearing if it is made by the petitioner since the respondent has statutory rights to a timely hearing and due process rights. Similarly, if last minute continuances are granted for previously scheduled evidentiary hearings, the Court's evidentiary hearing time is lost and the continued hearing takes up another slot which creates a cycle that contributes to delayed evidentiary hearings. This can cause a systemic problem for future parties.

C. Initial Hearings

1. Preparation

The Court sometimes needs to review other court cases to prepare for a hearing. This may be to determine whether there is a DANCO in another case or to determine if there is a family court action which addresses custody or parenting time. The Court may take judicial notice of an adjudicative fact if the fact is not subject to reasonable dispute and the parties are given an opportunity to be heard.[95] The Minnesota Board of Judicial Standards issued an advisory opinion which recommends that if the Court relies on a court record in another case, the Court should give the parties an opportunity to be heard on the propriety of taking judicial notice.[96]

2. Parties' Appearances

a. Both Parties Appear

If both parties appear at the hearing, and the petitioner is still seeking the Order for Protection, the recommended procedure is to explain to the respondent their options listed in paragraph 2 below.

If the respondent requests an evidentiary hearing and there is sufficient time to have the hearing that day, the evidentiary hearing should be held unless a continuance is granted. See Order for Protection Hearings section.

If a continuance is granted, the Court should issue an Order for Continuing Protection that explains the reason for the continuance and addresses any other urgent issues pending the evidentiary hearing.

b. Service Not Completed, No Appearance by Respondent

[95] Minn. R. Evid. 201
[96] Minn. Bd. Jud. Cond. Adv. Opin. 2016-2 at 5

If personal service has not been completed upon the respondent, the petitioner may be the only party to appear. The Court should have the petitioner complete an Affidavit and Order for Alternate Service or Publication.

If the *ex parte* order is not personally served or the petitioner's affidavit for alternative service is not filed with the Court within 14 days, the *ex parte* order expires.[97] If personal service is not completed and service by published notice is not completed within 28 days of issuance of the *ex parte* order, the order expires.

c. Service Completed, No Appearance by Respondent

If personal service (or alternate service pursuant to a court order) was completed upon the respondent and the respondent does not appear, the recommended procedure is to inquire of the petitioner if the allegations contained in the petition and affidavit are true and correct. The Court may then issue the final Order for Protection Following Hearing incorporating the contents of the petition and affidavit as findings of fact, if the petition and affidavit contain sufficient allegations of domestic abuse. If not, the matter may be dismissed.

If the hearing was scheduled at the request of the respondent, the Court may dismiss the respondent's request for a hearing and the ex parte order for protection remains in effect.

d. No Appearance by Petitioner

If the respondent appears but the petitioner does not, the recommended procedure is to dismiss the Order for Protection. There will, of course, be exceptions in unusual situations (illness of self or child/ren, incarceration, inclement weather, etc.).

e. Neither Party Appears

If neither party appears, the usual procedure is to dismiss the Order for Protection.

If the hearing was scheduled at the request of the respondent, the Court may dismiss the respondent's request for a hearing and the ex parte order for protection remains in effect.

f. Management of Calendar

Judicial officers set the order of which cases are called into the court room; however it is recommended that cases are called in following order:

i. Interpreters
   - It is bench policy to call cases with interpreters first. Interpreters are typically scheduled for two hours blocks and may be assigned to more than one case at the same time.

ii. In-Custody

[97] Minn. Stat. §518B.01, subd. 15, subd. 7(d)

- A party in-custody will require the use of additional deputy resources. In addition to transporting the party to and from their court appearance, there is typically two deputies required to accompany the party in-custody during their court appearance.

iii. Attorneys
- Attorneys will often attempt to negotiate the case before being called into the courtroom. This can expedite your process in the courtroom as the attorney(s) will let you know if there is an agreement or if the matter will need to be continued for an evidentiary hearing. In addition, calling cases with attorneys may lower attorney costs for the parties.

iv. One-Sided Cases/Motions
- These cases will typically take minimal time. Calling these cases before two sided cases, helps to determine if there will be time on the calendar to hold an evidentiary hearing if a two-sided case is contested.

v. Two-Sided Cases
- If time allows, an evidentiary hearing may be held if the respondent requests one.

g. Recalling Cases

If a request is made by either party to recall the case to address a pressing issue (parenting time, incorrect address, one piece of relief not addressed, etc.) and the parties are still present, consider recalling the case as soon as possible.

3. Respondent's Options[98]

When both parties appear, the Court should explain the respondent's following three options::

- Admit the allegations in the petition and affidavit and agree to the Order for Protection with findings of domestic abuse;
- Agree to the issuance of the Order for Protection without any findings of domestic abuse; or
- Deny the allegations in the petition and affidavit and request an evidentiary hearing.

In the second option, the Order will be enforced as if there was a finding of domestic abuse by the Court. These options should be presented neutrally. The Court of Appeals reversed a trial court where the judicial officerdescribed the second option as a once only "opportunity" and did not clarify the effect of the Order when the respondent asked a question about the effect which showed the respondent was confused about the duration of the order.[99]

4. Continuances

a. By Request of Both Parties or One of the Parties

Continuances may be granted for good cause at an initial hearing if either party is unable to proceed, or if a party requests a continuance and the court finds a continuance is appropriate.

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[98] See VIIID(2) below

[99] *Hansen v. Richter,* 2018 WL 414876 (January 16, 2018)(unpublished)

If a continuance is granted, an Order for Continuing Protection should be issued that lists the new hearing date and continues an Ex-Parte Order, if it was previously granted. The order should be served on each party immediately after the hearing.

Judicial officers should consider the possible prejudicial implications upon either party when determining whether to grant a continuance. See Order for Protection Hearings section.**BEST PRACTICE**

Be aware of patterns where continuances are consistently requested by the same party. If a pattern is identified, consider denying further continuances.

b. **Timelines for Hearing**:

The respondent may request a continuance of up to 5 days if served fewer than 5 days prior to the hearing which continuance shall be granted unless there are compelling reasons not to do so.[100]

Normally, the continuance shall be for no more than 5 days unless otherwise agreed to by the parties and approved by the Court.[101]

If an *ex parte* order has been issued and the Court declines to order some relief requested by the petitioner, a hearing must be held within 7 days. If the Court declines to issue an *ex parte* order, a hearing must be held within 14 days. The Court should hold the evidentiary hearing within these limits, but it is rarely feasible to do so. These time frames do not limit the Court's subject matter jurisdiction. The Court still has authority to hear the Order for Protection even if the full hearing happens outside the time lines but the *ex parte* order expires if the evidentiary hearing is not held with the time limits set by the Act.[102]

This may require the judicial officer and staff to make special efforts to meet the deadline. Some judicial officers take sufficient testimony to confirm the need for an Order for Protection and then continue the hearing to a date when there is sufficient time to complete the hearing. Other times it is possible to modify the *ex parte* Order for Protection to address the respondent's legitimate concerns with the *ex parte* order until a hearing can be completed. This means that the order is no longer an *ex parte* order as the Court has heard from both sides.

5. Interim Custody and Parenting Time

Frequently the issues of interim parenting time and custody will require consideration at an initial hearing. In situations where the parties are/were married, or situations in which there is a Family Court paternity case or where there is a valid Recognition of Parentage executed, the Court may include a provision for interim parenting time.

