

Memorandum



To: Texas Supreme Court Advisory Committee

From: Legislative Mandates Subcommittee

Date: September 28, 2018

Re: Gun Violence Protective Orders

I. Matter referred to subcommittee

The Texas Supreme Court has requested that the SCAC “draft forms which could be included in a Protective Order Kit that would advise a judge about a respondent’s access to firearms and impose necessary limits.” The Court’s request stems from Governor Abbott’s *School and Firearm Safety Action Plan* (May 30, 2018). In the plan, the Governor calls for legislative consideration of “a red flag law allowing law enforcement, a family member, school employee, or a district attorney to file a petition seeking the removal of firearms from a potentially dangerous person only after legal due process is provided.” A copy of the Governor’s proposal is attached.

II. Current Texas Statutory Provisions

Texas currently provides that a trial court may issue a protective order under the Texas Family Code, sections 6.504 and 81. Section 6.504 provides that any party to a suit for dissolution of a marriage may move for a protective order:

On the motion of a party to a suit for dissolution of a marriage, the court may render a protective order as provided by Subtitle B, Title 4. (Texas Family Code § 81.001 et seq.).

Section 81.001 of the Family Code, in turn, authorizes protective orders if the trial court finds that (1) family violence has occurred; and (2) it is likely to occur in the future:

A court shall render a protective order as provided by Section 85.001(b) if the court finds that family violence has occurred and is likely to occur in the future.

The two provisions differ in that section 81.001 requires a family violence finding and section 6.504 does not. Members of the same household, those in a dating relationship, or persons seeking to protect a child from abuse or family violence may request the order.

Section 85.022 lists the requirements of an order “applying to a person who committed family violence,” and in subsection (b), authorizes a trial court to prohibit the person who committed the violence from possessing a firearm:

(b) In a protective order, the court may prohibit the person found to have committed family violence from:

. . . **(6) possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision. . .**

* * *

(d) In a protective order, **the court shall suspend a license to carry a handgun issued under Subchapter H, 1 Chapter 411, Government Code, that is held by a person found to have committed family violence.**

Section 85.022 authorizes a trial court to prohibit firearm possession for those found to have committed family violence. But in section 85.026, the Family Code provides that **every** protective order issued under the chapter must contain a warning, either boldfaced, underlined, or in all caps, regarding the possession of a firearm. The warning must be included in temporary orders, including a temporary ex parte order:

“IT IS UNLAWFUL FOR ANY PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.”

The warning about the possession of firearms is required regardless of whether the order contains a family violence finding or expressly prohibits the possession of firearms. Thus, although the prohibition is discretionary and applies to family violence cases, judges who work on these cases typically include the prohibition against possessing a firearm. Why? As discussed in the next section, the warning stems from Texas Penal Code § 46.04 (although that provision does not refer to ammunition), which makes it a misdemeanor to possess a firearm while subject to a protective order. A protective order may last for up to two years, depending on the trial court’s findings.

The Family Code protective order statute § 71.002 establishes jurisdiction and § 82.003 determines venue for family protective orders. Criminal protective orders are governed by the Code of Criminal Procedure Chapter 7A. There is no protective order statute related to mental health commitments. A designated domestic violence district court (for example, the 280th District Court in Harris County) hears all protective order applications filed in the county.

For criminal protective orders, the Code of Criminal Procedure authorizes a magistrate to issue a protective order that prohibits the defendant from possessing a firearm and “shall suspend” a license to carry a handgun, when the defendant has been arrested for family violence and other enumerated offenses. *See* TEX. CODE CRIM. P. art. 17.292(b)(4), (l). The victim of the offense, the guardian of the victim, a peace officer or an attorney representing the state may request the order. *Id.* at (a)(1-4).

III. Enforcement

In addition to enforcement by contempt when there is an express prohibition against possessing a firearm, it is a criminal offense under Texas Penal Code § 46.04(c) to possess a firearm while subject to a protective order under the Family Code, *regardless of whether the order itself expressly forbids the possession of a firearm*:

(c) A person, other than a peace officer, . . . who is subject to an order issued under Section 6.504 or Chapter 85, Family Code, under Article 17.292 or Chapter 7A, Code of Criminal Procedure, or by another jurisdiction as provided by Chapter 88, Family Code, commits an offense if the person possesses a firearm after receiving notice of the order and before expiration of the order.

A violation of the provision is a class A misdemeanor. Section 46.04(c) has an exception for on-duty law enforcement, but otherwise has no exceptions.

The court issuing the protective order generally addresses the surrender of firearms. Some courts ask the respondent for proof of compliance with the prohibition. Other counties (like Tarrant County) have a surrender policy in cooperation with local law enforcement agencies, in which the firearm is held by the law enforcement agency during the pendency of the protective order. Once the protective order expires or is otherwise set aside, the respondent collects the firearm.

IV. The Texas Protective Order Kit

In 2012, the Texas Supreme Court adopted a “protective order kit,” designed to educate people with a family law dispute about protective orders. The description notes that a protective

order can “order the other person to not have a gun or a license to carry a gun.” A copy of the protective order kit is attached.

V. Other States’ Laws

Although the idea of gun violence restraining orders (or GVROs) has generated discussion across the country, only California has passed legislation enacting laws governing such orders. *See* Cal. Penal Code § 18180 et seq. The judiciary in California has promulgated forms for petitioners and respondents who are seeking or responding to a request for a gun violence restraining order. Both Florida and North Carolina have considered GVRO legislation, but it has not been enacted. A copy of the California law is attached. Relevant among its provisions:

- It allows an immediate family member or a law enforcement officer to request the order.
- After notice, a hearing, and grounds established by clear and convincing evidence, it provides that a trial court shall enjoin a respondent from possessing, owning, purchasing, or receiving firearms.
- The restrained person may request one hearing to terminate the order at any time during its effective period, and the court must terminate the order if there is no longer clear and convincing evidence of the grounds to support an order.
- It requires the restrained person to surrender firearms and ammunition.
- The court may consider evidence that demonstrates an “increased risk for violence in assessing whether there is a significant danger to the respondent or others and whether less restrictive means are inadequate.
- The court must find, by clear and convincing evidence, that the respondent “poses a significant danger of causing personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition,” and that “less restrictive means” have been ineffective or are inadequate or inappropriate for the circumstances.