Virginia State Crime Commission

Protective Orders

2010

Protective Orders

Executive Summary

During the 2010 Session of the Virginia General Assembly, seven bills dealing with protective orders had their subject matters referred to the Crime Commission for review: Senate Bill 208, introduced by Senator George Barker;[1] House Bill 453, introduced by Delegate Charniele Herring;[2] House Bill 164, introduced by Delegate Brenda Pogge;[3] House Bill 656, introduced by Delegate Ward Armstrong;[4] House Bill 1156, introduced by Delegate G. Glenn Oder;[5] House Bill 216, introduced by Delegate Jennifer McClellan;[6] and House Bill 285, introduced by Delegate James Scott.[7] The Crime Commission decided to expand the scope of these reviews, to address any other ways in which Virginia's existing protective order statutes and procedures might be improved.

To assist the Crime Commission in this task, a Protective Order Work Group was formed.[8] Representatives from local law enforcement, the Virginia State Police, victim and witness advocates, prosecutors, defense attorneys, clerks of juvenile and domestic relations district courts, magistrates, and the Virginia Sexual and Domestic Violence Action Alliance were invited to participate. In addition to reviewing the seven referred bills, the Protective Order Work Group also deliberated on a number of other topics related to protective orders in Virginia. Problems with the current system were discussed, and a number of proposed legislative solutions were offered. Members of the Work Group were encouraged to meet with Crime Commission staff, and offer specific ideas on how, legislatively, Virginia's protective order statutes might be improved. A general literature review, as well as a review of the other states' statutes, was conducted on the issue of dating violence and protective orders, as well as on utilizing GPS tracking devices for people who are subject to a protective order. Finally, to ascertain the number of protective orders in existence during the course of a year, data requests were made to the Virginia State Police and the Virginia Supreme Court.

Based upon all of this information, a number of legislative proposals were submitted to the full Crime Commission for their consideration. The Crime Commission decided to recommend a number of changes to Virginia's protective order statutes:

- The existing stalking protective order statutes, authorized under Virginia Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10, should be expanded to encompass all types of threatening conduct, not just actual crimes involving stalking, sexual battery, aggravated sexual battery, or serious bodily injury.

- The requirement that a criminal warrant must be issued in order to obtain a protective order from a general district court should be eliminated.

- With the significant expansion of these protective orders, they should be referred to simply as "protective orders," rather than as "stalking protective orders."

- The penalties for violating these protective orders should be made identical to the penalties for violating family abuse protective orders.

- As with family abuse emergency protective orders, law enforcement should be able to request an extension of an emergency protective order if a victim is incapacitated and unable to apply for an extension on her own.

- To assist law enforcement in serving emergency protective orders, the Supreme Court of Virginia should create notification forms that can be issued to respondents,

receipt of which would constitute valid service.

- Judges should be given the authority to require defendants to wear a GPS unit as a condition of bond, if released prior to trial, and as a condition of probation.

- Judges should be given the explicit authorization to prohibit the respondent of a protective order from damaging items of personal property, including harming a pet or companion animal.

- Judges, upon finding a defendant guilty of domestic assault, should be given the authority to issue a family abuse protective order, in addition to any sentence they might impose.

Background

There are two general types of protective orders that exist in Virginia: family abuse protective orders, and stalking protective orders.[9] Family abuse protective orders typically originate in juvenile and domestic relations district courts, and are governed by Va. Code §§ 16.1-253.4, 16.1-253.1, and 16.1-279.1. Stalking protective orders typically originate in general district courts, and are governed by Va. Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10.

Family abuse protective orders are available when the parties involved meet the definition of a "family or household member," as that term is defined by Va. Code § 16.1-228:

> (i) the person's spouse, whether or not he or she resides in the same home with the person, (ii) the person's former spouse, whether or not he or she resides in the same home with the person, (iii) the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person's mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.

The person petitioning for the protective order must have been the victim of "family abuse," which is defined by Va. Code § 16.1-228 as "any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member." There is no requirement that a criminal warrant have been issued in order to obtain a family abuse protective order.

Stalking protective orders are available to any person who has been the victim of stalking, sexual battery, aggravated sexual battery, or any criminal offense that resulted in a serious bodily injury. In order for a stalking protective order to be issued, a criminal warrant must have been taken out for the underlying crime which led to the need for a protective order.[10]

Both family abuse protective orders and stalking protective orders can be issued in three different forms, depending upon the extent of the hearing that was granted before issuance. Emergency protective orders, which can be issued *ex parte*, last for three days, expiring at 11:59 p.m. on the third day following issuance.[11] If the court that issued the emergency protective

order is not in session on that third day, the emergency protective order is continued until 11:59 p.m. of the day that the court is next in session.[12] For family abuse emergency protective orders, one additional three day extension may be applied for on behalf of a victim, by a law enforcement officer, if the victim is physically or mentally incapable of filing a petition for a preliminary protective order.[13]

