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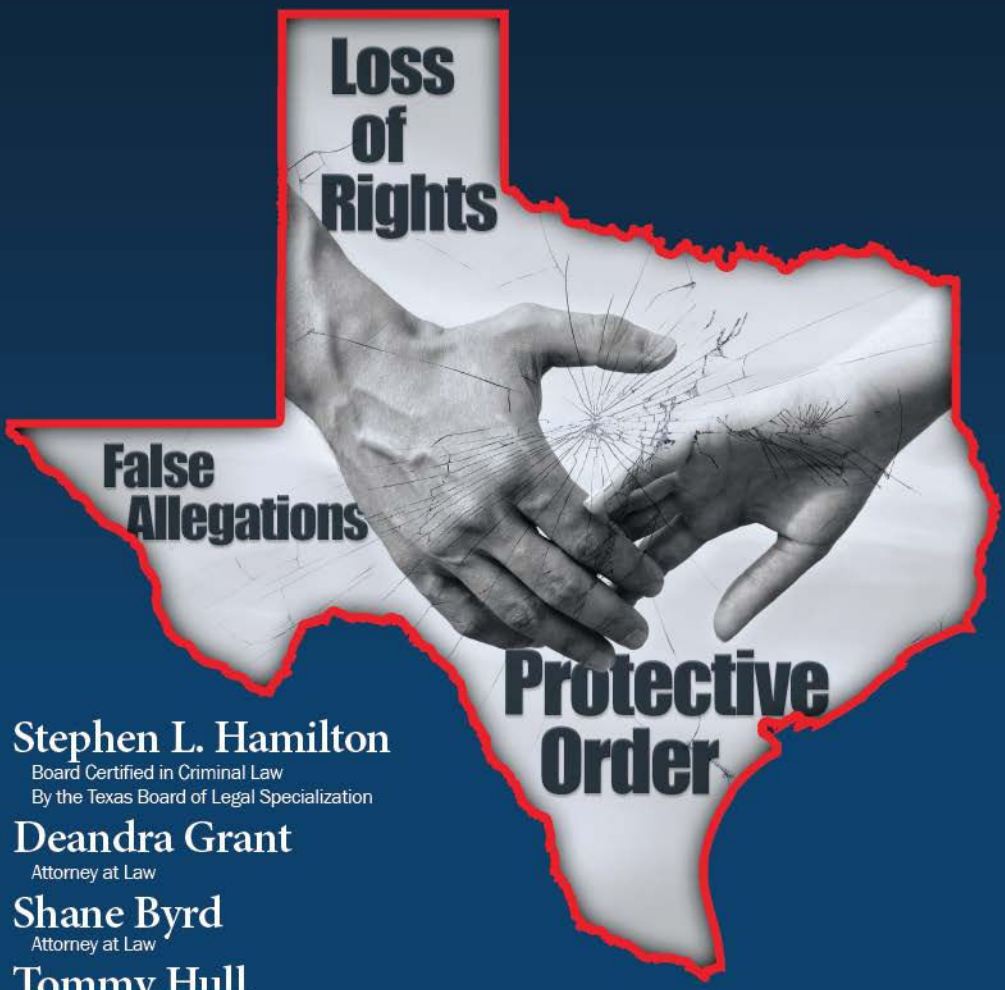
A Citizen's Guide to a Domestic Assault Arrest in Texas



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PROTECT YOUR FUTURE ★ KNOW YOUR RIGHTS™

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A Citizen's Guide *to a* Domestic Assault Arrest *in Texas*

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If you have been arrested and would like a free consultation, contact us at 833-Texas-Justice (833-839-2758)

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No lawyer (including the authors of this book) can ever make you any promises or guarantees about how your case will turn out. The testimonials and case histories presented in this book are not intended in any way to guarantee an outcome in any case.

Editing services by Siobhan Gallagher, YourBestEditor.com.

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Introduction

If you're reading this book, it's likely because you or someone else is facing accusations of domestic assault, a serious accusation that can result in an outright loss of your freedom, as well as collateral consequences you may not even be aware of.

It cannot, however, cover every situation. In your specific case, there may be exceptions to general rules that apply, so you should always talk to a criminal defense lawyer who handles domestic assault cases.

Today, the publicity given to family violence makes it difficult for people who are charged with a domestic violence crime to receive fair treatment in the criminal justice system.

Our years of experience representing individuals accused of domestic assault has shown that many accusations may be untrue or exaggerated. Unfortunately, police and prosecutors typically listen only to the accuser's side when making an arrest or filing charges. Our goal is to make prosecutors, judges, and juries look beyond the hype and arrive at a reasonable disposition.

Domestic violence is a problem, but like many social problems, it cannot be solved by the criminal justice system. Its laws make life difficult for individuals accused of domestic violence crimes and make it easy for accusers to make trouble for someone by making false allegations.

This book outlines domestic violence law in Texas so you can better understand the seriousness, should you be accused of a domestic assault offense, and how skilled lawyers can raise defenses on your behalf.

If you are worried that someone has or intends to contact the police to file a report of domestic assault accusing you, you should obtain immediate legal advice. Ideally, such advance preparation might prevent charges from ever being filed in the first place; but, also, if you are arrested and charged, following your lawyer's advice could help you avoid a conviction.

Penalty Classifications

Criminal charges referred throughout this book fall into two basic categories: the less serious misdemeanors and the more serious felonies. Misdemeanors are further classed by degree of seriousness as Class A (most serious), Class B, and Class C (least serious), while felonies are categorized as first, second, and third degree, with the added class of state jail felony. The penalties associated with these are:

Class A misdemeanor – Punishable by a jail sentence up to one year and a fine of up to $4,000

Class B misdemeanor – Punishable by a jail sentence of up to 180 days and a fine of up to $2,000

Class C misdemeanor – Punishable by a fine of up to $500

First degree felony – Punishable by imprisonment for life, or between five and 99 years, and a fine of up to $10,000

Second degree felony – Punishable by a prison sentence of two to 20 years and a fine of up to $10,000

Third degree felony – Punishable by a prison sentence of two to 10 years and a fine of up to $10,000

State jail felony – Punishable by confinement in a state jail for 180 days up to two years and a fine of up to $10,000

Meet the Team at HamiltonGrant Attorneys at Law

Stephen L. Hamilton

Attorney Stephen L. Hamilton, a partner at HamiltonGrant Attorneys at Law, has been awarded the highest possible AVVO rating (10) and his counsel is highly esteemed by his peers. Stephen ranks among the fewer than 1% of practicing criminal attorneys across Texas who have achieved coveted board certification in criminal law by the Texas Board of Legal Specialization. He is a lifetime legal member of the National Organization for the Reform of Marijuana Laws (NORML), the National Association of Criminal Defense Attorneys, the Texas Criminal Defense Lawyer's Association, and several other regional legal associations.

Scientific certifications include completing Blood Testing Gas Chromatograph training (used to test blood for alcohol and/or drug levels) and solid-state forensic drug testing (the legal requirement for Texas lab technicians to establish and identify substances by their precise drug composition).

Stephen has tried over 100 cases to a jury and has obtained not guilty verdicts in cases ranging from traffic tickets to those carrying a punishment range of 25 years to life in prison. He wins cases through all available means: motions, negotiations, trials, and appeals.

Deandra M. Grant, JD, GC, MS

AV-rated attorney Deandra Grant is a partner at HamiltonGrant Attorneys at Law and her practice is focused on DWI defense in Texas. A graduate of Trinity University in San Antonio and Southern Methodist University's School of Law, she is a national speaker on DWI law and science and the co-author of the annually updated book, *The Texas DWI Manual* (James Publishing), *Texas DWI: Truth & Consequences* and *Surviving Your Texas DWI*. Deandra is a Standardized Field Sobriety Testing Instructor and has completed the Drug Recognition Overview course. She was the first attorney in Texas to pass the Forensic Sobriety Assessment Certification exam. In addition, she has completed coursework in DWI forensic blood and urine testing and is trained as an operator and maintenance technician of the Intoxilyzer 5000. Deandra has certificates

in Forensic Chromatography: Theory & Practice (2011 & 2015), Forensic Analysis of Solid Drugs (2014) and Forensic Principles of DUID (2015) issued by Axion Labs and the American Chemical Society. In 2015, Deandra earned the distinction of being named an ACS–CHAL Forensic Lawyer–Scientist.

Deandra is a member of the Texas Criminal Defense Lawyers Association (Board Member 2011–2016), the Dallas Bar Association, the Collin County Criminal Defense Lawyers Association and the Dallas Criminal Defense Lawyers Association (Board Member since 2007). In addition, Deandra is a Charter Member and President-Emeritus of the DUI Defense Lawyers Association. She is also a member of the American Chemical Society and the American Academy of Forensic Sciences.

D Magazine has named Deandra to its list of Best Women Lawyers and Best Lawyers in Dallas. She's been named a "Texas Super Lawyer" and one of Texas' Top Rated Lawyers. *Best Lawyers in Dallas* named her one of the Top 10 DWI Lawyers in Dallas. Deandra completed a Graduate Certificate in Forensic Toxicology from the University of Florida's College of Veterinary Medicine and a master's degree in Pharmaceutical Science – Concentration in Forensic Science from the University of Florida's College of Pharmacy in 2016. Axion Analytical Labs added Deandra to their faculty in 2019.

Tommy Hull

A former Texas prosecutor, Tommy Hull is a native Texan, raised in the Texas hill country. He attended the University of Texas at San Antonio with his high school sweetheart and eventual wife, Brittany. After graduation from Texas Tech Law School, he accepted employment with the Midland County District Attorney's Office as a misdemeanor prosecutor. In less than a year he was promoted to felony prosecutor, and within months of that, named trial team chief prosecutor for a Midland County district court. As a prosecutor, before becoming a partner at HamiltonGrant Attorneys at Law, he was responsible for supervising all aspects of preparing and trying misdemeanor and felony criminal cases.

Shane Byrd

Before becoming a partner at HamiltonGrant Attorneys at Law, Shane had a solid history as a successful local businessman and owner of three bond companies, National Bonding of Lubbock, Lone Star Bail Bond, and American Bail Bond. Shane worked for more than three decades to assist clients and their families navigate their way through the criminal justice system, liaising with attorneys, judges, clerks, and the courts throughout Lubbock and most of Texas before deciding he wanted to help his clients beyond getting them bonded out of jail. With his undergraduate degree in criminal justice, he pursued his dream of becoming a criminal defense attorney and graduated with his J.D. from Charlotte School of Law, Charlotte, North Carolina. Returning home to Lubbock, he worked with the firm as of counsel and is now a partner at HamiltonGrant Attorneys at Law. He focuses his practice in the area of criminal defense. Shane's strong ties to the Lubbock community extend to ownership of a number of local businesses and the many events he has produced for Texas Tech students. As an active member of the community, he understands that good people make mistakes and is driven by his passion to protect the future of such persons and resolving their cases quickly and positively.

CHAPTER 1

Domestic Assault— What to Do…and *Not* Do

An accusation of family violence is not to be treated lightly. It is important to get out in front of it as swiftly as you can.

What to Do

- Exercise your right to remain silent. *Never talk to the police without having a lawyer present.*
- Get legal advice even if the police haven't yet contacted you.
- Be on your best behavior!

You have the right to remain silent, even if you haven't been arrested. That's right. *Even when the police do not advise you of that right.*

Police would prefer to question you *before* you're arrested so that they can avoid Mirandizing you, reminding you of your rights. Know this: You ALWAYS have the right to remain silent. Use it—it doesn't make you look guilty. It makes you look smart and savvy.

The police already assume you're guilty. They just want you to make their job easier by saying something they can use against you. Trying to talk your way out of a criminal charge almost always results in talking your way into one. They might misunderstand your statement or put their own spin on your words in the police report. However, when you refuse to talk, you deprive them of the very ammunition they seek to use against you.

