

The Judge may have recourse to the 2006 Attorney General Opinion in determining whether the parties are “family or household members”, whether they are cohabitants, and whether the Juvenile and Domestic Relations District Court or the General District Court has jurisdiction.

II. PROTECTIVE ORDERS IN CASES OF FAMILY ABUSE

A. Emergency Protective Orders (EPO) in Cases of Family Abuse – Va. Code § 16.1-253.4

1. Jurisdiction

Any Juvenile and Domestic Relations District Court judge, General District Court judge, Circuit Court judge, or magistrate may issue a written or oral ex parte emergency protective order.

2. Purpose

An EPO may be issued to protect the health or safety of any person, in the case of family abuse.

3. Procedure and Criteria – Va. Code § 16.1-253.4(B), (D), (F), (G)

- a. An EPO shall be issued when a law-enforcement officer or an allegedly abused person asserts under oath to a judge or magistrate, and on that assertion or on other evidence, the judge or magistrate finds that:
 - (i) a warrant for a violation of Va. Code § 18.2-57.2 has been issued or issues a warrant for a violation of § 18.2-57.2 and finds that there *is* probable danger of further acts of family abuse against a family or household member by the respondent; or
 - (ii) reasonable grounds exist to believe that the respondent has committed family abuse and there is probable danger of a further such offense against a family or household member by the respondent.
- b. Va. Code § 18.2-57.2 also sets forth the requirement that the magistrate issue an EPO when a warrant for assault and battery of a family or household member is issued.
- c. Pursuant to Va. Code §§ 16.1-253.4 and 18.2-57.2, if the respondent is a minor, an EPO shall not be required.
- d. When a judge or magistrate considers the issuance of an EPO pursuant to clause (i) above, he shall presume that there is probable danger of further acts of family abuse against a family or household member by the respondent unless the presumption is rebutted by the allegedly abused person.
- e. A law enforcement officer may request an EPO orally, in person or by electronic means.
- f. A judge or magistrate may issue an oral EPO which shall be verified by the judicial officer when reduced to writing by the law enforcement officer requesting the order or the magistrate on a preprinted form approved and provided by the Supreme Court of

Virginia. The completed form shall include a statement of the grounds for the order asserted by the officer or allegedly abused person. If the order is in writing initially and signed by the judicial officer, then no further verification is necessary.

- g. The availability of an EPO shall not be affected by the fact that the family or household member left the premises to avoid the danger of family abuse by the respondent.
 - h. The issuance of an EPO shall not be considered evidence of any wrongdoing by the respondent.
 - i. A judge or magistrate issuing an EPO shall provide the protected person or the law-enforcement officer seeking the EPO with the form for use in filing with the Court petitions for Preliminary Protective Orders and also shall provide written information regarding protective orders that shall include telephone numbers of domestic violence agencies and legal referral sources on a form provided by the Supreme Court. If the judge or magistrate provides the required information to the law-enforcement officer, the officer **may** provide the form and information to the person protected by the EPO when the officer provides him or her with a copy of the EPO.
4. Terms of an EPO – Va. Code § 16.1-253.4(B)

Upon a finding that the criteria for the issuance of an EPO have been met, the judge or magistrate shall issue an *ex parte* EPO imposing one or more of the following conditions on the respondent:

- a. prohibiting acts of family abuse or criminal offenses that result in injury to person or property;
 - b. prohibiting such contacts by the respondent with family or household members of the respondent as the judge or magistrate deems necessary to protect the safety of such persons; and
 - c. granting the family or household member possession of the premises occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property.
5. Duration – Va. Code § 16.1-253.4(C), (D)
- a. An EPO expires at 11:59 p.m. on the third day following issuance. If the order expires at a time the Juvenile and Domestic Relations District Court is not in session, the duration of the EPO is extended until 11:59 p.m. on the next business day that the court is in session.
 - b. The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order. A hearing on such a motion shall be given precedence on the docket.
 - c. If the person to be protected by the EPO is physically or mentally incapable of filing a petition for a preliminary protective order or a protective order, a law enforcement officer may request an extension for an additional period of time not to exceed three days after

expiration of the original order. That request for an extension of the EPO may be made orally, in person or by electronic means.

6. Service/VCIN/Copies of Order – Va. Code § 16.1-253.4(E)
 - a. The court or magistrate shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex and race of each protected person.
 - b. Immediately upon receipt of the order by a local law enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia Criminal Information Network system (VCIN).
 - c. A copy of the EPO shall be served on the respondent as soon as possible, and, upon service, the agency making service shall enter the date and time of service and other appropriate information required by the Department of State Police into VCIN.
 - d. The person to be protected by the EPO shall be given a copy of the order when it is issued.
 - e. A copy of the EPO shall be filed by the law enforcement officer with his department along with the written report required by Va. Code § 19.2-81.3(D).
 - f. The original copy of the order shall be filed with the Clerk of the Juvenile and Domestic Relations District Court within five business days of the issuance of the order.
 - g. If the order is later dissolved or modified, a copy of the dissolution or modification order shall also be attested, forwarded, and entered in the VCIN system.
 - h. Upon request, the Clerk shall provide the person protected by the EPO with information regarding the date and time of service.

B. Preliminary Protective Orders in Cases of Family Abuse (PPO) – Va. Code § 16.1-253.1

1. Venue

Proceedings shall be commenced where (i) either party has his or her principal residence, (ii) the abuse occurred, or (iii) a protective order was issued if at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner. Va. Code § 16.1-243(A)(3).

2. Jurisdiction

Pursuant to Va. Code § 16.1-241(M), the judges of the Juvenile and Domestic Relations District Court have jurisdiction to issue preliminary protective orders in cases of family abuse.

3. Purpose

To protect the health and safety of the petitioner or any family or household member of the petitioner who has been subjected to family abuse.

4. Procedure and Criteria – Va. Code § 16.1-253.1(A)

- a. The petitioner must file a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse.
- b. The preliminary protective order may be issued to protect the health and safety of the petitioner or any family or household member of the petitioner.
- c. The order may be entered *ex parte* upon a showing of good cause. Immediate and present danger of family abuse or evidence sufficient to establish probable cause that family abuse has recently occurred shall constitute good cause. Evidence to support an *ex parte* order may be presented in any of the following manners:
 - (i) an affidavit;
 - (ii) sworn testimony before an intake officer; or
 - (iii) sworn testimony before the judge.
- d. Either party may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket of the court.

5. Terms of a PPO – Va. Code § 16.1-253.1(A) and (B)

- a. A PPO may include any one or more of the following conditions to be imposed on the allegedly abusing person:
 - (i) prohibiting acts of family abuse or criminal offenses that result in injury to person or property.
 - (ii) prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such person.
 - (iii) granting the petitioner possession of the premises occupied by the parties to the exclusion of the allegedly abusing person; however, no such grant of possession shall affect title to any real or personal property.
 - (iv) enjoining the respondent from terminating any necessary utility service to a premises that the petitioner has been granted possession of pursuant to the PPO or, where appropriate, ordering the respondent to restore the utility services to such premises.
 - (v) granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner alone or jointly owned by the parties to the exclusion of the

allegedly abusing person; however, no such grant of possession or use shall affect title to the vehicle.

- (vi) requiring that the allegedly abusing person provide suitable alternative housing for the petitioner and any other family or household member and, where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing.
- (vii) any other relief necessary for the protection of the petitioner and family or household members of the petitioner.

Va. Code § 16.1-253.1(A).

