

# VIOLENCE IN THE HOME

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## III. VIOLENCE IN THE HOME

There are excellent resources for civil and criminal statutory law and practical information on domestic violence. The Georgia Domestic Violence Benchbook is a state resource funded by the Council of Superior Court Judges, Institute of Continuing Judicial Education, Prosecuting Attorneys Council, and the Criminal Justice Coordinating Council. It can be accessed online at [www.uga.edu/icje/DVBenchbook.html](http://www.uga.edu/icje/DVBenchbook.html).

### A. Restraining Order vs. Protective Order-

A Protective Order authorizes law enforcement to arrest an individual that violates such order. A Restraining Order is generally enforced by the contempt powers of the court. Most of the discussion relates to Civil Protective Orders. In Georgia there are three types of Protective Orders:

- a) family violence protective orders;
- b) stalking protective orders; and
- c) employer protective orders

1. Family Violence Protective Orders- The Family Violence Act O.C.G.A. § 19-13-1 sets forth the persons who may seek a family violence order and the type of acts from which protection may be sought. For a person to be entitled to a family violence order, such person must meet the “**Relationship test**” which includes the following:

Past or Present Spouses

Persons who are Parents of Same Child

Parents and Children

Stepparents and Step children

Foster Parents and Foster Children

Other Person Living or Formerly Living in the Same Household

**Cohabitation** is not required when there is a spousal, parental, step-parental or foster parental relationship. Past or present cohabitation is required to extend the family violence act to other relationships. The petitioner must prove that petitioner and respondent are “living or formerly living in the same household” to extend the act to actions between siblings, extended family members, roommates, unmarried intimate partners and same-sex couples. In some cases it may be unclear what constitutes “living together” or a “household”.

To issue a family violence order, the court must find that the respondent engaged in an act constituting family violence. The following types of conduct meet the “**Violence test**” qualifying for issuance of a family violence protective order:

Felony

Battery

Simple Battery

Simple Assault

Assault

Stalking

Criminal Damage to Property

Unlawful Restraint

Terroristic Threats

Criminal Trespass

To issue a family violence order, the court must also determine that the petitioner needs protection against future violence. The court must find evidence that the family violence occurred and that it may occur in the future.

2. Ex Parte Order- The court may issue an ex parte protective order. O.C.G.A. § 19-13-3 provides that upon the filing of a verified petition that alleges specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future, the superior court may order temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from violence.

After you prepare the Petition and proposed order, contact the clerk's office to check availability of a judge to hear family violence ex-parte hearing. You may need to go directly to judge with petition or go to the clerk's office first. If Petitioner needs support, prepare financial affidavit. Prepare child support worksheets for child support.

a. The hearing is short, addressing the essential requirements. You can present documents and call one witness. There is nothing in the statute or the court rules that describes the process for reviewing petitions for ex parte relief. Judges may decide to grant ex parte relief using only the written allegations of the petition. The court may review the petition and then question the petitioner. The court may delegate screening to a clerk or court employee.

b. The petitioner may request: Child Custody, Child support, Spousal Support, Have Spouse removed from marital home, use of a car, Spouse not cut off utilities or change any insurance and Spouse not destroy, damage or encumber property.

c. An ex parte order will need to be filed and a service copy taken to sheriff's office for service. The petitioner must ensure notice to the respondent of the petition, the hearing date and the ex parte order.

d. If the judge signs the Order, the judge will set a Second Hearing, a 30 day hearing. O.C.G.A. § 19-13-3(c) provides that the hearing shall be held within ten days of the filing of the petition or as soon as practical but in no case later than 30 days after the filing of the petition.

### 3. Temporary Protective Order- Twelve months

If petitioner prevails at the 30 day hearing by proving allegations by a preponderance of the evidence the court will grant a protective order. O.C.G.A. § 19-13-3(c). O.C.G.A. § 19-13-4(a) sets forth specific remedies that may be included in the protective order. The temporary protective order is effective for one year unless upon motion and hearing the court extends it. O.C.G.A. § 19-13-4(c). A violation of the order may be punished by an action for contempt or criminally punished under Article 7 of Chapter 5 of Title 16. A knowing and non-violent violation of family violence temporary restraining order or temporary or permanent protective order is a misdemeanor. O.C.G.A. § 16-5-95.