Whether you're innocent or guilty makes no difference. Too many innocent people are convicted of crimes because they chose to be "helpful" and talk openly, only to have the police twist their words to obtain a conviction.

At most, you should identify yourself (if asked) and never resist arrest. Tell them politely that you're invoking your rights to remain silent and speak to an attorney, and then say nothing further to anyone until you talk to a criminal defense lawyer.

If you're taken to jail, you'll have a chance to contact a lawyer after you're booked. You can answer booking questions (address, height, weight, etc.), but don't answer a single question about the crime you're accused of. Say only this: ***I will not answer any questions without my lawyer present.*** The police are supposed to stop questioning you as soon as they hear that phrase, but if they persist, just keep repeating it.

You're entitled to a prompt hearing before a magistrate who will consider releasing you on bond (more in chapter 8) and it's best to be represented by a lawyer *before* the bond hearing so an effective argument can be made to release you under reasonable conditions.

Once you are released, you need to be on your best behavior. Stay out of bars. Stay away from alcohol. Do not get into arguments, particularly with your accuser's family or friends. Keep a low profile. Wait for the accusation to be resolved before you resume your normal lifestyle. Until that happens, do everything you can to avoid situations that put you at risk of a new arrest.

What Not to Do

- Talk to *anyone* about your situation, including the police, unless your lawyer is present
- Contact your accuser for any reason
- Delay getting legal advice

It bears repeating: *Don't talk to anyone* at all about your situation *except* your attorney. No matter how sympathetic or supportive they seem, you put yourself at risk. Don't do it.

And don't try to persuade your accuser to retract the accusation or drop the charges. Only a prosecutor can drop a charge. If you contact your accuser in violation of a family violence protective order or a protective bond condition, you'll be charged with yet another crime.

Even if there's no protective order, any attempt to contact your accuser puts you at risk of being arrested for intimidating a victim or witness tampering. *Talk to a lawyer **before** you talk to your accuser or anyone else.*

The Best Defense

If you haven't been contacted by the police but worry you will be, get legal advice right away. The key to a good outcome lies in hiring an experienced lawyer at your earliest opportunity.

The criminal defense attorneys at HamiltonGrant Attorneys at Law are proud of the effective representation they provide to clients who are charged with domestic assault crimes. HamiltonGrant Attorneys at Law has earned the respect of judges and lawyers across Texas. Our reputation for excellence is the result of hard work and dedication to our clients.

Partner Stephen Hamilton is one of a very small percentage of attorneys in Texas who are board certified in criminal law.

Every case is unique. Your best defense can only be determined by conducting a thorough investigation of the facts and a rigorous application of the law. The attorneys at HamiltonGrant Attorneys at Law, with their years of experience handling domestic assault cases, will evaluate your case. Call us at 833-Texas Justice (833-839-2758) to learn more.

CHAPTER 2

Defending Domestic Assault Charges

Not all assaults are domestic crimes. A bar fight between two strangers could result in both being charged with assault. Still, assault is one of the most frequently charged domestic violence crimes in Texas.

What makes the crime of assault one of family violence is when the alleged victim is a member of the accused's family or is dating them. Texas law defines family members as people who are related by either blood or marriage, that is:

- current or former spouse
- natural or adopted children
- children of a spouse or former spouse
- relatives with whom you share a common ancestor
- relatives (in-laws) who share a common ancestor with your spouse or former spouse
- household members—people who currently or once lived in your dwelling, but needn't be related, e.g., a roommate

The types of violence that protective orders cover are:

- family violence
- child abuse
- dating violence

Family violence consists of:

- an act committed by the accused against another member of the accused's *family* or *household* that is intended to result in physical harm, bodily injury, assault, or sexual assault; and/or
- a threat that reasonably places a member of the accused's family or household in fear of imminent physical harm, bodily injury, assault, or sexual assault**.** Family violence does not include any act of self-defense.

Child abuse consists of:

- genuinely threatening or inflicting physical injury that results in substantial harm to a child;
- sexual contact with a child; and/or
- compelling or encouraging a child to engage in sexual conduct.

Dating violence involves:

- an act intended to result in physical harm, bodily injury, assault, or sexual assault; and/or
- a threat that reasonably places the victim in fear of imminent physical harm, bodily injury, assault, or sexual assault.

Dating violence can only be committed against a person who is or has been in a dating relationship with the accused, or someone who is dating or married to someone who previously dated or was married to the accused—and this is only if the new relationship is the reason behind the violent act (driven by jealousy or resentment, for example).

For a court to decide if a dating relationship exists, it must consider all of the following:

- the length of the relationship;
- the nature of the relationship;
- the frequency of interaction between the people in the relationship; and
- the type of interaction between the people in the relationship.

While that may seem relatively obvious, there are cases when a dating relationship is less clear. A single date, for example, does not constitute a relationship. Neither, necessarily, does meeting regularly for lunch or drinks after work, nor a casual friendship that does not involve romance or sex. Also, dating relationships are not limited to heterosexual ones. Two people in a same-sex relationship can be judged to be in a dating relationship.

Depending on the conduct alleged, domestic assault can be charged as either a misdemeanor or a felony. The crime is more serious, however, if the assault is a repeat offense involving family violence. Aggravated assault is a more serious crime than assault because it requires proof of a serious injury.

Kinds of Assault

In Texas, the crime of assault can be committed by making a threat, by causing "offensive contact," or by injuring another person.

Assault by threat

To obtain a conviction of assault by threat, the prosecution must prove beyond a reasonable doubt that the accused:

- intentionally or knowingly
- threatened imminent bodily injury (either by words or actions)
- to another person, including the accused's spouse.

Assault by offensive contact

Assault by offensive contact requires the prosecution prove beyond a reasonable doubt that the accused:

- intentionally or knowingly
- caused physical contact
- with another person, including the spouse of the accused,
- when the accused knew or should reasonably have believed that the other person would regard the contact as offensive or provocative.

Even shoving a person may legally constitute an offensive or provocative contact.

Assault causing injury

To convict an accused of assault causing injury, the prosecution must prove beyond a reasonable doubt that the accused:

- intentionally, knowingly, or recklessly
- caused bodily injury
- to another person, including the spouse of the accused.

Penalties for Assault

The maximum penalty for an assault conviction depends upon which kind of assault defined above was committed and whether it was a family violence assault.

Assault causing injury is generally a Class A misdemeanor, while assault by threat is a Class C misdemeanor. Assault by offensive contact is also a Class C misdemeanor, unless the victim is elderly, which can then be charged as a Class A misdemeanor.

Penalties for family violence assault

The penalty for an assault that causes injury may be increased if the assault was one of family violence. It is a third degree felony if the alleged victim was in a dating relationship with the accused or was a family member or household member of the accused, and the accused was previously convicted of:

- any offense of assault;
- kidnapping;
- homicide;
- indecency with a child; or
- continuous violence against the family.

This prior conviction does not need to have occurred in Texas, and a deferred adjudication counts as a conviction even if the accused was never convicted, provided the accused entered a plea of guilty or no contest.

The crime of assault causing injury is also a third degree felony if the alleged victim was in a dating relationship with the accused or was a family member or household member of the accused, and the accused strangled the alleged victim during the assault. "Strangled" here means that the accused impeded the alleged victim's breathing or blood circulation by either applying pressure to the victim's throat or blocking the victim's nose or mouth. Even momentarily squeezing someone's throat and preventing that person from drawing a breath may, in the jury's view, constitute strangulation.

The crime of assault causing injury rises to a second degree felony if the alleged victim was in a dating relationship with the accused or was a family member or household member of the accused and

- the accused has a previous conviction of one of the crimes listed above, and
- the accused strangled the alleged victim.

If the alleged victim was not a family member or in a dating relationship with the accused, a family violence assault can only be deemed committed if the alleged victim was a household member *at the time the assault occurred*.

This law differs from the Family Code, which defines a member of a household to include a former member of the household. This means that while a family violence protective order can be issued to protect a former member of a household, the crime of family assault cannot be based on an assault of a former household member.

Continuous Violence Against the Family

The crime of continuous violence against the family is a third degree felony that requires proof beyond a reasonable doubt that the accused:

- committed at least two assaults causing injury as defined earlier
- within any 12-month period
- against one or more persons who were in a dating relationship with the accused or were a family member or household member of the accused.

Aggravated Assault

Aggravated assault is a broad violation, three of which are relevant here.

Aggravated assault causing serious bodily injury

An assault causing serious bodily injury, a second degree felony, requires the prosecution to prove the same elements as an assault causing bodily injury as described previously, except that the prosecution must prove beyond a reasonable doubt that the bodily injury was serious, one with either substantial risk of, or that causes, death, serious permanent disfigurement, or protracted loss or impairment of any limb or organ.

Aggravated assault using a deadly weapon

A charge of assault using a deadly weapon, a second degree felony, requires the prosecution to prove beyond a reasonable doubt that the accused:

- intentionally, knowingly, or recklessly
- exhibited (displayed) a deadly weapon
- during the assault of another person.

The weapon needn't actually be used but simply displayed during the assault, seen as a form of intimidation, so there's no required proof of bodily injury having resulted. Conversely, one Texas case held that an accused who was struck and reacted by grabbing a nearby knife did not deliberately exhibit a weapon and therefore did not commit an aggravated assault.

Family violence aggravated assault

A charge of family violence aggravated assault, a first degree felony, requires the prosecution to prove beyond a reasonable doubt that the accused:

- intentionally, knowingly, or recklessly
- caused serious bodily injury
- to a person who was in a dating relationship with the accused or was a family member or household member of the accused at the time the assault occurred, and
- the accused exhibited a deadly weapon during the assault.

Possible Defenses Against Assault Charges

Again, every case is individual. This section is designed to give you an idea of some possible defenses that can be offered.

Identity: The accused, typically when a stranger, might be able to defend the charge by arguing that the alleged victim is mistaken about who committed the assault.

False accusation: A vindictive spouse could fabricate a claim of assault to obtain revenge against a spouse suspected of infidelity. False accusations

may also be leveled to gain an advantage in custody or other family law proceedings.

Necessity: In rare cases, this or a similar justification defense may apply, e.g., that it was necessary to commit an assault in order to prevent a more serious crime occurring.

Provocation: As a general rule, provocation doesn't justify or defend against assault, although it's not unheard of. But caution is needed as such a defense can backfire if the jury views the alleged victim sympathetically.

Assault by threat

Intent: "I'm going to mess you up" may or may not be a direct threat to inflict bodily injury. Ambiguity in whether the accused made a legitimate threat is one possible defense.

Vagueness: If the accused does not clearly state that they intend to injure the other person at or near the time the threat is made, failure to prove that the threat was one of imminent harm is another feasible defense.

Assault by offensive contact

Accidental contact: Unintentionally bumping into a person or inadvertently grabbing someone while falling are examples of accidental contact that, even if offensive, do not qualify as knowing or intentional.

Offensive vs. provocative: Reasonable people can disagree on whether certain kinds of contact can be seen as offensive; for example, whether the accused should reasonably believe that a spouse would be offended by any physical contact.

Assault causing bodily injury

Self-defense: Any person who has been attacked, even if the attack is initiated by a spouse, has the right to use reasonable force to defend against the attack.

Consent: If the injury is not serious, this may be a viable defense. For example, a Texas appellate case recognized that a spouse who gave the other spouse "love bites" with the other spouse's consent would be entitled to raise consent as a defense.

Disputing cause of injury: A red mark on the skin may be evidence of a slap or it may simply be a rash. Cases alleging a bodily injury not observed by a doctor often pivot upon the credibility of the alleged victim. Establishing that the accuser has a reason to invent an injury that never occurred may provide a solid defense.

