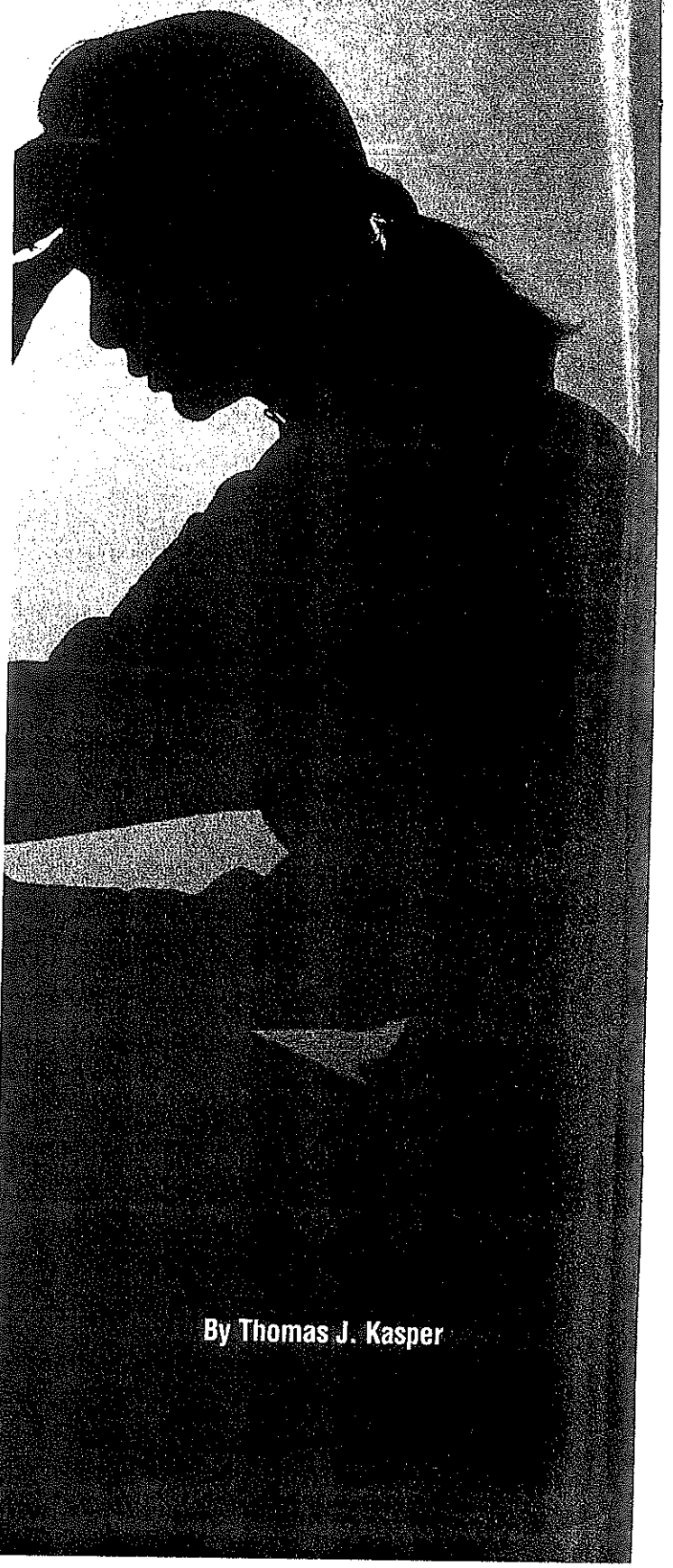
Obtaining and Defending Against an Order of Protection



Orders of protection are designed to prevent domestic violence, but they can also become part of the gamesmanship of divorce. This article discusses orders of protection and how to represent plaintiffs and defendants in OP proceedings.

Can a parent be subject to an order of protection when the parent breaks a child's pool stick because the 12-year-old child played pool with his friends rather than doing his homework as instructed? Yes, according to *Peck v Otten*.[1]

After the breakup of a dating relationship, do leaving notes for, calling, and sending roses to the former girlfriend together constitute grounds for an order of protection? Yes, according to *Shields v Fry*.[2]

Yet far more threatening behavior might not warrant an order if the plaintiff is not a "protected person" under the law based on his or her relationship with the defendant.

