

Question 10 – July 2013 – Selected Answer 1

(1) Can Frances establish a prima facie case for a protective order against Jack?

Yes, Frances can establish a prima facie case for a protective order against Jack. The issue is what actions warrant the issuance of a protective order. Under Texas law, a protective order is used to prevent a person from continuing to engage in family violence. Unlike a temporary ex parte order (which Frances should consider during the pending of the protective order proceeding), a hearing must be held (between 48 hours and 14 days) before a protective order can be implemented. Because there is a hearing, the range of remedies is more extensive than what is available in a temporary ex parte order where there is no hearing (discussed more below). The key to the use of a protective order is to prevent family violence. There is a prima facie case of family violence when a former spouse (and the father of the other former spouse's child) makes threats to either the child (which is not the case here), the former spouse, a member of the former spouse's household, or even someone that is in a dating relationship with the former spouse. Family violence can include actual physical violence against these individuals or even threats of violence. Here, although Frances and Jack are no longer married, this would be considered family violence because of the relationship among all parties involved. Jack made violent threats towards both Frances and Richard (Jack threatened to hit Frances, he told them that he would "take care" of the situation "once and for all," and he even left messages that threatened physical violence. Additionally, he actually pushed Frances into a desk, which would constitute more than just a threat of violence. Also, Jack has consistently harassed Frances, force his way into her home, and may even be following them (as evidence by him confronting them in the restaurant parking lot). All of these acts would be sufficient to qualify as family violence given their nature and the relationship among the parties. Therefore, Frances would have a prima facie case for a protective order against Jack.

(2) Assuming Frances establishes a prima facie case:

(a) What range of prohibitions could the court impose against Jack? The Court could impose a range of orders that would be designed to protect persons, property, and even parenting (if necessary). Furthermore, the court could require counseling for violence and require that Jack pay France's attorneys' fees. Finally, the court must prohibit Jack from carrying or being in possession of a firearm. In Texas, a court can fashion a broad range of relief that may be necessary to remedy and prevent family violence. For instance, the order could protect people: such as preventing stalking, preventing being within so many feet of another, and prevent harassing phone calls and other forms of intimidation. Also, the order could protect property, such as preventing someone from going onto another's property or destroying or encumbering property. Also, the court could fashion the order so that it protected parenting. If one person was going to intimidate another by taking a child away in violation of another's rights, this could be preemptively stopped by the protective order. Finally, because a protective order is issued pursuant to notice and a hearing, the court can even order that one pay attorney's fees and attend counseling for family violence. Here, Jack has engaged in lots of egregious behavior that is both violent and intimidating. The court would likely issue and order that would prevent him from sending her messages, emails, or even calling. Furthermore, it would be reasonable for the court to prevent Jack from being near both Frances, Richard, and possibly even their child (although a suit affecting the custody would likely need to be brought in the court with continuing exclusive jurisdiction if this suit for the protective order had not already been brought there). The court would be required to prevent Jack from carrying a weapon (which would be necessary in any case given his demonstrative threats of using a gun). Finally, the court could order Jack to pay Frances' attorneys' fees as well as ordering Jack to participate in some sort of counseling to help him cope with these violent tendencies.

(b) Can the court issue an order of 5 years duration? In general, a court cannot issue a protective order for a 5 year duration. Under Texas law, a protective order can usually only be issued for 2 years. In some cases, such as when there has been a previous violation of a protective order or there has been egregious circumstances involving serious violence, the court may be able to issue a protective order for longer. In this case, while the

behavior is certainly serious and Frances is justified in being afraid, an order of 5 years would not be allowed given that there is no indication of previous violations. Furthermore, if the court is to order that Jack engage in some sort of counseling, then this remedial behavior would hopefully pacify the situation so that the two years would be sufficient. Of course, if Jack continues the behavior (and especially if it escalates), a subsequent protective order for a longer period of time would probably be substantiated.

Question 10 – July 2013 – Selected Answer 2

1. Frances can establish a prima facie case for a protective order against Jack. In Texas, a protective order against a spouse or former spouse may be issued after a hearing before the court. A court will issue a protective order if it finds that a spouse or former spouse has committed family violence against the other spouse or their children. The request for a protective order must state specifically the acts of past family violence and must include any facts which would support the entry of an order, like continuing threats and harassment toward the spouse, children, or the spouse's new spouse or significant other. A court then has broad discretion to issue an order to protect people (i.e., threatened spouses or children) and property.

Here, Jack and Frances divorced in 2006, and Frances began dating Richard in 2010. This new relationship apparently enraged Jack to the point where he began sending harassing text messages and emails to Frances, which contained profanity and threatened physical violence if she did not stop seeing Richard. More troubling, on one occasion, Jack forced his way into Frances' house, screamed obscenities at her, shoved her into a desk and threatened to hit her. These acts were presumably done in the presence of the couple's 8-year-old daughter, whom he was coming to pick up at the time. Finally, Jack confronted Richard and Frances in a parking lot and threatened that if Richard did not stay away from Frances, he would have to "take care" of the situation "once and for all" while mimicking firing a gun towards her. While the harassing texts and emails probably would not give rise to a protective order on their own, the fact that he has since assaulted Frances and has made a credible threat to both Richard and Frances that he would shoot her if the couple did not stop seeing each other establishes a prima facie case for a protective order.