Family violence assault

Relationship: In most cases, whether the alleged victim was a family or household member is indisputable. In some cases, however, whether the alleged victim was or was not in a dating relationship with the accused can be argued, such as if the accused and the alleged victim only went out once or twice, or if they were never intimate.

Whether a household member: If the alleged victim is not a family member and was no longer a household member of the accused at the time the assault occurred, an argument against the assault constituting family violence can be made.

Questioning strangulation: In the absence of medical evidence that corroborates the testimony of the alleged victim, whether the breathing or blood flow of the alleged victim was actually impeded may be a question of fact for a jury to decide. As that may rest on the credibility of the alleged victim, attacking the credibility of that witness may offer the best defense.

Parental discipline: If the alleged victim is the child or ward of the accused, a defense can be based on the parental right to administer appropriate corrective punishment.

Continuous violence against the family

The defenses to a charge of continuous violence against the family are essentially the same as the defenses to assault causing bodily injury and to family violence assault, as described above.

Timeframe: In some cases, it may also be possible to defeat the charge by admitting that one assault occurred while denying that a second assault took place within the required 12-month timeframe.

Aggravated assault causing serious bodily injury

Nature of the injury: In addition to the defenses to a charge of assault causing bodily injury as described above, only a limited range of injuries meets the legal definition of serious bodily injury.

Aggravated assault using a deadly weapon

True use of a deadly weapon: Whether the accused exhibited a deadly weapon might be disputable, such as if the weapon fell out of the accused's pocket but the accused did not handle it, or it's an item not designed as a weapon (e.g., a hammer) and may only have been present for a non-criminal purpose.

What You Should Do

A domestic violence charge of assault can lead to serious consequences. And since every case is different, it may be possible to raise additional defenses that are unique to your case. The attorneys at HamiltonGrant Attorneys at Law tailor each defense to the individual circumstances.

You need to take an assault charge seriously. Whether you contest the charge by aggressively pursuing a dismissal or acquittal because you are innocent, or choose to negotiate a reasonable resolution of the charges, you need an experienced criminal defense attorney on your side. Finding a criminal defense lawyer who handles domestic violence crimes should be your first priority.

CHAPTER 3

Stalking and Harassment Charges

Stalking

Not every charge of stalking involves domestic violence—it can be committed against anyone. In many instances, however, the target is a former spouse or someone who is dating or formerly dated the accused.

Texas law allows alleged stalking victims to seek a protective order that is similar to a family violence protective order. Persons arrested for stalking may also be subject to an emergency protective order (see chapter 7) and to the protective bond conditions described in chapter 8.

What the prosecution must prove

When people think about stalking, they usually imagine someone following another person wherever they go, but in fact the offense is broader than that. To obtain a stalking conviction, the prosecution must prove beyond a reasonable doubt that the accused:

- on more than one occasion
- pursuant to a scheme or course of conduct
- that is directed against a specific person
- knowingly does any of the following:
  - commits the crime of harassment
  - engages in conduct they know the alleged victim will regard as threatening bodily injury or the death of the alleged victim or a member of their family or household or someone they're dating, or
  - engages in conduct they know the alleged victim will regard as threatening to damage or steal their property

They must also prove that such conduct actually does cause the alleged victim, a member of their family or household, or someone they're dating to fear bodily injury or death, to fear property will be damaged or stolen, or feel threatened, harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended in circumstances where a reasonable person would have those same fears or feelings.

The phrase "on more than one occasion" does not require any particular length of time to pass between the multiple acts that constitute stalking.

Texas courts have upheld convictions that were based on two acts that occurred just minutes apart.

One Texas appellate court upheld a conviction of a defendant who sent texts to his former girlfriend over a period of months that implied he had been following her, twice placed a tracking device on her car, slashed her tires, and caused her to fear for the safety of her daughter.

Penalty

The offense of stalking is a third degree felony. If the accused has a prior conviction for stalking in Texas or in another state, the offense is elevated to a second degree felony. Note that Texas courts have upheld stalking sentences ranging from six to ten years. That is why you should obtain legal advice immediately if you are accused of stalking.

Defenses to a stalking charge

Whether the accused's actions were part of a course of conduct or a scheme: The accused's actions must be evidenced as part of a course of conduct or scheme. Two completely unrelated incidents do not meet that test.

Reasonable fear: If a reasonable person would not feel threatened or experience one of the other emotions listed in the statute, that is a potential defense, particularly if the defendant's behavior is not extreme and did not include explicit threats to injure or kill the alleged victim.

Free speech: While no one has the right to threaten someone, under some circumstances you do have the right to say things that might offend another person, such as voicing different political beliefs.

Reasonable doubt: If the accusation is based solely on the word of a vindictive witness, reasonable doubt about the credibility of the accuser may lead to an acquittal.

Harassment

Harassment is broader than stalking, to where the Texas legislature has had difficulty drafting a statute that can survive a constitutional challenge. Earlier versions of the harassment statute have been successfully challenged as being unconstitutionally vague or as being so broad that they infringe on the First Amendment right to freedom of speech.

What the prosecution must prove

To commit the crime of harassment, the accused must do any of the following with the intent to harass, annoy, alarm, abuse, torment, or embarrass another person:

- initiate communication during which they make an obscene comment or request
- threaten to kill or to inflict bodily injury upon that person, a member of their family or household, or someone they're dating
- knowingly falsely report to someone the death or serious bodily injury of another in a way reasonably likely to alarm the person to whom it's made
- make repeated anonymous telephone calls to someone or cause their telephone to ring continually
- make repeated telephone calls to someone in a way reasonably likely to harass, annoy, alarm, abuse, torment, offend, or embarrass them
- make a telephone call and intentionally fail to hang up
- knowingly permit another person to use their telephone in a way prohibited by one of the items above
- send repeated electronic communications (e.g., emails, texts, instant messages) reasonably likely to harass, annoy, alarm, abuse, torment, offend, or embarrass the recipient

Penalty

Harassment is a Class B misdemeanor, unless the defendant has a previous conviction for harassment, in which case the crime is elevated to a Class A misdemeanor.

Defenses to a harassment charge

No intent to cause emotional distress: Although intent can be inferred from conduct, the only person who really knows what the accused intended is the accused. Lack of intent is often a strong defense to a harassment charge.

Identity: If the charge is based on a telephonic or electronic communication, it must be proved beyond a reasonable doubt that the accused made the call or sent the communication.

Proving distress: When the statute requires proof that an act was reasonably likely to cause emotional distress, whether the act would be distressing to any reasonable person vs. the alleged victim being simply thin-skinned can be raised.

He said/she said: Without independent evidence that the accused actually engaged in harassment, the credibility of the accuser acts as a defense, particularly when the accuser has reason to be, or has a history of being, vindictive.

Harassment As a Form of Stalking

Under the current version of the stalking statute, stalking can be committed by committing the crime of harassment more than once if the crimes of

harassment are directed against the same person as part of a scheme or course of conduct.

The prosecution must prove not only that the alleged victim was annoyed, embarrassed, or offended, but that a reasonable person would have been annoyed, embarrassed, or offended by the accused's conduct. E.g., persistently asking a person for a date *might* constitute stalking under the current law, on the theory that it is a repeated form of harassment, but only if the accused intended to cause distress to the alleged victim.

What You Should Do

A number of defenses can be raised to stalking and harassment prosecutions, some which depend on challenging the law itself while others involve challenging the specific facts alleged by the prosecution. That's why it's so important to engage an experienced criminal defense lawyer who can fashion one or more defenses tailored to your case.

CHAPTER 4

Other Domestic Assault Crimes

A number of crimes that are not necessarily domestic violence crimes can occur within the context of a dating relationship or within a family. When that happens, the court has the authority to make a finding that a crime of family violence has occurred.

That finding does not increase the maximum penalty for the offense but, as we will explain in the next chapter, a "family violence" finding can have other serious consequences if the accused is convicted.

Unlawful Restraint

The crime of unlawful restraint requires that the prosecution prove each of the following elements beyond a reasonable doubt:

- The accused
- intentionally or knowingly
- restrained another person
- without that person's consent.

To restrain someone means restricting their freedom of movement in a way that:

- substantially interferes with the person's liberty; or
- confines the person; or
- moves the person from one place to another. E.g., inviting a person into a car and then driving them to another county without their consent is considered a restraint of that person.

"Without consent" means that the restraint was accomplished by force, intimidation, or deception.

If you are charged with unlawful restraint in a domestic violence case, you could face significant consequences beyond the punishment you receive if convicted.

Restraint of children

If the alleged victim was under the age of 14, restraint can be accomplished by any means, including obtaining the child's agreement to be restrained or moved, so consent is not a defense if the alleged victim is younger than 14.

An exception exists if the child was under the age of 14 and the accused is a parent, grandparent, sibling, uncle, or aunt of the child who took the child solely for the purpose of assuming lawful custody of the child.

If the alleged victim was at least 14 but under 17, proving lack of consent is not necessary if all of the following three conditions are met:

- the child was taken to another state;
- the child was taken to a place more than 120 miles from the child's home; *and*
- the child was taken without the consent of the child's parents or guardian.

In all other circumstances, if a child between the ages of 14 to 17 consents to being moved, no unlawful restraint has occurred.

Penalty

Unlawful restraint is a Class A misdemeanor except in the following circumstances:

- If the person restrained was under the age of 17, making it a state jail felony; or
- if the accused recklessly exposes the alleged victim to a substantial risk of serious bodily injury, making it a third degree felony.

Defenses to a charge of unlawful restraint of an adult

Identity: Whether the accused was the person who restrained the alleged victim.

Intent: Whether the accused intended to restrain the alleged victim.

Awareness: Whether the accused knew that their actions were restraining the alleged victim.

Actual restraint: Whether the alleged victim was actually restrained.

Consent: Whether the alleged victim consented to the restraint.

If the alleged victim was at least 14 but under age 17, consent is a defense if the child was not removed from the state or taken at least 120 miles from home and, additionally, if

- the accused did not restrain the child by force, intimidation, or deception, *and*
- the accused is not more than 3 years older than the child.

In addition, if the child is under the age of 14 and the accused is a relative who had a right to assume custody, the accused can defend the case by arguing that they took the child for that purpose.

Child Custody Interference

In Texas, it's a state jail felony to interfere with child custody. There are three things the prosecution must prove to convict someone of that offense: That the accused:

- took or kept
- a child under the age of eighteen
- in one of the following ways:
  - in violation of a court order or judgment that determines custody;
  - after a divorce or custody proceeding has been filed, if the accused has not been granted custody and takes or retains the child with the intent of depriving the court of jurisdiction over the child; or
  - by removing the child from the United States without the permission of a person entitled to possession of the child.

Defenses to the charge

A valid court order: The existence of a valid court order entered in Texas or any other state that gives you custody of the child.

Custody unclear: If the charge is based on violating a custody order that fails to clarify you don't have custody is a possible defense, such as in joint custody situations.

Reasonable effort to comply: Retaining the child when due to circumstances beyond your control (e.g., no transportation was available or the child was too ill to move), and after making reasonable efforts to notify the person with custody of those circumstances, and you don't deny that person access to the child.

Maintaining their safety: If you took or retained the child to protect them or yourself from family violence.

Factual dispute: If you did not take or retain the child, or if the prosecution cannot prove you did.

If you do not have legal custody of a child, if you are worried that you will be charged with interference with custody, and if you are not in fear for the child's safety, you should return the child. Doing so may enable you to avoid a criminal charge. If you are concerned about the child's safety, talk to the lawyer handling your divorce or custody case about the best way to proceed.

You can also talk to the police, but check first to see if your lawyer feels it's necessary for them to be present when you do.

