

## CHAPTER 4—MAGISTRATE’S ORDER OF EMERGENCY PROTECTION—PART I: STATUTES AND CASE LAW

[\(Tex. Code Crim. Proc. arts. 17.291, 17. 292, and 17. 293\)](#)

**Note:** 2013 legislative changes are noted in red.

### Summary:

After an arrest for certain offenses, there are two situations in which a magistrate can issue an order of emergency protection for the victim and the victim’s family or household members. One is discretionary, the other mandatory.

The purpose of the magistrate’s order is to prevent the defendant from inflicting further harm on the victim after the defendant is released from confinement. The magistrate’s order differs from a [Tex. Fam. Code Title 4](#) protective order in that the former does not require a hearing, does not require the defendant and the victim to have a specific relationship (and can be issued to protect the victim from a stranger), and is issued before the defendant is released from jail. Unlike the protective orders available under Tex. Code Crim. Proc. chapter 7A (sexual assaults) and article 6.08 (crimes motivated by bias or prejudice), the magistrate’s order is available to victims of several different types of offenses. The magistrate’s order should complement the conditions of bond set for the defendant.

**Discretionary.** After a person is arrested for an offense involving family violence, sexual assault, aggravated sexual assault, or stalking, the magistrate *may* issue an order of emergency protection before the defendant is released from custody.

**Mandatory.** After an arrest for an offense that involved family violence with serious bodily injury or involved display or use of a deadly weapon, and before the defendant is released, the magistrate *shall* issue an order of emergency protection.

The magistrate’s order is criminally enforceable. Violation of the order is a Class A offense under [Tex. Penal Code § 25.07](#).

### 4.1 *Predicate offenses.*

A magistrate’s order of emergency protection can issue after an arrest for a violation of:

- [Tex. Penal Code § 22.11](#) (sexual assault);

- [Tex. Penal Code § 22.021](#) (aggravated sexual assault);
- [Tex. Penal Code § 42.072](#) (stalking);

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**OR**

- any offense involving family violence.<sup>1</sup>

([Tex. Code Crim. Proc. art. 17.292\(a-b\)](#))

## **4.2 *Standing to apply.***

The order can issue on the magistrate’s own motion or upon the request of the:

- victim;
- victim’s guardian;
- a peace officer;

**OR**

- the state’s attorney.

([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

## **4.3 *Hearing.***

A hearing is not required before a magistrate’s order may issue.<sup>2</sup> The statute does not address whether the order can exclude the defendant from the defendant’s residence.

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<sup>1</sup> In this context, “family violence” is defined as:

(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(2) abuse, as that term is defined by [Tex. Fam. Code § 261.001](#)(C), (E) and (G), by a member of a family or household toward a child of the family or household;

**OR**

(3) dating violence. ([Tex. Fam. Code § 71.004](#))

<sup>2</sup> *Ex parte* Flores, [130 S.W.3d 100](#) (Tex. App.—El Paso 2003, pet. ref’d). [Tex. Code Crim. Proc. art 17.292](#) is not unconstitutional because it does not require a hearing be held before the magistrate’s order of emergency protection

However, if the court is asked to do this, the best practice is to hold a hearing on at least that issue to satisfy due process.

#### **4.4 *Discretionary order.***

A magistrate's order *may* be issued after an arrest for an offense involving family violence, sexual assault, aggravated sexual assault or stalking.

([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

#### **4.5 *Mandatory order.***

After an arrest for an offense involving family violence, an emergency order of protection **must** be issued if the magistrate finds the offense also involved:

- serious bodily injury to the victim;
- the use of a deadly weapon during an assault;<sup>3</sup>

**OR**

- the exhibition of a deadly weapon during an assault.

([Tex. Code Crim. Proc. art. 17.292\(a\)](#))

#### **4.6 *Scope of the order.***

To protect the victim, the magistrate may order the arrested person not to:

- commit family violence;
- stalk another person, including the victim;
- communicate directly or indirectly in a threatening or harassing manner with a member of the victim's family or household (including the victim);

**OR**

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can issue. Prompt assumption of judicial control following a violent incident outweighs the need for an adversarial proceeding.

<sup>3</sup> [Tex. Penal Code § 1.07](#)(17) defines deadly weapon as (1) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (2) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

- go near the residence, work place, residence, school, or child-care facility of the victim or a member of the victim’s family or household.

