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CASE LAW UPDATE

Civil Protection Order

CASE LAW UPDATE FOR 2019

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This document contains summaries of published state court decisions of interest related to civil protection orders, their issuance, and their enforcement for the year 2019. While most of these summaries are brief, containing only the courts holding and any necessary background or procedural details, a few have been expanded based on their complexity, their uniqueness, or the importance of their holding. Cases have been categorized by their main issue below. Cases granted a rehearing before publication of this document are noted below.

CONSOLIDATION:

1. ***Doe v. Plourde*, 2019 Me. 109, 211 A.3d 1153 (Me. 2019)**. Supreme Judicial Court of Maine: The district court did not abuse its discretion by consolidating the respondent's motion to dissolve the temporary order with the final hearing, by limiting the consolidated final hearing to two hours, or by finding that the respondent intentionally harassed the petitioner.
2. ***Bergin v. Bergin*, 2019 Me. 133, 214 A.3d 1071 (Me. 2019)**. Supreme Judicial Court of Maine: Wife (petitioner) filed action against husband (respondent) seeking a divorce and an order for protection from abuse, which were consolidated. The trial court did not abuse its discretion in awarding the primary residence and final decision-making authority to father; in denying wife's motion for further findings of fact; in allowing expert to testify on parental alienation; or in declining to award wife continuing spousal support; and wife was not entitled

to order of protection.

DISCOVERY IN CIVIL PROTECTION ORDER CASES:

1. ***Sunderland v. Zimmerman*, 441 P.3d 179 (Okla. Civ. App. 2019)**. (Cert. granted on Feb. 15, 2019). Court of Civil Appeals of Oklahoma: The trial court abused its discretion by not allowing the respondent the opportunity to conduct discovery pursuant to Oklahoma Discovery Code.

FEES AND COURT COSTS:

1. ***Rogers v. Rogers*, 287 So.3d 749 (La. 2019)**. Louisiana Court of Appeals: The district court could not assess court costs against petitioner related to her petition for protection from stalking or sexual assault or her filed exception to the denial of such an order.

2. ***Bishop v. Goins*, 305 Ga. 310, 824 S.E.2d 369 (Ga. 2019)**. Georgia Supreme Court: Petitioners sought and received protection from stalking orders against their neighbors. Their neighbors appealed, and the Court of Appeals affirmed. Petitioners then filed a motion for costs and attorney fees incurred from the appeal. The Georgia Supreme Court held that the statute governing stalking-related protective orders did not authorize the court to independently award costs and attorney fees for appeals because the statutory language only authorized awards made in the original protection order.

FIREARMS:

1. ***State v. Hemenway*, 239 N.J. 111, 216 A.3d 118 (N.J. 2019)**.[1] New Jersey Supreme Court: The Prevention of Domestic Violence Act[2] allows a court to enter a "temporary restraining order (TRO) to protect a victim of domestic violence and to enter an order authorizing the police to search for and seize from the defendant's home, or any other place, weapons that may pose a threat to the victim."[3] During a search for weapons pursuant to such an order, the defendant was found to be in possession of cocaine. The defendant motioned to suppress the evidence from the search, challenging the validity of the TRO. Following the denial of his suppression motion, the defendant pleaded guilty to possession of

1 Fourth Amendment Challenge.
2 N.J. Stat. Ann. §§ 2C:25-17 to -35.
3 *Hemenway*, at 116.

cocaine with intent to distribute. Defendant appealed. The New Jersey Supreme Court held that before issuing a search warrant for weapons as part of a TRO, a court must find that there is probable cause to believe that an act of domestic violence has been committed by the defendant; that there is probable cause to believe that a search for and seizure of weapons is necessary to protect a victim; and that there is probable cause to believe that these weapons are located in the place ordered to be searched. The Federal and New Jersey Constitutions require a higher burden for a search warrant than the one enumerated in the Prevention of Domestic Violence Act. Therefore, the court must ask questions on the record to establish probable cause exists to issue an order to search for weapons with a TRO.

FULL FAITH AND CREDIT:

1. ***State v. O'Keefe*, 209 Vt. 497, 208 A.3d 249 (Vt. 2019)**. Supreme Court of Vermont: A protection order was issued against the defendant in New Hampshire while the defendant was incarcerated. There was also an existing custody order between the same parties in Vermont. Defendant was arrested in Vermont for violating the New Hampshire order in Vermont before a hearing on the Vermont custody order. The Supreme Court of Vermont held the defendant did not receive proper notice of the New Hampshire order in compliance with the requirements of the issuing state (New Hampshire). Therefore, the State (Vermont) could not prove the violation based on the New Hampshire order.

JURISDICTION:

1. ***Ex Parte Lester, 297 So.3d 477 (Ala. 2019)***. Alabama Court of Civil Appeals: Mother moved to have father (ex-husband) held in contempt of a judgement out of the parties divorce that prohibited contact between father and mother's current husband. Mother also moved for an ex parte temporary emergency order regarding visitation with the children and requesting further orders for the father to stay away from herself and her new husband, but did not file a formal petition for a protection from abuse order (PFA). The Circuit Court entered a PFA order against father. Father argued that the court lacked subject matter jurisdiction to issue a PFA because mother failed to file a formal complaint asking for such an order. The Alabama Court of Civil Appeals held that while mother may not have filed a pleading entitled "Protection from Abuse Complaint," she sought relief available through the Act in her motion arising out of their divorce judgment. The

trial court, a court of general jurisdiction, had subject-matter jurisdiction to enter PFA order, which can be requested in any pending civil or domestic relations action.