4. Stalking Law- O.C.G.A. § 16-5-94. A person other than a minor may seek a restraining order by filing a petition alleging conduct that constitutes stalking as defined by O.C.G.A. § 16-5-90. A person other than a minor may seek relief on behalf of a minor. Under O.C.G.A. § 16-5-94 (c) a petitioner may obtain an ex parte order by filing a verified petition alleging with specific facts that probable cause exists to establish that stalking has occurred in the past and may occur in the future. The court may order such relief as is necessary to protect the petitioner from stalking.

The protective order under the stalking law may (1) direct the respondent to refrain from such conduct; (2) order the respondent to refrain from harassing or interfering with the other; (3) award costs and attorney's fees to either party; and order

either party or both to receive psychiatric or psychological services to prevent further recurrence of the stalking.

5. Employer Protective Orders- O.C.G.A. § 34-1-7. Any employer, whose employee has suffered unlawful violence or a credible threat of violence carried out at the employee's workplace, may seek a temporary restraining order and an injunction on behalf of the employer prohibiting the unlawful violence or threats of violence at the employee's workplace or while the employee is acting within the scope of employment with the employer.

6. Forms- O.C.G.A. § 19-13-53 provides that the courts shall use a standardized form or forms for issuance of any protective order. These forms have been promulgated by the Uniform Superior Court Rules. These forms can be found as Appendix A to the Uniform Court Rules. They can be found on-line at [www.georgiacourts.org/forms.html](http://www.georgiacourts.org/forms.html). The forms include:

- a. Petition for Temporary Protective Order
- b. Family Violence Twelve Month Protective Order
- c. Family Violence Ex Parte Protective Order
- d. Order to Modify Prior Protective Order
- e. Order for Continuance of Hearing and Ex Parte Protective Order
- f. Stalking Permanent Protective Order
- g. Permanent Family Violence Protective Order
- h. Stalking Permanent Protective Order Pursuant to Criminal Conviction

## **B. Disputing False Allegations**

In most cases of domestic violence there is a dispute regarding who was abusive. Investigating officers often make credibility decisions in the field regarding whether one party was also violent or instigated the violence. Very often there is no witness to the allegations of domestic violence other than the petitioner and respondent. Not surprisingly the versions of the events will often be quite different. Is there any evidence to support the allegation other than the testimony of the petitioner? Is there any evidence to show the petitioner was in fact the aggressor? Did the respondent sustain injuries? In defending false allegations, you may point out the motivations that petitioner had for making false allegations. Sometimes, allegations of abuse appear to be made to obtain a better position in a divorce, a custody challenge or to maintain or gain possession of the marital home. Expose any motivations to make false allegations. If the police were not called to the incident, this supports the argument that the allegations were not serious. Likewise, if the petitioner waited a significant period of time before complaining about an incident, such fact is helpful in disputing the claim. During the hearing, expose any factual inconsistencies, any inconsistencies in documents or written statements, and any behavioral inconsistencies. If allegations arise from an incident in which the other party was abusive but you anticipate such party may file, you can file for a protective order. Or if the party files first you can file for a counter-protective order.

One of the best things a client can do is to take precautions before an allegation is made. First, take precautions to avoid conflict. For example, when a divorce is pending or threatened, a witness should accompany a party when an event may possibly result in conflict.

### **C. Adult Protective Services**

The Disabled Adult and Elder Persons Protection Act O.C.G.A. § 30-5-1 et. seq., makes it unlawful to abuse, neglect or exploit elder persons or disabled adults and requires certain persons to report abuses to Adult Protective Services. It is a misdemeanor for any person to abuse, neglect, or exploit any disabled adult or elder person. O.C.G.A. § 30-5-8. Physicians and other medical or hospital personnel are

required to report when they have reasonable cause to believe that a disabled adult or elder person, other than by accident, has been neglected or exploited. O.C.G.A. § 30-5-4 (a) (1). Under certain circumstances employees of financial institutions must report when they have reasonable cause to believe that a disabled adult or elder person has been exploited. O.C.G.A. § 30-5-4 (a)(1). The reports of abuse, neglect or exploitation should be directed to the APS Central Intake Unit of the Georgia Department of Human Resources, Division of Aging Services.<sup>1</sup>

#### **D. Child Protective Services**

The Georgia Department of family and Children Services (DFCS) is a State supervised, county administered system. Child protection services of DFCS has a staff that investigates reports of child abuse or neglect. A report of child abuse or neglect is made to the local county DFCS. Reports are confidential. The following is considered child abuse or neglect:

Physical abuse- injury to a minor child by a parent or caregiver which results in bruises, welts, fractures, burns, cuts or internal injuries.