If you have been, or think you will be, charged with interference with child custody, you need prompt legal advice from an experienced criminal defense attorney, such as those at HamiltonGrant Attorneys at Law.

Other Family Violence Offenses

Any crime against a person in Texas can result in a "family violence" finding being recorded on the judgment if the crime involved family violence. These include:

- murder and lesser degrees of homicide;
- kidnapping and aggravated kidnapping;
- sexual assault and aggravated sexual assault;
- sexual abuse of a child and indecency with a child;
- child abuse;
- elder abuse;
- child endangerment;
- improper photography or visual recording;
- indecent exposure; and
- leaving a child in a vehicle.

Understandably, full discussion of each of these crimes is beyond the scope of this book. If you have been charged with or are suspected of committing any of these crimes, you should contact a criminal defense lawyer immediately.

Call us now at 833-Texas-Justice (833-839-2758) if you have questions about your case or situation.

CHAPTER 5

Sentencing and Other Consequences

Sentence for domestic assault crimes in Texas depend upon several factors, including the severity of the crime and any criminal record of the accused. If convicted, it's important to do everything you can to minimize the sentence the court imposes.

In addition to any sentence (direct consequence) are the inevitable collateral consequences. The law treats direct consequences and collateral consequences differently.

Sentences and Community Supervision

If you are convicted of a crime, the court will impose a sentence, a fine, or a term of community supervision as your direct consequence of having been judged guilty. Texas domestic violence categories not involving homicide are:

- **First degree felony** – punishable by either a life sentence or 5–99 years, and a fine of up to $10,000
- **Second degree felony** – punishable by a prison sentence of 2–20 years and a fine of up to $10,000
- **Third degree felony** – punishable by a prison sentence of 2–10 years and a fine of up to $10,000
- **State jail felony** – confinement in a state jail for 180 days to two years and a fine of up to $10,000
- **Class A misdemeanor** – punishable by a jail sentence of up to one year and a fine of up to $4,000
- **Class B misdemeanor** – punishable by a jail sentence less than 180 days and a fine of up to $2,000
- **Class C misdemeanor** – punishable by a fine of up to $500

A record of prior criminal convictions may increase the maximum penalty or raise the level of your charge so that it's subjected to a higher penalty.

Minimum sentences and probation

If the judge decides to impose a minimum prison sentence, the minimum can be avoided in a couple of ways.

- The court can elect to impose community supervision (probation). If you obey its rules and complete it successfully, you'll be discharged without imprisonment. (If you don't and probation is revoked, you'll

return to court for sentencing. In most cases, the court then imposes a prison sentence of at least the minimum sentence authorized for the offense.)
- The judge can impose the minimum (or more) sentence and stay all or part of your sentence while you're on probation. That means you don't actually serve the stayed portion of your sentence as long as you obey the court's rules.

Probation is available for most crimes of domestic violence, although more difficult to obtain if you used or displayed a weapon when committing the crime, in which case talk to your lawyer about whether to have a jury vs. a judge decide punishment. Only a jury can recommend probation for certain offenses that involve the use of a firearm.

If you're granted probation for a family violence offense, the court assesses an additional $100 fee that is given to a family violence center located in the county where you were sentenced.

Deferred Adjudication

In some cases, it's possible to negotiate a resolution that avoids a sentence. The accused would be required to admit guilt and enter a plea of guilty or no contest, but you would not be found guilty or convicted of a crime, provided you complied with the terms of the agreement. If completed successfully, the case is dismissed and no conviction would ever be entered against you for this.

Deferred adjudication is possible for most but not all domestic violence offenses and more likely granted to first offenders in cases that did not result in a serious injury.

If you do not comply with the deferred adjudication agreement, you're returned to court for sentencing. It's too late by then to ask for a trial because a plea of guilty or no contest was entered. That's why it's important to understand the terms of a deferred adjudication and be sure you can live with those terms before giving up the right to a trial.

Getting the Best Sentencing Outcome

If you committed a domestic violence crime and your guilt is not in doubt, you can take immediate steps that might help you to avoid a more severe penalty. There are counseling and treatment services programs, like anger management, for individuals who've committed domestic violence.

If you enroll in one of these programs on your own initiative, before you face a judge, your willingness to accept responsibility and seek help will be impressive evidence of your potential for rehabilitation.

If you committed your crime while under the influence of alcohol or drugs, consider also enrolling in a substance abuse treatment program like Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) and keep a record of your attendance.

Anytime you recognize a problem and take steps to resolve it before a court orders you to do so, judges and prosecutors are more willing to take a chance on an alternative to jail and prison sentences.

Before you enter any kind of treatment program, make a commitment to complete it successfully. Enrolling in a program does no good if you skip sessions or fail to complete it. Even if you don't think you need treatment, it may be in your best interest to participate and convince the treatment provider that you've made progress.

Your goal is to obtain a glowing report from your counselor or therapist to convince prosecutors and judges you've changed your attitude and take your problem seriously.

Experienced criminal lawyers, like those at HamiltonGrant Attorneys at Law, know about the treatment resources available in your community. They also know which treatment providers write the best reports and are most likely to impress judges and prosecutors, provided you commit to and attend treatment or counseling sessions faithfully and participate in a meaningful way.

Collateral Consequences

Collateral consequences, such as the loss of the right to vote or hold public office, accompany all felony convictions, and are automatic when the felony crime involved family violence. For other crimes, the judge usually makes the finding of family violence at the time of sentencing.

The judge can make a finding of family violence if it doesn't increase the authorized maximum sentence. If the maximum sentence is higher than one of domestic violence, however, a jury must make that finding, unless the defendant admits to family violence.

Family law consequences

A finding that a crime involved domestic violence can have collateral consequences in family law (divorce or custody) proceedings. The conviction may make it more difficult for the accused to:

- obtain custody of a child;
- obtain unsupervised visits with a child;
- have unrestricted electronic communication with a child; or
- be appointed as a conservator for a child.

If the accused is convicted of a crime of family violence against a spouse less than two years before the start of a divorce proceeding or while a divorce proceeding is pending, the divorce court can order the accused to pay spousal maintenance of up to $2,500/month or up to 20% of the accused's monthly income for up to three years, and sometimes longer, even if maintenance would ordinarily be disallowed.

In addition, anyone convicted of family violence within the previous two years is generally not permitted unsupervised contact with their minor children, even if the children were not victims of the crime.

If you're facing a possible divorce, consult with a family law attorney *and* a criminal defense attorney before you're convicted of a crime of family violence.

Firearms and ammunition

Anyone convicted of a felony, whether or not it involves family violence, is prohibited by federal law from possessing a firearm or ammunition. The federal crime of "felon in possession of a firearm" applies, no matter how many years have passed since the conviction was imposed.

Federal law also prohibits possession of a firearm or ammunition when a misdemeanor involves domestic violence. All that's required is that one of the following must be true:

- An element of the crime made it a domestic violence crime—that the prosecution was required to prove the crime was committed against a family member in order to obtain a conviction; or
- The court that imposed the conviction made a finding that the crime involved domestic violence. The "family violence" finding made by Texas judges satisfies that condition.

As a general rule, only a pardon or expungement that erases the crime and restores civil liberties will restore the right to possess a firearm, and pardons are not easy to obtain. The U.S. Dept. of Justice can grant exemptions to people who demonstrate a serious need to possess a firearm, but it has not exercised that power for many years.

The State of Texas will disqualify applicants from obtaining a concealed-carry permit if they have been convicted of certain domestic violence crimes. In addition, it's illegal in Texas to possess a firearm for a period of 5 years if convicted of misdemeanor assault. The 5-year period begins on the date the accused is released from confinement or community supervision, whichever is later.

Occupational licenses

Conviction of a domestic violence crime may prevent you from obtaining a license to operate certain businesses, including businesses involving childcare, and affect the issuance of many other licenses, including real estate sales, teaching, nursing, plumbing, and other occupations.

If the law requires consideration of the applicant's good character before a license is issued, crimes involving moral turpitude—conduct considered morally unacceptable by society's standards—may disqualify an applicant. Even violating a family violence protective order is viewed as a crime of moral turpitude if the violation involved the use or threat of violence.

Consult with a lawyer if you're concerned about the impact a conviction may have on your business or professional license.

Immigration

Any crime of moral turpitude, including domestic violence, can affect immigration status. Individuals residing in the U.S. may well face deportation after a conviction, and those seeking citizenship or permanent residence may find their conviction renders them ineligible. Also, individuals who left the U.S. after being convicted may be denied reentry.

The immigration consequences of any criminal conviction depend upon a host of factors. If you're not a citizen, consult with both an immigration and criminal defense attorney *before you're convicted* to better understand what the consequences of a conviction might be.

Military service

Any conviction can affect your eligibility to enlist in the military. Talk to a recruiter for the military branch that interests you to determine its current policy regarding the impact of criminal convictions on enlistment.

If you are already in the military, know that Texas law requires the court to notify the staff advocate general or the provost marshal of the military installation to which you're assigned of any conviction or deferred adjudication that resulted from a crime of family violence. It's up to your commanding officer and other military authorities to decide how to respond to that information.

What You Should Do

Again, the first goal is always to avoid a conviction. It's not always achievable, but it's always worth pursuing.

If a conviction is unavoidable, the next goal is to persuade the prosecutor and the court to behave reasonably. Reasonable behavior might mean reducing the severity of the charge or imposing a punishment you can more easily live with.

Judges and prosecutors are more likely to behave reasonably when they understand your side of the story. The best way to minimize the consequences of a conviction is to make prosecutors and judges see you as a decent person who is unlikely to repeat a mistake.

An experienced criminal defense attorney can help you make your remorse and rehabilitation known to the court and prosecutor if and when a conviction is likely.

To minimize the consequences of a domestic violence accusation, you need to do the following:

- Avoid any kind of behavior that will get you into deeper trouble or reflect negatively on your character. Avoid contact with your accuser, if you can. If contact is necessary, avoid engaging in any conduct that could be interpreted as threatening or violent. Too many people who are accused of domestic violence blow their chance of avoiding serious consequences by repeating the same behavior that resulted in the criminal charge.
- Contact a criminal defense lawyer at your earliest opportunity. Your lawyer will help you develop a strategy to avoid or reduce the consequences of the accusations made against you. If you're guilty and the strategy is to minimize consequences rather than take your case to trial, the strategy may include your participation in the treatment or counseling programs discussed earlier.

To discuss the strategy best suited to your case with an experienced domestic violence defense attorney, call HamiltonGrant Attorneys at Law at 833-TexasJustice (833-839-2758).

CHAPTER 6

Family Violence Protective Orders

Many domestic violence prosecutions in Texas stem from violating existing protective orders. The fact that a family violence protective order is in place creates the risk that a criminal prosecution will follow. Even if you have no desire to violate the terms of a protective order filed against you, you might find yourself accused of disobeying the order if circumstances—circumstances beyond your control—create the impression that you breached one of its terms.

The best way to avoid a prosecution for violating a protective order is to persuade the court not to enter the order in the first place. While admittedly not always possible, it's often smart to try. But before doing so, consult a competent, experienced domestic violence attorney who can advise you on whether your testifying at a protective order hearing is in your best interest.

If the necessary requirements to obtain a protective order cannot be satisfied, you will likely succeed in the critical first step: opposing the request for the order. E.g., if the protective order application's accusations are untrue, exposing those lies at the hearing may also help you in other criminal prosecutions or family law proceedings.

A protective order can be filed against any family member who is not a minor, including those related by marriage, any person living in your household, and any individual you're dating or in a romantic relationship with.

The Texas Family Code makes protective orders available to victims of and those who fear family violence. The Family Code's broad definition of family violence is not limited to violence between spouses. (Chapter 2 details who are considered family and household members and the various acts that come under the umbrella of family violence.)