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[100] Minn. Stat. §518B.01, subd. 5(c); *See also, Andrasko v. Andrasko,* 443 N.W.2d 228 (Minn. Ct. App. 1989)(abuse of discretion not to grant continuance to seek counsel when received notice one day before hearing).

[101] Minn. Stat. §518B.01 subd. 5(e)

[102] *Burkstrand v. Burkstrand,* 632 N.W.2d 206 (Minn. 2001)

In situations where the parties have never been married to each other and the father has not been adjudicated or the parties have not signed a Recognition of Parentage, parenting time should not be ordered. In all situations, the initial hearing is more in the nature of triage and the judicial officer is frequently asked to rule on matters with conflicting cross claims and little information. The Court should err on the side of safety of the victim and the child until an evidentiary hearing is held.

The Court should direct the parties to address detailed issues of custody and parenting time in Family Court where there are more options available to help the parties. Parties should be encouraged to file appropriate actions or motions in the appropriate Family Court for permanent and detailed orders.

BEST PRACTICE

In giving primary consideration to the safety of the victim and the children[103], it may be necessary to address parenting time, custody and child support in an OFP proceeding. However, the OFP is a temporary, expedited proceeding and parties should be referred to family court to address these issues on a permanent basis.

D. Evidentiary Hearings

1. Introduction

Defining domestic abuse for the parties before the evidentiary hearing may help the parties focus on the issue of domestic abuse. While context may be important, the Court should direct the parties to focus on the allegations in the petition and affidavit. T

The evidentiary hearing is meant to be an expedited hearing. This can be facilitated by focusing on the narrow issues that the Court must determine. Focusing on the issues not only keeps the hearing to a manageable length but also minimizes the need for continuances to complete the trial. According to language in *Baker* and *Burkstrand*[104], an expedited hearing is in accord with the purpose of the statute.

A "full hearing" includes "the right to present and cross-examine witnesses, to produce documents, and to have the case decided on the merits."[105] A trial court was reversed which relied upon the sworn statement in petitioner's affidavit which contained hearsay without receiving testimony on the alleged incidents or to set foundation for the hearsay statements. The Court erred when, after a contested hearing, the only evidence of domestic abuse consisted of hearsay statements contained in the petition and affidavit for the order for protection.[106]

One incident of domestic abuse is a sufficient finding upon which to issue an Order for Protection. It may be helpful to determine whether there was domestic abuse before hearing testimony about possible relief.

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[103] Minn. Stat. §518B.01 subd. 6(a)4

[104] *Baker v. Baker,* 494 N.W.2d 282, 285 (Minn. 1992) and *Burkstrand v. Burkstrand,* 632 N.W.2d 206 (Minn. 2001)

[105] *El Nashaar v. El Nashaar,* 529 N.W.2d 13, 14 (Minn. Ct. App.1995).

[106] *Olson v. Olson,* 892 N.W.2d 837 (Minn. Ct. App. 2017)

The statutory definition of domestic abuse is much broader than "hitting." Additional history may be recited in the petition or by the petitioner at a trial and may be helpful to the judicial officer in deciding various aspects of the matter.

2. Respondent's Options

See Order for Protection Hearings section.

At the start of an evidentiary hearing, it is helpful to go over the respondent's 3 options again to see if there is still a need for an evidentiary hearing.

3. Standard of Proof

The standard of proof in an Order for Protection proceeding, is the preponderance of the evidence.[107] The petitioner bears the burden of proof as the party seeking to obtain the Order for Protection. A trial court was overturned when it found petitioner met this burden for an order for protection on behalf of a child where the alleged sexual assault of the child occurred six years earlier, the child recently disclosed, child protection had not yet interviewed anyone, the child did not testify and the parties testified that there was a child protection investigation pending with no other allegations.[108]

4. Opening Statements

Normally, parties and their attorneys waive opening statements due to the expedited nature of these proceedings.

5. Continuances

See Order for Protection Hearings section.

6. Testimony

a. Self-Represented Litigants

It may be helpful for the Court to ask questions of self-represented litigants. This helps focus the testimony and avoids an opportunity for an opposing party to attempt to manipulate or embarrass a party. The Court of Appeals approved this process in order for the Court to determine whether a proffered exhibit had proper foundation over an objection from counsel and because the Court was under time pressures to complete a calendar and needed the process to be more efficient. The decision emphasizes these proceedings are decided by the judicial officer, not a jury.[109]

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[107] *Oberg v. Bradley,* 868 N.W.2d 62, 64 (Minn. Ct. App. 2015)

[108] *Hessel v. Mohr*, 2017 WL 1842844 (May 8, 2017)(unpublished)

[109] *Scharber-Pikula v. Wynn,* 2017 WL 6567954 (December 26, 2017)(unpublished)

BEST PRACTICE

Consider limiting the scope of examination. The judicial officer may have the party direct cross-examination questions to the judicial officer. If inappropriate examination by the party continues, the judicial officer should end cross-examination.

b. Witnesses

It may be helpful to ask the parties at the outset how many witnesses they plan to call. Sometimes parties seek to call witnesses who do not have direct knowledge of the allegations in the petition or whose testimony will be repetitive or irrelevant. One way to focus the evidentiary hearing is to limit witnesses by requiring the parties to make an offer of proof. This can deescalate situations where both sides are bringing in "allies" to take sides. The Court should consider sequestration of the witnesses.

BEST PRACTICE

Limit witness testimony to those with direct knowledge of the alleged incidents in the petition, when possible. Require the party to make an offer of proof about a proposed witnesses' testimony.

c. Explanation of Process

It may be helpful at the outset to explain the order of testimony, including the right to cross-examination. Self-represented parties often try to testify rather than ask questions. The judicial officer should try to redirect and may need to just move to testimony.

d. Out-of-Court Statements by Children

Use of out-of-court statements may be a way to avoid requiring children to testify and traumatizing the children through the process.

Minnesota Rule of Evidence 807, the residual or "catch-all" exception to the hearsay rule, provides that if certain procedures involving notice are followed and the Court finds sufficient guarantees of trustworthiness, out-of-court statements may be admissible as evidence regardless of the availability of the declarant.

Mirroring the notice and reliability criteria of Minnesota Rule of Evidence 807, two Minnesota statutes expressly provide for the admission of the out-of-court statements of children under the age of 10 regarding child abuse committed on them or committed on another child but observed by them. Minn. Stat. §260C.165 covers out-of-court statements regarding either abuse or neglect and applies to any CHIPS, foster care, or domestic child abuse proceeding or proceeding for termination of parental rights. Minn. Stat. §595.02, subd. 3 applies to any court proceeding involving child abuse

but requires that there be other corroborative evidence of the act if the declarant (child under 10) is unavailable as a witness.

