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Jurisdictionally Sound Civil Protection Orders¹²

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What is a protection order?³

A protection order, sometimes called a ‘restraining order,’ is an official court document that provides specific restraints on the actions of an abuser and/or assailant. A victim of domestic violence, sexual assault, trafficking, or other criminal activity may want a protection order to keep physical distance between herself and her assailant, to protect her family and home, or to try to prevent further violence. Protection orders were developed to offer a civil remedy to victims without involving the criminal justice system.⁴ For a more

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² In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (United States v. Windsor, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

³ For more information on this topic, visit <http://niwaplibrary.wcl.american.edu/family-law-for-immigrants/protective-orders>.

⁴ *D.C. Intrafamily Offenses Act, 1969: Hearings on H.R. 8781 Before Subcomm. No. 1 To Establish Family Court System*, 91st Cong. (1969). For more information about protection orders look to: LESLYE E. ORLOFF & CATHERINE F. KLEIN, *DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS*, (Ayuda) (2d ed. 1992). For an amicus brief on protection orders see: Brief for Ayuda et. al. as Amici Curaie Supporting Petitioner at 9, *United States v. Dixon*, 509 U.S. 688 (1993) (No. 91-1231) (“The Criminal Justice System Alone Cannot Ensure Victims’ Safety”); NATIONAL COUNCIL OF JUVENILE AND FAMILY

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detailed explanation of what protection orders are and how an immigrant survivor can access a protection order, please see the protection order chapter in this manual.⁵

Why is jurisdiction important in receiving a protection order?

A protection order tells an abuser/assailant they cannot commit certain acts. In order for a court to have the jurisdiction to restrict someone's activities the court must have a legally valid reason for doing so. In the case of a protection order there must be a finding of violence or the threat of violence. If a court tries to restrain someone's activities without a statutorily recognized reason for doing so they lack any constitutional justification for limiting someone's actions, which means they lack the subject matter jurisdiction to control someone's actions.⁶

A protection order without a finding of domestic violence is an order issued by a court without subject matter jurisdiction, and is therefore invalid.⁷ Protection orders issued without findings violate the Violence Against Women Act's (VAWA) full faith and credit provisions and are unenforceable across state lines.⁸ Some judges may accede to requests from a domestic violence perpetrator and issue a protection order that is not based upon findings of domestic violence and may believe that such orders offer protection to victims.⁹ A court's jurisdiction for issuing a protection order depends on the court having subject matter jurisdiction. The subject matter jurisdiction for a protection order is based on an occurrence of domestic violence such as assault, battery, or other acts covered by the state domestic violence statute including stalking, threats, sexual assault, and attempts to cause bodily injury. When a judge issues a protection order without a finding of domestic violence, the order is unenforceable because the court does not have the subject matter jurisdiction to issue the order.¹⁰

COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES', FAMILY VIOLENCE PROJECT (1990).

⁵ Immigrant victims of domestic violence, sexual assault, stalking, or other forms of violence against women often encounter systematic barriers when accessing the justice system and victim services in the United States. They can be particularly useful for immigrant victims who may not want to become involved in the criminal justice system because of lack of information, immigration status concerns, cultural stigma, or language access issues. All victims may obtain protection orders regardless of their immigration status.

⁶ See *Schramek v. Bohren*, 429 N.W.2d 501, 502 (Wis. Ct. App. 1988); *Gilbert v. State*, 659 So.2d 233 (Fla. 1995); *Master v. Eisenbart*, No. 90-2897, 1991 Wisc. App. LEXIS 1270 (Wis. Ct. App. Sept. 18, 1991). See also generally NANCY LEMON, DOMESTIC VIOLENCE LAW (West) (2006).

⁷ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 849-50 (1993). See also *Broaca v. Broaca*, 435 A.2d 1016, 1018 (Conn. 1980); *People v. Wade*, 506 N.E.2d 954, 956 (Ill. 1987); *Robertson v. Commonwealth*, 25 S.E.2d 352, 358 (Va. 1943); 46 AM. JUR. 2D *Judgments* § 24 (2005) ("When a suit is dismissed for lack of jurisdiction, rulings on the merits rendered prior to the dismissal are nullities, void ab initio. . . . A judgment rendered without jurisdiction may be attacked and vacated at any time, either directly or collaterally.").

⁸ 42 U.S.C. § 13981 (1994).