Neglect- failure of the parent or caregiver to see that a child is adequately supervised, fed clothed or housed.

Sexual abuse- an adult uses a minor child for sexual stimulation.

The majority of cases that are reported to and substantiated by DFCS involve "Neglect." The neglect is most often the failure to provide adult supervision. The next most reported and substantiated type of cases is physical abuse. DFCS is required to notify the police of every report. When DFCS receives a report a CPS worker determines

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<sup>1</sup> Adult Protective Services is under the office of Aging Services. Reports of abuse, neglect, or exploitation of disabled adults or elder persons (65 or older) are made to the local APS offices or the APS Central Intake Unit (1-888-774-0152).

whether it involves maltreatment of a child under 18 by a parent or caregiver. If it does, it is investigated by an investigator. A CPS worker checks with other DFCS offices to see if there have been previous reports on this child or adult. The investigator visits the home or school to observe and talk with the child, meets with the family to discuss the matter, and talks with others who may have information including physicians, school personnel, neighbors, friends and relatives. DFCS determines if the allegations are substantiated or unsubstantiated. If they are substantiated, meaning facts indicate the child has been abused or neglected, the child may be taken from the home if he is in immediate danger. If there is an ongoing risk, DFCS may petition the juvenile court to remove the child. When there are substantiated allegations and children are left with their families, a DFCS case manager makes regular visits to the home and often services are provided. Such services may include referral for alcohol and drug treatment, referrals for employment and child support, counseling, in-home parent aides and child care.

During recent years, the media has spot-lighted DFCS focusing on inadequacies. DFCS was criticized for inadequate and untimely responses to cases of abuse and neglect. In 1999, Georgia received unfavorable national exposure in a "60 Minutes" segment that focused on the death of a five year old that died of severe abuse despite repeated warnings from medical personnel to DFCS. In 2000, the Office of the Child Advocate was created for the purpose to monitor and oversee DFCS' operations. The stated mission of OCA is to ensure the adequate protection of Georgia's children and to provide for an enhancement of the existing services offered through DFCS. The OCA is an independent ombudsmen office designed to protect the rights of children in state care and to monitor the agencies charged with protecting our children. The rights, powers, and duties of OCA are set forth in O.C.G.A. §§ 15-11-170 through 15-11-177. The OCA has the right and duty to:

Investigate and seek the resolution of complaints made by persons when the health, safety, or welfare of a child has been adversely affected;

Communicate privately with any child and the child's parents or guardian;

Have access to all records and files of DFCS concerning or relating to a child;

Inspect copy and subpoena records held by clerks of the courts, law enforcement agencies, service providers, including medical and mental health, and placement providers;

Review the facilities and procedures of any institution or residence, public and private, where a child has been placed by DFCS or a court and is currently residing;

Engage in programs of public education and legislative advocacy concerning the needs of children requiring the intervention, protection, and supervision of courts and state and county agencies.

#### **E. Child Abduction**

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>2</sup> replaced the Uniform Child Custody Jurisdiction Act in 2001. The UCCJEA provides clear criteria and priorities to determine the state that has jurisdiction to resolve a custody issue. The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, (PKPA) applies in all interstate child custody disputes, even though the child has not been kidnapped. Whenever there is a conflict between the UCCJEA and the PKPA, the PKPA takes precedence based on the Supremacy Clause. There is also an International Parental Kidnapping Crime Act 18 U.S.C. § 1204. The UCCJEA makes uniform the law of those states which enact the UCCJEA. These statutes should be consulted if there is a custody issue involving parents in different states. This paper and presentation will not attempt to cover these statutes in full.

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<sup>2</sup> O.C.G.A. §§ 19-9-40 to 19-9-51, §§ 19-9-61 to 19-9-70, §§ 19-9-81 to 19-9-97, §§ 19-9-10- to 19-9-104.