These statutes serve to highlight for the Court the Legislature's intent that the out-of-court statements of child abuse victims under the age of 10 be admitted as evidence in appropriate circumstances. However, the application of Minnesota Rule of Evidence 807 alone is generally sufficient and is not age-limited.[110]

Minn. Stat. §595.02, subd. 3 and Minnesota Rule of Evidence 807 consider similar factors when determining guarantees of trustworthiness. These factors include: [1] whether the statements were spontaneous, [2] whether the person talking with the child had a preconceived idea of what the child should say, [3] whether the statements were in response to leading or suggestive questions, [4] whether the child had any apparent motive to fabricate, ... [5] whether the statements are the type of statements one would expect a child of that age to fabricate, ... [6] the mental state of the child at the time the statements were made, ... [7] the consistent repetition of the child's statements during the same interview or conversation, ... [and][8] whether the child had an apparent motive to speak truthfully.[111] An unpublished case has used this analysis in the context of an Order for Protection.[112]

e. In-Court Statements by Children

The Court is sometimes asked to interview children. Each judicial officer may have different views of this. Interviewing children requires special skills and can cause emotional damage to the child even if done skillfully by the judicial officer. Judicial officers in Ramsey County have been reluctant to interview children.

f. Fifth Amendment Issues

Sometimes parties may offer testimony that has the potential to subject them to criminal prosecution. Minn. Stat. §518B.01 subd. 15 states that "any testimony offered by a respondent in a hearing…is inadmissible in a criminal proceeding." Nonetheless, there are times when a witness offers testimony that might result in criminal prosecution. Parties in civil proceedings may invoke the Fifth Amendment in order to protect themselves from criminal prosecution.[113] However, when a party asserts the Fifth Amendment in a civil action, the Court may make an adverse inference when that party refuses to testify.[114]

7. Rulings

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[110] *State v. Edwards,* 485 N.W.2d 911, 913 (Minn. 1992)(Statement made by victim to police admissible where no motive to fabricate and officer had no preconceived notion of what child would say.) But see *State v. Scott,* 501 N.W.2d 608 (Minn. 1983)(Taped police and social worker interview with victim had insufficient indicia of reliability.)

[111] *State v. Edwards,* 485 N.W.2d 911, 915-917 (Minn. 1992)

[112] *Wahl v. Wahl,* 2010 WL 5071351 (December 14, 2010)(unpublished)

[113] *In re Welfare of J.W.*, 391 N.W.2d 791, 797 (Minn. 1986)

[114] *Parker v. Hennepin County Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979)

The Court should announce its ruling in open court with the parties present. If the order is going to be issued, the judicial officer should go through all of its provisions to make sure the parties understand the terms of the order. If the parties are not personally served before they leave the court room, the parties should then be ordered to wait outside the courtroom until they are personally served with the order that is issued after the evidentiary hearing. If, in some rare circumstances, the Court takes the case under advisement, the Court should issue an Order for Continuing Protection since the *ex parte* order will otherwise have expired at the time of the hearing.

8. Reciprocal Orders for Protection

Orders for Protection may be issued if there is a petition filed. It is an error for the Court to issue reciprocal Orders for Protection where only one party files a petition for an Order for Protection and there is no evidence that the requesting party committed abuse against the adverse party.[115]

There are times when both parties have filed petitions for Orders for Protection and both have committed domestic abuse against each other, and issuing separate reciprocal orders is appropriate.

However, reciprocal Orders for Protection can be problematic. They can be another way for a party to harass and control the other party by using the Order for Protection to have the other party arrested. Reciprocal orders give the impression that both parties are violent and can be difficult for law enforcement to enforce. In cases where there are claims of domestic abuse by both parties, it is important to determine if one party was acting in self-defense and/or if one party was the primary aggressor. That consideration should be made in deciding whether to issue one or both orders.

9. Harassment Restraining Order in lieu of Order for Protection

After a hearing, there may be times when the judicial officer finds that the petitioner has not met his/her burden of proof in showing that the respondent committed acts of domestic abuse, but the respondent's actions qualify as harassment. In this situation, the Court may dismiss the Order for Protection but issue a Harassment Restraining Order in at the petitioner's request. The petitioner may have requested for the Court to "Issue a Harassment Restraining Order if the Order for Protection is denied at a hearing" on an addendum to the Petitioner's Affidavit and Petition for Order for Protection.

10. Collateral Consequences

The issuance of an Order for Protection may have collateral or unintended consequences for the parties. These issues sometimes come up during hearings or negotiations between counsel for the parties who attempted to settle prior to their evidentiary hearing.

Collateral consequences should not detract from the purpose of the hearing, which is to determine whether an act of domestic abuse occurred.

E. Motions or Requests

[115] *FitzGerald v. FitzGerald*, 406 N.W.2d 52 (Minn. Ct. App. 1987)

The statute provides that upon application, notice to all parties, and hearing, the Court may modify the terms of an existing Order for Protection.[116] The Minnesota General Rules of Practice for the District Courts apply to domestic abuse proceedings.

The Domestic Abuse/Harassment Office has procedures to address the motions depending on the type of motion that is brought. All motions need to originate through the Domestic Abuse/Harassment Office in order to coordinate files, check the electronic court record for conflicting orders, and update the statewide database.

Depending on the motion filed, testimony may be taken of parties or witnesses if the motion is opposed. If the motion is argued, it should be done as if it was a motion hearing in Family Court, based on the record including the affidavit(s) filed in support or opposition to the motion.

The Court should not deny a party an opportunity to serve and file a motion unless the party has been previously restricted by court order as a frivolous litigant.

1. Types of Motions

a. Non-Emergency

If the motion is one to dismiss the order or make the order less restrictive, the motion is served by mail and the hearing is set at least 17 days out to allow for service by mail. Court staff does not prepare an order in this situation. Court staff will mail the documents to the last known address of the non-moving party when the motion is a non-emergency motion.

b. Emergency

If the moving party alleges an emergency, court staff prepares an Emergency Ex Parte Order for Relief Upon Motion to Modify with Immediate Relief. If the Court grants the emergency relief, the court staff will set the hearing within 7 days, then send the order and motion for personal service on the moving party. If the request for immediate relief is denied, the court staff will proceed with filing and scheduling the motion.

c. Motion for New Trial

Orders for Protection are considered "special proceedings," which means a motion for a new trial is not authorized and will not alter the time to appeal.[117]

d. Petitioner's Motion to Dismiss

Often, the petitioner will seek to dismiss the Order for Protection for a variety of reasons.

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[116] Minn. Stat. §518B.01, subd. 11

[117] *Steeves v. Campbell*, 508 N.W.2d 817 (Minn. Ct. App. 1993)

The petitioner may file a Request for Dismissal in an Order for Protection proceeding without a court hearing. The court clerk will draft an Order for Dismissal. Without a court hearing, it may be difficult to determine what is causing the need for immediate action and what motivates the request. The request to immediately dismiss the Order for Protection may be denied. The court clerk will then inform the petitioner of the option to file an Affidavit and Motion to Modify the Order for Protection which will provide a motion hearing date and notice to the respondent.

At a court hearing, the Court may ask the petitioner if s/he has considered a "protection only" order. This is an order that allows contact with the respondent, but prohibits the respondent from committing domestic abuse against the petitioner. Although this offers minimal protection, it permits the petitioner to seek more restrictions on the order in the future before a recurrence of violence simply by showing an escalation of concerning behavior rather than a recurrence of abuse.

If the Order for Protection is dismissed and another order (ie. Domestic Abuse No Contact Order) is in effect, the Court should remind the parties that this amendment or dismissal does not amend or dismiss that order.

If this is an order issued under Minn. Stat. §518B.01, subd. 6a (up to 50 years), See Order for Protection Subsequent Orders and Extensions section.

e. Motion to Vacate

Respondents sometimes move the Court to dismiss an Order for Protection. These are really motions to vacate and Minnesota Rules of Civil Procedure 60.01 governs these motions[118].

