

## THE ABUSE OF RESTRAINING ORDERS

By Catherine MacWillie

The misuse of orders of protection by parents going through divorce is one of the most prevalent and unfortunate trends in family law. A system that was designed to protect against abuse is itself being abused.

The terminology of orders of protection varies by state; they can be called protection from abuse orders, domestic violence injunctions, etc., but to divorce attorneys, they are one of the most effective weapons used to leverage custody and other financial issues to benefit their clients.

As a result, many people are encouraged by their attorneys to use these orders of protection to gain a strategic advantage over the other parent from which it is difficult to recover. And since no judge wants to be the one who "gets it wrong" leading to a tragic result, restraining orders are easily obtained.

There are between 2 and 3 million temporary restraining orders issued in the United States every year. A report published in 2011 by Stop Abusive and Violent Environments (SAVE) estimated that 85% of protective orders are against men. Joseph E. Cordell of Cordell and Cordell estimates that nearly 90% of these orders are sought with the specific purpose to seek an advantage in a divorce and or custody proceeding. However, these stats are changing as men seek to file restraining orders against women in growing numbers.

I want to be clear that I am not addressing situations in which parents who are legitimate victims of domestic violence seek protection through the process of a restraining order from an abusive relationship. Instead, I am addressing issues of false allegations sought for an advantage during divorce and/ or custody and other financial issues and the parents who are victimized by the process ill-equipped to handle a high conflict case dealing with parental alienation.

### **Are There Different Types of Restraining Orders?**

There are generally three types of restraining orders. Based on jurisdiction and state, there may be some variances in the various titles. Please note I am not addressing employment or work-related restraining orders or injunctions. 1) Emergency Protective Order (EPO): These orders go into effect immediately and generally expire in less than a week. EPOs is usually requested by a police agency when a violent domestic dispute call arises. 2) Temporary Restraining Orders (TROs): The first restraining order that you will get if you have been threatened, stalked or abused by a person with whom you have a close relationship, such as a current or former significant other or relative. 3) Domestic Violence Restraining Order: A restraining order against a person you have a close relationship with, such as a relative or former spouse. Domestic orders differ from EPOs and TROs in that domestic orders usually last longer and can be renewed.

### **Can Someone Have More Than One Restraining Order?**

Yes, a parent may have more than one restraining order. Note that both criminal and civil law courts make use of restraining orders, so it is possible to have a restraining order from each type of court.

### **What is the Difference Between a Criminal and Civil Law Restraining Order?**

Civil law restraining orders are obtained directly from court through a civil action. The parent seeking protection must file a complaint in court and go through a hearing to obtain the restraining order.

Criminal restraining orders are sought on behalf of victims of a crime by the District Attorney. Typically, criminal restraining orders have more authority than a civil law restraining order and in case of a conflict between the civil and criminal restraining order, the criminal restraining order will take precedence.

In some states and jurisdictions, families dealing with divorce and custody issues and seeking a restraining order must file for the order in Family law court. While other jurisdictions allow the option of filing for the restraining order in a civil court set up to hear restraining orders or Family Law.

When the jurisdiction allows both options most parents seek a restraining order outside of Family Law court. There are many reasons for this. If the parent feels that the judge in Family law court has generally ruled to support the other parent regardless of the issues and evidence the parent may feel that fresh eyes would better benefit the situation and the evidence.

A civil court set up to hear restraining orders is more likely to issue the restraining order and err on the side of caution. Whereas, Family Law court may hesitate based on an incorrect perception of you, the case, or both. This often exists when a parent has had to represent themselves, and the other parent has an attorney representing them, but the parent is at a disadvantage.

Note; Civil and criminal law restraining orders both use the same terminology, EPO, TRO, and Domestic Restraining Order.

### **Can Both Parents Retain Restraining Orders?**

It is possible for two parents in a dispute to obtain restraining orders against each other. If both parents have physically abused each other, it is possible for both of them to obtain reciprocating orders.

### **Will I Know If a Restraining Order is Issued Against Me?**

The initial restraining order can be issued ex-parte, meaning the person who claims that he or she is in fear of bodily harm can get an order against you without your having the right to be heard. So you will not always know if a restraining order is issued against you. You will not be officially notified of a restraining order until you are served.