- b. The PPO shall specify a date for the full hearing which shall be held within fifteen days of the issuance of the PPO, unless
 - (i) the hearing is continued for good cause upon motion of the respondent during which extended period the PPO shall continue in effect.
 - (ii) the respondent fails to appear because the respondent was not personally served. In that case, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.
 - (iii) the respondent was personally served but was incarcerated and not transported to the hearing.

Va. Code § 16.1-253.1(B).

6. Effective Date – Va. Code § 16.1-253.1(C)

A PPO is effective upon personal service on the allegedly abusing person.

7. Service/VCIN/Copies of Order – Va. Code § 16.1-253.1(B)

- a. The court shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to the Virginia Criminal Information Network the respondent's identifying information and the name, date of birth, sex, and race of each protected person.
- b. Service may be made under the direction of the court by the primary law enforcement agency responsible for service and entry of protective orders. Service by a police officer of a city, county, or town is specifically authorized in Va. Code § 15.2-1704. Immediately upon receipt of the order by a local law enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.
- c. A copy of a preliminary protective order shall be served as soon as possible on the allegedly abusing person (respondent) in person as provided in Va. Code § 16.1-264, and upon service the agency making service shall enter the date and time of service into VCIN. Va. Code § 16.1-253.1.

- d. Upon request after the order is issued, the clerk shall provide the petitioner with a copy of the order and information regarding the date and time of service.
- e. Upon receipt of the return of service or other proof of service pursuant to Va. Code § 16.1-264(C), the clerk shall forward forthwith an attested copy of the PPO to the primary law enforcement agency which shall forthwith enter into VCIN any other information required by the state police that was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set forth.

C. Protective Orders in Cases of Family Abuse (PO) – Va. Code § 16.1-279.1

1. Venue

Where (i) either party has his or her principle residence, (ii) the abuse occurred, or (iii) a protective order was issued if, at the time the proceeding is commenced, the order is in effect to protect the petitioner or a family or household member of the petitioner. Va. Code § 16.1-243(A)(3).

2. Jurisdiction

Pursuant to Va. Code § 16.1-241(M), the judges of the Juvenile and Domestic Relations District Court have jurisdiction to issue protective orders.

3. Purpose

In cases of family abuse, including any case involving an incarcerated or recently incarcerated respondent against whom a preliminary protective order has been issued pursuant to Va. Code § 16.1-253.1, the court may issue a protective order to protect the health and safety of the petitioner and family or household members of the petitioner.

4. Procedure

- a. There shall be a full hearing, which shall be set by the PPO. Va. Code § 16.1-253.1(D).
- b. The petitioner must prove the allegation of family abuse by a preponderance of the evidence. Va. Code § 16.1-253.1(D).
- c. If a PPO was issued, the hearing for the PO may only be continued on motion of the respondent and for good cause shown and, if granted, the PPO shall remain in effect until the hearing. Va. Code § 16.1-253.1(B). If the hearing is continued, the respondent should be served with a copy of the order continuing the hearing and continuing the PPO in effect, and the new date must be recorded in VCIN.
- d. If a PPO was issued, and the respondent fails to appear because the respondent was not personally served, or if personally served was incarcerated and not transported to the hearing, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.

In such a case, the judge should set a new date for the hearing on the Petition for Protective Order and include that new date in the extended PPO.

5. Terms of a PO – Va. Code § 16.1-279.1(A), (A1)

- a. A PO may include any one or more of the following conditions to be imposed on the respondent:
 - (i) prohibiting of acts of family abuse or criminal offenses that result in injury to person or property;
 - (ii) prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary to protect the health or safety of such persons;
 - (iii) granting the petitioner possession of the residence occupied by the parties to the exclusion of the respondent; however, no such grant of possession shall affect title to any real or personal property;
 - (iv) enjoining the respondent from terminating any necessary utility service to the residence to which the petitioner was granted possession of pursuant to the PO or, where appropriate, ordering the respondent to restore the utility services to that residence;
 - (v) granting the petitioner temporary possession or use of a motor vehicle owned by the petitioner or jointly owned by the parties to the exclusion of the respondent; however, no such possession or use shall affect title to the vehicle;
 - (vi) requiring that the respondent provide suitable alternative housing for the petitioner, and, if appropriate, any other family or household member, and, where appropriate, requiring the respondent to pay deposits to connect or restore necessary utility services in the alternative housing;
 - (vii) ordering the respondent to participate in treatment, counseling or other programs as the court deems appropriate; and
 - (viii) any other relief necessary for the protection of the petitioner and family or household members of the petitioner, including a provision for temporary custody or visitation of a minor child.
- b. In addition, if a PO is entered, the court may also enter a temporary support order for any children of the petitioner whom the respondent has an obligation of support. Any such support order shall terminate upon a determination of support pursuant to Va. Code § 20-108.1.

6. Duration – Va. Code § 16.1-279.1(B)

- a. The PO may be issued for a specific period; however, unless otherwise authorized by law, a PO may not be issued for a period longer than two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified.

- b. The PO may be extended for a period not longer than two years if, prior to the expiration of the protective order, a petitioner files a motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. If the petitioner was the respondent's family or household member at the time the initial protective order was issued, the court may extend the protective order to protect the health and safety of the petitioner or persons who are the petitioner's family or household members at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. There is no limit to the number of extension that may be requested or issued.

7. Modification – Va. Code § 16.1-279.1(G)

Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Such a hearing must take precedence over other proceedings.

8. Attorneys' Fees – Va. Code § 16.1-279.1(E)

The court may assess costs and attorneys' fees against either party regardless of whether a PO has been issued as a result of a full hearing. Va. Code § 16.1-278.19 authorizes the award of attorneys fees and costs by the Juvenile and Domestic Relations District Court in any matter before the Court and requires that any such award be based on the relative financial ability of the parties. The fees and costs award language set forth in Va. Code § 16.1-279.1 does not refer to Va. Code § 16.1-278.19 and does not require that an award of fees and costs under that provision be based on the relative financial ability of the parties. Therefore, it may be argued that the limitation on such awards does not apply in cases involving protective orders.

9. Service of Order/Entry into VCIN – Va. Code § 16.1-279.1(C)

- a. The court shall immediately, and in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to VCIN the respondent's identifying information and the name, date of birth, sex, and race of each protected person.
- b. A copy of the PO shall be served on the respondent and provided to the petitioner as soon as possible. If the respondent is present at the hearing, it is best to have the respondent served immediately at the conclusion of the hearing.
- c. The clerk shall forward forthwith an attested copy of the order to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the state police which was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set forth.

10. Medical Evidence – Va. Code § 16.1-245.1

Under certain circumstances, a party in a protective order case may seek to present medical evidence in support of his or her position. Va. Code § 16.1-245.1 provides a mechanism by which such evidence may be presented in the absence of the testimony of a health care provider.

In any civil case heard in a Juvenile and Domestic Relations District Court involving allegations of child abuse or neglect or family abuse, any party may present evidence, by a report from the treating or examining health care provider as defined in Va. Code § 8.01-581.1 or the records of a hospital, medical facility or laboratory at which the treatment, examination or laboratory analysis was performed, or both, as to the extent, nature, and treatment of any physical condition or injury suffered by a person and the examination of the person or the result of the laboratory analysis.