Preliminary protective orders may also be issued *ex parte*, upon good cause shown.[14] They are preliminary, in that the order itself will provide a date upon which a full hearing shall occur. The date of this future hearing must be within fifteen days.[15] However, if the respondent to the petition is not served with the preliminary protective order, the full hearing may be continued for a period of time, not to exceed six months.[16]

After a full hearing, a "final" protective order may be issued.[17] These hearings may not be *ex parte*, although they may proceed if the respondent was properly served and notified of the hearing date, and elected not to attend. A protective order issued after a full hearing may last for up to two years.[18] The victim may petition the court to extend the protective order for an additional two year period, and may do so any number of times, so that the order is continued indefinitely.[19]

According to data obtained from the Virginia Supreme Court, in 2009, there were approximately 35,000 emergency family abuse protective orders and 1,200 emergency stalking protective orders issued, as well as approximately 32,700 preliminary family abuse protective orders and 570 preliminary stalking protective orders. And, there were approximately 15,000 "final" family abuse protective orders and 400 "final" stalking protective orders issued. At any one time, according to data obtained from the Virginia State Police, there are approximately 520 emergency protective orders, 1,900 preliminary, and 15,000 "final" protective orders in existence. Despite these large numbers, their data indicates that roughly 92% of all protective orders are successfully served upon the respondent.

Review of Bill Referrals

Senate Bill 208

Senate Bill 208 (SB 208), as originally introduced, would have expanded the definition of "family or household member," as that term is defined by Va. Code § 16.1-228, by inserting the phrase:

> any individual who is currently or was formerly involved in a substantive, intimate dating relationship with the person; the existence of such a substantive relationship shall be determined based on the following considerations: (a) the length of the relationship, (b) the nature of the relationship and (c) the frequency of interaction between the persons involved in the relationship. A casual relationship or ordinary fraternization in a business or social context does not constitute a dating relationship.[20]

The intent of this modification was to allow a person in a dating relationship to seek a "family abuse" protective order if he or she needed one. However, by modifying a key jurisdictional term, the unintended consequence of the bill would be that all criminal matters involving a current, or former, dating couple would be heard in juvenile and domestic relations district courts, not general district courts. After SB 208 was referred to the Senate Courts of Justice Committee, a substitute version of the bill was introduced that took a very different approach to expanding the scope of protective orders. Rather than modify the family abuse protective order statutes, the substitute modified the stalking protective order statutes, by allowing

the victim of any assault, or any crime that resulted in bodily injury, to apply for a stalking protective order.

To determine how many states currently allow a person in a dating relationship to seek a protective order, based specifically upon their status as part of a dating couple as well as a threat of future danger, a review of the other forty-nine states was conducted. Forty-three states currently have the phrase "dating relationship," or its equivalent, in their protective order statutes, and allow persons in a dating relationship to apply for a protective order.[21] The only states, besides Virginia, which do not currently allow for dating relationship protective orders are Georgia, Kentucky, Maryland,[22] South Carolina, South Dakota, and Utah.

There are a number of advantages to having "dating relationship" protective orders made available in Virginia. Doing so would allow victims of dating violence, who do not meet the definition of a "family or household member," and who do not qualify for, or meet the requirements of a stalking protective order, to obtain protection from the courts. The disadvantages to having "dating relationship" protective orders is that victims may be subject to cross-examination on intimate and personal details of their relationship with their aggressor during the protective order hearing. Also, some victims, including those in same sex relationships, may not wish their relationship to be made public, or become a subject of inquiry during a hearing. Finally, determining if a relationship meets the standard of a "dating relationship" might be difficult in particular cases, and if a judge rules that such a relationship does not meet the standard, the victim will be unable to obtain protection. For those victims, an approach similar to that contemplated by the substitute version of Senate Bill 208 would be preferable.

If the legislature were to adopt dating relationship protective orders, a number of practical questions would still need to be addressed. Should these protective orders be issued by juvenile and domestic relations district courts, like family abuse protective orders, or should they be issued by general district courts, like stalking protective orders? There are advantages to having dating relationship protective orders heard in juvenile and domestic relations district courts. The judges have extensive experience with protective orders, as most protective orders today are family abuse protective orders. These judges also are very familiar with the interactions and social dynamics of couples in volatile relationships, and have experience recognizing the signs and circumstances of abused victims.

There are also some disadvantages to situating dating relationship protective orders in juvenile and domestic relations district courts. If the jurisdiction of these courts is expanded, the already crowded dockets in some locales could become much worse. The wait times for protective order hearings might become a major inconvenience for all of the parties involved, including court personnel. In the event the protective order is violated, there could likely be concurrent criminal charges, which would be heard in the general district court for that locale. Having two different judges hear essentially the same facts as to what occurred during the incident in question would be a lack of judicial efficiency and might lead to inconsistent results between the two courts. If the concurrent criminal charges were to be heard in the juvenile and domestic relations district court, though, this would be an enormous expansion of those courts' basic jurisdictional limits. Up until now, juvenile and domestic relations district courts have been occupied solely with matters relating to children, and people who are in a family or household relationship.