The legislature created the order of protection as a means to protect the abused from the abuser. But while orders of protection have shielded many abuse victims, the broad language of their authorizing statute, the Illinois Domestic Violence Act ("IDVA"), can also be used as a sword with which litigants can attempt to gain an advantage in civil proceedings, usually divorce.

Divorce practitioners must be well versed in the IDVA to adequately represent abused spouses and also to defend against the use of the IDVA as a weapon. This article discusses the grounds

1. 329 Ill App 3d 266, 768 NE2d 769 (3d D 2002).
2. 301 Ill App 3d 570, 703 NE2d 921 (4th D 1998).

By Thomas J. Kasper

Thomas J. Kasper is a partner of Gitlin, Haaff & Kasper in Woodstock. He concentrates his practice in matrimonial law. He also lectures and writes on family law topics. For more information see <www.gitlin.com>.

under which an order of protection can be sought and offers pointers for seeking and defending against orders of protection.

Background

The statutory authority for orders of protection is contained in both the civil code (the Illinois Domestic Violence Act of 1986, 750 ILCS 60/101 et seq) and the criminal code (725 ILCS 5/112A-1 et seq). The criminal code substantially tracks the language of the civil provisions. For purposes of this article, references will be to the civil provisions of the Illinois Domestic Violence Act of 1986 (IDVA), though the criminal code provisions are identical or substantially similar.

The IDVA states that its purpose is to "[r]ecognize domestic violence as a serious crime against the individual and society which produces family disharmony in thousands of Illinois families,"[3] and to "[r]ecognize that the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability."[4]

Initiating an order of protection

Orders of protection may be initiated:

1. As an independent action, usually bearing an "OP" case designation thereafter consolidated into the case number of the divorce case;

2. In conjunction with another civil proceeding, usually a divorce case, therefore adopting the case number of the divorce case; or

3. In conjunction with a delinquency petition or criminal prosecution.[5]

Who is a protected person under the statute?

A plaintiff must be a "protected person" under the IDVA to seek an order of protection, as is illustrated by the following hypotheticals.

Nick and Lisa. Nick's former girlfriend, Lisa, is an avid hunter who owns many firearms. For several months after their breakup, Lisa contacted Nick via e-mail, fax, and a letter hand-delivered to Nick at work threatening to kill Nick when she saw him again. Lisa, however, neither during nor after the dating relationship, ever pointed a weapon at Nick. Can Nick obtain an order of protection against Lisa?

Nick and Sally. In contrast to the above, Nick's co-worker, Sally, whom he has lunch with occasionally, pointed a gun in Nick's face during an argument after work and fired a warning shot into the ground. Can Nick obtain an order of protection against Sally?

To answer these questions, you as attorney must determine whether the plaintiff is a protected person as contemplated by the statute. The statutory language shows that the plaintiff must be a family or household member:

> "Family or household members" include spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers as defined in paragraph (3) of subsection (b) of Section 12-21 of the Criminal Code of 1961. For purposes of this paragraph, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.[6]

Comparison. In the scenarios set forth above, Sally's conduct was more immediately threatening to Nick than was Lisa's, yet Nick could only seek an order of protection against Lisa, based upon the definition of family or household members as set forth in 750 ILCS 60/103(6).

Though Sally's conduct may constitute other criminal offenses, Sally and Nick are not household members or in a dating relationship. Thus, Nick cannot obtain an order of protection against her. In contrast, Nick was involved in a dating relationship with Lisa and, provided he has grounds for an order of protection, Lisa is a proper defendant for an order of protection action.

Elements of proof

Usually, a court must find "abuse" or "harassment" before it will grant an order of protection. The IDPA defines them as follows:

> "Abuse" means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis.[7]
>
> "Harassment" means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner. Unless the presumption is rebutted by a preponderance of the evidence, the following types of conduct shall be presumed to cause emotional distress:
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> (i) creating a disturbance at petitioner's place of employment or school;
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> (ii) repeatedly telephoning petitioner's place of employment, home or residence;
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> (iii) repeatedly following petitioner about in a public place or places;
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> (iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or other place occupied by petitioner or by peering in petitioner's windows;
>
> (v) improperly concealing a minor child from petitioner, repeatedly threatening to improperly remove a minor child of petitioner's from the jurisdiction or from the physical care of petitioner, repeatedly threatening to conceal a minor child from petitioner, or making a single such threat following an actual or attempted improper removal or concealment, unless respondent was fleeing an incident or pattern of domestic violence; or
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> (vi) threatening physical force, confinement or restraint on one or more occasions.[8]

The IDVA does not require that you limit the verified petition for order of protection to the forms provided by the courts, which usually do not provide enough room to fully state the facts.