⁹ "No findings" protection orders can be issued in a variety of ways. The order may be issued on a court form that the judge alters inscribing "no findings" on the face of the order. The court may issue a protection order and may cross out the information on the standard court form that crosses out or deletes the reference to the state statutory section that defines the subject matter jurisdictional basis for issuance of a protection order. In a few instances court forms have been erroneously developed that include a check box stating that the order is being issued and no findings have been made. Generally, court forms using this approach have been revised once subject matter jurisdictional concerns have been raised.

¹⁰ *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003) (vacating protection order where woman consented to order, but court had dismissed domestic violence complaint because no domestic violence found cannot approve even a consent order because order is to make domestic violence cease); *El Nashaar v. El Nashaar*, 529 N.W.2d 13 (Minn. Ct. App. 1995) (granting husband writ of prohibition where civil protection order granted by lower court because no findings accompanied civil protection order, so no basis for civil protection order); *Price v. Price*, 133 N.C. App. 440 (N.C. Ct. App. 1999) (reversing civil protection order because no evidence/findings of violence, only suspicion of husband); *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 707 (W. Va. 2003) (issuing civil protection order at father's request without findings of domestic violence- reversed); *Brandon v. Brandon*, 132 N.C. App. 646 (N.C. Ct. App. 1999) (reversing civil protection order because accompanied by unclear findings of fact); See also *Capron v. Van Noorden*, 6 U.S. 126, 126 (1804); 20 AM. JUR. 2D *Courts* § 99 (2005) ("jurisdiction over the subject matter cannot be affected by agreement or consent").

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All protection orders, including consent protection orders, need subject matter jurisdiction. Parties cannot consent to give a court jurisdiction that the court would not otherwise have.¹¹ A consent protection order without a finding of domestic violence can be vacated for lack of jurisdiction.¹² A consent protection order must include findings to support subject matter jurisdiction for the court issuing the order. This does not mean that the judge must always hold a full hearing and issue a formal domestic violence finding to obtain subject matter jurisdiction to issue a civil protection order. The court may base its subject matter jurisdiction on an admission by the respondent of one or more acts that qualify as domestic violence under the state protection order statute. Alternatively, when the parties are willing to consent to a protection order, subject matter jurisdiction can be obtained based upon the uncontested affidavit or pleading of the protection order petitioner. When there is no admission and all of the allegations in the protection order petition are contested the court must hold a hearing and issue a protection order based upon findings of domestic violence.

Why do judges issue Protection Orders without subject matter jurisdiction?

Judges may want to issue orders without any findings for a variety of reasons. The court may do so to promote more consent orders and avoid holding hearings.¹³ The court may be responding to an abuser's request that he maintain access to firearms¹⁴ or to avoid triggering presumptions against awarding custody to an abuser.¹⁵ In divorce proceedings that occur after a protection order has been issued, opposing counsel may attempt to argue that a no-findings protection order has already decided that there was no domestic violence in the relationship. In each of these instances if the court issues a "no findings" protection order when it lacks subject matter jurisdiction to do so, the court denies a victim of domestic violence the protection that was afforded to her under state protection order laws, and jeopardizes the health and safety of a victim and her children.

Some state court judges may issue court orders specifically designed to avoid treatment of that court order as an order under state protection order laws. These orders are not included in the state electronic protection order enforcement system (e.g. the California Law Enforcement Telecommunication System (CLETS) or Domestic Violence Restraining Order System (DVROS). Such orders are not protection orders and are unenforceable as protection orders. These orders offer protection to no one.

When a victim files for protection order relief the court should grant that relief after trial or by consent of the parties if the pleadings contain facts of abuse that qualify for issuance of a protection order under state law. If the court holds a hearing and does not find facts sufficient to support issuance of the protection order, the request for the order should be denied. In practice there may be proof problems in some protection order cases that do not sustain issuance of an order. In these cases, the judge's role is to deny issuance of the protection order and not give the petitioner victim less than the law requires. In other cases judges issue orders that are not jurisdictionally sound protection orders when asked to do so by the parties. This usually occurs when the abuser is represented and the victim who is not represented has been coerced into agreeing to a stipulated order that is not legally a protection order because the parties have agreed to leave findings of domestic violence out of the Agreed to Order.

