

THE TRUTH ABOUT DOMESTIC VIOLENCE CASES

Judge Robin Kimbrough Hayes
Presenter

Overview: Goals/Objectives

- ▶ Domestic Violence 101/Dynamics
- ▶ Orders of protection: Obtaining, Enforcement, and Firearms.
- ▶ Criminal Issues: Domestic Assault and Firearms.



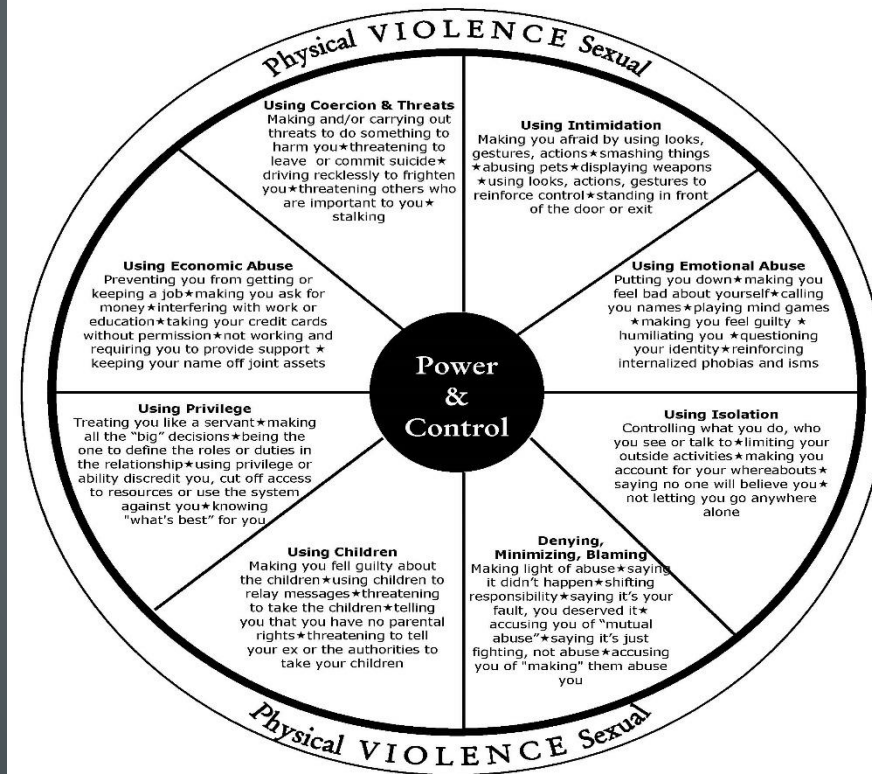
Dynamics

- ▶ Domestic Violence constitutes behaviors which intend to exert power and control over the victim.
- ▶ These behaviors are criminal and non-criminal.
 - ▶ Financial abuse
 - ▶ Threats to children
 - ▶ Sexual abuse
 - ▶ Hitting
 - ▶ Degrading comments



POWER AND CONTROL WHEEL

Power and Control Wheel



Adapted from the Domestic Abuse Intervention Project
Duluth, Minnesota

Domestic Violence Cycles

Domestic Violence comes in cycles.

► Tension Building

Abuser starts to get angry

Victim feels like they are 'walking on egg shells'

► Making-Up

Abuser may apologize for abuse

Abuser may promise it will never happen again

Abuser may blame the victim for causing the abuse

Calm

Abuser acts like the abuse never happened

Physical abuse may not be taking place



Victims and Choice

- ▶ Victims may decide to stay in a lethal situation for various reasons, including threats to children, threats of being killed, lack of housing, immigration status, and lack of financial resources.
- ▶ These behaviors are criminal and non-criminal.
 - ▶ Financial abuse
 - ▶ Threats to children
 - ▶ Sexual abuse
 - ▶ Hitting
 - ▶ Degrading comments





Orders of Protection

VENUE

Venue for an order of protection shall be in the county where the respondent resides or the county in which the domestic abuse, stalking or sexual assault occurred. If the respondent is not a resident of Tennessee, the petition may be filed in the county where the petitioner resides.

Who can issue?

Any court of record with jurisdiction over domestic relation matters or the general sessions court of the county—All other counties.



Filing Fees

Order of Protection T.C.A. § 36-3-617

- ▶ This statute provides that no victim shall be required to bear the costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an ex parte order of protection, order of protection, or a petition for an order, whether issued inside or outside the state.

- ▶ There is no initial fee for a petition to the court for any action on an order of protection.

Filing Fees— Order of Protection T.C.A. § 36-3-617-(2)

- ▶ If the court does not issue or extend an order of protection, the court may assess all court costs against the petitioner if the court finds by clear and convincing evidence:
 - ▶ (a) the petitioner is not a victim and that such determination is not based on the petitioner's request to dismiss the order, failure to attend the hearing or incorrectly filled out the petition; AND
 - ▶ (b) the petitioner knew that the allegations were false at the time the petition was filed.
 - ▶ If the court, after the hearing issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent.

