

## CHAPTER 5A—PROTECTIVE ORDERS FOR STALKING VICTIMS (Article 6.09)—PART I: STATUTES AND CASE LAW

[\(Tex. Code Crim. Proc. Art. 6.09;](#)

[Tex. Fam. Code Title 4\)](#)

### Summary:

At any proceeding before a court related to an offense under [Texas Penal Code § 42.072](#) (stalking), the court may issue a protective order upon finding that reasonable grounds exist to believe that the applicant is a victim of stalking by the defendant.

Except as specified in Article 6.09, the procedures in Texas Family Code Title 4 control in an Article 6.09 proceeding.

As of September 1, 2011, there are two statutes that a stalking victim may invoke to obtain a protective order—Texas Code of Criminal Procedure article 6.09 and article 7A. Both orders are available regardless of the victim’s relationship with the alleged offender. However, an Article 6.09 order is available only if a court is considering a formal allegation of criminal conduct by the person to be restrained. An Article 7A order is available regardless of whether a criminal charge is filed.

A violation of an Article 7A order is a Class A misdemeanor under [Tex. Penal Code § 38.112](#). There is no criminal penalty associated with a violation of an Art. 6.09 protective order. Possession of a firearm while restrained by an Article 6.09 order does not violate [Tex. Penal](#)

[Code § 46.04](#) but, depending what the order prohibits and whom it protects, firearms possession by the restrained party may violate [18 U.S.C. § 921](#).<sup>1</sup> (See Chapter 14).

This chapter discusses the Article 6.09 stalking victim’s protective order. The Article 7A stalking victim’s protective order is discussed in Chapter 5 above.

## **5A.1 Eligibility; jurisdiction; venue.**

A stalking victim<sup>2</sup> is eligible for a protective order under Tex. Code Crim. Proc. Art. 6.09, regardless of the relationship between the victim and the alleged offender, when the person to be restrained has appeared in a court at a proceeding related to conduct that constitutes stalking in violation of [Tex. Penal Code § 42.072](#).

### **5A.1.1 Controlling law.**

Except as otherwise stated in Article 6.09, a proceeding under this chapter is controlled by Texas Family Code Title 4.

[\(Tex. Code Crim. Proc. art. 6.09\)](#)

### **5A.1.2 Standing to apply.**

[Tex. Code Crim. Proc. art. 6.09](#) states that “a person” may request a protective order under this statute. Reading “person” in the context of the applicable provisions in Texas Family Code Title 4, the potential applicants include:

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<sup>1</sup> [18 U.S.C. § 921](#) makes it an offense to possess a firearm while restrained by a protective order, which is defined in [18 U.S.C. § 922\(g\)\(8\)](#) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly 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 injury.

<sup>2</sup> As used in this section the term “sexual assault victim” includes a victim of the offense of indecency with a child.

- (1) the victim;
- (2) an adult member of the victim's family or household;

**OR**

- (3) the prosecuting attorney of the county where either the applicant or the defendant resides.

[\(Tex. Code Crim. Proc. art. 6.09 \(a\); Tex. Fam. Code § 82.002\).](#)

### **5A.1.3 Jurisdiction.**

By implication, jurisdiction lies in the court where the associated criminal case is pending. The statute lists the following courts as having jurisdiction:

- (1) constitutional county court;
- (2) statutory county court;

**OR**

- (3) district court.

[\(Tex. Code Crim. Proc. art. 6.09\(a\)\)](#)

### **5A.1.4 Venue.**

The statute does not specifically state where venue lies, but venue necessarily follows the associated criminal case.

[\(Tex. Code Crim. Proc. art. 6.09\)](#)

### **5A.1.5 Contents of the application.**

The application must contain:

- the name and county of residence of the applicant and defendant;
- a detailed description of the relevant facts establishing the applicant is a victim of stalking by the alleged offender;
- an allegation that the defendant has appeared in court to answer to a charge of stalking under [Tex. Penal Code § 42.072](#) (stalking) against the applicant;
- a statement that the application for protective order is filed in the same county where the defendant's criminal charge was filed;

**AND**

- a request for a protective order.

[\(Tex. Code Crim. Proc. art. 6.09; Tex. Fam. Code § 82.009\)](#)

### **5A.1.6 Fees.**

#### **5A.1.6.1 No fees for applicant.**

An applicant may **NOT** be assessed fees, costs, or other charges in connection with the filing, serving, entering, or transferring of a protective order. This prohibition covers motions to dismiss, modify, or withdraw a protective order, certified copies of the order, court reporter or judicial fund fees, and any other fee associated with a protective order.