2. ***Peterson v. Butikofer*, 12019 Ohio 2456, 39 N.E.3d 519 (Ohio Ct. App. 2019)**. Ohio Court of Appeals: Wife lived in Ohio before meeting husband. She moved to Alaska to be with him. When the couple separated, wife returned to Ohio where she claimed husband continued to verbally threaten and harass her via text messages and e-mails. Wife filed petition for a domestic violence civil protection order (CPO) against husband. The Court granted wife's petition. Husband appealed. The Ohio Court of Appeals held that the trial court had personal jurisdiction over husband (pursuant to Ohio's long arm statute); that husband was not entitled to a continuance; and the CPO was sufficiently supported by credible evidence.

LANGUAGE ACCESS AND LIMITED ENGLISH PROFICIENCY:

1. ***State v. Elmer*, 333 Conn. 176, 214 A.3d 852 (Conn. 2019)**. Supreme Court of Connecticut: The defendant was convicted of, among other offenses stemming from the sexual assault of his daughter, three counts of violating a restraining order. The defendant appealed these three counts arguing that there was insufficient evidence that he "had knowledge of the terms of the order," an element of the offense, because the court did not explain the order to him clearly, he does not speak English, and the terms of the order were not translated.

   BACKGROUND:

   The defendant, who primarily speaks Spanish, immigrated to the United States, leaving the victim, his daughter, in Guatemala. Once a year, the defendant would return to Guatemala to visit his family. During one of these visits in 2007, the defendant began sexually abusing the victim/daughter. Three years later, the victim/daughter joined her family and moved to their home in Connecticut. Soon after she arrived, the defendant started sexually abusing her again. He would also verbally and physically abuse the victim/daughter and her other siblings.

   Several reports had been made about abuse of the children, and the Department of Children and Families (DCF) investigated allegations of abuse twice. During the second investigation, the victim/daughter's mother disclosed physical abuse

perpetrated by the defendant, but the victim/daughter had not yet disclosed the sexual abuse. DCF assisted mother and her children, including the victim/daughter, in moving to another town and with seeking an ex parte restraining order against the defendant.

The defendant was personally served with the order a few days later. The defendant appeared at the hearing on the order with counsel. The court issued a temporary restraining order that prohibited the defendant from contacting wife or their children; granted custody of the children to mother; and gave the defendant weekly supervised visitation with the children. The defendant was informed of the terms of the order by his attorney in private and by the judge and victim advocate in open court. He also received a physical copy of the order. The proceedings were translated into Spanish for the defendant by the court-appointed interpreter and/or his bilingual attorney.

The defendant contacted the victim/daughter at least three times after the order was issued. After the first text message, the victim/daughter reported it to the police, expressing that she felt unsafe. The defendant next sent the victim/daughter a letter, which she again took to the police and at this time disclosed the sexual abuse by her father. The defendant again sent the victim/daughter a text message, which she also reported to law enforcement.

Procedurally, the defendant was also charged with three counts of sexual assault and three counts of risk of injury to a child. The defendant was found guilty of two counts of sexual assault, two counts of risk of injury to a child, and all three counts of violation of a restraining order. The defendant was sentenced to 40 years, suspended after 25, followed by 25 years of probation on the sexual abuse and risk of injury to a child counts and five years on each restraining order violation to run concurrently with the other sentences.

The defendant appealed and the Appellate Court affirmed the convictions. He then sought certification to appeal to the Connecticut Supreme Court on limited issues, including "Did the Appellate Court properly conclude that there was sufficient evidence to support the defendant's conviction for criminal violation of a restraining order?"[4]

4 *Elmer*, at 183 (quoting an earlier decision in *State v. Elmer G.*, 327 Conn. 971 (2017)).

HOLDINGS:

The Supreme Court held that the evidence at trial was sufficient to support the conviction for violating a restraining order, including that the defendant had knowledge of the terms of the order. Affirmed.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR VIOLATION A RESTRAINING ORDER:

For a defendant to be found guilty of violating a restraining order, the State must show that the defendant had an order issued against him, had "knowledge of the terms of the order," and contacted a protected party in violation of the order.

The defendant did not dispute that there was a restraining order against him prohibiting him from contacting the victim/daughter or that he texted the victim/daughter twice and sent a letter once. He instead argued that he did not have knowledge of the terms of the order because he does not read or understand English and that the letter was sent before the order was in place.

With the temporary restraining order, defendant received four standardized Judicial Branch forms. The final form was a Spanish language translation of the notifications form "titled 'General Restraining Order Notifications (Family),' [which] contained basic information about the order, including that these documents constituted a restraining order, that violating the order was a criminal offense, that the recipient must comply with both the 'Order of Protection' and 'Additional Orders of Protection' forms, and that contacting a protected person could violate the order."[5]

At the hearing, the defendant's counsel told the court that he had reviewed the order with the defendant and his sister. The court and an advocate also went over the terms with the defendant. In total, the defendant heard the terms of the order in Spanish at least three times, when his attorney reviewed it with him in private and the Spanish interpreter of the court and the victim advocate reviewing the terms of the order on the record. "Although defense counsel argued to the jury that 'things get lost in translation' and that 'we have no idea what was understood [by the defendant],' there was no evidence that the translations were inaccurate or that the order entered by the court differed from the proposed order the defendant had reviewed with his attorney. Thus, the jury reasonably could have inferred that

5 *Elmer*, at 184.

each of these three translations was an accurate description of the order."[6]

The Court also noted that the defendant had asked the victim/daughter's sibling to deliver the letter to the victim/daughter. This could be interpreted as him knowing he was not to contact the victim/daughter himself.

The Supreme Court, therefore, concluded that the State presented sufficient evidence that the defendant had "knowledge of the terms of the order," which prohibited him from contacting the victim.