PRACTICE QUESTION

- ▶ The Petitioner files an order of protection, the Petitioner is able to prove domestic violence behavior, but you dismiss the OP because the Petitioner has failed to prove “immediate danger or harm.” Do you issue costs?



Who Can File the Petition?

- ▶ A person over the age of 18 (Adult).
- ▶ The parent of unemancipated minor on behalf of the minor.
- ▶ An advocate from a domestic violence, sexual assault, or a child advocacy center on behalf of unemancipated minor.
- ▶ A Guardian Ad Litem.
- ▶ The Department of Children's Services.

Who is Eligible for an Order of Protection

- ▶ A Domestic Abuse Victim (relationship requirement, Pets, Property, Person)
- ▶ Sexual Assault Victim
- ▶ Stalking Victim

What is a domestic relationship?

T.C.A. 36-3-601/39-13-111

- ▶ Adults or minors who are current or former spouses;
- ▶ Adults or minors who live together or who have lived together;
- ▶ Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- ▶ Adults or minors related by blood or adoption;
- ▶ Adults or minors who are related or were formerly related by marriage;
- ▶ Adult or minor children of a person in a relationship that is described above.

Special Notes

- ▶ No police report required.
- ▶ No time limitation on incidents.
(Definitely a consideration when evaluating whether there is immediate danger or harm.)

Ex Parte Orders

- ▶ Order issued without notice to Respondent
- ▶ Granted when there is a showing of “an immediate and present danger” of abuse to the petitioner.
- ▶ Must be personally served on the Respondent.
- ▶ Ex parte order is in effect when the Respondent has been served or has actual knowledge. T.C.A. 36-3-611.

Ex Parte Order of Protection Relief

- ▶ Directing Respondent to stop underlining behavior (abuse, stalking, sexual assault)
- ▶ Prohibiting the Respondent from telephoning, contacting, or otherwise communicating with the Petitioner, directly or indirectly, or coming about the victim for any purpose.
- ▶ Prohibit the Respondent from stalking Petitioner.

Shared Residence

- ▶ The magistrate may order the respondent to leave the shared residence while the order of protection petition is pending a hearing

STANDARD OF PROOF

- ▶ Is there domestic abuse, sexual assault, or stalking?
- ▶ Is there immediate danger or harm?

Relief Available after Hearing on Ex Parte Order—Full Order of Protection

- ▶ Grant of Petitioner possession of the residence. This does not affect title to any real property.
- ▶ Direct Respondent to provide suitable alternate housing only if the petition is not based on a dating or sexual relationship.
- ▶ Award of custody of children.
- ▶ Award financial support for children and Petitioner if parties are married.
- ▶ Direct Respondent to attend counseling programs.
- ▶ Court must order the respondent to surrender any weapons in his/her possession. 11)Directing the respondent to pay the petitioner all costs, expenses and fees pertaining to the petitioner's breach of a lease or rental agreement for residential property if the petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the petitioner or the petitioner's children. Nothing in this subdivision (a)(11) shall be construed as altering the terms of, liability for, or parties to such lease or rental agreement. (12)Ordering a wireless service provider to transfer the billing responsibility for and rights to the wireless telephone number or numbers to a petitioner pursuant to § 36-3-621.

Relief Available after Hearing on Ex Parte Order—Full Order of Protection--2

- ▶ Directing the respondent to pay the petitioner all costs, expenses and fees pertaining to the petitioner's breach of a lease or rental agreement for residential property if the petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the petitioner or the petitioner's children. Nothing in this subdivision (a)(11) shall be construed as altering the terms of, liability for, or parties to such lease or rental agreement.
- ▶ Ordering a wireless service provider to transfer the billing responsibility for and rights to the wireless telephone number or numbers to a petitioner pursuant to § 36-3-621.

Enforcement Issues and Orders of Protection-1

- ▶ Order of protection are effective for a fixed period of time, not to exceed one year.
- ▶ Violations should be reported immediately
 - ▶ Advocate on behalf of the Petitioner.
 - ▶ Act as a support for your Petitioner if there is a violation.
 - ▶ Discuss the consequences the Respondent will face on the violation.

Enforcement Issues and Orders of Protection-2



- ▶ A violation could result in the following:
 - ▶ Civil Contempt: imprisonment until the act is performed
 - ▶ Criminal Contempt: imprisonment not in excess of (10) days
 - ▶ Class A Misdemeanor: imprisonment up to 11/29
 - ▶ Extension of the order from 5 to 10 years.* (by motion)
 - ▶ \$2500 bond.
- ▶ States enforce one another's Order of Protections (Full Faith and Credit).

Enforcement Issues and Orders of Protection-3

- ▶ Whether it is civil or criminal depends on the purpose and type of violation.
- ▶ The officer can make a warrantless arrest on either an ex parte order or a full order of protection OP an Ex Parte Order if the Petitioner has been served or has actual knowledge of it.