The court will not hold a hearing until it receives confirmation that you have been served with the paperwork for court and made aware of the hearing usually within ten days of the temporary restraining order. You cannot violate a restraining order if you have not been properly served.

Just because you are handed paperwork on the restraining order does not mean you have been properly served. Provide details of the service and by whom to your attorney. This is important.

In the case where a temporary restraining order was not granted, notice of a court hearing must still be served on you. But no restraining order is in place. If you are unsure if a restraining order is in place from the paperwork, contact your attorney immediately for clarification.

### **How Long Will It Take to Get to Court?**

A temporary order of protection lasts only as long as it takes for a full court hearing to occur. Unfortunately, hearings can sometimes take up to six weeks or longer to be scheduled due to an already overburdened court system. Nor does a hearing necessarily occur on the first court date as continuances are sought as both sides attempt to gather additional evidence either for or against the restraining order.

Another scenario is the one in which several days are required for the hearing and due to the court schedule are spread over several weeks. With one day of the hearing being held one week, and two weeks or a month later a second day, and a third day another week or two weeks later.

There is also no right to discovery before the hearing. Once a hearing takes place, the burden of proof remains the same low standard as was given in the initial temporary restraining order much of the time.

### **Before Court What Should I Do?**

Gather as much physical evidence relating to the incident or events referred to in the restraining order, such as clothing, photos, videos, and objects. Assemble any documents or records that could relate to the case. These might include letters, emails, text messages, phone and GPS records, computer records, and any records that might show where you were at the time of an incident. Make a list of possible witnesses including their contact information. Include every person you think has information about the incident and the accusations on your witness list for your attorney.

Anything that you have that brings the other parent's story into question can help you to prove your case to the judge. If you have photos or videos of the event or a witness who can testify that you were not present when the alleged incident took place, this will help your case. If the parent seeking protection accuses you of calling or texting repeatedly, your phone records might show otherwise. If the parent states that you have driven by their home several times a day and your

GPS records enable you to prove the statement is false, all of this will help you demonstrate that the allegations are false, taken out of context or distorted.

### **What Does the Accuser Have to Gain in Abusing the Restraining Order Process?**

Plenty. Exclusive use and occupancy of a marital residence are not often granted and can take up to six months for a ruling. Therefore, unless an allegation of a threat of immediate harm is claimed, couples are forced to live under the same roof unless they can come to some form of agreement. Orders of protection force the accused to immediately leave the residence.

A restraining order sets a precedent for custody. If a permanent order of protection is issued containing a finding of domestic abuse, custody cannot later be disputed. As a result, there is suddenly a presumption that the victim should have legal custody in many jurisdictions.

The longer access to a child is limited, the less likely that parent will be deemed a primary caregiver. It is also likely their children will become afraid of this parent. This is due in part to the action of the court and the statements by the protected parent who will seize upon the opportunity to block the other parent from the children's lives and say terrible things about the other parent.

Many good parents are shocked to find themselves automatically subject to no parenting time or visitation or supervised visitation with a social worker. This may/often does confuse children, wishing to "please" the protected parent and scar them unnecessarily for life.

### **What Can Be Ordered?**

With little to no evidence, a parent can be forced out of their home, stripped of their parenting time, and prevented from any contact with their children, including phone and email contact. Restraining orders usually require the restrained parent to stay a certain distance from the residence of the protected parent and anywhere the protected parent is at any given moment, and their place of employment, the children and the children's school, etc. In an instant, the house and the children can/often are taken away from the parent being restrained.

In effect, restraining orders act to give sole custody to the parent filing for protection until final disposition of the hearing. An advantage often sought as one parent seeks to stop all contact with the children by the other parent. Financial provisions can also be ordered as part of the restraining order and vary by jurisdiction and state law.

Again, I am not addressing valid allegations of child abuse/domestic violence. I am discussing allegations wherein a parent is falsely accused in an attempt to gain an advantage in custody, property and other financial issues during a divorce and after.

