Protective Orders

November 15, 2010

Overview

- Study Authorization
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- Background
- Review of Referred Bills
- Additional Policy Issues
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Study Authorization

- During the 2010 Session of the Virginia General Assembly, seven bills dealing with protective orders were referred to the Crime Commission:
  - SB 208 (Barker)
  - HB 453 (Herring)
  - HB 164 (Pogge)
  - HB 656 (Armstrong)
  - HB 1156 (Oder)
  - HB 216 (McClellan)
  - HB 285 (J. Scott)

Study Methodology

- Literature review
- Protective Order Work Group
- Data collection:
  - Virginia Supreme Court
  - Virginia State Police
- Review of other states' laws

Background

- There are two general types of protective orders in Virginia—family abuse protective orders, and stalking protective orders.
- Family abuse protective orders typically originate in JDR courts.
  - Va. Code §§ 16.1-253.4, 16.1-253.1, 16.1-279.1.
- Stalking protective orders typically originate in general district courts.
  - Va. Code §§ 19.2-152.8, 19.2-152.9, 19.2-152.10.

Background

- Family abuse protective orders are available to those parties who meet the definition of a "family or household member" as defined by Va. Code § 16.1-228:
  - (i) Spouse,
  - (ii) Former spouse,
  - (iii) Parents, stepparents, children, stepchildren, siblings and half-siblings, grandparents, grandchildren,
  - (iv) In-laws, if they reside in the same home,
  - (v) Individuals who have a child in common, and,
  - (vi) Individuals who have cohabitated within the last 12 months, and their children if the children are living with them at the time of filing.

Background

- Family abuse protective orders are available in instances where there has been "family abuse" as defined by Va. Code § 16.1-228:
  - "Any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury."
- There is no requirement that a criminal warrant be issued.

Background

- Stalking protective orders are available to any person who has been the victim of stalking, sexual battery, aggravated sexual battery, or a criminal offense resulting in a serious bodily injury.
- A stalking protective order cannot be issued unless a criminal warrant has also been issued.

Background

- For both family abuse protective orders and stalking protective orders:
  - An emergency order may be issued ex parte, expiring at 11:59 p.m. on the third day following issuance, with one additional 3 day extension possible if the victim is incapacitated;
  - A preliminary protective order may be issued ex parte, upon good cause shown; a full hearing is to be held within 15 days, and in no event can the preliminary order be extended more than 6 months;
  - A "final" protective order may not be issued ex parte, and may last for up to 2 years, with additional 2 year extensions possible.

Background

- In 2009, the number of emergency protective orders issued was:
  - 35,000 for family abuse
  - 1,200 for stalking
- The number of preliminary protective orders issued was:
  - 32,700 for family abuse
  - 570 for stalking
- The number of final protective orders issued was:
  - 15,000 for family abuse
  - 400 for stalking

Background

- At any one time, there are in effect approximately:
  - 520 emergency protective orders
  - 1,900 preliminary protective orders
  - 15,000 final protective orders

Referred Bills: Senate Bill 208

- As originally introduced, SB 208 would have added, to the definition of "family or household member," people involved in a "substantive, intimate dating relationship."
- The intent of this bill, as introduced, was to allow persons in a current or former dating relationship the ability to seek family abuse protective orders.

Referred Bills: Senate Bill 208

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

Referred Bills: Senate Bill 208

- A substitute bill was introduced in the Senate Courts of Justice Committee that expanded the availability of stalking protective orders.
- Anyone who was the victim of any crime resulting in bodily injury (not restricted to serious bodily injury, as is the current law) or was the victim of an assault, would be able to seek a protective order.

Referred Bills: Senate Bill 208

- A fifty state review was conducted to determine how many states allow someone in a "dating relationship" to seek a protective order.
  - No requirement of marriage, cohabitation, or child in common
- Forty-two states currently allow some types of dating relationships to qualify for protective orders.

Referred Bills: Senate Bill 208

- Examples of how a "dating relationship" is defined:
  - The following factors may be considered in determining whether the relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship:
  - (a) The type of relationship.
  - (b) The length of the relationship.
  - (c) The frequency of the interaction between the victim and the defendant.
  - (d) If the relationship has terminated, the length of time since the termination.

Ariz. Rev. Stat. § 13-3601(A)(6)

Referred Bills: Senate Bill 208

- Examples (continued):
  - [A] dating relationship means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship. A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a "dating relationship."

Tex. Fam. Code Ann. § 71.0021(b) and (c)

Referred Bills: Senate Bill 208

- Examples (continued):
  - [A] dating relationship is one wherein the parties [of the opposite sex] are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

N.C. Gen. Stat. § 50B-1(b)(6)

Referred Bills: Senate Bill 208

- Examples (continued):
  - "Family or household members" means persons who: … are or were dating: Provided, That a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship.

