County Technical Assistance Service
INSTITUTE for PUBLIC SERVICE

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Orders of Protection

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Orders of Protection

Reference Number: CTAS-1312

"In America, early settlers held European attitudes towards women. Our law, based upon the old English common-law doctrines, explicitly permitted wife-beating for correctional purposes. However, certain restrictions did exist and the general trend in the young states was toward declaring wife-beating illegal. For instance, the common-law doctrine had been modified to allow the husband 'the right to whip his wife provided that he used a switch no bigger than his thumb' -- a rule of thumb, so to speak." Del Martin, *Battered Wives* Volcano Press, 1976, page 31.

Societal attitudes toward domestic violence have changed dramatically, and Tennessee laws related to it are modified almost yearly. Each revision has placed a greater burden on the law enforcement community to protect alleged victims, and the liability for failure to do so can be tremendous where an order of protection has been issued by the courts and served by the sheriff.

For law enforcement officers, domestic disputes and domestic violence are among the most difficult and dangerous situations to address. Some individuals seem to repeatedly manipulate the justice system for their own vindictive purposes, wasting valuable resources. Others petition the courts for protective orders, then fail to appear and testify, having returned to the alleged abuser. Officials may therefore become cynical and reluctant to take action.

However, in 2002, 3.1 percent of all male homicide victims and almost one-third of all female homicide victims in the United States were killed by a former or current "intimate partner." U.S. Department of Justice, Bureau of Justice Statistics, *"Homicide Trends in the U.S."* Domestic violence results in nearly 2 million injuries and 1,300 deaths nationwide each year. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control; 2003. Additionally, there have been a number of cases, in Tennessee and other jurisdictions, in which domestic conflict culminated in the murder of the perpetrator's own or estranged partner's children.

Definitions for Orders of Protection

Reference Number: CTAS-1313

For Orders of Protection, the following definitions will apply:

Petitioner — The victim; the plaintiff; "the person alleging domestic abuse, sexual assault or stalking in a petition for an order for protection." T.C.A. § 36-3-601(6).

Respondent — The defendant; the perpetrator; "the person alleged to have abused, stalked or sexually assaulted another in a petition for an order for protection." T.C.A. § 36-3-601(9).

Petition for Order of Protection — A standardized form filed with the court that provides relevant information about the petitioner, the respondent, their children, the domestic situation, and what events took place that led to the request for an order of protection. The petition asks that the court direct Respondent not to threaten, assault, contact, or stalk Petitioner.

Ex Parte Order of Protection — A temporary, emergency order issued when the court finds there is good cause to believe there is an immediate and present danger Petitioner will be victimized by Respondent. An ex parte order is issued immediately, without giving Respondent notice or an opportunity to be heard.

Order of Protection — An order issued after a hearing in which the court finds there is sufficient proof that Petitioner's allegations of domestic abuse, stalking or sexual assault are true, and that Petitioner needs to be shielded by the law from the Respondent. The order is valid for a defined period, not to exceed one year. For purposes of this chapter, such orders will be called "standard orders of protection" or "standard protective orders."

Sexual Assault Victim — Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of any form of rape, including aggravated rape (T.C.A. § 39-13-502), rape (T.C.A. § 39-13-503), aggravated sexual battery (T.C.A. § 39-13-504), sexual battery (T.C.A. § 39-13-505), sexual battery by an authority figure (T.C.A. § 39-13-527), statutory rape (T.C.A. § 39-13-506), or rape of a child (T.C.A. §§ 39-13-522, 33-3-601(9)).

Stalking Victim — Any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking. T.C.A. §§ 36-3-601(11), 39-17-315.

Legislative Intent

Reference Number: CTAS-1314
In 1995, our legislature took the somewhat unusual step of codifying (enacting as part of the Tennessee Code) its intent regarding application of state statutes related to domestic abuse:

> The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.

T.C.A. § 36-3-618.

Parties Who May Petition for an Order of Protection

Reference Number: CTAS-1315
With the exceptions added in 2005 to include sexual assault and stalking victims, state law requires that the petitioner have some past or present link of a domestic or familial nature with the respondent, though it may be indirect. The statute does not include acquaintances, neighbors, business associates and others who do not fall into the specified categories, which include:

1. Adults or minors who are current or former spouses;
2. Adults or minors who live together or who have lived together;
3. Adults or minors who are dating or who have dated or who have or had a sexual relationship; as used herein "dating" and "dated" do not include fraternization between two individuals in a business or social context;
4. Adults or minors related by blood or adoption;
5. Adults or minors who are related or were formerly related by marriage; or
6. Adult or minor children of a person in a relationship described above.

T.C.A. § 36-3-601(5)(A - F).