¹¹ See *Capron*, 6 U.S. at 126; 20 AM. JUR. 2D *Courts* § 99 (2005) ("jurisdiction over the subject matter cannot be affected by agreement or consent"); *Bush v. United States*, 703 F.2d 491 (11th Cir. 1983); *Latin Am. Cas. Ins. Co. v. Hi-Lift Marina, Inc.*, 887 F.2d 1477 (11th Cir. 1989); *Am. Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993).

¹² *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003).

¹³ See Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach to Dealing With Domestic Violence on Military Installations*, 48 St. Louis U. L.J. 277, 280 (2003) ("Mutual or consent orders of protection are often issued without a hearing or a specific finding of abuse . . ."); Klein et al., *supra* note 4, at 1074 ("Courts, relying on a sworn petition, also issue consent civil protection orders between the parties without a finding of abuse.")

¹⁴ See Lisa D. May, *The Backfiring Of The Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 34-35 (2005) ("Rather than properly applying state laws that would trigger the federal statutes, some judges misapply the state laws for the very purpose of circumventing the application of the federal firearms bans.")

¹⁵ See Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody To Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 664-65 (2001).

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When Judges agree to go along with this request, danger to domestic violence victims is enhanced. The victim receiving a court order that does not comply with the state protection order laws is misled into believing that she has received a valid enforceable protection order. The abuser may know that the order is not a jurisdictionally sound protection order and is not enforceable by law enforcement authorities. If the victim is operating under the illusion of a valid order and falsely relies on the order to protect her against future abuse, she may fail to take other steps to protect herself and her children from ongoing violence. The lack of subject matter jurisdiction for her order, as well as her reliance on that order, may place her in greater danger.

Practice Pointer- personal and subject matter jurisdiction¹⁶

If possible from a safety perspective, it is best to obtain a protection order in the jurisdiction in which the abuse occurred. A family law attorney will have to do a safety assessment with the survivor to determine if that is a viable option. Once the victim obtains a protection order in the state where the violence occurred, that protection order is enforceable in any U.S. jurisdiction to which the victim moves under the Violence Against Women Act's (VAWA) Full Faith and credit provisions.¹⁷ The victim can obtain the protection order in the original jurisdiction and then move to a new jurisdiction without the abuser knowing to which state she has relocated. When a victim has children with the abuser, laws governing interstate custody jurisdiction and parental kidnapping will need to be a part of this assessment.¹⁸ If the victim has already fled to a new jurisdiction, or the determination is made that a victim is safer moving and then obtaining the protection order, the attorney should interview the client to determine whether there is subject matter jurisdiction to file the protection order in the victim's new location. Harassing phone calls, threats, and stalking can be continuations of the abuse, giving the new jurisdiction subject matter jurisdiction.¹⁹ The presence of danger to the petitioner, such as when the abuser has come to the jurisdiction but has not yet contacted the survivor, can be enough of a threat for subject matter jurisdiction, and therefore to issue a protection order in the new jurisdiction.²⁰ Review your state's long arm jurisdiction statute to determine the specific requirements for personal jurisdiction over the abuser and the minimum contacts needed, which in some locations may depend on the threats and or actions taken by the abuser since the survivor has moved to the new jurisdiction.

1) Legal ramifications

When a protection order is issued without a finding of domestic violence a victim is left without protection and may suffer further legal consequences.

Reversal

When there is no jurisdiction for a court to have issued a protection order, the order can be reversed. In *Andrasko v. Andrasko* the Minnesota Court of Appeals held that "the trial court erred by failing to make findings regarding domestic abuse" and reversed the civil protection order.²¹ Similarly, the court in *Bryant v. Williams* stated that under North Carolina law "[t]he court's authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred and that the order

¹⁶ For a complete analysis of protection orders, see LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS (Ayuda) (2d ed. 1992).

¹⁷ 42 U.S.C. § 13981 (1994); National Center on Full Faith and Credit, <http://www.fullfaithandcredit.org>.

¹⁸ See chapters on Interstate Custody and Jurisdiction in LEGAL MOMENTUM, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS (2006).

¹⁹ *In re Anthony T.*, 510 N.Y.S.2d 810 (N.Y. 1986); *Adair v. United States*, 391 A.2d 288 (D.C. 1978); *United States v. Baish*, 460 A.2d 38 (D.C. 1983).