Legal Standard for Family Violence Protective Orders

A family or household member can obtain a protective order by persuading a court that:

- family violence occurred; and
- family violence is likely to occur in the future.

Also, a person who applies for a protective order does not need to prove that family violence caused a physical injury.

For example, the Texas Court of Appeals upheld a protective order entered against a husband who blocked his wife's car with his body and jumped on the hood in a threatening manner, then harassed her with a series of text messages, making her fear future violence would occur.

In another case, the Texas Court of Appeals upheld a protective order for a husband whose wife chased him with a car, forcing him to jump into a ditch because he believed his wife would run him down.

However, what may appear at first glance to be family violence is not always considered to be so. The Texas Court of Appeals held that a man was *not* entitled to a protective order when his girlfriend called him seven times a day for 30 days and told him that she'd shot her ex-husband when there was no evidence that the girlfriend possessed a weapon or that she threatened to cause him bodily harm, and the boyfriend did not testify that her statements made him fear that she would cause him imminent harm.

In another case, the Court of Appeals concluded that a man who harassed his ex-wife and her new husband at his son's baseball games, without threatening violence, didn't engage in family violence to justify issuing a protective order.

Types of Protective Orders

This book focuses on three basic kinds of protective orders:

- temporary family violence protective orders;
- final family violence protective orders; and, in the next chapter,
- emergency protective orders.

A temporary family violence protective order can be issued by the Court without a hearing. However, the Court must hold a hearing before it enters a final family violence protective order. Emergency protective orders are only obtainable after the accused has been arrested.

Other protective orders beyond these three do exist, but none of those, which include hate crime, stalking, and sexual assault protective orders and protective orders for victims of human trafficking, specifically protect against family violence.

However, since protective orders of any type protect against criminal activity, you should always consult a criminal defense attorney if you are served with an application for any type of protective order.

Applying for a Family Violence Protective Order

To help you defend against a protective order being filed against you in the first place, it's beneficial to understand the process to obtain a protective order, should an application be filed against you.

Places where the application can be filed

A person who wants a family violence protective order must file an application in court. District and county courts generally have jurisdiction to grant the order. The application can be filed in one of three places:

- the county where the applicant lives;
- the county where the person accused of family violence lives; or
- the county where the violence allegedly occurred, if not in one of the above two counties.

If the applicant files an application in the wrong county, the accused may have grounds to seek the application's dismissal. The accused can also seek dismissal if the applicant isn't a member of the accused's family or household or in a dating relationship with the accused.

If a divorce or child custody proceeding is pending and the application involves parties to that proceeding, it must generally be filed in the family court assigned to that proceeding.

The family court judge can, however, transfer the case to a judge who is currently assigned to hear protective order applications. Since applications for a protective order are sometimes filed to gain a strategic advantage in a divorce or custody proceeding, it is particularly important to oppose the application if it is filed in family court.

If a divorce has been granted, the application usually needs to be filed with the court that granted the divorce, but that court can transfer the case to a different court if the court deems the transfer appropriate.

If family law proceedings are taking place in a different state and a parent applies for a protective order in Texas on behalf of a child affected by a family law order in the other state, deciding whether Texas or the other state has jurisdiction to hear the case can become complex. You definitely need legal advice when in that position.

People who can file the application

Any person can apply for a family violence protective order to protect themselves or another family/household member from violence committed by a family or household member or a person in a dating relationship. And any adult, including those not part of the family or household, can file an application on behalf of a child.

A prosecuting attorney is allowed to seek a protective order on behalf of an alleged victim of family violence. It is particularly important for the accused to seek legal advice if a prosecuting attorney becomes involved, since the prosecutor would likely use the protective order proceedings to gain an advantage in a pending or future criminal prosecution.

The Department of Family and Protective Services may also seek a protective order on behalf of a family violence victim, generally when the alleged victim is a child.

Contents of the application

The application does not need to allege specific acts of family violence. If the person seeking the order wants a temporary protective order, however, the application must allege specific acts of family violence that make the applicant fear the likelihood of future violence.

If the applicant is the former spouse of the accused, the applicant must file a copy of the divorce decree with the application or state in the application that the decree will be filed with the court prior to the hearing.

If the applicant obtained an earlier protective order against the accused that has since expired, the applicant must either attach a copy of that order to the application or state in the application that the order will be filed with the court prior to the hearing.

If the application is based on an act of family violence that allegedly occurred while the expired protective order was still in effect, the applicant must state that fact in the application and allege that no other protective order has been entered based on the violation of the expired order.

If the application is not based on an act that occurred while the expired order was still in effect, the applicant must identify the threat that places the applicant in new fear of physical harm.

Application for a new order prior to expiration

If a protective order is set to expire within the next 30 days, the person protected by the order may file an application for a new protective order. The application must describe the threatened harm that places the applicant in continued fear of physical harm, and the existing order must be attached to the application or the application must allege that the order will be filed with the court prior to the hearing.

Giving Notice to the Accused

A notice that the application has been filed must be served on the accused, who is identified as the "respondent" in protective order proceedings. The notice must state the date, time, and place at which the court will hold a hearing on the application. The respondent is not required to file a written answer to the application but must attend the hearing to avoid a default. Failure to attend the hearing will likely result in the court issuing the requested order.

Temporary Family Violence Protective Order

The person who files the application can ask the court to issue a temporary *ex parte* protective order. *Ex parte* in this context means that the accused is not given a chance to respond to the request. The court can issue the order if it finds, from the facts alleged in the application, that there is a "clear and present danger" of family violence occurring.

The temporary order remains in effect for a period of 20 days or until a hearing is held on the application, whichever occurs first. If a hearing is not held within 20 days, the court has the power to extend the order for additional 20-day periods until the hearing is held.

Terms of the order

Most of the terms that can be included in a final family violence protective order can also be included in a temporary order. Those terms are listed in the next section, in our discussion of final family violence protective orders.

A temporary family violence order is most likely to include orders for the accused to:

- refrain from threatening or committing acts of violence against the protected person;
- have no contact with the protected person; and
- stay away from the protected person's residence and/or place of employment.

A final order can include additional terms that apply to both the person seeking the order and the accused. These additional terms cannot be included in a temporary order. (See section titled *Terms of order that can be entered against the accused* further on in this chapter.)

Order to vacate the premises

A temporary order can order the accused to vacate the residence of the person seeking the order if all of these apply:

- the accused occupies that residence with the person seeking the order;
- family violence is alleged to have occurred within the past 30 days;
- there is a clear and present danger of future violence; *and*
- the person seeking the order owns or leases the residence (individually or jointly) or the accused has a legal obligation to support the person seeking the order.

Note: If you, as the accused, are the sole owner or lessee of the residence, are not married to the person seeking the order, and no court has ordered

you to support that person, a temporary order cannot require you to leave the residence.

If the applicant asks for a temporary order that excludes the accused from a residence, the court must hold a hearing on that request. The court may—but is not required to— contact the accused to request the accused's input before deciding whether to issue that order.

If the court enters a temporary order that requires the accused to vacate the premises, it can also order a law enforcement agency to do all of the following:

- go to the residence with the victim;
- serve the temporary order upon the accused;
- inform the accused of the obligation to vacate the premises; and
- protect the person named in the order while the accused vacates.

Conflicting orders

If a temporary protective order conflicts with a custody order entered in a family court proceeding, the temporary protective order controls. That can happen, for example, when a party has been granted contact with a child by a family court order but is prohibited from contacting the child by a temporary protective order. The accused must obey the protective order until it expires. After expiration, the family court order will again take effect unless it conflicts with a final protective order.

What you should do

If you are served with a temporary protective order, the first thing you should do is to read it carefully. Once you are served with the order, you are bound by its terms, even if you do not read it. Not having read it is not grounds for a defense. (Remember: *Ignorance of the law is no defense.*) If you disobey any of those terms, you can be subject to the punishments discussed in chapter 5.

Although only an intentional violation of the order can be punished, whether you intended to violate the order or did so inadvertently is often unclear. Don't take chances. The best way to protect yourself is to make sure you understand the order and do everything in your power to obey it. You should also speak to an attorney right away about contesting the application to prevent the temporary order from becoming a final order.

If, prior to the final hearing, it is burdensome to obey the terms of a temporary protective order (particularly an order that requires you to vacate your residence), you can swiftly file a motion to vacate the temporary order. An attorney can help you do that. The court is required to hear and to decide that motion as soon as possible.

Final Family Violence Protective Order

After holding a hearing, the court can enter a final family violence protective order, sometimes called a permanent protective order. However, it's not really permanent. Generally, the court can only enter a protective order that lasts longer than two years if the accused has either:

- caused serious bodily injury to the person protected by the order or to a member of that person's family or household; or
- has been the subject of two or more previous family violence protective orders for the protection of the person who is protected by the current order.

The order may also last longer than two years if the accused is in jail or prison when the order is entered.

A family violence protective order may prohibit the accused from doing the following, mainly to the person protected by the order and, in some cases, any member of their family/household:

- committing family violence
- assaulting the person protected by the order
- stalking the person protected by the order
- going near their residence or place of employment
- communicating in a threatening or harassing manner with them
- communicating in any manner (other than through an attorney) with them (only if there's good reason to prohibit *all* communication, as opposed to threatening or harassing communication)
- engaging in conduct directed toward them if that conduct is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person
- harming or threatening to harm a pet
- going near a child's school or childcare facility if that child is protected by the order
- possessing a firearm

If the accused has a license to carry a concealed handgun, the court must suspend that license.

The accused may also be ordered to attend a counseling program designed to prevent further acts of abuse. If so, the accused must begin the program within 60 days and supply proof of that fact to the court. The program must be completed within 11 months after the protective order begins (or earlier if the protective order expires in less than a year). Failure to attend court-ordered counseling can be viewed as a contempt of court and punished accordingly.

The counseling program must be an accredited program. The judge cannot substitute a different kind of program such as an anger management class if the judge decides to order counseling. The judge may nevertheless have

discretion to order the accused to participate in additional programs, such as alcohol or drug abuse treatment.

Terms of order that can be entered against both parties

A protective order may also include terms that apply to either the accused, or to the person seeking the order, or to both. Those terms include:

- prohibiting the removal of a child from a party's care, or from the State of Texas
- stating the terms under which the accused will have access to a child if the accused is the parent of that child
- prohibiting the sale or transfer of ownership of jointly owned property
- prohibiting the removal of a pet from the party who possesses or is responsible for that pet
- directing the accused to vacate premises that are jointly owned or leased with the other party, or that the accused does not own or lease, or that the accused owns or leases if the accused has an obligation to support the other party
- requiring the accused to make a payment for the support of the other party or for the support of their children
- awarding possession or use of items of jointly owned property to either party

The court has no authority to enter an order that requires *both* parties to obey the terms that are listed above under "terms of order that can be entered against the accused." While it may seem fair for the court to enter an order that requires each party to avoid contact with the other, the court is powerless to enter that order. If the accused wants an order prohibiting contact by the other party, the accused must file their own application for a protective order and prove that the other party engaged in family violence.

Payment of fees

The person seeking the order can never be required to pay a fee to the court. If the court enters a protective order against a person who committed family violence, the court can require the accused to pay court costs as well as the applicant's attorney's fees. Attorney fees can include:

- fees of a private attorney retained by the applicant;
- reasonable fees for representation provided by a prosecutor (paid to the county); and
- reasonable fees for representation provided by an attorney employed by the Department of Family and Protective Services (paid to the state).

The court must consider the reasonableness of the requested fee and the accused's ability to pay before deciding whether to order the accused to pay

fees. If the court does demand that you pay those fees, failure to pay can result in you being held in contempt of court, arrested, and jailed.