Venue: Where the Petition May Be Filed

Reference Number: CTAS-1316
The petition may be filed in the county where the Respondent lives; or, in which the domestic abuse, stalking, or sexual assault happened; or, if the Respondent is not a Tennessee resident, in the county where the victim lives. T.C.A. § 36-3-602(d).

Ex Parte Protective Orders and Standard Orders of Protection

Reference Number: CTAS-1317
An ex parte order is issued by the court without giving Respondent notice or an opportunity to tell his or her side of the story. It is a temporary order. There must be a hearing within 15 days after Respondent is served with the ex parte order. Respondent must be given at least five days notice of the hearing date. T.C.A. § 36-3-605.

If, at the hearing, the court finds by a preponderance of the evidence that the victim's allegations are true, the court can extend the order for up to one year. The victim can return each year to ask that the order be extended for another year. A new hearing is required for each extension. T.C.A. §§ 36-3-605 and 36-3-608.

Serving the Order

Reference Number: CTAS-1318
Rules for serving ex parte and standard protective orders are identical, with one exception: To effect proper service, the deputy must:

1. Personally read the order to Respondent and leave a copy with him or her, or
2. If Respondent is not a Tennessee resident, the order can be served by mail on the appropriate secretary of state, who must then promptly send a certified copy to Respondent by registered or certified return receipt mail, along with written notice that service was so made. If Respondent refuses to accept delivery of the registered or certified mail, his or her refusal is the same as delivery and constitutes service.

T.C.A. § 20-2-215.

However, if Respondent was served with a copy of the petition, notice of hearing, and any ex parte order issued, and the court rules that the ex parte order be extended to a standard order of protection, *that* order shall be served by:

1. Delivering a copy of the order of protection to Respondent or Respondent's lawyer, or
2. By the clerk mailing it to Respondent's last known address. If the address "cannot be ascertained upon diligent inquiry," the certificate of service shall so state. Service by mail is complete upon mailing.

T.C.A. § 36-3-609(d); §§ 20-2-215, 216.

Because violating a protective order is now a crime rather than merely civil contempt, it is absolutely *essential* that the deputy serving the order comply with every detail of the rules of service. It is *never* acceptable to leave the order with a third party who promises to give it to the Respondent.

TCIC and NCIC

Reference Number: CTAS-1319

Entry into the Tennessee Crime Information System (TCIC) and Transmission of Information to the National Crime Information Center (NCIC).

Each time a court issues, modifies, or dismisses a protective order, the local law enforcement agency is to immediately enter the order, modification, or dismissal in the Tennessee Crime Information System "and take any necessary action to immediately transmit it to the National Crime Information Center." T.C.A. § 36-3-609(e).

When an order is served, the entry is updated to include the court appearance date. If, at the time of the hearing, an ex parte order is extended into a standard protective order, the updated entry will include the order's expiration date (usually one year from the date of the order), the judge's name, and any additional relevant information, such as whether the order allows "social contact."

"Social contact" is sometimes specified in the order, usually to allow Respondent to interact with Petitioner for the purpose of arranging visitation with minor children or other communication related to the welfare of the couple's children. Orders that permit "social contact" are often later modified to prohibit all contact if the court finds Respondent is using that proviso as an excuse to further harass Petitioner.

Scope, Duration, and Enforceability of Protective Orders

Reference Number: CTAS-1320

The order is valid and enforceable in any county in Tennessee. T.C.A. § 36-3-606(e). It may:

1. Direct Respondent not to commit domestic abuse, stalk or sexually assault Petitioner or petitioner's minor children;
2. Prohibit Respondent from calling, e-mailing, writing, or communicating with Petitioner, directly or indirectly;
3. Prohibit the Respondent from stalking the Petitioner, as defined in § 39-17-315;
4. Give Petitioner possession of the residence and evict the Respondent;
5. Require Respondent to provide suitable housing for Petitioner if respondent is the sole owner or lessee of the residence;
6. Award temporary custody of or establish temporary visitation rights with their minor children;
7. Award support to Petitioner if the parties are legally married and award child support for Respondent's children;
8. Require Respondent to get treatment or counseling for anger management or substance abuse;

9. Place the care, custody, or control of any animal residing in the household in the care, custody or control of the Petitioner or in an appropriate animal foster situation;
10. Direct the Respondent to immediately and temporarily vacate a residence shared with the petitioner, pending a hearing on the matter; or
11. Direct the Respondent to pay the Petitioner all costs, expenses and fees pertaining to the Petitioner's breach of a lease or rental agreement for residential property if the Petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the Petitioner or the Petitioner's children.

T.C.A. § 36-3-606(a).

The Duty to Arrest a Respondent Who Violates an Order of Protection

Reference Number: CTAS-1321

Law enforcement officers generally have considerable discretion about whether to make an arrest in a given situation and are usually protected from liability if the decision not to arrest results in harm to a member of the general public. However, Tennessee does *not* allow officer discretion when it comes to arresting individuals who violate protective orders. Arrest is *mandatory*.