ON BEHALF OF A MINOR:

1. ***Robert M. on behalf of Bella O. v. Danielle O.*, 303 Neb. 268, 928 N.W.2d 407 (Neb. 2019)**. Nebraska Supreme Court: Father sought protection order on behalf of daughter against mother based on allegations that mother physically attacked grandmother and uncle while daughter was present, but did not attack daughter. At a show-cause hearing, the trial court determined mother's conduct put daughter in fear of bodily injury by means of a credible threat and thus constituted domestic abuse, granting the protection order on behalf of daughter. The Nebraska Supreme Court held that the evidence supported the determination that mother committed domestic abuse towards uncle and grandmother by implied threats communicated through her actions; that this series of actions created the implied threats through a pattern of conduct; and that the evidence supported a finding that mother's conduct placed grandmother and uncle in reasonable fear for daughter's safety. Because the protection order statute provides that credible threats include threats that cause the target of the abuse to reasonably fear for the safety of his or her family, the daughter was also a victim of abuse and entitled to protection order.

ORDER EXTENSION/MODIFICATION AND REASONABLE FEAR:

1. ***McCool v. Macura*, 2019 Vt. 85, 224 A.3d 847 (Vt. 2019)**. Vermont Supreme Court: Petitioner filed a request for a relief-from-abuse order (RFA) in Washington County, Vermont, after respondent, her former intimate partner, allegedly entered her residence to retrieve some personal belongings and turned off the outside security cameras without her consent. This happened the same day as

6 *Id.* at 191.

an extension for a previous RFA between the parties in Orange County, Vermont, had been denied. The Superior Court granted a temporary RFA and later issued a final RFA based on a determination that respondent had abused petitioner by placing her in fear of imminent serious physical harm. Defendant appealed. The Vermont Supreme Court held that evidence was insufficient to support finding that defendant's conduct placed plaintiff in objectively reasonable fear of imminent serious physical harm despite the existence of the previous protection order because the respondent had never physically harmed the petitioner, had not attempted to restrain her in over a year, and had gone to the house at the time he did to avoid any conflict with the petitioner.

2. ***L.L. v. M.M.*, 95 Mass. App. Ct. 18, 120 N.E.3d 737 (Mass. 2019)**. Massachusetts Appeals Court: Ex-husband (respondent) filed a motion to terminate a permanent abuse prevention order in favor of his ex-wife (petitioner) that had been issued pursuant to a domestic violence incident 16 years earlier. The district court denied the motion and ex-husband appealed arguing that the court abused its discretion in finding that he had not sufficiently shown a significant change in circumstances leaving his ex-wife to no longer have a reasonable fear of physical harm.

BACKGROUND:

Ex-wife sought and received an ex parte order in 2000 ordering ex-husband to not abuse her, not contact her, and to stay 100 yards away from her. It also ordered the surrender of any firearms to the local police. Ex-wife alleged in her complaint that ex-husband had been physically and sexually abusive and had threatened to kill her if she tried to divorce him. At the time that she sought the protection order, she was no longer with ex-husband, but he had stopped by her house and started an argument with her and her oldest child. He was asked to leave, but refused. When both of her children also asked him to leave, according to the affidavit she offered with her complaint, "he became even more irate and grabbed a dozen roses out of a vase," hit her in the face with them, and left. She followed and threw the roses at his car while he pulled away from the house. He later returned and "aimed his vehicle at [her] 11- year-old daughter and tried to run her over." The affidavit further stated that "[w]e are all quite afraid of what he may attempt to do, if he has lost it enough to retaliate against a child with a vehicle."

Following a hearing, the order was extended twice and then, in 2002, was made

permanent. Fourteen years later, ex-husband filed the current motion seeking to terminate the order because of a change of circumstances. In his affidavit in support of the motion, ex-husband averred that he had not had contact with his ex-wife since 2001 and that he had moved to Nevada and married his current wife in 2010. The affidavit also stated that he liked to travel once a year, but he has been "stopped by U.S. Customs and Border Officials almost every trip" and "detained for approximately 45 minutes." He also claimed that the order was keeping him and the company he worked for from getting federal contracts.

At the hearing, ex-wife testified that she still feared the defendant and what he might do, stating that the order had been the only thing keeping her from constantly looking over her shoulder for him. The district court denied the ex-husband's motion to terminate the order and he appealed.

HOLDINGS:

The Appeals Court of Massachusetts held that ex-husband had not shown, "by clear and convincing evidence, that as a result of a significant change of circumstances, permanent abuse prevention order was no longer equitable."[7] Affirmed.

STANDARD FOR TERMINATION OF A PERMANENT PROTECTION ORDER:

In a similar case, *MacDonald v. Caruso*,[8] the Supreme Court of Massachusetts held that the respondent "must show by clear and convincing evidence that, as a result of a significant change in circumstances, it is no longer equitable for the order to continue because the protected party no longer has a reasonable fear of imminent serious physical harm."[9]

MacDonald involved a respondent who wished to terminate a protection order after 12 years because he had remarried and moved from New York to Utah. While the Court in *MacDonald* considered the distance between the parties and the likelihood that they might run into each other when considering the risk of future abuse, they also noted that he "rested his motion to terminate solely on his own attestations in his verified motion. He did not submit an affidavit from the chief of police or the keeper of the records of his city in Utah attesting that

7 *L.L. v. M.M.*, at 22.

8 *MacDonald v. Caruso*, 467 Mass. 382, 382-383, 5 N.E.3d 831 (2014).

9 *L.L. v. M.M.*, at 22 (quoting *MacDonald*).

the police had no record of any allegations of domestic abuse, or submit the New York and Utah equivalents of the Massachusetts criminal offender record information (CORI) and Statewide registry of civil restraining orders records to show the absence of arrests or convictions or other restraining orders. To prove that he had truly 'moved on with his life,' the defendant in this case needed to demonstrate not only that he has moved on to another relationship but that he has 'moved on' from his history of domestic abuse and retaliation."[10] The Court offered other suggestions such as certifications from completed drug, alcohol, or mental health counseling, or a batterer's intervention program.