W. Va. Code § 48-27-204(4)

Referred Bills: Senate Bill 208

- Examples (continued):
  - Adults or minors who are dating or who have dated or who have or had a sexual relationship, [as used herein "dating" and "dated" do not include fraternization between two (2) individuals in a business or social context].

Tenn. Code Ann. § 36-3-601(5)(C)

Referred Bills: Senate Bill 208

- Advantages to having “dating relationship” protective orders heard in JDR courts:
  - Implicitly gives legislative recognition to the problem and inherent dangerousness of dating violence.
  - JDR judges have extensive experience with protective orders, the interactions of volatile couples, and the signs and circumstances of abused victims.

Referred Bills: Senate Bill 208

- Disadvantages to having "dating relationship" protective orders heard in JDR courts:
  - If the jurisdiction of JDR courts is expanded in this way, the problem of over-crowded dockets in some locales could become much worse.
  - If concurrent criminal charges are heard in the general district court, two different judges might be deciding the facts of one event—a lack of judicial efficiency.
  - If concurrent criminal charges are heard in the JDR courts, it would be a significant change in their core role and function.

Policy Issues

- Should Virginia's protective order statutes be expanded to include any person who can show, by a preponderance of the evidence, that he has been threatened, and has a reasonable apprehension of bodily injury?
- Should Virginia's protective order statutes be expanded to include people who are, or were, in a dating relationship?
  - If so, should these cases be heard in JDR courts or general district courts?
  - Should there be a time limit on dating relationships that have ended, similar to the 1 year limit for cohabitating couples?

Referred Bills: House Bill 453

- HB 453 would deem a protective order to be personally served on the respondent if law enforcement either provides him with a copy of the order, or a notice of the issuance of the order, on a form approved by the Supreme Court of Virginia.

Referred Bills: House Bill 453

- Currently, it is not possible for all law enforcement officers in Virginia to be able to provide copies of protective orders to respondents that they encounter by chance during traffic stops.
- Of the 109 (out of 134) law enforcement agencies that responded to our survey:
  - 56 (51%) have MDTs (mobile data terminals) or MDCs (mobile data computers) in all patrol vehicles;
  - Another 20 (18%) have MDTs or MDCs in only some patrol vehicles; and
  - The remaining 31 (28%) do not have any MDTS or MDCs in their patrol vehicles.

Referred Bills: House Bill 453

- If the protective order were lengthy, with many requirements and exceptions, a simple form would not give sufficient notice to the respondent as to what restrictions he was under.

Policy Issue

- Should the service of a notification form by law enforcement, upon the respondent, be deemed personal service of a protective order?

Referred Bills: House Bill 164

- HB 164 would authorize judges to require the respondent of a protective order to wear a GPS tracking device or other similar device.
  - The decision would be discretionary with the judge.
  - The judge could also require a GPS device to be worn if a person were convicted of stalking, or pursuant to an order to vacate the marital home under Va. Code § 20-103.

Referred Bills: House Bill 656

- HB 656 is identical to HB 164, but adds the requirement that the respondent pay for the cost of the GPS device.

- It is also specified that the device must send a signal to law enforcement and the petitioner if the respondent approaches a prohibited location.

Referred Bills: House Bill 164/656

- The use of GPS tracking in domestic violence situations is a very new development, nation-wide.
- A fifty state review was conducted to determine how many states allow, by statute, a judge to require a person subject to a protective order to wear a GPS device.
- Eight states were identified that specifically reference protective orders in connection with a GPS or similar device:
  - Hawaii, Illinois, Indiana, Massachusetts, Michigan, North Dakota, Ohio, and Oklahoma.
- Only Ohio allows a judge to require GPS tracking as a requirement of a protective order, and not as a condition of bail or probation when a protective order is violated.

Referred Bills: House Bill 164/656

- Some counties and states require GPS tracking although there is no specific statutory authorization to allow this.
  - Judges in Mecklenburg County, North Carolina, will sometimes require GPS as a condition of bond for repeat offenders charged with felony domestic violence crimes.
- Some states allow GPS tracking for any kind of probation, not limited to domestic violence cases.
- A number of states, such as California and Massachusetts, have statutes authorizing GPS for probationers, but have not implemented programs due to a lack of funding.

Policy Issues

- Should judges, at their discretion, be able to require a respondent subject to a protective order to wear a GPS device?
  - Who pays for the device?
  - Should the respondent bear the cost? What if he is indigent?
- Should judges be able to order this, but only in the context of pre-trial release or probation?
- Should judges be able to order this, but only if there is a special request made by the petitioner, and additional evidence is presented, e.g., previous convictions for violating protective orders, or serious physical injury to the petitioner?