House Bill 453

House Bill 453 (HB 453) would deem a protective order to have been personally served on the respondent if law enforcement either provided him with a copy of the order, or a notice of the issuance of the order on a pre-approved form, to be created by the Virginia Supreme Court.[23] While the ability to effectuate service by simply providing a notice form to the respondent might make the process easier for law enforcement, serious concerns arise in situations where the protective order is very lengthy, with many specific details regarding what the respondent is and is not allowed to do. Simply giving such a respondent a generic notice form might not fully alert him as to the full extent of the constraints placed upon him by the actual order. To then hold him in contempt for violating the protective order might well run afoul of due process requirements, depending on the circumstances. However, if all of the necessary information was provided on a notice form, this could be a useful tool for law enforcement in situations where the respondent is unexpectedly encountered, such as during a traffic stop. Under current law, the officer either must have another officer meet him at the scene with a copy of the protective order, or the officer must ask the respondent to follow him to the police station so a copy can be served on him there.

While in theory, a police car could be equipped with a computer and printer, so that the protective order could be printed and then served during the course of the stop, at this time most law enforcement vehicles do not have such devices installed. A Crime Commission law enforcement agency survey found that most police cars do not have laptops; almost none have printers. The survey, which was distributed to 134 law enforcement agencies, received responses from 109 agencies (81% response rate). Fifty-six agencies (51%) reported having MDTs (mobile data terminals) or MDCs (mobile data computers) in all of their patrol vehicles. Another 20 agencies (18%) reported having MDTs or MDCs in only some of their vehicles. The remaining 31 agencies (28%) did not have any MDTs or MDCs in their vehicles. Therefore, printing out a copy of a protective order on the roadside is not a practical approach to the problem of effecting service when a respondent is unexpectedly stopped. As an alternative, the use of a pre-approved form might prove helpful in these situations, provided the order did not contain extensive requirements and prohibitions, such that filling out the form would be too time consuming for the officer. The officer could radio into dispatch, receive the necessary information to completely fill out the pre-printed form, and then deliver the form to the respondent. As this method would work best with simple order forms, it might be limited in application to only emergency protective orders, which tend to be much shorter than preliminary and final protective orders.

House Bills 164 and 656

Both House Bills 164 (HB 164) and 656 (HB 656) would allow judges, in placing conditions upon the respondent of a protective order, to require him to wear a Global Positioning System (GPS) tracking device, or other similar device.[24] The decision to order this would be discretionary with the judge. Judges would also be allowed to order the wearing of a GPS device if a defendant were convicted of stalking, or pursuant to an order to vacate a marital home, pursuant to Va. Code § 20-103. The two bills are identical, though HB 656 includes additional language that the respondent must pay for the cost of the device, and the device must be capable of sending a signal to law enforcement and the petitioner if the respondent approaches a prohibited location.

The intersection of GPS technology and the criminal justice system's efforts to prevent ongoing domestic violence is a relatively new development. As technologies are improving,

the use of such devices for purposes of monitoring abusers, and providing an additional measure of safety for victims, is a slowly growing trend, nationwide.[25]

A general statutory search was conducted to determine how many states specifically allow, by statute, the judicial imposition of a GPS tracking device on a person who is the subject of a protective order. Ten states were found that specifically mention protective orders in connection with GPS devices: Connecticut,[26] Hawaii,[27] Illinois,[28] Indiana,[29] Massachusetts,[30] Michigan,[31] North Dakota,[32] Ohio,[33] Oklahoma,[34] and Washington.[35] Of these ten states, only Ohio allows a judge to require a GPS device as an initial requirement of the protective order, in a manner similar to HB 164 and HB 656. The other nine states mention GPS devices and protective orders in the same statute, but the requirement is only available when the respondent is on bond while facing criminal charges, or as a condition of probation when the conviction was for violating a protective order.

It should be pointed out that in these two contexts, pre-trial bond conditions and probation, many other localities and states may allow judges or probation officers to impose the use of GPS devices on a defendant who is currently subject to a protective order. The authority to do this is found in either the general statutes authorizing the judge to impose whatever requirements are necessary to ensure public safety and the defendant's compliance with the rules of bond or probation, or is simply assumed as a matter of local practice. For example, while North Carolina does not have any statutes explicitly linking the use of GPS monitoring to a person who is subject to a protective order, individuals who are out on bond pending trial for violent felonies in Mecklenburg County are sometimes required to wear a GPS ankle bracelet.[36] This requirement could be applied to a defendant facing charges for violating a protective order in the course of a violent attack upon the protected party. On the other hand, while a number of states have authorized the use of GPS tracking as part of the criminal justice process, a lack of funding has meant that these programs have not yet been initiated, or are only running on a pilot program basis.[37]

Additional problems arise when the respondent to a protective order refuses to wear, or refuses to pay for, a GPS device. If he is not facing criminal charges, or is not on probation, it becomes problematic for a court to incarcerate the respondent for contempt of court, especially under circumstances where he is indigent. For that reason, any scheme that would permit a judge to impose a GPS tracking device requirement upon a person subject to a protective order would work best if it was limited to instances where that person was also subject to the criminal justice system.