However, as such evidence would otherwise be subject to a hearsay objection, the specific conditions of that provision must be met before the evidence may be admitted in evidence. If the following conditions are met, the medical record shall be admitted:

- a. Ten days in advance of the trial or hearing, the party intending to present the evidence must give the opposing party or parties a copy of the evidence and written notice of intention to present it at the trial or hearing (except in the case of a preliminary removal hearing when twenty-four hours notice is sufficient);
- b. Attached to the evidence must be a sworn statement of the treating or examining health care provider or laboratory analyst who made the report that the information contained therein is true and accurate, and fully describes the nature and extent of the physical condition or injury, and that the person named in the report was the person treated or examined, or, in the case of a laboratory analyst, that the information contained therein is true and accurate.
- c. If the record to be admitted is a report of a hospital or other medical facility a sworn statement of the custodian of the records shall be attached attesting to the truth and accuracy of the copy of the record of such hospital or other medical facility.
- d. Either party may subpoena the health care provider or custodian of the records to testify at the hearing or at a *de bene esse* deposition and the court shall determine which party or parties shall pay the fees and costs for such appearance or deposition, as the ends of justice may require. If the health care provider or custodian of the records is not subject to subpoena for purposes of cross-examination, the court shall allow a reasonable opportunity for the party seeking the subpoena to obtain the testimony as the ends of justice may require.

D. Violation of a Family Abuse EPO, PPO, PO

1. Criminal Proceedings for Violations – Va. Code § 16.1-253.2

a. Class 1 Misdemeanor

In addition to any other penalty provided by law, any person who violates a family abuse EPO, PPO or PO, which prohibits such person from going or remaining upon land, buildings or premises or from further acts of family abuse, or which prohibits contacts between the respondent and the respondent's family or household member is guilty of a Class 1 misdemeanor.

b. Class 6 Felony

(i) Third Offense

The respondent shall be guilty of a Class 6 felony if the instant case is a third or subsequent violation of a protective order and

- the instant offense was committed within twenty years of the first conviction; and
- the instant offense or one of the prior offenses was based on an act or threat of violence.

(ii) Violations Involving Assault and Battery, Entering Furtively, or Remaining in the Home

In addition to any other penalty provided by law, if a respondent commits an assault and battery upon any party protected by a family abuse EPO, PPO, or PO, resulting in serious bodily injury to the party, or if a respondent violates such an EPO, PPO, or PO by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, the respondent is guilty of a Class 6 felony.

c. Mandatory Sentence

(i) Second Offense

Any person convicted of a second offense of violation of a protective order, when the instant offense is committed within five years of the prior conviction and the instant or prior offense was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of sixty days.

(ii) Third Offense

In addition to being charged with a Class 6 felony, any person convicted of a third violation of a protective order, when the instant offense is committed within twenty years of the first conviction and the instant offense or any of the prior offenses was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of six months.

(iii) First and All Other Offenses

Upon conviction for any offense of violation of protective order for which a mandatory sentence is not otherwise provided, in addition to any other appropriate sentence, the respondent shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

d. Required Entry of Protective Order

Upon conviction, the court shall enter a protective order pursuant to Va. Code § 16.1-279.1 for a specified period not exceeding two years from the date of the conviction.

e. **Presumption Against Bail**

Subject to rebuttal, it shall be presumed that, in relation to a person who is charged with a second or subsequent violation of a protective order pursuant to Va. Code § 16.1-253.2, no condition or combination of conditions could reasonably assure the appearance of the respondent or the safety of the public.

2. **Contempt**

Va. Code § 16.1-253.1 (PPO) and Va. Code § 16.1-279.1 (PO) both provide that, except as otherwise provided in Va. Code § 16.1-253.2, a violation of a PPO or PO shall constitute contempt of court.

E. Confidentiality in Family Abuse EPO, PPO and Proceedings

No law-enforcement agency, attorney for the Commonwealth, court, clerk, or any employee of them may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the EPO, PPO, or PO or that of the family of such person, except to the extent that disclosure is (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause. Va. Code §§ 16.1-253.1(E),-253.4(I),-279.1(I).

The Clerk of Court should use Forms DC-621, NON-DISCLOSURE ADDENDUM, and DC-622, SEALED DOCUMENTS, to maintain the confidentiality of the information in the court file. Procedures for maintaining that information separately or in a manner not susceptible to public disclosure should be developed by the Court. Care to maintain confidentiality must also be taken when providing information to the Sheriff for service on the petitioner, in relation to any other case in which the address of the petitioner might otherwise be disclosed (e.g. a subpoena for the criminal case).

F. Firearm Issues Related to Family Abuse Orders of Protection

1. **Virginia Law: State Prohibition Against Purchase or Transport of Firearms**

Va. Code § 18.2-308.1:4 prohibits any person who is subject to a family abuse or a Title 19.2 EPO, PPO, or PO from purchasing or transporting any firearm while such order is in effect. Va. Code § 18.2-308.1:4 also prohibits a person who is subject to a § 16.1-253 or a § 16.1-278.2 PPO or PO, where a petition alleging abuse or neglect has been filed, from purchasing or transporting a firearm while the order is in effect. In addition, any person who is subject to an EPO, PPO, or PO specified in the statute who holds a concealed handgun permit, is prohibited from carrying a concealed handgun while any such order is in effect, and is required to surrender his or her permit to the court upon entry of the order for the duration of the order. Any violation of Va. Code § 18.2-308.1:4 is a Class 1 misdemeanor.

2. **Federal Gun Control Act: Federal Prohibition Against Possessing Firearms or Ammunition When Subject to a Qualifying Protective Order**

a. **Qualifying Protective Orders**

Pursuant to the Gun Control Act, 18 U.S.C. 922(g)(8), it is unlawful for a person subject to any order of protection to ship, transport or possess any firearm or ammunition or to

receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, if:

- (i) The order was entered after a hearing at which such person had actual notice and opportunity to participate;
- (ii) The order restrains such person from harassing, stalking or threatening an “intimate partner” or child of such “intimate partner” or engaging in other conduct that would place those persons in reasonable fear of bodily injury, and
- (iii) The order either includes a finding that such person represents a credible threat to the physical safety of such “intimate partner” or child, or, by its terms, specifically prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily harm. 18 U.S.C. § 922(g)(8).

b. “Official Use” Exemption

While subject to the § 922(g)(8) prohibition in their personal capacities, government personnel in their official capacities are exempt from the § 922(g)(8) firearm prohibition. 18 U.S.C. 925(a)(1). Although exempt from the § 922 (g)(8) federal prohibition, government personnel in their official capacities would be subject to Va. Code § 18.2-308.1:4.

c. The Requisite Domestic Relationship Under § 922(g)(8): Intimate Partner or Child of Intimate Partner

As used in the foregoing provisions, the term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person. 18 U.S.C. § 921(a)(32). The requisite domestic relationship does not cover all relationships protected under Virginia’s family abuse protective order status. In addition to “intimate partners” and children of “intimate partners,” a Virginia family abuse protection order can be granted to protect persons related by blood, affinity (“in-laws”), or adoption.

d. Prohibition for the Life of the Protective Order

The federal firearms prohibition under § 922(g)(8) is be effective until the qualifying protective order expires or is dismissed.

e. Penalties

A knowing violation of these provisions of the Gun Control Act is punishable by a maximum penalty of ten years incarceration, or a maximum fine of \$250,000, or both. 18 U.S.C. § 924(a)(2), 3571. Actual knowledge of the prohibition is not required to demonstrate a violation.