1. Motions to vacate default judgments

   In order to prevail in a motion to vacate, the moving party must show a basis pursuant to Minnesota Rules of Civil Procedure 60.02 which includes: mistake, excusable neglect, newly discovered evidence, and fraud. A party also has to show: a reasonable defense on the merits; a reasonable excuse for the failure to act; that the party acted with due diligence after notice of the default; and that there is no substantial prejudice to the opposing party.[119] The moving party does not have to make a strong showing on all four factors, but the Court does a balancing test.[120] The goal of all litigation is to bring about judgments after trials on their merits and the Courts should be liberal in opening default judgments.[121]

2. Motions to vacate agreements

[118] Minnesota Rules of Civil Procedure, Rule 60

[119] *Hinz v. Northland Milk & Ice Cream Co.,* 53 N.W.2d 454, 455-456 (Minn. 1952)

[120] *Riemer v. Zahn,* 420 N.W.2d 659, 662 (Minn. Ct. App. 1988)(balancing is particularly favored where the weakest of the four factors is the party's excuse for failing to answer).

[121] *Taylor v. Steinke,* 203 N.W.2d 859, 860 (Minn. 1973)

Stipulations are treated as binding contracts. They cannot be repudiated or withdrawn by one party without the consent of the other party except by leave of Court or good cause shown.[122] A party seeking to vacate a stipulation must do so for a reason and within the time frames listed in Minnesota Rules of Civil Procedure 60.02. In evaluating the enforceability of a stipulation, the Court of Appeals has considered whether the moving party was represented by counsel[123], whether the agreement was reached through extensive negotiations, and whether the moving party affirmed the terms in open court.[124]

f. Up to 50-Year Order for Protection

Orders which are extended pursuant to Minn. Stat. §518B.01, subd. 6a paragraph b may not be modified by the respondent until the order has been in effect for at least five years and the respondent has not violated the order during that time. See Order for Protection Subsequent Orders and Extensions section.

F. Review Hearings

Review hearings are set to review matters including compliance with ordered counseling, treatment, parenting time, custody, child support, Guardian ad Litem reports, firearms, etc.

If the respondent is personally served the order setting the review hearing and fails to appear for a review hearing to review compliance with court-ordered treatment or firearm surrender or transfer, a writ of attachment, commanding the arrest of the respondent, may be issued.

G. Contempt Hearings

The most effective way of enforcing many conditions in OFPs is through law enforcement. This is why contempt hearings are and should be rare in OFPs. Hearings shall be set within 14 days and are handled as in other contempt proceedings.[125]

IX. Subsequent Orders and Extensions

A. Subsequent Orders

When an Order for Protection has expired, a petitioner can apply for a new order. In this situation, a lower threshold standard applies. A petitioner does not need to show that physical harm is imminent or that a new act of domestic abuse has occurred in order for a subsequent Order for Protection to be issued. Upon application, notice to all parties, and hearing, testimony likely will be taken if the respondent opposes the issuance of the subsequent order. If the petitioner seeks only the relief

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[122] *Gran v. City of St. Paul,* 143 N.W.2d 246 (Minn. 1966)

[123] A proper waiver of counsel satisfies this factor. *See, Toughill v. Toughill,* 609 N.W.2d 634 (Minn. Ct. App. 2000)

[124] *Tomscak v. Tomscak,* 352 N.W.2d 464 (Minn. Ct. App. 1984)(agreement to waive spousal maintenance)(overruled by Minn. Stat. §518.145, subd. 2 in dissolution context).

[125] *Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968) and *Mahady v. Mahady*, 448 NW 2d 888 (Minn. Ct. App. 1989)

under subdivision 7, paragraph (a)[126], a hearing is not required unless the court declines to order the requested relief or the respondent requests a hearing.
A new order [127] may be issued upon a showing that:

- Respondent violated the prior Order for Protection[128]; or
- Petitioner is reasonably in fear of physical harm from the respondent (physical harm need not be imminent); or
- Respondent has engaged in the act of stalking within the definition of Minn. Stat. §609.749, subd. 2. The respondent need not have intended his/her actions to be harassing to the petitioner[129]; or
- Respondent is incarcerated and about to be released, or has recently been released from incarceration.[130]

B. Extensions of Existing Orders

When an Order for Protection is still in effect, a petitioner can apply for an extension. Like a subsequent order, a lower threshold standard applies. A petitioner does not need to show that physical harm is imminent or that a new act of domestic abuse has occurred in order for the Court to extend the terms of an existing order. Upon application, notice to all parties, and hearing, testimony likely will be necessary if the respondent opposes the extension. If the petitioner seeks only the relief under subdivision 7, paragraph (a)[131], a hearing is not required unless the court declines to order the requested relief or the respondent requests a hearing.
An existing order may be extended upon a showing that:

- Respondent violated the prior or existing Order for Protection. The previous Order for Protection does not require a finding of domestic abuse by the Court[132]; or
- Petitioner is reasonably in fear of physical harm from the respondent (physical harm need not be imminent); or
- Respondent has engaged in the act of stalking within the meaning of Minn. Stat § 609.749, subd. 2. The respondent need not have intended his or her actions to be harassing to the petitioner[133]; or
- Respondent is incarcerated and about to be released, or has recently been released from incarceration.[134]

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[126] Minn. Stat. §518B.01, subd. 7a
[127] Whether to grant an extension is discretionary under the language of the statute. *See e.g., Zweifel v. Zweifel,* 2012 WL 6554517 (December 17, 2012.)(unpublished)
[128] A violation may be determined by the court and does not require a conviction of a violation. *Ekman v. Miller,* 812 N.W.2d 892, 896 (Minn. Ct. App. 2012)
[129] *Braend vs. Braend*, 721 N.W.2d 924 (Minn. Ct. App. 2006)
[130] Minn. Stat. §518B.01, subd. 6a (a)
[131] Minn. Stat. §518B.01, subd. 7a
[132] *McIntosh v. McIntosh,* 740 N.W.2d 1 (Minn. Ct. App. 2007)(original order issued by stipulation with no findings).
[133] *Braend v. Braend,* 721 N.W.2d 924 (Minn. Ct. App. 2006)
[134] Minn. Stat. §518B.01, subd. 6a (4)

C. Up to 50-Year Orders for Protection

The Court may issue an order for a period of up to 50 years if the Court finds:

- The respondent has violated a prior or existing Order for Protection two or more times; or
- The petitioner has had two or more Orders for Protection in effect against the same respondent.

An order under this section may restrain the respondent from committing acts of domestic abuse against the petitioner or prohibit the respondent from having any direct or indirect contact with the petitioner.[135] An order issued under this section does not require a finding of domestic abuse by the Court.[136]

The Minnesota Supreme Court upheld the constitutionality of this provision[137] holding that the provision did not violate the respondent's First Amendment, Due Process rights and protections against Double Jeopardy and *ex post facto* laws.

The Supreme Court affirmed the trial court's issuance of a 50 year order for the petitioner, but remanded to the trial court to apply this test as to the minor children where there were no facts on the record of abuse to the children.

The Supreme Court clarified that the provisions of a fifty year order which pertain to a minor child apply only until the minor child reaches the age of 18.