### **What Happens Next?**

When a false or exaggerated allegation results in a stay away order, many innocent parents are forced from their homes and face the sudden and profound financial difficulty of new and additional costs. Parents rapidly find themselves having to pay for two households to show the court they can provide adequate provisions for future child visitations/parenting time.

This process often means that a parent will lose access to necessary legal and personal papers required to protect themselves from the restraining order. Although the restrained parent can request that these items be made available from opposing counsel or the court, the process takes time, and requests for compliance are most often ignored.

Even if the protective order is dismissed at the full hearing, and the allegations of abuse are found to be false, parents are still victimized by the stigma that they are abusers. False or unnecessary orders result in persistent damage to the innocent parent's reputation, career prospects, financial status, and their standing in the eyes of their children.

### **During Hearings Be Mindful Of....**

Many parents overwhelmed, pushed to the point of breaking, frustrated and alternating between being frightened and angry, will stare at the judge or the other parent trying to "will" them to see the truth - that they are innocent. Parents hold their hands in balled fists, write notes aggressively on pads of paper, shoving the pad towards their attorney in an attempt to present information to their attorney to pull out the lies the other parent has made against them.

It is understandable that you are upset at what is happening to you. But do not let your emotions rule the day. Ensure that you are not viewed as threatening or aggressive. Be polite, answer questions carefully and without anger. You want to help the court reach a different perception of you from what is being presented.

Even if a judge was initially resistant to issuing a restraining order against you, any display of aggressive behavior viewed as intimidation can and will result in the court granting the injunction based on that courtroom behavior seen as being a threat. So beware!

### **How Long Does a Restraining Order Last?**

A permanent restraining order is typically not meant to last a lifetime but is granted for a specified period of time. For example, a victim of domestic violence may be able to obtain an order one, two, three or five years. The restraining order can be extended upon an application of the victim and at a judge's discretion for another period of time up to five years a second or third time if warranted.

### **Additional Issues**

In part, the type of restraining order issued can require Anger management classes 10, 15, or 20 weeks for example. Parenting classes etc. In some states like California, if a domestic violence restraining order is granted, the parent being restrained is required by state law to complete a 52-week batterers program. This information may or may not be in the restraining order but by law is required, catching many parents unaware, causing contempt motions, or extending a restraining order until the restrained parent complies.

It is not unusual once a parent is pending a permanent restraining order for opposing counsel to submit an offer to modify custody, in an out of court settlement. That is often the motivation behind the filing of the restraining order in the first place. Restraining orders allow parents to obtain what would have taken longer and may not have been possible in family law, and now can be accomplished in less time, for less money and more effectively.

Even with an out of court settlement, your custody could still be suspended, monitored or terminated at the whim of the parent seeking the restraining order. Do not make any agreement without specifically asking your attorney how any offer will impact your custody and employment and how to protect both if you feel forced into this situation.

An out of court settlement can be reached that will allow you to continue to have parenting time with your children but it is tenuous at best. If the restraining order is granted or you reach a settlement ensure exceptions for custody exchanges, school functions, emergency medical situations which will allow you to be present. Or at the very least you request to be notified immediately if your current family law order does not contain this provision.

For some parents, a restraining order will result in the suspension or loss of their employment, depending on the type of restraining order obtained. This includes law enforcement, teachers or other professionals in specific groupings. Do your own research in regards to your employment in case your attorney is unaware of your specific circumstances or ask in advance so that they can research the issue to protect you.

### **Listen, Listen Very Carefully to What I Say Next**

A protected parent cannot give consent for the restrained parent to violate the restraining order. You will go to jail if not then, at another time. The protected parent and the restrained parent are usually unaware of this aspect of the restraining order and the law.

It works like this, two parents, no longer in conflict, feel they don't need the restraining order any longer. Unlike a family court order which does allow parents to make agreements outside the court order, a restraining does not. Then a dispute arises, the protected parent calls the police and they arrive while the

restrained parent is still at the house. But this could happen anywhere, the children's school, church, shopping center, etc. During the interview, officers learn of the prior violations. Violations you thought as the restrained parent was done with the consent of the other parent. **WRONG!**

The law takes the position that the protected person is unable to act in their own best interest and must be protected even from themselves. So the law removes the ability of the protected parent to waive their rights to protection and give consent to the restrained parent to violate the court order. Even if you are not arrested during that incident, if you are not present when police arrive, a report will be filed, you will be arrested at a later date and you will go to jail.