3. Notification of Firearm Prohibitions on Qualifying Protective Orders

- a. Warnings regarding Va. Code § 18.2-308.1:4 should be included in any EPO, PPO, or PO and are set forth in the following district court forms: DC-382, EMERGENCY PROTECTIVE ORDER; DC-384, PRELIMINARY PROTECTIVE ORDER; DC-385, PROTECTIVE ORDER; DC-532, CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; DC-527, PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; DC-626, EMERGENCY PROTECTIVE ORDER – FAMILY ABUSE; DC-627, PRELIMINARY PROTECTIVE ORDER – FAMILY ABUSE; and DC-650, PROTECTIVE ORDER – FAMILY ABUSE.
- b. Virginia district court protective orders that are likely to meet the federal criteria set forth in 18 U.S.C. § 922(g)(8) include district court forms DC-532, CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT and DC-650, PROTECTIVE ORDER – FAMILY ABUSE. Virginia district court protective orders that may meet the criteria set forth if the requisite domestic relationship exists and if not issued *ex parte* include DC-385, PROTECTIVE ORDER; DC-527, PRELIMINARY CHILD PROTECTIVE ORDER – ABUSE AND NEGLECT; and DC-627, PRELIMINARY PROTECTIVE ORDER – FAMILY ABUSE. Finally, by the plain language of 18 U.S.C. § 922(g)(8), the federal firearm prohibition would be triggered upon certain probationary “no contact” orders if the requisite domestic relationship exists. Warnings regarding the § 922 (g)(8) firearm provisions should be included in these orders of protection.

4. Concealed Weapon Permit

At the end of the hearing at which an order of protection is entered, the judge should inquire as to whether the respondent possesses any firearms and should request the surrender of any concealed weapon permit.

G. Full Faith and Credit for Out-of-State Family Abuse Orders of Protection

1. Foreign Protective Orders

Va. Code § 16.1-279.1(F) permits a person entitled to protection under a temporary or permanent order of protection issued by another state or the District of Columbia to file an attested or exemplified copy of that order of protection with the clerk of the Juvenile and Domestic Relations District Court in family/household member cases. Foreign POs are entitled to full faith and credit in Virginia, provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law.

2. Foreign Protective Orders to be Entered into VCIN

Upon filing in accordance with Va. Code § 16.1-279.1(F), the clerk shall forward forthwith an attested copy of the Order to the local police department or sheriff's office which shall, on the date of receipt, enter the name of the person subject to the order and other appropriate information required by the State Police into VCIN. Va. Code § 16.1-279.1(F).

3. Copies of Foreign Protective Orders and Law Enforcement Officer's Reliance

Upon inquiry by any law-enforcement agency of the Commonwealth, the clerk shall make a copy available of any foreign order filed with that court. A law-enforcement officer may, in the performance of his duties, rely upon a copy of a foreign protective order or other suitable evidence which has been provided to him by any source and may also rely upon the statement of any person protected by the order that the order remains in effect.

Va. Code § 16.1-279.1(F).

4. Full Faith and Credit to be Granted to Virginia Orders

An order of protection granted by a court in Virginia is to be enforced by the courts of any state, the District of Columbia, or any U.S. Territory, and may be enforced by Tribal Lands. 18 U.S.C. § 2265.

H. Appeal of a PO

An order of protection for family abuse is not required to be suspended pending appeal, and the Juvenile and Domestic Relations District Court judge may choose to continue such an order in effect. Va. Code § 16.1-298(B). Pursuant to that provision, the Circuit Court, or the Court of Appeals or Supreme Court in a writ of supersedeas, may suspend such an order pending appeal.

III. TITLE 19.2 PROTECTIVE ORDERS IN CASES OF ACTS OF VIOLENCE, FORCE OR THREAT

A. General

A court may enter an Emergency Protective Order (EPO), a Preliminary Protective Order (PPO), or a Protective Order (PO) if a Petitioner is being or has been subjected to an act of violence, force or threat. Va. Code §§ 19.1-152.8, -152.9, -152.10. The orders issued under these provisions are applicable where the Petitioner and Respondent are not family and household members.

B. “Act of Violence, Force or Threat” Defined

1. “Act of violence, force or threat” is defined as any act involving violence, force or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault, or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.
2. In protective order cases, “stalking” is conduct that:
 - a. occurs on more than one occasion, and
 - b. is directed at the petitioner with the intent to place, or with the knowledge that the conduct places the petitioner in reasonable fear of death, criminal sexual assault, or bodily injury to the petitioner or to the petitioner's family or household member; or

- c. is directed at the petitioner and the respondent *reasonably should have known* that the conduct places the petitioner in reasonable fear of death, criminal sexual assault, or bodily injury to the petitioner or to the petitioner's family or household member.

Va. Code § 18.2-60.3

C. Title 19.2 Emergency Protective Orders (EPO)

Va. Code § 19.2-152.8

1. Jurisdiction

Any judge of the Circuit Court, General District Court or Juvenile and Domestic Relations District Court or magistrate has the authority to issue a written or oral *ex parte* EPO, pursuant to Va. Code § 19.2-152.8, to protect the health or safety of a person.

2. Criteria – Va. Code § 19.2-152.8(B)

A judge or magistrate shall issue an *ex parte* EPO when a law-enforcement officer or an alleged victim asserts under oath to a judge or magistrate that such person is being or has been subjected to an act of violence, force or threat, and when on that assertion or other evidence, the judge or magistrate finds that:

- a. there is probable danger of a further such act being committed by the respondent against the alleged victim; or
- b. a petition or warrant for the arrest of the respondent has been issued for the arrest of the alleged perpetrator for any criminal offense resulting from the commission of any act of violence, force or threat.

3. Title 19.2 EPO Conditions – Va. Code § 19.2-152.8(B)

An EPO may impose one or more of the following conditions on the respondent:

- a. prohibiting acts of violence, force, or threat or criminal offenses that may result in injury to person or property;
- b. prohibiting such contacts by the respondent with the victim or such victim's family or household members as the judge or magistrate deems necessary to protect the safety of such persons; and
- c. such other conditions as the judge or magistrate deems necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses resulting in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

4. Duration – Va. Code § 19.2-152.8(C)

- a. Any EPO expires at 11:59 p.m. on the third day following issuance. If the expiration of the time period occurs when the court is not in session, the EPO shall be extended until 11:59 p.m. on the next business day that the court issued the order is in session.

- b. The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket.
 - c. If the person to be protected by the EPO is physically or mentally incapable of filing a petition for a preliminary protective order or a protective order, a law enforcement officer may request an extension for an additional period of time not to exceed three days after expiration of the original order. That request for an extension of the EPO may be made orally, in person or by electronic means.
5. Procedure – Va. Code § 19.2-152.8(D), (E), and (F)
- a. A law enforcement officer may request an EPO orally, in person or by electronic means.
 - b. A judge or magistrate may issue an oral EPO that shall be verified by the judicial officer when reduced to writing by the law enforcement officer requesting the order or the magistrate, on a preprinted form approved and provided by the Supreme Court of Virginia. The completed form shall include a statement of the grounds for the order asserted by the officer, or by the alleged victim of stalking or a criminal offense resulting in serious bodily injury. If the order is in writing initially and signed by the judicial officer, then no further verification is necessary.
 - c. The issuance of an EPO shall not be considered evidence of any wrongdoing by the respondent.
 - d. No fee shall be charged for the filing or service of a petition under this statute.
6. Service/VCIN/Copies of EPO – Va. Code § 19.2-152.8(E)
- a. Upon receipt of the order by a local law-enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.
 - b. A copy of an EPO shall be served on the respondent as soon as possible, and upon service the agency making service shall enter the date and time of service into VCIN.
 - c. The person protected by the EPO shall be given a copy of the order when it is issued.
 - d. The original copy shall be filed with the clerk of the appropriate district court within five business days of the issuance of the order.
 - e. If the order is later dissolved or modified, a copy of the dissolution or modification order shall be attested, forwarded, and entered into VCIN.
 - f. Upon request, the clerk shall provide the alleged victim with information regarding the date and time of service.