The magistrate’s order **must**:

- suspend the defendant’s concealed handgun license;

**AND**

- prohibit the defendant from possessing a firearm (unless the alleged offender works full time as a licensed peace officer) for the duration of the order.

**NOTE:** A copy of the order should be forwarded to the DPS Concealed Handgun Licensing division. The federal authorities request that order contain a “Brady marker,” which is some notation or finding that the respondent is subject to the prohibitions on firearm possession under [18 U.S.C. ch. 44](#). See chapter 14.

([Tex. Code Crim. Proc. art. 17.292\(c\), \(c-1\) and \(l\)](#); [Tex. Penal Code § 46.04](#); [18 U.S.C. § 922\(g\)](#))

#### **4.7 Contents of the order**

The magistrate’s order should include:

- one of the following **findings**:
  - that the defendant was arrested for an offense involving family violence or the offense of sexual assault, aggravated sexual assault, or stalking;

**OR**

- that the defendant was arrested for an offense involving family violence that resulted in either serious bodily injury to the victim, the use of a deadly weapon during an assault, or the exhibition of a deadly weapon during an assault;
- **ordering language**, including:
  - **stay away provisions**: require the defendant to avoid designated locations and the protected persons:
    - if the person subject to the order must stay away from certain places, specifically describing the locations and the minimum distance that the defendant must maintain from those locations;

**OR**

- if due to safety concerns, those prohibited locations cannot be disclosed, state that the defendant is subject to re-arrest for going to or near locations where the persons protected by the order live or work even without specific notice of those locations;
- **concealed handgun license:** language that suspends the defendant’s license to carry a concealed handgun;
- **possession of a firearm:** language that orders the defendant not to possess a firearm during the term of the order;
- **global positioning monitoring:** if applicable, an order that the defendant person participate in a global monitoring system pursuant to [Tex. Code Crim. Proc. art. 17.49\(b\)](#);
- **in the event of a conflict with another order:**
  - **prior child custody orders:** a statement that if there is a *prior* court order regarding access to, or possession of, a child, the magistrate’s order should state that it prevails to the extent there is a conflict with the prior order;
  - **subsequent permanent (final) Family Code protective orders:** a statement that a *subsequent* order issued under [Tex. Fam. Code Titles 1](#) (divorce) or 5 (SAPCR) or [Tex. Fam. Code ch. 85](#) (final family violence protective order) prevails over the magistrate’s order unless the Tex. Fam. Code order states otherwise;
  - **a subsequent temporary *ex parte* family violence protective order:** a statement that the magistrate’s order prevails over a *subsequently* issued [Tex. Fam. Code ch. 83](#) temporary *ex parte* family violence protective order unless the subsequent order contains a specific finding to the contrary.
- **notice of the order and warning:**
  - a statement that a copy of the order will be provided to the child-care facility or school of a child protected under the order;
  - a statement that a copy of the order will be provided to the law enforcement agency having jurisdiction over the residence of the persons protected by the order;

**AND**

- the following warning in bold type or all capital letters:

**“A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000 OR**

BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE OR A STALKING OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER.”

[\(Tex. Code Crim. Proc. art. 17.292\(c\)-\(i\)\)](#)

NOTE: The order should inform the respondent of the deadline for surrendering firearms and ammunition. The respondent should be told where and how to surrender weapons to law enforcement or another entity and how to present proof to the court that the surrender has occurred.

## **4.8 Service; effective date; duration; modification.**

### **4.8.1 Service.**

The order shall be served on the defendant in open court.<sup>4</sup> **For orders issued on or after May 15, 2013, a copy of the order shall be served by the magistrate or the magistrate’s designee in person or electronically, and the magistrate shall make a separate record of the service in written or electronic format.** ([Tex. Code Crim. Proc. art. 17.292\(j\)](#))

**NOTE:** The order can issue without the victim’s presence in the courtroom.

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<sup>4</sup> *Hernandez v. State*, No. 01-02-0986-CR, [2003 Tex. App. Lexis 6190](#) (Tex. App.—Houston [1<sup>st</sup> Dist.] July 17, 2003, pet. ref’d). Whether the defendant read the magistrate’s order of emergency protection or not, testimony that the signature on the order matched the defendant’s signature was sufficient to show notice of the order and once notified, the defendant was responsible for knowing the order’s contents. Accord, *McGregor v. State*, No. 05-02-0993-CR, [2003 Tex. App. Lexis 9270](#) (Tex. App.—Dallas Oct. 30, 2003, pet. ref’d).