House Bill 1156

House Bill 1156 (HB 1156) would allow a minor to petition for a protective order, without the consent of a parent.[38] The court receiving the petition would be required to provide a guardian ad litem for the juvenile. While allowing this could provide some juveniles with a means of relief in situations where the source of their abuse is a parent, there is also the possibility that without some adult supervision prior to the initiation of the case, completely frivolous petitions could be filed, resulting in needless costs to the parties and the court system. Additionally, a strong argument could be made that if a juvenile is being subjected to family abuse, child protective services should be involved and should investigate the situation as soon as possible. If they are by-passed due to an initial filing by the juvenile on his or her own, their later investigation may be compromised.

House Bill 216

House Bill 216 (HB 216) would make the respondent of a family abuse protective order, or a preliminary protective order issued pursuant to Va. Code § 16.1-253, who assaults the protected party, guilty of domestic assault under Va. Code § 18.2-57.2.[39] In most situations, such an assault would already be domestic assault, as domestic assault is defined as an assault on a family or household member, and family abuse protective orders and protective orders issued under Va. Code § 16.1-253 can only be issued when family or household members are involved. In a few cases, a family abuse protective order is issued, and some time later, the protected person no longer meets the definition of a family or household member; for example, the protected person had cohabitated with the respondent within twelve months at the time of the initial order, but more than twelve months had passed at the time of the subsequent assault. In these instances, the respondent would not be guilty of domestic assault. The penalties for assault and domestic assault are usually the same, a Class 1 misdemeanor; however, a third violation of domestic assault within twenty years is a Class 6 felony.[40] The practical effect of this bill, therefore, would be to increase the possibility, in a small number of cases, that a respondent to a family abuse protective order would be guilty of a Class 6 felony if he assaulted, or had assaulted in the past, a protected person.

House Bill 285

House Bill 285 (HB 285) would allow a court to include in a protective order specific provisions enjoining the respondent from harming a companion animal or pet belonging to the petitioner or a family or household member.[41] In order for any such harm to the animal to be considered a violation, however, it would have to be done with the intent to threaten, coerce, intimidate or harm the petitioner or family or household member. Already, judges have enormous latitude in crafting protective orders and can tailor them to fit the circumstances of particular cases. The family abuse protective order statute allows judges to prohibit the respondent from "such contacts…with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons," and allows them to order "any other relief necessary for the protection of the petitioner and family or household members..."[42] The stalking protective order statute similarly allows judges to prohibit "such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons," and allows them to order "any other relief necessary to prevent criminal offenses that may result in injury to person or property…communication or other contact of any kind by the respondent."[43] Therefore, it is arguable that HB 285 is not needed, and in fact could have an unintended consequence—if the legislature inserts this language into the protective order statutes, there is a chance judges will view this as granting them the authority to enjoin the harming of companion animals, but their authority is non-existent when it comes to other types of personal property.[44] Therefore, if the legislature wished to make clear that protective orders could include protections for companion animals, the statue should also be expanded to include all types of personal property.

Additional Policy Issues

Stalking protective orders

While the stalking protective order statutes closely mirror the family abuse protective order statutes, they are not identical.[45] It has been proposed that the stalking protective order statutes should be

modified to make them more similar. For example, there are heightened penalties for second or subsequent violations of a family abuse protective order; the same heightened penalties should apply for second or subsequent violations of a stalking abuse protective order.[46] Also, there is no requirement that a criminal warrant be taken out in order to apply for a family abuse protective order. It has been suggested that the criminal warrant requirement in applying for a stalking protective order should be eliminated. A victim of stalking might wish to seek the protection of a court order, but not become involved in a lengthy criminal trial process.

Similarly, while a conviction for domestic assault can lead to the issuance of a family abuse protective order on behalf of the victim, it does not do so automatically, while a conviction for stalking leads to an automatic order prohibiting contact between the parties.[47] This difference could be eliminated, so that a stalking conviction would no longer result in a mandatory "no contact" order. For those victims who fear the issuance of this kind of order will aggravate the defendant, making a volatile situation even worse, it would be better if such orders were optional, or would only be issued upon the request of the victim.

Another difference that could be eliminated involves extensions of emergency protective orders. Law enforcement officers have the ability to seek the extension of an emergency family abuse protective order, if the victim is incapacitated and unable to apply for another protective order on her own.[48] They do not have this ability in situations involving emergency stalking protective orders, which is a deficiency that should be removed. Lastly, it has been suggested that stalking protective orders could be renamed as restraining orders, as this is the term many laypeople use.

