Chapter 1:

Introduction

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Overview of the Problem

Domestic violence is a severe and pervasive problem. According to national surveys, nearly one-quarter to one-third of American women reported being physically or sexually abused by a husband or boyfriend at some point in their lives. National Center for Injury Prevention and Control, Costs of Intimate Partner Violence Against Women in the United States 1, 21 <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf> (Mar. 2003) (accessed Jan. 28, 2010); The Commonwealth Fund, Health Concerns Across a Woman's Lifespan: 1998 Survey of Women's Health <http://www.commonwealthfund.org/~/media/Files/Publications/Fund%20Report/1999/May/Health%20Concerns%20Across%20a%20Womans%20Lifespan%20%20The%20Commonwealth%20Fund%201998%20Survey%20of%20Womens%20Health/Healthconcerns__surveyreport%20pdf.pdf> (May 1999) (accessed Jan. 28, 2010). If one extrapolates those numbers to Nebraska women, it reveals that approximately 224,000 to 299,000 Nebraska women have been victims of domestic violence at some point in their lives. U.S. Census Bureau, State and County Quick Facts <http://quickfacts. census.gov/qfd/states/31000.html> (Nov. 17, 2009) (accessed Jan. 28, 2010). There is also a significant overlap between domestic violence and child abuse. In a national survey of more than 2,000 American families, it was found that approximately 50 percent of the men who frequently assaulted their wives also frequently abused their children. Murray A. Straus and Richard J. Gelles, Physical Violence in American Families (Transaction Publishers 1990). Other surveys, which were done on a smaller scale, indicate that the coincidence of child abuse and domestic violence is between 30% and 60%. Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Woman Abuse <http://new.vawnet.org/category/Main_Doc.php?docid=389> (VAWNet Feb. 1997) (citations omitted) (accessed Jan. 28, 2010).

Nebraska's network of twenty-two (22) domestic violence and sexual assault programs, as well as its four (4) tribal programs, serve only a fraction of these women and children because of the programs' very limited resources. In addition, domestic violence is a very complex problem and victims have many reasons for not coming forward for assistance. Such reasons include fear of the abuser; power and control tactics of the abuser; family, peer, or religious pressure; fear of being unable to financially support self and/or children; and,

fear of being labeled as "battered" or a "victim." When victims of domestic violence are ready for help, advocates at the programs can assist them and their children become safer by developing strategies, often called "safety plans," and by providing them with a net of support systems, including support groups, short term financial assistance, and referral to government and other agencies for necessary public assistance or benefits.

Working with an advocate and safety planning are only part of attempting to provide a battered victim with safety and independence. Often, one part of a safety plan could be a domestic abuse protection order. In some cases, it may be safer if a victim does not get a protection order. It is critical that the petitioner safety plan around the possibility of obtaining a protection order, as in some cases, the entry of a protection order does little to deter certain abusers, and in fact, may exacerbate violence. In other cases, protection orders may offer a victim some peace of mind, because with some abusers, the existence of a protection order is an effective deterrent from further violence or harassment of the victim.

Because of the pervasiveness of domestic violence and the benefits that can be obtained from protection orders, judges are routinely called upon to grant protection orders. Although protection orders will not solve all of the issues facing a victim of domestic violence, it may be an effective piece of a victim's short and long term safety planning for some victims. There is widely conflicting information about the overall effectiveness of protection orders, but in some cases, the existence of a protection order can either greatly reduce violence or stop it altogether. Victoria Holt et al., Civil Protection Orders and Risk of Subsequent Police-Reported Violence, 288 J.A.M.A. 589 (Aug. 7, 2002); James Ptacek, Battered Women in the Courtroom: The Power of Judicial Response (1999) (reviewed in Meda Chesney-Lind, James Ptacek, Battered Women in the Courtroom: The Power of Judicial Response, 35 Crime, L. & Soc. Change 363 (2001)).

1. Myths and Facts about Domestic Violence

In order to effectively deal with the permeating issue of domestic violence, one has to have a grasp on the dynamics of a domestic violence situation. There

are many myths surrounding domestic violence. As discussed in the first section of this chapter, domestic violence is far more prevalent than most people think, and there are many preconceived notions that individuals in the legal system may believe about domestic violence. These preconceptions could negatively affect the legal system's ability to meet the needs of the battered victims before it.

Among those myths are myths about the "typical" batterer. So what kind of person batters an intimate partner? The answer is that there is **no** answer—there is no single profile that encompasses the characteristics of all batterers. Battering behavior crosses racial, cultural, religious, age, and personality lines. Mike Brigner, The Ohio Domestic Violence Benchbook: A Practical Guide to Competence for Judges & Magistrates 2 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (2d ed. 2003) (accessed Feb. 1, 2010). Specifically, the following tend to be common misconceptions among members of the legal system:

- Myth: If a batterer could control his anger, he would not batter.

  Reality: Domestic violence is not caused by a batterer who is "out of control." Domestic violence is a systematic pattern of various types of behaviors designed to exert control over the victim. If domestic violence was just about anger, batterers would strike out in anger toward other family members, supervisors at work, and other acquaintances. This is not to say that some batterers will not batter their intimate partners when they are angry, but anger is not the underlying cause of the battering. Id. at 2-3; Iowa Coalition Against Domestic Violence, Questions about Domestic Violence <http://www.icadv.org/faq.asp> (2006) (accessed Feb. 1, 2010) (adapted from Family Violence Protection Fund, Domestic Violence: A National Curriculum for Family Practitioners (1995)).

- Myth: Most batterers have substance abuse addictions or mental illness that causes their violent behavior.

  Reality: While substance abuse and mental illness may contribute to domestic violence, they do not cause domestic violence. Brigner, Ohio Benchbook at 2 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf>; Iowa Coalition <http://www.icadv.org/faq.asp>.

- Myth: Batterers only batter when their partners provoke them in some way.

Reality: Batterers do tend to minimize their behavior, deny and/or lie about their behaviors, and blame the victim. Brigner, Ohio Benchbook at 2 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf>. "If she didn't make me so mad…" or "My wife is crazy and I had to calm her down…" The fact is, no matter what the behavior of the victim, violence against an intimate partner is against the law. The nature of an assault does not change just because it is against an intimate partner.

The practical reality is that batterers have a need to control their victims. They have developed techniques over the course of their relationships that allow them to exert control over their victim. Batterers believe that they have a right to batter their victim, and that they will not be held accountable for their behavior—not even in the courtroom. Id. at 2-3. Further, batterers tend to have a high level of recividism, and are highly likely to either batter the same partner again or have a long history of other relationships in which they have battered former intimate partners. American Bar Association Commission on Domestic Violence, Key Statistics <http://www.abanet.org/domviol/statistics.html> (accessed Jan. 28, 2010) (citing Edward Gondolf, Reassault at 30-Months after Batterer Program Intake, 44 Int'l J. of Offender Therapy and Comparative Criminology 111 <http://www.iup.edu/maati/publications/outcomeabstracts. htm#outcome4>) (2000)).

There are similarly many myths about the "typical victim." As with batterers, though, there is no single profile for a typical victim. Domestic violence knows no boundaries—it is experienced by poor women and wealthy women, minorities and non-minorities, religious and non-religious. Brigner, Ohio Benchbook at 4 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf>.

- Myth: There is adequate help from law enforcement, the courts, and their families for victims to be able to escape the violence.

  Reality: Many victims are isolated from their support systems of friends and family by a batterer. The batterer has ingrained in the victim that no one will believe her and that the police and the courts cannot help her. Id. Even if the court system is involved in a criminal prosecution, less than half of those prosecuted will be convicted. Andrew R. Klein, Practical Implications of Current Domestic Violence Research 42 (United States Department of Justice, National Institute of Justice, Apr. 2008) (citing Joel H. Garner and Christopher

D. Maxwell, Prosecution and Conviction Rates for Intimate Partner Violence 49 (Joint Centers for Justice Studies, Inc. (Shepherdstown, W.V.) 2008); Patricia Tjaden and Nancy Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence 52 (United States Department of Justice, National Institute of Justice 2000)).

- Myth: A victim needs to leave in order to be safe, or that when a victim leaves the batterer, the violence stops.

  Reality: Research actually indicates that a woman is most in danger of violence when she attempts to separate from her batterer. In 75% of spousal assaults, the parties were separated, making a victim's fear of being hurt or killed if she leaves him a completely realistic fear. The pressure of the community for the victim to leave the abuser may significantly increase the amount of danger she may encounter. Further, more victims are killed when they attempt to leave their abusers than at any other time. Brigner, Ohio Benchbook at 4 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf>. Staying with the batterer may be the safest option for a victim.

- Myth: Many allegations of domestic violence are false.

  Reality: "In reality, the overwhelming majority of women who report abuse are telling the truth, and an even greater number do not report the abuse...most abused women do not disclose victimization, even when reporting such information may be of vital importance to them… [O]f course, it is important to sort through varying accounts to ensure that no one is falsely accused of violent behavior. Nevertheless, studies continue to confirm that ***underreporting*** of violence is a much more significant problem than false accusations." Id. at 5 (quoting Peter Jaffe, et al., Working Together to End Domestic Violence (Mancorp Publishing Inc. 1996) (Emphasis added)).

For an in depth perspective regarding the myths and realities surrounding domestic violence, please see a resource cited by the Ohio Benchbook: Anne L. Ganley, Ph.D., Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases, Chapter 2 of The Domestic Violence Manual for Judges, Washington State Gender and Justice Commission (1997).

Overview of the Bench Guide

This bench guide is designed to serve as a guide for judges handling the most common type of legal protection available for victims of domestic abuse: domestic abuse protection orders under the Protection from Domestic Abuse Act, found at Nebraska Revised Statutes §§ 42-901 et seq. (Reissue 2008). Although the domestic abuse protection order is not the exclusive remedy available to protect victims of domestic violence and their families, this remedy was specifically enacted to make it easier for all victims of domestic violence to gain protection, and is therefore the most widely used.

This manual will highlight the Protection from Domestic Abuse Act. It will cover the basics of both establishment and enforcement of a domestic abuse protection order, and will also tackle some of the more difficult issues surrounding these orders. It will not, however, discuss other provisions of the statutory scheme that are not relevant to the establishment or enforcement of the protection orders themselves. The bench guide also provides basic information regarding harassment protection orders, which may be available to victims of abuse when the circumstances do not meet the requirements for the entry of a domestic abuse protection order. The statutory authority for harassment protection orders is found at Nebraska Revised Statutes §§ 28-311.02 et seq. (Reissue 2008). Though this bench guide is intended to speak primarily to the issue of domestic abuse protection orders, much of the statutory scheme and case law overlap, so it is impossible to discuss the domestic abuse protection orders without citing authority regarding the harassment protection orders, as well. The manual will, in addition to the state remedies, address the interaction of domestic abuse protection orders with other state and federal laws, such as the Nebraska Child Custody Jurisdiction and Enforcement Act and the Federal Gun Control Act.

Some Quick History of the Protection from Domestic Abuse Act

The Protection from Domestic Abuse Act was first enacted in 1978. Since that time, the Act has undergone several revisions, expansions, and contractions. In order to understand all of the Nebraska case law interpreting the Protection from Domestic Abuse Act, a careful reading of the statute which was then in effect is critical. A brief overview of some of the changes follows.

In 1978, the Protection from Domestic Abuse Act, found at Nebraska Revised Statutes §§ 42-901 et seq., provided that a victim of certain types of abusive behaviors perpetrated by persons related to the victim in a particular way could petition the court for an order enjoining certain behavior of that abuser. Over the Act's 32 year history, the definitions of what constitutes "abusive behavior" and what relationship the abuser must have with the victim have changed. Most significantly, in 1992, persons who were victims of harassment by non-household members were added to the list of persons who could seek a protection order. This addition to the act was short-lived, however, in that in 1998, those "harassment protection orders" were eliminated from the Protection from Domestic Abuse Act, and were moved to their own section at Nebraska Revised Statute § 28-311.09 (Reissue 2008).

The types of behavior a court can enjoin has also undergone radical transformation through the years. Not only is injunctive relief now available, but also affirmative (albeit temporary) relief, such as an award of temporary custody of minor children.

Additionally, the procedures for obtaining protection orders have evolved over time into their current form. Of particular interest is the fact that a protection order could always be obtained on an ex parte basis, although the names for the orders, and the procedures for service of process and timing of any subsequently held hearings have changed over time. Also of note is the fact that petitioners are now given greater access to the protection of the courts because the petition and affidavit forms are standardized and because a petitioner no longer has to pay court costs except for in cases of bad faith.

Finally, enforcement of protection orders has undergone transformations

over the years. In 1984, a criminal penalty was attached for the first time to a violation after service of an order issued pursuant to the Act. In keeping with the general trend in criminal law, those criminal penalties for violations of protection orders have been increased by the Legislature through the years, and now provide for enhanced penalties for subsequent offense. A mandatory arrest provision for violators was added in 1989.

Chapter 2:

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Subject Matter Jurisdiction

1. In General

Nebraska statutory law has created two civil protection order options: the domestic abuse protection order and the harassment protection order. While the primary focus of this bench guide is with regard to domestic abuse protection orders, some information regarding harassment protection orders has been included because not all applicants will meet the relationship criteria for the domestic abuse protection orders, and in some circumstances, regardless of the relationship, the victim may prefer to have a harassment protection order.

Nebraska Revised Statute § 42-924 (Reissue 2008) gives the right to any victim of domestic abuse to file a petition in the district courts of Nebraska to obtain a protection order. Thus, the court has subject matter jurisdiction over any action in which the plaintiff alleges that he or she has been subject to "abuse" as defined by Nebraska Revised Statute § 42-903 (Reissue 2008). For purposes of the Protection from Domestic Abuse Act, abuse is defined as one or more of the following acts between household members:

> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by physical menace, another person in fear of imminent bodily injury; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318[.]

Neb. Rev. Stat. § 42-903(1). The "household member" requirement will be discussed in Chapter 3 of this guide.

If an individual does not meet the requirements for the entry of a domestic abuse protection order, he or she may be eligible for a harassment protection order. Nebraska Revised Statute § 28-311.09 (Reissue 2008) gives a victim of harassment the right to file a petition in the district courts of Nebraska in order to obtain a harassment protection order. As a result of this statute, the court has subject matter jurisdiction over any action in which the petitioner alleges that he or she has been subject to "harassment" as defined by Nebraska Revised Statute § 28-311.02 (Reissue 2008). In many ways, the harassment protection order is,

in essence, very similar to a domestic abuse protection order, because it covers many of the same behaviors that give rise to its issuance, but differs in the fact of to whom such a protection order may be granted.

For purposes of the harassment protection order statutes, "[h]arass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose[.]" Neb. Rev. Stat. § 28-311.02(2)(a).

2. Failure to State a Cause of Action versus Subject Matter Jurisdiction

Given that petitions for protection orders are routinely drafted by pro se litigants, the court may frequently be faced with petitions which do not set forth facts sufficient to state a cause of action for the issuance of a protection order. However, a court should not confuse inartful pleading with lack of subject matter jurisdiction. The Supreme Court of Nebraska has stated that "[t]he sufficiency of a petition to state a cause of action is not the test of jurisdiction of a court or of the validity of a judgment rendered because of the petition." Gasper v. Mazur, 157 Neb. 857, 858, 62 N.W.2d 117, 118 (1954). Instead, where the allegations of a petition are sufficient to inform the respondent what relief the petitioner demands and the court has the power to grant it in a proper action, jurisdiction exists.

The Nebraska Court of Appeals has spoken directly to the sufficiency of the pleadings to state a cause of action in the context of a domestic abuse protection order. Buda v. Humble, 2 Neb. App. 872, 517 N.W.2d 622 (1994). In Buda, the petitioner had included in his petition and affidavit that harassing acts of the respondent included disturbing the peace of the petitioner, imposing restraints upon personal liberty, disturbing the peace of the children, telephone hang-ups, false accusations of damage to her vehicle, and false applications to the news media. Id. at 876, 517 N.W.2d at 625. The Court of Appeals, in reversing the entry of the protection order by the trial court, stated:

> [t]he allegations contained in [the petitioner's] application, particularly those in the affidavit wherein he was to specifically describe the conduct complained of, are too general to support a finding that any protective order should be issued. These allegations are simply conclusions. They do not sufficiently state

> that [the petitioner] or his children have been willfully or maliciously harassed by [the respondent].

Id. at 876-77, 517 N.W. 2d at 625. The petition and affidavit must contain more than conclusions; they must include specific details regarding specific facts.

In the protection order context, the form petition itself, Form 19:8 (Revised Jun. 2008) for domestic abuse protection orders and Form 19:2 (Revised Jun. 2008) for harassment protection orders, informs the respondent what relief is being requested, and under what statutory authority the petitioner is bringing the action. These allegations alone should be sufficient to establish subject matter jurisdiction for even the most poorly drafted petition. As the Buda case instructs, however, it is important to state the facts supporting the petition, not just the conclusions.

There is authority from the Supreme Court of Nebraska that indicates that the court may assume subject matter jurisdiction over either type of protection order, whether domestic abuse or harassment, regardless of which form petition the petitioner actually completes and files. Mahmood v. Mahmud, 279 Neb. 390, 778 N.W.2d 426 (2010). While case law seems to indicate otherwise, the petitioner and trial courts would be well advised to avoid using the forms interchangeably, as the consequences for ordering one or the other are significant. For a further discussion of this matter, see Chapter 5.

3. Out-of-State Abuse

Some questions have arisen as to whether the district courts in Nebraska have subject matter jurisdiction over abuse that did not occur in Nebraska. In other words, is there any limitation on the court's ability to enter a protection order in Nebraska other than personal jurisdiction over the respondent?

As long as there is personal jurisdiction over the respondent, there is nothing in the statute itself which limits the court's power to act. The statute seems to permit someone with no connections whatsoever to Nebraska to petition for a protection order. As a practical matter, however, it would be unusual for a petitioner with no connection to Nebraska to come to Nebraska's courts seeking protection from abuse. There certainly will be times, however, when a petitioner who is relocating to Nebraska will seek the power of the Nebraska court system to protect against abuse that occurred elsewhere.

Pierson v. Pierson, a New York case, dealt with the issuance of a protection order against a respondent when the acts that formed the basis of the New York petition took place in another state. 147 Misc. 2d 209, 555 N.Y.S.2d 227 (1990). In Pierson, the petitioner and respondent were both residents of New York prior to the filing of the cause of action. They then moved to Florida, where the respondent assaulted the petitioner. The petitioner then moved back to New York and was staying in a shelter when she filed a request for a protection order. The respondent got served in New York when he returned there. The respondent objected to the proceeding on the ground that the court lacked subject matter jurisdiction since all of the acts in the petition occurred outside of New York. The court first found that there was personal jurisdiction over the respondent because he was served with process in New York. The court then stated that there was nothing in the New York statute that limited the jurisdiction of the family court to in-state assaults or harassment. The court found that the respondent's presence in New York continued the risk to the petitioner and found that New York's interest in attempting to stop the violence, end family disruption, and obtain protection was compelling. Id. at 209, 555 N.Y.S.2d at 227.

Using that same reasoning, a Nebraska court could exercise jurisdiction when the petitioner is living in Nebraska, even temporarily. The harder case is when a non-resident petitioner seeks protection in Nebraska's courts against out-of-state abuse by a respondent who has just recently relocated to Nebraska, and who can only be served in Nebraska. A court might wish to decline to hear the action, citing an insufficient nexus with Nebraska for the petitioner to utilize the Nebraska courts for relief. However, if a Nebraska court did that, it may be foreclosing any protection at all for the petitioner, given that no other court may be able to effect personal service on the respondent.

Personal Jurisdiction

1. Obtaining Personal Jurisdiction

Before a court may enter orders personally binding on a respondent, it must have personal jurisdiction over that respondent. Personal jurisdiction issues will rarely arise in protection order cases, given that most petitioners will be seeking protection orders against respondents who are residents of this state. But, there may be occasional times when a petitioner will seek a protection order against a respondent who is a non-resident. In those cases a court may be asked to determine whether it has personal jurisdiction over the respondent.

A. Out-of-State Respondents

The Nebraska standard provides that "[b]efore a court can exercise personal jurisdiction over a nonresident defendant, the court must, first, determine whether a statutory standard of the long-arm statute is satisfied, and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process." Dunham v. Hunt Midwest Entertainment, 2 Neb. App. 969, 972, 520 N.W.2d 216, 219-20 (1994). Since the statutory standard in Nebraska's long-arm statute, Nebraska Revised Statute § 25-536(2) (Reissue 2008), provides that Nebraska courts may exercise personal jurisdiction over a person who has any "contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States," the fighting ground in personal jurisdiction battles in Nebraska is due process. That due process consideration is whether the defendant's contact or relation to this state is such that maintenance of the suit in Nebraska does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945). In any given case, that inquiry takes a court into the concepts of specific jurisdiction and general jurisdiction.

(1) General and Specific Jurisdiction

A court may exercise jurisdiction over a non-resident respondent who engages in activities in the forum state that are continuous and systematic. The concept of general jurisdiction provides that any non-resident respondent who engages in systematic and continuous activities in the forum state may then be sued in that forum state for any claim over which the forum state has subject matter jurisdiction. The exercise of specific jurisdiction is more limited than the exercise of general jurisdiction. A court may exercise specific jurisdiction over a non-resident respondent whose activities or relations with the forum state satisfy a three part test. A comprehensive restatement of that test is set forth by the Court of Appeals of Nebraska.

> (1) [The] nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum -related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Robinson v. Nabco, Inc., 10 Neb. App. 968, 976, 641 N.W.2d 401, 409 (2002).

Several examples illustrate these concepts in the protection order context:

Example 1: Respondent lives and works in Council Bluffs. Petitioner lives in Omaha. The parties were married to each other and then divorced in Minnesota. Recently, Respondent visited Petitioner at her home in Omaha and assaulted her. Petitioner requests a protection order from an Omaha court, an ex parte order is granted and the matter is set for hearing, and the protection order documents are served on Respondent in Council Bluffs. The Omaha court may exercise personal jurisdiction over the respondent under the doctrine of specific jurisdiction. The respondent has placed himself in the forum and then committed an assault in that forum; the protection order is a claim which arose out of the respondent's forum-related activity; and it

is fair for a court to require him to come to Omaha to respond to a request for a protection order.

Example 2: Respondent lives in Council Bluffs, but works on a daily basis in Omaha. Petitioner lives in Omaha. The parties were married to each other and then divorced in Minnesota. Recently, Petitioner visited Respondent at his home in Council Bluffs. During that visit, Respondent assaulted Petitioner. Petitioner requests a protection order from an Omaha court, an ex parte order is granted and the matter is set for hearing, and the protection order documents are served on Respondent in Council Bluffs. The Omaha court may exercise personal jurisdiction over the respondent under the doctrine of general jurisdiction. By working in Omaha, the respondent is engaging in systematic and continuous activities in Omaha and a Nebraska court may therefore exercise jurisdiction over him.

Example 3: Respondent lives and works in Council Bluffs. Petitioner lives in Omaha. The parties were married to each other and then divorced in Minnesota. Recently, Petitioner visited Respondent in Council Bluffs, where Respondent assaulted Petitioner. Petitioner requests a protection order from an Omaha court, an ex parte order is granted and the matter is set for hearing, and the protection order documents are served on Respondent in Council Bluffs. The Omaha court may not exercise personal jurisdiction over the respondent, absent any additional information indicating any connection of the respondent to Nebraska. Respondent has not thrust himself into Nebraska, and has not engaged in any systematic or continuous activities in the forum.

While Nebraska does not have any case law to change the result of Example 3, case law from other states indicates that there may be a way to overcome the issue of personal jurisdiction over an out-of-state respondent with seemingly no substantive physical connections to the state in which the protection order is sought. In a Minnesota case, the Court of Appeals of Minnesota upheld the entry of a protection order against an out-of-state father, finding that through the Minnesota long-arm statute, the Minnesota courts did, in fact, have personal jurisdiction over the father. Hughs on Behalf of Praul v. Cole, 572

N.W.2d 747 (Minn. App. 1997).

In Hughs, a protection order was requested on behalf of a minor child by his mother, against his mother's former boyfriend, who while not the biological father, had been adjudicated by a New Jersey Court to be the minor child's legal father and granted visitation. After that adjudication, the "father" moved to Pennsylvania, and the mother moved to Ohio with the minor child. For several years, the father exercised summer visitation with the minor child. After summer visitation one year, the mother filed a petition for a protection order on behalf of her son in Minnesota, alleging that during the last few summer visitation periods, the father and members of his new wife's family were violent with the child. At the time of the petition, which was granted, the mother and the minor child had recently relocated to Minnesota. Id. at 748-49.

In appealing the entry of the protection order, the father argued that the court did not have personal jurisdiction over him. It was not contested that the appellant never resided in Minnesota, never owned property in Minnesota, never transacted business in Minnesota, nor ever even visited Minnesota. In finding that the Minnesota long-arm statute provided for the exercise of personal jurisdiction over the father, the Court of Appeals noted that under the long-arm statute, Minnesota courts have jurisdiction over a respondent who commits an act outside of Minnesota that caused an injury in Minnesota. Given that the minor child's ongoing and severe emotional distress was suffered in Minnesota because of acts perpetrated against the minor child by the father in Pennsylvania, the state's long-arm statute applies. The court further found that due process was satisfied, because of the father's repeated phone calls to Minnesota regarding visitation, because of the reasonable foreseeability that the father may be involved in custody or visitation litigation in Minnesota, since the child resided in Minnesota, and because of the continuing relationship between the father and the son. Id. at 749-51.

A New Jersey court found that there was personal jurisdiction over the Mississippi defendant to a protection order when in the time leading up to the plaintiff's fleeing to New Jersey, he had threatened

her with a gun and told her that if she should ever try to leave him, he would kill her, the children, and himself; and then following her flight to New Jersey, he called her repeatedly there in an attempt to locate her. A.R. v. M.R., 799 A.2d 27, 30 (N.J. App. 2002). The parties had lived in New Jersey many years before, but had since moved to Mississippi, and the plaintiff was a Mississippi resident when she fled to New Jersey. In finding that the defendant batterer's repeated telephone calls into the state of New Jersey were sufficient to support a finding of personal jurisdiction over him, the Appellate Court of New Jersey stated:

> ["w]ere the court to deny jurisdiction in this case, the victim who seeks shelter in this state would be unprotected, unable to use the procedures established in this state which permit law enforcement officers and the courts to respond, promptly and effectively, to domestic violence cases. The victim would have to wait, in fear, for the alleged abuser to commit an additional act of domestic violence, this time in New Jersey, before having recourse to the law and to the courts of this state."]
>
> . . .
>
> In deciding whether defendant's conduct was such that he should have reasonably anticipated plaintiff's seeking our protection in New Jersey, we cannot lose sight of the purposes of the Act. This is no ordinary suit for money damages, but an action whose result may determine whether plaintiff and her children live or die. Had defendant only threatened in Mississippi to pursue the victim wherever she might go, we might have been obliged to find a lack of jurisdiction. But he went further: he repeatedly placed telephone calls into this state in his search for her.
>
> . . .
>
> Although the context of the telephone calls in the subject case could not be categorized as violations of the Act, in the context of the relationship between these parties, they could not have been placed without the defendant's full awareness of their frightening effect on plaintiff in New Jersey. In light of the parties' historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge, the telephone calls were tantamount to defendant's physical pursuit of the victim here.

Id. at 31-32 (quoting J.N. v. D.S., 693 A.2d 571 (N.J. Ch. Div. 1996)).

While the Nebraska long-arm statute has a similar provision to the Minnesota statute cited in Hughs, it is unclear whether a similar result could be reached in Nebraska. Nebraska Revised Statute § 25-536(1)(d) provides that:

> "[a] court may exercise personal jurisdiction over a person[]…[w]ho acts directly or by an agent, as to a cause of action arising from the person[]…causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state[.]

While the phrase "engages in any other persistent course of conduct" may be of service in a similar case in Nebraska, it is unknown whether the same facts as the Hughs case in Nebraska would cause a court to reach the same result. Similarly, while the A.R. court did not refer to its state long arm statute in its opinion, it did discuss the requirement of minimum contacts at length, and found that the defendant had an adequate connection with New Jersey, despite the fact that the defendant had only called the plaintiff in New Jersey without being physically present in New Jersey.

At least one case out of the Supreme Court of Nebraska has stated that out-of-state defendants' repeated telephone calls to their victim, as well as even visiting her in Nebraska, inducing her to travel out-of-state, where she subsequently died, did not constitute a basis upon which the court could exercise personal jurisdiction over the defendant. Von Seggern v. Saikin, 187 Neb. 315, 189 N.W.2d 512 (1971). Perhaps a distinction could be made between this case, which involved telephone calls inducing the victim to travel out of state, where the actual tortious incident occurred, and with a protection order situation in which the tortious activity was conducted over the telephone, such as a fact pattern which involved continuous harassment and threats over the telephone.

(2) Personal Service in Nebraska

A court may also exercise personal jurisdiction over a

respondent if that respondent was personally served with process here in Nebraska. Burnham v. Superior Court, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990). If, however, a respondent is lured into Nebraska by fraud or trickery and is thereafter personally served with process here, a court may not exercise personal jurisdiction over that respondent unless some other basis for the exercise of personal jurisdiction exists. See Zencker v. Zencker, 161 Neb. 200, 214, 72 N.W.2d 809, 818-819 (1955) (defendant's service with summons in Colorado does not convey personal jurisdiction of the Nebraska court when the plaintiff falsely "lured" the defendant to Colorado in order to sell jointly owned Colorado property). Similarly, a court may not exercise personal jurisdiction over a respondent solely because that respondent has been personally served with process in Nebraska if that service of process occurred while the respondent was traveling to or from or was attending court as a witness in response to a subpoena. Neb. Rev. Stat. § 25-1235 (Reissue 2008). This exemption has been held to be a personal privilege, however, which may be waived under proper circumstances. Mayer v. Nelson, 54 Neb. 434, 436, 74 N.W. 841, 842 (1898).

Example: Respondent lives and works in Council Bluffs. Petitioner lives in Omaha. The parties were married to each other and then divorced in Minnesota. Recently, Petitioner visited Respondent in Council Bluffs, where Respondent assaulted Petitioner. Petitioner requests a protection order from an Omaha court, and an ex parte order is granted. Respondent is served in Omaha while he is attending a concert at the Orpheum. The Omaha court may exercise personal jurisdiction over the Respondent because he was personally served in Omaha.

(3) Voluntary Appearance

The protection order statutes specifically provide for only one method of service, which is service by a sheriff. Neb. Rev. Stat. § 42-926 (Reissue 2008). Given the nature of cases involving protection orders, and the specific provision regarding service by a sheriff, it appears that the legislature has created a system in which the only

option for service is by a sheriff. See Holmstedt v. York County Jail Supervisor, 15 Neb. App. 893, 739 N.W.2d 449 (2007) (citation omitted) ("Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued."), rev'd on other grounds, 275 Neb. 161, 745 N.W.2d 317 (2008). Under this statutory structure, a petitioner would be well advised to serve the respondent by sheriff, as it is the only means provided in the statute.

While the protection order statutes specify service by sheriff, under Nebraska Revised Statute § 25-516.01 (Reissue 2008), "[t]he voluntary appearance of a party is equivalent to service." In many cases, a respondent is not likely to voluntarily submit himself to the court's jurisdiction, but in some cases in which a respondent may decide to appear voluntarily, a voluntary appearance could function as a "substitution" of sorts for actual service by a sheriff. If the respondent learned of the protection order and voluntarily submitted himself to the court's jurisdiction by appearing at a hearing, then any objections as to the insufficiency of service under the Protection from Domestic Abuse statutes would be waived unless brought up in a motion or a responsive pleading (i.e., a request for a hearing). Neb. Ct. R. Pldg. § 6-1112(h)(1).

B. Jurisdiction Based on the "Status" of the Victim as a Protected Party

There is some authority in other state courts that a court still may enter a protection order against a respondent over whom it does not have personal jurisdiction because of the status of the parties. In Caplan v. Donovan, 879 N.E.2d 117 (Mass. 2008), despite the court's admitted lack of personal jurisdiction over the respondent, the court stated that the petitioner was entitled to a protection order of limited scope because of the state's interest in protecting victims of domestic violence within their state. In its decision, the court stated that "a valid abuse prevention order issued without personal jurisdiction cannot impose any personal obligations on a [respondent], and is limited to prohibiting actions of the [respondent]." Id. at 124. The court could not compel the respondent to take any affirmative actions because of the lack of personal jurisdiction, but so long as the respondent was accorded due process through

providing reasonable notice and an opportunity to be heard, the respondent could be subject to an action restricting his actions. Id.

2. Challenging Personal Jurisdiction

Because notice of protection order proceedings is almost always given to a respondent who is a resident of the state by personal service from a sheriff within Nebraska, the court will rarely be faced with a situation where personal jurisdiction is an issue. If, however, a respondent does have a challenge to the court's exercise of personal jurisdiction over the respondent, there are two ways for a respondent to make that challenge.

A. Rule 12 Motion or Answer

Nebraska Revised Statute § 25-516.01 provides that a "defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process may be asserted only under the procedure provided in the pleading rules adopted by the Supreme Court." The pleading rules themselves provide that the defense of lack of personal jurisdiction may be made by responsive pleading or by motion. Neb. Ct. R. Pldg. § 6-1112(b). Section 25-516.01 continues on to state that:

> [i]f any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling will be waived and not preserved for appellate review if the party asserting the defense either (a) thereafter files a demand for affirmative relief by way of counterclaim, cross-claim, or third-party claim or (b) fails to dismiss a demand for such affirmative relief that was previously filed. If any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling on any issue, except the objection that the party is not amenable to process issued by a court of this state [i.e. personal jurisdiction], will be waived and not preserved for appellate review if the party asserting the defense thereafter participates in proceedings on any issue other than those defenses.

In other words, as long as an objection to the exercise of personal jurisdiction over a respondent has been raised properly, the objection will be preserved for appellate review. This is true even if the respondent thereafter participates fully in the proceeding. An objection to the method of service, however, will

not be preserved.

B. Collateral Attack in Enforcement Proceeding

The second way a respondent may be permitted to challenge the court's exercise of personal jurisdiction over a respondent is by raising the lack of personal jurisdiction over the respondent in any subsequently commenced contempt or criminal enforcement proceeding. Generally, a collateral attack is prohibited under the collateral bar rule, which provides that "...a party may not, as a general rule, violate a court order and raise the issue of its unconstitutionality collaterally as a defense in a contempt hearing." Sid Dillon Chevrolet v. Sullivan, 251 Neb. 722, 733-34, 559 N.W.2d 740, 747-48 (1997). This method is authorized in general injunction cases, where, if a defendant fails to answer or appear in the initial proceeding, and is subsequently brought before the court for contempt for failing to abide by the order, the defendant is then permitted to defend the contempt action by raising the issue of lack of personal jurisdiction over the defendant in the initial proceeding. Id. at 733-34, 559 N.W.2d at 747-48. There is an exception to the collateral bar rule when the court is without jurisdiction over the person being held in contempt, because "then any order entered would be void ab initio and not subject to the collateral bar rule." The collateral bar rule has been considered in the protection order context with regard to civil and criminal violations of a protection order. Hill v. Ramey, 744 N.E.2d 509 (Ind. App. 2001) (at a civil contempt hearing for a violation of a protection order, the respondent was able to assert lack of personal jurisdiction as a defense); State v. Andrasko, 454 N.W.2d 648 (Minn. App. 1990) (in the criminal contempt context, despite a successful appeal of the entry of a protection order against the respondent, the protection order was merely voidable, as compared to void ab initio). It is clear that should the protection order be violated when there is a lack of personal jurisdiction over the respondent, for whatever reason, that the order could be considered a nullity, though the cases make it clear that violation of a "voidable" protection order, as compared to a "void" protection order, still can result in criminal punishment of a respondent.

Jurisdiction When Party is a Tribal Member

Given the sovereignty of Indian tribes in the United States, there are issues raised when a non-tribal member attempts to bring a tribal member to a state district court to answer a civil cause of action. One resource on Native American law has stated that "[a] description of civil jurisdiction in Indian country is best begun by establishing what the state courts cannot do." William C. Canby, Jr., American Indian Law 1, 173 (3d ed. West 1998). While this review will not run the gamut of allowable and unallowable civil cases in state and tribal courts, it will try to narrow the scope of what each court can and cannot do with respect to protection orders.

The Supreme Court of the United States has narrowed the jurisdiction of the state courts over civil matter involving tribal members on tribal land. Fisher v. Dist. Ct., 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). These limitations are not, however, applicable in Nebraska, due to the enactment of Public Law 280 in 1953. That legislation, partially codified at 28 United States Code § 1360 (2006), gave the state courts of several states, including Nebraska, jurisdiction over civil causes of action between Indians or to which Indians were parties to the same extent as the state has jurisdiction over other civil causes of action. In 1968, the Indian Civil Rights Act changed this grant of jurisdiction by permitting states to "retrocede" jurisdiction. 25 U.S.C. § 1323(a) (2001). Nebraska has retroceded criminal jurisdiction with regard to the Omaha, Winnebago, and Santee Sioux tribes, as well as recently retroceding civil jurisdiction to the Santee Sioux tribe. 71 Fed. Reg. 7994 (Feb. 8, 2006). As long as the issuance of a protection order is deemed to be a "civil cause of action" pursuant to 28 United States Code § 1360, Nebraska state courts should have jurisdiction to issue protection orders against Indians, except with regard to Santee Sioux respondents.

