

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: The Honorable Fran Ulmer
Lieutenant Governor

Date: September 23, 1996

File No.: 663-97-0103

Tel. No.: 465-3428

Subject: Court Procedures for
Domestic Violence
Protective Orders

From: Dean J. Guaneli
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Criminal Division

You have asked our opinion on two questions relating to the Domestic Violence Prevention and Victim Protection Act of 1996, enacted in ch. 64, SLA 1996. Your first question is whether the court system can require a victim of domestic violence to apply for a six-month protective order as a condition of obtaining an *ex parte* 20-day protective order. Your second question is whether the court system can require a victim of domestic violence to provide a five-year history of all civil or criminal cases in which the person was a party.

The short answer to your first question is no, the court system cannot require a victim to apply for two separate and distinct court orders, when the victim only wishes to apply for one of the orders. The short answer to your second question is yes, the court system can require a victim to provide a history of civil or criminal cases.

Background

The Domestic Violence Prevention and Victim Protection Act of 1996 (the Act) was initially introduced in the Nineteenth Legislature as a Governor's bill (House Bill 454), and then later incorporated nearly in its entirety into House Bill 314. The Act was patterned after the Model Code on Domestic and Family Violence, adopted by the National Council of Juvenile and Family Court Judges (Model Code).

The Act creates three types of protective orders that can be obtained by victims or by someone acting on behalf of a victim. Alaska Statute 18.66.100(b) creates a standard protective order valid for six months. Alaska Statutes 18.66.110(a) creates a non-emergency *ex parte* protective order valid for 20 days. Alaska Statute 18.66.110(b) creates an emergency (and also *ex parte*) order valid for 72 hours.

It bears noting that the procedures necessary to obtain these orders vary widely. For example, although broad relief can be obtained under a normal protective order, the type of

relief available under an *ex parte* order is limited, and the relief available under an emergency order is more limited still. Compare AS 18.66.100(b) with AS 18.66.110(a) and (b).

In addition, in the case of emergency orders, the Act allows the order to be obtained upon the application of a peace officer, and the order is not subject to modification. In the case of the other two types of orders, AS 18.66.100(a) specifies who must file a petition, but the time limits for modification of the orders is different between the two.

Victims Cannot Be Forced to Ask for Relief They Do Not Wish

Although there are statutory provisions that apply to all three types of orders, there is nothing in the Act that combines or otherwise links these orders together in such a way to require that one type of order must be requested as a condition for obtaining another. Thus there is nothing in the Act to suggest a victim of domestic violence can be forced to request relief that she does not wish.*

There are many reasons why a victim of domestic violence might only need or want relief for 20 days. The victim may be planning to leave the state during that time, thus an additional order will not be necessary. Or, the perpetrator may be leaving the state shortly, leaving the area for work purposes, or entering a rehabilitative program.

The Act gives victims of domestic violence the right to obtain three types of court orders. This substantive right to obtain three different types of judicial relief must be read to include the right *not* to obtain or even ask for judicial relief that one does not desire.

Forcing a victim to ask for more relief than is needed may have negative consequences for the person. For example, the timing of hearings for a six-month order may require that a victim come face-to-face with her abuser within a matter of days after obtaining a

* It has been suggested that, because AS 18.66.110(b) refers to filing of a petition under AS 18.66.100(a), the Act could be interpreted to require the filing of a single petition requesting both a 20-day order and a 6-month order. AS 18.66.100(a) was derived from section 301 of the Model Act, entitled •Eligible Petitioners for order.• The purpose of AS 18.66.100(a) is to specify *who* may file a petition. It does not specify what relief the person must ask for.

20-day *ex parte* order, something that a victim may want to avoid. With the prospect of a 20-day order, yet being required to face her abuser or risk losing that order, many women may choose to go into hiding rather than seek to obtain an order. The Act does not anticipate, and it is doubtful the legislature intended, victims to be left with a choice that can effectively deny them the right to obtain *ex parte* relief.

Article IV, section 15, of the Alaska Constitution gives the supreme court broad authority to create court procedures. It would certainly be within the procedural authority of the supreme court to combine applications for protective orders into a single court file, or to adopt other reasonable procedural rules, but we believe it is beyond the court's power to adopt procedures that have the practical effect of depriving persons of substantive rights. Requiring victims to ask for both *ex parte* and six-month orders at the same time would do just that. We therefore conclude that the supreme court will likely find that victims of domestic violence cannot be required to file a petition requesting a six-month protective order as a condition of obtaining an *ex parte* order.

The Court May Request Information Relating to Prior Litigation

Your second question is whether the court can require a victim of domestic violence to provide a five-year history of all civil or criminal cases in which the person was a party. This question arises because AS 18.66.150(b) specifies that a petition for a protective order must include a statement of pending civil actions or domestic violence criminal actions involving either the petitioner or the respondent. Thus the issue is whether the court can go beyond pending cases and require a list of all litigation within the previous five years.

The answer to that question is straightforward. The first sentence of AS 18.66.150(b) provides that the required list of pending litigation is "[i]n addition to other information required." Thus, the statutory description of pending litigation is the minimum information needed, with the court given broad latitude to require disclosure of additional information, including a list of additional litigation.

Although the court can request that additional litigation (or any other information) be disclosed by the applicant for a domestic violence restraining order, some information requested by the court may be largely irrelevant to the pending petition. If this information is sensitive or personal, victims may feel that it infringes upon their privacy to require that it be disclosed in a public court filing.

Petitioners may also feel that disclosure of sensitive, perhaps irrelevant information, violates their rights as crime victims. The Alaska Constitution was amended in 1995 to add a provision relating to the rights of crime victims in article I, section 24. Among other things, the new amendment requires that victims of crime be treated with dignity, respect

and fairness during all phases of the criminal and juvenile justice process. Although this provision specifically applies to the criminal justice process, it provides guidance for agencies that deal with victims of domestic violence who seek court protective orders, because such cases have a close connection to criminal justice matters.

In light of these considerations, the court system may therefore wish to consider a procedure under which petitioners and victims of domestic violence can provide sensitive and personal information to the court under seal or *in camera*, especially when seeking *ex parte* orders.

Conclusion

For the reasons set out in this opinion, we conclude that the supreme court will likely find that victims of domestic violence cannot be required to file a petition requesting a six-month protective order as a condition of obtaining an *ex parte* order. We further conclude that AS 18.66.150(b) allows the court to request information about past court actions, in addition to the minimum requirement in the statute of pending civil actions or domestic violence criminal actions. The court system may, however, wish to consider a procedure under which victims of domestic violence applying for protective orders can provide sensitive and personal information to the court under seal or *in camera*.

DJG:jf