

New York Law Journal

Analysis

Seeking a Protective or Restraining Order Where Children Are Involved

A protective order cannot guarantee the abuse will stop and the victim and children will be safe. Nonetheless, it is a critical step to take because it helps to legally document the abusive experience.

By **Toby Kleinman and Daniel Pollack** | March 01, 2021 at 12:00 PM



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Protective orders are legally enforceable directives issued by courts in an effort to keep a person safe from their spouse, significant other, or a third party. Restraining orders and injunctions are other similar terms. Courts issue emergency protective orders 24 hours a day, 365 days a year. In most states, a protective order can:

- Order the alleged offender to stay away from the petitioner and the petitioner's family and property.
- Order the alleged offender not to harm the petitioner.
- Order temporary custody and support of the children to the petitioner.
- Order an offender not to possess any weapons.

Many attorneys recommend that their clients do not seek protective orders if the parties are seeking a legal separation or divorce. While each case stands and falls on its own merits, when children are involved, there may be different considerations.

Victims of domestic abuse and their children are more at risk of being harmed when they leave their partners. There are many deaths of children each year by violent partners. Childhelp.org [reports](#) that in 2014 "... state agencies identified an estimated 1,580 children who died as a result of abuse and neglect — between four and five children a day. However, studies also indicate significant undercounting of child maltreatment fatalities by state agencies — by 50% or more... More than 70% of the children who died as a result of child abuse or neglect were two years of age or younger... Around 80% of child maltreatment fatalities involve at least one parent as perpetrator."

While there is always an option to wait and deal with violence issues during a divorce, for many reasons an attorney may want to alert the court of such issues as soon as possible, which may be when seeking a protective order. If an individual does not feel safe, if he or she has have been threatened or their children have been threatened, or they are being harassed or stalked, it may be important to alert the court. In addition, credibility may come into play later if the court does not become aware of violence issues. Getting a restraining order against a violent partner with whom one has children may change the considerations for joint custody and time sharing between parents.

History

Most state statutes allow for protective orders to be issued in a relatively straight forward manner. The issuance of temporary protective orders is designed so that individuals do not require attorneys to get them. Nevertheless, attorneys are valuable to the process. For example, most forms to start the process for getting a restraining order may not require details of a history of violence, but it may be the history which portends safety in the future.

Such forms may merely ask “if” there was a history of violence, and don’t require any details of the history. Whether or not a particular form asks for a history of violence, the history should be provided. Indeed, details of the history of the violence may be critical for future protection as well as for custody decisions. It is accepted that there is a causal connection between child abuse and spouse abuse.

Also, perpetrators of spousal abuse are more likely to seek custody of their children, frequently to hurt the non-violent spouse. Therefore, filing a history and detailing the violence a victim has suffered as a part of first seeking a restraining order alerts a court before anything is contested in court. It also places on the record the concerns a victim legitimately has.

Giving as much detail as possible at an early stage of seeking protection also can keep a victim from an attack in court later on. Moreover, on the initial form seeking restraints and protection the victim of abuse can detail issues and concerns with the parent-child relationship between the perpetrator of violence and the child. Doing so can mitigate an attack later on, alleging the victim for being the cause of an estrangement between the violent parent and the child.

Protective Order Hearing

Court may give little time for protective order hearings. They may have multiple hearings in a single morning and may consequently resist putting on full hearings. Assuming the violence and history have been detailed for the first court filing, the critical question that is asked of the litigant will be a variation of this: “Is everything you have written with regard to the history true and accurate to the best of your ability?” If the answer is “yes” and there is no adversary at the initial hearing, there is a strong likelihood a protective order could be granted based on that testimony. If there is a follow-up hearing for a final restraining order, that

inquiry can be repeated and details can be given. Clients should be forewarned and prepared to answer an attack that their behavior instigated the violent episode. Or, they may be attacked that they responded with some violence which can be used to argue they are not sincerely afraid. The truth is always the best defense. The impact on children should be raised as a part of the history initially reported. Any corroborating evidence is helpful at a contested final hearing. Did the client write a contemporaneous note on her calendar? Did the client cancel any appointments following an incident of violence? Did the client say anything to anyone? If so, consider bringing them as a witness as it will assist your clients' credibility.

The Law

Know the nuances and details of the law. This means knowing the leading cases as well as the statute. Know the history of the case as it relates to the law. For example, a prior denial of a restraining order does not mean a victim of violence should not attempt to get a restraining order later if more violence or threats occur.

Critically, restraining orders are designed for a victim's protection. They provide safeguards for children as well. The law understands that perpetrators do not necessarily stop threats and violence even after divorce or separation. Attorneys can encourage clients to get necessary protections for themselves and their children. Police should also be alerted. Victims should also be told to carry a copy of the restraining order wherever they go.

A protective order cannot guarantee the abuse will stop and the victim and children will be safe. Nonetheless, it is a critical step to take because it helps to legally document the abusive experience.

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