D. Title 19.2 Preliminary Protective Orders (PPO)
Va. Code § 19.2-152.9

1. Jurisdiction

Unlike Va. Code § 19.2-152.8 which grants authority to both types of District Courts and the Circuit Courts to grant Title 19.2 EPOs, Va. Code § 19.2-152.9, related to Title 19.2 PPOs, does not identify specifically the appropriate court for the filing of petitions. That section only uses the word “court.” Va. Code § 19.2-5 provides that the word “court”, as used in that title, shall mean any court vested with appropriate jurisdiction under the laws of the Commonwealth.

The substantial 2011 changes to Title 16.1 and Title 19.2 PO provisions occurred as the result of two comprehensive, identical legislative enactments. 2011 Acts of Assembly, Chapters 445 (SB 1222), 480 (HB 2063). The two types of protective orders are predicated on the same behavior, with the only difference being that if the petitioner and respondent are family or household members, the PO proceedings are under Title 16.1. Therefore, there is a plausible legal argument that whereas all PO proceedings between family or household members are under Title 16.1 in J&DR district court, Title 19.2 PO proceedings between adult parties are in general district court, while Title 19.2 proceedings when at least one of the parties is a juvenile are in J&DR district court. See Va. Code § 16.1-241(I) (“any violation of law that causes or tends to cause a child to come within the preview of [Chapter 11 of Title 16.1].”).

2. Procedure and Criteria – Va. Code § 19.2-152.9(A)

- a. The court may issue a PPO against the alleged perpetrator in order to protect the health and safety of the petitioner and family or household members of the petitioner, upon the filing of a petition alleging the following:
 - (i) the petitioner is or has been, within a reasonable period of time, subjected to an act of violence, force or threat; or
 - (ii) a warrant or petition has been issued for the arrest of the alleged perpetrator for any criminal offense resulting from the commission of any act of violence, force or threat.
- b. An *ex parte* PPO may be issued upon good cause shown. Evidence of immediate and present danger of any act of violence, force, or threat, or evidence sufficient to establish probable cause that any act of violence, force, or threat has recently occurred, shall constitute good cause for the issuance of an *ex parte* PPO. Evidence to support a petition for an *ex parte* PPO may be presented in any of the following manners:
 - (i) an affidavit;
 - (ii) sworn testimony before the judge; or
 - (iii) sworn testimony before the intake officer.

3. Terms of a PPO – Va. Code § 19.2-152.9(A) and (B)

- a. A Title 19.2 PPO may include any one or more of the following conditions to be imposed on the respondent:
- (i) prohibiting acts of violence, force, or threat, or criminal offenses that may result in injury to person or property;
 - (ii) prohibiting such other contacts by the respondent with the petitioner or the petitioner's family or household members as the court deems necessary for the health and safety of such persons; and
 - (iii) such other conditions as the court deems necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses that may result in injury to person or property, or (iii) communication or other contact of any kind by the respondent.

Va. Code § 19.2-152.9(A).

- b. The PPO shall specify a date for the full hearing, which shall be held within fifteen days of the issuance of the preliminary order, unless that hearing is continued for good cause on a motion of the respondent during which extended period the PPO shall continue in effect. Va. Code § 19.2-152.9(B).
- c. If the respondent fails to appear at the hearing because he or she was not personally served, the court may extend the PPO for up to six months.
- d. The extended PPO must be served as soon as possible on the respondent.
- e. The order shall specify that either party may at any time file a motion with the court requesting a hearing to dissolve or modify the order. The hearing on the motion shall be given precedence on the docket of the court. Va. Code § 19.2-152.9(B).

4. Effective Date – Va. Code § 19.2-152.9(C)

A PPO is effective upon personal service on the alleged perpetrator.

5. Service/VCIN/Copies of Order – Va. Code § 19.2-152.9(B)

- a. Upon receipt of the order by a local law-enforcement agency for service, the agency shall enter the name of the person subject to the order and other appropriate information required by the Department of State Police into VCIN.
- b. A copy of a PPO shall be served as soon as possible on the alleged perpetrator in person and, upon service, the agency making service shall enter the date and time of service into VCIN.
- c. Upon request after the order is issued, the clerk shall provide the petitioner with a copy of the order and information regarding the date and time of service.

- d. Upon receipt of the return of service or other appropriate proof of service, the clerk shall forward forthwith an attested copy of the PPO to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the State Police which was not previously entered. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested, forwarded and entered into VCIN.

E. Title 19.2 Protective Orders (PO)
Va. Code § 19.2-152.10

1. Jurisdiction

See Section III D. 1., above.

2. Procedure and Criteria

- a. A title 19.2 PO may be issued by the court to protect the health and safety of the petitioner and family or household members of the petitioner, upon:
 - (i) the issuance of a petition or warrant for, or a conviction of, any criminal offense resulting from the commission of any act of violence, force or threat; or
 - (ii) a hearing held pursuant to Va. Code § 19.1-152.9(D).

Va. Code § 19.2-152.10(A).
- b. The hearing referred to above shall be a full adversarial hearing, the occasion for which shall be specified by a PPO. Va. Code § 19.2-152.9(B) and (D).
- c. The Petitioner must prove the allegation that the Petitioner is, or has been, within a reasonable period of time, subject to an act of violence, force, or threat by a preponderance of the evidence. Va. Code § 19.2-152.9(D).
- d. If a PPO was issued, the hearing for the PO may only be continued on motion of the respondent and for good cause shown and, if granted, the PPO shall remain in effect until the hearing. Va. Code § 19.2-152.9(B). If the hearing is continued, the respondent should be served with a copy of the order continuing the hearing and continuing the PPO in effect, and the new date must be recorded in VCIN.
- e. If a PPO was issued, and the respondent fails to appear because the respondent was not personally served, the court may extend the PPO for a period of no more than six months and the extended PPO must be served on the respondent as soon as possible.
- f. No fees shall be charged for filing or serving any petition pursuant to this section. Va. Code § 19.2-152.10(I).

3. Terms of a PO – Va. Code § 19.2-152.10(A)

A PO may include any one or more of the following conditions to be imposed on the respondent:

- a. prohibiting acts of violence, force or threat or criminal offenses that may result in injury to person or property;
 - b. prohibiting such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons; and
 - c. any other relief necessary to prevent (i) acts of violence, force or threat, (ii) criminal offenses that may result in injury to person or property, or (iii) communication or other contact of any kind by the respondent.
4. Duration – Va. Code § 19.2-152.10(B)
- a. The PO may be issued for a specific period; however, unless otherwise authorized by law, a PO may not be issued for a period longer than two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified.
 - b. The PO may be extended for a period not longer than two years if, prior to the expiration of the protective order, a petitioner files a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. The court may extend the protective order to protect the health and safety of the petitioner or persons who are the petitioner's family or household members at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. There is no limit to the number of extensions that may be requested or issued.
5. Modification – Va. Code § 19.2-152.10(G)
- Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Such a hearing must take precedence over other proceedings.
6. Attorneys' Fees – Va. Code § 19.2-152.10(E)
- The court may assess costs and attorneys' fees against either party regardless of whether a PO has been issued as a result of a full hearing.
7. Service of Order/Entry into VCIN – Va. Code § 19.2-152.10(C)
- a. A copy of the Protective Order shall be served on the respondent and provided to the petitioner as soon as possible.
 - b. The court shall immediately, but in any case no later than the end of the business day on which the order was issued, enter and transfer electronically to VCIN the respondent's identifying information and the name, date of birth, sex, and race of each protected person. The court shall also forward forthwith an attested copy of the order to the local police department or sheriff's office which shall, on the date of receipt, enter into VCIN any other information required by the state police which was not previously entered.

- c. If the order is later dissolved or modified, a copy of the order of dissolution or modification shall also be attested by the clerk and forwarded as previously set out.