In this case, the Appeals Court acknowledged that the ex-husband had submitted criminal records information, they also found "there is no affidavit from local police, and no affidavit or testimony from his current wife. On this record, it is impossible to say whether the [ex-husband] has resolved his problems with domestic abuse or merely become more adept at hiding them."[11] He also did not provide testimony with the opportunity to be cross-examined by the petitioner.

The Massachusetts Supreme Judicial Court in *MacDonald* also declined to consider the length of time that has passed since the issuance of the order, stating that "[t]he significant change in circumstances must involve more than the mere passage of time, because a judge who issues a permanent order knows that time will pass. Compliance by the defendant with the order is also not sufficient alone to constitute a significant change in circumstances, because a judge who issues a permanent order is entitled to expect that the defendant will comply with the order."[12]

The Appeals Court further noted that, unlike *MacDonald*, the ex-wife in this case appeared and opposed the motion to terminate. Based on the history between the parties, her testimony was sufficient for the court to find that she reasonably continued to fear for her safety.

Finally, as to being stopped by customs or not being eligible to compete for Federal contracts, the Appeals Court pointed again to *MacDonald* and its refusal to consider collateral consequences for the respondent of a protection order.

Based on the reasoning of *MacDonald* and the ex-husband's showing that he had

10 *Id.* at 23 (quoting *MacDonald*).
11 *Id.*
12 *Id.*

moved to another state and that there had been no violations of the order since 2001, the Appeals Court held that the district court did not abuse its discretion by denying the ex-husband's motion.

PROCEDURE/TESTIMONY/FINDINGS:

1. ***Tipan v. Tipan*, 582 S.W.3d 70 (Ky. Ct. App. 2019)**. Kentucky Court of Appeals: The petitioner, her mother, and her minor siblings fled their home country to escape severe abuse perpetrated by her father, the respondent. Petitioner filed a motion seeking a domestic violence protection order (DVPO) against her father, alleging he had recently traveled to Kentucky and began to harass, threaten, and stalk her and her minor siblings. The younger siblings were in petitioner's care while their mother was out of state pursuing a claim for asylum. At the hearing on the DVPO, the petitioner was the only witness sworn. Fourteen minutes into her testimony, the court stopped the testimony and indicated it had serious jurisdiction issues. The court stated that it would be more appropriate to determine custody issues in the mother's asylum action and that the court was "not sure this is the appropriate venue for any kind of asylum to be protected from what would occur in [their home country]." Petitioner objected, stating the purpose of the petition was to seek protection from domestic violence, not seek custody or asylum. She asked to continue providing testimony of the domestic violence that had occurred in Kentucky and the risk of violence against her siblings. The trial court overruled the objection and again pronounced it was dismissing the petition. The Kentucky Court of Appeals held that it was improper for the trial court to prohibit petitioner's counsel from completing direct examination of the petitioner before announcing its decision and that the trial court further erred by failing to enter mandatory written findings in support of its decision.

2. ***McCaffrey v. Ashley*, 44 Fla. L. Weekly D548, 265 So.3d 688 (Fla. Dist. Ct. App. 2019)**. Florida District Court of Appeals: Petitioner sought an injunction for stalking against a former co-worker. The Circuit Court summarily denied the petition without prejudice. The petitioner appealed. The Florida Court of Appeals held that the petitioner was entitled to either an order that specified the deficiencies in her allegations prior to the denial of her petition or an evidentiary hearing.

3. ***L. M. B. v. Cohn*, 298 Or. App. 782, 450 P.3d 50 (Or. Ct. App. 2019)**. Oregon

Court of Appeals: Petitioner requested a stalking protective order (SPO) against respondent and received an ex parte temporary order. At the hearing for a final order, the court did not have petitioner testify and instead based its decision to issue the final order on the allegations in the petition and the petitioner's testimony at the ex parte hearing. Respondent appealed arguing that no evidence was entered into the record at the final hearing to support the issuance of the order. The Oregon Court of Appeals held that the evidence was insufficient to support the entry of a final SPO against respondent because there was nothing offered into evidence on the record from the petitioner about any of the allegations. The petition and testimony from the ex parte hearing did not constitute evidence.

4. ***Taylor v. Price*, 44 Fla. L. Weekly D1330, 273 So.3d 24 (Fla. Dist. Ct. App. 2019)**. Florida District Court of Appeals: Wife appealed the dismissal of her petition for protection against domestic violence that she filed against her husband. She argued that the trial court erred when it dismissed the petition while accepting her unrebutted evidence. The Florida District Court of Appeal held that the trial court was required to accept wife's uncontroverted testimony and grant her petition.

5. ***Lugo v. Corona*, 35 Cal.App.5th 865, 247 Cal.Rptr.3d 764 (Cal. Ct. App. 2019)**. California Court of Appeals: Wife, petitioner, sought a domestic violence restraining order (DVRO) against her husband. The Superior Court denied the request because a criminal protective order was already in place between the parties and suggested that the parties should instead seek to amend the existing order in criminal court. The California Court of Appeals held that the existence of a criminal protective order did not bar the entry of a DVRO between the same parties.

TECHNOLOGY:

1. ***A. A. C. v. Miller-Pomlee*, 296 Or. App. 816, 440 P.3d 106 (Or. Ct. App. 2019)**. Oregon Court of Appeals: Mother (petitioner) sought and received a stalking protection order (SPO) against father (respondent). Father appealed the order, contending that, among other arguments, the trial court erred in finding that "objectively non-threatening text messages" qualified as unwanted contact under Oregon's statute, ORS 30.866, that there was insufficient evidence to support the finding that respondent was "tracking" petitioner, and that "tracking" is not

"contact" under the statute.

BACKGROUND:

The parties, former intimate partners, have a child in common. Respondent was physically and verbally abusive to petitioner during their relationship. Respondent attempted to control what the petitioner wore, whom she talked to or associated with, and how much time she spent on the phone. If she did not obey, he would take away her phone, her access to money, or her car keys.