[\(Tex. Fam. Code § 81.002\)](#)

#### **5A.1.6.2 No fees for alleged offender.**

Although Title 4 of the Tex. Fam. Code authorizes assessment of fees (including attorney’s fees), the assessment is tied to a finding that the person committed family violence, a finding that may be inapplicable to a protective order under Art. 6.09. Therefore, absent a finding of family violence, there is *no direct statutory authority permitting the assessment of fees or other costs against the alleged offender in this type of hearing.*

### **5A.2 Temporary order.**

As discussed above, it is unclear whether the legislature meant for temporary *ex parte* protective orders to be available in Article 6.09 proceedings. Article 6.09 does not mention temporary orders so the only authority for a temporary order derives from the authorization of such orders in Family Code Title 4.<sup>3</sup>

**NOTE:** Should the court contemplate issuing a temporary protective order in an Art. 6.09 proceeding, the applicant will need to submit a sworn statement and the issue of the proper finding must be considered. It is unclear whether the Art. 6.09 probable cause findings supplement or replace the “clear and present danger” finding required by Family Code § 83.001 for a temporary order. To the extent one finding is not subsumed in the other, the better practice may be to include both findings (e.g., a probable cause finding and a clear and present danger finding). If a temporary order is contemplated, the applicant will have to submit a sworn statement supporting the application.

[\(Tex. Code Crim. Proc art. 6.09; Tex. Fam. Code § 83.001; Tex. Fam. Code § 83.002; Tex. Fam. Code § 83.003; Tex. Fam. Code § 83.004; Tex. Fam. Code § 83.005; Tex. Fam. Code § 83.006; Tex. Fam. Code § 85.001\)](#)

### **5A.3 Hearing.**

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<sup>3</sup> In comparison, see Texas Code Criminal Procedure article 7A.01, which is also governed by Tex. Fam. Code Title 4 but contains a specific provision for temporary orders.

Art. 6.09 does not specifically address the issues of notice, settings, continuances, answers, agreed or separate orders, or defaults so Family Code Title 4 controls the applicable procedures.

### **5A.3.1 Minimum notice period for hearing.**

The defendant is entitled to at least 48 hours prior notice of the hearing date and time, and the defendant's request for a resetting for failure to give the minimum notice must be granted.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

### **5A.3.2 Initial setting for hearing.**

The initial setting for the hearing must be:

- no later than the 14<sup>th</sup> day after the protective order application was filed for all courts **EXCEPT**
- in *district courts* that cover multiple counties or in district courts in counties over 2 million in population, the hearing may, upon request of the applicant's representative, be set no later than the 20th day after the application was filed.

[\(Tex. Fam. Code § 84.001; Tex. Fam. Code § 84.002\(a\)\)](#)

### **5A.3.3 Resetting the hearing for insufficient notice.**

If the defendant is not served with notice of hearing at least 48 hours before the scheduled hearing time, either the applicant or the defendant may request the hearing be rescheduled for a date that is:

- within 14 days of the date the request was made;

**OR**

- within 20 days of the request for cases in the district courts in counties with a population over 2 million or that cover multiple counties.

[\(Tex. Fam. Code § 84.003; Tex. Fam. Code § 84.004\)](#)

#### **5A.3.4 Continuances.**

The court has discretion over whether to grant a legislative continuance requested pursuant to [Tex. Civ. Prac. & Rem. Code § 30.003](#). See § 3.4.

[\(Tex. Fam. Code § 84.005\)](#)

#### **5A.3.5 Order based on agreement.**

Article 6.09 refers only to “protective orders,” not to “order based on the parties’ agreement” (a.k.a. “agreed orders”). Tex. Fam. Code Title 4 protective orders are slightly different from “agreed orders” so it is debatable that the procedure for “agreed” orders set out in Chapter 85 of the Family Code should be utilized in the context of Article 6.09 protective orders. If the court finds that an agreed order is appropriate under Article 6.09, it should follow the procedures set out in Chapter 85 of the Family Code. See Chapter 3.

[\(Tex. Fam. Code § 85.005; Tex. Fam. Code § 85.021\)](#)

#### **5A.3.6 Separate or “mutual” protective orders.**

There is no authority for entering a separate or “mutual” protective order that imposes criminally enforceable provisions against an applicant.<sup>4</sup>

#### **5A.4 Answer.**

A defendant may, but is not required to, file an answer at any time before the hearing.