Illustrating how inflexible state law is on the matter, the attorney general's office issued an opinion that "a law enforcement officer, having observed the commission of a felony, may choose not to arrest or charge the offending party, *except when the officer has probable cause to believe that a suspect has violated an order of protection*." Op. Tenn. Atty. Gen. No. 01-119 (July 27, 2001).

In other words, while an officer has discretion to ignore a felony committed right before his or her eyes, that option does not exist if the misconduct violates a valid order of protection, regardless of whether it would otherwise constitute a misdemeanor, or no criminal offense at all. If Petitioner or Petitioner's property come to harm after an officer fails to arrest the violator, the county is subject to liability for damages. *Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999); *Hudson v. Hudson*, 2005 WL 2253612 (W.D. Tenn. 2005).

On the other hand, if the law enforcement agency fails to notify TCIC and NCIC that an order has been dismissed or of its expiration date, and the former Respondent is wrongfully arrested, the prospect of legal liability again rears its ugly head. That is one of many reasons it is *so* important that such orders be correctly served and that modifications and other required information be correctly entered in the Tennessee and National Crime Information Systems.

An arrest for violating a protective order may be made *with or without* a warrant. A law enforcement officer shall arrest Respondent without a warrant if:

1. The violation took place in the officer's jurisdiction;
2. The officer reasonably believes Respondent has violated or is violating the order; and
3. The officer verifies that an order of protection is in effect, which can be through telephone/radio communication with the appropriate law enforcement department.

T.C.A. § 36-3-611(a)(1-3).

Even if Respondent is violating an ex parte order and not a standard order of protection, the officer is required to make an arrest, *but only if* Respondent "has been served with the ex parte order or otherwise has acquired actual knowledge of the order." T.C.A. § 36-3-611(b). The term "actual knowledge" means Respondent has direct, clear knowledge of information that would lead a reasonable person to inquire further. *Black's Law Dictionary, 7th Edition*. Otherwise, an ex parte order cannot be enforced by arrest.

Ex Parte Orders and "Actual Knowledge"

Reference Number: CTAS-1322

Although an ex parte order is effective for only a matter of days, this is often the time during which emotions run high and violence or increased harassment are most likely to erupt. At what point is Respondent deemed to have actual knowledge? If the deputy reads the order to Respondent over the phone, is it in effect? What if the deputy gives oral notice of the order's existence and requirements, but does not have a copy to give Respondent at that time? What is the deputy's duty if, when serving an ex parte order, Petitioner is on the premises, and Respondent refuses to leave?

First, let us look at the issue of "actual knowledge." If the ex parte order has been personally served, Respondent, of course, has actual knowledge. If it has not, Respondent may be deemed to have actual knowledge when he is put on notice of its existence and general requirements by a law enforcement officer.

> *EXAMPLE*: Officer Bob responds to a call and arrives at the scene to find Respondent Bubba duct-taping love notes all over Petitioner Patty's front door. Patty advises Officer Bob she was granted an ex parte order of protection against Bubba, her former boyfriend, two hours earlier. Officer Bob calls his dispatcher and verifies that the judge did indeed issue an ex parte order, which has not yet been served. Officer Bob informs Bubba that the order has been issued and Bubba is to stay away from Patty until the hearing; and directs Bubba to leave the premises. Brimming with *actual knowledge*, Bubba stumbles off into the night to seek solace at his favorite bar.
>
> Two hours later, Officer Bob is again called to Patty's house, and there's Bubba, drawing big red hearts on the vinyl siding. It is his house, and he insists on his right to decorate it. Anyway, no one has given him any piece of paper that says he can't be in his own blankety-blank yard. At this point, Officer Bob arrests Bubba and hauls him away to jail. Of course, Officer Bob could and should have arrested Bubba on the ***first*** call ***if*** he had been able to verify the protective order was personally served on Bubba earlier that day.

Some officers are concerned when they serve an ex parte order of protection and realize Petitioner is on the premises. If Respondent has previously assaulted Petitioner, vandalized Petitioner's property, or otherwise threatened or harmed Petitioner, it is foreseeable that Respondent may be at it again by the time the deputy reaches the end of the driveway. The best practice is for the deputy to ensure Respondent is away from the premises before the deputy departs the scene. If, after the order is served, Respondent becomes belligerent or threatening, or refuses to leave, the order is being violated and the duty to arrest arises.

It is a crime and contempt of court to violate an order of protection and Respondent may be found guilty of both. T.C.A. § 36-3-610. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

A critical change in Tennessee law took effect July 1, 2005. Under the old law, a Respondent arrested for violating the protective order was charged with contempt, a civil offense that carries a penalty of only 10 days in jail and a $50 fine. At the time of arrest, the magistrate set bond pending the hearing, which was to be conducted within 10 days, and Petitioner was required to appear and show cause why the contempt order should be issued. Of course, if Respondent committed a crime in the process of violating the protective order, *e.g.*, burglary, vandalism, assault, he or she could be prosecuted for that criminal act.