After they ended their relationship, petitioner continued to receive abusive texts from the respondent, and therefore changed her phone number and did not share the new number with him. She did, however, email the new number to another person from her personal email account. She had never shared this email account with the respondent nor had she ever given him permission to access it. After she sent this email, she started to receive text messages from the respondent at her new number.

The petitioner received a text from the respondent soon after taking their child to a soccer clinic that indicated he had taken pictures of the child at the clinic. This scared the petitioner because she did not know how he knew they were there. She then emailed her attorney from her email account and received a text message from the respondent indicating he had read the correspondence with her attorney. She also testified that she received texts from the respondent that said he "knows where [she is] at that time" and "knows everything."

Petitioner testified that she logged onto her phone's "Find My iPhone" app and found that both her and the respondent were logged into the app and accessing her email account. This led her to believe that the respondent had been using her email and the app to track her and her cell phone's location. She offered a screenshot of her cellphone into evidence showing both her and the respondent's phones listed in the app.

HOLDINGS:

The Court of Appeals of Oregon held that there was sufficient evidence to support the lower court's finding that the respondent had tracked the petitioner's whereabouts electronically; that respondent's electronic tracking constituted an

unwanted contact pursuant to a stalking protection order; and that the record was sufficient to support the lower court's finding that the respondent's unwanted contact by tracking the petitioner subjectively alarmed her. Affirmed.

WHETHER THE RESPONDENT TRACKED THE PETITIONER:

In their decision, the Court of Appeals noted that there was ample evidence in the record to support the finding that the respondent was tracking the petitioner electronically, such as the respondent testifying and admitting that he had accessed the petitioner's email account; the petitioner testifying that access to her email account, along with the Find My iPhone app, would allow the respondent to track her phone; the petitioner's screenshot of her phone showing the respondent listed in the app; and the texts sent from the respondent informing the petitioner that he "knew everything" including where she was located.

WHETHER TRACKING IS "CONTACT" UNDER THE OREGON PROTECTION ORDER STATUTE:

For the purposes of seeking a protection order based on allegations of stalking, "contact" is defined as follows:

> (3) "Contact" includes but is not limited to:
> (a) Coming into the visual or physical presence of the other person;
> (b) Following the other person;
> (c) Waiting outside the home, property, place of work or school of the other person or of a member of that person's family or household;
> (d) Sending or making written or electronic communications in any form to the other person;
> (e) Speaking with the other person by any means;
> (f) Communicating with the other person through a third person;
> (g) Committing a crime against the other person;
> (h) Communicating with a third person who has some relationship to the other person with the intent of affecting the third person's relationship with the other person;
> (i) Communicating with business entities with the intent of affecting some right or interest of the other person;
> (j) Damaging the other person's home, property, place of work or school;
> (k) Delivering directly or through a third person any object to the home, property, place of work or school of the other person; or

(L) Service of process or other legal documents unless the other person is served as provided in ORCP 7 or 9.[13]

While the Court of Appeals acknowledged that electronically tracking someone is not explicitly enumerated in the list of conduct included in the definition, they determined the use of the word "includes" meant that the list was more illustrative than exhaustive.

Previously in *Boyd v. Essin*,[14] the Court considered whether watching a petitioner's home via binoculars could be considered contact and "concluded that 'contact' does not require a 'direct oral or visual connection between a petitioner and a respondent.' Instead, it 'is sufficient if the act, when learned, gives rise to an unwanted relationship or association between the petitioner and the respondent.'"[15]

Similarly, in this case, the Court concluded that electronically tracking someone was "contact" within the meaning of the statute finding it "similar in kind and effect to following a person, ORS 163.730(3)(b), in that it (1) provides real-time information about a person's whereabouts and (2) may lead a person to have concerns that they are being followed, as was the case with petitioner here. It is also the kind of conduct that the statute was intended to prevent."[16]

WHETHER THE UNWANTED CONTACT ALARMED THE RESPONDENT:

The Court also held that the evidence was legally sufficient to support the finding that the unwanted contact (electronic tracking) subjectively alarmed the petitioner. This evidence included her testimony that it "really scared" and "concerned" her, especially because she believed it may lead him to "retaliate" against her. It was also objectively reasonable considering their history, including the respondent's violence and previous controlling actions towards petitioner.

2. ***Coleman v. Razete*, 2019 Ohio 2106, 137 NE 3d 639 (Ohio Ct. App. 2019)**.[17] Ohio Court of Appeals: In a civil protection order granted for protection from stalking, the court's order to the respondent to not post about petitioner on social

13 Or. Rev. Stat. § 163.730 (2015).
14 *Boyd v. Essin*, 170 Or. App. 509 (2000).
15 *Miller-Pomlee*, at 826 (internal citation omitted).
16 *Id.* at 827.
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media during the duration of the order was an unconstitutional prior restraint on speech.

3. ***Bunting v. Bunting*, 266 N.C. App. 243, 832 S.E.2d 183 (N.C. Ct. App. 2019)**. North Carolina Court of Appeals: The district court entered a domestic violence protection order (DVPO) on behalf of ex-wife against her ex-husband. Ex-husband appealed, arguing that the text messages he sent did not constitute harassment because they served a legitimate purpose; that there was no evidence she suffered from substantial emotional distress; and that the trial court erred when it found there was sufficient evidence to conclude he had committed acts of domestic violence. The North Carolina Court of Appeals held that ex-husband's text messages placed ex-wife in fear of continued harassment; she suffered substantial emotional distress as result of the text messages; and the evidence was sufficient to establish that he had committed acts of domestic violence against her, supporting the issuance of the DVPO.