In the protection order context, however, there is precedent to suggest that if the domestic abuse occurred on reservation land, between tribal members who are both domiciled on the reservation, a state court could still lack

jurisdiction, even in a mandatory Public Law 280 state if the "exercise of state court jurisdiction . . . would infringe upon the rights of the tribe to establish and maintain its tribal government." St. Germaine v. Chapman, 505 N.W.2d 450 (Wis. App. 1993). In St. Germaine, the Wisconsin Court of Appeals determined that, despite Wisconsin being a mandatory Public Law 280 state, its state courts lacked jurisdiction to enter a protection order when the protection order was sought by one member of the Lac du Flambeau tribe against another where the conduct arose solely on Indian land, and where the tribe had a domestic abuse ordinance which provided identical relief to Wisconsin's protection order statute.

A respondent may be served on tribal lands with a state court protection order by the county sheriff when the respondent is a nonmember of the tribe. State v. Zaman, 984 P.2d 528, 529 (Ariz. 1999) (citing Organized Village of Kake v. Egan, 369 U.S. 60, 72, 82 S. Ct. 562, 569, 7 L. Ed. 2d 573 (1962); Langford v. Monteith, 102 U.S. 145, 147, 26 L. Ed. 53, 54 (1880); Canby, American Indian Law at 151. Despite a dissent to the contrary, the majority held in Zaman that Public Law 280 did not affect service issues with regard to nonmembers, only upon members. 984 P.2d at 529.

If the cause of action arises off the reservation, but it involves a member of a tribe who lives on the reservation, it appears that the county sheriff may not serve a state court civil process on the reservation. Id. at 530 (citing Dixon v. Picopa Construction Co., 772 P.2d 1104 (Ariz. 1989); Felix S. Cohen, Handbook of Federal Indian Law 31 (1982 ed.)). Service of a protection order on a member, on tribal land, may be considered "out-of-state" for purposes of service of process. 984 P.2d at 529 (citing Note, Service of Process on Indian Reservations: A Return to Pennoyer v. Neff, 18 Ariz. L. Rev. 741, 750 (1976)). Unfortunately, service by a tribal sheriff, unless he has been cross-deputized with the county sheriff's office, might violate state law. Id. The one exception to this is the Santee Sioux tribe, with its retroceded civil jurisdiction. This retrocession means that a county sheriff may serve a member of the tribe, who lives on the reservation, with service of process on the reservation.

Essentially, there is very little authority on jurisdictional and service issues for civil matters between state courts and tribal courts. This creates a situation in which there are no hard and fast rules that will guarantee personal jurisdiction and/or adequate and legal service of process.

Venue

Nebraska Revised Statute § 42-924 provides that any victim of domestic abuse may file a petition and affidavit for a protection order with the clerk of the district court. Nebraska Revised Statute § 25-403.01 (Reissue 2008) then provides that any action can be brought in:

1. The county where defendant resides; or
2. The county where the cause of action arose; or
3. The county where the transaction or some part of the transaction occurred out of which the cause of action arose; or
4. If all defendants are non-residents of Nebraska, in any county.

Finally, Nebraska Revised Statute § 25-403.01 provides that if an action is brought in any other county than is proper, the court still has jurisdiction, but upon timely motion by defendant, the court must transfer the action to the proper court in a county in which such action might have been properly commenced. Once it is transferred, the new court may order the plaintiff or the plaintiff's attorney to pay to the defendant all reasonable expenses, including attorney's fees, incurred by the defendant because of the improper venue or in proceedings to transfer the action. Before a court orders a petitioner in a protection order case to pay those expenses, it should first contemplate whether the expense provision of that statute overrides the "no cost" provision of Nebraska Revised Statute § 42-924.01 (Reissue 2008), discussed in Chapter 5.

Chapter 3:

Elements of Proof

Elements of Proof

Abusive Conduct by Respondent

1. Intentionally and Knowingly Causing Bodily Injury
   A. Sufficiency of the Evidence
2. Attempting to Cause Bodily Injury
   A. Sufficiency of the Evidence
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Respondent is a Household Member

1. Household Member Defined
   A. Residing Together
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   D. Dating Relationship

Elements of Proof

Nebraska Revised Statute § 42-924 (Reissue 2008) provides that a victim of domestic abuse may seek a court order of protection from an abuser. But before that victim is entitled to relief under that section, he or she must be able to allege and prove that he or she is a victim of "abuse" as defined in Nebraska Revised Statute. § 42-903(1) (Reissue 2008). Notice that the definition of "abuse" under that section requires proof of certain conduct by the respondent.

A further prerequisite to the entry of a protection order is the existence of a certain relationship between the petitioner and the respondent. In order for a domestic abuse protection order to be granted, the respondent must be family or a "household member," as defined in Nebraska Revised Statute § 42-903(3).

With regard to harassment protection orders, the requirement of that relationship that is required for the entry of a domestic abuse protection order is not present, making it a viable alternative for an individual who is being threatened or harassed, but who does not meet the statutory definition of family or household member under the Protection from Domestic Abuse Act.

Abusive Conduct by Respondent

In order for a petitioner to obtain a protection order under Nebraska Revised Statute § 42-924, he or she must allege facts in his or her affidavit in support of the petition for a protection order that he or she has been subjected to abusive conduct by the respondent. Nebraska Revised Statute § 42-903 defines this abusive conduct as the occurrence of one or more of the following:

- Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument
- Placing, by physical menace, another person in fear of imminent bodily injury
- Engaging in sexual contact or sexual penetration without consent, as defined in section 28-318

When a court is faced with a request for a protection order, it must evaluate the evidence to determine whether the petitioner has proven that one or more of the above abusive acts occurred. There are no cases designated for permanent publication in Nebraska which provide the lower courts guidance in determining whether there is enough evidence of abusive conduct to issue a domestic violence protection order in a given circumstance. Civil tort law in Nebraska is not particularly helpful in this inquiry, either, because the protection order statute does not use words common to civil tort law, such as "battery" and "assault," to define the requisite abusive conduct. Instead, it uses words which more closely mirror criminal law definitions of assault. Since that is the case, it is fair to assume that the appellate courts will draw guidance from criminal cases and criminal statutes that define those words to determine whether a respondent's conduct rises to the level of "abuse."

Petitioners and courts should be aware that even if a petitioner has not experienced the requisite abusive conduct under Nebraska Revised Statute § 42-903, that petitioner may be alleging conduct which would entitle that petitioner to a harassment protection order under Nebraska Revised Statute § 28-311.09 (Reissue 2008). For a further discussion of this issue, please refer to Chapter 7 of this bench guide.

1. Intentionally and Knowingly Causing Bodily Injury

One way for a petitioner to prove abusive conduct under Nebraska Revised Statute § 42-903 is to prove that the respondent "attempt[ed] to cause or intentionally and knowingly caus[ed] bodily injury with or without a deadly instrument[.]" Obviously, "with or without a deadly instrument" means that a petitioner need not prove the use of a weapon in order to prove abusive conduct. But what does "intentionally and knowingly causing bodily injury" mean? Those familiar with criminal law in Nebraska will recognize that this language is similar to that language from the criminal offense of first degree, second degree, and third degree assault under Nebraska Revised Statutes §§ 28-308 (Reissue 2008), 28-309 (Reissue 2008), and 28-310 (Reissue 2008). The only difference, however, is that instead of the either/or requirement of intentionally *or* knowingly in the assault statutes, the domestic abuse protection order statute provides for intentionally *and* knowingly. Given this overlap with the terms "intentionally" and "knowingly," some reference to the law in Nebraska concerning assault may prove instructive.

Case law in Nebraska provides that in the assault context, "intentionally" is defined as "willfully or purposely and not accidentally or involuntarily." State v. Williams, 243 Neb. 959, 966, 503 N.W.2d 561, 566 (1993). Additionally, Williams states that "[w]hile in a criminal statute the meaning of 'knowingly' varies with the context, it commonly imports a perception of the facts requisite to make up the crime." Id. at 966, 503 N.W.2d at 566. The court went on to say that "the intent with which 'an act is committed...may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.'" Id. at 962, 503 N.W.2d at 564 (quoting State v. Costanzo, 227 Neb. 616, 419 N.W.2d 156 (1988)). Finally, the Nebraska Supreme Court has held that assault, no matter the degree, is a general intent crime. Thus the intent required to commit the crime goes to the act only, and not the result. Williams, 243 Neb. at 963, 503 N.W.2d at 564-65.

For purposes of the Nebraska Criminal Code, "bodily injury" is defined as "physical pain, illness, or any impairment of physical condition[.]" Neb. Rev. Stat. § 28-109(4) (Reissue 2008). Bodily injury is the injury required for a conviction under second and third degree assault, though the protection order definition of

abuse meeting the criteria for issuance of a protection order does not have the same use of a weapon requirement as the second degree assault does.

A. Sufficiency of the Evidence

A court faced with a request for a protection order petition must evaluate the allegations in the petition. If a hearing is conducted, the court must then evaluate other evidence, as well. The court must make a determination as to whether sufficient evidence exists to establish a basis for the issuance of the order. Although there are not many reported sufficiency of the evidence cases in Nebraska regarding protection orders, there are many reported Nebraska criminal cases regarding assault. Reference to them may be instructive to a court faced with a protection order request.

In the following circumstances the appellate courts have upheld convictions for "intentionally" or "knowingly" causing bodily injury under Nebraska Revised Statute § 28-310. These cases include only those that deal with defendants acting intentionally or knowingly, though the third degree assault statute provides for reckless behavior, as well. In each case, the evidence of the action was sufficient for the court to convict the defendant. See State v. Waltrip, 240 Neb. 888, 484 N.W.2d 831 (1992) (being punched by the defendant even though the victim testified the punch did not cause any pain); State v. Beins, 235 Neb. 648, 456 N.W.2d 759 (1990) (verbally abusing the victim, threatening to slap her, then hitting her in the face and elsewhere several times, and eventually rolling on top of the victim and beginning to "choke" her); State v. Cole, 231 Neb. 420, 436 N.W.2d 209 (1989) (engaging in a verbal exchange, followed by a "tug of war" over the defendant's boots and victim's keys which caused the victim to have bruises and an injured finger); State v. Richardson, 227 Neb. 274, 417 N.W.2d 24 (1987) (causing bruising, a bloody lip, and black eye to the victim); State v. Goodon, 219 Neb. 186, 361 N.W.2d 537 (1985) (hitting the victim on the leg with an automobile, no matter how minor the injury was); State v. Schroder, 218 Neb. 860, 359 N.W.2d 799 (1984) ("coming after" the victim, kicking and hitting her, grabbing and pulling her by her hair, and later hitting and shoving her, as well as threatening her with a gun, and when she attempted to leave, shooting at her); State v. Miner, 216 Neb. 309, 343 N.W.2d 899 (1984) (kicking the minor victim in the

stomach); State v. Bartholomew, 212 Neb. 270, 322 N.W.2d 432 (1982) (forcing his teenage niece into his pickup, punching her, and beating her with a leather belt); State v. Hortman, 207 Neb. 393, 299 N.W.2d 187 (1980) (pouring cold water over a severely retarded man, making the man stand by an open window in cold weather, then punching him and running him into a doorframe); State v. Farr, 1 Neb. App. 272, 493 N.W.2d 638 (1992) (struggling over a tire iron that was introduced by the defendant's son into a fight between the victim, the defendant, and the defendant's son, causing injuries to the victim's arm). Some case law regarding first degree assault is also helpful. See In re Interest of Janet J., 12 Neb. App. 42, 666 N.W.2d 741 (2003) (evidence sufficient to show that parent committed first degree assault against her infant child when evidence indicated that doctors believed that injury was of a type that had to be caused knowingly and intentionally and that her other children had suffered similar injuries), disapproved on other grounds, In re Interest of Jac'Quez N., 266 Neb. 782, 669 N.W.2d 429 (2003); State v. Hale, 2007 WL 1121717 (Neb. App. 2007) (defendant's statements of his intent to run another motorist off of the interstate was sufficient for a finding that he intentionally and knowingly assaulted the other motorist).

A case out of New Jersey might also prove instructive concerning sufficiency of the evidence in the protection order context. In New Jersey, a protection order can be issued if the petitioner proves that the conduct alleged constitutes a violation of certain New Jersey criminal laws. One such criminal law is simple assault. A person is guilty of simple assault if he or she "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another." N.J. Stat. Ann. 2C:12-1(a)(1) (2009 Cum. Supp.). (New Jersey's definition of "bodily injury" as "physical pain, illness or any impairment of physical condition" is the same as Nebraska's. N.J. Stat. Ann. 2C:11-1(a) (2005).) In one recent case in New Jersey, the court concluded that "[n]ot much is required to show bodily injury. For example, the stinging sensation caused by a slap is adequate to support an assault." N.B. v. T.B. v. M.V., 687 A.2d 766, 772 (N.J. 1997) (citing State v. Downey, 576 A.2d 945 (N.J. 1988); see also New Jersey v. Bazin, 912 F. Supp. 106, 115 (D.N.J.1995) ("Even the slightest physical contact, if done intentionally, is considered a simple assault under New Jersey law.")).

2. Attempting to Cause Bodily Injury

Nebraska's protection order statute also provides relief to a petitioner who proves that the respondent "attempted" to cause bodily injury. The protection order statutory scheme does not provide any guidance as to what constitutes an "attempt," but, again, reference to the criminal law definition may be of some assistance. Nebraska Revised Statute § 28-201(1) (Reissue 2008) provides that a person can be found guilty of an attempt to commit a crime if he:

> (a) [i]ntentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or
>
> (b) [i]ntentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

It further provides that:

> When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

Neb. Rev. Stat. § 28-201(2).

A. Sufficiency of the Evidence

In Nebraska, there are no protection order cases which discuss what constitutes sufficient evidence of "attempting to cause bodily injury." In the criminal context, however, the Nebraska Supreme Court has illuminated what is required to prove an "attempt." The court found that the overt act of kicking in the direction of a police officer and coming within one foot of the officer's groin constituted a "substantial step" for purposes of the attempt statute. This was so, even though it was impossible for the defendant's foot to have made contact with the officer. The court stated that the defendant did not have to actually be able to commit the offense. A "substantial step" was all that was required. State v. Green, 238 Neb. 475, 471 N.W.2d 402 (1991).

3. Placing Petitioner in Fear of Imminent Bodily Injury, by Physical Menace

A petitioner can also prove abusive conduct by showing that the respondent placed the petitioner in fear of imminent bodily injury, by physical menace. Here, we cannot look to Nebraska's criminal code for assistance in defining those phrases because the criminal code does not utilize them. The most closely related phrase in Nebraska's criminal code is to "threaten[] in a menacing manner" under Nebraska Revised Statute § 28-310(1)(b), the alternative form of third degree assault. "Threaten in a menacing manner" has been interpreted to mean "a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer apprehension of being so harmed." State v. Siebert, 223 Neb. 454, 390 N.W.2d 522 (1986). There is, however, a difference between "threatening in a menacing manner" and "placing in fear of imminent bodily injury, by physical menace."

A. "Physical Menace" and "Imminent Bodily Injury"

Prior to 2009, neither Nebraska statutes nor case law specified what "physical menace" meant, despite the term's use in several statutes. A recent case from the Nebraska Court of Appeals has determined what is meant by the protection order statute when it refers to a "physical menace." Specifically, under Nebraska law, "'physical menace' as used in § 42-903(1)(b), means a physical threat or act and requires more than mere words." Cloeter v. Cloeter, 17 Neb. App. 741, 747, 770 N.W.2d 660, 665-66 (2009). In so finding, the Court of Appeals referenced other court opinions, noting that "[o]ther courts that have construed 'physical menace' in the context of statutes proscribing assault have determined that the term necessarily requires more than words, that is, there must be some physical act on the part of the defendant." Id. at 747, 770 N.W.2d at 665-66 (citing People ex rel. R.L.G., 707 N.W.2d 258 (S.D. 2005); People v. Sylla, 7 Misc. 3d 8, 792 N.Y.S.2d 764 (2005); McDonald v. State, 784 So. 2d 261 (Miss. App. 2001) (Southwick, Presiding Judge, concurring; McMillin, Chief Judge, and Thomas, Judge, join)).

While some courts have construed the requirement of physical menace to be something more than words alone, other courts have found that

depending on the circumstances, a court could find that "mere words" constituted a physical menace. A case out of Pennsylvania, Wippel v. Wippel, 25 Phila. Co. Rptr. 587 (1992), is one such case. In Wippel, the petitioner sought and obtained a protection order under the Pennsylvania protection order statute which defined "abuse" as "placing by physical menace another in fear of imminent serious bodily injury." The question raised by the respondent on appeal was whether his threatening behavior directed toward the petitioner was sufficient to support a finding of abuse within that section of the statute. Id. at 588-89. The facts alleged in the petition concerned an incident outside of a court hearing. The petitioner was at the court hearing when the respondent was brought to court in handcuffs. As he was coming into the courtroom, he told a friend of the petitioner "I'm coming, Susan, tell Stuart I'm coming. I'm coming." The friend interpreted the respondent's remark as a threat to petitioner because "Stuart" was the pastor of plaintiff's church and petitioner resided on the church grounds. Id. at 589. The court which granted the protection order found that this was a veiled threat, because the respondent spoke in a threatening manner, and his words had the intended effect of causing petitioner to fear for her safety. In addition to this incident, the court allowed the petitioner to testify about an incident one month earlier, when the respondent called the petitioner on the telephone and threatened her. It also permitted the petitioner to testify about an incident a few months earlier, in which the respondent reached into the window of the car in which petitioner was riding, threatened her, and prevented her from driving away. Id. After hearing this testimony, the court found that the most recent incident outside the courtroom constituted "abuse" under the "physical menace" section of the protection order statute. It also determined that the evidence of previous incidents of abuse were properly admitted to show respondent's intent to threaten petitioner in June outside of the courtroom. Thus, even though the respondent used only words, the court found that constituted "physical menace." Id. at 592.

Prior to 2009, Nebraska statutory and case law did not define "imminent" for purposes of protection orders or criminal matters. The Court of Appeals has since set forth the definition of "imminent" in a recent decision. Specifically, the court stated that "'imminent' bodily injury within the context of § 42-903(1)(b) means a certain, immediate, and real threat to one's safety

which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment." Cloeter, 17 Neb. App. at 748, 770 N.W.2d at 666.

New York statutory law has defined "physical menace" and "imminent bodily injury" in much the same way as Nebraska has. New York Penal Law § 120.15 (2009) provided that a person is guilty of menacing in the third degree if "by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury." In the case of State v. Carlson, the court was faced with a situation where the defendant was alleged to have spit in the victim's face after using a racial epithet. 183 N.Y. Misc. 2d 630, 705 N.Y.S.2d 830 (1999). The court determined that spitting, without more, "may well be offensive physical contact, but the physical menace must place the complainant in fear of imminent physical injury. The facts alleged are simply insufficient to determine the defendant's intent. Simply put, some other act must transpire before the complainant could reasonably fear serious physical injury or physical injury." The court also cited another New York case in which the court held that "[b]ecause the Penal Law requires 'physical menace', the defendant must commit a physical act to place another in fear of imminent serious physical injury; statements will not suffice." Id. at 637, 705 N.Y.S.2d at 835 (citing People v. Wright, N.Y.L.J. at 23, col. 4 (Jul. 19, 1991)).

B. Reasonableness of the Fear

Another issue that arises in this context is the standard to be used to determine the reasonableness of the fear which was instilled in the petitioner; in other words, whether to apply an objective test or a subjective test. Again, there is no Nebraska case law on this issue, but cases in other jurisdictions illuminate the issue.

Opting for the subjective test is North Carolina in the case of Brandon v. Brandon, 513 S.E.2d 589 (N.C. App. 1999). The North Carolina protection order statutes made "placing the aggrieved party or a member of the aggrieved party's family or household, in fear of imminent serious bodily injury" one of the definitions of "abuse" which must be proven before a protection order can

be issued. In that case, the court was asked to decide whether a subjective or an objective test should be applied in making that determination. The court noted that in an action for civil assault, the plaintiff had to show both her own actual subjective apprehension and that her actual subjective apprehension was objectively reasonable under the circumstances. The court then concluded that the statute defining abuse for purposes of the protection order statute was plain on its face and called for a subjective test only. The court then ruled that

> where the trial court finds that a plaintiff is actually subjectively in fear of imminent serious bodily injury, an act of domestic violence has occurred pursuant to N.C. Gen. Stat. § 50B-1(a)(2). The plain language used by our legislature does not require a trial court to attempt to determine whether the plaintiff's actual subjective fear is objectively reasonable under the circumstances.

Id. at 595. The only relevant inquiry under the North Carolina courts, therefore, is into the petitioner's subjective fear, with no analysis under the "reasonable person" standard.

On the other hand, the Maryland Court of Appeals determined that the standard to be applied is "an individualized objective one—one that looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner's position." Katsenelenbogen v. Katsenelenbogen, 775 A.2d 1249 (Md. App. 2001). It went on to note that:

> [a] person who has been subjected to the kind of abuse defined in § 4-501(b) may well be sensitive to non-verbal signals or code word that have proved threatening in the past to that victim but which someone else, not having that experience, would not perceive to be threatening. The reasonableness of an asserted fear emanating from that kind of conduct or communication must be viewed from the perspective of the particular victim. Any special vulnerability or dependence by the victim, by virtue of physical, mental, or emotional condition or impairment, also must be taken into account.

Id. at 1249-50. While this is an objective standard, it is clear that the court acknowledges that there is a subjective inquiry to be made.

Respondent is a Household Member

Proof of abusive conduct alone is not sufficient to obtain a protection order. Contained within the definition of "abuse" in Nebraska Revised Statute § 42-903 is an additional requirement that the respondent be a "household member." If the conduct is not perpetrated by a "household member" it is not "abuse" under the statutory scheme, and therefore the petitioner would not be entitled to a domestic abuse protection order. The petitioner may, however, be entitled to a harassment protection order under Nebraska Revised Statute § 28-311.09. For a further discussion of this issue, please refer to Chapter 7.

1. Household Member Defined

Nebraska statute defines "household member" as including:

- Spouses
- Former spouses
- Children
- Persons presently residing together
- Persons who have resided together in the past
- Persons who have a child in common, whether or not they have been married or have lived together at any time
- Other persons related by consanguinity or affinity
- Persons who are presently involved in a dating relationship with each other or who have been involved in the past in a dating relationship with each other.

Neb. Rev. Stat. § 42-903(3). Under the prior version of the statute, prior to its 2004 amendment, the definition of "household member" did not include individuals in a dating relationship. "Dating relationship," for purposes of the protection order statutes, "means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context[.]" Id. Nebraska Revised Statute § 42-903 contains several key words which were not expressly defined by the Act. Thus, reference

to other areas of law must be made in an attempt to provide guidance.

A. Residing Together

What the words "residing together" mean for purposes of the protection order statutes is an interesting question. There is a great deal of case law in Nebraska defining "residence" in a variety of circumstances. When the Nebraska Supreme Court has been called upon to define "residence," it usually begins by remarking that "residence" and "domicile" are used interchangeably. The court then usually goes on to say that in order to acquire a domicile by choice there must be a concurrence of (1) residence (bodily presence) in the new locality, and (2) an intention to remain there. In re Estate of Meyers, 137 Neb. 60, 288 N.W.2d 35, 37 (1939). It is clear from this that there are two types of "residence"--bodily presence alone, and bodily presence with an intent to remain. So, does "residing together" for the purposes of the protection order statute involve bodily presence in a place where both parties have an intention to remain (or in the case of "formerly residing together," "bodily presence together in a place where both parties had an intention to remain"), or is bodily presence in the same place sufficient? Notice that the form petition, Form 19:8 (Revised Jun. 2008), doesn't even use the words "residing together." Instead, the drafters used the words "currently live with" or "lived with in the past" to answer this dilemma.

A case from Wisconsin does provide a little insight into the issue, should it ever arise in Nebraska. In Petrowsky v. Krause, the Court of Appeals of Wisconsin had to determine whether the petitioner and respondent were "household members" for purposes of issuing a domestic abuse restraining order. 588 N.W.2d 318 (Wis. 1998). In that case, the petitioner and the respondent had dated for over two years, but had maintained separate residences. During one summer, they had taken frequent trips "up north" in Wisconsin, where they shared a cabin together. The Wisconsin domestic protection order statutes required that the two be "household members" before a protection order could be issued and defined a "household member" as "a person currently or formerly residing in a place of abode with another person." In construing that statute, the court of appeals stated: "The plain meaning of reside implies a continuous arrangement." Id. at 320. It then went on to cite

the definition of "reside" from Black's Law Dictionary, and finally held that "the clear language of the statute mandates a continuous living arrangement between the parties in order for them to be considered household members." In determining that the petitioner and respondent were not household members, the court stated:

> [w]hile we can imagine that trips 'up north' could have the requisite continuity to establish a household, the facts here do not add up to that occurrence. Petrowsky and Krause dated for over two years while maintaining separate residences. Their summer excursions, while perhaps frequent, did not amount to a domestic living arrangement.

Id. Clearly, the court requires more of a connection between parties than vacations together.

Cases from Hawaii provide more guidance, but in a slightly different context. In Hawaii it is a crime to abuse a family or household member. The definition of "family or household member" includes "persons jointly residing or formerly residing in the same dwelling unit." In 1990, the Hawaii Supreme Court was called upon to determine what that meant in the case of State v. Tripp, 795 P.2d 280 (Haw. 1990). In that case, the defendant was charged with abuse of a family or household member. His defense was that the victim was not someone with whom he had jointly resided or formally resided. The victim testified that her permanent address was that of her grandfather, but that she had lived with the defendant for four months in the home of an unrelated person while that person was staying on the mainland. She testified that the defendant kept clothes at that home, did laundry there, had meals there and slept there. During that time, the victim became pregnant with the defendant's child. The Supreme Court held that the victim's testimony was sufficient to find that the defendant was a "family or household member," even though the defendant's testimony was that he only stayed at that home three days a week. Id. at 283. Additionally, in State v. Archuletta, the Intermediate Court of Appeals of Hawaii was also called upon to interpret whether a particular victim and defendant were "family or household members" for purposes of the same criminal charge. 946 P.2d 620 (Haw. 1997). In that case, during the relevant time period, the defendant lived with the victim three or four nights a week, but had his own residence as well. The court determined that it was no defense to the charge that the defendant resided in

two different locations, as he was attempting to defend the case on the basis that he only spent several days a week with petitioner, but maintained a separate residence. It found that, although a person may have only one legal domicile at a time, a person can have more than one residence. The two terms are closely related, but are not synonymous. Id. at 622 (quoting Black's Law Dictionary 1309 (6th ed. 1990) (citing Fielding v. Casualty Reciprocal Exchange, 331 So.2d 186, 188 (La. App. 1976)).

B. Consanguinity and Affinity

Consanguinity is defined by Black's Law Dictionary as "[t]he relationship of persons of the same blood or origin[,]" while affinity is defined as "the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage." Black's Law Dictionary 243, 45 (Bryan A. Garner, ed., 7th Ed., West 2000). The Nebraska Supreme Court has defined affinity as the relationship that arises as a result of the marriage contract between one spouse and the blood relations of the other and consanguinity as the relationship by blood. Zimmerer v. The Prudential Ins. Co. of America, 150 Neb. 351, 353, 34 N.W.2d 750, 751 (1948).

In most areas of the statutory law, the degree of consanguinity or affinity has been expressly set forth. For instance, Nebraska Revised Statute § 24-739 (Reissue 2008) provides that a judge shall be disqualified from acting as a judge in a case in which he or she is related to either of the parties in the action by consanguinity or affinity within the fourth degree. But, there are times, as in this protection order statute, where the degree is not statutorily specified. Such is the case with disqualification of a probate judge under Nebraska Revised Statute § 24-740 (Reissue 2008). That statute prohibits a probate judge from acting in a case where he is related to any party in interest by consanguinity or affinity. Presumably this is because of the possibility that the judge might find himself a member of the group of persons who might financially benefit or not from the will. Since it is clear the legislature knows how to specify degrees of consanguinity or affinity when it wants to, and can leave it open ended when it desires, it is most likely the case that the petitioner in a protection order case simply must prove that the respondent is related by blood or marriage for the statutory element of sufficient relationship to be met. Notice that Form Petition 19:8 (Revised Jun. 2008) simply provides

a box for the plaintiff to check indicating that the respondent is "related to me by blood or marriage."

C. Children

Although children are included in the statute's relationship list, step-children are not. Whether the courts would interpret "children" to include "step-children" is an open question. Most of the Nebraska statutes dealing with "children" specifically include or exclude step-children in the statutory definitions. Most likely, however, the issue will not be litigated because most step-children will fit into another category as well, i.e. "formally resided with," or "related by affinity."

There are limited circumstances in which an adult child might not fall under any of the other categories. For instance, if an unmarried older couple lived together, there may be no recourse for a domestic abuse protection order for the victim if the adult child of their intimate partner had never lived with the victim or his or her partner. In that case, there would be no relation by affinity, and the adult child would never have lived with the victim and his or her partner. In that particular situation, the victim's next best option would be to seek a harassment protection order.

D. Dating Relationship

With the recent change to the domestic abuse protection order statutes in 2004, the definition of "household members" was expanded to include individuals involved in a dating relationship. While the Protection from Domestic Abuse Act does define a dating relationship, the definition itself has at least one word that is not defined: "affectional." It is unclear how Nebraska courts will handle this definition, as there is no case law at present that aids in setting forth that definition.

Other states that have provisions for the issuance of protection orders for individuals involved in a dating relationship have varying language, but those statutes and case law may be helpful in defining what exactly a dating relationship is under the Nebraska statute. The definition of "dating relationship" varies widely by state. Some states merely indicate including those individuals who are in an "intimate" or "dating" relationship, without much explanation. Colo. Rev. Stat. Ann. § 13-14-101(2) (2009); 19-A Me. Rev. Stat. Ann. § 4002(4) (2009 Supp.); Mo. Ann. Stat. § 455.010(1) (2003); N.M.

Stat. Ann. § 40-13-2(d) (1999). In some states, a dating relationship means a romantic or intimate relationship, and does not include a "casual relationship" or "ordinary fraternization" in a business or social context. 750 Ill. Comp. Stat. 60/103(6) (2009); Mich. Comp. Laws Ann. § 600.2950(1) (2009 Cum. Supp.); Nev. Rev. Stat. Ann. § 33-.018(1) (2007); Okla. Stat. tit. 22, § 60.1(4) (2009 Cum. Supp.); Tenn. Code Ann. § 36-3-601(11) (2005); W. Va. Code § 48-27-204 (2004). Other states require a social relationship of a romantic or intimate nature, as determined by certain factors which include the nature of the relationship, the length of the relationship, the frequency of interaction between the parties, and the time period since the termination of the relationship, if applicable. Ark. Code Ann. § 9-15-103(3) (2005 Supp.); Iowa Code Ann. § 236.2 (2008); Kan. Stat. Ann. § 60-3102(b) (2005); Minn. Stat. Ann. § 518B.01(b) (2010 Supp.); Vt. Stat. Ann. tit. 15, § 1101(2) (2002); Wash. Rev. Code § 26.50.010(c)(2) (2010 Cum. Supp.). While having a list of factors to consider like the aforementioned statutes, Massachusetts has the requirement that a court must adjudicate the issue of whether a dating relationship exists. Mass. Gen. Laws Ch. 209A, § 1(2007). Some states require both a list of factors to consider in determining what is a dating relationship, but also note that such relationships do not include a "casual relationship" or "ordinary fraternization" in a business or social context. Del. Code Ann. tit. 10, § 1041(2)(b) (1999); Miss. Code Ann. § 93-21-3(e) (2007); Tex. Fam. Code Ann. § 71.0021-004 (2008); Wisc. Stat. § 813.12(1) (2009 Cum. Supp.). Other states have rather unique requirements for what constitutes a dating relationship. See N.J. Stat. Ann. § 2C:11-1 (2005) (requirement that individuals be of opposite sex); Or. Rev. Stat. Ann. § 107.705(3) (2003) (Requirement of a sexually intimate relationship within two years immediately preceding the filing for a protection order).

An Alabama case has set forth a standard for a more detailed determination of dating for purposes of meeting the relationship requirement with a list of factors to consider. Hobdy v. State of Alabama, 919 So.2d 318

(Ala. App. 2005). Factors which would indicate that parties are involved in a "dating relationship" include:

(1) minimal social interpersonal bonding of the parties over and above a mere casual fraternization
(2) the duration of the alleged dating activities prior to acts of domestic violence
(3) nature and frequency of the parties' interactions
(4) parties' ongoing expectations with respect to the relationship, either individually or jointly
(5) parties' demonstration of an affirmation of their relationship before others by statement or conduct
(6) any other reasons unique to the individual case.

Id. at 324-25.

Even if an individual is found to not have the required relationship—that of a "household member"—to the other party, it is unlikely that there will be further litigation regarding this particular definition. If the required relationship is not present, then Nebraska's harassment protection order statutes may be utilized for a similar order.

Chapter 4:

Types of Relief Available

All Relief Available

Further Discussion of Relief Available

1. Removal of Respondent From Petitioner's Residence
2. Temporary Custody of Petitioner's Children, Not to Exceed 90 Days
3. Enjoining Respondent From Telephoning, Contacting or Otherwise Communicating With Petitioner
4. Ordering Respondent to Stay Away From Any Place Specified by the Court
5. Other Relief Deemed Necessary
    A. Financial Support
    B. Visitation
    C. Personal Property
    D. Floating Buffer Zone
    E. Weapons
    F. Pets
    G. Necessary Items

Types of Relief Available

There are several types of relief which a court can now provide under Nebraska law when a petitioner files for a domestic abuse protection order. That relief includes:

- Enjoining the respondent from imposing any restraint upon the petitioner or upon the petitioner's liberty
- Enjoining the respondent from threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner
- Enjoining the respondent from telephoning, contacting, or otherwise communicating with the petitioner
- Removing and excluding the respondent from the petitioner's residence, regardless of ownership of residence
- Ordering the respondent to stay away from any place specified by the court
- Awarding the petitioner temporary custody of any minor children for ninety (90) days or less
- Ordering other relief deemed necessary to provide for safety and welfare of the petitioner and any family or household member.

Neb. Rev. Stat. § 42-924(1) (Reissue 2008).

Further Discussion of Relief Available

While Nebraska law provides for several different kinds of relief in a domestic abuse protection order, courts are sometimes reluctant to order several of the statutorily authorized forms of relief. Several of the more universally used forms of relief are self explanatory, but those that are more rarely utilized by the courts bear some attention here.

1. Removal of Respondent From Petitioner's Residence

Nebraska Revised Statute § 42-924(1)(d) states the respondent can be ordered to stay away from the residence of the petitioner, regardless of the ownership of the residence. Respondents in many states have taken exception to orders entered under similar statutes, with little success.

Contrary to the position of many attorneys who are defending the respondents against protection orders, the temporary exclusion of the respondent from a jointly owned residence in the context of a protection order is not a taking of real property without due process of law. Nebraska law does have a provision in its Constitution that "[n]o person shall be deprived of life, liberty, or property, without due process of law[.]" Neb. Const., Art. I, Sec. 3. Given the unique circumstances in the context of an entry of a protection order, due process considerations are raised, but have to be weighed against the state's vital interest in protecting victims of domestic violence. In many circumstances, the state's interest in protecting victims of domestic violence will outweigh the due process considerations. Case law from other states illustrates the reasons why such an argument by a respondent shall always fail.

In one case in Pennsylvania, it was held that a court, in a protection order, may exclude a spouse from access to jointly owned property for a temporary period without an opportunity to be heard. Boyle v. Boyle, 12 Pa. D. & C. 3d 767 (1979). The court determined that this was a valid exercise of police power and not an unconstitutional act of depriving a party of his property without the benefit of a jury trial. The Boyle court stated that domestic violence is a serious social problem and the criminal remedies for victims of domestic violence were inadequate. Therefore, the protection order statutes employ "police

power in a reasonable manner to abate a well recognized and widely spread social problem." Id. at 773. The Court went on to say that the exclusion from residence provision did not in any manner affect title to real estate and found no unconstitutional taking or unconstitutional deprivation of individual or property rights, as it was only temporary in nature. Id.

Other courts have held similarly. In one Missouri case, the court noted that while the respondent had a protected property interest under the United States Constitution and the Missouri Constitution, under the criteria set forth by the United States Supreme Court, a temporary deprivation under an ex parte protection order does not require notice and a hearing prior to the entry of an ex parte protection order excluding the respondent from a jointly owned property, because such an exclusion was balanced by an important government interest of keeping individuals safe from harm. State ex. rel. Williams v. Marsh, 626 S.W.2d 223, 229-32 (Mo. 1982) (citing Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 873, 47 L. Ed. 2d 18 (1976); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)). The Missouri statute also authorized the exclusion of the respondent from a home in which the petitioner has no ownership interest. Williams, 626 S.W.2d at 229 (citing Mo. Rev. Stat. §§ 455-.035-.045 (Supp. 1980)). Given that the Missouri statute provided for a hearing within fifteen days of the filing of the petition for an ex parte protection order, with or without the respondent having requested such a hearing, the Missouri court did not reach the issue of whether such an ex parte order could continue indefinitely. See also Moore v. Moore, 657 S.E.2d 743, 748 (S.C. 2008) ("In view of these competing interests [of respondent's due process with the state's interest in protecting victims of domestic violence], it is necessary…to balance these interests to determine the nature and extent of applicable due process procedures.").