No matter what the protected parent says, no what they promise, do not violate the court order. In fact, some protected parents may intentionally be "faking" everything to set you up for the violation of court order to have you arrested. You could suddenly find yourself in jail on the first disagreement facing criminal charges with no custody and no visitation rights to the children.

Listen up mothers - this statement applies just as much to you as it does to fathers. Whereas in the past restraining orders have been issued nearly without exception to men with few exceptions, in growing numbers restraining orders are now being issued against mothers in family law matters. So **DON'T**. Mothers or Fathers

#### **Is It Possible to Vacate/Cancel a Restraining Order?**

If the protected parent says they want to disregard the restraining order and consent to contact, you can tell them that sounds wonderful. But in order for that to occur, they need to do that legally. They need to go back to court and vacate the restraining order. Unless the protected person is willing to do that, you are at risk and subject to arrest at their whim if you have contact with the protected parent or the children in violation of the restraining order.

Parents are advised that even if the protected parent files to vacate the restraining order, the courts may deny the motion and the restraining order will remain in place until its expiration. This is more likely to be the case in a criminal law restraining order but is applicable to the civil law restraining order as well.

#### **WILL A RESTRAINING ORDER SHOW UP ON MY CRIMINAL RECORD?**

**A restraining order will appear on your criminal record. Although a restraining order is a civil order, whenever someone runs your record for probation, employment, or immigration purposes, it will show that someone had or has a restraining order against you.**

#### **Protecting Yourself from a Restraining Order**

Your best protection against a restraining order is your cell phone or tape recorder. Video or tape record all contact with the other parent. Have your cell phone/tape recorder ready in advance of contact. This applies to telephone calls too. Consult

with your attorney regarding state law on this issue. So many parents when asked if they video/tape recorded the contact, say "it all happened so fast I didn't have time to think and then it was over." Use your cell phone to take photos if necessary. Do not delete text messages that you receive or send. Save them, they are evidence and just may prove your innocence, etc.

When you have contact with the other parent, meet in public and have a witness present whenever possible. Custody exchanges should be done at school, so no contact with the other parent is required. If that is not possible, change the pickup or drop off location to your local police or sheriff's station. Officers can ensure that the peace is kept and no incidents occur. Carry multiple copies of your court order for custody with you at all times for presentation to law enforcement or school personnel.

If the other parent attempts to provoke you, LEAVE. Do not push or shove them. Do not raise your voice, argue or scream. WALK AWAY, WALK AWAY NOW. Record everything and narrate the recording. Remember your every action will be judged. Keep your voice calm, low, no profanity, etc. Some examples of statements; please Jim/Sara do not hit me in the chest, the face, etc. I am going to walk away now. I am not going to fight with you. We are standing in the living room and the kids are in the other room. We should work with a counselor to settle our differences.

The following could be you! On December 08, 2011, the Huffington Post picked up a story reported by ABC, NBC, and the Daily Mail in the United Kingdom to name a few; Miglino arrived at the home of his wife's parents Wednesday just after 5 p.m. to pick up his three-year-old son per a court-ordered custody schedule, said Broward Sheriff's Office spokesperson Dani Moschella. Expecting Hepner to be combative as she met him in the yard with the child's pillow and bag, he hit record on his phone before stepping out of the car.

The phone instead captured Hepner telling Miglino that his father-in-law wished to speak with him inside. When Miglino declined to enter the house, Moschella said, Hepner pulled a gun from behind her grandson's pillow and fired three shots at her son-in-law, hitting him twice in the ribcage and shoulder. Wounded, Miglino fell on top of Hepner in the yard, screaming, "I can't believe you did that! What are you, crazy? I can't believe you shot me!"

"Get the \*\*\*\* off me!" Hepner screamed, calling her son-in-law at least one choice name before he was transported to Broward General Hospital. Police say he was treated and released. In a classic he-said, she-said, Hepner told investigators that the incident began when Miglino tried to shoot her, but she knocked the gun from his hand and shot him in self-defense.