For orders issued under Minn. Stat. §518B.01, subd. 6a (b) there are special rules for service, burden of proof, and conditions under which motions to modify may be made by the respondent.[138] A respondent may file a motion to have a lengthy Order for Protection modified or vacated after five years only if there are no violations of the order *and* there are changed circumstances. The motion must be made in the county in which the order was issued and a hearing date must be set. The petitioner must be personally served with the request not less than 30 days prior to the hearing. The respondent must prove by a preponderance of the evidence that there has been a change in circumstances and that the reasons why the court extended the Order for Protection no longer apply or are unlikely to happen. If the respondent has met the burden of proof, the court may modify or vacate the order, which must be personally served on the petitioner. If the respondent has not met the burden of proof, the court shall deny the request and no future request to modify or vacate may be made until five years have passed from the date of the denial.

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[135] Minn. Stat. §518B.01, subd. 6a (b)

[136] *Rew v. Bergstrom,* 845 N.W.2d 764, 776 (Minn. 2014)

[137] *Rew v. Bergstrom,* 812 N.W.2d 832 (Minn. Ct. App. 2011)(*pet. for cert. pending)*

[138] Minn. Stat. §518B.01, subd. 6a (b)

HARASSMENT RESTRAINING ORDERS[139]

X. Service and Cost

A. Service

1. Personal Service

The statute does not address who can serve a Harassment Restraining Order; however, service of the temporary Harassment Restraining Order must be made by a sheriff or by publication, in order for the Court to issue a Harassment Restraining Order following a hearing.[140]

2. Publication

If personal service cannot be made upon the respondent, the Court may order service by publication. Publication must be made as in other actions.

The moving party must file an Affidavit and Order for Publication. The Affidavit must state that an attempt at personal service made by a sheriff was unsuccessful because the respondent is avoiding service by concealment or otherwise, and that a copy of the petition and Order for Hearing and any temporary restraining order has been mailed to the respondent at the respondent's last known address or place of business, if the respondent is an organization, or the residence or place of business is not known to the petitioner. An attempt to serve by law enforcement is necessary even if there is no known address for respondent. The Court can then order service by publication and continue the hearing for another initial hearing once publication has been completed.[141]

If the petitioner is proceeding under the "No Hearing" provisions as described below, then service by publication may be made by one week published notice.

> Minn. Stat. §609.748 subd. 3 (b) states: "The order for a hearing and a temporary order issued under subdivision 4 may be served on the respondent by means of a one-week published notice under Minn. Stat. §645.11."

3. Service Upon Juvenile Respondents

Minn. Stat. §609.748 subd. 3(c) and subd. 4(c) directs a copy of the Harassment Restraining Order, along with notice of the pendency of the case and the time and place of the hearing be mailed to the last known address of any parent or guardian of the juvenile respondent who is not the petitioner.

The Second Judicial District Domestic Abuse/Harassment Office practice is to send the documents to the Ramsey County Sheriff's Office for personal service upon the juvenile respondent and a parent or

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[139] Case law relating to the Domestic Abuse Act may be recognized in interpreting the Harassment Restraining Order. *Anderson v. Lake,* 536 N.W.2d 909, 911 (Minn. Ct. App. 1995)

[140] Minn. Stat. §609.748 subd. 3 (b)(1) and Minn. Stat. §609.748 subd. 5 (b)(2)

[141] *Ayala v. Ayala*, 749 N.W.2d 817 (Minn. Ct. App. 2008)

guardian. If personal service upon the parent or guardian is unsuccessful, the clerks will mail a copy to the last known address of that parent or guardian.

B. Filing Fees and Cost of Service

A civil filing fee applies to each moving party upon the first paper filed in the case by that party.[142]

Filing fees are waived for the petitioner and the respondent if the petition alleges acts that would constitute a violation of Minn. Stat. §609.749 subd. 2, 3, 4, or 5 (Stalking); or Minn. Stat. §609.342 (Criminal Sexual Conduct in the First Degree), and/or Minn. Stat. §609.3451 (Criminal Sexual Conduct in the Fifth Degree).[143]

Filing fees and cost of service is waived if the party is granted *In Forma Pauperis* status.[144]

XI. One Judge, One Family

Blocking a Harassment Restraining Order is at the discretion of the judicial officer.

For a full description of the combined Family, Civil Harassment, Juvenile and Probate Jurisdiction, see Order for Protection One Judge, One Family section.

XII. Ex Parte Harassment Restraining Orders

A. Jurisdictional Requirements[145]

Although the statute headnotes says "Restraining order; court jurisdiction", these provisions are conditions for venue and therefore may be waived)[146]

- Either party lives in Ramsey County; or
- The alleged harassment and/or abuse occurred in Ramsey County

There are no residency requirements that apply to a petition for a Harassment Restraining Order.

B. Who Can File

1. On Behalf of (OBO) Minor Child(ren)

[142] Minn. Stat. §357.021
[143] Minn. Stat. §609.748, subd. 3(a)
[144] Minn. Stat. §563.01
[145] Minn. Stat. §609.748, subd. 2
[146] Hicks v. Hicks, 2017 WL 4767097 October 23, 2017 (unpublished)

The parent, guardian, or stepparent of a minor who is a victim of harassment[147] may seek a Harassment Restraining Order from the district court on behalf of the minor. In any event if an order is issued on behalf of a child, it expires once the child turns 18.[148]

2. On Behalf of (OBO) Adults

The legal guardian of an adult ward may petition the court for a HRO on behalf of the ward even though Minn. Stat. §609.748 does not expressly provide for a harassment petition by a guardian on behalf of an adult ward.[149]

3. Corporations

A corporation can be considered a person[150] and requires an attorney to efile on their behalf.[151]

C. Allegations of Harassment

When a party petitions the court for a Harassment Restraining Order the judicial officer must determine if there have been acts of harassment. Harassment includes the following[152]:

- A single incident of physical or sexual assault[153]; or
- A single incident of stalking under section 609.749, subdivision 2, clause (8)[154], a single incident of nonconsensual dissemination of private sexual images under section 617.261[155]; or

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[147] The harassment must be directed to the child. *See* Section V (H) *supra. See also, Heikkila v. Dietman,* 2016 WL 3376047 (June 20, 2016)(unpublished)(reversing issuance of an HRO on behalf of children when no harassment directed to the children.); Minn. Stat. §609.748, subd. 2

[148] *Rew v. Bergstrom,* 845 N.W.2d 764, 785 (Minn. 2014)

[149] *State v Nodes*, 538 N.W.2d 158(Minn.App.1995) review granted (Minn.Dec. 20, 1995) and appeal dismissed (Minn.Feb. 9, 1996)

[150] *Hudson v. Johnson,* 528 N.W.2d 260 (Minn. Ct. App. 1995) holds that a corporation can be considered a person and thus has standing to petition for a harassment restraining order under the statute.

[151] Minn. Stat. §481.02 subd. 2 (2010) and District Court Case No. 62-CV-09-8681 Order signed by Judge Kathleen Gearin filed 2/16/11

[152] Minn. Stat. §609.748, subd. 1

[153] This prong of the statute has been construed to require the petitioner to prove the physical aspect of the statutory definition of assault in Chapter 609 (the intentional infliction of or attempt to inflict bodily harm upon another) *Peterson v. Johnson*, 755 N.W.2d 758, 763 (Minn. Ct. App. 2008). This interpretation is not applicable to the proof necessary for an Order for Protection. See footnote 1 of *Peterson*. A trial court has been reversed for issuing an order based on one single incident of trespass. *Stokes-Ciochetto and obo minor children v. Eskeli,* 2017 WL 164441 (January 17, 2017)(unpublished)

[154] Minn. Stat. §609.749, subd. 2 (8)

[155] Minn. Stat. §617.261

- Repeated incidents of intrusive or unwanted acts[156], words, or gestures that have or intend to have a substantial adverse effect on the safety, security, or privacy [157] of another[158][159]; or
- Targeted residential picketing, which includes the following acts when committed on more than one occasion:
    - Marching, standing, or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security, or privacy of an occupant of the building; or
    - Marching, standing, or patrolling by one or more persons which prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located; or
- A pattern of attending public events after being notified that the actor's presence at the event is harassing to another.