Maryland has also dealt with the same issue. In Maryland, an injunction prohibiting respondent in a divorce case from being in the jointly owned marital home was determined not be an unconstitutional taking of property without just compensation. Cote v. Cote, 599 A.2d 869 (Md. App. 1992) (citing Fuentes, supra); Pitsenberger v. Pitsenberger, 410 A.2d 1052 (Md. 1980), appeal dismissed, 449 U.S. 807, 101 S. Ct. 52, rehearing denied, 449 U.S. 1028, 101 S. Ct. 601 (1980)). In Cote, the court held that in order for the deprivation of use to be a taking, the protection order prohibiting the respondent from entering the residence had to deny him all beneficial use of the property. Id. at 873-74. In

finding that there was no taking, the court stated that:

> [u]nder these circumstances, Mr. Cote obtained some tangible benefits from Ms. Cote remaining in the marital home. Specifically, he avoided the possibility of having to provide an alternative place for Ms. Cote to live during the pendency of the divorce.

Id. at 874. Additionally, the Maryland appellate court cited to the Pitsenberger opinion in stating that the property, when minor children are involved, is of beneficial use to the excluded respondent because it properly houses *his* children. Id. (citing Pitsenberger, 410 A.2d at 1052).

A North Dakota case illustrates this issue with regard to the sole ownership interest of the respondent in the marital home from which he was excluded pursuant to a protection order. Peters-Riemers v. Riemers, 624 N.W.2d 83 (N.D. 2001). In finding that there had been no violation of the respondent's due process rights, the court stated that "the protection order merely temporarily excludes [the respondent] from the dwelling the parties share." Id. at 90. In making this finding, the court acknowledged that the applicable statute provided that a protection order did not change the title of the real property in any way. Id. (citing N.D. Cent. Code § 14-07.1-02(7) (Cum. Supp. 2007)).

The court is in a unique position to send a message to the respondent that abusive behavior will not be tolerated, through a variety of remedies tailored to increase the safety of the petitioner, according to one respected judicial organization.

> The National Council of Juvenile and Family Court Judges recommends that if a court must separate parties who are living together, it should remove the abuser from the home and allow the abused individual and children to remain with appropriate provisions for protection. The Council recommends this practice even if the home legally belongs to the abuser, because it "gives a clear message to the offender that such behavior will not be tolerated regardless of who holds legal title, and that the state intends to protect victims from further abuse." The Council further notes that requiring an abused individual to vacate the home does not deter criminal behavior. Instead, it may reward the abuser for a crime and discourage an abused individual who has no alternate housing from seeking needed protection.

Michigan Judicial Institute, Domestic Violence: A Guide to Civil & Criminal Proceedings 7-12 <http://courts.michigan.gov/mji/resources/dvbook/DVBB_2009-2010-December.pdf> (3d Ed. 2009) (accessed Feb. 1, 2010) (citing

Herrell & Hofford, Family Violence: Improving Court Practice, 41 Juvenile and Family Court Journal 1, 18 (1990)).

2. Temporary Custody of Petitioner's Children, Not to Exceed 90 Days

Nebraska Revised Statute § 42-924(1)(f) gives a court specific authority to award temporary custody, not to exceed 90 days, of minor children in a protection order. Some Nebraska courts have refused to grant this 90 day temporary custody in a protection order case out of fear of violating Nebraska's current Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) found at Nebraska Revised Statute § 43-1226 et seq. (Reissue 2008). The UCCJEA is meant to create uniformity so that in the situation of a jurisdictional dispute over a custody matter, all courts are utilizing identical methods for determining jurisdiction of the custody case.

> The purposes of the UCCJEA are to avoid interstate jurisdictional competition and conflict in child custody matters, to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, to discourage the use of the interstate system for continuing custody controversies, to deter child abductions, to avoid relitigation of custody issues, and to facilitate enforcement of custody orders.

Watson v. Watson, 272 Neb. 647, 652, 724 N.W.2d 24, 29 (2006) (citing Uniform Child Custody Jurisdiction and Enforcement Act (1997), § 101, comment, 9 U.L.A. 657 (1999)).

The UCCJEA clearly applies to custody determinations in protection orders, because a temporary custody order in a protection order is a "child custody determination" under the UCCJEA. The UCCJEA defines a child custody determination as:

> [a] proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, ***and protection from domestic violence***, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under sections 43-1248 to 43-1264.

Neb. Rev. Stat. § 43-1227(3) (Reissue 2008) (emphasis supplied). In interstate

custody cases, the UCCJEA specifically sets forth which state has jurisdiction to make those custody determinations. Neb. Rev. Stat. §§ 43-1238 to 43-1241 (Reissue 2008). In addition, there are certain pleading, notice, and proof requirements in the UCCJEA which must be followed before a court's custody determination may be enforced. Neb. Rev. Stat. §§ 43-1242, 43-1246 (Reissue 2008).

Most states, including Nebraska, do not have protection order petitions which meet the pleading requirements under the UCCJEA. Even if the petition does not meet the UCCJEA requirement, the Violence Against Women Act (VAWA) provides an alternate means of ensuring enforcement of a custody order contained in a protection order. Under VAWA 2005, the definition of "protection order" was amended for the specific purpose of improving the enforcement of custody provisions within protection orders across state and tribal lines. Darren Mitchell, Presentation and Powerpoint, Custody Provisions in Protection Orders (San Antonio, Tex., Feb. 17, 2009). The legislative history to that provision in VAWA 2005 explicitly states that

> [t]echnical amendments are made to the criminal code to clarify that courts should enforce the protection orders issued by civil and criminal courts in other jurisdictions. Orders to be enforced include…the custody and child support provisions of protection orders.

Mitchell, Presentation and Powerpoint, Custody Provisions in Protection Orders (quoting Section-by-Section Summary of H.R. 3402, the Violence Against Women and Department of Justice Appropriations Reauthorization Act of 2005, Section 106). This includes ex parte protection orders. See National Conference of Commissioners on Uniform State Laws, §§ 205 comment <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uccjea97.htm> (1997) (Recognizing that ex parte custody orders in the context of a protection order may be enforceable against due process objections for a short period of time). Given the short duration of the temporary custody provision in Nebraska protection orders, it is likely that Nebraska ex parte protection orders with custody provisions do not run afoul of due process concerns. This comment clearly acknowledges that a hearing is required for long term custody orders in order to be valid under the UCCJEA. For a more in-depth discussion of the due process issues surrounding ex parte protection orders, the reader is referred to Chapter 8 of this bench guide.

Another piece of federal legislation may potentially cause reason for pause among some judges when ordering a protection order with temporary custody provisions. Federal law provides that in order for the custody provisions of the protection order to be given full faith and credit in another state, the respondent must have been given reasonable notice and the opportunity to be heard. 28 U.S.C. § 1738A(e) (2006). There is no "opt out" provision, as in the UCCJEA, that allows state law to determine the validity of a custody order entered without notice and an opportunity to be heard, although as noted earlier in this chapter, there is authority that VAWA 2005's amended definition of protection order provides enforcement authority of ex parte custody provisions in a protection order.

A far greater problem is that of judges who are unwilling to enter a protection order when the petitioner has children with the respondent and requests temporary 90 day custody. Many petitioners in this situation, especially in certain parts of Nebraska, are being told that a protection order is not a vehicle for family law matters, and judges are refusing to even consider the safety aspects of the request for such an order. Protection orders are clearly not, especially as evidenced by the short term custody provision in the Protection from Domestic Abuse Act of Nebraska, designed to be a mechanism for obtaining custody. The 90 day provision is just a "stop gap" measure to provide safety to the petitioner while he or she is figuring out how to proceed with obtaining permanent custody through an actual custody order. Ninety days, especially in the case of a petitioner who is fearful for his or her life, often moving out of a shared home, and trying to get children into a new school or day care, is not a long period of time with which to better situate the family for safety from the respondent, but it does offer some brief respite for many individuals so that they may keep both their children and themselves safe from harm until such time as they are able to file for custody of their children.

In the event that a protection order has been entered between the parties, Nebraska law provides for the interaction between a protection order and a custody order. The Nebraska Parenting Act provides that "[w]hen required by the best interests of the child, the court may enter a custody, parenting time, visitation, or other access order that is inconsistent with an existing restraining order, protection order, or criminal no contact order. However, it may only do so if it has jurisdiction and authority to do so." Neb. Rev. Stat. § 43-2934(3) (Reissue 2008). For a more in-depth discussion of this topic, please refer to Chapter 8 of

this bench guide.

3. Enjoining Respondent From Telephoning, Contacting, or Otherwise Communicating With Petitioner

Protection orders which prohibited the respondent from contacting the petitioner have undergone attack in several states as being violative of the First Amendment's prohibition against infringement on free speech or right to travel, with little success. The South Dakota Supreme Court has upheld a protection order which prohibited defendant from "verbally contacting plaintiff in any manner...and not verbally abuse or threaten plaintiff." State v. Hauge, 547 N.W.2d 173 (S.D. 1996). The court held that the order could withstand a challenge that it infringed on the respondent's right to free speech, stating:

> [w]ithout a doubt, domestic abuse protection orders preserve compelling governmental interests... Judges must exercise broad authority to fashion necessary safeguards for the unpredictable insecurities victims of domestic abuse often face... The circuit court found it necessary to compel [the respondent] to stop contacting his ex-wife, as part of her need for protection. To shield victims of domestic violence from threats and intimidation, courts must sometimes prohibit all contact between the abused and the abuser. Those who feel assailed in their own homes are often the most vulnerable... Allowing a person who has physically abused a family member to continue offensive interaction, would surely make protection orders a feeble device for maintaining peace. By using the mail to contact his ex-wife, [the respondent's] claimed right to free speech goes beyond freedom of expression in a public forum, and intrudes upon [the petitioner's] personal sanctuary-her home.

Id. at 176. Other states have also rejected First Amendment free speech or freedom of movement challenges to the entry of a protection order prohibiting the respondent from having any face-to-face, telephone, or mail contact with the petitioner in a protection order case. See Coyle v. Compton, 940 P.2d 404, 414 (Haw. 1997) (quoting State v. Kameenui, 753 P.2d 1250, 1252 (Haw. 1988) (Order prohibiting contact and being within three blocks of the plaintiff's home, school, or employment found not to violate defendant's fundamental freedom of movement because "'there is no constitutionally protected right to remain free in [one's] home after physically harming someone residing there.'"); Gilbert v. State, 765 P.2d 1208, 1210 (Okla. 1988) ("We...reject any notion that the First Amendment to the United States Constitution or....the Oklahoma Constitution ever covered threatening or abusive communications to persons who have

demonstrated a need for protection from an immediate and present danger of domestic abuse.").

Many courts allow exceptions to restrictions on communication when the parties have minor children. A court would be well advised to consider how such an exception could easily be abused by a respondent. Given the risk of an abuser using the children as a means of continued abuse of the victim, such a provision allowing contact for the purpose of discussion about the minor children of the parties could create another opportunity for an abuser to continue his or her abuse. For a further discussion of the danger of abuser access to children, please see section 5(b) of this chapter.

4. Ordering Respondent to Stay Away From Any Place Specified by the Court

Protection orders prohibiting a respondent from going to a particular location have been upheld against a First Amendment right to travel challenge. Coyle v. Compton, 940 P.2d 404 (Haw. 1997) (Order prohibiting respondent from being within three blocks of the plaintiff's home, school, or employment does not violate defendant's fundamental freedom of movement). Courts should consider ordering respondents to stay away from any place to which petitioner must go on a regular basis, such as home, school, work, or the location of a child care provider. In one report, it became apparent that restricting communication and access to the victim's workplace was an important piece in helping a victim feel safe.

> The need for identifying the victim's workplace is important to prevent misunderstanding by the respondent or the police. For example, one batterer terrified his wife by repeatedly parking across the street from where she worked so she could see him from her desk. Her supervisor became angry as her work began to deteriorate. However, the police reported that there was nothing they could do because this behavior was not specifically prohibited in the protection order. Thus, unless the victim's work address is unknown to the abuse and the victim feels safer keeping it confidential, it should be specified.

New Mexico Judicial Education Center at the Institute of Public Law, New Mexico Domestic Violence Benchbook 2-14, Sec. 2.5.2(3)(A) <http://jec.unm.edu/resources/benchbooks/dv/New%20Mexico%20Domestic%20Violence%20Benchbook.pdf> (2005) (accessed Feb. 1, 2010) (quoting Peter Finn & Sarah

Colson, Civil Protection Orders: Legislation, Current Court Practice and Enforcement, 42 (National Institute of Justice, Mar. 1990)).

5. Other Relief Deemed Necessary

Nebraska joins the majority of states in providing a catch-all provision to the list of statutorily created forms of relief which could be granted to a petitioner in a protection order. Nebraska's law states that a court may order "such other relief deemed necessary to provide for the safety and welfare of the petitioner and any designated family or household member." Neb. Rev. Stat. § 42-924(1)(g). Arguably, any order is permissible as long as it is "deemed necessary to provide for the safety and welfare of the petitioner and any designated family or household member," and, of course, as long as it is not unconstitutional. This was precisely the approach taken by the District of Columbia Court of Appeals in the case of Powell v. Powell, 547 A.2d 973 (D.C. 1988). In that case, the lower court refused to grant the petitioner's request that the respondent be ordered to pay $1100 monthly "to cover both child support and rental expenses for a house or apartment" or in the alternative to be ordered to continue making mortgage payments on the family residence and to pay for the costs of making the residence secure against the respondent's unauthorized return. Id. at 973. The lower court's ruling was based on its belief that it had no power under the protection order statute to award any monetary relief. Id. at 973-74. The D.C. Court of Appeals held that the lower court erred when it determined that it did not have the power to award any monetary relief, and cited to the provision of the protection order statutes which provided that the court may direct the respondent "to perform or refrain from other actions as may be appropriate to the effective resolution of the matter." Id. at 974 (quoting D.C. Code § 16-10005(c)(10)). The court reasoned that an award of monetary relief may accomplish an "effective resolution" of the domestic violence before the court, given that one of the petitioner's assertions that her economic dependency on the respondent was "a major factor in the perpetuation of the long history of violence in the family." Powell, 547 A.2d at 974. It concluded that this "catch-all" language created no limitation on the court's ability to order monetary relief. Id. at 975.

Other courts faced with similar situations have agreed that the "catch-all" provision creates no set limitation on the court's authority to grant requested

relief. See, e.g. Rayan v. Dykeman, 224 Cal. App. 3d 1629, 274 Cal. Rptr. 672 (Cal. 1990) (California's "catch-all" provision gives a court the authority, pursuant to the parties' stipulation, to order the transfer of title of real property from the plaintiff to the defendant); Jane Y. v. Joseph Y., 123 Misc. 2d 771, 474 N.Y.S.2d 681 (N.Y. Fam. Ct. 1984) (New York's "catch-all" provision permits a court to order the removal of a family dog which had been trained to attack the wife or anyone else who was the subject of the husband's wrath). The court's authority is not totally unlimited, however, given the language of the "catch-all" provisions themselves or the purposes of the protection order statutes themselves. For instance, in New York, the court's authority to enter orders is limited to those that are likely to be helpful in eradicating the root of the family disturbance. Leffingwell v. Leffingwell, 86 A.D.2d 929, 448 N.Y.S.2d 799 (N.Y. Fam. Ct. 1982) (while the lower court's order removing the respondent from the household was reasonable, the additional order imposing a curfew on him on Fridays and Saturdays was not deemed relevant "to forestalling conduct deemed offensive").

Although it is clear that the "other relief" must be "necessary to provide for the safety and welfare of the petitioner and any family or household member," a court may wish to know what types of orders would be appropriate and what kinds of orders have withstood challenge in other jurisdictions. The sections which follow are an attempt to answer some of those questions.

A. Financial Support

Over half of the states have explicit provisions in their protection order statutes permitting a court to order a respondent to pay some type of financial support to the petitioner as part of a protection order. See, e.g., 750 Ill. Comp. Stat. 60/214(b)(12) (2009). Those statutes specifically provide for orders concerning child support and spousal support (see, e.g., Ga. Code Ann. § 19-13-4 (6), (7)) (2004); rent, mortgage and insurance payments (see, e.g., Pa. Stat. Ann. tit. 23 § 6108(a)(5) (2009 Cum. Supp.)); payments for the cost of counseling (see, e.g., Iowa Code Ann. § 236.5(1) (2009 Cum. Supp.)) or for shelter services (see, e.g., 750 Ill. Comp. Stat. § 60/214(b)(16)). Several statutory schemes also permit a court to order the respondent to pay petitioner for losses incurred as a result of the abuse. See, e.g., Mass. Gen. Laws Ann. ch. 209A, § 3(f) (2007). Although Nebraska's statutory scheme has

no specific provision authorizing a court to order such financial support, Nebraska's catch-all section does permit a court to order "other relief as deemed necessary to provide for the safety and welfare of the petitioner and any family or household member." Neb. Rev. Stat. § 42-924(1)(g). Under the authority of a similar "catch-all" provision, the D.C. Court of Appeals determined that a court has the power in a protection order to require a respondent to pay financial support such as child support and rental expenses or mortgage payments. Additionally, the appellate court determined that the lower court could direct a respondent to pay for the costs of making a residence secure against the respondent's unauthorized return. Powell v. Powell, 547 A.2d 973 (D.C. 1988). In many circumstances, these types of payments may significantly increase the welfare and safety of the petitioner because they decrease the petitioner's dependence on the respondent. Obviously, a court would need to be apprised of the financial situation of a petitioner and respondent before such an order should be entered. Additionally, a court may be more comfortable ordering specific financial assistance, such as requiring a respondent to maintain health insurance coverage for the petitioner or minor children, instead of a specific dollar amount. Finally, a child support order may be appropriate on a temporary basis when an emergency exists, such as when a temporary custody order has been entered in the protection order.

B. Visitation

Abusive parents seek visitation with their children for two reasons. Like other parents, they love or miss their children, particularly during this time when they have been separated from the family. But abusive parents may also seek contact with the children to maintain contact, intimidate, and control the abused party. Thus, the potential for renewed violence during visitation is a concern.

> In its study of civil protection orders issued in three jurisdictions, the National Center for State Courts reported that Plaintiffs with children were more likely than childless Plaintiffs to experience enforcement problems with their orders. The authors of the study believed that Plaintiffs with children reported more problems because they were more likely to encounter the Defendant for purposes of child

> visitation. The most frequently reported child-related problems involved abuse when children were exchanged for visitation and Defendants' threats to keep the children.

Alabama Coalition Against Domestic Violence, Alabama's Domestic Violence Benchbook 21 <http://www.acadv.org/2005benchbook.pdf> (July 2005) (accessed Feb. 1, 2010) (citing Materials adapted from Michigan Judicial Institute, Domestic Violence: A Guide to Civil & Criminal Proceedings, 298 (3rd ed. 2004) (citing National Center for State Courts, Civil Protection Orders: The Benefit and Limitations for Victims of Domestic Violence 51 (1997)). In response to this, over half of the states give statutory authority to a court to establish or deny visitation as part of a protection order. See, e.g., Kan. Stat. Ann. § 60-3107(a)(4) (2005). Others give specific statutory authority enjoining a respondent from removing children from the state or a parent. See, e.g., 750 Ill. Comp. Stat. § 60/214(b)(5), (8). Other statutes enjoin a respondent from interfering with petitioner's efforts to remove a child. See, e.g., Mich. Comp. Laws § 600.2950(1)(f) (2009 Cum. Supp.). Some states also specifically provide a court with the authority to order a respondent not to conceal a child. See, e.g., 750 Ill. Comp. Stat. § 60/214(b)(8). Finally, some states specifically provide that a court may prohibit a respondent from gaining access to information concerning a child. See, e.g., Mich. Comp. Laws § 600.2950(1)(h).

Nebraska does not provide specific statutory authority for the entry of an order concerning visitation as part of a protection order, but, in practice, judges are already doing so, no doubt utilizing the section that provides that a court may grant "other relief as deemed necessary to provide for the safety and welfare of the petitioner and any family or household member." Neb. Rev. Stat. § 42-924(1)(g). In some cases, entering a visitation order could put the petitioner at grave risk for another assault, and the best and safest route would be to not provide for visitation in a protection order. If a court is considering entering a visitation order, though, it may be appropriate to enter a specific and detailed order regarding visitation, instead of ordering "reasonable rights of visitation." Such a vague order may be unenforceable and also may increase the chance of renewed violence, because it may require frequent contact between the respondent and the petitioner. A court may also provide some protection by requiring that the visitation be supervised.

Court ordered visitation is often abused by respondents to a protection

order, and in fact, it can create dangerous situations for the petitioner. Among the documented concerns in one study were significant numbers of batterers using visitation to continue to abuse a former partner and/or the children. In that study, 5% of abusive fathers, during visitation, threaten to kill the mother, 34% threaten to kidnap their children, and 25% threaten to hurt their children. Mike Brigner, The Ohio Domestic Violence Benchbook: A Practical Guide to Competence for Judges & Magistrates 44 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (2d Ed. 2003) (accessed Feb. 1, 2010) (citing Joan Zorza, Protecting the Children in Custody Disputes when One Parent Abuses the Other, 29 Clearinghouse Rev. 295 (1996)). These considerations led a National Institute of Justice study to conclude that "nowhere is the potential for renewed violence greater than during visitation." Brigner, Ohio Benchbook at 44 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (citing Peter Finn and Sarah Colson, Civil Protection Orders Legislation, Current Practice and Enforcement 43 (1990)). The Alabama Benchbook states that "[i]t is recommended that judges recognize the potential for renewed violence during visitation as well as misuse of children as a tool of continued control." Alabama Coalition Against Domestic Violence, Alabama Benchbook at 55 <http://www.acadv.org/2005benchbook.pdf>.

In Nebraska and elsewhere, however, many judges are granting the batterer unlimited access to the victim. This is, in many cases, putting a parent's right to see his child over the safety of that child and the other parent.

> Despite all of the documented evidence of the harms and dangers to adult victims and children from unrestricted visitation in domestic violence cases, many courts decline to issue protective visitation orders. Experts advise that: "A parent's 'right to visitation' cannot take precedence over a child's exposure to a high-risk environment."

Brigner, Ohio Benchbook at 44 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (quoting Carla Garrity & Mitchell Baris, Custody and Visitation: Is it Safe?, 17 Fam. Advocate 40, 43 (1995)). If the protection order is entered after an initial custody determination, "[a]ny reluctance on the part of the court to 'interfere with visitation' should be tempered by the fact that the prior parenting orders were issued by a court without knowledge of

the current domestic violence behavior." Id. at 33.

C. Personal Property

Protection order statutes in many states give specific authority to courts to make orders regarding personal property. Those statutes provide that a court may order transfer of possession of certain property, or may restrain a party from disposing of, damaging or transferring, encumbering or concealing property. See e.g., Ga. Code Ann. § 19-13-4(a)(8); Del. Code Ann. tit. 10 § 1045(9) (1999). Just as children can be used as a tool of control and manipulation, so can property, thus orders concerning personal property may provide a petitioner with a certain degree of protection.

Nebraska does not have a specific statute which permits a court to enter an order concerning personal property, but the protection order scheme does provide that a court may grant "other relief as deemed necessary to provide for the safety and welfare of the petitioner and any family or household member." Neb. Rev. Stat. § 42-924(1)(g). Pennsylvania's Protection from Abuse Act does not have a specific statute covering possession of personal property, either, but an order granting the return of certain personal property was found to be within the province of the court under a more general provision which gave the court the right to require a defendant to "reimburse the plaintiff for reasonable losses incurred." Gerace v. Gerace, 631 A.2d 1360, 1361 (Pa. 1993) (Citing 23 Pa. Stat. Ann. § 6108(a)(1)-(8)). Under that provision a Pennsylvania Superior Court determined that a court "may order a defendant to return a plaintiff's personal property where procuring it herself would potentially subject her to danger." Gerace, 631 A.2d at 1361-62.

It would be wise for a judge to make specific orders regarding how the petitioner will obtain the property if the petitioner is in hiding or shelter. If the petitioner must obtain the items herself by returning to the residence, the court should consider offering her protection by requesting the presence of the sheriff or the local police department. In order to be enforceable, an order concerning the removal or return of property should specify the property to be removed or returned, and the date, time, and location for the

removal or return.

D. Floating Buffer Zone

Another protection which a court should consider in a given case is what has come to be known as a "floating buffer zone." Although such a provision is not specifically authorized by Nebraska's protection order statutes, it should be considered under Nebraska's catch-all provision which allows a court to grant "other relief as deemed necessary to provide for the safety and welfare of the petitioner and any family or household member." Neb. Rev. Stat. § 42-924(1)(g).

The constitutionality of a floating buffer zone of 1000 feet was upheld in the protection order context by the Supreme Court of Vermont in Benson v. Muscari, 769 A.2d 1291 (Vt. 2001). In Vermont, the protection order statute specifically authorized "restrictions prohibiting the defendant from coming within a fixed distance of the plaintiff, the children, the plaintiff's residence, or other designated locations where plaintiff or children are likely to spend time." Id. at 1294 (citing 15 Vt. Stat. Ann. § 1103(c)(1)). In the case before the court, the defendant was ordered not to "place himself within 1000 feet of Plaintiff or of the child." Id. at 1294. In upholding this order, the Supreme Court of Vermont stated:

> [i]t is well documented that "stay away" provisions, including buffer zones of protection, implement important policy objectives underlying abuse prevention orders. They are specific and definite, minimizing interpretation issues. [Citation omitted.] They prohibit what otherwise may be viewed as inoffensive contact before it matures into further incidents of abuse. [Citations omitted.] And they provide the victim a measure of emotional security from fear of further contact with the abuser. [Citation omitted.] We conclude, therefore, that these important policy goals are sufficient to justify the incidental restrictions they may impose on defendant's freedom of travel and association.
>
> Although there may be some risk of inadvertent violation of an order requiring defendant to stay 1000 feet from plaintiff, we cannot conclude that the condition denies defendant due process of law. His argument is based largely on the claim that he may be prosecuted, or held in criminal contempt, for inadvertent violation of the order… [D]efendant could not,

> [however,] be criminally convicted of violating the abuse prevention order unless the State proved that he intended to place himself within 1000 feet of plaintiff... Accordingly, we reject the argument that the order denied him due process of law.

Id. at 1294-95. The court then determined that the order entered in the case was supported by the evidence, given that the plaintiff worked as a house cleaner and traveled to and from numerous locations to perform her job, which left her alone and vulnerable. Id. at 1296.

E. Weapons

The possession of weapons by a person who has committed domestic abuse can be an extremely dangerous mix, especially when the domestic violence has included the use or threatened use of weapons. Possession or access to a firearm is one of the recognized factors in assessing cases for the potential of lethality. Access to firearms increases the risk of intimate partner homicide by more than five times, compared to those situations in which there are no weapons. Family Violence Protection Fund, The Facts on Guns and Domestic Violence <http://www.endabuse.org/resources/facts/Guns.pdf> (accessed Feb. 1, 2010) (citing J. C. Campbell, D; Webster, J; Koziol-McLain, C. R; et al., Risk Factors For Femicide in Abusive Relationships: Results From A Multi-Site Case Control Study, American Journal of Public Health 93(7) (2003)). It is also recognized, through the same study, that abusers who possess guns are more likely to inflict the most severe abuse on their victims. Id.

In at least one state, the legislature has recognized this and made specific provision for disposition of weapons part of their protection order statutes. 23 Pa. Stat. Ann. § 6108(a)(7) (2009 Cum. Supp.). In two other states, the courts have upheld orders concerning weapons under those states' protection order catch-all relief sections, which are similar to the catch-all provision in Nebraska Revised Statute § 42-924. See Benson v. Muscari, 769 A.2d 1291 (Vt. 2001); Conkle v. Wolfe, 722 N.E.2d 586 (Ohio App. 1998). These orders have been upheld, even though the federal government has also made it a violation of the 1994 Federal Gun Control Act for a person who is the subject of a qualified domestic violence protection order to purchase,

receive or possess firearms and ammunition which have been sent through interstate commerce. 18 U.S.C. § 922(g)(8) (2000 & 2009 Cum. Supp.).

In Benson v. Muscari, the Vermont Supreme Court upheld an order prohibiting the respondent from possessing firearms, but remanded the order prohibiting him from possession of a "dangerous weapon" for an opportunity to substitute a more narrow and precise restriction. 769 A.2d at 1298. No specific provision in the Vermont protection order statutes provided for this type of order. The court entered this order under the general statutory provision which permits a court in a protection order case to make orders it "deems necessary to protect the plaintiff or the plaintiff's children." Id. at 1297. The court noted that possessing a firearm was also a federal violation, but commented that a provision in the protection order itself was necessary, because federal prosecution was not likely because of limited resources. Id. at 1298 (citing Comment, Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse, 23 Vt. L. Rev. 349, 362, 366-67 (1998) (citing a report by the Vermont United States Attorney)).

In Conkle v. Wolfe, the Ohio Court of Appeals also upheld a provision of a state protection order which prohibited the respondent from possessing firearms during the term of the protection order. 722 N.E.2d 586. As was true in Vermont, the Ohio protection order scheme did not specifically provide for this type of order, but did have a provision that permits a court to "grant other relief that the court considers equitable and fair. . . ." Id. at 593 (quoting Ohio R.C. § 3113.31(E)(1)(a)-(h)). The court also found that this order was not preempted by the federal Gun Control Act, given that Congress had provided that

> "'[n]o provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.'"

Conkle, 722 N.W.2d at 593-94 (quoting 18 U.S.C. § 927). The court continued:

> [t]he federal scheme to regulate interstate traffic in firearms does not displace the state's power to restrict certain individuals from possessing weapons. Ohio law does not stand as an obstacle to the accomplishment and execution of

> the full purposes and objectives of Congress that are reflected in the Gun Control Act. Congress designed the Gun Control Act to assist states in regulating firearms within their own borders, not to prevent states from regulating firearms within their borders. Therefore, the trial court did not need to find Wolfe to be a "credible threat" in order to enjoin him from possessing weapons.

Conkle, 722 N.W.2d at 594.

A Nebraska court may prefer not to order disposition of a weapon because it believes that the Federal Gun Control Act will provide the petitioner the required protection, specifically under the prohibition of a respondent who is subject to a qualifying protection order from possessing firearms or ammunition, found at 18 United States Code § 922(g)(8). That section provides that it is unlawful for a person who is the subject of a qualifying protection order to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." For the prohibition to apply, the court order had to have been issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate. The new protection order requirements for a hearing on all petitions for protection orders, which went into effect on July 17, 2008, were designed to bring Nebraska's protection orders under the scope of the federal firearms statutes. The order must have "a finding that such person represents a credible threat to the physical safety of such intimate partner or child ***or***...by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." 18 U.S.C. § 922(g)(8)(C)(i)-(ii) (Emphasis supplied).

Under the amended protection order statute regarding mandatory evidentiary hearings on all petitions for a protection order, whether or not an ex parte order was entered, all final Nebraska protection orders are now considered "qualified" protection orders for purposes of the federal firearms statutes. What is still unclear, under the new statutory scheme, is exactly how law enforcement in each county will react.

The protection order forms themselves, Forms 19:10 (Revised Oct. 2008), 19:11B (Revised Oct. 2008), and 19:12 (Revised Oct. 2008), include a checkbox for a judge's finding that the respondent represents a credible threat

to the physical safety of the petitioner. Checking this box would satisfy this element. Even if the box is not checked, if the court enjoined the respondent from "threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner" as provided in the second line of those same form protection orders, that element would also be satisfied, as long as the federal court could determine that the parties involved were "intimate partners." Given the boilerplate language contained in the protection orders, specifically under the second item in the list of relief granted, even if the court does not make a specific finding that the respondent represents a credible threat to the safety of the petitioner, by checking this item of relief on the protection order, the order could still qualify under the federal firearms statute. Finally, given the current pressures on federal law enforcement resources, whether a particular offender would receive the attention of a federal prosecution is unknown.

Thus, if a Nebraska court is concerned about the respondent having a weapon, that court should consider ordering a disposition of that weapon in state court as part of the protection order itself. To assist in determining what firearms should be included in the order, the court could inquire of the respondent under oath, a listing of all the respondent's firearms. Then the court order can specify with particularity what the respondent needs to do with the weapons. Then, if the respondent does not comply in the manner or within the time frame set forth in the court's order, a contempt action could be brought by the petitioner, or a prosecution could be initiated by the county attorney. Finally, the court should also prohibit possession of all firearms during the duration of the order.

The federal firearms provisions operate regardless of any specific statement by the state court in the protection order itself, if the order is a qualifying order. The court need not specify that the respondent cannot possess a firearm or ammunition in order for the federal firearms provision to apply. Federal law operates independently of any specific mention of firearms in the state court order.

The federal firearms provisions do not just provide sanctions to the individuals who are subject to a qualifying protection order, but also apply to third parties who sell or transfer any firearm or ammunition to someone who

is subject to a qualifying protection order. 18 U.S.C. § 922(d)(8). This often comes up in situations in which a family member or friend of the respondent to a qualifying protection order "holds" the firearms and/or ammunition during the time that the order is in effect, when a family member or friend acquires firearms or ammunition and then transfers those to someone who is subject to a qualifying protection order, or when a family member or friend "loans" or provides access to firearms and ammunition to an individual who is subject to a qualifying protection order. This provision also applies to individuals who sell firearms or ammunition, as well.

A reader who is interested in further information concerning the federal firearms provisions and their impact on state court judicial practice should review the brief but excellent article entitled "Firearms and Domestic Violence: A Primer for Judges," by Darren Mitchell and Susan B. Carbon in the summer 2002 edition of Court Review beginning on page 32.

F. Pets

In cases involving domestic violence, there is a significant risk of animal abuse, as well. Seventy-one percent of victims entering a domestic violence shelter, who also own pets, have reported that their abuser has injured, killed, or threatened family pets for the express purpose of revenge or to psychologically control their victims. American Humane, Facts about Animal Abuse & Domestic Violence <http://www.americanhumane.org/about-us/newsroom/fact-sheets/animal-abuse-domestic-violence.html> (accessed Feb. 1, 2010) (citing F.R. Ascione, C.V. Weber & D.S. Wood, The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women who are Battered, Society & Animals 5(3), 205-218 (1997)). For many victims, the thought of leaving a beloved family pet with an abuser who has preyed upon that pet as a means of abusing and controlling the victim is unimaginable. In some cases, the only viable alternative for a victim who cannot bring a pet with her if she wants to escape the abuse is not to leave the abuser at all. Between 25% and 40% of victims are not able to leave an abusive situation because of their concern about what will happen to their pets should they leave. American Humane, <http://www.americanhumane.org/about-us/newsroom/fact-sheets/animal-abuse-domestic-violence.html> (citing P. Arkow, Breaking the Cycles of Violence: A Guide to Multi-disciplinary Interventions. A Handbook for Child Protection, Domestic Violence and Animal Protection

Agencies (Latham Foundation, 2003); S. McIntosh, Calgary Research Results: Exploring the Links Between Animal Abuse and Domestic Violence, Latham Letter 22(4), 14-16 (2001); P. Arkow, Animal Abuse and Domestic Violence: Intake Statistics Tell a Sad Story, Latham Letter 15(2), 17 (1994)).

Recognizing the risk of pet abuse, LB 83 was introduced in 2009 in Nebraska. The purpose of LB 83 was to provide for the safety of pets through specific provisions in domestic abuse protection orders. American Veterinary Medical Association, State Legislative Updates <http://www.avma.org/advocacy/state/Legislative_updates/legislative_update_090313.asp> (Mar. 13, 2009). The bill failed to advance to a second round of debate, primarily due to concerns about rural individuals being unable to sell livestock or other farm animals for slaughter. While the language was later changed to reflect just household pets, there was still a concern that the bill was actually being pushed with the end goal of restricting how farmers raise cattle, hogs, and other livestock.

There is currently no prohibition on courts entering protection orders which provide for the safety of pets in the "other relief" section of the protection order. Given the strong tie between the incidence of animal abuse and domestic violence, it is suggested that courts utilize this section to make provisions for pets.

G. Return of Necessary Items

In many cases in which a victim seeks a protection order and separates from her abuser, she may be leaving behind a number of important items or documents in her haste to leave, or in some cases, the abuser may keep important items or documents under lock and key in an attempt to make it more difficult for the victim to leave.

An immigrant victim may easily be impacted by an abuser's retention of important documents, especially if the abuser is her sponsor for citizenship. Without important documents, including her Social Security card, immigration documents, or driver's license, an immigrant victim may not be able to obtain or continue employment, thus forcing her to return to her abuser. The "other relief" section of a domestic abuse protection order may allow the victim to

seek those important documents from the abuser that she might not otherwise have access to, thus increasing her potential for increased safety and autonomy. National Council for Juvenile and Family Court Judges, A Guide for Effective Issuance & Enforcement of Protection Orders 38 (2005).