4. ***F.K. v. S.C.*, 481 Mass. 325, 115 N.E.3d 539 (Mass. 2019)**. Massachusetts Supreme Judicial Court: Two high school students sought harassment protection orders against a fellow student after he created a rap song, which he posted on social media, that referenced acts of violence and sexual violence he wanted to inflict upon petitioning students. The district court issued harassment protection orders. The responding student appealed. The Massachusetts Supreme Judicial Court held that the respondent's act of performing a rap song and posting it on the internet did not constitute three or more acts of harassment aimed at a specific person. Instead, the Court found that performing the song and posting it publicly on the internet through SoundCloud and Snapchat, as well as sharing it with six friends, was only one continuous act and therefore was insufficient to qualify for a harassment protection order.

TERMS OF THE ORDER:

1. ***State v. Smith*, 57 Kan. App. 2d 312, 452 P.3d 382 (Kan. Ct. App. 2019)**.[18] Kansas Court of Appeals: Defendant was convicted of violating protection from stalking (PFS) order issued in favor of her neighbor for referring to neighbor as pedophile in public. Defendant appealed, arguing that the PFS order was an unconstitutional prior restraint on her freedom of speech. She also argued, in the alternative, that there was insufficient evidence that she referred to her neighbor

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as a pedophile "in public" because she was standing on the doorsteps of her house and talking to her husband. The State argued that the constitutionality of the order should have been challenged at the issuance of the order, not the criminal proceedings on a violation of the order. The State further argued that the statement was defamation, and therefore, was not entitled to First Amendment protection.

BACKGROUND:

The defendant, Ms. Smith, and her family lived across the street from the victim, Mr. Perez, and his family. The families had a history of making criminal allegations against each other, including the defendant accusing Mr. Perez of sexual misconduct with her child. In 2017, both Ms. Smith and Mr. Perez sought and received temporary PFS orders against each other. At the hearing on the PFS orders, Ms. Smith's petition for a final order was denied, but Mr. Perez's was granted. The record in this appeal on the conviction for violating the order did not include the transcript from that final hearing.

The final order included the following provision, which the defendant now challenges as a prior restraint on her freedom of speech:

> Defendant shall not make direct or indirect disparaging statements in public regarding plaintiff being a child molest[e]r. 'Public' includes social media postings. Any such postings made directly or indirectly by defendant shall be removed immediately. This Order authorizes social media entities to remove disparaging postings regarding Plaintiff.[19]

In 2017, the defendant, while entering her home, said to her husband, "come inside away from the pedophile," loudly enough for the victim and his family to hear across the street. The Perez's security cameras captured the incident on video. The defendant was subsequently charged with violating the PFS. She moved to dismiss the charges on the basis of the order being an unconstitutional prior restraint on her speech, but the motion was denied and she was later convicted.

HOLDINGS:

The Kansas Court of Appeals held that the evidence at trial was sufficient to

19 *Smith*, at 314.

establish that the defendant made statements calling her neighbor a pedophile while in public; the State failed to establish that the statement was false; there was insufficient evidence that the defendant made the statement knowing it was false; there was insufficient evidence that the neighbor's reputation was damaged by the statement; the order was a content-based prior restraint on the defendant's speech, and therefore presumptively unconstitutional; and the State failed to establish that order served a compelling public interest. Reversed and vacated.

WHETHER DEFENDANT'S STATEMENT WAS MADE "PUBLICLY":

The defendant argued that the statement was made in private because anything within the curtilage of one's home should be considered private and she was on her property in front of her home when she made the statement to her husband. The State argued, however, that the statement was made loud enough to be heard across the street and therefore was made "in public."

In support of her argument, the defendant offered the holding from the United States Supreme Court case *Oliver v. United States*.[20] The Court of Appeals, however, declined to agree because the Fourth Amendment protects one's privacy from government, and this case involved no government actors. Even if the Fourth Amendment applied in this case, the statements were made loud enough that they carried over beyond her property to that of the victim's curtilage.

WHETHER THE FIRST AMENDMENT CHALLENGE WAS PROPERLY BEFORE THE COURT:

Procedurally, the State argued that the constitutionality of the order itself was not properly before the court because the challenge should have been to the issuance of the order, not at the criminal proceeding to enforce the order.

The Court of Appeals, however, did not agree. The defendant had a right to appeal the criminal judgement by statute, which provides that in an appeal from a criminal judgment, "any decision of the district court or intermediate order made in the progress of the case may be reviewed."[21] Because this case was based on the enforcement of the PFS order, the First Amendment challenge to that order in this case was properly before the Court.

20 *Oliver v. United States*, 466 U.S. 170 (1984).

21 *Smith*, at 317 (quoting Kan. Stat. Ann. § 22-3602(a) (2018)).

WHETHER DEFENDANT'S SPEECH WARRANTED FIRST AMENDMENT PROTECTIONS:

In determining whether the order was a prior restriction on the defendant's speech, the Court of Appeals began its analysis with the well-established law that content based restrictions on speech are presumptively a violation of the First Amendment. There are, however, categories of speech that do not enjoy such protections and may be restricted without violating one's freedom of speech, including "advocacy intended, and likely, to incite imminent lawless action; defamation; speech integral to criminal conduct; 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent."[22]

The State argued that the statement made by the defendant was defamatory, and therefore, not entitled to First Amendment protection. According to the Court of Appeals, however, the State failed to prove defamation at trial. In its analysis, the Court noted that the cases relied upon to disqualify defamation from First Amendment protections were based on claims of libel. The current case involved a one-time verbal statement, and therefore, would be classified as slander. Libel, on the other hand, involves written statements, making proof of what was said more certain, more capable of distribution, and therefore creating a greater risk of potential damage to the victim's reputation. In the current case, the verbal statement was only heard by the defendant's spouse and her neighbors.

Further, even if a slanderous statement could be defamatory, the State failed to show that the statement was false and that the defendant made the statement knowing it was false. While the State argues that the allegations of sexual misconduct with her child were investigated, but never charged, no evidence was submitted at trial as to the truth or falsity of the defendant's statement referring to the victim as a pedophile. The State also did not prove the statement damaged the victim's reputation, as required for a claim of defamation. The statement was made once and was only heard by the two families. Therefore, the Court of Appeals concluded that there was not a showing of a prima facie case for defamation that could potentially exclude the statement from First Amendment protection.