Generic "no contact" orders

Frequently, upon a finding of guilt in a criminal case, the judge will order as a condition of the sentence that the defendant have "no contact" with the victim. These "no contact" orders do not have the same legal significance as a formal protective order. They are not entered into the Virginia State Police's Virginia Crime Information Network (VCIN) system,[49] a violation is not an immediately arrestable offense as a Class 1 misdemeanor,[50] there are no resulting firearms restrictions,[51] and subsequent violations do not result in enhanced penalties, as with family abuse protective orders.[52] This practice of issuing generic "no contact" orders, in lieu of formal protective orders, could be prohibited by the legislature. While it would not be practical, nor appropriate, to mandate the issuance of formal protective orders in all categories of criminal cases, this proposal makes sense and easily could be implemented for the crime of domestic assault. Language could be inserted into Va. Code § 18.2-57.2, the domestic assault statute, prohibiting judges from making general "no contact" orders between the parties; if the circumstances of the case necessitate an order prohibiting future contact between the parties, such an order must come in the form of a formal family abuse protective order, issued pursuant to Va. Code § 16.1-279.1. Similarly, this prohibition could be inserted into the stalking statute, Va. Code § 18.2-60.3, which currently requires a judge to "issue an order prohibiting contact between the defendant and the victim or the victim's family or household member." Instead, the judge could be mandated, if a "no contact" order were to be issued, that it be in the form of a formal stalking protective order, as defined by Va. Code § 19.2-152.10.

Broadening the definition of "family abuse"

During the course of the study, some members of the Protective Order Work Group suggested that the current definition of "family abuse"[53] is not sufficiently broad, in that it fails to include activities that, while not strictly constituting a threat or placing the victim "in reasonable apprehension of bodily injury," still can be used by an aggressive partner to intimidate and control, e.g., severe verbal abuse. As a victim must demonstrate "family abuse" in order to petition for a family abuse protective order, someone who is subject to repeated emotional abuse is not able to apply for one. One solution would be to add to the definition of "family abuse" and incorporate those behaviors which are included in the definition of "domestic violence," as provided for in Virginia's Insurance Code, under Va. Code § 38.2-508:

> a. Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape or sexual assault;
>
> b. Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;
>
> c. Subjecting another person to false imprisonment; or,
>
> d. Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

If the definition of "family abuse" were to be expanded in this manner, it would also make sense to change the name of "family abuse protective orders" to "domestic violence protective orders," as the latter name would be a more apt description. Additionally, this definition could be included in the stalking protective order statutes, so that these kinds of emotionally abusive behaviors could also lead to a protective order in situations where the aggressor is not a family or household member.

However, increasing the scope of "family abuse" to include behaviors that do not involve physical violence, or the threat to commit violence, could lead to many more protective order petitions being filed, some of which might border on the frivolous, as there is no precise definition of what constitutes "severe emotional distress." Also, increasing the scope of protective orders in this way would be a significant change in what activities are deemed serious enough to merit the imposition of a protective order. While there can be no doubt that behaviors that involve a threat of bodily harm are serious enough to warrant an intervention by the law, the policy justification to allow the same remedies and sanctions for behaviors that are mean-spirited, but not physically threatening, is not as clear or compelling.

Family abuse emergency protective orders

Under current law, both law enforcement officers and victims of family abuse can petition for the issuance of an emergency family abuse protective order, lasting for three days, or, if the third day is one when the court is not in session, lasting until the end of the next day when the court is in session.[54] There is no requirement that an arrest warrant be requested, or issued, for an emergency family abuse protective order to be issued. During the course of the study, some members of the Protective Order Work Group proposed that when law enforcement requests an emergency family abuse protective order on the behalf of a victim, a criminal arrest

warrant must also be, or have been, issued. This would prevent law enforcement from having emergency family abuse protective orders issued, without the victim's knowledge or consent, when the circumstances surrounding the alleged family abuse are not serious enough to merit a criminal arrest. This new prohibition would not apply to victims, though, who would still be able to seek emergency relief without the necessity of a criminal arrest warrant being issued.

A slightly different proposal, related to the length of time for family abuse emergency protective orders, was to eliminate their automatic extension if the third day is one in which the court is not in session.[55] Instead, all family abuse emergency protective orders would definitely end after three days, regardless of whether or not the issuing court was in session. There would be an exception, though. For the sake of protection, a victim could specifically request, at the time of the initial petition, that the emergency protective order not end after three days, but be continued until the court was next in session. The ability to request an extension would not be available to law enforcement, however. The purpose behind this change would be to prevent law enforcement from having a domestic couple separated for more than three days, without the victim's knowledge and consent.

It should be noted, though, that both of these proposals curtail some of the authority law enforcement currently has when they petition magistrates for family abuse protective orders.

Subsequent protective orders

When a person is convicted of violating a protective order, it is mandatory for the judge to issue a new protective order, in addition to any criminal sentence imposed.[56] During the course of the study, some members of the Protective Order Work Group suggested that to prevent the confusion that can arise when multiple protective orders are in effect, any new protective order issued under these circumstances should automatically supersede the previous protective order, provided the new protective order is issued by a court of equal or superior authority. However, a major flaw with this idea is that it could involve separate courts, of equal authority, "revoking" each other's orders, which is not the normal practice in Virginia. Also, if a new order failed to include provisions from the previous order, and was deemed to supersede it, a victim might lose essential protections or benefits, such as temporary housing provided by the defendant.