Another use of the "other relief" section is for the return of the victim's necessary medications, medical devices, and assistive living devices. While this provision can be used for any victim, it is of special importance to disabled victims. There are special challenges for disabled victims of domestic violence. In some cases, the abuser may be the caretaker of the disabled victim, and with that caregiving role, the abuser may withhold basic life necessities, such as medication and other items. New York City Mayor's Office to Combat Domestic Violence, Special Issues: Victims with Disabilities <http://www.nyc.gov/html/ocdv/html/issues/disabilities.shtml>. Therefore, it is important that the return of necessary items is made as soon as possible under a protection order, as without such items, a victim may be forced to return to her abuser.

Chapter 5:

Procedure for Requesting Domestic Abuse Protection Order

Petition and Affidavit is Filed

1. What Does Petitioner File?
    A. Forms
    B. How Specific Must Petitioner Get?
2. Can the Petitioner Get Any Help?
    A. Unauthorized Practice of Law?
3. Where Does Petitioner File?
4. Fees and Costs
5. Minors as Petitioners
6. Minors as Respondents

Choice of Court

1. Constitutionality of Choice of Court

Petition and Affidavit is Filed

Any person who needs protection from domestic abuse can file for a protection order provided he or she meets the necessary requirements.

1. What Does Petitioner File?

The Protection from Domestic Abuse Act has set forth the requirements for petitioning for a protection order under Nebraska law.

A. Forms

The procedure for obtaining a domestic abuse protection order has been greatly simplified by the use of standard forms promulgated by the Nebraska State Court Administrator's Office, as required under Nebraska Revised Statute § 42-924.02 (Reissue 2008). Nebraska law provides that the standard forms are the ***only*** forms to be used in the state in the petitioning and entry of protection orders. Id. (Emphasis added). These forms are available at all clerks of the district courts across the state. Many protection order forms are also available through local domestic violence and sexual assault programs across the state. In addition to these locations, some forms may be accessed through the Nebraska Supreme Court's website at <http:// www.supremecourt.ne.gov/self-help/pos.shtml> (last updated Nov. 3, 2009) (accessed Feb. 1, 2010). The most recent forms for protection orders have been included in Appendix A of this guide.

Form 19:8 (Revised Jun. 2008) is the form petition and affidavit provided by the Court Administrator's office. This form is relatively simple to use, as it only requires the petitioner to check boxes and fill in appropriate blanks. The petitioner is also required to file a Social Security number form, which has the names, Social Security numbers, gender, and dates of birth of all parties involved in the petition, including the petitioner, the respondent, and any minor children. This form is confidential and is not made part of the actual "public" case file because of the sensitive information included in it. This information is then to be entered in a computer system which allows Nebraska protection orders to be accessed by law enforcement in other states,

which aids in the interstate enforcement of foreign protection orders. As of the date of publishing of this guide, this interstate database has not been fully implemented, and not every protection order is currently being entered into the database.

A recent Supreme Court case has attempted to weaken the mandate of using only the forms created by the State Court Administrator under Nebraska Revised Statute § 42-924.02. Mahmood v. Mahmud, 279 Neb. 390, 778 N.W.2d 426 (2010). In that case, the petitioner applied for a domestic abuse protection order utilizing the domestic abuse protection order forms, but the court issued a harassment protection order instead. Id. at 391-92, 778 N.W.2d at 429. In finding that the forms the petitioner uses are all but interchangeable, the court noted that

> [w]hile Nebraska's § 28-311.09(6) provides that the standard forms shall be the only ones used, this does not mean that without the proper standard form, the court lacks authority to act.
>
> Moreover, in this case, [the petitioner] used a standard form—she merely used the standard form for abuse instead of harassment. Our review of the two forms reveals that they are barely distinguishable. The differences between the two forms are that they contain different titles, that the abuse protection form asks for the relationship of the respondent, and that the abuse protection form asks the petitioner to list the most recent incidents of "domestic abuse," instead of the most recent incidents of "harassment."

Id. at 395, 778 N.W.2d at 431. While the Supreme Court seems to indicate that the forms are interchangeable, it is advisable that petitioners carefully evaluate which form to utilize, and that courts carefully scrutinize the forms, as well. While the Supreme Court found little difference in the forms utilized, there are significant differences in the consequences of the entry of such orders, such as the federal firearms implications for the respondent to a domestic abuse protection order, and the enforcement of the orders, such as mandatory versus discretionary arrest. For a further discussion of the federal firearms restrictions, see Chapter 8. For a further discussion of enforcement provisions for protection orders, see Chapter 9.

B. How Specific Must Petitioner Get?

Petitioners do need to be factually specific in their petitions. In a Nebraska Court of Appeals case, the petitioner was found to have made conclusory statements regarding instances of harassment, without the facts to support such statements. Buda v. Humble, 2 Neb. App. 872, 517 N.W.2d 622 (1994). In Buda, the petitioner included in his petition that "Petitioner has been willfully and maliciously harassed by Respondent with the intent to terrify, threaten or intimidate Petitioner" and "Petitioner is in fear of physical harm from Respondent as supported by the attached affidavit." Id. at 876, 517 N.W.2d at 624-25. The affidavit stated that "a Protection Order is needed to protect her or him and her or his family from the Respondent as the Respondent has been guilty of acts of a harassing nature and physical violence toward the Petitioner." In the section specifying recent acts conducted by the respondent against the petitioner, the petitioner wrote: "disturbing the peace of the petitioner[,]" "imposed restraint upon personal liberty[,]" "disturbed peace of children[,]" "telephone hang ups[,]" "false accusations of damage to her vehicle[,]" and "false allegations to News media[.]" Id. The Court stated that "[t]he allegations contained in [the petitioner's] application, particularly those in the affidavit wherein he was to specifically describe the conduct complained of, are too general to support a finding that any protective order should be issued. These allegations are merely conclusions." Id. at 876-77, 517 N.W.2d at 625.

2. Can the Petitioner Get Any Help?

It is clear that the petitioner cannot get help in filling out the forms from the clerk of the district court. Nebraska law specifically prohibits the clerk of the district court or the clerk's employees from providing assistance in completing the forms. Neb. Rev. Stat. § 42-924.02. However, Nebraska statutes do require that Nebraska Department of Health and Human Services provide "assistance in completing the standard petition and affidavit forms for persons who file a petition and affidavit for a protection order." Neb. Rev. Stat. §§ 42-905(5), 42-906 (Reissue 2008). In Nebraska, the Department of Health and Human Services has contracted this service to local nonprofit agencies. These nonprofit agencies have hired advocates to help victims of domestic violence. Few of the advocates who

assist people with protection orders are attorneys.

A. Unauthorized Practice of Law

Given that non-lawyer advocates are assisting persons in obtaining protection orders, the question arises as to whether they are thereby engaging in the unauthorized practice of law. In other states, these types of cases typically arise when the abuser or the abuser's attorney files a complaint against the advocate assisting the victim. See Margaret F. Brown, Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law, 34 Colum. J.L. & Soc. Probs. 279, 283 (Summer, 2001) (citing Sarah M. Buel, Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay, 28 Colo. Bar. J. 18, 18 n.7 (Oct. 1999); Selland v. Selland, 519 N.W.2d 21 (N.D. 1994). In most cases, the suits were not even brought by members of the bar concerned with inadequate "legal" representation to the clients—they were brought by abusers themselves.

Nebraska statutory law provides that:

> no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

Neb. Rev. Stat. § 7-101 (Reissue 2007). Violation of that section is a Class III misdemeanor.

A new court rule specifically excepts nonlawyer advocates and supervised volunteers of nonprofit entities whose primary purpose is assisting domestic violence and sexual assault victims from the definition of the unauthorized practice of law in the assistance of a victim with a protection order proceeding. Neb. Ct. R. § 3-1004(T) (2008). The court rule specifically sets out the activities which an advocate may participate in which are excepted from being considered the unauthorized practice of law. These activities include describing the protection order proceedings to victims, accompanying them throughout all stages of the process, and attending all

court proceedings. At the judge's discretion, the advocate may sit at counsel table with the victim, accompany the victim for any discussions in chambers, or respond to questions from the court. They may not, however, question witnesses, make arguments to the court, or otherwise participate as a legal representative for the victim. Id.

While the exception to the definition of the unauthorized practice of law is a wide exception, an advocate is required, under Nebraska law, to keep all communication with the victim confidential. See Neb. Rev. Stat. § 29-4303(1) (Reissue 2008) (All communications made between a victim of domestic violence or sexual assault, made to an advocate with a nonprofit organization whose sole purpose is to assist victims of domestic violence and sexual assault, are privileged communications and may only be disclosed under limited circumstances.) Given this privilege, a court would be well advised to not allow an advocate any kind of active participation in any protection order proceeding itself.

3. Where Does Petitioner File?

As provided in Nebraska Revised Statute § 42-924(2) (Reissue 2008), the petitioner files the petition and affidavit in the district court clerk's office. The petitioner also must file the supplemental Social Security form along with the petition, affidavit, and praecipe. The petitioner should take caution to file the case in a court with proper venue, as previously discussed in Chapter 2.

4. Fees and Costs

Fees to cover costs for filing a petition, issuance, or service of a protection order shall not be charged as long as the only relief requested is provided by the Protection from Domestic Abuse Act. Contrary to the practice of many courts in Nebraska, costs may **not** be assessed to the petitioner if the judge dismisses the petition for failure to provide adequate evidence, for failure to assert recent events, etc. Under the terms of the Violence Against Women Act, under which Nebraska accepts financial grant monies, Nebraska is required to certify that:

> its laws, policies, and practices do not require…in connection with the filing, issuance, registration, or service of a protection order, or a petition for a protection order, to protect a victim of

> domestic violence, stalking, or sexual assault, that the victim bear the costs associated with… the filing, issuance, registration, or service…[] protection order, petition for a protection order, or witness subpoena, whether issued inside or outside the State, tribal, or local jurisdiction[.]

42 U.S.C.A. § 3796gg-5(a)(1) (2003 & 2009 Cum. Supp.). The Nebraska statute, which brings Nebraska into compliance with the federal requirements for a state to receive grant monies, is even more restrictive. The Nebraska statute provides that:

> [f]ees to cover costs associated with the filing of a petition for a protection order or the issuance or service of a protection order seeking only the relief provided by the Protection from Domestic Abuse Act ***shall not*** be charged, except that a court may assess such fees and costs if the court finds, by ***clear and convincing evidence***, that the statements contained in the petition were false and that the protection order was sought in bad faith.

Neb. Rev. Stat. § 42-924.01 (Reissue 2008) (emphasis supplied). Alternatively, at the final hearing, a court may assess against the respondent the costs associated with the filing of a petition for a protection order or the issuance or service of a protection order. Id. Simply put, absent a finding that the allegations contained in the petition or affidavit were false and the protection order was sought in bad faith, the court has no ability to assess costs against a petitioner, even if the court finds the evidence insufficient to enter a protection order at all.

Some courts in Nebraska are assessing fees when a petitioner fails to appear for a scheduled hearing or when the petitioner dismisses the protection order or her petition, reasoning that if a petitioner does not appear at the hearing or dismisses the order, then she must have sought such an order in bad faith. This reasoning is patently unsound, as it does not recognize the dynamics of domestic violence. A petitioner may dismiss a protection or fail to appear at a hearing because of coercion and threats from the respondent, or because the parties have reconciled. Either way, a dismissal or failure to appear at a hearing does not, by itself, show that a protection order was sought in bad faith or that the allegations it the petition were untrue. The National Council of Juvenile and Family Court Judges have made it clear, in its 2005 publication regarding protection orders, that a petitioner who dismisses her protection order should not be assessed fees by the court. Best practices in that publication suggest that the systems and individuals involved with protection orders "[e]nsure that victims are not penalized when they don't follow through, either by dismissing or changing

their orders." National Council on Juvenile and Family Court Judges, A Guide for Effective Issuance & Enforcement of Protection Orders 9 (2005).

5. Minors as Petitioners

There is no doubt that a minor may seek a protection order. The statute is clear that **any** victim of abuse may apply. Neb. Rev. Stat. § 42-924(1) (Reissue 2008). What is less clear, however, is whether minors can petition for a protection order without having a parent or guardian petition on their behalf. For any other lawsuit, the action must be commenced, maintained, and prosecuted by his guardian or next friend, as provided by Nebraska Revised Statute § 25-307 (Reissue 2008). Once commenced, the action may be dismissed by the guardian or next friend only with approval of the court; the case can be dismissed by the court if the next friend brought a case which is not for the benefit of the minor. Finally, the court can substitute the guardian of the minor or any other person as next friend. Id. The Protection from Domestic Abuse Act states specifically that "[i]f there is any conflict between sections 42-924 to 42-926 and any other provision of law, sections 42-924 to 42-926 govern." Neb. Rev. Stat. § 42-924(4). Such language indicates the possibility that a minor may petition on their own behalf for a protection order. There is not a similar provision in the harassment protection order statutes, though, so this is likely limited to domestic abuse protection orders.

Even if a court mandates that a minor have a parent, guardian, or next friend maintain an action on their behalf, there are certain recognized circumstances in which a parent or guardian does not have to file on behalf of a minor. One such circumstance is that of a minor who marries. In an unpublished case before the Nebraska Court of Appeals in 2005, a father filed for a protection order on behalf of his minor daughter and himself against his daughter's husband. Hilario P. v. Mario R., 2005 WL 14005 (Neb. App. 2005). The daughter married her husband at age seventeen in South Dakota, which provided that a marriage of a minor between the ages of sixteen and eighteen would be allowed with parental consent. While the Court did not have the documents evidencing parental consent in evidence, it did have the certificate of marriage, which they assumed meant that the statutory requirements for the marriage of a minor were fulfilled under South Dakota law. Given the daughter's

marriage, the daughter was no longer a minor under Nebraska law, and the father therefore was no longer her guardian and was not entitled to act on her behalf. As such, the Court reversed and remanded the case to the trial court, with instructions to dismiss the protection order. Id.

6. Minors as Respondents

A minor may also be a respondent in a protection order case. In that instance, the case must be defended by a guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge. Neb. Rev. Stat. § 25-309 (Reissue 2008). This duty of the court to appoint a guardian for a minor respondent in a protection order case was illuminated in dicta in the case of Lockenour v. Sculley, 8 Neb. App. 254, 592 N.W.2d 161 (1999). In that case, the Court of Appeals reversed the granting of a harassment protection order on other grounds, but agreed with the respondent's contention that the district court should have appointed a guardian for a minor respondent in that case. Id. at 259-60, 592 N.W.2d at 165. See also Lucero v. Pino, 946 P.2d 232, 235 (N.M. App. 1997) (entry of a protection order against an unrepresented minor respondent, who was also not appointed a guardian ad litem, may be voidable).

Choice of Court

Even though the petition and affidavit is to be filed with the clerk of the district court, Nebraska Revised Statute § 25-2740(2) provides that the petitioner must designate in the petition whether he or she wants the proceeding heard by a county court judge or a district court judge. Form 19:8 (Revised Jun. 2008), the petition for a domestic abuse protection order, has a specific question which gives the petitioner this choice. Whether this designation is subject to alteration, either by the receiving court or by the parties is an open question. The district court may have a county court judge hear a case because Nebraska law has always permitted a district court judge to appoint by special order a consenting county court judge to hear a specific case. While the county court judge must consent to the appointment, the consent of the parties is not required, nor are objections to such appointment by the parties allowed. Neb. Rev. Stat. § 24-312 (Reissue 2008). There is now a provision in the protection order statutes that the court may now order protection orders to a referee for findings and recommendations. Neb. Rev. Stat. § 42-925(3) (Reissue 2008).

This limited ability of the court to have control over which level hears a particular protection order petition could be unfortunate, because certainly there are times when it would make the most sense for one court or the other to hear the matter. If the district court is in the process of hearing the parties' bitterly contested divorce case, would it not make the most sense to have that same court hear the protection order matter? Conversely, if the county court had heard the three past criminal assault cases, wouldn't it be more expedient to allow that court to rule on the protection order application, even if the parties objected to that?

At the same time, it may make more sense for a county court to hear a protection order application, as there are many counties in Nebraska which only have a district court judge in the courthouse hearing cases once every few weeks, but those same counties have a county court judge who is present more frequently than the district court judge. In those cases, it makes sense for the petitioner to be able to designate that she wants the case heard by the county court judge, as he or she has an immediate need for safety under a protection order, and if she waited for the district court judge to hear the petition, she could

potentially be unprotected for a matter of weeks.

Although these problems will persist if there is no method to have the most familiar court hear the protection order application, they can be mitigated somewhat if the court can receive appropriate information concerning the parties in a timely manner. Question number six (6) of the form petition for a domestic abuse protection order, Form 19:8 (Revised Jun. 2008), does assist a court in receiving appropriate information concerning the parties because it requests the petitioner to include information about any cases to which the petitioner has been a party. In addition, a court could institute a policy that requires its clerk's office to do a quick check of any past or pending litigation involving either of the parties. The court could then make appropriate inquiry into those cases.

1. Constitutionality of Choice of Court

This statutory scheme that permits a district court case to be heard by a county court also provokes another interesting issue. Although Nebraska Revised Statute § 25-2740 makes it appear that the action is still one in the district court and the legislature is simply appointing the county court to, in essence, sit as a district court judge on these cases, something which only can happen with the county judge's consent in other cases under Nebraska Revised Statute § 24-312(2), Nebraska Revised Statute § 24-517(7) (Reissue 2008) clearly gives the county court concurrent original jurisdiction with the district court in all domestic abuse protection order cases. Given that the granting of a protection order is equitable in nature, a constitutional objection could be raised to the granting of a protection order by a judge of the county court. This is because equity jurisdiction is vested in the district court by way of Article V, Section 9 of the Nebraska Constitution, which provides in part: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide…" Indeed, although there is no Nebraska case law on this issue, in one harassment protection order case, the Court of Appeals of Washington declared that the legislature violated Washington's Constitution when it attempted to grant to the district courts the jurisdiction to issue civil protection orders when the Washington Constitution had given the superior courts exclusive jurisdiction over equity cases. State v. Brennan, 884 P.2d 1343, 1348 (Wash. App. 1994).

Given that no case in Nebraska has ever expressly construed Article V, Section 9 of the Nebraska Constitution as giving exclusive jurisdiction over equity cases solely to the district courts and, given that no protection order case in Nebraska has expressly determined that the granting of a protection order is an equitable remedy, the question is an open one in Nebraska. Again, a proper analysis and treatment of this issue is beyond the scope of this handbook, but courts should be aware that it is an issue that could be raised in the protection order context.

Chapter 6:

Court's Response to Request for Domestic Abuse Protection Order

Court's Choices When Petition and Affidavit is Filed

1. Ex Parte Granted in Full
2. Ex Parte Not Granted
    A. Dismissal Permitted?
3. Partial Relief is Granted

Service on Respondent

1. Other Service Permitted?
2. Service of Process on Out-of-State Respondent
3. Service of Process Within 14 Days
4. Service of Process After Ex Parte Order Issued
    A. When Respondent Fails to Appear at Evidentiary Hearing
    B. When Evidentiary Hearing Held and Ex Parte Order is Continued
    C. When Evidentiary Hearing is Held and Ex Parte Order is Modified

Court's Choices When Petition and Affidavit is Filed

1. Ex Parte Granted in Full

When a petition and affidavit for relief under Nebraska Revised Statute § 42-924 (Reissue 2008) is filed, the court may grant a protection order ex parte "if it reasonably appears from the specific facts included in the affidavit that the petitioner will be in immediate danger of abuse before the matter can be heard on notice." Neb. Rev. Stat. § 42-925 (Reissue 2008). If the court is granting all relief requested on an ex parte basis, the court should utilize standardized form 19:10 (Revised Oct. 2008). Notice that this can be accomplished simply by indicating with a check mark on the appropriate lines those provisions which are to be ordered ex parte.

It should be noted that the federal firearms provisions do not apply to ex parte protection orders, though a judge may certainly provide for the removal of firearms from the respondent under the "all other relief as required" provision of the protection order. The federal firearms provision is only triggered in the event that the respondent is given adequate notice and an opportunity to be heard. As such, Nebraska Revised Statute § 42-925 provides that if an order is entered ex parte, the court shall immediately schedule a hearing to be held within thirty (30) days of the service of such ex parte order. It further provides that notice be given to both the petitioner and the respondent of such evidentiary hearing, and if the respondent does not appear, then the order is affirmed. Neb. Rev. Stat. § 42-925 (1). The duration of the order is one year from issuance, the date of the hearing affirming such ex parte order. Neb. Rev. Stat. § 42-925(4). For purposes of the federal firearms provision, even if the respondent does not appear at that hearing, it is still considered an opportunity to be heard, thus making the order a "qualifying" order for purposes of the federal firearm statutes.

2. Ex Parte Not Granted

A court may deny an ex parte order if the specific facts included in the

affidavit do not show that the petitioner will be in immediate danger of abuse. Neb. Rev. Stat. § 42-925(1). If a court denies an ex parte order, Nebraska Revised Statute § 42-925 mandates a specific procedure for the court to follow. The court must schedule an evidentiary hearing within fourteen (14) days after the filing of the petition if an ex parte order is not entered. The petitioner and respondent must both be provided with notice of such hearing. Neb. Rev. Stat. § 42-925(2).

A. Dismissal Permitted?

A significant question existed, prior to the passage of legislation which mandated hearings on all protection orders, about whether a court may dismiss a petition at this early stage of the proceedings. It had become the practice for many courts to dismiss petitions without affording a hearing on them. Dismissing a petition sua sponte is not, however, specifically permitted by either the protection order statutes themselves, or the general civil provision governing dismissals, Nebraska Revised Statute § 25-601 (Reissue 2008). Further, it is clear under the protection order statutes that the court may not dismiss any petition without first conducting an evidentiary hearing. Confusion has arisen because of Form 19:16 (Revised Jul. 2006), which states that a petition may be dismissed upon a review of the petition and affidavit. This form was drafted prior to the 2008 amendments to the Protection from Domestic Abuse Act, which mandated hearings on all petitions, and as such, are not considered authority for dismissals without the required evidentiary hearing.

While the present law does not allow any court to dismiss a petition for a protection order without an evidentiary hearing, it is still of assistance to consider the possible factors in a court's decision to dismiss a case without even a hearing. In a case governed by that general dismissal statute, the Nebraska Court of Appeals determined that a divorce respondent's application for change in visitation could not be dismissed by the court without first holding a hearing. The court did, however, state that a court could dismiss an action without holding a hearing for want of subject matter jurisdiction. Eisenmann v. Eisenmann, 1 Neb. App. 138, 146-47, 488 N.W.2d 587, 592 (1992).

In the protection order context, it is quite likely that the courts were dismissing cases without a hearing when a pro se petitioner failed to set forth facts in the petition and affidavit sufficient to state a cause of action. Given that the first hearing in a protection order case is a show cause hearing, both under the former and current law, courts may have been reluctant, and still may be reluctant, to require a respondent to appear to defend a case when a petitioner has not set forth a factually sufficient case.

This has created a "double standard" of sorts between protection order actions and other civil actions. In any other situation in any other case, however, a court does not have the authority to dismiss a case for mere failure of a petitioner or plaintiff to state a cause of action. In other civil cases, it is the respondent or defendant's duty to file an appropriate motion, after which time the petitioner or plaintiff should be given time to amend. Only when the petition or complaint fails to plead subject matter jurisdiction should the court dismiss the petition or complaint without a hearing. As stated in one Pennsylvania protection order case:

> [t]o dismiss inartfully drafted petitions which may not, on their face, be couched in the precise definitional terms set forth in the statute would eviscerate the purpose and goals of the PFAA [Protection From Abuse Act], which is to provide spouses, household members, intimate partners and children with immediate temporary protection from abuse. We likewise decline to adopt appellant's suggestion that a trial court lacks the authority to conduct a hearing on any PFAA petition which may not contain a prima facie allegation of abuse.

Weir v. Weir, 631 A.2d 650, 654 (Pa. 1993). This decision was specifically premised on the fact that the vast majority of protection order petitions are completed and filed by pro se parties with no legal training. Id.

3. Partial Relief Granted

Under the former version of Nebraska Revised Statute § 42-925, a court was authorized to order only partial relief on an ex parte basis, and the former ex parte order form had a checkbox that stated that if checked, the judge may order additional relief pursuant to an order to show cause. Thus, the judge could order basic partial relief without a hearing at all or partial relief with a later hearing set to determine further additional relief.

Under the newly amended statute, there is no specific mention of whether a court is authorized to provide partial relief or not. However, given that there is not a prohibition on the entry of partial relief, it appears that it is still authorized. Form 19:10 (Revised Oct. 2008) does not provide a checkbox for such matters, as it is no longer necessary to do so, since every petition for a protection order is now afforded an evidentiary hearing.

Service and Notice on Respondent

After a protection order is issued, the clerk of the court must provide a copy of the protection order to the sheriff's office in the county where the respondent may be personally served and is to provide instructions for service. Neb. Rev. Stat. § 42-926 (Reissue 2008). Nebraska Revised Statute § 42-926 then provides that the sheriff is to attempt service and file the return of service within fourteen (14) days of the issuance of the order.

1. Other Service Permitted?

In most circumstances the service required by the above provisions will be successful. But, if it is not, are other types of service permitted? The general service of process statute in Nebraska, Nebraska Revised Statute § 25-508.01 (Reissue 2008), provides that an individual may be served by personal, residence or certified mail service. Additionally, service by publication, and other forms of constructive service are permitted by Nebraska Revised Statute § 25-517.02 (Reissue 2008). There is also the authority of Nebraska Revised Statute § 25-1069 (Reissue 2008), which provides that an injunction obtained without notice shall be served by the sheriff "in the manner presented for serving a summons." Do these statutes apply to the service of an ex parte protection order?

The answer is almost certainly "no." Nebraska Revised Statute § 25-505.01 (Reissue 2008) provides that a plaintiff may not be permitted to use those methods of service if either a statute or a court places a limitation on that type of service. As there is already a service method provided in the Protection from Domestic Abuse Act which specifies the service requirements under the Act, it is likely that other methods of service would be prohibited. Although there is no clear prohibition of alternative service options in the service provisions of the Protection from Domestic Abuse Act, there also is a specific method prescribed in the Act. See Chapter 2 for additional discussion regarding service of the petition.

2. Service of Process on Out-of-State Respondent

Nothing in the protection order statutes prohibit service of process on a

respondent who lives outside of Nebraska. Obviously, if the respondent could be more easily served in Nebraska, that should be the first course of action. If service cannot be secured in Nebraska, however, a request should be sent to the out-of-state sheriff's office where the respondent may be served. Neb. Rev. Stat. § 25-540(a) (Reissue 1995). It should be sent in the same manner as it is sent to a sheriff within the state.

3. Service of Process Within 14 Days

Since Nebraska Revised Statute § 42-926 provides that the sheriff's office is required to attempt service of the protection order upon the respondent and file its return with the clerk of the court within fourteen (14) days of the issuance of the order, questions have arisen concerning the effect of that "14 day requirement." The concern is that there is no statutory authority for the status of a protection order if it has not been served upon the respondent within the 14 days.

While there is not statutory authority directly on point for this particular issue, there is statutory guidance for civil cases, in general. If one looks to Nebraska's general civil procedure provisions for guidance, it is clear that in other situations, unserved petitions don't just evaporate if they are not served. Indeed, Nebraska Revised Statute § 25-507.01 (Reissue 2008) provides that petitions are to be served within twenty (20) days. They are not, however, to be dismissed if that is not accomplished. By operation of Nebraska Revised Statute § 25-217 (Reissue 2008), such an unserved petition is to be dismissed only after six (6) months have passed. In the protection order context, it is not just the petition which the courts are saying must be served within 14 days—it is a court order, which by its very terms, is to be effective for a term of one year from the date of issuance. Given this concern, some courts have taken the position that the unserved protection order is therefore void under state law.

Other Nebraska courts believe that if the protection order cannot be served within 14 days that the order should be reissued and a new praecipe for service should issue. This would allow the respondent to be served within 14 days of the "issuance of the order." There is a certain amount of appeal to this approach, and this is the position that the State Court Administrator's Office has taken in its direction to Nebraska judges about protection order procedures. The

date of the reissued order would start the clock for the one year duration.

Some Nebraska courts require the petitioner to request in writing that the sheriff attempt service again. This is apparently in keeping with the alias summons practice permitted by Nebraska Revised Statute § 25-502.01 (Reissue 2008). This again treats an order in the same manner as a summons.

Other Nebraska courts believe that the 14 day service requirement is simply a mandate to the sheriff to attempt service in a prompt manner. When the sheriff's return indicates no service, these courts simply order the sheriff to attempt service again. Indeed, when one considers service of the order in the enforcement context, this seems to make sense. When a violation of a protection order is prosecuted, the prosecution must prove a knowing violation of the order "after service." There is nothing in the elements of the criminal offense that requires the prosecution to prove "service within 14 days" or "service as provided by Nebraska Revised Statute § 42-925." Therefore, what is most important is getting the respondent served with the order.

4. Service of Process After Ex Parte Order Issued

There is also a question about whether a court needs to serve a protection order after an evidentiary hearing has been scheduled or held. The different outcomes which can result from a hearing require different solutions to that service question.

A. When Respondent Fails to Appear to Evidentiary Hearing

When a respondent has been served with an ex parte protection order and then fails to appear for an evidentiary hearing, a court most likely does not need to serve the respondent with the continuation order if the terms have not changed. This was the holding of State v. Patterson, 7 Neb. App. 816, 585 N.W.2d 625 (1998). In that case, the respondent was served on January 2nd with an ex parte protection order, which advised the respondent that if he wished to show cause why the order should not remain in effect for one year, he could appear at a hearing scheduled for January 8th. Id. at 816-17, 585 N.W.2d at 126. The respondent did not appear at the hearing, and a docket entry was made stating that the previous order was to remain in full force and

effect for a period of one year from the date it was originally issued. The respondent subsequently violated the order and a prosecution for violation of a protection order was initiated. The respondent was convicted, and contended on appeal that the service of process on him was insufficient. He alleged that the January 2nd protection order should not have been admitted into evidence in absence of the State's proving that he had been served with the January 8th continuation order. Id. The Court of Appeals rejected his argument and held that the court did not have to serve the defendant again with the January 8th continuation order, and therefore the January 2nd protection order was properly admitted into evidence. Id. at 821, 585 N.W.2d at 128. This decision was made prior to the statutory changes, though, as well as before the changes were made to the protection order forms. That said, the fact that the court scheduled an evidentiary hearing after issuing an ex parte order without the respondent specifically having to request one is virtually identical to how the courts are now statutorily mandated to conduct protection order hearings, so it is likely that the same reasoning would hold true.

That said, the current forms are not the same forms as the forms which were used in Patterson. As such, if a judge chooses to issue a "Modified Domestic Abuse Protection Order," Form 19:11B (Revised Oct. 2008), or a "Domestic Abuse Protection Order," Form 19:12 (Revised Oct. 2008), while keeping the terms of the original ex parte order the same in the new order, then it is likely that the respondent will need to be served again. Nebraska Revised Statute § 42-925(1) provides that the court shall affirm the ex parte order if the respondent does not appear at the evidentiary hearing and show cause. The requirements for service are "upon the issuance of ***any*** protection order under section 42-925[.]" Neb. Rev. Stat. § 42-926 (emphasis added). While it is not necessarily a "new" order, it will most likely be issued on a new form showing that it is a final order, and thus, it will mostly likely need to be served upon the respondent again. There is a further discussion of this matter in subsection (B).

B. When Evidentiary Hearing Held and Terms of the Ex Parte Order are Continued

Under the former law, the court could essentially continue the terms of

the ex parte protection order. Service under that statutory scheme appeared to indicate that the "continuation order" would not need to be served again upon the respondent. State v. Patterson, 7 Neb. App. 816, 585 N.W.2d 625 (1998). By its very terms, the form ex parte protection orders, Form 19:10, indicated that the order is granted for a period of one year "unless modified by the court[.]"

Form 19:10 has since been revised, and now provides that "[t]he terms of this order shall be effective until one year from the date of issuance, unless vacated by the court prior to such date." While this language seems to indicate some leeway in the question of whether the order entered after the hearing occurred must be served, the most prudent course would be to utilize Form 19:12, the form for a final protection order, which provides a checkbox for entry of a "final" order, have the clerk file stamp it, and then have the respondent served with that new order. If the court has access to sheriff's deputies as court officers, this could be accomplished relatively simply by asking the parties to remain in court while the court drafts the continuation order, Form 19:12, and have the sheriff serve it right there in court. If the case has to be taken under advisement, before the court dismisses the parties, it should verbally advise the respondent that the ex parte protection order is still in full force and effect until further ruling of the court, and then make a minute entry on the docket sheet to that effect. Thereafter, if the court continues the protection order in full force and effect, it should have form 19:12 served on the respondent.

C. When Evidentiary Hearing is Held and Ex Parte Order is Modified

If the court modifies the order after the evidentiary hearing, the respondent needs to be made aware of those changes. In this case, to avoid any confusion or issues in any subsequent enforcement action, the court should have the respondent served with the new order, Form 19:11B. This could be accomplished relatively quickly if the judge can draft the modified order during the hearing itself, and then have the sheriff serve the order immediately before the respondent leaves the courtroom.

If the case must be taken under advisement, before the court dismisses the parties it should verbally advise the respondent that the ex parte protection order is still in full force and effect until further ruling of the court, and make a minute entry on the docket sheet to that effect. Thereafter, when the court modifies the ex parte protection order, it should have the new order served on the respondent.

Chapter 7:

Evidentiary Hearing

Fact Issues Before the Court

Conduct at Proceeding
1. Evidence Presented
2. Examination of Witnesses
3. Recording of Proceedings

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Continuances

Petitioner's Failure to Appear at Hearing

Fact Issues Before the Court

The factual issue to be litigated is whether the facts stated in the sworn application for a protection order are true. Zuco v. Tucker, 9 Neb. App. 155, 160, 609 N.W.2d 59, 64 (2000). As noted previously in Chapter 5, if the court had permitted additional sworn testimony at the ex parte stage, the court would need to provide the respondent with notice of those facts, as those factual allegations would also be at issue in the show cause hearing. See J.K. v. B.K., 706 A.2d 203 (N.J. 1998) (New Jersey Superior Court reversal of the granting of a protection order on due process grounds because the complaint did not allege an act of domestic violence, and the only acts to which the plaintiff testified which did constitute domestic violence were previous ones which had not been so alleged).

In Nebraska, when a party is faced with a situation where the evidence presented differs from the pleadings, that party can always request the court to amend the pleadings to conform with the proof. For instance, a plaintiff may present evidence that indicate a claim which is not a part of the pleadings, but is so similar in nature to what is pled in the complaint that the addition of such claim does not substantially change the original claim. In the alternative, a defendant may present evidence about a defense which was not pled, but might be allowed because it does not substantially change the essential nature of the defense. As stated in In re Interest of Joshua M., "[a] trial court may conform the pleadings to the facts proved when an amendment does not change substantially the claim or defense." 251 Neb. 614, 634, 558 N.W.2d 548, 562 (1997) (citing McCook Nat. Bank v. Myers, 243 Neb. 853, 503 N.W.2d 200 (1993)). In that case, the Nebraska Supreme Court determined that a trial court did not err when it permitted amendment of a juvenile court termination of parental rights petition after all parties had rested to include an additional statutory basis for termination.

Conduct at Proceeding

1. Evidence Presented

A recent decision from the Supreme Court of Nebraska has established a change to the general practice of courts statewide with regard to the evidence considered for a protection order. Specifically, recent case law indicates that the form petition and affidavit, without being entered and accepted as an exhibit at trial, is not to be considered evidence in support of a petitioner's case. Mahmood v. Mahmud, 279 Neb. 390, 398, 778 N.W.2d 426, 433 (2010). The Supreme Court also mandated, in the same decision, that testimony must be under oath. The Supreme Court noted that "[w]hile we do not expect show cause harassment protection hearings to reflect the full panoply of procedures common to civil trials, we do hold that at a minimum, testimony must be under oath and documents must be admitted into evidence before being considered. Id., 778 N.W.2d at 433.

Protection orders were meant to function as a means of protection for petitioners, acting pro se, without the necessity of an attorney. Unfortunately, under the Supreme Court's mandate, a pro se petitioner may not be able to adequately represent themselves at an evidentiary hearing, as most pro se litigants are not familiar with the rules of evidence or courtroom procedure. This decision essentially forecloses most petitioners' ability to obtain a protection order without the assistance of an attorney. In some cases, the inability to hire an attorney may well mean that petitioners do not seek the protection of a protection order.