22 *Id.* at 318.

WHETHER THE PFS ORDER INCLUDED A CONTENT-BASED RESTRICTION ON SPEECH:

Despite the State arguing otherwise, the Court of Appeals held that the PFS order was clearly a content-based prior restriction on the defendant's speech. The order forbad a specific person from making a specific expression, in this case from making any direct or indirect disparaging comments in public about Mr. Perez being a child molester, and was, therefore, a prior restraint, which is presumed unconstitutional.

To overcome this presumption, the restrictions must be narrowly tailored to serve a compelling public interest and there must be no less restrictive means available.

WHETHER THE STATE SHOWED A COMPELLING INTEREST:

The State's interest in restraining speech in a PFS is to protect the petitioner from stalking, which is defined in Kansas as "an intentional harassment of another person that places the other person in reasonable fear for that person's safety."[23] Harassment is defined as "a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose."[24] And, "course of conduct" is defined as "conduct consisting of two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"[25]

The Court of Appeals looked to the Kansas Supreme Court's decision in *State v. Whitesell*[26] and its analysis of the PFS statute and the effect on freedom of speech.

> "The statute's purpose is legitimate: to protect innocent citizens from intentional or knowingly threatening conduct that subjects them to a reasonable fear of physical harm. Furthermore, the statute is tailored so that it does not substantially infringe upon speech protected by the First Amendment. It regulates the manner in which individuals interrelate with one another and prohibits individuals from communicating with others in

23 *Smith*, at 322 (quoting Kan. Stat. Ann. § 60-31a02(d) (2018)).
24 *Id.*
25 *Id.* at 322-23.
26 *State v. Whitesell*, 270 Kan. 259, 13 P.3d 887 (2000).

> a way that is intended or known to cause fear of physical harm. ... [T]he statute permits all communications between individuals that are conducted in a time, place and manner that do not intentionally or knowingly cause the receiver of the message reasonably to fear for his or her physical safety. The statute's legitimate sweep does not portend any substantial burden on constitutionally protected conduct, and we find no realistic danger that the statute will compromise the First Amendment rights of parties not before the Court."[27]

In the current case, the Court of Appeals found that the facts stipulated to regarding the original order or the statement made in violation of that order were not sufficient to show that Mr. Perez or the rest of his family had a reasonable fear for their personal safety, as required by the PFS statute. The statute was not intended to protect citizens from any slanderous statements, but instead, as highlighted in *Whitesell*, to protect against repeated intimidation and prevent physical violence.

The Court of Appeals pointed out that the proper place for legal redress of an allegation of slander is not seeking a PFS, but instead is a civil defamation action.

Restrictions on free speech are valid only when they are narrowly tailored to serve a compelling public interest and where no less restrictive alternatives are available. The purpose of the protection from stalking statute is to protect citizens from threatening conduct that subjects them to a reasonable fear of physical harm.

Because the State failed to prove a compelling state interest in prohibiting non-threatening speech that did not cause Mr. Perez to reasonably fear for his safety or the safety of his family, the Court of Appeals held that this PFS order, as applied, was an improper prior restraint on Ms. Smith's freedom of speech.

2. ***Margarita O. v. Fernando I.*, 189 Conn. App. 448, 207 A.3d 548 (Conn. App. Ct. 2019)**. Connecticut Appellate Court: Former wife (petitioner) sought a relief from abuse restraining order against her former husband (respondent). The Superior Court granted the application and issued a restraining order. The order included a requirement that the respondent remain 100 yards from the petitioner except when both of their children were also present. The petitioner had not asked for

27 *Id.* at 323 (quoting *Whitesell*).

this specific relief; it was instead added by the judge in response to husband questioning whether he could be at his children's events and their school. Former husband appealed the issuance of the order. The Connecticut Appellate Court held that while the trial court did not abuse its discretion in granting the petitioner the order, it did abuse its discretion in entering the additional protection prohibiting former husband from being within 100 yards of the petitioner because there was no evidence to support the need for this protection. The petitioner had not asked for the children to be included in the order and there was no evidence that she would be safe from danger if both children were present.

VIOLATIONS OF ORDERS:

1. ***State v. Shaka*, 927 N.W.2d 762 (Minn. Ct. App. 2019). (Cert. granted July 16, 2019)**. Minnesota Court of Appeals: Defendant was convicted in the district court of violating a domestic abuse no contact order (DANCO). Defendant appealed arguing that the trial court erred in applying the forfeiture by wrongdoing exception to the confrontation clause by admitting the prior hearsay statements of a non-testifying witness without the State sufficiently proving that the defendant caused or secured the unavailability of the witness.

BACKGROUND:

The defendant was charged in 2017 with unlawful possession of a firearm and violation of a DANCO order. The defendant was detained while awaiting trial. In jail, the defendant made a number of phone calls to the victim. The jail recorded the calls as the jail informed the defendant it would. Based on these jailhouse phone calls, the State charged the defendant in a separate complaint with four additional counts of violating the DANCO order.

At the trail on the second complaint, a law enforcement officer testified about the calls and the State played the recordings. Afterwards, the State informed the district court and the defendant that the victim had failed to appear pursuant to their subpoena to testify. The State also informed the court that there were additional recordings of calls from the jail by the defendant, who they claimed "spent the evening finding people to seek out [victim] and make sure she didn't come to court."[28] The State asked the court for a continuance to locate the victim, or in the alternative, to apply the forfeiture by wrongdoing exception to the Confrontation

28 *Shaka*, at 766.

Clause and allow for the officer to testify as to his interview of the victim where she confirmed that the female voice on the recordings was indeed her.