8. Medical Evidence – Va. Code § 19.2-245.1

See Section II. C. 10., above.

F. Violation of a Title 19.2 EPO, PPO, PO

1. Criminal Proceedings for Violations – Va. Code § 18.2-60.4

a. Class 1 Misdemeanor

In addition to any other penalty provided by law, any person who violates a Title 19.2 EPO, PPO or PO is guilty of a Class 1 misdemeanor.

b. Class 6 Felony

(i) Third Offense

The respondent shall be guilty of a Class 6 felony if the instant case is a third or subsequent violation of a protective order and

- the instant offense was committed within twenty years of the first conviction; and
- the instant offense or one of the prior offenses was based on an act or threat of violence.

(ii) Violations Involving Assault and Battery, Entering Furtively, or Remaining in the Home

In addition to any other penalty provided by law, if a respondent commits an assault and battery upon any party protected by a EPO, PPO, or PO, resulting in serious bodily injury to the party, or if a respondent violates such an EPO, PPO, or PO by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives, the respondent is guilty of a Class 6 felony.

c. Mandatory Sentence

(i) Second Offense

Any person convicted of a second offense of violation of a protective order, when the instant offense is committed within five years of the prior conviction and the instant or prior offense was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of sixty days.

(ii) Third Offense

In addition to being charged with a Class 6 felony, any person convicted of a third violation of a protective order, when the instant offense is committed within twenty years of the first conviction and the instant offense or any of the prior offenses was based on an act or threat of violence, shall be sentenced to a mandatory minimum term of confinement of six months.

(iii) First and All Other Offenses

Upon conviction for any offense of violation of protective order for which a mandatory sentence is not otherwise provided, in addition to any other appropriate sentence, the respondent shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended.

d. Required Entry of Protective Order

Upon conviction, the court shall enter a protective order pursuant to Va. Code § 19.2-152.10 for a specified period not exceeding two years from the date of the conviction.

e. Presumption Against Bail

Subject to rebuttal, it shall be presumed that, in relation to a person who is charged with a second or subsequent violation of a protective order pursuant to Va. Code § 18.2-60.4, no condition or combination of conditions could reasonably assure the appearance of the respondent or the safety of the public.

2. Contempt Proceedings for Violations

- a. Va. Code § 19.2-152.9(C) provides that, except as otherwise provided, a violation of a Title 19.2 PPO issued under that section shall constitute contempt of court. However, if the respondent is convicted in criminal proceedings based on allegations of the same act or acts alleged in the contempt proceedings, a finding of contempt is barred. Va. Code § 18.2-60.4.
- b. Va. Code § 19.2-152.10(D) provides that, except as otherwise provided, a violation of an acts of violence PO issued under that section shall constitute contempt of court. However, if the respondent is convicted in criminal proceedings based on allegations of the same act or acts alleged in the contempt proceedings, a finding of contempt is barred. Va. Code § 18.2-60.4.

G. Confidentiality in Title 19.2 EPO, PPO and PO Proceedings

No law-enforcement agency, attorney for the Commonwealth, court, clerk, or any employee of them may disclose, except among themselves, the residential address, telephone number, or place of employment of the person protected by the EPO, PPO, or PO or that of a family member of such person, except to the extent that disclosure is (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause. Va. Code §§ 19.2-152.8(H), -152.9(F), -152.10(H).

The Clerk of Court should use Forms DC-621, NON-DISCLOSURE ADDENDUM, and DC-622, SEALED DOCUMENTS, to maintain the confidentiality of the information in the court file. Procedures for maintaining that information separately or in a manner not susceptible to public disclosure should be developed by the Court. Care to maintain that confidentiality must also be taken when providing information to the Sheriff for service on the petitioner, in relation to any other case in which the address of the petitioner might otherwise be disclosed (e.g. a subpoena for the criminal case).

H. Firearm Issues Related to Domestic Violence, Stalking, and Other Acts of Violence

1. Virginia Law

Any person convicted of any assault, assault and battery, sexual battery, or stalking who holds a concealed handgun permit must forfeit the permit and surrender it to the court. Va. Code § 18.2-308(E), (J).

2. Federal Gun Control Act: Federal Prohibition Against Possessing Firearms or Ammunition by Domestic Violence Misdemeanants

a. Qualifying Misdemeanor Crime of Domestic Violence Conviction

Pursuant to § 922(g)(9) of Title 18, United States Code, it is unlawful for any person “who has been convicted in any court of a misdemeanor crime of domestic violence [MCDV]” to possess any firearm or ammunition. The term “misdemeanor crime of domestic violence” is defined as any state or federal misdemeanor that “has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shared a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. § 922(a)(33)(A).

- (i) *Any Misdemeanor Involving Use or Attempted Use of Physical Force or Threatened Use of Deadly Weapon.* While the U.S. Supreme Court has not yet weighed in on the interpretation of MCDV, a majority of federal circuits have construed MCDV to include “any misdemeanor conviction that has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and, at the time of commission, the victim was the perpetrator’s current or former domestic partner, parent, or guardian.” The Fourth Circuit, however, has interpreted that “the relationship status between the perpetrator and the victim must be an element of the predicate misdemeanor offense.” *United States v. Hayes*, 482 F.3d 749, 760 (4th Cir. 2007). In other words, in most federal circuits, a conviction under a general assault and battery statute would qualify as an MCDV if the evidence demonstrates that the requisite domestic relationship existed between the perpetrator and the victim at the time of commission. In contrast, applying the Fourth Circuit’s MCDV interpretation, conviction under a general assault and battery statute would not meet the MCDV definition because the requisite domestic relationship is not an expressed element of the crime.

b. No “Official Use” Exemption

There are no exemptions for government personnel (e.g., law enforcement) from the MCDV firearm restriction. 18 U.S.C. § 925(a)(1). They are subject to the prohibition in both their personal and official capacities.

c. The Requisite Domestic Relationship Under § 922(g)(9)

- (i) At the time of the commission of the qualifying misdemeanor, the convicted offender must be a:
- current or former spouse, parent or guardian of the victim;
 - person with whom the victim shares a child in common;
 - person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian; or
 - person who is similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33).
- (ii) The scope of relationships protected by § 922(g)(9) in misdemeanor criminal cases is different from the scope of relationships protected under § 922(g)(8) in protective order cases. As cited in *Hayes*, the plain meaning and legislative history of 18 U.S.C. § 922(g)(9) indicates that MCDV was intended to encompass child abuse. *See Hayes*, 482 F.3d at 757. The act of cohabitation does not create a qualifying relationship unless one cohabits with another “as a spouse, parent or guardian.”

d. Procedural Requirements

The MCDV firearm ban does not apply unless:

- (i) the defendant was represented by counsel, or knowingly and intelligently waived the right to counsel; and
- (ii) if the defendant is entitled to have the case tried by a jury, the case was actually tried by a jury or the defendant knowingly and intelligently waived the right to have the case tried by a jury; and
- (iii) the conviction was not expunged or set aside and the defendant was not pardoned for the offense. 18 U.S.C. § 921(a)(33).

e. Date of Prior MCDV Conviction

The federal MCDV prohibition on firearms applies to persons who were convicted of misdemeanor crimes of domestic violence at *any* time, even before passage of the law in September 1996. *See, e.g., U.S. v. Denis*, 297 F.3d 25, 32 (1st Cir. 2000).

f. Penalties

A knowing violation of these provisions of the Gun Control Act is punishable by a maximum penalty of ten years incarceration, or a maximum fine of \$250,000, or both. 18 U.S.C. § 924(a)(2), 3571. Actual knowledge of the prohibition is not required to demonstrate violation.