2. Examination of Witnesses

The Nebraska Court of Appeals declared in Zuco v. Tucker that a litigant in a protection order proceeding has a due process right to a full hearing. 9 Neb. App. 155, 609 N.W.2d 59 (2000). In that case, a district court's blanket policy of limiting witnesses was found to be violative of a litigant's right to due process. Id. at 160, 609 N.W.2d at 64. The Court of Appeals was quick to point out, however, that certain techniques to expedite the hearing are appropriate. It first cited the

Nebraska Rules of Evidence, Rule 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by... considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. at 160, 609 N.W.2d at 64 (quoting Neb. Rev. Stat. § 27-403). It then went on to state:

> [i]n view of the fact that protection order proceedings are summary in nature and that frequently one or both parties are not represented by counsel, we believe the trial judge is justified in taking an active role in enforcing § 27-403 in such cases. We also realize that the contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true. We therefore think that in protection order proceedings, the trial judge is justified in insisting upon a short offer of proof so that the judge may enforce § 27-403.

Zuco, 9 Neb. App. at 160, 609 N.W.2d at 64. It should be noted, however, that the Court of Appeals did note that had the respondent's attorney made an offer of proof with regard to testimony which the trial judge did not allow, that perhaps the end result might have been different—i.e., the testimony of additional witnesses might have been allowed. Id. at 160-61, 609 N.W.2d at 64.

It is also worth noting that the Nebraska Court of Appeals is not backing down from its position that protection order litigants deserve sufficient time in court to present their cases. In the case of Gernstein v. Allen, the Nebraska Court of Appeals upheld the trial court's determination that a motion for new trial should have been sustained, in part because the respondent had not been given sufficient opportunity to present his side of the case at the hearing. 10 Neb. App. 214, 630 N.W.2d 672 (2001).

In addition to the court controlling the litigants' presentation of evidence in a protection order hearing, the trial judge also has the express authority to call witnesses in that hearing, either on his or her own motion or at the suggestion of a party. If the court does call witnesses, the other party or his or her counsel has a right to cross-examine those witnesses called by the court. Elstun v. Elstun, 257 Neb. 820, 825-26, 600 N.W.2d 835, 839-40 (1999) (citing Neb. Rev. Stat. § 27-614(1)). The court specifically made note of the fact that if the attorney for one party was not allowed to ask questions of either his or her client or the other party, who was acting pro se, the court's denial of such questioning would have "certainly chilled" any consideration of a pro se party to cross examine the

represented party. Elstun, 257 Neb. at 825, 600 N.W.2d at 839.

3. Recording of Proceedings

When an evidentiary hearing is held in a protection order matter, the hearing should be recorded. Lockenour v. Sculley, 8 Neb. App. 254, 592 N.W.2d 161 (1999). In reversing the protection order because of the lack of a recorded proceeding, the Nebraska Court of Appeals stated that "[m]eaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision." Id. at 258, 592 N.W.2d at 164 (citing Norwest Bank Nebraska v. Bellevue Bridge Comm., 7 Neb. App. 750, 585 N.W.2d 505 (1998)). Specifically,

> [i]t is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.

Lockenour, 8 Neb. App. at 258, 592 N.W.2d at 164 (citing Gerdes v. Klindt's, Inc., 247 Neb. 138, 139, 525 N.W.2d 219, 220 (1995)).

No Right to Court Appointed Attorney

The Nebraska Court of Appeals has determined that a respondent in a protection order establishment case is not entitled to court appointed counsel. Elstun v. Elstun, 8 Neb. App. 97, 589 N.W.2d 334 (1999), aff'd in part and rev'd in part, Elstun v. Elstun, 257 Neb. 820, 600 N.W.2d 835 (1999). Nebraska case law, pursuant to the United States Constitution, provides that an indigent litigant has a right to appointed counsel only in a civil or criminal case in which that litigant may be deprived of his or her personal liberty. Elstun, 8 Neb. at 107, 589 N.W.2d at 342 (citing Allen v. Sheriff of Lancaster County, 245 Neb. 149, 511 N.W.2d 125 (1994); Carroll v. Moore, 228 Neb. 561, 423 N.W.2d 757 (1988), cert. denied 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989)).

Nebraska case law sets forth the factors that must be considered in whether counsel should be appointed:

(1) the private interests at stake;

(2) the risk of erroneous results under current procedures, considered with the probable value of the suggested procedural safeguard; and

(3) the governmental interests at stake.

Elstun, 8 Neb. App. at 108, 589 N.W.2d at 342 (citing Carroll v. Moore, supra (citing Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))). Given that the hearing on whether or not to grant a protection order does not affect the liberty interest of the respondent—only a violation of the protection order does—the respondent is not entitled to court appointed counsel. Elstun, 8 Neb. App. at 107-08, 589 N.W.2d at 342.

Taking Judicial Notice of Other Proceedings

In the protection order context, oftentimes the litigants have been involved in other judicial proceedings which bear directly on the issues raised in the petition. Thus, the court may be frequently faced with requests to take judicial notice of various court proceedings.

The Nebraska Rules of Evidence deal directly with judicial notice. A court is permitted to take judicial notice of adjudicative facts at any stage of a proceeding whether requested to or not. Neb. Rev. Stat. § 27-201(3) (Reissue 2008). It also provides that a court must take judicial notice if requested by a party and supplied with the necessary information. Neb. Rev. Stat. § 27-201(4). Finally, it provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Neb. Rev. Stat. § 27-201(2).

It has been held that a court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. Gottsch v. Bank of Stapleton, 235 Neb. 816, 834-35, 458 N.W.2d 443, 455-56 (1990). The Gottsch court cautioned, however, that:

> [a] distinction must be carefully drawn between taking judicial notice of the existence of documents in the Court file as opposed to the truth of the facts asserted in those documents…
>
> …[W]hile a Court may take judicial notice of each document in the Court's file it may only take judicial notice of the truth of facts asserted in documents such as orders, judgments, and findings of fact and conclusions of law beause of the principles of collateral estoppel, res judicata, and the law of the case.

Id. at 835, 458 N.W.2d at 455-56 (citing In re Snider Farms, Inc., 83 Bankr. 977, 986 (N.D. Ind. 1988)). The Supreme Court of Nebraska goes on to state that "a court may judicially notice existence of its records and the records of another court, but judicial notice of the facts reflected in the court's records is subject to the doctrine of collateral estoppel or of res judicata." Gottsch, 235 Neb. at 836,

458 N.W.2d at 456.

The Supreme Court is aware that there are some safeguards necessary for the utilization of judicial notice as a means of incorporating additional evidence and information from earlier cases. With regard to those safeguards, there must be a record of testimony, through the preparation of a transcript, and documents must have been made part of the record through marking as exhibits. In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 709, 484 N.W.2d 68, 73 (1992) (quoting In Interest of Adkins, 298 N.W.2d 273 (Iowa 1980)). This must be done, "[o]therwise, a meaningful review is impossible." Id. Judicial notice cannot just be on the judge's memory of a prior proceeding.

> What a judge knows and what facts a judge may judicially notice aren't identical data banks... [A]ctual private knowledge by the judge is no sufficient ground for taking judicial notice of a fact as a basis for a finding or a final judgment...

In re Interest of C.K., L.K., and G.K., 240 Neb. at 708, 484 N.W.2d at 73 (citing McCormick on Evidence § 329 at 922-23 (E. Cleary 3d ed. 1984)).

Thus, subject to the above limitations, a court is permitted to take judicial notice of other court proceedings in determining whether to issue a protection order. In order to obtain the necessary information, a court may wish to inquire about any previous or ongoing proceedings involving the parties so as to have a clear picture of the situation. Notice that question number 6 on the form Petition and Affidavit, Form 19:8 (Revised Jun. 2008), which asks the petitioner to list proceedings involving the respondent, appears to contemplate the court doing this very thing.

Burden of Proof

Although not specified in statute or in published Nebraska case law, the burden of proof in a protection order show cause hearing is presumably the same as in other civil actions of the same nature, i.e., injunctions—the movant has the burden to prove by a preponderance of the evidence that the order should be entered. The Court of Appeals, in a 2001 unpublished opinion, stated that every petitioner, analogous to a proceeding for an injunction, must show by a preponderance of the evidence why he or she is entitled to relief. Taylor v. Pflaum, 2001 WL 880669, * 4 (Neb. App. 2001) (citing Abboud v. Lakeview, Inc., 237 Neb. 326, 466 N.W.2d 442 (1991) ("A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.")). See also Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992) (North Dakota Supreme Court held that the moving party in a protection order case has the burden of proving "a showing of actual or imminent domestic violence" by a preponderance of the evidence); Coyle v. Compton, 940 P.2d 404 (Haw. 1997) (Intermediate court of appeals of Hawaii determines that preponderance of the evidence is the required standard of proof for the issuance of a domestic violence protection order in the absence of a specific statute to the contrary, and despite the fact that persons who sought a harassment protection order were required by statute to prove their cases by clear and convincing evidence). Once that burden is met, the burden shifts to the respondent to show cause as to why such an order should not be entered. Neb. Rev. Stat. § 42-925 (Reissue 2008).

Many respondents nationwide have attempted to contest the use of a preponderance of the evidence standard, but these attacks have been largely unsuccessful. In explaining why the standard is preponderance of the evidence when the respondent argued that it should be a clear and convincing standard because it affected his rights to his children, the Supreme Court of Idaho stated:

> "A standard of proof reflects the weight ascribed to competing interests, and it embodies a societal judgment about how the risk of fact-finding error should be allocated." (Citation omitted)… Society, through its legislature, has determined that expedited protection of victims of domestic violence is of primary concern, and through the Domestic Violence Act has provided a speedy procedural means for victims to obtain relief. The risk of fact-

> finding error in the case at hand is less likely than where actual termination of parental rights is concerned…
>
> In the present situation, the custody restriction is limited to no more than ninety days in duration; in fact, a permanent change of custody is not obtainable under the Domestic Violence Act. Considering the need for prompt relief, and the fact that the preponderance of the evidence standards is adequate in instances of permanent alteration of custody rights, the preponderance of the evidence is certainly a sufficiently demanding standard to protect the short-term custody restriction.

Ellibee v. Ellibee, 826 P.2d 462 (Idaho 1992).

Another court which has addressed the sufficiency of the preponderance of evidence burden reached a similar conclusion. In balancing petitioners' interest in being protected from domestic violence and respondents' liberty interest in being able to go where they want and do what they say, the Superior Court of New Jersey stated that the preponderance of the evidence standard was far superior to that of the clear and convincing standard, using the factors set forth by the Supreme Court of the United States. Crespo v. Crespo, 972 A.2d 1169, 1175-78 (N.J. App. 2009) (citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 484 (1972) (Setting forth factors for states to consider when adopting a particular burden of proof, in order to adequately address constitutional due process)). The court specifically noted the chance of denying relief to a deserving petitioner because of a lack of corroborating evidence because of the private nature of the domestic violence was an unacceptable risk under the clear and convincing standard.

> Judges-being human-may at times err in assessing which of two contestants has told the truth; we do not, however, view Mathews as requiring a burden of persuasion that more effectively eliminates the chance of a mistaken adjudication at the steep price of permitting countless more meritorious claims to be lost at the hands of the clear-and-convincing standard.

Id. at 1177.

Proof of Recent Act of Domestic Violence

The decision to issue a protection order is, of course, extremely fact sensitive. However, one factual situation that occurs with sufficient frequency to warrant further discussion is whether a court should issue a protection order when the allegation of domestic violence is rather remote in time. Nebraska's statutory scheme does **not** require that the abuse inflicted must be recent in order for a protection order to issue. Only when an ex parte order is requested is the court to consider whether the petitioner is in "immediate danger of abuse."

One case in North Dakota illustrates that while the recency of abuse is relevant, it is not a requirement for the entry of a protection order. In that case, the respondent argued that an October incident was too remote in time to justify a petition for a protection order filed four months later. Steckler v. Steckler, 492 N.W.2d 76, 81 (N.D. 1992). The North Dakota Supreme Court upheld the issuance of the protection order even though the most recent allegation of abuse had occurred four months earlier, and the protection order statute required a showing of actual or imminent domestic violence. In upholding the issuance of the protection order, the court stated:

> Where as here there exists a history of visitation violations and allegations of abuse, the court may consider what happened in October…as relevant evidence of what might occur in the future. It need not await a more tragic event to take action. The remoteness of the October…incident is a matter for the court to consider in weighing the evidence before it.

Id. at 81.

In a Washington case, with a statutory structure more analogous to that of Nebraska, the Court of Appeals affirmed the entry of a protection order against a respondent. Spence v. Kaminski, 12 P.3d 1030 (Wash. App. 2000). In the hearing on the protection order requested in the case, there was evidence presented of the respondent's recent custodial interference, and acts of domestic violence which had occurred several years earlier. Id. at 1032-33. The trial court found that the total history of the couple's relationship, including previous threats and violence, supported the petitioner's conclusion that she may be in danger. Id. at 1033. The trial court granted the protection order, presumably under the provision of Washington state statutes that permits a protection order

to issue under a definition of domestic violence that includes "infliction of fear of imminent physical harm." Id. at 1033. The Washington Court of Appeals upheld the issuance of the protection order, stating that nothing in the statute requires a recent act of domestic violence for the issuance of a protection order after a hearing.

> Facially, the provisions of [the protection order statute] are not ambiguous. The petition must allege that the victim "has been a victim of domestic violence[]" [as defined in statute]. Nothing in these provisions requires a recent act of domestic violence… In light of the Legislature's intent to intervene *before* injury occurs, and in recognition that [the applicable Washington statutes] do not require an allegation of recent domestic violence, we decline to read into these statutes a requirement of a recent violent act.

Id. at 1035 (Emphasis in original) (Citations omitted). Instead, the Court found that the continuing relationship of the parties presented ongoing opportunities for conflict and upheld the order. Id. at 1034.

The Ohio Court of Appeals has similarly decided a case in which a protection order was issued based on evidence of physical and sexual abuse during the petitioner's and respondent's marriage, but the most recent abuse occurred nine months prior to the filing of the petition for a protective order. Morris v. Stonewall, 1999 WL 1037507, * 1 (Ohio App. Nov. 15, 1999). The respondent appealed, arguing that the trial court's order was an abuse of discretion because there was no immediate and present danger of domestic violence and the alleged domestic violence had already ceased. Id. Ohio's definition of "domestic violence" for purposes of the protection order statute is quite similar to that of Nebraska. The Appeals Court rejected the respondent's argument, and determined that even though it had been some time since the last incident of abuse, given the long duration of the abuse and the fact that the respondent was a member of the law enforcement community who frequented the same places as the petitioner, there was a basis for finding that there remained a present threat of future violence. Id. at *4. See also Woolum v. Woolum, 723 N.E.2d 1135 (Ohio App. 1999) (holding that despite respondent's lack of violent incidents since the expiration of the previous protection order, his continuing threats of future violence and past behavior justified the entry of a subsequent protection order).

The Minnesota Court of Appeals did give some indication on how recent an act of violence must be in order to be considered for purposes of a protection

order. In one case, the Minnesota Court of Appeals held that there was insufficient evidence of "domestic abuse" as defined by Minnesota's protection order statute when the most recent evidence of abuse presented at the hearing was almost two years old, and there was no evidence of any intent to do present harm to either the petitioner or her children. Bjergum v. Bjergum, 392 N.W.2d 604, 606 (Minn. App. 1986). It is possible to distinguish this case based on its fairly narrow facts, as the petitioner was unable to provide enough information regarding violent acts more recent than the previous two years. Id. at 605. The Court of Appeals relied on an earlier Minnesota Court of Appeals case in making this decision.

In the earlier case, the Court of Appeals reversed the trial court's entry of a protection order based on the petitioner's allegations of past abuse in a relationship that had been ended for approximately four years. Kass v. Kass, 355 N.W.2d 335, 336 (Minn. App. 1994). The petitioner saw the respondent in a vehicle behind her vehicle on a road in another town where the parties had lived when they were married. Id. The court stated that:

> [t]he use of the phrase "infliction of fear" in the statute implies that the legislature intended that there be some overt action to indicate that [respondent] intended to put [petitioner] in fear of imminent physical harm… Thus, we construe the definition of "domestic abuse" under Minnesota's Domestic Abuse Act to require either a showing of present harm, or an intention on the part of [respondent] to do present harm.
>
> Although we sympathize with [petitioner's] concern for her safety founded upon bad experiences of the past, those experiences are, by [her] own admission, four years old. Even if we view the facts in the light most favorable to the [petitioner], and accept that there was domestic abuse in the past and that [respondent] [was the person following the [petitioner's] car], the record is devoid of any showing of [respondent's] present intention to do harm or inflict fear of harm. Thus, we find no record to justify the issuance of a restraining order merely based upon [petitioner] seeing [respondent] on a public street for the first time in four years.

Id. at 337. Again, the finding of a lack of recent events by the Minnesota court is because of the unique set of facts in the case. It appears from the opinion that the petitioner's sighting of the respondent was a chance encounter, and if the man in the car behind was in fact the respondent, that he did not realize that she was in the car ahead of him. Id. at 337-38. As such, the court was not able to

discern any facts that indicated the possibility of future violence or anything else that would put the petitioner in fear of future violence. This case may also be distinguished on its relatively narrow facts. The Court of Appeals made reference to the fact that maybe the result would have been different had the "chance encounter" been determined to not be chance and the respondent had actually shown intent to harm the petitioner. Id. at 337.

In fact, at least one state has codified the stance that an act of violence must not be recent in order to justify the entry of a protection order. The relevant Indiana statute sets forth that "[a] court may not deny a petitioner relief under section 9 of this chapter solely because of a lapse of time between an act of domestic or family violence and the filing of a petition." Ind. Code § 34-26-5-13 (2005 Cum. Supp.). As the Indiana Protection Order Deskbook states: "This section of the [Indiana Civil Protection Order Act (ICPOA)] recognizes that a perpetrator of domestic or family violence may pose a risk of violence long after the last act or episode of violence, and an Order may be necessary to protect a victim from that continuing or recurrent risk." Indiana Judicial Center, Protection Order Deskbook 4-5, 4-6 <http://www.in.gov/judiciary/center/pubs/benchbooks/protection-order-deskbook.pdf> (Jul. 2006) (accessed Feb. 1, 2010).

Petitioner Proves Harassment Violation When Requested Domestic Violence Protection Order

An issue arises when a petitioner files a petition requesting relief from abuse by a household member under Nebraska Revised Statute § 42-924 (Reissue 2008), but fails to prove all of the elements necessary for relief under that statute. Sometimes that failure of proof occurs because the petitioner and the respondent were not "household members" or the "abusive conduct" does not fit the statutory definition. The proof offered in some circumstances would, however, satisfy the requirements necessary to obtain a harassment protection order under Nebraska Revised Statute § 28-311.09 (Reissue 2008). This is because Nebraska Revised Statute § 28-311.09 does not require a particular relationship between the parties and does not require bodily injury. A question arises as to whether a court must dismiss the petition for the domestic abuse protection order for failure of proof, or if the court may enter a harassment protection order.

To answer these questions, a court must consider the fact that a respondent clearly has a due process right to be notified of the basis for the proceedings. On the other hand, a court cannot ignore the fact that the Legislature was specifically attempting to make the procedure for obtaining protection orders simple so that pro se litigants could have access to the protection afforded by these types of orders.

Consider the following example: A petitioner approaches a court requesting a domestic violence protection order. The court reviews the petition and determines that the facts do not amount to abuse under the statutory definition, but would constitute harassment under the harassment protection order statute. It is also clear the petition shows that the petitioner will suffer irreparable harm, loss, or damage so the granting of an ex parte harassment protection order would be advisable. If the petitioner is available, is working with an advocate, and there is time for him or her to fill out the form petition for a

harassment protection order, some courts have denied the domestic violence protection order, but have drafted the dismissal order in such a manner that the petitioner understands the case was dismissed only because the requirements of the section under which the petitioner brought the case were not met. If the petitioner is not working with an advocate, however, such a course of action may discourage the petitioner, and he or she would not know to submit another petition using the harassment protection order forms. Additionally, if the petitioner is not immediately available to reapply for an order, such a course of action may also leave him or her unprotected for a period of time.

Other courts in the above situation have solved the problem in a different manner. Those courts simply enter an ex parte order pursuant to the harassment protection order statute, even though the petitioner has requested a domestic violence protection order. Those courts are seemingly recognizing that petitioners are acting pro se, and are often not able to understand the distinctions between the two types of orders. The order in that situation should be modified, however, to give the respondent sufficient notice to satisfy due process that the court has treated the request for a domestic violence protection order as a request for a harassment protection order under a totally different statutory scheme. The other notifications which are sent to the respondent should be the ones used when a harassment protection order is issued, as well. If a respondent requests a hearing and raises the issue, a court could always permit a petitioner to amend the pleadings and continue the hearing if requested by the respondent. If a respondent does not request a hearing, the ex parte order would continue, and the respondent would be subject to the enforcement of its provisions, absent any appeal, because only lack of subject matter jurisdiction and lack of personal jurisdiction can be attacked in an enforcement proceeding. State v. Mott, 692 A.2d 360 (Vt. 1997).

Until a clear answer comes from the appellate courts concerning this issue, the lower courts will need to assess each case as it arises and make a determination about which course of action is the most appropriate in any given situation.

Continuances

Although continuances of a protection order hearing are inevitable, a court should grant them only when absolutely necessary. Nebraska statute does not define when a continuance is absolutely necessary, but other states have developed best practices with regard to when it is appropriate for a court to order a continuance.

One such appropriate time for a court to order a continuance is when the petitioner requests a continuance for purposes of finding an attorney to represent her when the respondent is already represented by legal counsel. Mike Brigner, The Ohio Domestic Violence Benchbook: A Practical Guide to Competence for Judges & Magistrates 30 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (2d Ed. 2003) (accessed Feb. 1, 2010). See also Alabama Coalition Against Domestic Violence, Alabama's Domestic Violence Benchbook 25 <http://www.acadv.org/2005benchbook.pdf> (Jul. 2005) (accessed Feb. 1, 2010) (adapting materials from the Michigan Judicial Institute, Domestic Violence: A Guide to Civil & Criminal Proceedings 295-96 (3d Ed. 2004) (citing Herrell and Hofford, Family Violence: Improving Court Practices, 41 Juvenile and Family Court Journal 1, 7 (1990)) ("If [an] unrepresented party cannot adequately represent his or her own best interests, the court may permit a continuance to allow the party to seek legal assistance.")).

If one must be granted, the court should remind the respondent that any ex parte protection order which had been issued is still in full force and effect.

Petitioner's Failure to Appear at Hearing

There are obviously many reasons why a petitioner might fail to appear at any scheduled hearing. Among the more dangerous reasons are that the petitioner (1) may not have received notice of the hearing; (2) may be physically unable to attend the hearing; (3) may be intimidated by the respondent; (4) may not understand that a hearing is required; or (5) may want to stop the proceedings because the physical abuse has temporarily ceased. Given these possibilities, and the fact that a court has limited abilities to discover why a petitioner has not come to court, a court should consider continuing the hearing if a petitioner fails to appear at that hearing. This is among the best practices of other states, as well.

> If the Plaintiff fails to appear at the final hearing, the court should consider the possiblity that injuries or intimidation may have caused the Plaintiff not to appear. The likelihood that one of these situations may exist makes the dismissal of the petition, without further inquiry, potentially dangerous to the Plaintiff. A brief recess or continuance to allow counsel, Plaintiff, victim advocates, or court staff to investigate is advisable. Any dismissal under these circumstances should be without prejudice.

Alabama's Domestic Violence Benchbook at 28 <http://www.acadv.org/2005benchbook.pdf>. See also Brigner, Ohio Benchbook at 30 <http://www.ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf>. There may be a variety of reasons why a petitioner may not appear at the hearing that have nothing to do with threats, intimidation, or injury from the respondent; however, given that the purpose of these orders is to keep petitioners safe, it is important that the court determine the reason behind a petitioner's failure to appear.

It is important to note that a petitioner's failure to appear at the evidentiary hearing is not, by itself, evidence that he or she sought the protection order in bad faith. As such, court fees should not be assessed against the petitioner by the court. As discussed above, a petitioner's failure to appear at the hearing may have more to do with intimidation by the respondent than the desire of the petitioner to not have a protection order entered. For a complete discussion of the fees associated with protection orders, see Chapter 5.

Chapter 8:

Special Issues in Issuance of Protection Orders

Constitutionality of Continuation of Ex Parte Order When No Hearing Held

Wording of Orders

Federal Firearms Prohibition

Duration of Orders

Conflict With Other Existing Orders

1. Protection Order Entered Subsequent to Earlier Divorce or Custody Order
2. Protection Order Entered Prior to Divorce or Custody Order

Cross or Counter Petitions

Modification Requests While Order Still In Effect

Motion to Dismiss Protection Order

1. Request to Dismiss by Petitioner
2. Request to Dismiss by Respondent

Effect of Denial of Protection Order on Subsequent Requests for Protection Order

Modification of Duration of Order, or Issuance of Second or Subsequent Protection Order

Motion for New Trial

Constitutionality of Continuation of Ex Parte Order When No Hearing Held

Statutes which permit the granting of protection orders on an ex parte basis have been held to be constitutional in numerous cases. See, e.g. Blazel v. Bradley, 698 F. Supp. 756 (W.D. Wis. 1988) (Wisconsin ex parte protection order statutory scheme did not deprive respondent of due process of law even though it did not provide for the petitioner's presence at the ex parte hearing and did not provide for prior notice to the respondent of the hearing, because it did provide that the petition had to be specific and verified, and did provide for a hearing for the respondent within seven days). Nebraska's amended statutory scheme, with its mandate for an evidentiary hearing to be held on every petition, including those in which an ex parte protection order is entered, is typical of such statutes that have withstood a constitutional attack. See Neb. Rev. Stat. § 42-925 (Reissue 2008) (requiring an evidentiary hearing on all protection order petitions).

Depending on the type of order involved, the statutory scheme raises both substantive and procedural due process issues. Some protection orders simply prohibit a respondent from doing that which is prohibited by law anyway—assaulting, molesting, attacking or otherwise disturbing the peace of the petitioner. Seemingly those types of orders raise no substantive due process issues because they involve no governmental intrusion on protected rights. Other orders prohibit contact with the petitioner, or restrict the freedom of a respondent to go to a particular location, thus implicating the constitutional rights to freedom of travel and association. Still others remove and exclude respondents from a shared residence, which implicates the respondent's property interests. Still others set a ninety (90) day child custody order, which brings into play a respondent's fundamental liberty interest, albeit on a temporary basis. Finally, if a court is utilizing its full powers under the "catch-all" provision, the type of order a court wishes to grant is limited only by the request of the petitioner, thus orders issued pursuant to the "catch-all" authority may also implicate important "property" or "liberty" interests.

The United States Supreme Court, in Mathews v. Eldridge, set forth three factors which courts should consider when determining whether a certain

procedure violates an individual's right to due process of law.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976).

A court faced with a decision about what process is due should carefully weigh the risk of harm to the petitioner that notice without an accompanying protection order gives to a respondent, as against the gravity of the interference on a temporary basis of the respondent's property or liberty interest. The petitioner's ability to be protected from harm by the respondent should clearly outweigh the temporary restriction on a respondent's property or liberty interest, though. The protection order forms promulgated by the Nebraska Supreme Court appear to give a court some flexibility to fashion a process that corresponds to that court's understanding of the necessary balance that is required by the constitution in any given situation. Utilizing Form 19:10 (Revised Oct. 2008), a court can order all requested relief on an ex parte basis, and leave it to the respondent to challenge such order at the time of the evidentiary hearing. A court can also utilize Form 19:10 to enter an ex parte order on some, but not all of the petitioner's requests, and address the additional relief requested at the evidentiary hearing.

Wording of Orders

Nebraska Revised Statute § 42-924.02 (Reissue 2008) provides that the protection order forms promulgated by the State Court Administrator's office are to be the only forms used in the state. Given the statutory requirement of uniform protection orders, it is highly unlikely that courts are drafting their own orders in these cases, though some judges are making slight modifications to some of the wording of the form orders. Additionally, there are blanks available on each of the standardized forms for a court to order additional relief to the petitioner.

A court should carefully draft any such additional provisions of relief, so as to make it clear what is prohibited. For instance, in the case of Kuenen v. Kuenen, 504 N.Y.S.2d 937 (N. Y. App. Div. 1986), a respondent had sought and obtained permission from the family court to enter the marital home to remove clothing and other personal belongings. He used that opportunity to remove furniture from the home as well. Id. at 938. The family court then held the respondent in contempt, which was reversed by the appellate court. The appellate court reversed the finding of contempt because the order was not "clear and explicit" and the act complained of was not "clearly prescribed." Id.

One common occurrence under Nebraska's protection order scheme is when a court allows visitation to occur between the respondent and the parties' children. In that case, many judges are allowing telephone contact to be made if it pertains to the children and visitation. Judges should be wary about granting unlimited telephone contact for this particular issue, however, because many respondents will simply call the petitioner multiple times per day, sometimes even dozens of times per day, and so long as the respondent mentions "visitation" during the telephone call or voicemail, the respondent thinks that the call is technically in compliance with the order, while continuing his pattern of domestic abuse. Judges need to consider these issues, as this is just another means for the respondent to continue the abuse. If visitation must be ordered, telephone contact with regard to such visitation should be limited to, for example, only one call per day or per week, or whatever time period the court believes is reasonable.

Federal Firearms Prohibition

According to federal law, it is a crime for an individual who is subject to a valid, qualifying protection order to possess or transfer a firearm in interstate commerce. 18 U.S.C. § 922(g)(8) (2000 & 2009 Cum. Supp.). The protection order must be a "qualifying" protection order to invoke the provisions of the federal firearms provisions. In order to be considered a "qualifying" order, some prerequisites must be addressed.

- The protection order must have been issued by a court and must restrain the individual from harassing, stalking or threatening an intimate partner or the child of an intimate partner or engaging in conduct that would place an intimate partner in reasonable fear of bodily harm to the partner or child; and
- The protection order must have been issued following an evidentiary hearing and the person restrained must have received notice of the hearing and had an opportunity to participate; and
- The protection order must also include a specific finding that the person to be restrained poses a credible threat to the physical safety of the victim or must include an explicit prohibition against the use of force that would reasonably be expected to cause bodily injury.

18 U.S.C. § 922(g)(8)(A)-(C).

In Nebraska, the statutes and the forms themselves combine to create a "qualifying" order for purposes of the federal firearms statute. Forms 19:10, 19-11B (Revised Oct. 2008), and 19:12 (Revised Oct. 2008) all provide language that contributes to that end. The standard language in each of those forms includes a finding that the "respondent represents a credible threat to the physical safety of the petitioner," so the third requirement above is satisfied if the applicable box is checked. Additionally, as long as the court orders the respondent to refrain from "threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner" as provided in the second line of the protection order form, part of the first requirement is satisfied. Since 18 United States Code § 921(a)(32) (2000 & 2009 Cum. Supp.) defines intimate partner as a "spouse…[or] former

spouse of the person, an individual who is a parent of a child of the person, or an individual cohabitates or has cohabited with the person[,]" the relationship part of the first requirement is usually met in most Nebraska issued protection orders. It should be noted, however, that in order for the firearms provision to apply, the parties must meet the requirements for the "intimate partner" definition under 18 United States Code § 921(a)(32), so protection orders that have been issued to parties involved in a dating relationship do not meet the relationship requirement, absent other qualifying factors, such as cohabitation by individuals in a dating relationship.

The only problem in applying the federal law to a person who has obtained a protection order in Nebraska occurs when that order is entered on an ex parte basis. The second requirement above clearly mandates that an evidentiary hearing be held with prior notice being given to the respondent before the federal firemarms prohibition can be applied. As such, there is not any protection of the federal firearms provision until the evidentiary hearing is held within 30 days of the service of the ex parte order and a final order is entered.

Even when the requirements are met to establish a protection order as a "qualifying" protection order, there is an exception to the prohibition on the possession of firearms for certain law enforcement officers who are subject to a protection order. Under 18 United States Code § 925 (2000 & 2009 Cum. Supp.), there is an "official use" exemption, which permits certain local, state and federal employees who are required to use weapons as part of their official duties to continue to possess those weapons for use in performing their official duties. The possession of personal weapons is still prohibited, as is use of the weapon for some other purpose.

Duration of Orders

Nebraska law provides that a protection order must specify that it is to last for a period of one (1) year. Neb. Rev. Stat. § 42-924(3). If no ex parte order is issued, a hearing is held, and then a protection order is issued, it is obvious that the order lasts for a period of one year from issuance of the order. If an ex parte order is entered, but the judge modifies it at the subsequent evidentiary hearing using Form 19-11B, then it appears that the duration of the order is one year from the entry of the modified order. If an ex parte order is entered, the respondent does not appear at the evidentiary hearing, and the court affirms the order, then it is not quite as clear. It does appear that, given the forms that have been approved, that the one year duration starts from the date of the affirming of the ex parte order, as the judge is required to complete Form 19:12.

There is case law authority in other states that the date from which the duration of the order is figured is the entry of the final order. See Holderman v. Hagner, 760 A.2d 1189 (Pa. 2000) (The duration of the protection order was considered to be one year from the time of entry of the final order, instead of the entry of the temporary ex parte order, which was in effect for approximately five months because of the respondent's inability to appear in court until five months after the ex parte order was issued). In Holderman, the court noted that it expects to modify temporary ex parte orders after the respondent's hearing. Id. at 1195.

It is not clear under Nebraska law whether the duration of the order is to be calculated from the date of the entry of the ex parte order or whether it is to be calculated from the date of the final order. Given that a court may deny an ex parte order based on the failure of the petitioner to show an immediate danger, but may enter a final order based on past events which may indicate future unlawful and violent behavior of the respondent, it makes sense that the applicable date would, in fact, have to be the date of the entry of the final order.

Conflict With Other Existing Orders

People who are seeking protection orders are often involved in divorce or paternity actions. Thus, protection order litigants may be subject to divorce or paternity decrees that grant custody and child support. Or, they may have already sought and either been denied or granted temporary restraining orders; temporary child custody orders; prohibitions against transfer of property; or exclusion orders under Nebraska Revised Statute § 42-357 (Reissue 2008). Since all of these remedies are also available in a protection order case, several concerns arise in these situations. Should a protection order be issued granting temporary custody or child support if it will be in contravention to an existing court order in a divorce or custody case, whether it be temporary or permanent? If a court does issue a protection order which contravenes a divorce court order, which order prevails? Should the case be transferred to the judge who handled the other matter? How will law enforcement determine which order should be enforced? If a request for a particular order was denied by another court, is a request for similar relief in a protection order case subject to the doctrines of res judicata or collateral estoppel? These situations are not easy, but some guidance follows.

1. Protection Order Entered Subsequent to Earlier Divorce or Custody Order

A court should first determine if its order is actually in contravention of a previously entered order. For instance, the North Dakota Supreme Court held that a protection order, which provided for a change in the location of where the father had to pick up and deliver the children, was not a modification of custody, and therefore did not amount to an impermissible modification of the divorce decree. Steckler v. Steckler, 492 N.W.2d 76 (N.D. 1992). It stated that the effect of the protection order did not modify the substance of the divorce decree, and in any event, was within the statutory authority of the court to accomplish the objective of a protection order issued pursuant to the statutory scheme. Specifically, the court noted that the protection order did not modify the amount of visitation, nor did it restrict his access to the children. Id. at 81-82.

If a divorce court has awarded custody and child support to one party, but that party then commits an act of violence against the children or in the children's presence, the non-custodial parent would have every right to go back to the divorce court and request a temporary custody order under Nebraska Revised Statute § 42-357. The procedure for obtaining such an order is difficult and effectively requires the non-custodial parent to hire an attorney. This would be impossible to accomplish in a timely fashion for many litigants. On the other hand, the procedure for obtaining a protection order is much easier and does not require the presence of an attorney. A court faced with a request for a protection order under such circumstances should strongly consider entering a temporary custody order of no more than ninety (90) days, as provided by Nebraska's protection order statutory scheme. To refuse to grant a protection order could place the children at serious risk. This short-lived custody order would then give the petitioner time to return to the court in the other action to seek a more permanent solution.

The Maryland Court of Appeals was faced with just such a situation. Kaufman v. Motley, 705 A.2d 330 (Md. App. 1998). In that case, a mother was seeking custody of her children as part of her request for a protection order, following a consent order before another judge in the same court, which placed custody of the minor children with their father. Id. at 331. Custody was awarded to the mother. Id. The Maryland Court of Appeals upheld the change in custody in light of the evidence presented by the mother at the hearing, stating:

> [the father's] argument is that custody, under the prevailing case law, cannot be changed absent express findings that there has been a material change in circumstances and that the modification of the custody arrangement is in the best interest of the child. The [father] is confusing two very separate modalities by which a court may issue a custody order. The general rule for the modification is, indeed, as the [father] describes it. (Citations omitted). That was not, however, the modality employed in this case.
>
> Section 4-506(d), listing the forms of relief that may be granted under a protective order, expressly provides that, as part of the protective order itself, the judge may "award temporary custody of a minor child of the respondent [the appellant here] and a person eligible for relief [the appellee here]." Barbee v. Barbee, 311 Md. 620, 624, 537 A.2d 224 (1988), expressly referring to the right "to be awarded temporary custody of the children" as one of the protections afforded by the Domestic Violence Act.

Id. at 333. The court did, however, caution the parties that the change in custody order was only effective as provided by the Domestic Violence Act, and only lasts for the 200 days provided by statute. Id. at 334.