Protective Order Hearings

No hearing is required before a temporary family violence protective order is entered. However, a hearing must be held before the court can enter a final family violence protective order.

The hearing must generally occur within 14 days after the application for the order is filed with the court. In some counties, the 14-day period can be extended to 20 days at the request of a prosecutor.

If the accused receives notice of the hearing less than 48 hours before the hearing is scheduled to commence, the accused is entitled to request a postponement. If the postponement request is made in writing, it must be granted. The written request for postponement is called a motion for continuance. The rescheduled hearing must be held within 14 days of the date it was originally scheduled.

The accused must be served in order for the hearing to take place as, by law, a person must be made aware of allegations being made against them (accomplished by their being served) to have sufficient opportunity to defend themselves against the accusations. If the accused cannot be served with notice of the hearing prior to the hearing, the person seeking the order can ask the court to reschedule the hearing. If that request is granted, the rescheduled hearing must be held within the following 14 days. The court can reschedule multiple times to permit service to be made. If the court does not grant the request to reschedule, the proceeding will be dismissed if service is not made before the scheduled hearing date. Dismissal does not prevent the person seeking the order from filing a new application.

If the accused is served with notice of the hearing at least 48 hours before the scheduled hearing but does not attend the hearing, the request for a protected order is often granted by default, but the court is not required to grant the order by default if the events alleged in the application do not necessarily prove beyond a reasonable doubt that family violence did or is likely to occur.

Discovery

Texas appellate courts have held that a protective order hearing cannot be delayed for the purpose of conducting discovery—permitting the accused to discover what evidence has been provided against them to warrant seeking the protective order. This doesn't mean discovery is unavailable to you, if accused. An accused who acts promptly may be able to schedule a deposition of the person who applied for the protective order prior to the hearing. Obtaining the applicant's testimony can help the accused prepare for the hearing and, more importantly, provide evidence (including inconsistent

statements) that would assist the accused with regard to any pending or future criminal charge resulting from the applicant's claim to having been the victim of family violence.

Proof required at the hearing

The person seeking the order has the burden to prove that:

- family violence occurred; *and*
- family violence is likely to occur in the future.

If the person seeking the order satisfies the court that both of the above are likely true, the court *must* enter a protective order. However, while the fact that family violence occurred in the past generally permits the inference that family violence is likely to occur in the future, it is not automatically a given.

A different rule exists if an earlier protective order was in effect and the court finds that the accused violated that order before it expired. If the court finds those facts to be true, it can enter a new protective order without making any other findings.

A protective order hearing is a civil—not a criminal—proceeding. The person seeking the order is not required to prove beyond a reasonable doubt that the accused engaged in family violence. While judges will ordinarily enter a protective order if they believe it is more likely than not that family violence occurred and is likely to occur in the future, the standard that judges must apply is deliberately vague. That vagueness gives judges considerable discretion to enter a protective order, even if they consider the evidence of family violence to be doubtful. As a practical matter, each judge has their own standard for deciding whether the evidence warrants entry of a protective order.

Rules of evidence

Proof must be based on evidence. Courts only consider evidence (including testimony, documents, and physical evidence, like pictures) if the evidence is admissible under the rules of evidence, which are designed to ensure that only reliable evidence is considered in a court proceeding.

Examples of rules of evidence include:

- The evidence must be relevant;
- hearsay must be excluded, unless it is reliable;
- the authenticity of documents must be established; and
- evidence classified as legally prejudicial must be excluded.

If evidence offered to the court is potentially inadmissible, the opposing party can object to it. The court then applies the appropriate rule of evidence to decide if it's admissible. If no objection is made, the court will probably

consider the evidence, even if it's inadmissible—yet another reason why failing to seek legal advice beforehand can have serious consequences for you.

These rules of evidence apply to protective order proceedings, although a judge is likely to relax them a bit if the person seeking the order is not represented by a lawyer. Hearsay is not admitted unless an exception to the rule against hearsay exists or it's the statement of a child under the age of 12 describing abuse to that child. The rules of evidence are complex. You are more likely to navigate those rules successfully if you are represented by a lawyer.

Jury trial

The statute governing protective order hearings indicates that a finding of family violence is to be made by the court, which the Texas Court of Appeals interpreted to mean that the legislature did not intend to grant the right to a jury trial in a family violence protective order proceeding.

Whether that provision of the law violates the right to a jury trial has not clearly been resolved. Texas law requires a jury to be requested 30 days before the trial, something that is impossible to do before the hearing because the hearing is held within 14 days after the application is filed. Whether this interferes with the constitutional right to a jury trial, and whether that right applies to protective order proceedings, remain open questions. Until the issue of entitlement to a jury trial is resolved, your lawyer may want to request a jury trial in a protective order hearing if that request would pose a strategic advantage for you.

Even if a jury trial is granted, a jury would only decide whether family violence occurred and is likely to occur again. It would still be up to the judge to decide the terms and duration of the protective order.

Defenses against a protective order application

If the person seeking the protective order didn't follow all of the procedural requirements, the accused can ask for the application to be dismissed before any evidence is taken. If the application doesn't include all the information that must be provided, the application can be dismissed before any evidence is taken. A lawyer can help you move for dismissal if grounds exist to support the motion.

If the application proceeds to a hearing at which evidence is presented, the accused can defend against the request for a protective order by:

- cross-examining the witnesses called by the person seeking the protective order;
- testifying and calling other witnesses;

- arguing that the evidence does not establish that family violence occurred;
- arguing that the evidence established only an isolated or trivial instance of family violence but does not show a likelihood of family violence in the future; or
- arguing that evidence of past harassment, which did not include a threat of violence, is not sufficient to establish a threat of future violence.

The right of the accused to due process of law includes the right to cross-examine the accuser, the person applying for the protective order, and to present evidence to challenge the claim that family violence occurred. In one instance, however, the Texas Court of Appeals vacated a protective order that was entered after the judge interrupted a cross-examination and granted the order without permitting the accused to present evidence, denying the accused this very same due process.

This is yet another reason why obtaining legal counsel before any hearing takes place can make a very real difference. An attorney can conduct a skilled cross-examination on your behalf, swiftly object to any evidence if grounds for objection (such as hearsay) exist, and present available evidence on your behalf. Unless you're well versed in the rules of civil procedure and evidence, it'd be difficult for you to do those things yourself. You need legal counsel. Contact the attorneys at HamiltonGrant Attorneys at Law for help.

Modifying a Protective Order

Both the person protected by the order and the accused can ask the court to modify an order. The court can either delete a part of the order or add any provision that could have been (but wasn't) included in the original order. Unless the accused files a motion to end the order before it expires, the court does not need to find that circumstances have changed in order to modify an order.

If the court originally made the protective order effective for less than two years, the order can be extended. Note, however, that it can't be extended more than two years from the date it was first entered unless the court could have made it effective for longer than two years when it first entered the order.

The person protected by the order can ask to modify it at any time, but the accused must wait one year before filing a motion to modify it. If that motion is denied, the accused must wait another year before filing another motion to modify the order. Most protective orders expire before the accused is eligible to file a second modification motion.

If the parties have reconciled and want to resume living together and the order required the accused to vacate the premises, the accused must convince the judge that cohabitation will not increase the likelihood of family violence or endanger the protected person before the order can be modified. Some

judges are inclined to allow couples to make their own decisions without judicial interference, but others will not modify an order without evidence that the accused is unlikely to commit new acts of violence.

Completion of counseling or anger management classes and a favorable report from the counselor might be enough to satisfy the judge. Also, if the alleged victim is willing to testify that the facts relied upon in granting the order are untrue, the judge might vacate or modify the order, unless the recantation appears to have been coerced. If criminal charges are pending against the accused, however, a recantation given under oath at a hearing to modify the protective order would be valuable evidence in the defense of the criminal charge.

Appeals

A final protective order can be appealed to a higher court, but time limits exist for initiating an appeal, so consult with an attorney immediately if you want to pursue an appeal.

A protective order entered as part of a divorce proceeding cannot be appealed until the divorce becomes final. You should ask an attorney whether a mandamus proceeding to review a protective order before a divorce judgment is entered would help you if a protective order is entered against you by a divorce court while your divorce is pending.

Consequences of a Protective Order

Even if you never violate a protective order that has been entered against you, the order has consequences, such as:

- Your name being entered into the Texas Department of Public Safety law enforcement database of people subject to protective orders. Even after it expires, your name remains in the database to identify you as having been subject to a protective order.
- If you attempt to buy a firearm from a dealer, they will be notified that you can't purchase a firearm because a protective order has been entered against you.
- A federal law makes it illegal to possess or transport a firearm or ammunition while you are the subject of a protective order that protects your "intimate partner," defined to include your spouse or former spouse, the other parent of your child, and anyone with whom you cohabited. That law only applies to orders entered after a hearing, not to orders entered by consent when no hearing was held.

Filing Your Own Application

If you have been arrested for assault in a "mutual combat" situation (e.g., your spouse initiated physical conflict that forced you to defend yourself) it makes sense to seek your own protective order, particularly if you think your spouse is being encouraged to seek one against you. Although not always true, generally the first person in a relationship to file for a protective order is likely to get one. Having a protective order won't protect you against a criminal prosecution, but a prosecutor might think twice about charging you, or a jury might be reluctant to convict you, if you could convince a court that you needed protection from family violence. In other cases, doing so might put you in an awkward position. Always discuss such a decision with a criminal defense attorney beforehand.

Contempt of Court

Most violations of a family violence protective order are punished criminally. Criminal prosecutions are discussed in chapter 9.

As we explained earlier, a protective order can include terms that apply only to the accused or it may state terms that apply both to the accused and the accuser/protected person, such as to avoid all contact with each other. However, only the accused can be prosecuted criminally for violating the terms of the protective order.

If a term of the protective order applies to both the accused and the protected person and is violated, the violation of that term cannot be prosecuted as a crime. Instead, it may only be punishable by a sentence for contempt of court in civil court.

In theory, this means that even the protected person, if they violate a protective order, can be held in contempt of court. In practice, the Judicial Benchbook that guides judges in Texas states: "Holding an applicant in contempt of court will generally be counter-productive and should be considered a remedy of last resort, imposed only when non-compliance will cause a safety issue."

Since a protected person's failure to obey an order rarely creates a safety issue, the Benchbook seems to say to judges that they should never punish protected persons for disobeying a protective order.

Unfortunately, there is no similar language telling judges to ignore violations of a protective order by an accused. If an accused violates a part of the protective order that applies to both parties, the accused may still be hauled into court and sanctioned. One sanction is to put the accused in jail until they are willing to comply with the order.

Not all judges accept the double standard that allows a protected person but not the accused to violate a protective order. Judges generally do not like to have their orders disobeyed. If the person who obtained a protective order

against you is in violation of a term of the order that binds both parties, you should talk to a lawyer about remedies (including contempt) that you might be able to pursue.

If you receive notice that contempt sanctions are being pursued against you, talk to your lawyer about your options. Most contempt proceedings can be resolved by obeying the order. If there is a disagreement about whether you are complying with the order, your lawyer can help you resolve that disagreement. You may need to present evidence at a contempt hearing to prove you're doing your best to obey the order.

What You Should Do

It's always smart to be represented by counsel at a protective order hearing. That's particularly true if there's a prosecutor representing the applicant.

If you testify at the protective order hearing, the prosecutor is entitled to cross-examine you and might use your testimony against you in a subsequent criminal prosecution. An attorney can help you decide whether to testify or if it's best to exercise your right to remain silent. You must usually elect to do one or the other. If you answer some questions but refuse to answer others, the judge may decide you have given up your right to remain silent and may order you to respond to all questions. These issues expose you to a legal minefield that you should not navigate without skilled legal assistance.