3. Notification of Firearm Prohibitions to Qualifying Domestic Violence Misdemeanants

The Virginia Department of Criminal Justice Services (DCJS), with the assistance of the Supreme Court of Virginia, Office of the Executive Secretary (OES), has developed a pamphlet concerning the federal MCDV firearms law. As qualifying convictions may be difficult to identify or track, the district courts will be provided with a recommended policy of distribution when certain misdemeanor convictions involve current or former members of the same household or related individuals, for example: simple assault, assault and battery, assault against a family/household member, marital sexual assault, sexual battery, or stalking.

More specifically, Virginia “misdemeanor crimes of domestic violence” that are likely to meet the criteria set forth in 18 U.S.C. § 922(g)(9) (by definition set forth in 18 U.S.C. § 921(a)(33)(A)(i)) include: general assault and battery, § 18.2-57; assault against family/household member, §§ 18.2-57.2, -57.3; simple assault, § 18.2-57; marital sexual assault, § 18.2-67.2:1; sexual battery, § 18.2-67.4; attempt to commit misdemeanor (previously listed), § 18.2-27; and attempted sexual battery, § 18.2-67.5(C).

I. Full Faith and Credit for Out-of-State Orders of Protection

1. Foreign Protective Orders

Va. Code § 19.2-152.10(F) permits a person entitled to protection under a temporary or permanent order of protection issued by another state or the District of Columbia to file an attested or exemplified copy of that order of protection with the clerk of the appropriate district court. Foreign POs are entitled to full faith and credit in Virginia, provided reasonable notice and opportunity to be heard were given by the issuing jurisdiction to the person against whom the order is sought to be enforced sufficient to protect such person's due process rights and consistent with federal law.

2. Foreign Protective Orders to be Entered into VCIN

Upon filing in accordance with Va. Code § 19.2-152.10(F), the clerk shall forward forthwith an attested copy of the Order to the local police department or sheriff's office which shall, on the date of receipt, enter the name of the person subject to the order and other appropriate information required by the State Police into VCIN. Va. Code § 19.2-152.10(F).

3. Copies of Foreign Protective Orders and Law Enforcement Officer's Reliance

Upon inquiry by any law-enforcement agency of the Commonwealth, the clerk shall make a copy available of any foreign order filed with that court. A law-enforcement officer may, in the performance of his duties, rely upon a copy of a foreign protective order or other suitable evidence which has been provided to him by any source and may also rely upon the statement of any person protected by the order that the order remains in effect. Va. Code § 19.2-152.10(F).

4. Full Faith and Credit to be Granted to Virginia Orders

An order of protection granted by a court in Virginia is to be enforced by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands. 18 U.S.C. § 2265.

J. Appeal of Family Abuse or Title 19.2 PO

A family abuse PO or a Title 19.2 PO is not required to be suspended pending appeal and the district court judge may choose to continue such an order in effect. Va. Code § 16.1-298(B) (applicable to family abuse POs); Va. Code § 16.1-106 (applicable only to protective orders issued under § 19.2-152.10). Pursuant to those provisions, the circuit court, or the Court of Appeals or Supreme Court, on writ of supersedeas, may suspend such an order pending appeal.

IV. ADULT CRIMINAL CASES INVOLVING DOMESTIC VIOLENCE

A. Law Enforcement Officers and Domestic Violence Charges – Va. Code § 19.2-81.3

1. Arrest Without a Warrant – Va. Code § 19.2-81.3(A)

Any law enforcement officer may make an arrest without a warrant for violations of Va. Code § 18.2-57.2 (assault and battery of a family or household member); Va. Code § 18.2-60.4 (violation of any Title 19.2 protective order) and Va. Code § 16.1-253.2 (violation of any family abuse protective order), regardless of whether the violation of law was committed in the presence of the officer, based on probable cause or upon the reasonable complaint of a person who observed the alleged offense or upon personal investigation.

2. Mandatory Arrest in Domestic Assault and Battery and Violation of Protective Order Cases – Va. Code § 19.2-81.3(B), (C)

- a. A law enforcement officer having probable cause to believe that a violation of Va. Code § 18.2-57.2 or § 16.1-253.2, or that a violation of § 18.2-60.4 involving physical aggression, has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the circumstances, was the predominant physical aggressor, unless there are special circumstances which would dictate a course of action other than arrest.
- b. The standards for determining who is the predominant physical aggressor shall be based on the considerations set forth in § 19.2-81.3(B) and (C), including, but not limited to, (i) who was the first aggressor, (ii) the protection of the health and safety of family and household members, (iii) prior complaints of family abuse by the allegedly abusing person involving family or household members, (iv) the relative severity of the injuries inflicted on persons involved in the incident, (v) whether any injuries were inflicted in self-defense, (vi) witness statements, and (vii) other observations.

3. Required Report – Va. Code § 19.2-81.3(D)

Regardless of whether an arrest is made, the officer shall file a written report with his department, which shall state whether any arrests were made, and if so, the number of arrests specifically including any incident in which he has probable cause to believe family abuse

has occurred, and, where required, including a complete statement in writing that there are special circumstances which would dictate a course of action other than arrest. Upon request of the allegedly abused person or person protected by the order, the department shall make a summary of the report available to the allegedly abused person or person protected by the order.

4. Family Abuse EPO Required – Va. Code § 19.2-81.3(E)

- a. In every case in which a law-enforcement officer makes an arrest under Va. Code § 18.2-57.2, the officer shall petition for an EPO when the person arrested and taken into custody is brought before a magistrate.
- b. Regardless of whether an arrest is made, if the officer has probable cause to believe that a danger of acts of family abuse exists, the law enforcement officer shall seek a family abuse EPO under Va. Code § 16.1-253.4.
- c. If the person arrested or the potential perpetrator of family abuse is a minor, an EPO shall not be required.

5. Assistance to the Victim – Va. Code § 19.2-81.3(D) and (F)

- a. The officer shall also provide the allegedly abused person, both orally and in writing, information regarding the legal and community resources available to the allegedly abused person. Va. Code § 19.2-81.3(D).
- b. A law enforcement officer investigating any complaint of family abuse, including but not limited to assault and battery against a family or household member may, upon request, transport, or arrange for the transportation of an abused person to a hospital, safe shelter, or magistrate. Any local law enforcement agency may adopt a policy requiring the same. Va. Code § 19.2-81.3(F).

B. Assault and Battery Against a Family or Household Member – Va. Code § 18.2-57.2

1. Misdemeanor – Va. Code § 18.2-57.2(A)

Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.

2. Felony – Va. Code § 18.2-57.2(B)

Where it is alleged in the warrant, petition, information, or indictment that a person has been previously convicted of two offenses against a family or household member of assault and battery in violation of Va. Code § 18.2-57.2, malicious wounding, aggravated malicious wounding, malicious bodily injury by means of a substance, or an offense under the law of any other jurisdiction which has the same elements of any of the above offenses, in any combination, within the past 20 years, each occurring on a different date, such person is guilty of a Class 6 felony.

3. Magistrate Must Issue an EPO – Va. Code § 18.2-57.2(C)

Whenever a warrant for a violation of this section is issued, the magistrate shall issue a family abuse EPO, except if the defendant is a minor in which case an ERO is not required.