2.a. At issue is the range of prohibitions that a court could impose against an ex-spouse who is the subject of a protective order. If a protective order is issued on a finding of family violence, at the least the court may order that the offending spouse be ordered to stay a certain distance away from the victim spouse, any children, and any significant other of the victim spouse. This may include restricting the offender by requiring him to stay away from residences, schools, and/or places of work of the victim or her significant other. The court may also temporarily modify any possession or access rights the offender spouse may have with regard to any children of the marriage in an effort to maintain the safety of all parties, or in the alternative, may decide to allow access but require any visitation to be monitored. The court will also require that the offender spouse does not possess any guns or ammunition. Additionally, while not a "prohibition", the court could require Jack to attend counseling or anti-battering courses in the order. The court may also, in its discretion, prohibit the offender spouse from taking or damaging any of the victim spouse's property.

Here, because of the history of violence and threats of violence to both Frances and Richard, the court will probably be more restrictive with Jack. This means that it is almost certain that the court would place distance requirements as to how far away from Frances and Richard, their residences, and places of business, Jack must stay. Also, since it appears that he may have committed the assault of Frances in their child's presence, the court may decide that, at the very least, supervised visitation of Kelly is required in a location other than Frances' home (but would probably be more likely to temporarily modify the possession order altogether because of the history).

2.b. The court may not issue an order of 5 years in duration. In Texas, the longest period for which a court may issue a protective order is two years. The order may be renewed for successive two year period if necessary, but the parties must again have a hearing before the court to determine where the parties stand at the time and whether a the order should be modified or re-issued at all. In this case, due to the history and the credible threats, the court will probably issue the order for the maximum two-year period.

Question 10 – July 2013 – Select Answer 3

(1) Frances can establish a prima facie case for a protective order against Jack because family violence has occurred and is likely to occur in the future. At issue, is whether Frances can establish a prima facie case for a protective order against her ex-husband Jack under Texas law. The Texas Family Code provides that in order to establish prima facie case for a protective order the petitioner must establish that family violence (as defined by the Texas Family Code) has occurred within 30 days of filing the suit and that it is likely to occur in the future. The protective order can last up to 2 years and can be extended if the defendant violates any terms in the protective order during the 2 years. Family violence is defined as violence or threat of violence to a family member, current or former spouse, a person living in the household of the family member or a person including a dating relationship with a family member.

In this case, Frances has a prima facie case because she was married to Jack and that the violence occurred towards her and threats of violence were directed to her and her boyfriend, Richard. Jack began his violent behavior when he sent messages to Frances with profanity and threatened physical violence unless she ceased her dating relationship with Richard. Furthermore, he forced his way into the house and started screaming obscenities toward her (while the daughter Kelly was present since he was at the house to pick up Kelly for his scheduled visitation). Futhermore, he shoved her into a desk and threatened to strike her. Although no police report was filed, Kelly's testimony should be sufficient. Finally Jack threatened Kelly and Richard in the parking lot, and threatening Kelly's life if Richard did not stop seeing Kelly. All of these

incidents combined should provide sufficient evidence for the court that Jack has committed family violence in the past and is likely to commit violence in the future. Since Frances can establish the prima facie case, a court is likely to issue a protective order.

(2) (a) The court could impose a range of prohibitions on Jack included, excluding him from nearing Frances' home within a certain distance, excluding him from any place of business Frances or Richard work in and excluding any communication (including through text message, email or telephone or in person) between Jack and Frances or Jack and Richard.

The Texas Family Code provides a wide range of possible prohibitions in a protective order. These prohibitions include, prohibiting any communication between the parties, excluding the defendant from entering a specified area near the petitioner's home or work place, prohibiting communication to children regarding the other parent. The court could also prohibit contact between the defendant and any child without court approval. The court will prohibit the defendant from making any harassment or threats toward the victim or the child. Finally it is mandatory that the court prohibit the defendant from obtaining of possession any firearm or weapon.

In this case, it is likely that the court will order all of the above because the conduct by Jack was so threatening, especially the threat that he would kill Frances by making the motion of gun with his hand. The court will also order protection for the Richard since he is a victim of the threats as well since Jack stated that "if Richard did not stay away from Frances he would have to 'take care' of the situation 'once and for all'".

This kind of threat would warrant all of the prohibitions. Since Jack also committed violence toward Frances in the presence of the child, Kelly (or at least while she was home), the court will also place prohibitions in the order for her and likely order some sort of counseling for Jack and they might require supervised visitations for Jack since he will no longer be able to pick Kelly up from Frances house.

(b) No the court cannot tissue an order for five years. Under the Texas Family Code, the maximum duration for a protective order is two years. The court may extend the protective order if the defendant has violated the terms

Of the protective order, however, the court cannot enter an order that is outside the 2 year limitation. Despite Jack's offenses the court will only order the Protective Order for 2 years. If Jack violates the order in any way and the court finds that the order is still needed after 2 years, they may extend it.