Reorganization of the family abuse protective order statutes

Currently, the family abuse protective order statutes are scattered throughout Title 16.1 of the Code of Virginia.[57] During the course of the study, some members of the Protective Order Work Group suggested that these statutes should be reorganized, placing them into their own Article. In this way, they could be more easily referenced, as the statutes would proceed numerically, as is the case with the stalking protective orders.[58] To do this would require the Virginia Supreme Court to modify all of their forms, though, as the statute numbers referred to on the existing forms would no longer be correct. There would be a fiscal cost to implement this change.

Conclusion

Protective orders play an important role in both the civil and criminal justice systems in Virginia. They provide specific protection to victims, by placing restrictions on the movements and activities of the respondents, and by placing the respondents on notice that any subsequent threatening activities will result in a criminal conviction. Each year in Virginia

over 15,000 "final" protective orders are issued, and at any one time, there are approximately 17,000 protective orders in existence. At present, however, only victims of family abuse perpetrated by a family or household member, or victims of stalking, sexual battery, aggravated sexual battery, or a crime resulting in serious bodily injury, may apply for a protective order.

To extend the benefits of protective orders to other victims, the Crime Commission formally recommended that the requirements for obtaining a protective order should be broadened, so that any person who has been subjected to conduct that creates a reasonable fear of sexual assault or bodily injury may petition for a protective order. In this way, victims of dating violence, as well as other victims who are not able to obtain a protective order under the current laws, will be able to seek formal protection, issued by a general district court or a circuit court. To further accomplish this policy objective, the Crime Commission recommended eliminating the existing requirement that a criminal warrant be issued in order to obtain a protective order from a district court. Reflecting these changes, the Crime Commission recommended that these protective orders be referred to as "protective orders," rather than the existing terminology of "stalking protective orders." The Crime Commission also recommended that the penalties for violating a protective order should be the same, regardless of whether the order was a family abuse protective order, issued by a juvenile and domestic relations district court, or a protective order, issued by a general district court. To help the two kinds of protective orders have even more parity, the Crime Commission recommended that law enforcement be given the authority to request an extension of an emergency protective order if the victim is incapacitated and unable to apply for an extension; law enforcement currently has this authority for family abuse emergency protective orders.

All of these recommendations were incorporated into HB 2063, which was introduced by Delegate Rob Bell during the Regular Session of the 2011 General Assembly. After amendments, this bill was enacted into law by the Governor on March 24, 2011. A separate bill, SB 1222, was introduced by Senator George Barker. This bill was conformed to HB 2063; after amendments both bills were identical when they were enrolled. SB1222 was also enacted into law by the Governor on March 24, 2011.

The authority of courts should be expanded to assist them in their task of providing appropriate protection to victims. To help accomplish this, the Crime Commission made three specific recommendations. First, judges should be authorized to require the wearing of a GPS tracking device for defendants who are out on bond awaiting trial, or as a condition of probation after sentencing. By doing this, future acts of harassment or violence by the defendant might be prevented in certain cases. Second, the Crime Commission recommended that courts should be given the authority to order the subject of a protective order to refrain from damaging items of personal property, or harming pets or companion animals. Third, it was recommended that upon finding a defendant guilty of domestic assault, courts should be given the ability to issue a family abuse protective order, in addition to any criminal sentence.

The GPS recommendation was presented to the 2011 General Assembly in HB 2106, which was introduced by Delegate Ward Armstrong. After being amended in the House of Delegates to include the requirements that if a person released before trial is required to wear a GPS device, he must be placed on a secure bond, and that pre-trial defendants and defendants on probation may be required by the court to pay for the cost of their GPS devices, this bill was enacted into law by the Governor on April 6, 2011. SB 925, which was introduced by Senator Ryan McDougle and dealt with the same issue,

was amended to be identical to HB 2106, and was also enacted by the Governor on the same day.

The recommendation that courts be given the authority to include in the terms of a protective order the requirement that the respondent refrain from damaging items of personal property, or harming pets or companion animals, was presented to the 2011 General Assembly in HB 1716, which was introduced by Delegate James Scott. After being amended to exclude specific mention of companion animals, as they are covered by the term "personal property," the bill was incorporated into HB 2063, which, as mentioned above, was subsequently passed by the legislature and enacted into law on March 24, 2011.

The recommendation that upon finding a defendant guilty of domestic assault, courts should be given the ability to issue a family abuse protective order, in addition to a criminal sentence, was presented to the 2011 General Assembly in HB 1936, which was introduced by Delegate Onzlee Ware. This bill was tabled in the House Courts of Justice Committee.

Finally, the Crime Commission recommended that, in order to assist law enforcement in the service of processing emergency protective orders, the Supreme Court of Virginia should create special notification forms. Provided that all of the necessary information in the original protective order is included on the form, the respondent will be deemed to have been served with the emergency protective order upon receiving the completed form. This recommendation was presented to the 2011 General Assembly in HB 2089, which was introduced by Delegate Charniele Herring. HB 2089 was enacted into law by the Governor on March 24, 2011.