Enforcement Issues and Orders of Protection-4

- ▶ A person who knowingly violates an order of protection commits the offense of violation of a protective order under the provisions of T.C.A. § 39-13-113.
- ▶ Elements:
 - ▶ Person must have received notice of the order of protection or restraining order.
 - ▶ Person must have had an opportunity to be heard on the order of protection or restraining order.
 - ▶ Court must make specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse as defined in this part.
- ▶ Subject to arrest with or without a warrant.
- ▶ A person who fails to comply with the provisions of T.C.A. § 36-3-625.
- ▶ Conditions of Release (12-hour hold).
- ▶ Sentences served consecutively or concurrent at judge's discretion.

Weapons and the Order of Protection

- ▶ Upon issuing an order that complies with provisions of 18 U.S.C. § 922 (g) (8)/a qualifying order of protection, the court must order the Respondent to terminate physical possession of firearms by any lawful means within 48 hours of granting the order.



What is a Qualifying Order of Protection?

- ▶ Petitioner is an intimate partner of the Respondent.
- ▶ Respondent received actual notice and had an opportunity to be heard.
- ▶ Restrains future conduct.
- ▶ Finding of a credible threat to the physical safety of an intimate partner.

Order of Protections: Tennessee Firearms Prohibition

- ▶ A person under an order of protection that fully complies with 18 U.S.C. 922(g)(8) is prohibited from possessing a weapon. T.C.A. § 36-3-625.
- ▶ A person under an order of protection is not eligible for a weapons permit.
T.C.A. § 39-17-1351.
- ▶ A person's weapons permit is subject to revocation if under an order of protection.
T.C.A. § 39-17-1352.

Dispossession of Firearms-1

- ▶ How does the respondent become “dispossessed” of any firearms?
 - ▶ The respondent under a qualifying order of protection must dispossess him/herself of any firearms by a “lawful means.”

Dispossession of Firearms-2

- ▶ Ensure Affidavit of Dispossession is completed at the time of the hearing or as soon as practical.
- ▶ Lawful means- someone who can lawfully possess a firearm; and other circumstances federal guidelines control dispossession

PRACTICE QUESTION

- ▶ The Petitioner has evidence that the Respondent has committed domestic abuse. You also learn through the Respondent that the Petitioner has called, texted, and showed up to the Respondent's job. Do you grant the order of protection?



Domestic Violence and the Criminal Case

Arrest-T.C.A. § 36-3-619

- ▶ If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor or felony, or
- ▶ If two (2) or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor.
- ▶ Arrest is the preferred response only with respect to the primary aggressor.

Bail Considerations in Domestic Abuse Cases

- ▶ Threat to the alleged victim or other family or household member
- ▶ Threat to public safety
- ▶ Reasonably likely to appear in court

Conditions of Release

- ▶ Enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim
- ▶ Prohibiting the defendant from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly

Violation of Conditions of Release

- ▶ Punished as contempt of court
- ▶ Bail revoked
- ▶ Punished as a Violation of Protective Order if requirements are met.

Special Protections for Victims of Domestic Abuse , Sexual Assault, and Stalking

- ▶ Bail Considerations
- ▶ Mandatory 12-Hour Hold
- ▶ Conditions of Release
- ▶ Victim Notification of Release
- ▶ Special Probation Considerations



PRACTICE QUESTION

- ▶ A warrant is issued for Susan on a domestic assault. Susan is arrested. The warrant indicates that the alleged incident happened 2 years ago. The victim now lives in Georgia. Would the 12-hour hold apply?



The Judge, the Plea, the Probation

- ▶ Affidavit of dispossession should be completed, and firearm dispossession should be on the plea form.
- ▶ Do you have a compliance docket? These help to track weapon dispossession.
- ▶ Ensure that you are sending folks to BIPS programs, where applicable, and working with your probation officers.

Weapons and the Domestic Violence, Stalking, and Sexual Assault Victim



- ▶ A person convicted of a misdemeanor crime of domestic violence is prohibited from possessing a firearm under Tennessee and federal law.
- ▶ A person convicted of a felony is prohibited from possessing a firearm under Tennessee and federal law.

Penalties

- ▶ A person commits a misdemeanor who possesses a firearm and has been convicted of a MCDV. T.C.A. § 39-17-1307.
- ▶ Each violation is a separate offense.
- ▶ If a violation also constitutes a violation of T.C.A. § 36-3-625 and/or T.C.A. § 39-13-113 each violation may be charged as a separate offense.

Federal and Tennessee Nuances with the MCDV

- ▶ Both Tennessee and federal law prohibit a defendant convicted of a MCDV from possessing a firearm.
- ▶ Tennessee's definition expands the federal definition of MCDV to include dating relationships/roommates.
- ▶ United States v. Rahimi (applying New York State Rifle and Pistol Association vs. Bruen)

CHALLENGES

- ▶ Delays in prosecution.
- ▶ Multiple court appearances.
- ▶ Understanding Victim psychology.
- ▶ Distinguishing between RO and an OP.

TIPS

- ▶ Know these laws, they work together, i.e. - 605, -625, -113.
- ▶ Use the standard of review on OP's.
- ▶ Hear compliance dockets.
- ▶ Work with your DA and local DV programs.

The truth about orders of protection and domestic violence crimes is that it's complicated and changing.

--Robin Kimbrough Hayes