A court should consider possible consequences of entering such an order, if there is an existing order in another court. If another court in the same geographical area has jurisdiction over some of the same subject matter, it may be more appropriate to deny the application and refer the petitioner to the court with continuing jurisdiction. Indeed, it is generally the rule that where an action is pending in two courts, the court first acquiring jurisdiction will hold jurisdiction to exclusion of the other. Olsen v. Olsen, 254 Neb. 293, 575 N.W.2d 874 (1998).

However, a court considering the denial of the petition for a protection order should consider the potential for violence and the consequences of denying such a petition. In some cases, the petitioner is desperate for judicial intervention in a situation which has become deadly to her. The failure to enter a protection order in a court that does have jurisdiction over the protection order could be a matter of life and death. When there is any doubt at all, courts should enter the protection order. The ninety day custody provision is a temporary measure designed solely to increase safety for a petitioner and the petitioner's children, and it is a *temporary* measure that is not meant to override a *permanent* custody order.

This stance is one which is supported by case law in other states. One case where such a controversy existed was State v. Marshall Superior Court, 644 N.E.2d 87 (Ind. 1994). In that case, the record revealed that a mother and father divorced in 1991, with physical custody of the children being granted to the father in the Marshall Circuit Court. Id. at 88. A later motion for modification of the decree was filed in the same circuit court. Not long after the first motion for modification was decided, the mother filed in the same circuit court a petition for physical custody of the children. Then a confrontation occurred between the mother and the father's new wife, which resulted in the new wife filing a motion in the superior court for a permanent protective order, requesting that the mother be ordered to have no contact with all the family, including the mother's own children. A protection order was entered in the superior court. The mother then filed a writ of mandate against the superior court, arguing that the temporary

protective order conflicted with the decree in circuit court establishing her visitation rights, and requested that the Supreme Court resolve the jurisdictional conflict. The Supreme Court granted the writ, concluding that the new wife should have taken her motion to the circuit court because the Circuit Court had jurisdiction over substantially the same action as did the Superior Court. Id. at 88-89. Specifically, the court stated that "[the father and his new wife] may not circumvent the comprehensive statutory framework for child custody and visitation orders through this collateral attack." Id. at 89.

The court did make it very clear, however, that in the event of an emergency, a court which was not the court of continuing jurisdiction over the children could nonetheless enter a protection order in order to provide the petitioner with some means of safety.

> We emphasize that all courts must be open to entertain requests for temporary or emergency protective orders against a threatening parent where the facts of the situation demonstrate good cause for not petitioning the court where the dissolution was heard. Situations will arise in which the custodial parent fears for his or her safety or the safety of the children and, due to the imminence of the threat or distance from the court of first jurisdiction, must seek protection from another court. Such was not the case here…
>
> We hold that where no emergency situation exists, the court where the divorce, custody and visitation matters were heard retains continuing jurisdiction over the case. A party should go to that court to secure a protective order, absent some extraordinary circumstance.

Id. at 89-90.

Other states have established best practices that allow for such temporary measures. As one domestic violence resource states, "[a]ny reluctance on the part of the court to 'interfere with visitation' should be tempered by the fact that the prior parenting orders were issued by a court without knowledge of the current domestic violence behavior." Mike Brigner, The Ohio Domestic Violence Benchbook: A Practical Guide to Competence for Judges & Magistrates 33 <http://ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (2d Ed. 2003) (accessed Feb. 1, 2010). Courts in Nebraska should keep in mind that the issue of safety is first and foremost, and the custody provisions in the protection order statutes are meant only to be a means of providing temporary custody in order to

enhance the petitioner's and the petitioner's children's safety.

In a protection order case, if a court is going to grant a temporary custody or support order that conflicts with a previously entered order of the same or another court, it would greatly assist law enforcement if the court carefully drafts the order. The order should include a statement that the court was aware of the previously entered custody order, but specifically intended to supersede the previous custody order to protect the petitioner and the children.

2. Protection Order Entered Prior to Divorce or Custody Order

Other states have dealt with the issue of what effect an existing protection order has or should have on a divorce or custody order. These cases have raised the issue of res judicata, among other issues.

In Maine, a wife had sought three protection from abuse orders against her husband, which had all been denied. Richards v. Bruce, 691 A.2d 1223 (Me. 1997). The husband then sought to modify a divorce decree to prevent his now ex-wife from moving to North Carolina with the child, which the trial court denied. Id. at 1224. On appeal, the ex-husband stated that the issue of his alleged abuse of his ex-wife, which was included in the guardian ad litem's report to the court, was res judicata since all of the requests for protection orders were denied. Id. at 1226. The Supreme Court of Maine recited the rule that "res judicata bars relitigation of a cause of action between the same parties or their privies once a valid final judgment has been entered in an earlier suit on the same cause of action." Id. (citing Beegan v. Schmidt, 451 A.2d 642, 644 (Me. 1982)). The court then held that, although the protection from abuse case and the divorce judgment modification involved the same parties, they did not involve the same cause of action, and therefore, the doctrine of res judicata did not apply. Richards, 691 A.2d at 1226 (citing Gurski v. Culpovich, 540 A.2d 764, 765-66 (Me. 1988)).

In an Illinois case, the wife obtained a protection order based on the husband's abuse of her and her children. In re Marriage of Jackson, 734 N.E.2d 513 (Ill. App. 2000). Two months later, the wife filed a divorce case, and asked the court to consolidate the protection order proceedings with the divorce proceedings. Id. at 514. The trial court granted the consolidation request, and

then determined that the custody, visitation and child support provisions of the protection order would be incorporated in the dissolution judgment, all without further hearings on the matter. The appeals court determined that this, in effect, improperly gave res judicata effect to the protection order provisions. Id. at 514-15. In so finding, the court noted that res judicata applies when there is "(1) a final judgment on the merits; (2) identity of causes of actions; and (3) identity of parties." Id. at 515. The court then applied the doctrine in the given case and determined that there was no identity of causes of actions in the two cases, stating:

> [t]he order of protection case was concerned with only the issue of whether Lawrence had abused Kathy and their children and what actions should be taken to end the abuse. The evidence would have necessarily been limited to instances of alleged abuse. The dissolution of marriage proceeding, particularly that portion involving the custody and visitation of the children, would have involved a much larger inquiry into Lawrence's parenting abilities. To be sure, his alleged abuse would have been a major factor to consider. However, it would not have been the only factor, as in the order of protection case.

Id. As discussed earlier in this bench guide, it is clear that the protection order statutes and the custody statutes serve two separate purposes, though there is a certain amount of overlap between the two. As such, the two different types of cases need to be treated as exactly that—different cases.

Within Nebraska's Parenting Act, there are provisions regarding how a court should proceed when it is looking at entering a custody, visitation, or parenting access order, when there has been a protection order, restraining order, or criminal no-contact order entered prior to a determination of custody, visitation, or parenting time. It provides that:

> the court shall consider whether the best interests of the child, based upon the circumstances of the case, require that any custody, parenting time, visitation, or other access arrangement be limited to situations in which a third person, specified by the court, is present, or whether custody, parenting time, visitation, or other access should be suspended or denied.

Neb. Rev. Stat. § 43-2934(2) (Reissue 2008)). The Parenting Act further requires that the "order shall specify the time, day, place, and manner of transfer of the child for custody, parenting time, visitation, or other access to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all

family members." Neb. Rev. Stat. § 43-2934(1). If the court determines that it is in the best interest of the child, though, the court may enter a custody, visitation, or parenting time order which is inconsistent with the existing protection order, restraining order, or criminal no-contact order. Neb. Rev. Stat. § 43-2934(3). If the court hearing the custody, visitation, or parenting time case lacks jurisdiction to modify the existing protection order, restraining order, or criminal no-contact order, the court shall require that a certified copy of the custody, visitation, or parenting time order be placed in the court file containing the protection order, restraining order, or criminal no-contact order. Neb. Rev. Stat. § 43-2934(4). Essentially, the terms of the protection order, with regard to anything involving children, can be invalidated by a later custody, visitation, or parenting time order, though the protection order terms should be at least considered by the court entering the custody, visitation, or parenting time order.

Cross or Counter Petitions

Nebraska Revised Statute § 42-924.03 (Reissue 2008) provides that a respondent may not be granted a protection order against a petitioner unless both of two conditions exist. First, the respondent must file a cross or counter petition requesting the protection order. Second, the issuing court must make specific findings of domestic or family abuse against the petitioner and must determine that the respondent is entitled to a protection order.

No procedure is set forth in the Act to handle this cross or counter petition. Certainly, due process would require that the respondent give notice to the petitioner of the cross or counter petition. Additionally, since there is no statutory authority for the issuance of a cross or counter petitioner on an ex parte basis, a hearing would be required. Given that a typical respondent who files a cross or counter petition will also be actually attending the evidentiary hearing on the petitioner's request for a protection order, the court would undoubtedly wish to schedule the hearing on both the petition and cross or counter petition for the same time and date. The court would then utilize the same process as it did with the original petition for a protection order, using the same forms with regard to notice to the opposing party.

While Nebraska law technically allows for the issuance of a protection order against the original petitioner by the practice stated above, dual or "mutual" protection orders are not advised by many authorities. The Alabama Coalition Against Domestic Violence offers the following best practices:

> Judges should not routinely or summarily issue mutual PFA or mutual restraining orders in domestic violence cases. Issuance of mutual restraining orders raises issues of due process, enforcement, and bias. Unfortunately, mutual PFA orders are sometimes issued even when the Defendant has filed no cross petition nor alleged any violence by the Plaintiff. The message to the perpetrator is that such behavior is excusable, was perhaps provoked, and that he or she will not be held accountable for the violence. Victims who have not engaged in violent behavior are often confused, frustrated and stygmatized when such orders are issued against them.

Mutual PFA orders may create due process problems as they are

> issued without prior notice, written application, or finding of good cause. The Plaintiff of the original request for a restraining order now finds himself or herself a subject of the order of protection, having no opportunity to prepare a response or consult with an attorney.
>
> Mutual PFA orders create significant problems of enforcement, which render them ineffective in preventing further abuse. They are confusing to law enforcement officers and unenforceable. When one of the mutual orders is violated, police have no way of determining who needs to be arrested.

Alabama Coalition Against Domestic Violence, Alabama's Domestic Violence Benchbook 31 <http://www.acadv.org/2005benchbook.pdf> (Jul. 2005) (accessed Feb. 1, 2010). The best practice is clearly to determine who the primary aggressor is for purposes of entering an order of protection.

While a determination of who is the primary aggressor in the event of counter or cross petitions may be cumbersome and frustrating for any court to deal with, it is of vital importance. Many experts consider mutual orders to present a complex problem and that they may be "'more dangerous to the victim than having no order at all.'" Brigner, Ohio Benchbook at 31 <http:// ocjs.state.oh.us/Publications/OCJS%20benchbook.pdf> (citing Joan Zorza, What is Wrong with Mutual Orders of Protection? Domestic Violence Report, Civil Research Institute, Inc. <www.scvan.org/mutual_orders.html> (1999)).

Modification Requests While Order Still in Effect

It is the general rule that a court which rendered an injunction has the power to dissolve or modify an injunction where the conditions have so changed as to make such relief equitable and just. The court's power in this respect is inherent. 42 Am. Jur. 2d Injunctions § 302 (2000). Additionally, Nebraska Revised Statute § 25-2001(1) (Reissue 2008) provides that the inherent power of a district court to vacate or modify its judgments or orders during the term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six (6) months after the entry of the judgment or order. Subsection (2) of that same section provides that the power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not in any way limited. Finally, Nebraska Revised Statute § 25-2009 (Reissue 2008) extends this power to county court, so far as the same may be applicable to the judgments or final orders of such courts.

Although no modification provision is specifically provided in the Protection from Domestic Abuse Act, two provisions of the Act do acknowledge that any order entered pursuant to it can be modified. First, Nebraska Revised Statute § 42-924(3) states in pertinent part that an order issued pursuant to the act shall specify that it is "effective for a period of one year. . . unless otherwise modified by the court." Second, Nebraska Revised Statute § 42-926 (Reissue 2008) states that if a protection order is dismissed or modified, the clerk must provide a copy of the dismissal or modification to the local police department or local law enforcement agency and the local sheriff's office. Further, the protection order forms clearly provide for the modification of such orders.

The next issue is when a court should grant the modification request. Certainly, a court needs to be mindful of the dynamics of domestic violence when considering such requests for modification. Some requests may be simply an effort by the respondent to exercise inappropriate power and control over the victim of domestic violence, while other requests will result from genuine interest in facilitating reunification efforts. Care must be exercised by a court in considering such requests.

In a recent South Dakota case, the South Dakota Supreme Court worked through some of the issues surrounding modification of a protection order. Sjomeling v. Stuber, 615 N.W.2d 613 (S.D. 2000). In that case, the former boyfriend of the petitioner filed a motion to modify or set aside a protection order that had been entered against him based on the fact that the court had abbreviated the protection order hearing which allegedly denied him opportunity to present evidence establishing there was no basis for entry of a protection order. Id. at 615. In affirming the denial of the former boyfriend's motion, the appellate court noted that the protection order statute did provide for modification of an order of protection. Id. at 616 (citing S.D. Cod. Laws § 22-19A-14 ("Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection.")). See also 42 Am. Jur.2d Injunctions § 306 (2000) (an injunction may be modified only on a showing of changed conditions. From this, the court concluded that a protection order could be modified, but only "as changed circumstances may dictate." Sjomeling, 615 N.W.2d at 616. Since the former boyfriend in this case was not alleging a sufficient change in circumstances, and was simply trying to relitigate the issues resolved with the entry of the protection order, the court found his request for a modification was properly denied. Id. Accord, In re Devillano-Smyth v. Smyth, 223 A.D.2d 748 (N.Y.S. 1996) (It was proper for the lower court to refuse to hold a hearing or to modify a protection order when the respondent had not alleged any change in circumstances; respondent should have appealed from the entry of the order instead of seeking to have the protection order modified almost a year later).

Motion to Dismiss Protection Order

As was discussed in the previous section, the general rule in an injunction case is that a court which rendered an injunction has the inherent power to dissolve or modify the injunction where the conditions have so changed as to make such relief equitable and just. 42 Am. Jur. 2d Injunctions § 302. Additionally, Nebraska Revised Statute § 25-2001(1) provides that the inherent power of a district court to vacate or modify its judgments or orders during the term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order. Subsection (2) of that same section provides that the power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not in any way limited. Finally, Nebraska Revised Statute § 25-2009 extends this power to county court, so far as the same may be applicable to the judgments or final orders of such courts.

Although no provision in the Protection from Domestic Abuse Act specifically permits a court to dissolve a protection order, two provisions of the Act seem to acknowledge that any order entered pursuant to it can be modified or dissolved. As discussed earlier in this section, Nebraska Revised Statute § 42-924(3) states in pertinent part that an order issued pursuant to the act shall specify that it is "effective for a period of one year…unless otherwise modified by the court." Second, Nebraska Revised Statute § 42-926 states that if a protection order is dismissed or modified, the clerk must provide a copy of the dismissal or modification to the local law enforcement agency and the local sheriff's office. There is a form specifically dealing with a petitioner's right to move the court to vacate and dismiss the protection order, Form 19:18 (Jul. 2006). The form includes a statement by the petitioner that "[t]his request is being done by me as a free and voluntary act."

As with requests for modifications of protection orders, the question is when it would be appropriate for a court to dismiss or dissolve a protection order. Again, a court must bear in mind the dynamics of domestic violence when considering such requests, and recognize that all requests may not be appropriate to grant. Several cases illustrate the caution which may be appropriate to exercise when approaching a request to dissolve a protection

order.

1. Request to Dismiss by Petitioner

Nebraska does not have a specific provision regarding the dismissal of a protection order by the petitioner, but some other states do. In New Jersey, the protection order statutes provide that a final domestic violence restraining order can be dissolved "upon good cause shown." Stevenson v. Stevenson, 714 A.2d 986 (N.J. 1998) (citing N.J. Stat. Ann. § 2C:25-29d). In Stevenson, a New Jersey court granted a protection order after the petitioner had endured a brutal beating at the hands of the respondent. Id. at 988-89. Five months later, the petitioner asked the court to dissolve the order. Id. at 989. At the hearing scheduled on that request, the petitioner made it clear that she wanted the dissolution only on the condition that the respondent commit no further violence. Id. at 990. The court was faced with the issue of whether a domestic violence restraining order must be dissolved in all cases where the plaintiff so requests. The court ultimately determined that it was discretionary, stating:

> [w]hen considering a victim's application to dissolve, and whether there is good cause to do so, a court must determine whether objective fear can be said to continue to exist, and also whether there is a real danger of domestic violence recurring, in the event the restraining order is dissolved. Particularly is this so in a case like this, involving the commission of the vicious beating of a woman by her husband during a drunken rage, and a documented history of previous violence and brutality by the defendant. Whether or not this plaintiff would agree, it is clear that *from the standpoint of objective fear*, that a reasonable victim of such a brutal beating by a husband, who has assaulted her in the past and has a history of other violent behavior, and is the subject of experts' findings of uncontrolled anger and excessive use of alcohol, would have a reasonable fear that future violence by her husband would occur, were the restraining order dissolved.

Id. at 994 (Emphasis in original). The court continued by stating that:

> [e]ven in cases of reconciliation, the court must still make an *independent finding* that continued protection is unnecessary before vacating a restraining order. Without making an independent finding based on the objective evidence, a court does not meet the public policy dictates of the Act that victims of domestic violence must be assured the maximum protection from abuse the law can provide; that the official response to domestic violence, including that of the courts, shall communicate the

> attitude that domestic violent behavior will not be excused or tolerated; and that it is the responsibility of the courts to protect victims of domestic violence by ordering those remedies and sanctions that are available to assure the safety of the victims and the public.

Id. at 994 (Emphasis in original). The court concluded: "This court will not be an accomplice to further violence by this defendant, by wholly dissolving at this point the restraints that have been entered against him." Id. at 995. The court did, however modify the protection order so that the parties could have contact related to their child, and ordered the defendant to undergo psychotherapy and substance abuse treatment. Id.

Another New Jersey case illustrates what might be considered "good cause" for purposes of dismissing a protection order. I.J. v. I.S., 744 A.2d 1246 (N.J. 1999). In that case, the plaintiff obtained a domestic violence restraining order, and came before the court one year later to have it dismissed, after the respondent was arrested for violating the order, which she had mistakenly advised him was no longer in effect. The court found that the plaintiff had been educated about domestic violence and found that the request to dismiss was voluntary and without coercion. Id. at 1248-49. The court then held that the statutory "good cause" standard did not apply to a petitioner asking for a protection order to be dissolved, just a respondent, but that the petitioner still must be educated about domestic violence, show that there is a lack of coercion, and advised as to the consequences of dismissing a protection order. The court stated: "if a plaintiff has the power to institute a civil action, he or she should have the power to dismiss a civil action." Id. at 1252.

Nebraska law does not have a good cause requirement in its statutes for dismissals of protection orders. Form 19:18 requires the petitioner to specify the reasons for the request to vacate the protection order, as well as to state to the court that the request is being made by the petitioner as a free and voluntary act. The Alabama Coalition Against Domestic Violence advises that courts should require a petitioner who requests a dismissal to appear for a hearing so that the court may determine whether the request is made in good faith and without coercion. Alabama Coalition Against Domestic Violence, Alabama Benchbook at 32 <http://www.acadv.org/2005benchbook.pdf>. While it is important to determine whether the petitioner is acting of her own free will, or if the respondent is coercing her into dismissing the order, the bottom line is that the

petitioner knows better than anyone else—including the court—what keeps her safe.

2. Request to Dismiss by Respondent

Requests for dismissal of a protection order by the respondent of the protection order is—and should be—viewed differently than those requested by the petitioner. This is illustrated by another New Jersey case. Carfagno v. Carfagno, 672 A.2d 751 (N.J. 1995). In Carfagno, a protection order was entered against the respondent, and approximately three years later, the respondent requested dismissal of the protection order despite his two contempt citations for violating the order. The petitioner objected to the dismissal, due in large part to the fact that she was still in fear of him because of his continued attempts to assert control over her. Id. at 754-55. Under a statute that provided for a dismissal when "good cause" is shown, the court began by setting forth factors a court should consider when determining whether a protection order should be dismissed. Those factors included:

(1) whether the victim consented to lift the protection order;

(2) whether the victim fears the respondent;

(3) the nature of the relationship between the parties today;

(4) the number of times that the respondent has been convicted of contempt for violating the order;

(5) whether the respondent has a continuing involvement with drug or alcohol abuse;

(6) whether the respondent has been involved in other violent acts with other persons;

(7) whether the respondent has engaged in counseling;

(8) the age and health of the respondent;

(9) whether the victim is acting in good faith when opposing the respondent's request;

(10) whether another jurisdiction has entered a protection order protecting the victim from the respondent; and

(11) other factors deemed relevant by the court.

Id. at 756-57. The court then determined that if the victim has consented to lifting the protection order and the court finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis. Id. The court then discussed the factors as they related to the case

before it and determined that the respondent had not shown good cause to dissolve the order, and therefore denied the motion. Id. at 760.

In another case under the same statute, a New Jersey court embraced the factors listed in Carfagno, supra, when it was faced with a respondent's application to dissolve a protection order. Kanaska v. Kunen, 713 A.2d 565 (N.J. 1998). The court stated that it could not consider dismissal of a protection order when it did not have the complete record of prior hearings before it, and that the failure to include a complete record with the respondent's filing for a dismissal was fatal to his appeal. Id. at 568. The court determined that the moving party has the burden to make a prima facie showing that good cause exists for dissolution of a final protection order. Once that burden is met, then the court should determine whether there are facts in dispute material enough to a resolution of the motion before ordering a hearing. Id. at 569. Then, only when the movant demonstrates a substantial change in the circumstances that existed at the time of the final protection order hearing should the court entertain the application for dismissal. The court acknowledged that the respondent may use the "good cause" provision to continue to try to assert power and control over the petitioner. "The victim should not be forced to repeatedly relitigate issues with the perpetrator, as that itself can constitute a form of abusive and controlling behavior." If a respondent uses the court system to continue his control over her, the court stated that courts should not hesitate to use counsel fees or the frivolous litigation statute as a deterrent when they find that litigation is commenced as a manifestation of the perpetrator's unhealthy desire to control or abuse a domestic violence victim. Id.

Effect of Denial of Protection Order on Subsequent Requests for Protection Order

An issue that has received some attention is whether a court may entertain a petition for a protection order when a previous petition has been denied based on similar facts. The Nebraska Supreme Court was able to side-step the question in the case of Hauser v. Hauser by determining that the case was moot. 259 Neb. 653, 611 N.W.2d 840 (2000). Though a first protection order was denied a few months earlier, the petitioner came back to the court with another request for a protection order which alleged the same facts as in the previous petition, but which now alleged that the respondent had been charged criminally with assault for the behavior alleged in the petition. Id. at 654-55, 611 N.W.2d at 842. The lower court had granted the protection order and the respondent had appealed alleging that the second request should have been denied under the doctrine of res judicata. Id. at 655, 611 N.W.2d at 842. The Nebraska Supreme Court found that the issue was moot because the protection order which had been granted by the trial court had since expired. Id. at 656-57, 611 N.W.2d at 843. For discussion of res judicata in general, see Cole v. Clarke, 10 Neb. App. 981, 641 N.W.2d 412 (2002).

An appellate court in Ohio did reach the issue of res judicata in the protection order context. Eichenberger v. Eichenberger, 613 N.E.2d 678 (Ohio App. 1992). In that case, following the entry of an emergency order, the final hearing was held periodically over several weeks time, resulting in a protection order being issued. During those hearings, the husband urged the trial court to not permit testimony concerning an event which had been the basis for a previously filed petition for a protection order which had been denied by the court under the doctrine of res judicata. Id. at 679. The appellate court stated that the testimony of the previous event was properly admitted because it illuminated the reasonableness of the wife's fear of her husband, nor was it res judicata. Id. at 682. The court stated that:

> [t]he prior filing did not lead to a journalized finding that [the respondent] either did or did not engage in conduct which would warrant a final civil protection order. Thus, the doctrine of res judicata does not apply.

> Further, [the petitioner's] state of mind could very well have been the product, in part at least, of her past interactions with [the respondent]. The fear she claimed to have felt and the reasonableness of that fear could and should be determined with reference to her history with [the respondent].

Id. In many cases, there may have been behavior by the respondent that could not be considered physically violent, but were more in the way of harassment or threats of the petitioner. In those cases, it may be appropriate to consider a new protection order petition based on the facts presented in the earlier petition, as well as the facts which have emerged since the last filing. For instance, in the case of a denied protection order petition based on physical attacks by the respondent, the court could still enter a protection order based on both those physical abuse facts, as well as subsequent threats by the respondent to harm or to kill the petitioner. There must be some new facts to include, but past acts which were included in an earlier petition may be referenced, especially if they indicate the petitioner's fear of future violence.

Modification of Duration of Order, or Issuance of Second or Subsequent Protection Order

Under the terms of Nebraska's Protection from Domestic Abuse Act, a protection order lasts for only one year. Neb. Rev. Stat. § 42-924(3). Although modification of the order seems to be permitted, it is unclear whether a modification could include an extension of duration of the protection order. What is clear is that one year of protection may not be sufficient for some petitioners. Those petitioners may be back in court either for an extension of the first order, or for a second protection order as the first expires.

If a petitioner chooses to request a second protection order, must that petitioner wait until the protection order actually expires before bringing the second petition to the court? Certainly if a court is concerned with the safety of a petitioner, it would be most prudent for a court to permit the filing and entry of an ex parte protection order before the first order expires. This is so, because it often takes some time to serve a respondent with a protection order. That lapse in time could leave the petitioner without protection for several days, or even weeks.

Assistance from other states can be found in answering the question of when a protection order should be extended, or a second or subsequent order be entered. Some statutory schemes from other states contemplate an order of limited duration, and then permit a modification to a permanent protection order. Other statutory schemes provide specifically that a protection order can be extended. Although neither of those is the case in Nebraska, the reasoning of those courts may still be helpful to a court in determining whether a second order should be granted, and what evidence a court should consider when faced with such a request.

In a Massachusetts Court of Appeals case, the ex-wife plaintiff obtained a one-year protection order against her ex-husband defendant. Pike v. Maguire, 716 N.E.2d 686 (Mass. App. 1999). Near the expiration of that order, she moved for the one-year order to be made permanent. Hearings were held, after which the protection order was made permanent. The defendant appealed, stating that

the plaintiff had not alleged any evidence of "new" abuse. Id. at 687. The appeals court first noted that the Massachusetts statute at issue specifically provided that "the fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order." Id. at 688 (quoting Mass. Gen. Laws ch. 209A § 3). The court then stated that the only criterion for extending the original order is a showing of continued need for the order. The appellate court then upheld the granting of the order, citing the defendant's record of violations of a prior order, the defendant's demanding demeanor in court, the fact of the prior protection orders entered against the defendant, the volatile nature of the child custody and visitation battles between the parties, and an incident of a smashing of the plaintiff's family vehicle's windshield, although it did not appear that this was linked conclusively to the defendant, in support of the trial court's finding that the plaintiff had a reasonable basis to continue to fear the respondent. Pike, 716 N.E.2d at 688.

In an appellate case out of the District of Columbia, the appellate court was faced with an appeal from a decision in which the trial court denied a third motion to extend a protection order, after having extended such protection order for a one year period on two separate occasions. Cruz-Foster v. Foster, 597 A.2d 927 (D.C. App. 1991). The appellate court noted that the statute involved provided that a protection order cannot be entered on a permanent basis, but that they can be extended for good cause shown by the petitioner. Id. at 929 (citing the Intrafamily Offenses Act, § 16-1005(d)). The court noted that past history of the case should be considered when deciding to grant or deny a motion to extend, because "a defendant's past conduct is important evidence—perhaps the most important—in predicting his probable future conduct." Id. at 930. It reiterated the importance of this evidence by stating "the past history of the case is *critical* to the determination whether she [met her burden of proof]." Id. (Emphasis supplied). The appellate court reversed and remanded the case for further hearing, reminding the trial court that it should not confine its consideration only to recent events that had occurred, but should, instead, consider the "entire mosaic." Id. at 931.

In another District of Columbia Court of Appeals case, a petitioner sought and obtained a one-year protection order against the respondent after the respondent had assaulted the petitioner, and later sought to have such protection order extended. Maldonado v. Maldonado, 631 A.2d 40 (D.C. App. 1993). By the

time the motion for extension came on for hearing, the respondent had been sentenced to two to eight years for the criminal assault charges which had been filed. The respondent consented to the extension of the order, but the judge made no finding concerning the voluntariness of the consent. The judge denied the protection order extension because the respondent would be incarcerated during the entire period of the new order. Id. at 42. The appellate court reversed the denial, and remanded the case for further proceedings, noting that the respondent could be released for good time, or he could escape from his confinement during the period of time during which the petitioner was requesting the protection order to be extended. The appellate court also noted that even while the respondent was incarcerated, he could still harass or threaten the petitioner by telephone or mail or through third parties, and could even cause a third party to assault her while he was still incarcerated. Finally, the appellate court also noted that the protection order might act as a deterrent to the respondent with regards to future violence. Id. at 43.

Motion For New Trial

Nebraska Revised Statute § 25-1142 (Reissue 2008) permits a party to file a motion for "new trial" and provides the grounds upon which a new trial may be granted. A motion for new trial is a proper vehicle by which to seek review of the granting of a protection order after a hearing is conducted, provided the statutory criteria for such review is asserted. Gernstein v. Allen, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

Chapter 9:
Enforcement of Domestic Abuse Protection Order

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Enforcement Mechanisms

Enforcement of domestic abuse protection orders can be handled as a crime by the county attorney under Nebraska Revised Statute § 42-924(3) (Reissue 2008). Though it is theoretically possible to pursue a violation of a protection order as a contempt action, there are far greater benefits to addressing a violation through the criminal justice system. The clear advantage to prosecution of any violations under Nebraska Revised Statute § 42-924(3) is the enhanced criminal penalties discussed below. Hence, this bench guide will focus solely on criminal enforcement.

Nebraska Revised Statute § 42-924(3) provides that any person who knowingly violates an order issued pursuant to Section 42-924(1), which is a Nebraska issued protection order, or Section 42-931 (Reissue 2008), which is a foreign state's domestic abuse protection order, after service shall be guilty of a Class II misdemeanor. If the person has a prior conviction for violating either a Nebraska issued domestic abuse protection order or a foreign protection order, that person is guilty of a Class I misdemeanor. Neb. Rev. Stat. § 42-924(3)(a). If the person has a prior conviction for violating the same domestic abuse protection order or a protection order granted to the same petitioner, that person is guilty of a Class IV felony. Neb. Rev. Stat. § 42-924(3)(b).

Arrest Provisions

1. Mandatory Arrest

In relevant part, Nebraska Revised Statute § 42-928 (Reissue 2008) provides that a peace officer must arrest a person with or without a warrant if the officer has probable cause to believe that the person has committed a violation of an order issued pursuant to Nebraska Revised Statute § 42-924, a violation of Nebraska Revised Statute § 42-925 (Reissue 2008), or a violation of a valid foreign protection order recognized pursuant to Nebraska Revised Statute § 42-931, when the petitioner provides the peace officer with a copy of the protection order or when the peace officer determines that such an order exists after communicating with the local law enforcement agency. Nebraska Revised Statute § 42-935 (Reissue 2008) also gives the officer some protection, in that it provides that the peace officer may rely upon a copy of any putatively valid foreign protection order which has been provided to the peace officer by any source.

In coming years, it may become easier for peace officers to determine whether a foreign protection order is, in fact, a valid protection order. Given the push under Project Passport, a nationwide movement to encourage uniformity in protection order forms, Nebraska may well have similar protection order forms to those of other states, thus making it easier for Nebraska law enforcement to recognize, and therefore, enforce, foreign protection orders without delay.

2. Offender Cannot Bond Out at Jail

Nebraska Revised Statute § 42-929 (Reissue 2008) provides that a peace officer making an arrest pursuant to Nebraska Revised Statute § 42-928 must take such person into custody and thereafter take such person before a judge of the county court or the court which issued the protection order. Therefore, the alleged offender may not post bond at the jail without first being taken before the appropriate judge. As required in all criminal cases, an arrested individual may not be held in custody for more than forty-eight (48) hours without a judicial determination of probable cause. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) (citing Gernstein v. Pugh, 410 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)).

3. No Contact Order

Once the alleged offender is brought before the court, Nebraska Revised Statute § 42-929 requires the court to establish the conditions of the person's release from custody, including the determination of bond or recognizance. It also specifically provides that the court must issue an order directing that the alleged offender shall have no contact with the alleged victim of the abuse or violation.

Elements of the Crime

In State v. Patterson, the Nebraska Court of Appeals set forth the elements the state must prove in a criminal case for violation of a protection order. 7 Neb. App. 816, 585 N.W.2d 125 (1998). First, the state must prove entry of the protection order pursuant to the applicable section. It must also prove service of the order on the defendant. Finally, it must prove a knowing violation of the order. Id. at 819, 585 N.W.2d at 127 (citing Neb. Rev. Stat. § 42-924).

1. Order Issued

A. In Nebraska

(1) Method of Proof

In State v. Patterson, the Nebraska Court of Appeals determined that the State's offer of a certified copy of the protection order was properly admitted in evidence to prove entry of the protection order. 7 Neb. App. 816, 821, 585 N.W.2d 125, 127-28 (1998).

B. Foreign Protection Order

(1) Nebraska's Full Faith and Credit Provision

Nebraska law permits prosecution of a violation of a protection order which occurred in Nebraska, even if the order which was violated was issued in a foreign jurisdiction. Neb. Rev. Stat. §§ 42-924(3); 42-931. If a violation occurs in Nebraska of a protection order which had been issued in another State or tribal court, that foreign protection order can be enforced in Nebraska, and a prosecution for its violation can be brought. Neb. Rev. Stat. § 42-924(3). That foreign protection order is only to be enforced, however, if the prosecution proves that the order was issued under certain circumstances and is, therefore, a "valid order." An order is considered valid if it:

(1) identifies the protected individual and the

respondent;

(2) is currently in effect;

(3) was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state; and

(4) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued, in a manner consistent with the rights of the respondent to due process.

Neb. Rev. Stat. § 42-934(d) (Reissue 2008).

(2) VAWA's Full Faith and Credit Provision

A reader familiar with the federal Violence Against Women Act (hereinafter VAWA) would notice that Nebraska's statutory full faith and credit language cited above parallels, but is not identical, to 18 United States Code § 2265 (2000 & 2009 Cum. Supp.), the full faith and credit language from VAWA. The federal language is as follows:

(a) Full Faith and Credit. - Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government, or Territory as if it were the order of the enforcing State or tribe.

(b) Protection order. - A protection order issued by a State, tribal, or territorial court is consistent with this subsection if -

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition. - A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if -

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

18 U.S.C. § 2265. For purposes of the full faith and credit provision, Congress defined "state" to include "a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States." 18 U.S.C. § 2266(8) (2000 & 2009 Cum. Supp.). The Nebraska full faith and credit provision provides that "[a] valid foreign protection order related to domestic or family abuse issued by a tribunal of another state, tribe, or territory shall be accorded full faith and credit by the courts of this state and enforced pursuant to the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act." Neb. Rev. Stat. § 42-931. So while the language in the Nebraska statute does not exactly mirror the language of the federal statute, for all intents and purposes, they provide for full faith and credit in exactly the same circumstances.

(3) Federal Preemption

The obvious purpose of Nebraska's and VAWA's full faith and credit provisions is to make protection orders enforceable in all fifty

states, and on tribal lands, provided that certain safeguards have been followed. Nebraska's full faith and credit provision, however, differs from VAWA's full faith and credit provision in form only, but not in substance.

While the Nebraska full faith and credit statute has not been challenged in an appeal, other states have had similar statutes challenged by the respondent to a protection order enforcement in the enforcing state, so it is possible that such a situation could arise in Nebraska. Given that particular situation, a court faced with enforcement of a protection order in one of the above areas would need to determine whether VAWA's full faith and credit provision has preempted the relevant portion of Nebraska's full faith and credit provisions. If it has, the federal law would need to be followed. While such a situation is unlikely, this section includes a brief discussion of federal preemption if that situation should, in fact, occur.

Nebraska has recognized that there are three forms of federal preemption: express, implied and conflict preemption. Eyl v. Ciba-Geigy Corp., 264 Neb. 582, 650 N.W.2d 744 (2002). Since both Congress and the Nebraska legislature have passed full faith and credit legislation, it is clear that we are dealing with "conflict preemption."

As stated in one case from the Ohio Court of Appeals in the protection order context, "[t]he federal preemption doctrine is based upon the Supremacy Clause of Article VI, United States Constitution, and holds that any state law must yield if it interferes with, or is contrary to, federal law." Conkle v. Wolfe, 722 N.E.2d 586 (Ohio App. 1998). See generally Fid. Fed. S. & L. Assn. v. de la Cuesta, 458 U.S. 141, 152, 102 S. Ct. 3014, 3022, 73 L.Ed.2d 664, 674-675 (1982). Federal law nullifies state law only to the extent that the state law actually conflicts with federal law. Holm v. Smilowitz, 615 N.E.2d 1047, 1053-1054 (Ohio App. 1992) (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 158, 98 S. Ct. 988, 994-995, 55 L. Ed. 2d 179, 188-189 (1978)). A conflict exists when, under the facts and circumstances of the case, the state law "'stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress.'" Holm, 615 N.E.2d at 1054 (quoting Ray, 435 U.S. at 158, 98 S. Ct. at 994, 55

L. Ed. 2d at 188-189). Thus, to the extent that Nebraska's full faith and credit provisions conflict with federal law or stand as an obstacle to the accomplishment of the federal full faith and credit objectives, they must yield to the federal law.