In some cases, it's possible to resolve the proceeding with a negotiated settlement. If you and the person seeking the order can agree on the terms of the order, the court will generally enter what you've both agreed upon. If an order is likely to be entered against you, it may be better to negotiate terms that are easier for you to obey than terms the court might impose.

There may also be situations in which you don't want a hearing to occur. E.g., if your spouse is reacting in the heat of the moment and is likely to calm down in a few weeks, it may be better to agree upon an order than let them testify about any acts of violence by you. If they testify under oath, there'll be a permanent record of their testimony. If you're prosecuted for a crime based on the violent incident they describe, it'll be difficult for your spouse to retract their testimony at the time of your criminal trial.

Even if they don't want you to be prosecuted or have their words used against you in a criminal proceeding, they'll have difficulty changing their story if they're subpoenaed to testify at your trial. If they deny you were violent, their testimony at the protective order hearing might still be introduced as evidence against you in your criminal trial.

On the other hand, if you're being prosecuted or likely to be prosecuted for a crime of domestic violence, your attorney might use the protective order hearing to help prepare your defense. By cross-examining the person accusing you, your lawyer can expose inconsistencies or lies in that person's testimony. Cross-examination also locks your accuser into a story. If they

depart from that story when testifying against you at a criminal trial (perhaps because they don't remember the story they originally told), their credibility will suffer. In addition, information that your defense attorney learns at a protective order hearing may lead to fruitful investigation that will help the defense of your criminal case.

Deciding when to proceed with a protective order hearing vs. when it's better to settle depends upon a number of factors. An experienced attorney is in the best position to help you make that judgment call. If you need help with a protective order, contact us at HamiltonGrant Attorneys at Law. Our attorneys can help you understand your options and advise you on the best way to proceed in your case.

Working with one of our domestic violence attorneys is particularly important if you think a protective order application is only the first step in a chain of events that will lead to a criminal prosecution.

CHAPTER 7

Emergency Protective Orders

Family violence protective orders can be entered whether or not the accused has been arrested or charged with a crime. An emergency protective order (EPO), on the other hand, can only be entered if the accused has been arrested on a charge of family violence or for a sexual assault.

The issuance of an EPO is discretionary, except when the offense allegedly caused a serious bodily injury or if a deadly weapon was allegedly used or exhibited during the commission of the offense. Then it becomes mandatory.

Duration and Content

An EPO lasts for a minimum of 31 days but not more 61 days. If a deadly weapon was used in the commission of the offense for which the accused was arrested, the order lasts for a minimum of 61 days but not more than 91 days.

An EPO can prohibit the accused from:

- committing family violence
- assaulting the person protected by the order
- stalking the person protected by the order
- threatening or harassing the person protected by the order or any member of that person's family or household
- going near the residence or place of employment of the person protected by the order or that of any member of that person's family or household
- going near a child's school or daycare facility if the child is protected by the order
- possessing a firearm

The accused can also be required to participate in an electronic monitoring program while the order remains in effect. If the accused has a license to carry a concealed handgun, the order must suspend that license.

Bond Conditions As an Alternative to an EPO

An emergency protective order is not a bond. The decision of whether or not to release the arrested person on bond is generally considered at the same initial court appearance.

Bond conditions may overlap with the terms of an EPO. For example, if both an EPO and a bond condition prohibit contact with an alleged victim,

the defendant must continue to obey the bond condition if the EPO expires while the defendant is still released on bond.

In cases where an emergency protective order is not mandatory, some prosecutors and magistrates may prefer to impose protective bond conditions instead of issuing an EPO, as a bond generally remains in effect longer than an EPO. (Protective bond conditions are discussed in the next chapter.) Protective bond conditions can also be imposed without conducting an evidentiary hearing, unlike EPOs.

Modification of the Order

If the court enters an emergency protective order, it can later change the order at the request of the accused or the protected person, including deleting any original provision and adding any provision that could have been included in the original order. The court must hold a hearing before it modifies the order. The accused is entitled to attend that hearing with their attorney.

If the accused requests the modification, they must persuade the court that the existing order is unworkable. E.g., an order may be unworkable if it causes a financial hardship or if it unfairly prevents an accused from seeing their child. They must also persuade the court that the person protected by the order will not be endangered by the requested modification. E.g., if the alleged victim is moving out of a dwelling shared with the accused, deleting a provision that prohibits the accused from living at that dwelling would not endanger the person protected by the order.

What You Should Do

If you are arrested for domestic violence, you should obtain representation immediately. Your lawyer should attend your initial court appearance with you to make an argument on your behalf regarding any proposed EPO. As there is often little time to prepare before an initial court appearance, if the court decides to enter an EPO (or decides the order is mandatory), it may be useful to seek a modification of the order at a later time.

While order modification may make your life easier, another benefit is that the hearing may provide your attorney with information helpful in your defense.

The attorneys at HamiltonGrant Attorneys at Law can help you resist an EPO if you retain our services before your first court appearance. We can also help you to seek modification of the terms of an EPO and use modification hearings to gain an advantage in your criminal prosecution.

CHAPTER 8

Protective Bond Conditions

Every person arrested for a crime in Texas must be taken before a magistrate so that bail can be set. Bail is an amount the accused must post in order to be released prior to trial. In some cases, the magistrate will agree to release the accused without requiring the posting of cash.

If an accused is to be released, the court will almost always require the accused to sign a bond. A bond is a promise to return to court whenever the court schedules a hearing at which the accused must be present. The bond remains in effect until discharged by the court, something that usually does not happen until the case ends.

Courts set the conditions of release included in the bond, and the accused must agree to those conditions in order to be released. Standard conditions include the requirement to come to court when notified of a court appearance, to keep the court informed of address changes, and to commit no crimes while the bond is in effect. Many additional conditions are typically set by courts, including some, such as a "no consumption of alcohol" condition, specifically tailored to the offense or to the accused.

The Court's Discretion to Impose Protective Bond Conditions

Protective bond conditions are designed to protect someone from harm that the accused might inflict. In most cases, the protected person is the alleged victim of the charged crime. In some cases, witnesses or family members might also be treated as protected persons.

The magistrate has broad discretion to set conditions that are reasonably related to the safety of the victim or the community. Protective bond conditions in a case charging a crime of domestic violence generally include:

- prohibiting the accused from going near the protected person's residence, school, or place of employment ("stay away" conditions);
- prohibiting the accused from having contact with the protected person ("no contact" conditions—the court may or may not permit some forms of contact, e.g., phone or email, depending on the circumstances); and
- requiring the accused to wear a GPS monitoring device and pay for its maintenance costs.

Other conditions may also be set, including those imposed in a family violence protective order, provided they're reasonable. Courts generally

regard "no contact" or "stay away" conditions as reasonable when the accused is charged with a crime involving a threat or act of violence.

Limitations on Protective Bond Conditions

While bond conditions may secure the safety of the protected person, they must also meet each of these tests:

- they must be reasonable;
- their primary purpose must be to assure that the accused appears in court when a personal appearance is required; and
- they must relate to the safety of the alleged victim or the community.

The "primary purpose" requirement is more theoretical than practical. If a protective bond condition is reasonable and rationally related to the alleged victim's or community's safety, courts will almost always indulge the fiction that its primary purpose is to assure the accused's court appearances.

Violations of Protective Bond Conditions

The violation of any bond condition can lead to the bond being revoked. When that happens, the defendant is confined to jail until the case is resolved. The violation of some bond conditions can be also prosecuted as a crime. The deliberate failure to come to court when a court appearance is required can be prosecuted as bail jumping. The violation of a protective bond condition can also be prosecuted as a violation of Texas Penal Code Section 25.07, discussed in detail in the next chapter.

When the prosecution seeks revocation of bail on the grounds that the defendant violated a protective bond condition, the defendant is entitled to a hearing at which the prosecution must prove it is more likely than not that the violation occurred. If the prosecution meets that burden, the court can revoke the defendant's bond.

In addition, if the defendant is charged with a new crime under Section 25.07 for violating a protective bond condition, Texas law authorizes the court to deny bail for the new offense. In a prosecution under Section 25.07, bail will only be denied for the violation of a "stay away" condition if the court finds that the accused went to the place identified in the bond with the intent to commit a crime of family violence or to commit the offense of stalking.

The denial of bail in a prosecution under Section 25.07 falls within the discretion of the court. If the lawyer for the accused can persuade the court that the violation was trivial or unlikely to be repeated, the court may agree to set bail on the new charge.

What You Should Do

If you've been arrested, you should obtain representation by a criminal defense attorney immediately. Having a lawyer with you at your first court appearance will give you the best chance of persuading the court to set reasonable conditions of release. Some protective bond conditions may not be troubling but others could make your life difficult. You need to sit down with a lawyer *before* your first court appearance so that your lawyer can make an effective argument to the court, based on your individual circumstances, concerning the protective bond conditions that should or should not be set in your case.

The lawyers at HamiltonGrant Attorneys at Law understand the importance of persuading magistrates to impose reasonable bond conditions. We are available to help you at every stage of your domestic violence prosecution, from the setting of bond through the final resolution of your case. Call us at 833-TexasJustice (833-839-2758) to speak to an experienced domestic violence attorney about your arrest and prosecution.

CHAPTER 9

Defending Violations of Protective Orders and Protective Bond Conditions

The violation of a protective order or a protective bond condition is a potentially criminal offense in Texas that applies only to those in one of the following categories:

- A family violence protective order has been entered against the accused (including protective orders issued by a divorce court or the court of another state)
- A temporary family violence protective order has been entered against the accused
- An emergency protective order has been entered against the accused
- The accused has been released on bond in a criminal prosecution charging family violence, sexual assault, sexual abuse, or stalking and includes a protective bond condition

It is a crime for any person who falls within one of the categories listed above to violate the protective order or protective bond condition by knowingly or intentionally doing any of the following:

- Committing an act of family violence
- Committing a sexual assault or an aggravated sexual assault against the protected person
- Stalking the protected person
- Communicating directly with a protected person or a member of that person's family or household in a threatening or harassing manner—leaving a message on an answering machine or sending a text message are each considered direct communications, whether or not they were received
- Using another person to communicate a threat to a protected person or to a member of that person's family or household
- Having any communication in any manner with a protected person or a member of that person's family or household if communication is prohibited by the order or bond condition (unless the communication is made by the accused's lawyer or by a person authorized by the court to communicate on the accused's behalf)
- Going near the protected person's residence, place of employment, school, or any other place that the order or bond condition requires the accused to avoid
- Possessing a firearm
- Harming, threatening, or interfering with the custody of a protected person's pet or assistance animal

What the Prosecution Must Prove

To obtain a conviction for a violation of Section 25.07, the prosecution must prove beyond a reasonable doubt that these three circumstances existed when the violation occurred:

- the accused was subject to one of the specified protective orders or to a protective bond condition at the time the offense was allegedly committed;
- the accused knew of the order or condition; and
- the accused violated the order or condition by committing one of the acts listed previously.

If the State fails to prove each of those elements beyond a reasonable doubt, the accused is entitled to an acquittal.

Where Prosecutions Can Occur

An accused can be prosecuted for a violation of Section 25.07 in the county where the violation allegedly occurred, the county in which the protective bond condition was entered, or if the protective order was entered in Texas, the county in which the protective order was entered.

Protective Orders Entered in Other States

A valid protective order entered in another state is enforceable in Texas, including prohibitions that could not legally be included if the protective order were entered in Texas, unless the court that entered the order had no jurisdiction over the accused or if the entry of the order violated the defendant's due process right to be notified of the application for the order and/or to have a meaningful opportunity to challenge the application—that is, the accused must be given a chance to attend a hearing on the application before it becomes final.

A defendant who is accused of violating a protective order in another state can defend against the accusation by presenting evidence that the order is not valid for either of those two reasons.