²⁰ *Pierson v. Pierson*, 147 Misc.2d 209 (N.Y. Fam. Ct. 1990).

²¹ 443 N.W.2d 228, 230 (Minn. Ct. App. 1989).

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further the purpose of ceasing acts of domestic violence.”²² Similarly, in *Sandoval v. Mendez* the court affirmed the trial court’s refusal to enter a civil protection order for lack of subject matter jurisdiction because a necessary statutory provision had not been met.²³

Protection Order Is Not Valid and Enforceable Under the Violence Against Women Act’s Full-Faith and Credit Provisions

Under the Violence Against Women Act of 1994 (VAWA)²⁴ federal law requires that each state, tribe, or territory give full faith and credit to a sister state’s protection order (including an emergency order) as long as due process requirements were met in the state where the order was issued. The full faith and credit provision of VAWA requires that a *valid* protection order must be enforced throughout the United States. When there are no findings to give a court jurisdiction to issue a protection order, it is not a valid protection order and courts in other states may refuse to give the order full faith and credit.²⁵

In making protection orders enforceable across state lines, Congress limited full faith and credit protections to orders that meet the following requirements:

- 1) a pleading has been filed;
- 2) the restrained party was provided notice and an opportunity for a hearing; and
- 3) the order was based upon findings that the restrained party had committed acts deemed domestic violence under the protection order statute of the state issuing the order.²⁶

Congress took this approach to assure that the restrained party had been provided due process before a protection order was issued and to deter the practice of courts issuing mutual protection orders restraining both the abuser and the victim.²⁷ When judges issue “no findings” protection orders these orders are contrary to VAWA, are unenforceable beyond the boundaries of the issuing state, and risk rendering the legal order ineffective.²⁸

2) Impact on survivor

In addition to reversal of an order and problems with full-faith and credit, a ‘no findings’ order causes several other problems for victims of domestic violence. Orders issued without jurisdiction, because of no findings of domestic violence, are dangerous for domestic violence victims because the order:

- Allows the abuser to avoid accepting responsibility for his violent and abusive behavior, thereby undermining the protection order’s effectiveness.

²² 588 S.E.2d 506, 508 (N.C. Ct. App. 2003); cf. *Ditlefsen v. Feyereisen*, No. 86-1151, 1987 WL 267486 (Wis. Ct. App. Feb. 3, 1987) (“[w]ithout findings on the criteria set out in [Wisconsin’s statute], there is no basis for determining subject matter jurisdiction” in custody case).

²³ 521 A.2d 1168 (D.C. Ct. App. 1987).

²⁴ 42 U.S.C. § 13981 (1994).

²⁵ Heintz, *supra* note 10, at 280 (finding order did not comply with Violence Against Women Act’s “requirement of reasonable notice or opportunity to be heard” because of lack of findings). Cf. *In re Jorgensen*, 627 N.W.2d 550, 564 (Iowa 2001) (refusing to apply New York custody order because New York court failed to make factual findings and thus lacked subject matter jurisdiction).

²⁶ 18 U.S.C. §2265-6; U.S. ATTORNEY’S OFFICE W. DIST. N.Y. & ST. UNIV. OF N.Y. AT BUFF. SCH. OF LAW FAMILY VIOLENCE CLINIC, OBTAINING AND ENFORCING VALID ORDERS OF PROTECTION IN NEW YORK STATE, 37 (U.S. Dep’t of Justice), http://www.usdoj.gov/usao/nyw/victim_witness/pdf/OOPmanual.pdf; NATIONAL CENTER ON FULL FAITH AND CREDIT PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCREASING YOUR SAFETY: FULL FAITH AND CREDIT FOR PROTECTION ORDERS, <http://www.vaw.umn.edu/documents/survivorbrochure/survivorbrochure.html> (last visited Jan. 24, 2008); Edward S. Snyder & Laura W. Morgan, *Domestic Violence Ten Years Later*, GP-SOLO LAW TRENDS & NEWS: FAMILY LAW, August 2005, <http://www.abanet.org/genpractice/newsletter/lawtrends/0508/family/domviolence.html>.

²⁷ BATTERED WOMEN’S LEGAL ADVOCACY PROJECT, INC., MUTUAL ORDERS OF PROTECTION: INFORMATION FOR JUDGES, ADVOCATES, AND BATTERED WOMEN (2003), <http://www.bwlap.org/TAPs/mutualOFP.pdf> (explaining the problems with mutual protection orders).

