

## Potential Domestic Violence Statute Issues

Many of the following paragraphs identify potential issues, but the courts have worked through them for years. In and of themselves they probably do not justify a wholesale review of the Code. If, however, a wholesale review occurs, these points should be considered.

- § 78B-7-102: The definition of cohabitant includes “related by blood or marriage.” Because there is no indication on the degree of relationship to which this extends, there may be inconsistency from case to case as to how potential cohabitants are treated. There is also a potential problem with the definition of abuse in the standards for obtaining a protective order and an ex parte protective order. It does not appear to have created problems thus far, but I will briefly mention it later.
- § 78B-7-105: This statute states that the clerks office is obligated to provide “nonlegal assistance.” The question recently arose as to whether this requires clerks to perform duties above and beyond what they can and do perform in other cases. My opinion was that, based on the restrictions on giving legal advice and practicing law, and the obligation to remain neutral, the provision is best read as the legislature simply making certain that court employees do not shirk their existing responsibilities in this area. But if the legislature has other ideas these should be addressed.
- § 78B-7-106: This is where the different standards and definitions can create difficulties. This section states that the court may issue an ex parte protective order if abuse has occurred. However, in § 78B-7-103 an individual may seek a protective order if that person has been subjected to abuse or is one toward whom there is a substantial likelihood of abuse. The standard for ex parte protective orders seems to omit the part about substantial likelihood of abuse. It is potentially an issue because if a court denies an ex parte protective order the court only holds a hearing on the petition at petitioner’s request. Thus, if a petitioner is relying on a substantial likelihood of abuse, that may not qualify for an ex parte protective order and the burden would be on the petitioner to keep the case moving forward. Another question in that statute relates to the provision on prohibiting contact between the respondent and the petitioner. In the dating violence statutes and in the stalking statutes, the respondent can be restrained from communicating with both the petitioner and family household members. In the cohabitant abuse statutes the provision on family and household members does not exist. Was that intentional? Also, in the dating violence statutes the court may set a specific distance from which the respondent must stay away from the petitioner. Should a similar provision be in the cohabitant abuse statutes?

- § 78B-7-107: When a respondent is subject to an ex parte protective order, under this section the respondent may file a motion to vacate the ex parte protective order. However, the realities of motion practice are that by the time a petitioner is served with a motion and is given the requisite time to respond, the time for a hearing on the petition will have occurred. The provision may be a good idea in theory, but it has difficulties in practical application.
- § 78B-7-109: This section states that a person has a continuous duty to keep the court informed of other proceedings, but is qualified by the language “at any hearing.” Do the parties have a continuing duty to advise the court throughout the court case, or only a duty to inform the court at the hearing on the petition?
- § 78B-7-115: The provision on automatic expiration of a protective order after 10 years is difficult to apply because there is an exception to the provision. A protective order does not automatically expire if the petitioner is able to demonstrate that the petitioner has a reasonable fear of abuse or that the respondent has been convicted of a protective order violation. The order also does not automatically expire if the respondent was incarcerated during any of the 10 years. Because protective orders are entered into the statewide system, the court needs to remove those orders when they automatically expire. However, because the court will not know whether the respondent has spent time in prison or whether the petitioner has a fear of the respondent, the court arguably should not remove the protective order from the system and thus leave the petitioner vulnerable when the petitioner believes the order is in place. There should be another mechanism for expiring protective orders.
- § 77-20-3.5: In the criminal statutes, this section creates problems in scheduling. This section requires the magistrate who reviews the probable cause statement to set a hearing in the court that will hear the case. This would require a judge in one court to schedule a hearing in another court. Because each court handles its own calendaring this is often difficult. The statute also creates challenges for courts in expiring jail release agreements and jail release court orders. Perhaps a majority of people arrested for domestic violence are released on a jail release agreement. The jail is not able to schedule matters on court calendars. A person must appear at the court within 96 hours. If the person does not appear the jail release court order or the jail release agreement is extended. If the person’s case is never calendared which sometimes occurs, then there is no failure to appear and presumably the jail release agreement or order remains in place. Individuals have been arrested and released on jail release agreements that remain in effect indefinitely because charges are not filed and an appearance is never scheduled. This section may warrant examination to make the expiration and continuation of protective orders more seamless.

- § 77-36-2.6: This section requires a defendant to appear within one judicial day after an arrest for domestic violence. This appears to apply whether a defendant remains in custody or has been released. Having a defendant appear within one day is not feasible in some areas and is inconsistent with the previous section of having a defendant appear within 96 hours.
- § 77-36-2.7: This statute requires the court to provide a copy of the pretrial protective order to a victim. However, at this stage the court often does not have information on the victim and victims almost never appear in court at this stage. The section also states that if a domestic violence case is dismissed, the reason for dismissal is to be entered into the Statewide Domestic Violence Network. This is relatively easy if there is already a protective order on the network. However, in many cases there will not be a protective order on the network because, for various reasons, the court will not have issued an order. It is therefore difficult to enter a dismissal on the network when a case does not exist.
- § 77-36-5.1: Under this section, a court may issue a sentencing protective order or a continuous protective order or perhaps both. If a defendant has been sentenced to jail a court is required to issue a continuous protective order. This may mean that a person may have both a sentencing protective order and a continuous protective order in place (in addition to a cohabitant abuse protective order), because a sentencing protective order includes relief that is not found in a continuous protective order. This may or may not be a problem. It is too early to tell. The section states that the court must issue a continuous protective order unless the court determines by clear and convincing evidence that the victim does not have a reasonable fear of future harm or abuse. The only way that the court would be able to determine if the victim no longer has a reasonable fear of future harm is through a hearing. The court must therefore issue a continuous protective order subject to revoking the continuous order at a later date if the perpetrator is able to show that the victim does not reasonably fear the perpetrator. One court recently struggled with the idea of issuing a continuous protective order before a hearing could be held to determine whether the victim feared the perpetrator. The section also states that a district court may issue a continuous protective order at any time. Because many domestic violence cases are filed in justice courts there may be situations in which a justice court has handled the domestic violence case and not issued a continuous protective order, but then the victim is entitled to go to the district court and petition for a continuous protective order. The district court would not have the benefit of the justice court domestic violence case. This also appears to be a shortcut to obtaining a protective order without having to file under the Cohabitant Abuse Act. Under the Cohabitant Abuse Act a petitioner has the burden of proof to show abuse or domestic violence whereas under the continuous protective order statute a district court simply needs to find that the continuous protective order is necessary to protect the victim.

§ 78B-7-102: This section includes a continuous protective order under the definition of a protective order for purposes of the cohabitant abuse statute. By including a continuous protective order in the definition, it raises questions as to how the civil provisions apply to an order issued from a criminal case. Since the phrase “protective order” includes continuous protective orders wherever that phrase is used in the statute, it raises questions such as whether, for example, the Administrative Office of the Courts is required to create forms; the continuous protective orders must include some of the provisions in the civil area, such as information on identifying the perpetrator; whether expedited service by a sheriff is required, etc.