4. Deferral of Proceedings for First Time Offenders – Va. Code § 18.2-57.3

a. Decision to Defer

If a defendant charged with assault and battery of a family or household member pleads guilty, nolo contendere, or not guilty and the court finds that the facts are sufficient to justify a finding of guilt, without entering a judgment of guilt, the court may defer further proceedings and place the defendant on probation upon terms and conditions, if:

- (i) the defendant was an adult at the time of the offense;
- (ii) the defendant has not previously been convicted of any offense under the laws of Virginia, the United States, or any local government relating to assault and battery against a family or household member or has not previously had a proceeding against him for violation of such an offense dismissed as provided in Va. Code § 18.2-57.3; and
- (iii) the defendant consents to a ruling under this provision. (It must be noted that by proceeding under this deferral provision, the defendant would waive his or her right to an immediate appeal as a final judgment in the case would be deferred for two years, or earlier upon a violation of the deferral conditions.)

b. Terms and Conditions

- (i) The court may require the defendant to be assessed or evaluated and, based on the results of that assessment or evaluation, require the defendant to enter and successfully complete any recommended education or treatment programs. When assessment or evaluation services are not available, the court may require the defendant to enter and successfully complete any education or treatment programs as the court may determine may be best suited to the needs of the defendant. Those programs may include, but are not limited to, batterer intervention programs, alcohol and/or substance abuse treatment, and parenting education programs.
- (ii) The court may order the defendant to be placed in a local community-based probation program, if available.
- (iii) The court shall order the defendant to be of good behavior for a period of not less than two years following the deferral of the proceedings, including the period of supervised probation, if applicable.

c. Violation of Terms or Conditions

Upon violation of a term or condition of supervised probation or of the period of good behavior, the court may enter an adjudication of guilt and proceed as otherwise provided.

d. **Fulfillment of Terms and Conditions**

Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the defendant. The discharge and dismissal of the proceedings pursuant to Va. Code § 18.2-57.3 shall be without a finding of guilt and is a conviction only for the purposes of applying the provisions of Va. Code § 18.2-57.3 in any subsequent proceedings. No charges dismissed pursuant to Va. Code § 18.2-57.3 shall be eligible for expungement.

e. **Any Deferrals or Dismissals Must Comply with the Provisions of Va. Code § 18.2-57.3**

Due to the enactment of Va. Code § 18.2-57.3, the court has no authority to use any other method or conditions to defer or continue for dismissal a charge of assault and battery of a family or household member. Strict compliance with that statutory provision is required.

Opinion of the Virginia Attorney General, March 31, 2005.

5. **Protective Order and Other Conditions and Limitations in Addition to Sentence**

Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

6. **Reporting to the Military**

Va. Code § 18.2-57.4 requires the court to report the conviction of any active duty member of the United States Armed Forces to family advocacy representatives of the United States Armed Forces.

C. Stalking When Family and Household Members are Victims

1. **Misdemeanor – Va. Code § 18.2-60.3(A)**

Any person who on more than one occasion engages in conduct directed at a person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor.

2. **Felony – Va. Code § 18.2-60.3(B)**

A third or subsequent conviction of stalking occurring within five years of a conviction of stalking or for a similar offense under the law of any other jurisdiction shall be a Class 6 felony.

3. Cases Involving Family and Household Members to be Heard by the Juvenile and Domestic Relations District Court

Pursuant to Va. Code § 16.1-241(J), the Juvenile and Domestic Relations District Court shall have jurisdiction over all stalking or other criminal cases in which one family or household member is charged with an offense in which another family or household member is the victim. In such cases, the trial of the misdemeanor or the preliminary hearing of the felony will be heard in the Juvenile and Domestic Relations District Court.

4. Location of Criminal Conduct – Va. Code § 18.2-60.3(C)

If the defendant engaged in stalking conduct as described in Va. Code § 18.2-60.3(A) on at least one occasion in the jurisdiction where the defendant is tried, the defendant may be convicted irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct occurred. Evidence of incidents of such conduct that occurred outside of the Commonwealth may be admissible, if it is relevant and the case is based on conduct occurring within the Commonwealth.

5. Protective Order and Other Conditions and Limitations in Addition to Sentence

a. Mandatory No Contact Order

Va. Code § 18.2-60.3(D) requires that an order prohibiting contact between the defendant and the victim or the victim's family or household members be entered by the court upon a finding of guilt in addition to any sentence imposed.

b. Protective Order and Other Conditions and Limitations in Addition to Sentence

Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

6. Notice to Victim of Release or Escape from Incarceration – Va. Code § 18.2-60.3(E)

Notice shall be given to any stalking victim or other person designated to receive notice of the release or escape of any defendant incarcerated for stalking, if the victim requests such notice in writing and keeps the relevant authority informed of the current mailing address and telephone number of the person to be notified. The notice is to be given by the Department of Corrections, sheriff or regional jail director depending on the institution in which the defendant is incarcerated. Notice of release for a sentence of more than thirty days shall be given at least fifteen days prior to release. Notice of release for a sentence of at least forty-eight hours but no more than thirty days shall be given at least twenty-four hours prior to release. Notice of escape shall be given as soon as practicable following the escape.

7. Confidentiality – Va. Code § 18.1-60.3(E)

All information regarding a person to receive notice pursuant to Va. Code § 18.2-60.3(E) shall remain confidential and shall not be made available to the defendant.

D. Violations of Family Abuse and Title 19.2 Protective Orders

Criminal charges for violations of family abuse and Title 19.2 protective orders are discussed previously in relation to those particular orders. See Sections II. D. 1. and III. G. 1., above.

E. Other Adult Criminal Charges Involving Domestic Violence

1. Types of Offenses

There are many other criminal charges that may involve domestic violence or family abuse, including, but not limited to, murder, malicious wounding, rape, sexual battery, abduction, weapons offenses (e.g., brandishing), telephone abuse, and property crimes (e.g., destruction of property, unlawful entry, unauthorized use of a vehicle).

2. Considerations for Sentencing

When determining the appropriate sentence to impose in cases involving domestic violence, special consideration must be given to the nature of the relationships of the parties, the potential for further domestic violence, the impact on any children in the household, and any motive or cause for the conduct involved in the offense.

3. Protective Order and Other Conditions and Limitations in Addition to Sentence

Va. Code § 16.1-278.14 provides that in cases of violation of any law involving offenses committed by one family or household member against another, the Juvenile and Domestic Relations District Court, in addition to any penalty, may impose conditions and limitations upon the defendant to protect the health and safety of family or household members, including, but not limited to, a protective order as provided in Va. Code § 16.1-279.1, treatment and counseling for the defendant and payment by the defendant for crisis shelter care for the complaining family or household member.

V. FACTORS TO CONSIDER IN ALL DOMESTIC VIOLENCE CASES

A. Domestic Violence is About Power and Control

1. Domestic violence is a learned behavior and is rarely caused by substance abuse, genetics, stress, illness, or problems in the relationship. However, those factors are often used as an excuse for the behavior and may exacerbate the violence.
2. Domestic violence is usually a part of a pattern of assaultive or controlling behaviors, which may vary depending on the circumstances.

B. Factors to Consider as to the Level of Danger Posed by a Particular Respondent

1. Suicidal or homicidal ideation, whether threatened or attempted.
2. Escalation in frequency or severity of behaviors.
3. Prior criminal behavior or injunctions, or prior similar activities (although evidence of prior acts and behaviors may be objected to as not relevant; such evidence may be relevant to assess the current danger and risk, as well as provide evidence of intent, identity, lack of accident, motive, knowledge, plan or pattern of behavior).

C. Common Attitudes and Conduct Exhibited by Perpetrators of Domestic Violence

1. Consistent attempts to control victim.
2. Minimization and denial of own behavior; placement of blame on victim or others.
3. Low self-esteem.
4. Jealousy and possessiveness.
5. Intimidation.
6. Dependency on victim.
7. Appearance of being very amiable and likeable in Court.
8. Promises that the behavior will never recur.