Though findings of abuse and harassment are usually central to an order-of-protection proceeding, the IDVA also prohibits other types of conduct, including interference with personal liberty, in-

3. 750 ILCS 60/102(1).
4. 750 ILCS 60/102(3).
5. 750 ILCS 60/202.
6. 750 ILCS 60/103(6).
7. 750 ILCS 60/103(1).
8. 750 ILCS 60/103(7).

timidation of a dependent, and neglect.

Consider the following hypotheticals:

George and Rhonda. George came home drunk several hours later than usual on Wednesday nights. Rhonda and George argued about George's tardiness and drunkenness. During the argument George:

1. Threatened to take the license plates off of Rhonda's vehicle so she could not leave;
2. Threatened to throw her and her child out of the residence;
3. Threatened to take the child away from Rhonda where she could not find him;
4. Threatened to tape Rhonda's mouth if she did not "shut up."

George has never been charged with a crime. George has also never pushed, punched, or otherwise physically harmed Rhonda. Can Rhonda petition for an order of protection?

Yes. George's conduct is "harassment" according to the IDVA. With respect to threatening to conceal the minor child from the mother, George's conduct is *presumed* to be harassment under 750 ILCS 60/103(7)(v). George's threat to tape Rhonda's mouth is also *presumed* to be harassment pursuant to 750 ILCS 60/103(7)(vi).

Susy and Mike. Susy and her husband Mike have been separated for six months. Susy resides in the former marital residence with their daughter, a high school senior.

On Monday, Mike drove his truck to and sat in front of the house for 30 minutes. On Tuesday he drove by the house very slowly on two separate occasions. On Friday, as Susy was driving home, Mike pulled in front of her and hit the brakes. The following Monday he again drove slowly by the house and sat in his truck on the street out front for about 20 minutes.

Susy suffers from multiple sclerosis. She fears that these continuing incidents are adversely affecting her health. Can she seek an order of protection against Mike?

Yes. Mike's conduct is *presumed* to be harassment under 750 ILCS 60/103(7)(iv) because his conduct is essentially "keeping petitioner under surveillance by remaining present outside his or her home."

Perhaps Mike had a legitimate reason to be present on those dates and times and for those durations. However, his conduct is presumed to be harassment and would entitle Susy to an order of protection against Mike unless he offered evidence to demonstrate the reasonableness and necessity of his conduct.

Orders of protection – a step-by-step guide

1. Counsel for the plaintiff must draft the petition for order of protection pursuant to local court rules, IDVA and county forms. Include the specific affidavit of the plaintiff setting forth dates and times for each event. Describe the impact of each event upon plaintiff.
2. If immediate harm may befall the plaintiff if notice is given, schedule the hearing as an emergency hearing. In so doing, provide specific allegations that justify proceeding on an emergency ex parte basis.
3. Attend the initial hearing (either ex parte or with notice based on determination in step 2). The plaintiff may have to testify, but written allegations are typically sufficient for issuance of an emergency order of protection (lasting approximately three weeks), which will include a return date.
4. Immediately following the hearing, the plaintiff's attorney should deliver a copy to the local sheriff for service upon the defendant and entry by the sheriff into the Law Enforcement Agency Data System ("LEADS").
5. Upon being served with an order of protection, the defendant's attorney should carefully interview the defendant. The focus of the interview must include a review of the facts and a determination by the attorney as to whether any of the defendant's conduct, based on the defendant's version of the facts, constitutes harassment, abuse, or other conduct prohibited under the IDVA. The defendant's attorney should then determine whether to request an earlier hearing date under 750 ILCS 60/224(d).
6. At either the expedited rehearing date or the return date, the plaintiff will either dismiss the order of protection or a hearing will occur. The court can either deny the petition for a plenary order of protection or enter a plenary order with an expiration date no more than two years from the date of entry.
7. If a plenary order of protection is entered, the plaintiff should follow step 4 above. If the petition for an order of protection is denied, the parties can return to their pre-petition status quo.
8. If a plenary order of protection is entered – even if the underlying cause of action (e.g., a divorce) is pending – and the defendant seeks to appeal, he or she must file the notice within 30 days of the entry of the plenary order of protection, because entry of a plenary order of protection is a final and appealable order.