The determination of whether certain conduct constitutes harassment may be judged from both an objective standard, when assessing the effect the conduct has on the typical victim, and a subjective standard, to the extent the court may determine the harasser's intent.[160]

A trial court was affirmed when it denied an HRO where the Court concluded the respondent's actions may have been "legally defamatory" but did not implicate petitioner's "safety, security or privacy". [161]

D. Ex Parte Options

When considering a request for an *ex parte* order, the judicial officer should determine whether or not the petition alleges facts sufficient to show the following:[162]

- The name of the alleged harassment victim;
- The name of the respondent[163];

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[156] *Polinski v. Bolton,* 2017 WL 2224391 (May 22, 2017)(unpublished)(Initiating "@mentions" on Twitter means the respondent has taken affirmative steps to ensure the target receives the message and can satisfy the definition of harassment. The decision suggests in *dictum* that "tagging" a person on Facebook could similarly satisfy the definition of harassment.

[157] A trial court was upheld when it issued a harassment restraining order for a frivolous litigant prohibiting him from filing any frivolous lawsuits against petitioner. *Davies v. Mehralian,* 2015 WL 404560 (February 2, 2015)(unpublished)

[158] "Repeated" means more than one incident. *Roer v. Dunham*, 682 N.W.2d 179, 182 (Minn. Ct. App. 2004) This prong of the statute has been construed to require proof of, first, "objectively unreasonable conduct or intent on part of the harasser," and second, "an objectively reasonable belief on the part of the person subject to harassing conduct" that the conduct had a substantial adverse effect on his or her safety, security, or privacy. *Peterson v. Johnson*, 755 N.W.2d 758 (Minn. Ct. App. 2008).

[159] *Witchell v. Witchell,* 606 N.W.2d 730 (Minn. Ct. App. 2000)(inappropriate and argumentative comments made in a parenting time notebook do not constitute harassment).

[160] *Kush v. Mathison,* 683 N.W.2d 841, 845 (Minn. Ct. App. 2004), *review denied* (Minn. Sept. 29, 2004)

[161] *Sharper Management, LLC v. Pittel,* 2016 WL 4497467 (August 29, 2016)(unpublished)

[162] Minn. Stat. §609.748 subd. 3 and 4

[163] A child under ten years of age cannot be a "delinquent child" under the Juvenile Court Act. Welfare of S.A.C., 529 N.W.2d 517.520 (Minn. Ct. App. 1995).

- Reasonable grounds to believe that the respondent has engaged in harassment; and
- An immediate and present danger of harassment.

1. Grant Ex Parte Order Without Hearing

A hearing is not required unless the petitioner requests oneor if the petitioner is requesting an order to be issued for up to 50 years. [164]

2. Grant Ex Parte Order With Hearing Date

A hearing is required if the petitioner requests one or if the petitioner is requesting an order to be issued for up to 50 years.[165]

a. Court Grants the Relief Requested

b. Court Declines to Order Some of the Relief Requested

3. Deny Ex Parte Order

a. Issue Order for Hearing

If the judicial officer does not find that there is an immediate and present danger of harassment to justify ex parte relief, and the petitioner requests a hearing, a hearing must be scheduled unless the court finds there is no merit. [166]

E. Length of Time Ex Parte Harassment Restraining Order Is in Effect

The Harassment Restraining Order must be for a fixed period of not more than two years.

XIII. Relief

A Harassment Restraining Order may include the following relief:

A. No Harassment

Whether *ex parte* or following hearing the respondent may be ordered to cease or avoid the harassment of another person; or

B. No Contact

Whether *ex parte* or following hearing the respondent may be ordered to have no contact with another person. The state's form orders include a provision that prohibita the respondent from a specific distance surrounding the petitioner's home and job site. Special attention should be given to

[164] Minn. Stat. §609.748, subd. 3 and 5

[165] Ibid

[166] Minn. Stat. §609.748, subd. 3(a)(3); *see Nygard v. Walsh,* 2016 WL 596606 (February 16, 2016)(unpublished)(affirming trial court's denial of ex parte order and opportunity for hearing when allegations were stale and finding this did not violate appellant's due process rights).

this provision if the parties live in the same building or within close proximity of each other. See Best Practice below.

A petitioner may request that his or her address remain confidential; however, the Court of Appeals reversed the court's provision in a HRO that prohibited the respondent from being within two blocks of an undisclosed location. [167] It is not error for a Court to restrict a Respondent from coming within two blocks of Petitioner's *known* residence.[168]

BEST PRACTICE

When the petitioner(s) and respondent(s) live in the same building or live in close proximity of each other it should be ordered that it is not a violation of the order for the respondent(s) to be at their own residence. If the Court is inclined to order the respondent(s) to stay away a specific distance from the petitioner's residence, the Court should be as specific as possible so the provision is clear to the parties and law enforcement.

BEST PRACTICE

If it is identified that the petitioner and respondent attend the same school or have the same employer, and it is not the Court's intention to exclude the respondent from the school or workplace, the order should clarify that it is not a violation of the order for the respondent to attend school (also being mindful of campuses and dorms) or be at the workplace.

C. Other Relief – First Amendment

A petitioner may seek an order restraining a party from publishing certain information on websites or requiring a respondent to remove postings on a website. Such requests implicate First Amendment issues. The Harassment Statute has survived a facial challenge on First Amendment grounds because the State may constitutionally regulate certain types of words or conduct without infringing on the First Amendment rights.[169] An order which specifically prohibits posting harassing content as defined by the Harassment Statute has been upheld against First Amendment challenges.[170] An order directing a respondent to remove a blog from the internet and prohibiting actions directed at petitioner which mirrors language from the Harassment Statute was found to pass Constitutional muster.[171]

XIV. Hearings

[167] *Williams v. Rimmer,* 2015 WL 2457003 (May 26 2015)(unpublished)

[168] *Welsh v. Johnson*, 508 N.W.2d 212, 216 (Minn. App. 1993) (such a restriction does not violate the First Amendment)

[169] *Dunham v. Roer,* 708 N.W.2d 552, 565-66 (Minn. Ct. App. 2006), *review denied* (Minn. Mar. 28, 2006)

[170] *Westbrooke Condo Assoc. v. Pittel,* 2015 WL 133874 (January 12, 2015)(unpublished)

[171] *Johnson v. Arlotta,* 2011 WL 614651 (December 12, 2011)(unpublished)

A. Participants and Their Roles

1. District Court Clerk

See Order for Protection Hearings section.

2. Interpreters

See Order for Protection Hearings section.

3. Deputies

See Order for Protection Hearings section.

B. Procedures

1. Mentally Ill Parties

See Order for Protection Interface with Other Court Actions section.

2. Incompetent Parties

See Order for Protection Interface with Other Court Actions section.

3. Administrative Continuances

See Order for Protection Interface with Other Court Actions section.