"Detectives weren't able to hear the recording on the phone until Thursday because the phone needed to be charged," Moschella said. "Once it was charged,



and they were able to review it, she was arrested." Hepner, who police say had no prior criminal record, was charged with attempted murder in the first degree.

### **Actual Scenario #1**

During the divorce, the other parent admitted there was never any violence in the marriage, but in an effort to halt visitation, which even the judge admitted they were trying to do, and for no good reason, they punched the parent on the forehead as hard as they could hoping that parent would hit them and they could obtain a restraining order with injuries.

### **Actual Scenario #2**

When a parent told the other parent they wanted a divorce, they agreed to the request by the other parent who asked them to hold off filing until after the first of the year. The parent thought the other parent just needed time to adjust and they were willing to do that if that meant they could work civilly through the divorce. However, in hindsight, the parent now realizes the other parent was using the time to figure out how to manipulate them and how they could get custody of their children. That became apparent when they were arrested for domestic violence and then faced a restraining order.

They spent the night in jail. The next morning, they learned all the bank accounts had been closed and they couldn't go back home. A restraining order had been obtained, not only to keep them away but to keep them away from the children because there "was a danger to the children." The other parent said they filed the restraining stating the parent had mental problems, that they were an alcoholic and drank a bottle of wine every night. All the accusations were shocking to the parent who had been arrested. For thirty days, the parent did not have phone or person-to-person contact with their children. In a period of thirty days, the children lost one of their parents. They just disappeared from their lives practically overnight.

When the parents went to court, the judge granted the other parent's request for a permanent restraining order because the other parent showed the court pictures of injuries. The parent looked at their attorney and said, "I didn't do this!" The police asked the other parent clearly, "Do you need a paramedic, are you injured?" and the other parent said, "No." And then there are injuries?

They tell their attorney the other parent had to self-inflict the injuries after everyone had left. After they'd taken the other parent away and after they had taken the children to school, they came back and took pictures of the injuries.

The accused parent has never been in court before; they are sitting there with hardly any clothing because they can't get any of their clothing from the residence. They feel that they probably look every bit the alcoholic, mentally unstable parent they have been accused of being.

This judge grants the injunction for one year. The other parent asked for supervised visitation, based on the fact that they said the children witnessed what happened. The parent is saved only because the oldest child was in the home. They testified they were nowhere near the incident. They said they heard some shouting but didn't see anything and the other children were with them the entire time.

With that, the judge didn't grant supervised visits, but they cut the parent's visits down to where they would only see the children once on a weekday right after school until 8pm and then every other weekend. The minimal amount of time. To go from being a stay-at-home parent from the time the children were born to that?

The judge also ordered that the only way the parents communicate is through an email system called the "Our Family" wizard.

### **Is There a Remedy?**

There has been a small effort to address the problem of false restraining orders, but none have resulted in any significant efforts to remedy it. In New Jersey, in 2008, one trial judge found that the current standard of proof was unconstitutional in that it violated the defendant's right to due process and required the stricter "clear and convincing evidence standard." However, the Appellate Division overturned the ruling, which was upheld by the New Jersey Supreme Court.

In 2005, The Family Law News, California State Bar's official publication in the field, noted that the state issued on average 250,000 orders of protection annually. It acknowledged that the issuance of such orders were "routine" and conceded that they were misused by parties seeking to "jockey" for an advantage in custody matters and as retaliation. Similarly, the Illinois Bar Journal called orders of protection "part of the gamesmanship of divorce."

A few recent studies examined this problem. One study found that 59% of allegations of domestic violence between couples involved in custody disputes could not be substantiated by the courts as true. A 2008 analysis of orders issued in one county in West Virginia concluded that 81% were unnecessary or false. A 2010 review by Connecticut's Judicial Department noted that ex parte orders increased over 25% from 2003 and 2004 and that nothing was being done to stop frivolous requests.

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Finally, please note that I am not an attorney, and I do not give legal advice. Restraining orders in divorce cases are notoriously convoluted, and laws differ from state to state. Have a detailed discussion with your divorce attorney to find out what action you should take specific to your case and circumstances in your state in these circumstances.