The impact of orders of protection on mediation of child custody disputes

Mediation is often successful in resolving custody and visitation disputes. 750 ILCS 5/602.1(b) requires parties with joint parenting agreements to participate in mediation or otherwise resolve proposed changes, disputes or alleged breaches of the agreement before resorting to court involvement. Many counties in Illinois also require mediation before a custody determination.

However, many counties do not refer cases to mediation when there is an order of protection. Also, many judges will refuse to enter joint parenting agreements in cases involving an order of protection.

Thus, remember that while an order of protection may bring immediate temporary relief to your divorcing client, it may also make the case ineligible for mediation. Elimination of mediation puts the case on the path of trial and considerable expense rather than amicable and cost-effective settlement.

Furthermore, an order of protection could limit settlement options. For example, the plaintiff's attorney will not be able to offer joint custody to the defendant in return for some concession because joint parenting is not an option if the defendant is subject to an order of protection.

The impact of orders of protection in child custody determinations

Child custody is determined by the eight factors set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA). Factors (6) and

(7) are:

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person.[9]

750 ILCS 60/214 sets forth the remedies allowable in an order of protection, which includes a grant of exclusive possession of the residence. A party with exclusive possession of the marital residence gains an advantage in a custody determination.

A plaintiff must be a "protected person" under the IDVA to seek an order of protection.

Orders of protection have even been used as a sword for a de facto modification of custody. In *Peck v Otten*, a case referred to at the beginning of this article, the parties were divorced in 1995. Custody was awarded to the mother.

In March 2000, by agreed order, custody was transferred to the father. In March 2001, the mother filed a petition for an order of protection. At the hearing, evidence showed that the father told the child, Cory, age 12, that he was going out at 8 p.m. Cory was to clean the house and finish his homework.

The father returned home around 12:30 a.m. There was evidence he had been drinking. When the father arrived home he discovered that Cory had not cleaned the house or completed his homework. The father woke the child, grabbed the pool cue that had been given to the child and broke it. He told Cory that if he did not have time to do his homework and the housework, then he did not have time for playing pool.

The trial court held the father committed abuse in the form of harassment as defined by the IDVA. The appellate court upheld the trial court, holding that the IDVA defined harassment as "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress." The appellate court opined that the father's actions were unnecessary and of such a nature to cause a reasonable person to feel emotional stress and did, in fact, cause a 12-year-old emotional distress.[10]

A strong dissent by Justice Holdridge argued that the record did not support the majority's finding that the father committed harassment when he broke the child's pool cue. The dissent argued first that the father's conduct fell within the statutory exception for "a reasonable direction of a minor child by a parent." The object of the father's actions, according to the dissent, was to instill in the child the importance of homework and household chores rather than recreational activities. There was no evidence that the child was struck or even touched by the father. It was a demonstrative lesson.

Despite the spirited dissent, an order of protection was entered which transferred possession of the child back to the mother.

How to obtain an order of protection

Each county has its own set of forms and local rules. The forms contain much of the same requested information, such as name, date of birth, height and weight of the defendant, driver's license number, address, etc.

The key component for the practitioner is the affidavit setting forth the allegations. Most courthouse forms do not provide enough room to fully state the facts. There is no requirement in the IDVA that the attorney limit the verified petition for order of protection to the forms provided by the courts. It is acceptable and good practice to include as an exhibit a typed, completed affidavit as to the specific date and time of each incident of abuse, harassment, etc., and the impact of each such incident (such as bruising, frightening, etc.) on the abused.

A good petition for an order of protection will describe each incident in great detail as it relates to the definitions of abuse, harassment, or any other prohibited conduct under the IDVA. Customarily, the court will issue the emergency order at the ex parte hearing without testimony. However, the client must be present to testify, because some courts will request testimony along with the petition.

After service of the order of protection, any witnesses who saw the incidents of violence or abuse should be asked to attend or, if necessary, should be brought to court by subpoena by the plaintiff's attorney. Most of the testimony about what the other party said should be admitted as non-hearsay based on the hearsay exception for admissions made by a party opponent into evidence. Furthermore, the testimony must be tailored to prove the elements of harassment, abuse, or other prohibited conduct under the IDVA.