C. Initial Hearings

1. Parties' Appearances

a. Both Parties Appear

Cases set for an initial hearing on the Harassment calendars will be offered mediation by trained volunteer attorneys. Mediation is not offered in cases that alleged a physical or sexual assault. Cases involving domestic violence can mediate upon agreement of both parties but should not be required.

Mediation is not available for cases scheduled on judicial officer's blocked calendars. If mediation is successful, the agreement is read into the record and the clerk will draft the order. If mediation is not successful, the recommended procedure is to explain to the respondent their 3 options.

If the respondent requests an evidentiary hearing and there is sufficient time to have the hearing that day, the evidentiary hearing should be held unless a continuance is granted. If a continuance is granted, the Court should issue an Order for Continuance that explains the reason for the continuance and addresses any other urgent issues pending the evidentiary hearing.

b. Service Not Completed, No Appearance by Respondent

If personal service has not been completed upon the respondent, the petitioner may be the only party to appear. The Court should have the petitioner complete an Affidavit and Order for Publication. The court should issue an Order for Continuance.

c. Service Completed, No Appearance by Respondent

If personal service by a sheriff or publication was completed upon the respondent but the respondent does not appear, the recommended procedure is to inquire with the petitioner if the allegations contained in the petition and affidavit are true and correct. The Court may then issue the final Harassment Restraining Order incorporating the contents of the petition and affidavit as findings of fact, if the petition and affidavit contain sufficient allegations of harassment.[172] If not, the matter may be dismissed.

If the hearing was scheduled at the request of the respondent, the Court may dismiss the respondent's request for a hearing and the *ex parte* Harassment Restraining Order remains in effect.

d. No Appearance by Petitioner

If the respondent appears but the petitioner does not, the recommended procedure is to dismiss the Harassment Restraining Order. There will, of course, be exceptions in unusual situations (illness, incarceration, etc.).

e. Neither Party Appears

If neither party appears, the usual procedure is to dismiss the Harassment Restraining Order.

If the hearing was scheduled at the request of the respondent, the Court may dismiss the respondent's request for a hearing and the *ex parte* order remains in effect.

2. Respondent's Options

If mediation was unsuccessful, the Court should explain the respondent's following 3 options:

- Admit the allegations in the petition and affidavit and agree to the Harassment Restraining Order with findings of harassment;
- Agree to the issuance of the Harassment Restraining Order without any findings of harassment; or
- Deny the allegations in the petition and affidavit and request an evidentiary hearing.

3. Continuances

a. By Request of the Parties

[172] A default order with these findings was affirmed if there were sufficient facts alleged in the petition to constitute harassment. *Robbennolt v. Weigum,* 2016 WL 1551686 (April 18, 2016)(unpublished)

Continuances are granted by securing a date from the courtroom clerk, using the form (Order for Continuance), stating that any *ex parte* order remains in effect, and having the order served on each party immediately after the hearing.

Sometimes frequently requesting continuances can be a way for a respondent to manipulate a victim by increasing chances to either directly or indirectly apply pressure on the petitioner to dismiss the petition.[173]

D. Evidentiary Hearings

1. Introduction

Defining harassment for the parties before the evidentiary hearing may help the parties to focus on the issue of harassment. While context may be important, the Court should direct the parties to focus on the allegations provided in the petition and affidavit. It may be helpful to determine whether there was harassment before hearing testimony about possible relief.

The evidentiary hearing is meant to be an expedited hearing. This can be facilitated by focusing on the narrow issues that the Court must determine. Focusing on the issues not only keeps the hearing to a manageable length but also minimizes the need for continuances to complete the evidentiary hearing.

The hearing requirement for a harassment restraining order includes the right to examine and cross-examine witnesses and to produce documents.[174] Absent an order from the Court, there is no requirement that a party provide a witness list.[175]

2. Respondent's Options

At the start of the evidentiary hearing, it is helpful to go over the Respondent's 3 options again to see if there is still a need for an evidentiary hearing.

3. Standard of Proof

Since the Minnesota Legislature has not identified the standard of proof to be used in Harassment Restraining Order cases, the preponderance of the evidence standard applies.[176] The petitioner bears the burden of proof as the party seeking to obtain the Harassment Restraining Order.

4. Opening Statements

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[173] *Gada v. Dedefo*, 684 N.W.2d 512 (Minn. Ct. App. 2004) Court of Appeals affirms denial of request for continuance where Court noted family members pressuring petitioner in waiting area of Court.

[174] *Anderson v. Lake,* 536 N.W.2d 909, 911 (Minn. Ct. App.1995).

[175] *Brunner v. Harper,* 2017 WL 3974404 (September 11, 2017)(unpublished)

[176] Polinski v. Bolton, 2017 WL 2224391 May 22, 2017 (unpublished)

Normally, parties and their attorneys waive opening statements due to the expedited nature of these proceedings.

5. Continuances

See Order for Protection Hearings section.

6. Testimony

a. Out-of-Court Statements by Children

See Order for Protection Hearings section.

b. In-Court Interviews of Children

See Order for Protection Hearing section.

c. Fifth Amendment Issues

See Order for Protection Hearing section.

7. Witnesses

See Order for Protection Hearing section.

8. Rulings

See Order for Protection Hearing section.

9. Mutual Harassment Restraining Orders

Mutual Harassment Restraining Orders are sometimes issued by agreement.

If both parties have filed petitions for Harassment Restraining Orders and both have committed acts of harassment against each other, separate orders should issue in each case.

10. Collateral Consequences

The issuance of a Harassment Restraining Order may have collateral or unintended consequences for the parties. These issues sometimes come up during hearings or negotiations between counsel for the parties who attempted to settle prior to their evidentiary hearing.

Collateral consequences should not detract from the purpose of the hearing, which is to determine whether harassment occurred.

F. Motion Hearings

The statute does not provide direction on motions to modify the Harassment Restraining Order. The court should refer to Minnesota Rules of Civil Procedure.

The Domestic Abuse/Harassment Office has procedures to address the motions depending on the type of motion that is brought. All motions need to originate through the Domestic Abuse/Harassment Office in order to coordinate possible companion cases and check the electronic court record for conflicting orders.

If the motion is argued, it would be handled based on the record including the affidavit(s) filed in support or opposition to the motion.

The Court should not deny a party an opportunity to serve and file a motion unless the party has been previously restricted by court order as a frivolous litigant.

1. Types of Motions

a. Non-Emergency

If the motion is one to dismiss the order or make the order less restrictive, the motion is served by mail and the hearing is set at least 17 days out to allow for service by mail. Court staff does not prepare an order in this situation. If not already served, court staff will mail the documents to the last known address of the non-moving party when the motion is a non-emergency motion.

b. Emergency

If the moving party alleges an emergency, court staff prepares an Amended Order Granting Petition for Ex Parte Harassment Restraining Order. If the Court grants the emergency relief, the court staff will set the hearing at the earliest practicable time[177], and then send the order and motion for personal service on the non-moving party. If the request for immediate relief is denied, the court staff will proceed with filing and scheduling the motion.

c. Motion for New Trial

Harassment Restraining Orders are considered "special proceedings," which means a motion for a new trial is not authorized and will not alter the time to appeal.[178]

d. Motions to Dismiss

Often, the petitioner will seek to dismiss the Harassment Restraining Order for a variety of reasons.