#### **4.8.2 Effective date.**

The order is effective upon issuance, which is the date that the order is signed.

[\(Tex. Code Crim. Proc. art. 17.292\(j\)\)](#)

#### **4.8.3 Duration.**

- Discretionary order or mandatory order for serious bodily injury:
  - minimum length—31 days;
  - maximum length—61 days.
- Mandatory order for using or exhibiting a deadly weapon:
  - minimum length—61 days;
  - maximum length—91 days.

[\(Tex. Code Crim. Proc. art. 17.292\(j\)\)](#)

#### **4.8.4 Modification.**

After notice to all affected parties and a hearing, the issuing court may modify the order upon a finding that:

- the original order is unworkable;
- AND**
- modification will not increase the risk to the victim;
- AND**
- modification will not endanger a person protected under the order.

[\(Tex. Code Crim. Proc. art. 17.292 \(d\) and \(j\)\)](#)

#### **4.8.5 Transfer of jurisdiction.**

Upon motion, notice, and hearing or by agreement of the parties, jurisdiction over the magistrate's order may be transferred to the court having jurisdiction over the criminal offense that precipitated issuance of the magistrate's order. The receiving

court may make the same modifications to the preexisting the order that the issuing court can make.

[\(Tex. Code Crim. Proc. art. 17.292\(n\)\)](#)

#### **4.9 Notice to other persons.**

The issuing court shall provide a copy of the order to all of the following:

- the victim (by delivery through law enforcement within 24 hours after issuance if the victim is not present when the order issues);
- the child-care facility or school of any child protected by the order;
- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Licensing Division;

**AND**

- the local law enforcement agency (**either** the police department **or** the sheriff's office but not the Department of Public Safety) with jurisdiction over the protected person's residence. This copy of the order must be accompanied by a completed DPS protective order data entry sheet (see § 19.11).

[\(Tex. Code Crim. Proc. art. 17.292; Tex. Code Crim. Proc. art. 17.293\)](#)

#### **4.10 Enforcement.**

A violation of a magistrate's order of emergency protection is a Class A misdemeanor offense under [Tex. Penal Code § 25.07](#).

#### **4.11 Further detention.**

If there is probable cause to believe that the defendant's immediate release will result in further violence, then after bond is granted:

- the head of the agency arresting or holding the defendant may *sua sponte* hold the defendant an additional 4 hours;
- the magistrate may order the defendant held for up to 24 hours upon making a finding that violence would continue upon release;
- the magistrate may order the defendant held for up to 48 hours if:



- in the 10 years preceding the arrest, the defendant had more than one arrest for a family violence offense;

**OR**

- during commission of, or flight from commission of the offense, the defendant used or exhibited a deadly weapon.

**NOTE:** Upon application of the state’s attorney, the magistrate may postpone the defendant’s release on bond for up to 72 hours after arrest. ([Tex. Code Crim. Proc. art. 17.033\(c\)](#)). See § 8.4.

([Tex. Code Crim. Proc. art. 17.291](#))

#### **4.12 *Notice of pending release.***

Before releasing a person who has been arrested for a family violence offense or who is being held without warrant to prevent family violence, the law enforcement agency holding the person shall make reasonable attempts to notify the victim.

([Tex. Code Crim. Proc. art. 17.29](#))

#### **4.13 *Global position monitoring.***

In the magistrate’s order, the court can order that the defendant participate in a global position monitoring system. The victim can also be offered an opportunity to participate in the monitoring system. See § 8.5.2.

([Tex. Code Crim. Proc. art. 17.292\(c-1\)](#); [Tex. Code Crim. Proc. art. 17.49](#))

#### **4.14 *Confidentiality of victim’s identity.***

The victim of an offense may file a request for pseudonym form (developed by the state attorney general’s office) requesting that a pseudonym be used instead of the victim’s name in all public files and records concerning the offense, including records of judicial proceedings. Once the form is filed with law enforcement, the law enforcement agency must honor the request and provide notice of the filing to the state’s attorney. After receiving notice of the filing, the state’s attorney is thereafter responsible for ensuring that the pseudonym is used in all legal proceedings concerning the offense.

([Tex. Code. Crim. Proc. art. 57D.02](#))