Pictures of bruises, damaged property, etc., are useful and should be offered into evidence whenever possible. Also helpful is any additional third party testimony as to arguments, damaged property, bruises, medical records, and the impact of defendant's conduct on the plaintiff.

How to defend against entry of an order of protection

Customarily, the emergency order of protection is in place for 21 days. On the return date, the defendant has an opportunity to argue against the issuance of a plenary order of protection. One defense strategy is to request an earlier hearing date. Under 750 ILCS 60/224, a defendant can request an earlier date upon two days notice.

If the plaintiff on the order of protection is pro se, the defendant can often defeat the order by filing an earlier hearing – a section 224 motion – providing two days' notice. If the plaintiff fails to appear at the re-hearing because of lack of proper legal representation or reliance on the return date of the original order, the defendant could defeat the order of protection by default.

In addition, if there are additional witnesses, such as relatives, friends, neighbors, bystanders, and police, the plaintiff may not have an opportunity to marshal those witnesses to court if the re-hearing is allowed on an emergency basis under section 224.

The defendant's attorney must carefully review the plaintiff's affidavit and ques-

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9. 750 ILCS 5/602(a)(6) and (7).
10. *Peck* at 269, 768 NE2d at 771.

victims, Illinois was home base to the corporate defendants.

Both the trial and appellate courts treated the Illinois corporate home of the defendants as decisive in finding that the Illinois courts should remain open to the victims. No doubt the settlement value of the case will be much higher than if the dismissal in favor of a more convenient Philippine forum had been approved.

A middle way

Forum non presents a puzzle for the U.S. civil litigation system. The forum non decision, though nominally procedural, often determines the outcome of the litigation. And that decision, in turn, often depends on whether state or federal judges make the call.

Meanwhile, the underlying policy questions stay pretty well hidden. Should U.S. courts regulate U.S. companies that do business overseas, requiring them to meet U.S. standards and pay U.S. awards to victims throughout the world? Or should U.S. companies be permitted to do business overseas in accordance with the often much less demanding standards that prevail in the developing world?

While it seems obviously unacceptable to permit multi-national corporations to escape responsibility altogether, it seems equally wrongheaded to routinely apply U.S. standards of justice to U.S. firms doing business around the world. We need a middle way. An international convention on the valuation of claims in mass tort cases – applicable in both U.S. and overseas tribunals – might help avoid the polar outcomes we so often witness in civil litigation. ■

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tion the defendant as to each sentence of the affidavit. Each sentence, and at times each word in each sentence, must be taken apart by the attorney and the defendant to determine, from the defendant's point of view, what exactly happened.

Often, as with most contested litigation, there are at least two sides to the story. The defendant may have testimony or other evidence as to why the conduct was not abuse and harassment. The defendant may have witnesses who can testify that the conduct did not occur or explain why the conduct was reasonable.

For example, petitions often allege that multiple telephone calls by the defendant constitute harassment. However, it is impossible to determine whether the calls are unreasonable, and thus harassing, without knowing their content.[11] Multiple telephone calls that threaten the life of the plaintiff would be harassment under the statute. On the other hand, multiple calls made to facilitate visitation to which the defendant is entitled may well be reasonable. It is a question of fact and must be carefully examined by the attorney and the client in preparing for the hearing.

When interviewing your defendant client, you must demand complete truthfulness as to what happened on the date or dates involved. Often, the defendant will admit facts that make clear an order of protection will be granted. In that case, the best strategy may be to seek a deal, such as entry of an injunction prohibiting harassment, physical or verbal abuse, or the like in connection with the divorce case rather than a plenary order of protection. Another alternative would be a plenary order of protection that protects the plaintiff but does not name the children if there is no abuse or harassment alleged against the children in the petition.

Know when to deal

The Illinois Domestic Violence Act of 1986 was a legislative response to physical abuse in families. The intent of the IDVA is admirable. As commendable as the IDVA is as an anti-abuse law (the shield) it is also used to gain an advantage in divorce and/or custody proceedings (the sword).

It is important for the attorney, regardless of whether he represents the plaintiff or defendant, to carefully review the statutory provisions, carefully interview the client as to each and every allegation of the petition for order of protection, and to provide whatever witnesses and other evidence are available at the hearing in support or defense of the order of protection. In addition, as with all civil litigation, it is important to know when to cut losses and make a deal. ■

11. *People v Karich*, 293 Ill App 3d 135, 687 NE2d 1169 (2d D 1997).