The petitioner may file a Request for Dismissal in a Harassment Restraining Order proceeding without a court hearing. The court clerk will draft an Order for Dismissal. Without a court hearing, it may be difficult to determine what is causing the need for immediate action and what motivates the request. The request to immediately dismiss the Harassment Restraining Order may be denied. The court clerk will inform the petitioner of the option to file a Motion and Notice of Motion to Change Harassment Restraining Order which will provide a motion hearing date and notice to the

[177] Minnesota Rules of Civil Procedure, Rule 65.01

[178] *Steeves v. Campbell*, 508 N.W.2d 817 (Minn. Ct. App. 1993)

respondent.

If the Harassment Restraining Order is dismissed and another order (ie. Domestic Abuse No Contact Order) is in effect, the Court should remind the parties that this amendment or dismissal does not amend or dismiss that order.

If this is an order issued under Minn. Stat. §609.748, subd. 5(3) (up to 50 years), see Harassment Restraining Order Extensions and 50-Year Harassment Orders section.

e. Motion to Vacate

See Order for Protection Hearings section

f. Contempt Hearings

The most effective way of enforcing many conditions in Harassment Restraining Orders is through law enforcement. This is why contempt hearings are and should be rare in HROs. Hearings shall be set within 14 days and are handled as in other contempt proceedings.[179]

g. Up to 50-Year Harassment Restraining Order

Orders which are extended pursuant to Minn. Stat. §609.748, subd. 5(3) may not be modified by the respondent until the order has been in effect for at least five years and the respondent has not violated the order during that time.

XV. Extensions and 50-Year Harassment Restraining Orders

A. Extending a Harassment Restraining Order

Nothing in the statute allows for a petitioner to request for an extension of an existing Harassment Restraining Order. In an unpublished case, the Court found that a restraining order may be granted if the proceeding met the statutory requirements for issuing an initial Harassment Restraining Order. In this case, the party's motion for an extension of the Harassment Restraining Order met the requirements for a petition because it identified the parties and was accompanied by a sworn affidavit setting forth alleged incidents of harassment so the Court construed it as issuing a new Harassment Restraining Order that did not violate the prohibition against extending a Harassment Restraining Order beyond 2 years.[180]

B. 50-Year Harassment Restraining Orders

The Court may issue an order for a period of up to 50 years if the Court finds[181]:

[179] *Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968) and *Mahady v. Mahady*, 448 N.W.2d 888 (Minn. Ct. App. 1989)
[180] *Roer v Dunham*, 682 N.W.2d 179 (Minn. Ct. App. 2004)
[181] Minn. Stat. §609.748 subd. 5 (3)

- The respondent has violated a prior or existing Harassment Restraining Order two or more times[182]; or
- The petitioner has had two or more Harassment Restraining Orders in effect against the same respondent.

  For orders issued under Minn. Stat. §609.748, subd. 5(3) there are special rules for service, burden of proof, and conditions under which motions to modify may be made by the respondent.[183] A respondent may file a motion to have a lengthy Harassment Restraining Order modified or vacated after five years only if there are no violations of the order *and* there are changed circumstances. The motion must be made in the county in which the order was issued and a hearing date set. The petitioner must be personally served with the request not less than 30 days prior to the hearing. The respondent must prove by a preponderance of the evidence that there has been a change in circumstances and that the reasons why the court extended the Harassment Restraining Order no longer apply or are unlikely to happen. If the respondent has met the burden of proof, the court may modify or vacate the order, which must be personally served on the petitioner. If the respondent has not met the burden of proof, the court shall deny the request and no future request to modify or vacate may be made until five years have passed from the date of the denial.

[182] A trial court did not err when it took judicial notice of four *Alford* please in four criminal cases and found that respondent had violated an HRO at least two times. *Berg v. Flaherty,* 2016 WL 3223218 (June 13, 2016)(unpublished)

[183] Minn. Stat. §609.748, subd 5

Appendix A: Domestic Violence Risk Assessment Bench Guide

Domestic Violence Risk Assessment Bench Guide

A research-based bench guide for use by Minnesota judges
at all stages of family, Order for Protection, civil or criminal involving domestic violence[184]

Note: The **presence** of these factors can indicate **elevated risk** of serious injury or lethality. The **absence** of these factors is not, however, evidence of the absence of risk of lethality.

1. Does alleged perpetrator have access to a **firearm**, or is there a firearm in the home?

2. Has the alleged perpetrator ever used or threatened to use a **weapon** against the victim?

3. Has alleged perpetrator ever attempted to **strangle** or choke the victim?

4. Has alleged perpetrator ever **threatened to or tried to kill** the victim?

5. Has the physical **violence increased in frequency or severity** over the past year?

6. Has alleged perpetrator **forced** the victim to have **sex**?

7. Does alleged perpetrator try to **control** most or all of victim's **daily activities**?

8. Is alleged perpetrator constantly or violently **jealous**?

9. Has alleged perpetrator ever threatened or tried to commit **suicide**?

10. Does the **victim believe** that the alleged perpetrator will re-assault or attempt to kill the victim*? A "no" answer does not indicate a low level of risk, but a "yes" answer is very significant.*

11. Are there any pending or prior Orders for Protection, criminal or civil cases involving this alleged perpetrator?

These risk assessment factors are validated by a number of studies. See Campbell, Jacquelyn, et al," Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study Practitioner Summary and Recommendations: Validation of Tools for Assessing Risk from Violent Intimate Partners", National Institute of Justice (December, 2005); Heckert and Gondolf, "Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault", Journal of Interpersonal Violence Vol 19, No 7 (July 2004).

[184] Reissued in July 2013 without changes by the Gender Fairness Subcommittee of the Committee for Equality and Justice. Originally prepared by the Gender Fairness Implementation Committee, 2009.

How To Use The Domestic Violence Risk Assessment Bench Guide

- **Obtain information regarding these factors through all appropriate and available sources**
    - Potential sources include police, victim witness staff, prosecutors, defense attorneys, court administrators, bail evaluators, pre-sentence investigators, probation, custody evaluators, parties and attorneys
- **Communicate to practitioners that you expect that complete and timely information on these factors will be provided to the court**
    - This ensures that risk information is both sought for and provided to the court at each stage of the process and that risk assessment processes are institutionalized
    - Review report forms and practices of others in the legal system to ensure that the risk assessment is as comprehensive as possible
- **Expect consistent and coordinated responses to domestic violence**
    - Communities whose practitioners enforce court orders, work in concert to hold alleged perpetrators accountable and provide support to victims are the most successful in preventing serious injuries and domestic homicides
- **Do not elicit safety or risk information from victims in open court**
    - Safety concerns can affect the victim's ability to provide accurate information in open court
    - Soliciting information from victims in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the victim
- **Provide victims information on risk assessment factors and the option of consulting with confidential advocates**
    - Information and access to advocates improves victim safety and the quality of victims' risk assessments and, as a result, the court's own risk assessments
- **Note that this list of risk factors is not exclusive**
    - The listed factors are the ones most commonly present when the risk of serious harm or death exists
    - Additional factors exist which assist in prediction of re-assault
    - Victims may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports
- **Remember that the level and type of risk can change over time**
    - The most dangerous time period is the days to months after the alleged perpetrator discovers that the victim
        - might attempt to separate from the alleged perpetrator or to terminate the relationship
        - has disclosed or is attempting to disclose the abuse to others, especially in the legal system