Referred Bills: House Bill 1156

- HB 1156 would allow a minor to petition a JDR court for a protective order, without the consent of a parent. The minor could proceed *pro se.*

- The court would have to appoint a guardian ad litem for the minor.

Policy Issue

- Should minors be able to petition for a protective order, without parental consent?

Referred Bills: House Bill 216

- HB 216 would make the respondent of a family abuse or child abuse protective order, who assaults the protected person, guilty of domestic assault under Va. Code § 18.2-57.2.
- In most cases, under current law, such an assault would already be domestic assault.
- This bill would only affect those cases where the protected person was a "family or household member" at the time the protected order was issued, but no longer met that definition at the time of the assault.

Referred Bills: House Bill 216

- The penalties for assault and domestic assault are generally the same—a Class 1 misdemeanor. However, a third conviction for domestic assault within 20 years is a Class 6 felony.
- Otherwise, this bill does not affect or increase the penalty that a defendant could receive.

Policy Issue

- Should Virginia make the respondent of a family abuse or child abuse protective order, who assaults the protected person, guilty of domestic assault under Va. Code § 18.2-57.2?

Referred Bills: House Bill 285

- HB 285 allows a court to include in a protective order a provision prohibiting the respondent from harming a companion animal belonging to the protected person, or a family or household member.
- In order for any such harm to be deemed a violation of the protective order, it must be done with the intent to threaten, coerce, intimidate or harm the protected person or a family or household member.

Policy Issue

- Should protective order statutes specifically mention pets and companion animals?
  - Note: Arguably, judges already have the authority to do this. Alternatively, this bill could be expanded to include prohibiting damage to personal property in general.

Additional Policy Issues

- Should the warrant requirement for stalking protective orders be eliminated?

- Should the penalties for violations of stalking protective orders be made identical to the penalties for violations of family abuse protective orders?

Additional Policy Issues

- Should judges be prohibited from making generic "no contact" orders in cases of domestic assault? (They either issue a protective order, at the request of the victim, or do not prohibit future contact between the parties).
- Should a judge be authorized to issue a protective order, *sua sponte*, upon finding a defendant guilty of domestic assault, if they think it is necessary?
- Should judges be prohibited from making generic "no contact" orders in cases of stalking?

Additional Policy Issues

- Should either the definition of "family abuse," or the requirements for a family abuse protective order, be broadened to include severe emotional distress, psychological trauma, and damage to property so as to intimidate and control another?
  - This is the definition of "domestic violence" found in Va. Code § 38.2-508(7).
- Should the behaviors that can qualify for a stalking protective order be broadened in this way?

Additional Policy Issues

- Should the issuance of a protective order upon a conviction for stalking not be automatic, but only upon the request of the victim?
  - This would mirror the process for convictions of domestic assault.
- If a stalking emergency protective order is issued, and the victim is incapacitated, should law enforcement be able to petition for an extension, as they can with family abuse emergency protective orders?

Additional Policy Issues

- Should the term “family abuse” be changed to “domestic violence?”
- Should the term “stalking protective order” be changed to “restraining order?”

Additional Policy Issues

- Should law enforcement be prohibited from requesting a family abuse emergency protective order if a criminal warrant has not been issued?
  - Victims would still be able to apply for an emergency protective order without requesting a warrant.
- Should family abuse emergency protective orders automatically expire after 72 hours, and not continue past that, unless the petitioner specifically petitions the court to continue the order?
  - Under current law, they last for 72 hours or until the court is next in session.

Additional Policy Issues

- Should the law be clarified, that when a new protective order is issued upon a conviction for violating a protective order, the new protective order supersedes the old one?
  - Under current law, upon a conviction for violating a protective order, a new protective order is immediately issued.
- Should the law be clarified that a stalking protective order can be obtained against a juvenile?

Additional Policy Issues

- Should the family abuse protective order sections in Title 16.1 be reorganized, and placed in their own Article?

- Should a person, subject to a "child abuse" preliminary protective order under Va. Code § 16.1-253, still be allowed firearms rights, if the reason for the order was truancy or a "normal development" issue?

Training Issues

- Should an educational DVD or pamphlets be made available in general district court clerks' offices to assist victims in petitioning for a protective order?
- Should judicial and criminal justice personnel receiving training on domestic violence and protective order issues, including the proper use, if available, of video petitions to magistrates?
- Should judges receive training on the requirement that a violation of a stalking protective order requires a new protective order to be issued?

Discussion