As of July 1, 2005, a knowing violation of a protective order became a crime in and of itself, a Class A misdemeanor carrying a sentence of up to 11 months and 29 days in jail. Furthermore, the new law directs that such a sentence is to be consecutive to any other sentences resulting from the same factual allegations, unless the judge specifically directs otherwise. T.C.A. § 36-3-612(g).

It is important to reiterate that the new criminal penalty applies only to orders of protection issued after a hearing, *not* to ex parte orders. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005).

Once Respondent is arrested, the magistrate must consider certain factors and set conditions of release. Upon release, Respondent is given written notice of the conditions, which may include orders to stay away from Petitioner, not to possess or use alcohol, not to possess a firearm or other weapon, or other directives. T.C.A. §40-11-150(a-b). If a law enforcement officer later has probable cause to believe Respondent has violated any condition of release, the officer *shall* arrest Respondent, without a warrant, regardless of whether the officer actually witnessed Respondent committing the violation. T.C.A. §40-7-103(b).

Domestic Violence Victim Notification

Reference Number: CTAS-1323

An order of protection is a form of civil process. Violating the order can be a civil offense, a criminal offense, or both. Op. Tenn. Atty. Gen. No. 05-183 (December 22, 2005). When releasing a defendant charged with domestic violence related offenses, including stalking, *violating an order of protection*, or any assaultive offense, the jailer is required to provide the victim with notice. The table below details the statutory requirements. T.C.A. § 40-11-150(f-h).

Protected Victim	Family or Household Member (Includes current or ex-spouse; adult or minor who lives or has lived with defendant; adult or minor related/formerly related by blood/marriage; adult/minor dating/dated in past or having/had a sexual relationship; adult/minor child of anyone described above).

Who Notifies Victim of Release	Law enforcement agency with custody of Defendant shall initiate notification whether or not victim requests it.
Time Frame for Notification	Notification is to be made at the time of Defendant's release.
Measures Required to Contact Victim	"Use all reasonable means to immediately notify the victim."
Information to be Given to Victim	Notice that Defendant is being/has been released; address and phone # of nearest shelter and counseling center.
Delay Release Until Victim Notified?	Statute prohibits delay.
Other Duties	Send/give victim copy of conditions of release. Must also provide copy of the conditions to Defendant.
Hold Required Before Bail/ Release	Twelve hours from time of arrest. Judge may order release in less time if he or she determines that sufficient time has, or will have, elapsed for the victim to be protected.

The Public Duty Doctrine

Reference Number: CTAS-1324
Mary Matthews v. Pickett County

Mary Matthews v. Pickett County, 996 S.W.2d 162 (Tenn. 1999), is the most cited Tennessee case regarding liability for failure to arrest a Respondent who violates an order of protection.

The court held that an order of protection creates a special duty to protect the victim named on the order and that special duty includes protection of the victim's property. The complainant can win personal injury *and* property damages if the Petitioner shows that the deputies breached their duty to arrest the Respondent when the Respondent violated an order of protection, and that the Petitioner was harmed as a result.

The public duty doctrine gives officers immunity for injuries caused by breach of a duty owed to the general public.

> *EXAMPLE*: Officer Bob pulls over drunk driver and recognizes Buddy, who is only a few blocks from home. Officer Bob lets Buddy go on his promise to go straight home, but Buddy heads for another bar, running over Valerie Victim on the way. Officer Bob clearly breached his duty to protect the public at large, but Valerie Victim will not win her lawsuit against Officer Bob or the county *because she was not a forseeable victim*. When Officer Bob breached his duty to protect the public by failing to arrest Buddy, he did not know this *particular* Victim was a block away and could be harmed by his failure to act.

The public duty doctrine did not protect the officers in *Matthews* because the order was not issued to protect the public at large but *solely to protect Mary Matthews*, whose calls for help indicate she relied on the court's order to keep her safe from Winningham. Her reliance created a special duty exception to the public duty doctrine, an exception that applies when a public official undertakes to protect an individual, and that person relies on the official to do so.

The special duty exception creates a special relationship between the parties, in this case the government and Ms. Matthews. The officers had a duty protect her by arresting Winningham if there was reason to believe he had violated a valid order of protection. The court held that if the breach of that duty allowed Winningham freedom to burn down Ms. Matthews' house, the deputies and the county are liable for her harm.

The Tennessee Supreme Court makes it clear by this ruling that, if the government violates its special duty to safeguard a party named by an order of protection, and the individual is harmed as a result, compensation can be awarded for personal injury *and* property damage.