[\(Tex. Fam. Code § 82.022\)](#)

#### **5A.5 Default.**

Whether or not the defendant files an answer, if the defendant fails to appear or be represented at the hearing, a default judgment may be entered after:<sup>5</sup>

- proof of proper service of notice (service at least 48 hours before the hearing time or a rescheduled hearing);
- the court deems the allegations in the application to be true and finds that the deemed facts are sufficient to support a finding that the defendant committed a criminal offense due to bias or prejudice and is likely to commit another such act based on the same motives;

**AND**

- proof of any evidence necessary to support the sanctions (terms and conditions imposed upon the defendant) imposed by the order.

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<sup>4</sup> In order to require a party to act or refrain from engaging in conduct, the court must find the person has committed family violence. Because Art. 6.09 does not require a finding of family violence, there does not appear to be a basis for entering a separate order against a person requesting a protective order under Art. 6.09. [\(Tex. Fam. Code §§ 85.001\(b\), 85.003 and 85.022\)](#)

<sup>5</sup> See *Polley v. State*, No. 11-03-0340-CR, 2004 Tex. App. 11317 (Tex. App.—Eastland, Dec. 16, 2004, no pet.).

**NOTE:** To issue an order based on deemed findings in a default proceeding, the court **MAY NOT** take evidence on any issue other than proof of service of notice and sanctions.

[\(Tex. Code Crim. Proc. 6.09; Tex. Fam. Code § 84.003; Tex. Fam. Code §, 84.004, Tex. Fam. Code §85.006; Tex. R. Civ. P. 107; Tex. R. Civ. P. 239; Tex. R. Civ. P. 243\)](#)

## **5A.6 *Permanent order contents.***

### **5A.6.1 Required findings.**

To issue a permanent order, the court must hold a hearing and find that probable cause exists to believe that:

- (1) the applicant is a victim of conduct by the defendant that violates [Tex. Penal Code § 42.072](#);
- (2) the nature of the scheme or course of conduct engaged in by the defendant in the commission of the offense indicates that the defendant is likely to engage in further conduct that is prohibited by [Texas Penal Code § 42.072\(a\)\(1\), \(2\), or \(3\)](#);
- (3) a protective order is needed to protect the victim;

The court must further order that:

- (4) a constable will serve a copy of the order on the defendant;

**AND**

- (5) the court clerk will forward a copy of the order to the local law enforcement agency that has jurisdiction over the applicant's residence.

[\(Tex. Code Crim. Proc. art. 6.09\)](#)

## 5A.6.2 Conditions.

In the protective order, the following conditions may be imposed as necessary to protect the victim or the victim's family or household. The court may require the defendant:

- (1) to take a specified action necessary or appropriate to prevent or reduce the likelihood of future harm;

**AND**

- (2) not to:

- communicate directly or indirectly in a threatening or harassing manner;
- go near the residence, work place, school, or child-care facility of a person protected by the order;
- engage in conduct, including following a person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass;
- harm, threaten, or interfere with the care, custody, or control of a pet, companion animal, or assistance animal that is possessed by a person protected by an order or by a member of the family or household of a person protected by the order;
- possess a firearm (unless the defendant works full time as a licensed peace officer);

**OR**

- carry a concealed handgun (by suspending a license issued under [Tex. Gov't Code § 411.177](#)).

**NOTE:** The federal authorities recommend that the 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. § 921](#). See chapter 14, *infra*.

([Tex. Code Crim. Proc. art. 6.09](#); [Tex. Fam. Code § 85.021](#); [Tex. Fam. Code § 85.022](#) )

### **5A.6.3 Stay away provisions; confidential locations.**

With regard to places the defendant must stay away from, the permanent order must specifically describe each location and the minimum distance that the defendant must maintain from that location, unless the applicant requests that the location not be disclosed.

([Tex. Fam. Code § 85.007](#); [Tex. Fam. Code § 85.022](#))

### **5A.6.4 Warnings.**

The permanent order must contain the same warning as contained in a Family Code Title 4 protective order.

"A PERSON WHO VIOLATES THIS ORDER MAY BE PUNISHED FOR CONTEMPT OF COURT BY A FINE OF AS MUCH AS \$500 OR BY CONFINEMENT IN JAIL FOR AS LONG AS SIX MONTHS, OR BOTH. 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. IT IS UNLAWFUL FOR ANY 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 A PROTECTIVE ORDER TO POSSESS A FIREARM OR AMMUNITION.

The warning must be in letters that are bold, underlined, or all caps.

[\(Tex. Code Crim. Proc. 6.09\(c\)\(1\); Tex. Fam. Code § 85.026\)](#)

**NOTE:** Under the controlling statute, [Tex. Fam. Code § 85.026](#), the following language is required in an order issued under Art. 6.09.

A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY LAW OR 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 BOTH. AN ACT THAT RESULTS IN A SEPARATE OFFENSE MAY BE PROSECUTED AS A SEPARATE OFFENSE IN ADDITION TO A VIOLATION OF THIS ORDER.