(4) Method of Proof

The "method of proof" for proving the existence of a protection order differs by situation and to whom the order is to be proved.

In the context of the proof of an existence of a protection order issued by a sister state to Nebraska law enforcement, law enforcement may rely on a document which appears to be a foreign protection order in its enforcement of such order. Neb. Rev. Stat. § 42-935(a) (Reissue 2008). Even if someone seeking to enforce a foreign protection order does not have a copy of the order, law enforcement may nevertheless enforce it if it appears from the surrounding circumstances that there is probable cause that such an order does exist. Neb. Rev. Stat. § 42-935(b). For nonjudicial enforcement of the order—i.e., enforcement by law enforcement—the foreign protection order does **not** need to be filed in a Nebraska court or "registered" with law enforcement. Neb. Rev. Stat. § 42-935(d). If the holder of the protection order does wish for it to be registered, such registration may be done through the Nebraska State Patrol. Neb. Rev. Stat. § 42-936 (Reissue 2008).

In the context of judicial enforcement of a foreign protection order, a more extensive showing is required. Under Nebraska statutory and case law, it appears that the existence of the protection order may be proven by obtaining a certified copy of it from the jurisdiction that issued it, and it may then be considered to be a valid foreign protection order. See State v. Hall, 270 Neb. 669, 708 N.W.2d 209 (2005) (citing Neb. Rev. Stat. § 27-902) (in an enhancement hearing for being a habitual criminal, sister state's court documents were admissible into evidence by being properly authenticated when they were certified by the clerk of that sister state's court).

(5) Additional Considerations

No case in Nebraska conclusively addresses the issue of

whether those "full faith and credit" requirements are additional elements of the crime which need to be proven by a jury beyond a reasonable doubt or are instead issues of admissibility of the protection order to be determined by the judge as a preliminary question under Nebraska Revised Statute § 27-104 (Reissue 2008). Given that the nature of the requirements are legal inquiries—subject matter jurisdiction of issuing court, personal jurisdiction over the parties, respondent given reasonable notice and opportunity to be heard, and restrictions concerning reciprocal orders—it is very likely that the Nebraska Supreme Court would find that these elements affect admissibility only, and are not elements to be proven to a jury beyond a reasonable doubt.

This can be illustrated by reference to cases which involve driving under the influence of alcohol, as the statutes are very similar in nature to those of protection orders. In a DUI case involving the validity of a breath test, the Nebraska Supreme Court held that it was not proper for the jury to determine whether the test was validly performed as required by repealed Nebraska Revised Statute § 39-669.11, which is now codified as Nebraska Revised Statute § 60-6,201 (2008 Cum. Supp.). The Court stated:

> [t]herefore, once the trial court determines that the Gerber tests have been met and that the evidence is admissible, it is not within the province of the jury to determine, as suggested by instruction No. 13, that the test was not performed by an individual possessing a valid permit issued by the state Department of Health for such purposes, or that the test was not performed according to methods approved by the state Department of Health, or that the testing device or equipment was not in proper working order at the time the test was conducted, or that the test was not conducted in compliance with all statutory requirements. The jury may only determine what weight to give the test in determining guilt or innocence.

State v. West, 217 Neb. 389, 401-02, 350 N.W.2d 512, 520-21 (1984) (citations omitted). A similar conclusion may be reached in a situation involving protection orders.

The Supreme Court of Vermont has been faced with a question

of whether, in a prosecution for a violation of an abuse prevention order, the validity of the abuse prevention order was to be determined by the judge or the jury. State v. Mott, 692 A.2d 360 (Vt. 1997). The court determined that the validity of the order was not an element of the offense, and therefore, it should not be an issue that is submitted to the jury. The issue of the validity of the order was a question for the judge to determine. Id. at 366 (citing State v. Pike, 465 A.2d 1348, 1351 (1983)).

(6) Proof of the Additional Requirements

Nebraska Revised Statute § 42-934(e) does provide the prosecution with a presumption of the validity of an order which appears authentic on its face. Presumptions in criminal cases are, however, restricted by the operation of Nebraska Revised Statute § 27-303 (Reissue 2008).

Given the nature of the additional requirements which must be shown when a foreign protection order is to be offered into evidence, some considerable work and expense may be required to prove that the foreign order is valid. First, the court must be informed of the governing jurisdiction's statutory scheme and any case law interpreting that statute. This can be accomplished through the procedures established in the Uniform Judicial Notice of Foreign Law Act found at Nebraska Revised Statute §§ 25-12,101 et seq. (Reissue 2008). Specifically, Nebraska Revised Statute § 25-12,101 provides that every court in Nebraska shall take judicial notice of the common law and statutes of every other state, territory, or other jurisdiction of the United States. If a protection order was issued by a tribal court, the prosecutor would be well-advised to contact the tribal court judge for guidance.

In addition to being informed about the law of the other jurisdiction, the court will need a certified copy of the protection order itself, and may also need certified copies of all documents, affidavits, docket entries, proofs of service, and other orders from the other jurisdiction. If evidentiary hearings were held, the court may need to review the transcript of those hearings, as well.

2. Service of Order on Defendant

The prosecution must prove that a respondent has been served with a protection order before that respondent can be found guilty of violating that protection order. A number of issues arise from this requirement.

A. Nebraska Order

(1) Proof of Service

Nebraska Revised Statute § 25-1275 (Reissue 2008) provides that service of any notice required by law may be proved by the affidavit of any competent witness attached to a copy of the notice, and made within six months of the time of the posting.

(2) How and When Must Service be Accomplished?

When the protection order was issued in Nebraska, what does the "after service" element in Nebraska Revised Statute § 42-924 mean? If the respondent is served within the 14 days as provided for in Nebraska Revised Statute § 42-926 (Reissue 2008), it is clear that the protection order could be enforced against the respondent. If the respondent was served by the sheriff as provided in Nebraska Revised Statute § 42-926, but was served outside of the 14 days set forth in that statute, there may be some enforcement issues, depending on the court. Several courts have questioned whether that protection order could still be enforced.

Since there is no Nebraska appellate case law on this point, it certainly could be argued that the provisions in Nebraska Revised Statute § 42-926 are not requirements for proper service, but are instead simply directives to the sheriff's office to serve the protection orders promptly. Additionally, the "after service" element of the crime does not indicate "service as provided in § 42-926" or other similarly specific statutory reference to the 14 day requirement. An argument could be made that although expedient service is optimal for protection orders, so long as the respondent has been properly served by the

sheriff, that the failure to do so within 14 days should not bar enforcement. In many counties, however, the court is reissuing the order when the 14 days expire, and then is attempting service by sheriff again, in order to strictly comply with the statute. This method is perhaps the best method to stay within the word of the statute, and to ensure that there are no potential problems at the time the protection order is enforced.

B. Foreign Protection Order

(1) Proof of Service

Nothing in Nebraska Revised Statute § 25-1275 (Reissue 2008) prohibits proof of service in the manner indicated, which is by affidavit, just because the service was made in a different state. Since the issuing state's laws apply as to the issuance of the protection order, if the service is proper under the issuing state's law, it is proper for purposes of Nebraska enforcing such an order.

3. Knowingly Violate the Order

The State must prove a knowing violation of a protection order in order to obtain a conviction for violation of that order. The Nebraska Supreme Court has held that "[w]hile in a criminal statute the meaning of the word 'knowingly' varies with the context, it commonly imports a perception of the facts requisite to make up the crime." State v. Williams, 243 Neb. 959, 966, 503 N.W.2d 561, 562-563 (1993). Therefore, in a trial for a knowing violation of a protection order, evidence which impacts on the defendant's knowledge of the order or its contents is certainly relevant in that trial. See State v. Patterson, 7 Neb. App. 816, 585 N.W.2d 625 (1998) (When the respondent has been served with the protection order, he may not adequately understand it, but he cannot argue that he did not have notice of it). It should not, however, be the basis for the granting of a motion to dismiss the State's case unless the State has failed to make a prima facie case of a knowing violation. For instance, if the victim testifies that he or she told the defendant that she was going to have the protection order removed, but had not yet done so, and the certified copies of the protection order show no

such vacation of the order, the court should not sustain a motion to dismiss the State's case for want of proof of a knowing violation. It should be a question for the jury to determine.

4. Venue

The State must also prove that the crime occurred in the county where the offense is being tried. Neb. Rev. Stat. § 29-1301 (Reissue 2008).

If the offense consisted of a series of acts, the prosecution can occur in any county where any one of the acts took place. Yost v. State, 149 Neb. 584, 592, 31 N.W.2d 538, 543 (1948). This is consistent with Nebraska statutory law, which provides that criminal cases should be tried in the county in which the offense was committed.

> If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense.

Neb. Rev. Stat. § 29-1301.01 (Reissue 2008).

Finally, if an offense is committed in Nebraska on certain means of transportation, the accused can be tried in any county through, on or over which the mode of transportation passed, or in the county where the trip terminated, as provided by Neb. Rev. Stat. § 29-1301.02 (Reissue 2008).

Sufficiency of the Evidence

The only Nebraska appellate case which has addressed sufficiency of the evidence in a violation of a protection order case is State v. Pittman, 5 Neb. App. 152, 556 N.W.2d 276 (1996). In that case, the protection order prohibited respondent from imposing any restraint upon the personal liberty of petitioner. Id. at 161, 556 N.W.2d at 282. The standard for an arrest for a violation of a protection order is that law enforcement have probable cause to believe that the respondent violated a protection order that the law enforcement officer has either seen or believes to exist after a determination of whether one exists by communication with other law enforcement. Id. at 160, 556 N.W.2d at 282 (citing Neb. Rev. Stat. § 42-928). Given the respondent's actions in driving to another town in which the petitioner worked, parking outside her place of employment between the building and her car, thus not allowing her to feel safe to exit the building to her car, and her repeated, unheeded requests for the respondent to leave, the Court of Appeals found that there had been probable cause for law enforcement to arrest the respondent for violation of a protection order. Id. at 160-61, 556 N.W.2d at 282-83.

Right to Jury Trial

1. Defendant's Right to Jury Trial

There are "two tiers" to the inquiry as to whether a defendant in a criminal case for violation of a protection order is entitled to a jury trial. State v. Schake, 1999 WL 703292 (Neb. App. 1999). The Schake case is directly on point, as it is an appeal regarding the conviction of the defendant for violation of a protection order, and the defendant specifically appealed regarding the failure of the trial court to provide him with a jury trial. "The U.S. Constitution, through the Due Process Clause of the 14th Amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court." Id. (citing State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986)). A jury trial is not required by the United States or Nebraska Constitution for every criminal case, but it must be provided when the offense is "serious." State v. Clapper, 273 Neb. 750, 730 N.W.2d 657 (2007) (citing State v. Cozzens, 241 Neb. 565, 490 N.W.2d 184 (1992)). A "serious offense," for purposes of this determination, is one which carries a maximum penalty of more than six (6) months imprisonment. Schake, 1999 WL 703292 at * 1 (citing Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); State v. Bishop, 224 Neb. 522, 399 N.W.2d 271 (1987)).

If the offense is not "serious," under this determination, then the right to a jury trial is statutory only. Schake, 1999 WL 703292 at * 2 (citing State v. Lafler, 224 Neb. 613, 399 N.W.2d 808 (1987)). The relevant statute provides that:

> [e]ither party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, other infractions, and any matter arising under the Nebraska Probate Code, may demand a trial by jury.

Neb. Rev. Stat. § 25-2705. Even if there is no Constitutional right to a jury trial, a defendant in the criminal cases not enumerated may request a jury trial pursuant to the statutory right, but there is no requirement of a jury trial absent the defendant's request for one.

For the violation of protection orders, the right to a jury trial is dependent on whether or not the defendant has violated the same protection order against the same petitioner before, whether it is the defendant's first offense, or if the

defendant has ever violated any protection order against anyone else in the past. The first violation of a protection order is a class II misdemeanor. Neb. Rev. Stat. § 42-924(3). A Class II misdemeanor carries a maximum penalty of six months imprisonment. Neb. Rev. Stat. § 28-106(1) (Reissue 2008). The second violation of a protection order against the same petitioner is a class IV felony. Neb. Rev. Stat. § 42-924(3)(b). A Class IV felony carries a maximum penalty of five (5) years imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2008). Any violation by anyone who has previously been convicted for violating any protection order, against any other individual who petitioned for a protection order, will be considered a Class I misdemeanor. Neb. Rev. Stat. § 42-924(3)(a). A Class I misdemeanor carries a maximum penalty of up to a year imprisonment. Neb. Rev. Stat. § 28-106(1).

Any individual who violates a protection order, without any previous violations either against the same petitioner under the same or different protection order, and who does not have any past convictions for violating a protection order against any other individual, does not have a constitutional right to a jury trial, since the maximum imprisonment for such an offense is six months. However, a defendant who either has a past conviction for violation of a protection order against a different petitioner does have a constitutional right to a jury trial, as does an individual who is being charged with a second violation against the same petitioner.

Even though a defendant charged with a first offense violation of a protection order does not have a constitutional right to a jury trial, the defendant does have a statutory right to request a jury trial pursuant to Nebraska Revised Statute § 25-2705. The right to a jury trial can be waived, however. Since the right is statutory only, it has been held that a defendant waives that right unless he or she asserts it affirmatively. State v. Bishop, 224 Neb. 522, 399 N.W.2d 271 (1987) (citing State v. Miles, 202 Neb. 126, 274 N.W.2d 153 (1979); State v. Godfrey, 182 Neb. 451, 155 N.W.2d 438 (1968), cert. denied 392 U.S. 937, 88 S. Ct. 2309, 20 L. Ed. 2d 1396). In Bishop, the Nebraska Supreme Court also ruled that a defendant's failure to demand that jury trial within ten (10) days after arraignment as required by a county court rule, constituted a waiver of that right to trial by jury. Id. at 527, 399 N.W.2d at 276 (citing Neb. Ct. R. 23).

On the other hand, given that the second violation of a protection order carries an enhanced penalty from that of a first offense, there is an additional

consitutional consideration. A defendant charged with second offense violation of a protection order, a Class I misdemeanor, has both a statutory and a constitutional right to a trial by jury. No request for that jury trial need be made by the defendant, and any waiver of that right must be done so affirmatively, on the record. The record must reveal that the voluntary waiver was knowingly and intelligently made. Bishop, 224 Neb. at 528, 399 N.W.2d at 276.

A defendant charged with second offense (same order or same petitioner) violation of a protection order, a class IV felony, has a constitutional right to trial by jury, and, as above, no demand therefore must be made, and any waiver of that right must appear affirmatively on the record.

2. State's Right to Jury Trial

The Nebraska Supreme Court has determined that the state does not have any right to a jury trial, and that such right is personal to the defendant. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129 (1967). The state does not have the right to require the defendant to have a jury trial if the defendant wishes to waive that right. Id. at 641, 150 N.W.2d at 131. While this case was specific to felony offenses in which the right to a jury trial was constitutional, the right to a jury trial even statutorily is likely to follow this same line of reasoning.

Right to Attorney

No defendant can be imprisoned for any criminal offense if he is denied the assistance of counsel. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). There is no requirement that the right to counsel be limited to criminal offenses with maximum potential sentences greater than six (6) months, such as is the case with regard to a defendant's right to a jury trial. Id.

The Nebraska legislature has provided criminal defendants charged with felonies punishable by imprisonment with a statutory right to counsel under Nebraska Revised Statute § 29-3902 (Reissue 2008). The right to counsel extends to defendants of misdemeanor offenses if, as a result of a conviction, imprisonment is actually imposed. Id.; State v. Golden, 8 Neb. App. 601, 607, 599 N.W.2d 224, 229 (1999) (citing State v. Stott, 255 Neb. 438, 586 N.W.2d 436 (1998) (citing Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979))). There is no requirement of counsel for a defendant of a misdemeanor offense if only a fine is imposed. Golden, 8 Neb. App. at 607, 599 N.W.2d at 229 (citing State v. Dean, 2 Neb. App. 396, 510 N.W.2d 87 (1993) (citing State v. Austin, 219 Neb. 420, 363 N.W.2d 397 (1985))). If a defendant cannot afford an attorney, one should be provided for him. The Nebraska Supreme Court has outlined the inquiry that a trial court should make in order to determine whether a defendant is indigent, including the defendant's income, availability to defendant of other resources, including real and personal property, bank accounts, social security, unemployment or other benefits, normal living expenses, outstanding debts, and the age of any dependents. State v. Richter, 221 Neb. 487, 492-93, 378 N.W.2d 175, 179-80 (1985) (citing State v. Lathe, 326 A.2d 147 (Vt. 1974); Bolds v. Bennett, 159 N.W.2d 425 (Iowa 1968), questioned, State v. Gilroy, 313 N.W.2d 513 (Iowa 1981), but followed, In re Marriage of Kopp, 320 N.W.2d 660 (Iowa App. 1982); State ex rel. Partain v. Oakley, 227 S.E.2d 314 (W. Va. 1976)).

Of course, as with all constitutional rights, the defendant may waive his right to an attorney.

> A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privileege; therefore, the key inquiry is whether

> one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel.

State v. Wilson, 252 Neb. 637, 648, 564 N.W.2d 241, 250 (1997) (citing State v. Dean, 246 Neb. 869, 523 N.W.2d 681 (1994)). The State has the burden of proving waiver of the defendant's right to counsel. Wilson, 252 Neb. at 649, 564 N.W.2d at 251 (citing Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); State v. Green, 238 Neb. 328, 470 N.W.2d 736 (1991)). Care should be taken at arraignment in advising the defendant of his right to counsel, and in making a good record about the defendant's waiver of that right. This is especially true because a conviction obtained in violation of this right can be reversed on appeal, and can be attacked in any subsequently held enhancement hearing.

Taking a Plea

As with all criminal cases, it is far more likely that an accused will plead guilty or no contest to a charge of violating a protection order than it is for him or her to have a trial, whether it be to a judge or to a jury. As all courts know, care must be exercised in order to take a plea that will withstand attack, both on appeal and in any subsequently held enhancement hearing. A case from the 1980s set forth requirements for the determination of whether a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly:

1. The [arraigning] court must
   a. inform the defendant concerning (1) the nature of the charge, (2) the right of assistance to counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, (5) the privilege gainst self-incrimination; and
   b. examine the defendant to determine that he or she understands the foregoing.
2. Additionally, the record must establish that
   a. there is a factual basis for the plea; and
   b. The defendant knew the range of penalties for the crime with which he or she is charged.

State v. Irish, 223 Neb. 814, 820, 394 N.W.2d 879, 882 (1986). The Nebraska Supreme Court has encouraged lower courts to utilize written plea forms whenever possible, in order to safeguard the defendant's rights as well as to guard against potential issues with the plea process being brought up in an appeal later.

Nebraska law has added an additional advisement to this list. It provides that, prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer an advisement on the record to the defendant. That advisement is: "If you are not a United States citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of removal from the United States, or denial of

naturalization pursuant to the laws of the United States." Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008). Additionally, it provides that, if requested, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement. Neb. Rev. Stat. § 29-1819.02(2)-(3).

Sentencing

1. Penalties

A. First Offense—Class II Misdemeanor

Nebraska Revised Statute § 42-924(3) provides that violation of a protection order is a Class II misdemeanor. Nebraska Revised Statute § 28-106 provides that a Class II misdemeanor is punishable by up to six (6) months in jail, or up to a $1000 fine, or a combination of both fine and imprisonment. A court may also order restitution for actual physical injury or property damage or loss sustained by the victim as a direct result of the commission of the offense, as provided in Nebraska Revised Statute §§ 29-2280 et. seq. (Reissue 2008). Restitution would most likely be ordered in the context of a second charge, most likely assault, which had been filed simultaneously with the violation of the protection order charge.

B. Second Offense—Class I Misdemeanor

Nebraska Revised Statute § 42-924(3) provides that violation of a protection order, second offense, is a Class I misdemeanor. The statute does not require that it be the same protection order filed by the same petitioner. The sentencing for such a violation of the same protection order against the same petitioner, or another protection order by the same petitioner, is set forth in the next subsection. Nebraska Revised Statute § 28-106 provides that a Class I misdemeanor is punishable by up to one (1) year in jail or prison, or up to a $1000 fine, or a combination of both fine and imprisonment. As with the Class II misdemeanors, a court may also order restitution for actual physical injury or property damage or loss sustained by the victim as a direct result of the commission of the offense, as provided in Nebraska Revised Statute § 29-2280 et. seq.

C. Second Offense, Same Order and Same Petitioner - Class IV Felony

Nebraska Revised Statute § 42-924(3) provides that the violation of a

protection order, second offense, under the same order and against the same petitioner, is a Class IV felony. Nebraska Revised Statute § 28-105 provides that a Class IV felony is punishable by up to five (5) years imprisonment, or up to a $10,000 fine, or a combination of both fine and imprisonment. A court may also order restitution for actual physical injury or property damage or loss sustained by the victim as a direct result of the commission of the offense, as provided in Nebraska Revised Statute §§ 29-2280 et. seq.

2. Enhancement

Nebraska Supreme Court, Nebraska Court of Appeals, and United States Supreme Court case law make it clear that proof of a prior conviction is simply an issue for the judge to determine as part of sentencing, as opposed to an element of the crime which the jury must find beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998); Jones v. United States, 526 U.S. 227 (1999)). See also State v. Rubek, 11 Neb. App. 489, 653 N.W.2d 861 (2002) ("Nebraska's appellate courts have consistently interpreted statutes that authorize higher sentences for recidivists as setting forth enhancement factors[]" and that such interpretation also applies to protection order violations). Although an exhaustive treatment of enhancement law in Nebraska may be warranted herein, to do so would unduly burden this bench guide. The reader is therefore directed to Judge Alan Gless's article "Nebraska Plea-Based Convictions Practice: A Primer and Commentary" found at 79 Nebraska Law Review 2 (2000) for a thorough treatment of the subject.

A. Enhancement Hearing

The usual procedure employed to determine whether a defendant is to be subject to a statutorily enhanced penalty due to a prior conviction is for the court to hold an enhancement hearing after a conviction on the underlying offense has been obtained. At that enhancement hearing, the State must first prove the existence of a prior conviction by a preponderance of the evidence. State v. Hall, 270 Neb. 669, 680, 708 N.W.2d 209, 217 (2005) (citing State v. Hurbenca, 266 Neb. 853, 669 N.W.2d 668 (2003)).

Second, the State must prove that the defendant was represented by counsel in the prior proceeding or validly waived the right to counsel. State v. Louthan, 257 Neb. 174, 179-80, 595 N.W.2d 917, 921-22 (1999). The Louthan court acknowledged the question regarding whether a conviction could be used for purposes of sentencing enhancement when the first conviction did not result in a sentence of imprisonment, but declined to decide it. Id. at 188, 595 N.W.2d at 926.

Any evidence can be used to prove the prior conviction. The usual method is for the state to offer a certified copy of the records of the prior conviction, including the charging document, plea forms, and the judge's minutes. See State v. Hall, 270 Neb. 669, 708 N.W.2d 209. Sometimes those records do not reveal the presence or waiver of the right to counsel so a bill of exceptions could also be offered to supply that proof. A defendant's statement on the record that he or she was convicted of the previous crime is also sufficient to prove the fact of the conviction, but there must also be some proof presented that the defendant had or validly waived counsel in the prior proceeding. State v. Ziemba, 216 Neb. 612, 618-19, 346 N.W.2d 208, 214 (1984).

B. When is Something a "Prior Conviction" for Purposes of Enhancement?

There has been some confusion in Nebraska about when a case becomes a "prior conviction" for purposes of enhancement, but case law seems to settle that issue for purposes of enhanced penalties. The Nebraska Supreme Court and Court of Appeals have stated that, under the terms of the driving under the influence of alcohol statute, a conviction for purposes of enhancement is the finding of guilty by the court, not the finding of guilt **and** the imposition of sentencing. State v. Kramer, 231 Neb. 437, 436 N.W.2d 524 (1989) (citing In re Interest of Wolkow, 206 Neb. 512, 293 N.W.2d 851 (1980); State v. Long, 205 Neb. 252, 286 N.W.2d 772 (1980)). Given the similarities between the enhancement provisions of the protection order and driving under the influence statutes, the case law for driving under the influence enhancement is instructional as to that of violation of a protection order.

In the rather unusual factual scenario of the Kramer case, the defendant had pled no contest to a charge of driving under the influence of alcohol in 1985. He was placed on probation in an order that stated in relevant part: "having been found guilty as charged, sentence is suspended and defendant is placed on probation for a period of 180 days…." Then in 1987, the same defendant pled guilty to a new charge of driving under the influence of alcohol, and was found guilty. The case was scheduled for an enhancement hearing in early 1988, at which time the court found that the 1985 case constituted a valid prior conviction for purposes of enhancing the present charge to a second offense, despite the fact that in the 1985 case, no jail sentence had been imposed, just probation. Id. at 437-38, 436 N.W.2d at 525. The court stated that: "the conviction takes place prior to the imposition of sentence. Therefore, the fact that the defendant's sentence to the original conviction was suspended does not invalidate the use of the original conviction for enhancement purposes." Id. at 439, 436 N.W.2d at 526.

A conviction must be a "final conviction" for purposes of being used as the basis for enhancing the sentence for a subsequent offense. State v. Estes, 238 Neb. 692, 472 N.W.2d 214 (1991). In Estes, the defendant was in the process of appealing a conviction for the first DUI offense at the time that he was being sentenced for a second DUI charge. After pleading no contest and having his sentencing for the second DUI conviction enhanced because of the existence of the first DUI conviction, the defendant appealed the second case, arguing that the second case should not have been enhanced to a second offense. The court stated that:

> [t]o constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction must be a final conviction. Accordingly, a prior conviction that is pending on appeal will not support enhanced penalties because it has not yet become final…
>
> If the conviction has been affirmed on appeal or the time for appeal has expired, the conviction is final for purposes of enhancement… [E]ven if the first conviction is affirmed before sentencing on the second conviction, it may not be used for sentencing enhancement purposes, since it was not final at the time the second offense was committed.

Id. at 695, 472 N.W.2d at 216.

The problem becomes clear if one considers a couple of scenarios: First, imagine that Defendant "A" commits a violation of a protection order on day 1. Defendant "A" pleads guilty to that violation on day 2 at arraignment. The judge finds Defendant "A" guilty, orders a presentence investigation, sets a bond that Defendant "A" can post, and continues sentencing for six weeks hence. On day 3, Defendant "A" is again arrested for violation of the same protection order. Could Defendant "A" be successfully prosecuted for a felony violation of a protection order?

Or consider the following scenario: Defendant "B" commits a violation of a protection order on day 1. Defendant "B" has a trial on day 45, is found guilty and is sentenced to pay a $500 fine, for which Defendant "B" requests time to pay, which is granted. On day 55, Defendant "B" is arrested for again violating the same protection order. Defendant "B" is arraigned on day 56 and pleads not guilty. On day 57, Defendant "B" timely files what is later is determined to be a frivolous appeal of the first conviction.

The decisions in Estes and Kramer must be read together in order to determine the correct path for purposes of an enhanced sentence. Under the facts as presented for the two scenarios, neither of the defendants could be successfully prosecuted for a felony despite each defendant's blatant disregard for the protection orders and the findings of guilt which had been entered against the defendants at the time of the commission of the second violation. The conviction was not final at the time of the commission of the second offense, therefore the defendants cannot face enhanced penalties. After all, Defendant "A" could make a motion to set aside his or her plea based on any number of valid reasons, or Defendant "A" could appeal any subsequently imposed sentence and have that conviction reversed on appeal. Defendant "B" actually did appeal. Even though later it was determined that it was a frivolous appeal, it could have been a successful appeal, and Defendant "B" would no longer be convicted of the first offense.

Since protection orders in Nebraska only last for one year, the likelihood of a successful felony prosecution of a second offense, same protection order is relatively slim, though a court could order continuations of existing protection orders for additional year time periods, as noted in earlier sections of this manual.

C. Nebraska Convictions Only?

Another question that arises in the enhancement area is whether out-of-state convictions for violations of protection orders can be used to enhance a conviction obtained here in Nebraska. This may be possible because the language used in the enhancement portion of Nebraska Revised Statute § 42-924 is quite general in nature. The statutory language states that:

> [a]ny person who knowingly violates an order issued pursuant to subsection (1) of [section 42-924] or section § 42-931 [foreign protection orders] after service shall be guilty of a class II misdemeanor, except that (a) any person convicted of violating such order who has a prior conviction for *violating a protection order* shall be guilty of a Class I misdemeanor and (b) any person convicted of violating such order who has a prior conviction for violating the same protection order or a *protection order granted to the same person* shall be guilty of a class IV felony.

Neb. Rev. Stat. § 42-924(3) (emphasis added).

If one compares this language to other enhancement provisions in Nebraska, an argument can be made on either side about whether an out-of-state conviction could be used. On the one hand, it is clear that the legislature knows how to specifically limit enhancement to in-state convictions only. For instance, the statute which makes carrying a concealed weapon a felony when it occurs the second time provides that the second offense must be "under this section." Neb. Rev. Stat. § 28-1202(4) (Reissue 2008). Similarly, theft convictions under Nebraska Revised Statute § 28-518 (Reissue 2008) may be enhanced only if the previous conviction was under the same subsection of Nebraska Revised Statute § 28-518.

On the other hand, the legislature also knows how to clearly indicate that convictions from other states are usable for purposes of enhancement. Such is the case with prosecutions for being a habitual criminal under Nebraska Revised Statute § 29-2221 (Reissue 2008) wherein the legislature provided that a person would be a habitual criminal if he or she "has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States." Such is also the case now for prosecutions for driving under the influence pursuant to Nebraska Revised Statute §§ 60-6,196 et. seq. wherein the legislature has provided that a person

is subject to enhanced penalties if that person has had one or more convictions from other states.

Nebraska's protection order statute does not have specific language that either includes or excludes out-of-state convictions, so it is unclear whether such convictions should be used to enhance a Nebraska conviction. If a court were to take the position that a person who had been previously convicted of a violation of a protection order in another state were subject to enhanced penalties for a violation of a protection order in this state, it would encounter several issues that would need to be resolved. For instance, there is the issue of whether a conviction for criminal contempt in another state for violating a protection order is a "conviction for violation of a protection order" for purposes of Nebraska's enhancement provisions. There also is some question about what a "protection order" is for purposes of the statute, considering the definitions set forth for a "foreign protection order" under Nebraska Revised Statute § 42-931 or a "protection order" under the federal Violence Against Women Act.

D. Is the Prior Conviction "Good"?

For a short time in Nebraska, separate proceedings could be utilized to attack prior convictions for a variety of reasons, usually ones involving failure at the time of the taking of a plea to advise and thereafter to obtain adequate waivers of defendants' various constitutional rights. State v. Wiltshire, 241 Neb. 817, 491 N.W.2d 324 (1992). In 2000, however, the Nebraska Supreme Court has eliminated that authorization in DUI cases and habitual criminal cases. State v. Kuehn, 258 Neb. 558, 604 N.W.2d 420 (2000) (habitual criminal cases); State v. Louthan, 257 Neb. 174, 595 N.W.2d 917 (1999) (DUI cases). Although the court's analysis in those cases permit the belief that the Nebraska Supreme Court may not extend those two holdings beyond the bounds of DUI cases and habitual criminal cases, most lower courts have interpreted those cases as eliminating the separate proceeding attack in all cases. As long as this holds true, a defendant in a second offense violation of protection order case would only be permitted the limited attack on the conviction that is available at the enhancement hearing. This attack is whether the defendant had or validly waived his right to counsel in the prior

proceeding. Even this limited attack may not be assailable if the defendant's previous conviction resulted in something less than a jail sentence. This is because the Nebraska Court of Appeals has determined that an uncounseled misdemeanor conviction, valid because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction. State v. Jackson, 4 Neb. App. 413, 544 N.W.2d 379 (1996). The Nebraska Supreme Court has yet to weigh in on this issue, however, having successfully dodged it in both State v. Orduna, 250 Neb. 602, 550 N.W.2d 356 (1996) and State v. Louthan, 257 Neb. 174, 595 N.W.2d 917, so caution must be exercised in coming to any firm conclusion on that issue.

E. How Does the Prosecution Prove It is the "Same Order" or the "Same Petitioner"?

In order for a second protection order violation to constitute a felony, the previous conviction must be based on the "same protection order," or a "protection order granted to the same petitioner." Although proof of this would be obvious if the prosecution in both the prior case and the recent case adequately pled the court docket number, case title, and date of entry of the protection order, oftentimes that degree of particularity in pleading will not be the case. In that case, the prosecution may need to provide the court with the bill of exceptions of the plea or trial so that the court can determine which order was the subject of the previous violation. If the previous conviction occurred in another state, the court would also need to determine whether Nebraska's statutory scheme permits enhancement with an out-of-state conviction, as indicated previously in subsection C of this section.

Chapter 10:

Special Issues in Enforcement of Protection Orders

Aiding and Abetting a Violation

Possible Defenses

1. Consent
2. Collateral Attack of Order During Trial

Double Jeopardy

1. Successive Prosecution
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Aiding and Abetting a Violation

Much debate surrounds the issue of whether a victim of domestic abuse who has obtained a protection order against an abuser could be successfully prosecuted for aiding and abetting a violation of that order under Nebraska Revised Statute § 28-206 (Reissue 2008). Although there is no specific answer to that question in Nebraska, there is legal precedent in Nebraska which suggests that the answer is "no." It is likely that in the future the legislature shall close that loophole in the law and definitively provide in statutory law that a petitioner may not be charged or convicted of aiding and abetting in the violation in her own protection order.

Nebraska Revised Statute § 28-206 provides that one "who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Prosecutors and judges in some counties are using this statute against a victim of domestic abuse to hold her criminally responsible for aiding and abetting a violation of her own protection order under that statute.

Whether a person can be held criminally responsible depends upon whether the legislature intended for that person to be held liable. For example, in conspiracy law, Wharton's rule provides that an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of those two persons for its commission. In that type of case, the conspiracy is deemed to have merged into the completed offense. This rule applies only to offenses that require concerted criminal activity, such as incest, bigamy, adultery, and dueling, and does not apply to those offenses where the substantive offense that is the object of the alleged conspiracy can be committed by a single person. Following that reasoning, the Nebraska Supreme Court in State v. Utterback, determined that the two participants in the transfer of a controlled substance could not be prosecuted for conspiracy to commit delivery or distribution of a controlled substance. 240 Neb. 981, 990-91, 485 N.W.2d 760, 769-70 (1992), overruled on other grounds, State v. Johnson, 256 Neb. 133, 589 N.W.2d 108 (1999), overruled on other grounds, State v. Davidson, 260 Neb. 417, 618 N.W.2d 418 (2000)).

The court in Utterback then went on to discuss limitations on criminal responsibility under Nebraska's aiding and abetting laws. It determined that there is an exception to criminal liability for the participant whose acts are not specifically deemed to be criminal by the particular statute.

> The final exception to accomplice liability... occurs when the crime is so defined that participation by another is necessary to its commission. The rationale is that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by others in the offense as a crime. This exception applies even though the statute was not intended to protect the other participants. Thus, one having intercourse with a prostitute is not liable for aiding and abetting prostitution, and a purchaser is not an accomplice to an illegal sale.

Utterback, 240 Neb. at 991-92, 485 N.W.2d at 760 (quoting U.S. v. Southard, 700 F.2d 1, 20 (1st Cir. 1983)). The Nebraska Supreme Court then went on to state: "[w]hen the guilt of one party is excluded by the terms of the statute, it follows that such a participant cannot be held punishable as being an aider or abettor of the offense." Utterback, 240 Neb. at 992, 485 N.W.2d at 770. Finally, it stated: "We conclude that purchaser of a controlled substance is not an aider and abettor in the controlled substance's delivery or distribution." Id.

Thus, the question in the protection order context is whether the legislature intended to exclude the recipient of a protection order from criminal responsibility. This is precisely the approach that the Ohio Court of Appeals took when it determined that the recipient of a protection order was excluded from criminal responsibility for a violation of that protection order. City of North Olmsted v. Bullington, 744 N.E.2d 1225 (Ohio App. 2000). The Court referred to the non-waivability language in the Ohio protection order statutes, and stated:

> [b]y placing specific non-waivability language in the law, the General Assembly recognized that sometimes whether volitional or under duress, the victim might allow the offender access to his or her person...
>
> [I]n so doing, the General Assembly focused absolutely on the behavior of the offender with intent to punish the offender's behavior and not the behavior of the victim, for whom the order is designed to protect. To do otherwise would make [the petitioner] responsible for [the respondent's] action. The TPO restrains his behavior and makes him responsible for his own behavior.