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[1] S.B. 208, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[2] H.B. 453, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[3] H.B. 164, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[4] H.B. 656, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[5] H.B. 1156, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[6] H.B. 216, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[7] H.B. 285, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[8] *See* page ix for the membership of the Protective Order Work Group.
[9] There are also the preliminary protective orders that are issued pursuant to Va. Code § 16.1-253. However, these are issued when there are allegations of child abuse or neglect, and are a precursor to a child removal hearing. While the words "protective order" are in the title of these court orders, they are very different in scope, and are issued for different reasons, than the protective orders that are granted to a victim of family abuse or stalking.
[10] VA. CODE ANN. §§ 19.2-152.8(B), 19.2-152.9(A), 19.2-152.10(A) (Michie 2010).
[11] VA. CODE ANN. §§ 16.1-253.4(C), 19.2-152.8(C) (Michie 2010).
[12] Id.
[13] VA. CODE ANN. § 16.1-253.4(D) (Michie 2010).
[14] VA. CODE ANN. §§ 16.1-253.1(A), 19.2-152.8(A) (Michie 2010).
[15] VA. CODE ANN. §§ 16.1-253.1(B), 19.2-152.9(B) (Michie 2010).
[16] Id.
[17] VA. CODE ANN. §§ 16.1-279.1, 19.2-152.10 (Michie 2010).
[18] VA. CODE ANN. §§ 16.1-279.1(B), 19.2-152.10(B) (Michie 2010).
[19] Id.
[20] S.B. 208, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[21] The states that permit dating relationship protective orders are: ALA. CODE § 30-5-2(5)(d) (2010); ALASKA STAT. §§ 18.66.100(a), 18.66.990(5) (Mitchie 2010); *see also* ALASKA STAT. §§ 11.41.260 & 11.41.270 (Michie 2010); ARIZ. REV. STAT. §§ 13-3601(A)(6), 13-3602; ARK. CODE. ANN. §§ 9-15-103, 9-15-201 (Michie 2010); CAL. FAM. CODE §§ 6210, 6211 & 6320 (West 2010); COLO. REV. STAT. §§ 13-14-101(2) & 13-14-102(1.5)(b) (2010); CONN. GEN. STAT. §§ 46b-15(a) & 46b-38a(2); DEL. CODE ANN. tit. 10, §§ 1041(2) & 1042; FLA. STAT. § 784.046(1)(d) & (2)(b) (2010); HAW. REV. STAT. §§ 586-1 & 586-3 (2010); IDAHO CODE §§ 39-6303 & 39-6304 (Michie 2010); 750 ILL. COMP. STAT. 60/103 & 60/201 (2010); IND. CODE §§ 31-9-2-44.5 & 34-26-5-2 (2010); IOWA CODE § 236.2(1)(e)(1),

(1)(e)(5) & 263.3(1) (2010); KAN. STAT. ANN. §§ 60-3102(b) & 60-3104 (2010); LA. REV. STAT. ANN. §§ 46:2151 & 46:2136 (West 2010); ME. REV. STAT. ANN. tit. 19-A, § 4005 (West 2010); MASS. GEN. LAWS ch. 209A §§ 1 & 3 (2010); MICH. COMP. LAWS § 600.2950(1) (2010); MINN. STAT. ANN. § 518B.01, subd. 2 & 3 (2010); MISS. CODE ANN. § 93-21-3(a) & 93-21-7(1) (2010); MO. REV. STAT. §§ 455.010 & 455.020 (2010); MONT. CODE ANN. §§ 40-15-102 & 45-5-206 (2009); NEB. REV. STAT. § 42-903(3) & 42-924(1) (2010); NEV. REV. STAT. §§ 33.018 & 33.020 (2010); N.H. REV. STAT. ANN. §173-B:1 & 173-B:3 (2010); N.J. STAT. ANN. § 2C:25-19(d) & 2C:25-28 (2010); N.M. STAT. ANN. § 40-13-2(D) & 40-13-3 (Michie 2010); N.Y. FAM. CT. ACT § 812(1)(e) (McKinney 2010); N.C. Gen. Stat. §§ 50B-1(b) & 50B-2 (2010); N.D. CENT. CODE §§ 14-07.1-01(4) & 14-07.1-02 (2010); Ohio; OHIO REV. CODE ANN. § 3113.31 (West 2010); OKLA. STAT. tit. 22 §§ 60.1 & 60.2A (2010); OR. REV. STAT. §§ 107.705(3) & 107.710 (2010); 23 PA. CONS. STAT. ANN. §§ 6102(a) & 6106 (West 2010); R.I. GEN. LAWS §§ 15-15-1 & 15-15-2 (2010); TENN. CODE ANN. §§ 36-3-601 & 36-3-602 (2010); TEX. FAM. CODE ANN. §§ 71.0021 to 006 & 82.002 (Vernon 2010); VT. STAT. ANN. tit. 15 §§ 1101 & 1103(a) (2010); WASH. REV. CODE ANN. §§ 26.50.010 & 26.50.020(2) (West 2010); W. VA. CODE, §§ 48-27-204 & 48-27-305 (2010); WIS. STAT. §§ 813.12(am) (2009); WYO. STAT. ANN. §§ 35-21-102 & 35-21-103 (Michie 2010).