²⁸ 18 U.S.C. §2265(a)-(b)

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- Can avoid state laws designed to avoid awarding custody to the non-abusive parent and make it more difficult for the battered victim to be awarded custody of the parties' children;²⁹
- Can allow the abuser to retain his firearms avoiding federal laws that require that abusers with protection orders be barred from purchasing fire arms and obtaining a fire arms license;³⁰
- May undermine the ability of courts to have abusers turn over weapons;
- Can undermine an immigrant victim's domestic violence-related immigration case³¹ and access to public benefits;³²
- Can delay or hinder access to welfare benefits for battered women and children; and
- Can make it less likely in a divorce for the battered victim to be able to retain the family home or to obtain a distribution of the family assets that takes domestic violence into account.

3) Issuing Jurisdictionally Sound Protection Orders – Including Consent Protection Orders

To issue a valid protection order there must be a finding of domestic violence, which gives the issuing court subject matter jurisdiction. This does not mean that there must be a full hearing. Ideally, the court can obtain abuser consent to the issuance of a protection order so that the court may avoid a full hearing on the subject of abuse. In consenting, the abuser must be agreeing to a finding of domestic violence,³³ otherwise there is no subject matter jurisdiction, regardless of an abuser's agreement to the order.³⁴

As in any uncontested civil court case, the court can issue a valid order resting its subject matter jurisdiction upon the uncontested affidavit or pleading of the petitioner.³⁵ When the abuser does not contest to the issuance of the protection order and the protection order petition alleges facts sufficient to constitute domestic violence under the state protection order statute, protection order courts across the country have subject matter jurisdiction to issue valid consent protection orders. If the abuser insists on a consent civil protective order, without any finding of abuse, the court should reject the abuser's position, hold a full hearing, and issue a civil protective order if it finds that the victim has shown the required facts.

All protection orders should be issued on unaltered court forms or other court orders that contain one of the following:

²⁹ See *Zimmerman v. Zimmerman*, 569 N.W.2d 277, 279 (N.D. 1997) (reversing custody order because court had not "carefully delineate[d] relevant and specific facts in support of its [domestic abuse] determination"); CLARE DALTON, LESLIE DROZD, & FRANCES WONG, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE (2d ed. 2006); AMERICAN BAR ASSOCIATION, CIVIL PROTECTION ORDERS (CPO'S) AND CHILD RELATED ISSUES (2004) (summary of State CPO laws including child custody for non-abusive parents); Mark Hardin, *Ramifications for Spouse and Partners*, A.B.A. CRIMINAL JUSTICE MAGAZINE, Spring 2002, available at <http://discussions.abanet.org/crimjust/mo/premium-cr/cjmag/17-1/ramifications.html>; HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994).

³⁰ See, e.g., 18 U.S.C. § 922(g)(8) (2005) (prohibiting possession of firearms by any person who is subject to a court order that issues after a hearing and "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child").

³¹ See 8 U.S.C. § 1229 (2000); 8 U.S.C. § 1101(a) (amended by Pub. L. No. 109-162 on Jan. 5, 2006); LEGAL MOMENTUM, *supra* note 15, at §§ 3, 5, 6.

³² LEGAL MOMENTUM, *supra* note 15, at §§4:1-2.

³³ Some courts may ask the abuser to admit that one or more incidents of domestic violence have occurred. Other courts require only a general agreement from the abuser to the court's issuance of a domestic violence finding, coupled with an uncontested pleading by the petitioner alleging domestic violence. Both approaches are sufficient for subject matter jurisdiction.

³⁴ *Bryant v. Williams*, 161 N.C. App. 444 (N.C. Ct. App. 2003) (vacating protection order and dismissed domestic violence complaint where woman consented to order because no domestic violence found cannot approve even a consent order since order is to make domestic violence cease).

³⁵ See *Vogt v. Vogt*, 455 N.W.2d 471, 474 (Minn. 1990); LEGAL MOMENTUM, *supra* note 15, at §5:1.

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- A citation to the state protection order statute defining domestic violence for purposes of issuance of a protection order;
- A statement that the court finds that the petitioner is entitled to a protection order under the state protection order statute;
- A statement that the court has found that it has subject matter jurisdiction to issue a protection order;
- A statement that the respondent admits an act or act of domestic violence as defined by the state protection order statute; or
- A finding of fact by the court that the respondent has committed an act or acts that qualify as domestic violence under the state protection order statute.