Id. at 1227. In addition, in determining legislative intent, the Court also relied on the fact that in Ohio the General Assembly specifically prohibited mutual protection orders, thus "seemingly mak[ing] it impossible to charge a person with complicity." Id. at 1228. The Nebraska orders do not contain such express language that the terms of the protection order cannot be waived by an invitation or consent of the petitioner, but the reasoning of the Olmsted court was applicable to Nebraska in that it recognized that victims of domestic violence are a protected class under the specialized criminal law of protection orders, and as such, could not be punished for that criminal law's violation.

This decision from Ohio specifically held that the legislative intent must be examined to determine whether the victim could be prosecuted for aiding and abetting a violation. The question for Nebraska is then what was the intent of the Nebraska legislature on this issue? While there is no direct discussion of the topic in either the floor debate or the committee hearings, several things can be inferred about the legislative intent simply by examining the protection order statutes themselves. First, before a petitioner can receive a protection order in Nebraska, there must be a judicial finding that the petitioner is in need of protection from domestic abuse by the respondent. Thus, once the protection order is issued, there has been a judicial finding that the petitioner is a member of the class of people the statutory scheme was designed to protect. Second, the legislature specifically treated the filing of a petition for a protection order very differently than other civil petitions, in that Nebraska Revised Statute § 42-924(3) (Reissue 2008) prohibits the withdrawal of a petition for a protection order without order of the court. This provision arguably indicates the legislature's understanding of the dynamics of domestic violence and the role of intimidation and control on the part of the abuser. Finally, the legislature also enacted Nebraska Revised Statute § 42-924.03 (Reissue 2008) which prohibits a court from granting a respondent a protection order unless that respondent files a cross or counter petition seeking such an order, and the issuing court makes specific findings of domestic abuse against the respondent and determines that the respondent is entitled to a protection order. This provision again indicates the legislature's desire to focus the responsibility for the abuse directly on the abuser, not on the actions of the recipient of the abuse.

Another court has had far less patience with the prosecution of a victim for aiding and abetting in the violation of her own protection order. In a non-

binding district court opinion, a judge in Colorado made clear, in no uncertain terms, that Colorado state law does not allow for prosecuting a victim for aiding and abetting in the violation of her own protection order. People of the State of Colorado v. Caldarella, 07CV174 (Dist. Ct., County of Adams, 2007) (Order affirming municipal court's dismissal of a prosecution of a victim for aiding and abetting in the violation of her own protection order). Specifically, the court noted that the prosecution's action went against the legislative purpose of the protection order statutes, as the victim is the person the legislature is seeking to protect. In that case, the prosecution tried to frame the victim's crime of aiding and abetting as a crime against the people of Colorado. In this case, the judge made it clear that the protection order statutes protected the victims of domestic violence—and only the victims of domestic violence—rather than the public at large. In so finding, the court tersely stated:

> [t]he state may have a vested interest in enforcing the protection order and the victim may generally be aligned with the state in such circumstances; however, merely because the prosecution and the victim have divergent views of the process does not render the victim any less of a victim. All crimes are committed against the dignity of the People of the State of Colorado. That is why the People or their designated representative bring such an action. However, the nature of the prosecution does not alter the victim's status as a victim, nor, through some sort of legal alchemy, permit her to be exploited by a bullying prosecutor rather than a bullying spouse.

Id. at 3-4.

There is case law from Iowa, however, which reaches a different conclusion in a contempt setting. Henley v. Iowa Dist. Ct., 533 N.W.2d 199 (Iowa 1995); Hutcheson v. Iowa Dist. Ct. for Lee County, 480 N.W.2d 260 (Iowa 1992). In each of those cases, a criminal defendant was ordered to have no contact with his/her victim pursuant to Iowa Code § 236.14 as part of a criminal prosecution for assault. In each case, the victim was cited for contempt for aiding and abetting the defendant's violation of that order. The Iowa Supreme Court held in both cases that the lower court had jurisdiction to punish the victim for contempt as an aider and abettor. In upholding the contempt citations, the court relied on the general rule of law that a non-party can be held in contempt of court for violating a court order or injunction even though the person was not a party to the injunction or order, as long as the non-party knew of the order and either acted in concert or was in privity with a person to whom the court's order was

directed. Although it expressed some concern for the victims in each case, it determined that it should not distinguish this type of case from the 1930's liquor violation cases in which the above rule was first announced. It should be noted, however, that Iowa law, at the time of these cases, had no prohibition of the entry of mutual protection orders. Also, given that this decision was in the context of a criminal no-contact order, it is questionable whether the court would have charged the victim for aiding and abetting if the order had been a civil protection order instead.

The Nebraska legislature is expected to introduce legislation in the future specifically prohibiting a victim of domestic violence and petitioner for a domestic abuse protection order from being charged with aiding and abetting in the violation of her own protection order.

Possible Defenses

1. Consent

A question has also arisen concerning whether consent by a victim to conduct which was prohibited by a protection order constitutes a defense to a charge of violation of a protection order. Although case law in Nebraska has not developed in that area, the Supreme Court of Washington faced that very issue. State v. Dejarlais, 969 P.2d 90 (Wash. 1998). In that case, the defendant was charged with violating a protection order, a gross misdemeanor. The victim had obtained a protection order which prohibited the defendant from, among other things, contacting or attempting to contact the victim in any manner. After the victim obtained the protection order, she continued her relationship with the defendant, despite the order. The defendant let himself in to the victim's home, without being invited, and raped the victim. The defendant was charged with rape and violation of a protection order. The defendant proposed a jury instruction which stated that if the petitioner for the protection order specifically solicits or invites the presence of the defendant, then the defendant cannot be found guilty of the violation of the protection order. Id. at 90-91.

On appeal, the Washington Supreme Court first noted that the tendered instruction did not correctly reflect the facts of the case, but because the defense argued that the victim's repeated invitations and ongoing acquiescence to the defendant's presence constituted a blanket consent or waiver of the order's terms, the court agreed to decide the issue on its merits. Id. at 92. The court then determined that consent is not a defense to a violation of a protection order for several reasons. First, the court noted that the statutory elements of the crime of violation of a protection order did not address consent, and the Legislature had not affirmatively established consent as a defense elsewhere in the statutes. The court also noted that, as required by statute, the order of protection the defendant received stated that the defendant could be arrested "even if the person or persons who obtained the order invite or allow you to violate the order's prohibitions. The respondent has the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application." Id. Third, the court emphasized the fact that the statutory scheme requires the police to make an arrest when they have probable cause to

believe a person has violated a protection order. The court noted that the statute made no exception for consensual contacts, and that the obligation to arrest doesn't require a complaint by a protected person. Finally, the court noted that the Washington statutory scheme provides that modification of a protection order requires notice to all parties and a hearing. The court reasoned that to permit consent to be a defense would be to allow a de facto modification in violation of the notice and hearing requirements. Id. at 93.

Nebraska's statutory scheme is similar to Washington's, in that consent is neither addressed in the elements of the crime, nor listed as a defense. Also, under Nebraska Revised Statute § 42-928 (Reissue 2008), Nebraska police have a similar duty to make an arrest when they have probable cause to believe a person has violated the order, also without regard to whether the contact was consensual, or whether the protected person made a complaint. Finally, although modification of a protection order is not provided specifically by statute, Nebraska Revised Statute § 42-926 (Reissue 2008) does provide that if a protection order is dismissed or modified by the court, the clerk must provide to law enforcement a copy of that modification or dismissal. Presumably this duty exists so that law enforcement can be accurately apprised about which orders to enforce through its arrest powers. Additionally, each of the form orders of protection, Forms 19:10 (Revised Oct. 2008), 19:11B (Revised Oct. 2008), and 19:12 (Revised Oct. 2008), indicate that the order is granted for one year from the date of issuance "unless vacated by the court prior to such date."

Another case which illuminates this issue more, but in the contempt context, is People v. Townsend, 538 N.E.2d 1297 (Ill. App. 1989). In that case, the defendant was found in violation of a protection order when he was found to have been in contact with the petitioner when he visited her home and struck her. The respondent appealed, arguing that the State failed to prove a willful violation in light of the fact that he believed the order had been "lifted" by the petitioner. The court held that a criminal contempt conviction in this context required proof beyond a reasonable doubt of a willful violation, but did not agree that a victim's invitation to violate the court's order frees a contemnor from conviction for willful misconduct. In the words of the court: "Orders of protection are orders of the court, not orders of the victims…. A contrary result would lead to mockery of the powers granted the courts under the Act." Id. at 1299.

Another case in the contempt context also determined that acquiescence by a petitioner in cohabitation by a respondent after an order of protection is issued does not constitute a waiver by the petitioner of the right to be free from intrusions by the respondent after cohabitation terminates, upon either the rights of safety or the rights of privacy secured by the order. In that case, Cole v. Cole, the petitioner obtained a protection order and then allowed the respondent to move back in with her. 147 Misc. 2d 297, 556 N.Y.S.2d 217 (1990). The petitioner then moved out to establish her own home. Approximately two weeks later, the respondent forced his way into the petitioner's residence and assaulted her. The court first determined that the doctrine of estoppel was not established in the case, and then turned to the doctrine of waiver. In determining that the doctrine of waiver did not apply in this case, the court noted that the order of protection itself stated that the order remains in full force and effect until such time, if at all, as the order is modified or terminated by a future order of a court having competent jurisdiction. The court noted that:

> [a] victim of domestic violence who has procured an order of protection is entitled to a court's protection from further violence throughout the duration of the order of protection even if the victim is desirous of pursuing a goal of voluntary reconciliation with the offender. Attempts to salvage the otherwise beneficial aspects of a relationship which is afflicted by unlawful behavior would be discouraged if the law permitted the very attempt of salvation to result in a loss of protection from the sinister aspect. The law does not impair an individual's choice to pursue a relationship with one whose prior conduct has evinced a need for judicial limits upon destructive behavior.

Id. at 301, 556 N.Y.S.2d at 219. It then continued with the following advice: "[a] respondent who perceives peril in the potential for manipulative use of a protective order by a petitioner may invoke a simple and effective remedy to avoid such manipulation, by application for vacatur or appropriate modification of the order." Id. at 301, 556 N.Y.S.2d at 219.

2. Collateral Attack of Order During Trial

The collateral bar rule provides that a party may not, as a general rule, violate a court order and raise the issue of the order's unconstitutionality collaterally as a defense in a contempt proceeding. Instead, the appropriate method to challenge such a court order is to petition to have the order vacated or

amended. There are two exceptions to this rule—if court was without jurisdiction over the subject matter or over the contemptor—in other words, if court was without subject matter jurisdiction or personal jurisdiction. Sid Dillon Chevrolet v. Sullivan, 251 Neb. 722, 559 N.W.2d 740 (1997). Although this rule is specific for contempt actions, since violation of protection order cases are in essence contempt actions, an argument could certainly be made that it would apply in this setting as well.

If the Nebraska Supreme Court were to apply this collateral attack role in protection order cases, a respondent would only be able to attack the validity of the protection order as a defense in a criminal prosecution if that order were entered without personal jurisdiction over the respondent or by a court that lacked subject matter jurisdiction. Obviously, instances of such an attack would be rare. Lack of subject matter jurisdiction might, however, be raised in two very unique situations. It might be raised when both the respondent and petitioner are Native Americans. It might also be raised when the protection order granted a temporary custody order and an allegation has been made that the pleading or notice requirements of the Nebraska Child Custody Jurisdiction and Enforcement Act have been violated. For discussion of these two issues, the reader is referred to Chapters 2 and 4 respectively.

One state which has permitted a similar collateral attack is Vermont in State v. Mott, 692 A.2d 360 (Vt. 1997). In that case, the defendant argued that his conviction for violating an abuse prevention order should be overturned because the order was void, allegedly having been entered in violation of his procedural due process rights and in violation of his constitutional right to free speech. The Vermont Supreme Court took the position that in certain circumstances it would permit a limited collateral attack of an abuse prevention order in a criminal prosecution for violation of the same when the order is void because the abuse prevention order was issued in violation of a defendant's constitutional due process rights. Accord, State v. Andrasko, 454 N.W.2d 648 (Minn. App. 1990) (while the protection order in this particular case was merely voidable, the court recognized that a void order could be attacked collaterally).

As a side note, in State v. Mott, the Vermont Supreme Court was also faced with a question of whether, in a prosecution for a violation of an abuse prevention order, the validity of the abuse prevention order is to be determined by

the judge or the jury. The court determined that the validity of the order was not an element of the offense, therefore it was a question for the judge to determine. Mott, 692 A.2d at 366.

Double Jeopardy

The constitutional prohibition against double jeopardy prohibits two things--successive prosecutions for the same offense and double punishment for the same offense. Thus, in the protection order context, a double jeopardy issue can arise in either of two situations. First, the prohibition against successive prosecutions is implicated when a prosecutor files a criminal case for violation of a protection order case or contempt and then, in a separate and subsequent action, commences a prosecution for other crimes arising from the same set of facts. Second, the prohibition against double punishment is implicated when a prosecutor files a case in which a violation of a protection order charge is filed together with other criminal charges arising out of the same set of facts.

1. Successive Prosecution

The United States Supreme Court has addressed the successive prosecution issue situation in U.S. v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). In that case, a question arose as to whether a non-summary contempt action brought against a defendant by a private party for violation of a protection order would prohibit a subsequent government prosecution for crimes based on the same facts as the contempt action. The Supreme Court affirmatively answered the question, stating that the prohibition against double jeopardy did apply to a prosecution brought subsequent to an action for non-summary contempt. In that same case, the Supreme Court overruled Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), which had provided for a "same conduct" test for purposes of double jeopardy. The Court specifically stated that the Blockburger "same elements" test is the test to apply in determining whether the double jeopardy prohibition has been violated. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (citing Blockburger v. U.S., 284 U.S. 299 (1932)). The test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' [sic] and double jeopardy bars additional punishment and successive prosecution."

Although the majority of the Supreme Court agreed that the Blockburger test should be employed, the justices could not agree on how to apply that test in the non-summary contempt situation. Two approaches emerged, which the Nebraska Court of Appeals has summarized rather succinctly as follows:

> Under the Blockburger same-elements test, a defendant can be prosecuted for multiple offenses based on the same conduct if each offense requires proof of a factual element which does not have to be proven in another offense.
>
> . . .
>
> The Court [in Dixon] did not reach a consensus on how to apply the Blockburger test when comparing the elements of a criminal contempt violation to the elements of a subsequently prosecuted statutory criminal charge. Of the five-justice majority that overruled Grady, Justice Scalia, joined by Justice Kennedy, stated that for purposes of applying the Blockburger test in Dixon, the Court must compare the statutory elements of the offenses underlying the criminal contempt convictions with the statutory elements of the subsequently prosecuted criminal charges brought against the defendants. . . [On the other hand,] Chief Justice Rehnquist rejected the idea that Blockburger requires any substantive analysis of the elements of the conduct underlying a criminal contempt conviction. The Chief Justice stated that there are only two elements in any criminal contempt conviction: (1) knowledge of the defendant that the court order existed and (2) willful violation of the order. Thus, argued the Chief Justice, Blockburger requires a comparison between the universal, generic elements of a criminal contempt conviction and the elements of a subsequently prosecuted criminal charge.

State v. Vice, 2 Neb. App. 930, 933-34, 519 N.W.2d 564, 565-66 (1994).

In other words, to determine whether a successive prosecution violates the prohibition against double jeopardy, the Scalia/Kennedy approach would require a court to look at the specific words of prohibition inside of the protection order itself and then compare them with the elements of the other criminal offense. Under Rehnquist's approach, however, the court would simply compare the elements of the crime of violation of a protection order with the crime in question.

The result in Dixon illustrates that the outcome of a particular case may well depend on which of those two tests is applied. One of the defendants in Dixon was found in contempt in a non-summary contempt action for violating a civil protection order which prohibited him from assaulting or in any manner threatening the victim. Subsequently, he was prosecuted for five criminal counts.

Count I was a charge of simple assault on the victim, Counts II-IV charged him with threatening to injure the victim on three separate occasions, and Count V charged assault with intent to kill the victim. Justices Scalia and Kennedy, applying the first test, determined that the prosecution for simple assault was barred, but the other counts could stand. Chief Justice Rehnquist, Justices O'Connor and White applied the second test and determined that none of the counts were barred.

Thus, federal constitutional law is rather cloudy in this area. It is equally cloudy under state law in Nebraska because, although the Nebraska Court of Appeals faced the successive prosecution issue in the protection order context in State v. Vice, it did not reach a conclusion as to which test it would apply. 2 Neb. App. at 933, 519 N.W.2d at 565-66. In that case, the prosecutor brought a violation of a protection order case in county court, the defendant was found guilty after trial, and sentenced to six months imprisonment. At roughly the same time, the prosecutor filed a felony terroristic threats charge in district court. The defendant filed a motion to quash on double jeopardy grounds, which was overruled by the district court. The defendant proceeded to trial, was found guilty, was sentenced, and then appealed the denial of the motion to quash. The Nebraska Court of Appeals was then faced with the defendant's double jeopardy claim. As stated previously, it noted the United States Supreme Court's split in application of the Blockburger test, and then found that the defendant's double jeopardy claim must fail under either test. If Rehnquist's test was applied, the court determined that the elements of violation of a protection order and terroristic threats were obviously different, and therefore the prohibition against double jeopardy was not violated. If, instead, the Scalia/Kennedy test was applied, there was insufficient evidence in the record to apply that test, so that claim failed for lack of evidence. The court noted that the protection order prohibited a variety of conduct, specifically threatening, assaulting, molesting, attacking or otherwise disturbing the peace of the petitioner; imposing any restraint on the petitioner's liberty; or entering the petitioner's residence. The court then noted that the trial court had found the defendant "guilty as charged" of violating the protection order, but the record before it was insufficient to determine which specific provision of the protection order the defendant was found to have violated. Since the defendant's conviction for violating the protection order could have been based on any of three proscriptions in the order,

two of which, for purposes of Blockburger double jeopardy analysis, were not equivalent to the crime of terroristic threats, the court determined that the defendant's double jeopardy challenge should fail. The court stated that:

> [w]ithout engaging in an element by element examination of the prohibited conduct in each proscription of the protection order, we note that a prosecution of Vice for violating the protection order that was based on the proscription prohibiting Vice from restraining [the petitioner's] liberty, or on the proscription prohibiting Vice from entering [the petitioner's] residence, would have required proof of factual elements that do not have to be proven in a prosecution for terroristic threats. Furthermore, to secure a conviction for the crime of terroristic threats, the State must prove that a defendant threatened to commit a crime of violence, a factual element that does not have to be proven in a prosecution based on the other two proscriptions in the protection order. [Citation omitted]. Because we cannot determine the elements of the conduct underlying Vice's conviction for violating the protection order, we cannot apply the Blockburger test to determine whether Vice was subjected to double jeopardy.

Vice, 2 Neb. App. at 936, 519 N.W.2d at 568.

The Nebraska Supreme Court has weighed in on the double jeopardy successive prosecution issue in State v. Franco. 257 Neb. 15, 594 N.W.2d 633 (1999). It that case, the court determined that Nebraska's forfeiture law was criminal for purposes of the prohibition against double jeopardy, and determined that a prosecution for possession of a controlled substance with intent to deliver under one Nebraska statute was barred by a previously brought forfeiture action under another Nebraska statute. In making that determination, the Court embraced the Blockburger test, and then stated the following:

> [w]e conclude, as did the district court, that the use of money or the use of a vehicle under § 28-431 is not an element of the violation under § 28-416 (1)(a) and that such use need not be proved to establish a possession with intent to distribute. However, Blockburger requires the court to consider whether § 28-431 requires proof of any element that is not an element of proof of possession with intent to distribute under § 28-416 (1)(a). [Citation omitted.] Upon examination, we are unable to find any element within § 28-431 that is not a part of § 28-416 (1)(a). A violation of § 28-431 necessarily requires proof of a violation of § 28-416 (1)(a).

Franco, 257 Neb. at 25-26, 594 N.W.2d at 641. It then determined that because a violation of Section 28-416 is subsumed by a forfeiture action under Section 28 -431, the two were the same for purposes of a successive prosecution double

jeopardy claim.

Given the ruling in Franco, and its rather unique context, it would be difficult to make a prediction about whether the Nebraska Supreme Court would follow the Scalia/Kennedy approach or the Rehnquist approach to the Blockburger test in the protection order context.

2. Double Punishment

Even if a court employs the Blockburger test and determines that two offenses are the "same" for purposes of a successive prosecution double jeopardy claim, it does not necessarily follow that if both charges were brought in the same prosecution, the imposition of two sentences would be barred by the prohibition against double jeopardy. The Nebraska Supreme Court made this clear in Franco, 257 Neb. 15, 594 N.W.2d 633, wherein it held that, although a forfeiture action under Nebraska Revised Statute § 28-431(1) and a criminal prosecution under Nebraska Revised Statute § 28-416 could not be successively brought, those two violations could, if brought in the same action, be punished cumulatively. The Court determined that where a legislature specifically authorizes cumulative punishment under two statutes, the prosecutor is permitted to seek and the trial court may impose cumulative punishment under those statutes in a single trial. Id. at 27, 594 N.W.2d at 641-42.

Thus, when a defendant is charged with violation of a protection order and any other crime, before a court may impose cumulative punishment, a determination must be made about whether the legislature intended to so cumulatively punish. The Nebraska Supreme Court does embrace the rule that when one of the two charged crimes is a lesser included offense of the other, cumulative punishments are prohibited. State v. Nissen, 252 Neb. 51, 82, 560 N.W.2d 157, 178 (1997). Certainly a wide variety of crimes could be charged along with a violation of a protection order case, many of which could never be considered lesser-included offenses. Most protection orders do prohibit respondents from "threatening, assaulting, ...or otherwise disturbing the peace of the petitioner," all of which at least conjure up an argument about whether a defendant could be punished cumulatively for a violation of a protection order and for disturbing the peace under Nebraska Revised Statute § 28-1322 (Reissue 2008) or for any of the three degrees of assault under Nebraska Revised Statutes

§§ 28-308 to 28-310 (Reissue 2008).

As stated in State v. Greer,

> [i]n determining what constitutes lesser-included offenses, Nebraska has adopted the statutory elements approach, which involves a textual comparison of criminal statutes to determine if each statute contains at least one element not contained in the other statute.

7 Neb. App. 770, 786-87, 586 N.W.2d 654, 667 (1998), affirmed in part and reversed in part, State v. Greer, 257 Neb. 208, 596 N.W.2d 296 (1999). "Thus, a lesser-included offense is one which is necessarily established by proof of the greater offense, or stated another way, to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense." Greer, 7 Neb. App. at 787, 503 N.W.2d at 667.

As long as a court is following the Rehnquist approach from U.S. v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556, and is comparing just the elements of the crime of violation of a protection order—knowing violation after service—with the elements of the "other" crime, it is obvious that there would be no lesser included offenses of violation of a protection order. If, however, a court follows the Scalia/Kennedy approach from Dixon and looks inside of the protection order to determine what conduct was prohibited, and then violated, it becomes more difficult. Rarely is only one type of conduct prohibited in a protection order, given the requirement that courts use the forms provided by the Court Administrator's office. Thus, without specific findings of fact, it will generally be quite difficult to determine what conduct the finder of fact found to constitute the violation. Additionally, to even engage in this analysis would require an inquiry into the facts of the case, which the "same elements" test prohibits.

If the court determines that the other charged crime is not a lesser included offense of a violation of a protection order charge, the question still remains whether the Legislature intended to punish cumulatively. In some situations there is an easy answer to this inquiry because in the statutory scheme the legislature has specifically indicated that the crime should be treated as separate and distinct offense. See, e.g., Neb. Rev. Stat. § 28-1205 (use of a

deadly weapon to commit a felony considered a separate offense from the felony). This is not the case with the crime of violation of a protection order, however.

If a court compares a violation of a protection order case with almost any other relevant crime, a distinction is immediately apparent. Most other relevant crimes, although brought by the State of Nebraska, would be most properly characterized as crimes against a person. A violation of a protection order, although issued for the protection of a person, could quite aptly be characterized more as a crime against the authority of a court. Those two quite different foci could lead a court to conclude that the Legislature intended that a person convicted of, for instance, both disturbing the peace and violation of a protection order, should face double punishment. As in the successive prosecution double jeopardy area, the cumulative punishment aspect of protection order prosecutions is an area where more guidance from the appellate courts is needed.

Full Faith and Credit to Foreign Protection Orders

As discussed in Chapter 9, both the United States Code, specifically 18 United States Code § 2265 (2000 & 2009 Cum. Supp.) and Nebraska Revised Statute § 42-931 (Reissue 2008) provide that protection orders issued by other state or tribal courts are to be given full faith and credit throughout the United States, as long as certain requirements were met when the protection order was issued in that other state or tribal court. While the section in Chapter 9 dealt with the conflicts between the federal and state statutory schemes, this section will focus on the application of those requirements in the enforcement context.

1. Types of Foreign Orders Which May be Enforced

18 United States Code § 2265 provides that protection orders from other states and tribal courts are entitled to full faith and credit. Some orders, however, may not be "qualifying" protection orders deserving of such treatment. The federal full faith and credit statute defines "protection order" as:

> (A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and
>
> (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

18 U.S.C. § 2266(5) (2000 & 2009 Cum. Supp.). Note that the language in the definition clearly provides for custody, visitation, and child support in the context of a protection order in subsection (B).

Other considerations include the Parental Kidnapping Prevention Act (PKPA) found at 28 United States Code §§ 1738A and 1738B (2006) provided that certain jurisdictional and notice criteria had been met by the issuing court. Plus, Nebraska's Uniform Interstate Family Support Act, found at Nebraska Revised Statute §§ 42-701 et seq. (Reissue 2008), may also permit enforcement of the support provisions within a protection order, and Nebraska's Uniform Child Custody Jurisdiction and Enforcement Act found at Nebraska Revised Statute §§ 43-1226 et seq. (Reissue 2008) may permit enforcement of the child custody provisions within a protection order, provided the jurisdictional and notice criteria of each of those statutes have been met.

A. Personal and Subject Matter Jurisdiction

The full faith and credit provisions in Nebraska Revised Statute § 42-931 and those in 18 United States Code § 2265 implicitly provide that a Nebraska court charged with enforcing an out-of-state protection order must first determine that the issuing court had jurisdiction over the parties and the subject matter—in other words, whether the issuing court had personal jurisdiction over the respondent and subject matter jurisdiction over the claim. In making these determinations, the enforcing court should follow the law of the issuing jurisdiction. People v. Hadley, 172 Misc. 697, 658 N.Y.S.2d 814 (1997). In several instances, a court should be wary about whether the issuing court actually had both personal and subject matter jurisdiction.

(1) Protection Orders Involving Tribal Courts

Questions of jurisdiction are especially difficult to determine if the protection order sought to be enforced in a Nebraska court was issued by a tribal court over either a non-member Indian or a non-Indian, or was issued in a state court against an Indian respondent. Issues involving protection orders issued against Indian respondents are especially difficult, given that a tribal court may have exclusive jurisdiction to hear such matters. Tribal membership, Indian status, location of the cause of action, and relationship between the parties can all impact on a court's jurisdiction to hear a protection order case

involving an Indian. Because this area of law is quite treacherous, this section of the bench guide is only intended to tease out a few of the questions that must be asked before a foreign protection order involving an Indian should be enforced. Nebraska state court judges are encouraged to contact tribal judges for assistance in determining issues of personal and subject matter jurisdiction. Additional help can be found in Melissa L. Tatum, A Jurisdictional Quandry: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Act, 90 Kentucky Law Journal 123 (2001-2002).

(2) Jurisdiction of Tribal Courts

When a petitioner requests a protection order from a tribal court, obviously the tribal court cannot act unless it has provision for such relief in its code. Even if it has a protection order provision in its code, United States Supreme Court case law would suggest that the tribal court is prohibited from extending its jurisdiction over a non-Indian respondent when the tribal court's sanctions for violation of the protection order are criminal in nature. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). The tribal court must also review its code to determine whether there is any limitation to extending its jurisdiction to the types of parties involved, or to the "location" where the cause of action arose. Finally, the tribal court must determine whether there is any federally imposed limitation to its jurisdiction, whether that be by federal statute or by case law. Id. A state court looking to enforce a tribal court protection order must engage in that exact inquiry, as well, because only protection orders which were issued by tribal courts with subject matter jurisdiction and personal jurisdiction over the parties may be enforced.

(3) Respondent is Tribal Member

Assuming, then, that the tribal court's jurisdiction over the parties, the subject matter involved, and the "location" of the cause of action is clear under the tribal code, the focus then turns to the case law limitations placed on that tribal court's authority. One key to this

determination is status of the respondent. It is clear that tribal members are subject to the jurisdiction of their own tribal courts. See Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). It appears that tribal courts do have criminal jurisdiction over other Indians who are not tribal members, as evidenced by 25 United States Code § 1301(2) (2001), which provides that Indian tribes could "exercise criminal jurisdiction over all Indians[,]" but no mention was made concerning civil jurisdiction in 25 United States Code § 1301(2). Thus, as long as the respondent is a member of the tribe where the case is brought, that tribal court has jurisdiction over that respondent. If the respondent is a non-member Indian, or a non-Indian, the issue is less clear.

(4) Respondent is Not Tribal Member

When the respondent is not a member of the tribe where the protection order is being litigated, or is a non-Indian, whether the tribal court has jurisdiction is a complicated inquiry. First, Supreme Court case law suggests that the tribal court would never have jurisdiction to enter a protection order against a non-Indian respondent if the respondent would be subject to criminal penalties in the tribal court for violation of the protection order. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Additionally, the cases of Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 209 (1981), Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997), and Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), are cases which must be reviewed when addressing issues of jurisdiction of tribal courts over non-members, but they certainly generate more questions than answers about the power of a tribal court to enter an order of protection against a non-member respondent.

The general rule, first stated in Montana, and then rephrased slightly in Hicks is as follows: "[w]here nonmembers are concerned, the 'exercise of tribal power beyond *what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express

congressional delegation.'" Hicks, 533 U.S. at 359, 121 S. Ct. at 2310, 150 L. Ed. 2d at 407 (emphasis in original) (quoting Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 209). Montana did, however, note an exception which would permit tribal regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565, 101 S. Ct. at 1245, 67 L. Ed. 2d at 510. Also, an explanation of what is meant by "necessary to protect tribal self-government and control internal relations" was set forth in Strate, and again embraced in Hicks as the "authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.'" Hicks, 533 U.S. at 360-61, 121 S. Ct. at 2311, 150 L. Ed. 2d at 408-09 (quoting Strate, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (brackets in original)). Finally, in Hicks, the United States Supreme Court determined that the ownership status of any land in question is "only one factor to consider in determining whether regulation of the activities is 'necessary to protect tribal self-government or to control internal relations.'" 533 U.S. at 360, 121 S. Ct. at 2310, 150 L. Ed. 2d at 408 (quoting Montana, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 209).

Where does the issuance of a protection order by a tribal court against a non-member fit in all of this? Certainly, the relationship between the parties would be relevant to the issue of jurisdiction, given that the tribal court has jurisdiction to regulate "domestic relations among members" and "non-members who enter into consensual relationships with the tribe or its members." Also, the domicile of the parties or the location of the abuse could also give rise to tribal court jurisdiction under the authority to "control internal relations."

Assuming, then, that the tribal code permits tribal court jurisdiction to extend to non-members, and that the tribal code does not subject a non-member respondent to criminal penalties in the tribal court for a violation of the protection order, jurisdiction over a non-member respondent is most likely when the petitioner is a member, both parties are domiciled on the reservation, and the abuse

occurs on the reservation. The most obvious case for no jurisdiction in the tribal court is when both parties are non-members, are not domiciled within the bounds of the reservation, and the abuse did not occur on the reservation. In other words, the more significant ties the case has to the tribe, the more likely the tribal court will have jurisdiction.

(5) State Court Jurisdiction Over Indian Respondent

If a Nebraska court is asked to enforce an order issued by another state court when the parties involved are members of an Indian tribe, the United State Supreme Court cases of Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) and Fisher v. Dist. Ct., 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) require that Nebraska court to take special care in determining whether that the other state or tribal court had jurisdiction to hear the claim, and had jurisdiction over the respondent.

Williams was a case in which a non-Indian brought a claim in state court against an Indian for a transaction arising in the reservation. The United States Supreme Court ruled that the tribal court had exclusive jurisdiction to hear that claim, and the state court was therefore without jurisdiction. Fisher involved an adoption in state court of an Indian child, whose biological parents were both Indian, by Indian adoptive parents, when all the parties lived on Indian land. The United States Supreme Court ruled that, when a tribal code has an adoption law on its books, and all parties are members of the tribe and residing on the reservation, the tribal court has exclusive jurisdiction to hear that claim, and the state district court was therefore without jurisdiction to have adjudicated the matter.

In light of these two cases, a Nebraska court cannot assume that a state court had jurisdiction over a protection order case when one of the parties involved is an Indian, or when the "cause of action" arose on the reservation. Special inquiry must be made in such cases. While the jurisdiction of the court that entered the protection order is a vital inquiry, it is also important to decide if the protection order is entitled to full faith and credit by the Nebraska state court, so as to

determine if the Nebraska state court may enforce the protection order.

(6) Public Law 280 States

An additional wrinkle which a Nebraska court must face in determining whether another state court had jurisdiction to issue a protection order against an Indian respondent is whether Public Law 280 has had any effect in that state. In 1953, Congress enacted Public Law 280. That legislation gave the state courts of five states (later six) jurisdiction over certain criminal and civil matters involving Indians. Specifically, 28 United States Code § 1360 (2006) gave those states jurisdiction over civil causes of action between Indians or to which Indians are parties in Alaska, California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation) and Wisconsin. 18 United States Code § 1162 (2000) gave Alaska (except on Annette Islands when Metlakatla Indians are involved), California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation) and Wisconsin jurisdiction over criminal offenses committed by or against Indians in Indian country. Until 1968, other states could acquire such civil and criminal jurisdiction through legislative action. In 1968, however, the Indian Civil Rights Act was passed, which permitted those six states to retrocede jurisdiction to the Federal government, and which limited a state's ability to acquire jurisdiction to those instances where the tribe consented. 25 U.S.C. § 1323(a) (2001).

Given this, a Nebraska state court seeking to enforce a protection order issued by another state involving an Indian respondent must ask and answer a series of additional questions to determine whether that state court had jurisdiction to enter that protection order. First, is the issuance of a protection order a civil "cause of action" so that Public Law 280 may apply? Second, is the state a mandatory Public Law 280 state? Third, did the state successfully assert jurisdiction over civil causes of action pursuant to Public Law 280? Fourth, did the state successfully retrocede civil jurisdiction back to any of its tribal courts?

If, after that inquiry, it is determined that the other state court

has civil jurisdiction over civil causes of action involving Indians, then a Nebraska court should be able to apply that state's general jurisdictional rules to determine whether the state court had jurisdiction over the parties and over the subject of the litigation.

In the protection order context, however, there is precedent in other states to suggest that if the domestic abuse occurred on reservation land, between tribal members who are both domiciled on the reservation, a state court could still lack jurisdiction, even in a mandatory Public Law 280 state, if the exercise of "state court jurisdiction may infringe upon the rights of the tribes to establish and maintain tribal governments." St. Germaine v. Chapman, 505 N.W.2d 450, 451 (Wis. 1993). In St. Germaine, the Wisconsin Court of Appeals determined that, despite Wisconsin being a mandatory Public Law 280 state, its state courts lacked jurisdiction to enter a protection order when the protection order was sought by one member of the Lac du Flambeau tribe against another member where the conduct arose solely on Indian land, and where the tribe had a domestic abuse ordinance which provided identical relief to Wisconsin's protection order statute. Id.

B. Reasonable Notice and Opportunity to be Heard

A party seeking enforcement of a protection order must prove that the respondent received "reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process." 18 U.S.C. § 2265(b)(2). See also Neb. Rev. Stat. § 42-931 (Nebraska's full faith and credit statute). Further, 18 United States Code § 2265(b)(2) provides that, in the case of ex parte orders, "notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." Thus, every time a court is asked to enforce a foreign protection order, it must determine that the respondent has received due process prior to its entry.

C. Mutual Protection Orders

The full faith and credit provisions of the United States Code, specifically 18 United States Code § 2265, and Nebraska's full faith and credit provision, found at Nebraska Revised Statute § 42-931, differ in one very significant way concerning mutual protection orders. Federal law provides that, if a protection order is entered against a petitioner for the protection of a respondent, and the petitioner and respondent are spouses or intimate partners, then that protection order can only be enforced in another jurisdiction when the respondent filed a cross or counter petition against the petitioner seeking such relief and the issuing court has made specific findings that the respondent was entitled to such an order. 18 U.S.C. § 2265(c). In Nebraska, in the event that a protection order has been entered against a petitioner, it is enforceable when the respondent filed a cross or counter petition against the petitioner seeking such relief and the issuing court made specific findings that the respondent was entitled to such an order. Neb. Rev. Stat. § 42-924.03. There is no mention of full faith and credit in the mutual protection order statutes in Nebraska, but Nebraska does have a full faith and credit statute which provides full faith and credit to a valid protection order of another state. While a mutual protection order may not be valid under Nebraska law, if it is valid under the issuing state's law, it is entitled to full faith and credit in Nebraska, though the Nebraska full faith and credit statute is less restrictive regarding the status of the parties than the federal statute is.