The district court granted the brief continuance and issued a bench warrant for the victim. When the State had been unable to locate her by the third day of trial, they informed the court, summarized their efforts to locate her, and moved for the court to allow the officer to testify. The defendant objected, arguing that allowing the officer to testify as to the victim's out of court statements would violate his Sixth Amendment right to confront the witnesses against him.

The district court found the victim unavailable and that the defendant made the calls to keep the victim out of the courtroom. The district court also found that the defendant had provided his father the victim's address and phone number and 'urged' his father 'to go to her house in St. Paul and get her to not come to trial.'"[29] The district court further found that the defendant's father had agreed to go to the victim's house to prevent her from testifying at trial. Based on these findings, the district court concluded that the defendant had "'caused or acquiesced to cause through his wrongdoing her to not appear to testify' and, therefore, that [defendant] had 'waived his right to confrontation regarding her statements.' The district court granted the state's motion and ruled that the officer could testify about his conversation with the victim."[30]

The officer testified that the victim had come to his office to prepare for her testimony and that during that time he played two of the recordings. He testified that she confirmed that it was her voice on the calls.

HOLDINGS:

The Minnesota Court of Appeals held that the district court did not clearly err in finding that the defendant procured the unavailability of the victim-witness to testify and applying the forfeiture by wrongdoing exception to the Confrontation Clause. Specifically, the court held that a court may draw "reasonable inferences from circumstantial evidence" in the application of the forfeiture by wrongdoing exception and that the evidence in this case supported the court's finding that the defendant caused the victim-witness not to testify against him.

29 *Id.* at 765.
30 *Id.*

WHETHER THE DISTRICT COURT ERRED BY APPLYING THE FORFEITURE BY WRONGDOING EXCEPTION TO THE CONFRONTATION CLAUSE:

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him."[31] A witness's out of court statements of a testimonial nature are not allowed to be used in a criminal case against the defendant unless the witness is unavailable and the defendant previously had the opportunity to cross-examine them.

In *State v. Cox*,[32] the Minnesota Supreme Court held that forfeiture by wrongdoing must meet four elements by a preponderance of the evidence. Those elements include "(1) that the declarant-witness is unavailable; (2) that the defendant engaged in wrongful conduct; (3) that the wrongful conduct procured the unavailability of the witness; and (4) that the defendant intended to procure the unavailability of the witness."[33] The Court of Appeals also recognized that this exception has been codified in Minnesota Rule of Evidence 804(b)(6).

The Court of Appeals noted that the defendant conceded that the district court did not err in its determination of three of these four elements. The only element that the defendant challenged in this case was that the evidence did not support the finding that he or his family procured the unavailability of the victim-witness.

While the district court admitted it did not know why the victim-witness did not appear to testify, the court relied on circumstantial evidence to find that there was causation, specifically that the victim met with the officer the first day of trial, that the victim told defense counsel that she would appear, and that then, after the defendant asked his family to go get her to not testify, the victim failed to appear.

The Court of Appeals agreed with the defendant's assertion that there was no direct evidence that he caused the victim-witness to be unavailable, but pointed to the Minnesota Supreme Court case *Bernhardt v. State*,[34] which concluded that circumstantial and direct evidence are entitled to the same weight. The Court of Appeals further cited a variety of persuasive cases from other jurisdictions that

31 *Id.* at 767 (quoting U.S. Const. amend. VI).
32 *State v. Cox*, 779 N.W.2d 844 (Minn. 2010).
33 *Shaka*, at 767 (quoting State v. Cox).
34 *Bernhardt v. State*, 684 N.W.2d 465 (Minn. 2004).

held circumstantial evidence may specifically be used to determine the application of the forfeiture by wrongdoing exception. Based on *Bernhardt*'s conclusion regarding the weight to be given to circumstantial evidence, the Court of Appeals held that the district court did not err when it drew "reasonable inferences from circumstantial evidence in determining whether a defendant's wrongdoing procured the unavailability of a witness."[35]

2. ***State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (Neb. 2019)**.[36] Nebraska Supreme Court: Defendant was convicted in county court of 21 misdemeanor counts of violating a civil protection order (CPO) and sentenced to county jail for 180 days on each count, to be served consecutively (or 3,780 days). On appeal to the district court, the defendant claimed that the sentences imposed were excessive and disproportionate, in violation of the Eighth Amendment. The defendant argued that the sentence was especially disproportionate because the county jail is not generally equipped for such extended sentences. The statute requires that all misdemeanor sentences be served in county jail unless being served concurrently with a felony sentence. The district court affirmed defendant's convictions and sentences. Defendant appealed the district court's decision. The Nebraska Supreme Court held that, as a matter of first impression, Eighth Amendment proportionality analysis usually focuses on each individual sentence rather than the cumulative length of consecutive sentences; that the defendant's individual sentences were not grossly disproportionate in violation of the Eighth Amendment; and that the aggregate of the consecutive sentences was not excessive.

3. ***State v. Taylor*, 193 Wash. 2d 691, 444 P.3d 1194 (Wash 2019)**. Washington Supreme Court: The defendant, who was charged with a felony violation of a no-contact order, requested that he be able to stipulate to the existence of the protection order (PO) pursuant to the United States Supreme Court's decision in *Old Chief v. United States*.[37] Doing so would keep the State from entering the actual PO into evidence. The request was denied and defendant was convicted. The defendant appealed. In a matter of first impression, the Washington Supreme Court held that the doctrine from *Old Chief* (that when the existence of a prior conviction is an element of an offense, the court must accept an offer from the

35 *Shakar*, at 769.
36 Eighth Amendment Challenge.
37 *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644 (1997).

defendant to stipulate to the prior conviction) does not apply to the admission of a domestic violence protection order in a prosecution of a felony violation of that protection order. Therefore, the defendant's domestic violence protection order was admissible and the State was not required to accept defendant's offer to stipulate to its existence.

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