Dual Prosecutions

Double jeopardy protects an accused from two convictions for the same crime but it does not protect against two convictions for separate crimes, even if those crimes are based on a single act. Section 25.07 provides that an accused who commits a crime that violates a protective order can be charged with that crime *and* with violating Section 25.07. E.g., if an accused who is subject to a protective order that prohibits stalking commits the crime of stalking, that person can be charged not only with stalking but also the crime of violating the protective order.

Penalty

A violation of Section 25.07 is a third degree felony if the violation:

- was committed by stalking;
- involved the commission of an assault; or
- occurred after two prior convictions for violating a protective order or protective bond condition.

Violating Section 25.07 twice within 12 months is also a third degree felony. Any other violation of Section 25.07 is a Class A misdemeanor.

Whether the conviction is for a felony or a misdemeanor, Texas law makes it illegal for the convicted person to possess a firearm or ammunition after the conviction is entered.

Defenses to the Charge

A number of defenses can be raised in a prosecution for violating a protective order or a protective bond condition. Texas law also precludes certain defenses.

Consent to the violation is not a defense

Section 25.07 provides that "reconciliatory actions or agreements" made between the protected person and the accused cannot change the terms of a protective order or bond condition—only a court can do that.

An invitation by the person protected by a protection order to violate the order is not a satisfactory defense to a charge under Section 25.07. For example, if the person protected by the order calls the accused and asks the accused to come to their residence, the accused can still be charged with a violation of Section 25.07 if the accused disobeys the protective order by visiting the protected person's residence.

That provision of the law creates a trap for the unwary. If you are subject to a protective order and the protected person wants to meet you, it might seem safe to meet that person. You might think that the protected person is unlikely to notify the police that you are violating the order if the protected person asks you to violate it. Unfortunately, people who make that assumption often find themselves arrested.

If the police are notified by a neighbor or someone else who knows about the protective order and sees you with the protected person, you can be charged with a violating Section 25.07 if the protective order included a "no contact" or "stay away" provision. If you accept an invitation to violate a "no contact" or "stay away" order, you also take the risk that the protected person is acting vindictively or maliciously and will call the police as soon as you knock on their door, just for the pleasure of seeing you arrested.

It is NEVER safe to accept an invitation to violate a protective order or a protective bond condition.

Section 25.07 provides that a person protected by the order cannot be arrested for violating the order. Even if the person protected by the order "sets you up" by inviting or inducing you to violate it, that person cannot be charged with aiding and abetting your violation. The best way to avoid being prosecuted for violating a protective order is to obey the order, no matter what the protected person asks you to do.

Invalidity of the order is usually not a defense

If you had notice of the protective order hearing and an opportunity to be heard at the hearing, you cannot defend against an alleged violation of Section 25.07 by arguing that the court should not have entered the protective order.

Even if the evidence at the protective order hearing was insufficient to justify entry of the order, the validity of the order can only be challenged by appealing the judge's decision to enter the order. A "collateral attack" on the order cannot be made by challenging its validity in a criminal prosecution for a violation of the order.

An exception to that rule exists if the order was entered in violation of your right to due process. In general terms, that means that if the court entered an order without notifying you that an order had been requested or without giving you the opportunity to defend against the requested order, you could raise the invalidity of the order as a defense to a criminal prosecution.

Defenses based on lack of knowledge of the order

Texas courts have held that a person who is subject to a protective order can be convicted of violating it, even if they do not know or understand the contents of the order, provided they received adequate notice of the order's existence. The intent is to prevent individuals from shielding themselves against a prosecution by failing to appear at the protective order hearing (so that a judge cannot explain the order to them) or by failing to read the temporary or final protective order (so that they can remain willfully ignorant of its terms). Courts hold the accused responsible for reading and understanding the contents of a protective order. Failure to do so is not a valid defense.

On the other hand, the prosecution must prove that the accused knew that an order was entered or at least knew the order might be entered. If the accused was in court when the order was entered (as will always be true in cases involving emergency protective orders or bond conditions), it will probably be easy to prove that a court clerk handed the order to the accused.

If the accused was not in court and the order was entered by default, the prosecution will at least need to prove that the accused was served with the application for the order and was notified of the hearing date. Essentially, you proceed at your own risk by ignoring an application for a protective order. The law requires the order to be served upon you after it is entered, but you could be prosecuted if you violate the order before ever receiving a copy of it.

Although the law does not require an accused to attend the protective hearing, it might place a duty on the accused to learn whether a protective order was entered so that the accused can avoid violating that order. That interpretation seems to undercut the law's provision that requires a protective order to include a warning about the potential criminal penalties that apply to its violation. The purpose of that warning is unclear if an accused can be punished for violating an order without ever having seen the warning.

Whether it is consistent with due process to punish an accused for violating an order that the accused never received is an open question in Texas, one that might be raised as a defense in an appropriate case. An experienced domestic violence attorney will know whether that is an issue that is worth pursuing in your situation.

Temporary protective orders are almost always entered without the accused's knowledge and before the accused is notified of the application for a protective order. They are usually served upon the accused together with the application.

Until the accused receives a temporary protective order, it is rare that an accused could have knowledge of the order's existence. In most cases, proof that the accused received a temporary protective order will be essential to proving the accused knowingly violated its terms.

Defenses based on violations that cannot be the basis for a criminal prosecution

Chapter 6 lists the terms of an order the court can impose upon a person found to have engaged in family violence. It also lists terms that can be imposed both on the accused and the protected person. A violation of the terms that can be imposed on both parties cannot be prosecuted as a crime.

In addition, the only person who can be criminally prosecuted for disobeying a protective order is the person who was found to have committed family violence. A protected person cannot be prosecuted for a violation of Section 25.07. If a protected person violates a protective order, that violation can only be punished by seeking sanctions for contempt of court.

Defenses based on inadvertence or accident

Texas courts have concluded that Section 25.07 requires proof that the accused possessed what is called a culpable mental state. Culpability requires not only that the accused know about the protective order but also that the accused knows that they are engaging in conduct that would violate the order. An inadvertent violation of the order will not establish that the accused acted with the requisite mental state.

Accidental violations of protective orders are not uncommon. For example, if an order requires an accused not to come within 500 feet of a protected person and the accused unexpectedly encounters the protected person in a supermarket aisle, the accused did not knowingly or intentionally violate the order. On the other hand, if the accused lingers after encountering the protected person rather than walking away, the accused might then be found guilty of knowingly violating the order.

Sometimes an order will require the accused to stay away from the protected person's place of employment. Usually the order will specify the place of employment, although courts have upheld convictions for violating orders that do not identify the place of employment when the evidence establishes that the accused knew where the protected person worked. If the protected person changes their place of employment and the accused is not notified of that change, however, the accused would have a potentially valid defense against a charge that the accused violated the order by entering the new place of employment.

As another example, if an order prohibits physical contact with a protected person, accidentally literally bumping into the person would not be considered a knowing or intentional violation of the order. However, whether the contact was an accidental bump or a deliberate shove might be a factual dispute for a jury to settle.

Defenses based on other factual disputes

Uncertainty about whether an accused actually committed an act that violated the order or bond condition is often a fruitful ground upon which to base a defense. If a threatening statement was communicated by telephone or email, the prosecution must prove that the person making the threat was the accused rather than someone impersonating the accused. If there is no record of the violation (such as an email) and no witness to the violation other than the protected person, the "he said/she said" nature of the proof may create a reasonable doubt about the accused's guilt. That is particularly likely to happen when the person making the accusation can be shown to be vindictive, hostile, or otherwise motivated to make a false accusation against the accused.

When the charge involves an allegation of family violence, disputes often revolve around what actually occurred. Did the accused make an actual threat or did the accused merely use loud and angry words without harassing

or threatening the protected person? Did the accused actually strike the protected person or is the protected person blaming the accused for an act of violence committed by someone else? Each case must be investigated carefully and any possibility of a significant factual dispute must be considered as a potential defense to the charge.

Defenses based on ambiguity in the protective order

Most "stay away" provisions of a protective order identify a residence or place of employment by address and specify a distance from that place that the accused must maintain. For instance, the order might require the accused to stay at least 300 feet away from a particular address.

If the order includes no specified distance but merely instructs the accused not to go near a particular address, the ambiguous nature of the word "near" could create a defense. An accused who knocks on the door of the house has obviously gone near the house, but it is less clear that the accused has violated the order by driving through the neighborhood.

Courts have held that a mistake in the address (e.g., an order to stay away from 301 Elm Street when the correct address is 3011 Elm Street) does not excuse the accused's violation of the order if the accused knew the correct address. A jury might nevertheless conclude that an accused shouldn't be convicted if the accused didn't violate the literal terms of the order. That is particularly likely to happen if the jury feels some sympathy for the accused and believes the protected person has behaved unreasonably.

Defenses to harassing communications

If the charged crime is based on communicating in a harassing manner, the State must prove that the accused:

- engaged in a course of conduct
- directed at the protected person
- that caused or tended to cause substantial distress, and
- had no legitimate purpose.

Several defenses are available if a criminal charge is based on harassing communications:

- If the accused made only a single harassing communication, the accused has a defense based on the failure to prove a course of conduct.
- If the accused directed harassing language at another person but in the presence of the protected person, the accused has a defense based on the failure to prove harassment directed at the protected person.
- If the accused used language that is unlikely to cause someone to become upset, the accused has a defense based on the failure to prove that the accused caused substantial distress.

Whether the accused had a legitimate purpose for a communication that might otherwise be considered harassing is for the jury to decide. Admonishing a spouse for infidelity or bad parenting, for instance, might be seen to serve a legitimate purpose by a jury that sympathizes with the accused.

What You Should Do

All of the defenses discussed above, and others that might arise in an individual case, can lead to an acquittal or dismissal in an appropriate case. They can also be used to create leverage in negotiating a favorable resolution of the criminal charge. The attorneys at HamiltonGrant Attorneys at Law know how to make use of these defenses to help clients who are charged with violating protective orders or protective bond conditions.

If you are charged with a violation of Section 25.07, an experienced attorney can help you decide how to defend against the charge.

Never make the mistake of defending yourself. The law is complex and the consequences of a conviction can be serious. To maximize your opportunity to avoid those consequences, it is essential to have an experienced criminal defense lawyer on your side.

You should retain an attorney as soon as you are charged so that your lawyer has ample opportunity to raise defenses that could help you avoid a conviction.

Our years of experience representing individuals accused of domestic assault has shown that many accusations may be untrue or exaggerated. Unfortunately, police and prosecutors typically listen only to the accuser's side when making an arrest or filing charges. The goal of HamiltonGrant Attorneys at Law is to make prosecutors, judges, and juries look beyond the hype and arrive at a reasonable disposition.

To put an aggressive team of criminal defense lawyers on your side, call us now at 833-TexasJustice (833-839-2758).

If you or a loved one ever find yourself arrested for Domestic Assault in Texas, this book is a must-read!

Attorneys Stephen Hamilton, Deandra Grant, Shane Byrd and Tommy Hull believe in empowering people to make the best decisions when confronted with potentially life-altering events caused by a domestic assault arrest. Everyone is entitled to a strong and passionate defense. That is why they have written this book. It will arm you with information about domestic assault arrests in Texas and how to assemble the best defense possible.

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Attorney Stephen Hamilton is the founding partner and lead trial attorney at Hamilton • Grant. Stephen ranks among the fewer than 1% of practicing criminal attorneys across Texas who have achieved coveted board certification in criminal law by the Texas Board of Legal Specialization. He has been awarded numerous awards, and his counsel is highly esteemed by his peers. He is a lifetime legal member of the National Association of Criminal Defense Attorneys, the Texas Criminal Defense Lawyer's Association, and several other regional legal associations.

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