However, use of this warning in an Art. 6.09 article is problematic because, a violation of an order issued under Art. 6.09 is **NOT** a crime. Depending on what the order prohibits and whom it protects, possession of a firearm while restrained by an Article 6.09 order might violate the federal Gun Control Act. [18 U.S.C. § 921](#) and [18 U.S.C. § 922\(g\)\(8\)](#).<sup>6</sup>

**NOTE: Oral warning required at hearing.** Is not quite clear that the provisions of [Tex. Family Code §85.041\(c\)](#) regarding oral warnings apply in this context (because the required warning addresses family violence). however, the better practice seems to be to warn the defendant orally as well as in writing of the order's prohibitions and attendant consequences for violations.

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<sup>6</sup> [18 U.S.C. § 921](#) makes it an offense to possess a firearm while restrained by a protective order, which is defined in [18 U.S.C. § 922\(g\)\(8\)](#) as a court order issued after notice and an opportunity to be heard that restrains a person from harassing, stalking, or threatening an intimate partner or child of an intimate partner or engaging in conduct that would place an intimate partner in fear of bodily injury to the intimate partner or child and includes a finding that the person restrained represents a credible threat of physical safety to such intimate partner or child or by its terms explicitly 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 injury.

### **5A.6.5 Duration.**

The permanent order must state its duration, which can be:

- (1) for the time specified in the order, not to exceed two years;
- (2) if no period is stated in the order, until the second anniversary of the date of issuance;
- (3) until modified by court order;
- (4) if the respondent is confined or imprisoned when the order would expire, the order expires on the first anniversary of the date the respondent is released;

**OR**

- (5) for applications filed on or after September 1, 2011, longer than two years, upon a finding that the person restrained by the order: (a) caused serious bodily injury to the applicant or a member of the applicant's family or household OR (b) was the subject of two or more previous protective orders rendered:

- to protect a person to be protected by the current order

**AND**

- after a finding that the person restrained has committed family violence and is likely to commit family in the future.

[\(Tex. Fam. Code § 85.001 and Tex. Fam. Code § 85.025\)](#)

### **5A.6.6 Service of the order.**

If the respondent or his attorney is not present to take possession of a copy when the order is signed, a copy of the protective order shall be delivered to the respondent:

- as provided by [Tex. R. Civ. P. Rule 21a](#) (in person, by mail, or by facsimile to the person or the person's attorney);

**OR**

- served in the same manner as a writ of injunction ([Tex. R. Civ. P. 689](#)).

**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.

[\(Tex. Fam. Code § 85.041\)](#)

### **5A.6.7 Delivery to victim and others.**

The court's clerk shall send a copy of the order to:

- the victim or the victim's attorney (this is a certified copy);
- law enforcement agencies with jurisdiction over the victim's residence;

- if the restrained person is a member of the state military force or is on active-duty status serving in the United State armed forces, to the staff judge advocate at the Joint Force Headquarters or the provost marshal of the military installation to which the respondent is assigned for immediate notification of the respondent's commanding officer ([Tex. Fam. Code § 85.042](#); [Tex. Code Crim. Proc. art. 42.0182](#));
- a school or child-care facility, if the defendant is ordered to stay away from the premises of that school or facility and if the victim has provided the address to the clerk;

**AND**

- if the order suspends a concealed handgun license, to the Department of Public Safety's Concealed Handgun Division.

### **5A.6.8 Confidentiality of victim's identity.**

The victim of an offense may file a 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. 57D.02](#))

### **5A.7 Duties of law enforcement.**

- **Database.** Within 10 days after receipt of a copy of the order and the completed DPS protective order data entry sheet or its functional equivalent<sup>7</sup> (see § 19.11), the

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<sup>7</sup> See the form in the Supreme Court Task Force's Protective Order Kit, available at: [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

local law enforcement agency having jurisdiction over the victim's residence shall enter the information about the protective order into the statewide law enforcement information system maintained by DPS.

[\(Tex. Code Crim. Proc. art. 6.09; Tex. Fam. Code § 86.0011\)](#)

- **Firearms dealers.** Upon request, DPS shall inform licensed firearms dealers whether or not a prospective transferee has an active protective order in the DPS database. If so, DPS shall inform the licensed firearms dealer that the transfer is prohibited under [18 U.S.C. § 922](#).

[\(Tex. Fam. Code § 86.002\)](#)

- **Foreign orders.** Each law enforcement agency shall establish procedures to inform its officers of the existence of protective orders issued in other jurisdictions.

[\(Tex. Fam. Code § 86.005\)](#)