Each of these rulings provides a sufficient factual finding to support subject matter jurisdiction for issuance of a protection order. When one or more of the above findings are clear from the text of the civil protection order issued by the court, no specific oral or written finding of abuse is required for a protection order to be valid.³⁶

What are the gun ownership ramifications of a protection order?

There are some federal laws that limit gun ownership and may affect a judge's desire to issue a no findings protection order. The law that directly mentions protection orders and firearms is 18 U.S.C. section 922 (g) (8). Often 18 U.S.C. section 922 (g) (9) (also called the Lautenberg amendment) is mistakenly assumed to be activated by a protection order. There are also several other laws that may affect an abuser's ability to receive firearms from others or increase the penalties for an abuser who lies in order to get a firearm.³⁷

18 U.S.C. 922 (g) (8)

922 (g) (8) prohibits some abusers subject to a protection order from possessing firearms and ammunition. In order for a protection order to deny an abuser access to firearms under this law the protection order must:³⁸

- 1) have been issued after a hearing with a) Notice to the respondent, and b) Opportunity for the respondent to participate
AND
- 2) restrain
 - a. stalking, harassing, threatening –OR–
 - b. other conduct that places partner or their child/children in reasonable fear of injuryAND
- 3) include a finding of credible threat –OR– explicitly prohibit the use of force/ harm to partner or child
AND
- 4) protect a petitioner who is or was an “intimate partner”
 - a. spouse or former spouse –or–
 - b. parent of a child with abuser –or–
 - c. person who cohabits or has cohabitated with abuser

Some judges and attorneys mistakenly believe that a no findings protection order does not satisfy the requirements of section 922(g)(8) and, consequently, that the abuser would be free from any federal firearms prohibition. However, section 922(g)(8) applies even to a no findings order provided the order satisfies the other requirements of the federal statute and the terms of the order expressly prohibit the use, attempted use, or threatened use of physical force (see element 3 above, which provides for two alternatives). Most

³⁶ Oral approval by the judicial officer based on the pleadings and consent of the parties is sufficient to establish jurisdiction. Explicit on the record specific factual findings are not required.

³⁷ 18 U.S.C. § 922(a)(6), (d)(8)-(9), (g)(1)-(7). See also OFFICE OF VIOLENCE AGAINST WOMEN & NAT'L CTR ON FULL FAITH AND CREDIT, ENFORCING DOMESTIC VIOLENCE FIREARM PROHIBITIONS: A REPORT ON PROMISING PRACTICES 6-10 (2006) (noting various state statutes).

³⁸ OFFICE OF VIOLENCE AGAINST WOMEN & NAT'L CTR ON FULL FAITH AND CREDIT, *supra* note 34. See also 18 U.S.C. §922(g)(8).

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protection orders include provisions containing the required “physical force” prohibition; therefore, the failure to include a factual finding concerning credible threat would not evade the firearms prohibition in section 922(g)(8). To best ensure that protection orders comply with the federal statute, attorneys and judges should encourage the development of standard protection order forms that include a non-discretionary, explicit prohibition on the use, attempted use, or threatened use of physical force.

The Lautenberg Amendment (18 U.S.C. section 922 (g) (9))

This amendment prohibits those who have been **convicted** of a **misdemeanor crime of domestic violence** from possessing firearms and ammunition. A finding of domestic violence that is the basis of a protection order is NOT a conviction of a misdemeanor of the crime of domestic violence. A judge may mistakenly believe that they will be denying an abuser access to firearms under this amendment when they base a protection order on a finding of domestic violence; however, this is not the case. Although 18 U.S.C. 922 (g) (8) may prohibit access to firearms depending of the nature of the protection order, the Lautenberg Amendment will not.

Conclusion

By following these suggestions, courts may avoid the potential pitfalls of “no findings” protection orders and better protect victims of domestic abuse by providing jurisdictionally sound protection orders. If the respondent is unwilling to admit any abuse and is unwilling to agree to the relief the petitioner is seeking, or is only willing to agree to the issuance of a protection order “without a finding,” *the court must still find domestic violence to issue a protection order*. Without a finding of domestic violence there is no subject matter jurisdiction for the court to issue a protection order.

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