[22] Maryland does allow persons in a dating relationship to apply for a peace order, but strictly speaking, such an order is not identical to a protective order. MD. CODE ANN., CTS. & JUD. PROD. §§ 3-8A-03(A)(2), 3-1502(B)(1) (2010).

[23] H.B. 453, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[24] H.B. 164, 2010 Gen. Assem., Reg. Sess. (Va. 2010); H.B. 656, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[25] *See, e.g.,* Ariana Green, *More States Use GPS to Track Abusers*, N.Y. TIMES, May 9, 2009, http://www.nytimes.com/2009/05/09/us/09gps.html?_r=1&scp=1&sq=ariana+green+gps&st=nyt.

[26] CONN. GEN. STAT. § 46b-38c(f) (2010). This statute provides for up to three judicial districts, one of which must be in an urban area, to begin a pilot program in which individuals charged with violation of a protective order may be subject to electronic monitoring. Connecticut's statute does not allow for state-wide use of GPS monitoring.

[27] Haw. Rev. Stat. §§ 586-4(e)(3) (2010). Between the time of the Crime Commission's consideration of this subject in November, and the drafting of this report in January, this statue was repealed by the Hawaii legislature. Hawaii no longer has a provision allowing for the use of a GPS tracking device to monitor a person subject to a protective order.

[28] 730 ILL. COMP. STAT. 5/5-8A-7 (2010).

[29] IND. CODE § 34-26-5-9(i)(1) (West 2010).

[30] MASS. GEN. LAWS ch. 209A § 7 (West 2010).

[31] MICH. COMP. LAWS § 765.6b(6) (2010).

[32] N.D. CENT. CODE § 14-07.1-19 (2010).

[33] OHIO REV. CODE ANN. §§ 2903.214(E)(1)(b) & 2929.01(UU) (2010).

[34] OKLA. STAT. tit. 22 § 60.17 (West 2010).

[35] WASH. REV. CODE § 26.50.110(1)(b) (West 2010).

[36] Christopher D. Kirkpatrick, *Tracking Crime by the Ankle,* CHARLOTTE OBSERVER, May 4, 2009, http://www.charlotteobserver.com/local/story/703601.html.

[37] *See, e.g.,* Jim Hannah, *Kenton Won't Pay for Stalker GPS, August 16, 2010,* available at http://pqasb.pqarchiver.com/enquirer/access/2111189301.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Aug+16%2C+2010&author=Jim+Hannah&pub=Cincinnati+Enquirer&edition=&startpage=n%2Fa&desc=Kenton+won%27t+pay+for+stalker+GPS.

[38] H.B. 1156, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[39] H.B. 216, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[40] VA. CODE ANN. §§ 18.2-57(A), 18.2-57.2(B) (Michie 2010).

[41] H.B. 285, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[42] VA. CODE ANN. §16.1-279.1(A)(2) & (8) (Michie 2010).

[43] VA. CODE ANN. §19.2-152.10(A)(1) & (3) (Michie 2010).

[44] This is a principle of construing the words of a legislative statute that is known as *expressio unius est exclusio alterius;* i.e., the specific referral of something in positive terms implies that all other things are not included. "Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

[45] VA. CODE ANN. §§ 19.2-152.8, 19.2-152.9, 19.2-152.10 (Michie 2010); *cf.* VA. CODE ANN. §§ 16.1-253.4, 16.1-253.1, 16.1-279.1 (Michie 2010).

[46] VA. CODE ANN. § 16.1-253.2 (Michie 2010); *cf.* VA. CODE ANN. § 18.2-60.4 (Michie 2010), where there are no heightened penalties for subsequent offenses.

[47] VA. CODE ANN. §§ 18.2-60.3(D) (Michie 2010). The order that is required is not specifically identified as a stalking protective order, as defined by Va. Code

§ 19.2-152.10. Another consideration for the legislature might be to clarify that such an order is, in fact, a stalking protective order.

[48] VA. CODE ANN. §16.1-253.4(D) (Michie 2010).

[49] VA. CODE ANN. §§ 16.1-279.1(C), 19.2-152.10(C) (Michie 2010).

[50] VA. CODE ANN. §§ 16.1- 253.2, 18.2-60.4 (Michie 2010).

[51] VA. CODE ANN. §§ 18.2-308.1:4 (Michie 2010).

[52] VA. CODE ANN. §§ 16.1- 253.2 (Michie 2010).

[53] VA. CODE ANN. § 16.1- 228 (Michie 2010).

[54] VA. CODE ANN. § 16.1- 253.4(C) (Michie 2010).

[55] VA. CODE ANN. §16.1-253.4(C) (Michie 2010).

[56] VA. CODE ANN. §§ 16.1-253.2, 18.2-60.4 (Michie 2010).

[57] VA. CODE ANN. §§ 16.1-253.1, 16.1-253.2, 16.1-253.4, 16.1-279.1 (Michie 2010).

[58] VA. CODE ANN. §§ 19.2-152.8, 19.2-152.9, 19.2-152.10 (Michie 2010).