**TPO EPISODE NOTES**

**[This episode is part of a multi-episode series. Please listen to the prior episodes in this series. Otherwise, what we say in this episode may make even less sense than usual.]**

**[start]**

**Wade: Hello folks, and welcome to another edition of “The Good Judge-ment Podcast. I am Wade Padgett**

*Tain: And I’m Tain Kell. Today we are going to address an issue that came to us through our listeners*

**Wade: That’s right. Remember that you too can play an active role in helping us select the topics for our episodes – Tain, remind our listeners how that can reach out to us.**

*Tain: You can reach us with your topic suggestions and glowing reviews at* *goodjudgepod@gmail.com* *And our website can be found at goodjudgepod.com. That’s where you can find the episode notes that we use for all of our episodes – to help you avoid having a wreck while trying to write down case citations – or falling off the treadmill – or whatever other calamity that could befall a podcast listener.*

**Wade: Tain, today we are going to discuss TPO’s – Temporary (and permanent) Protective Orders. And this topic will involve multiple episodes.**

*Tain: Well, I have a bit of a confession to make on this topic. In my career, I have not presided over many TPO actions. Our senior judges usually are kind enough to hear those for us in Cobb County. So I will be asking as many questions today as offering deep thoughts or insight.*

**Wade: That’s fine, Tain. I will try to steer the ship.**

Currently, we frequently hear two primary types of TPO’s, Family Violence and Stalking prot. order actions

TPO actions are not based in common law – we have discussed that issue before. Therefore, the law requires compliance with the statutes – and strict compliance at that!

There are a couple of points of law that apply to all of the different types of TPO proceedings – first and foremost, these are CIVIL actions

BUT, the Civil Practice Act does not apply to these cases. *Carroll v. State*, 224 Ga. App. 543 (1997).

The preponderance standard applies *Perlman v. Perlman*, 318 Ga. App. 731 (2012); see *Bland v. Bland*, 347 Ga. App. 273 (2018) where facts did not support the trial court’s conclusion that an act of family violence had occurred.

All of the actions we are discussing in this episode require a verified petition.

Credibility determinations are left to the trial judge when there is conflicting evidence. *Copeland v. Copeland*, 2021 WL 4078630 (2021)

Most of the case law involving both FV Prot. Orders and Stalking Protective Orders can be found within the statutes involving FV Prot. Orders. That is because the Stalking Prot. Order statutes (§16-5-90, et. seq.) specifically provide that issues such as jurisdiction in a stalking case are governed by the relevant provisions of the FV Prot. Order statute (see §16-5-94(b) and (e)).

In other words, while Stalking Prot. Orders and FV Prot. Orders deal with different “bad acts,” the process and procedure for both types of proceedings is set forth within the FV Prot. Order statutes.

**FAMILY VIOLENCE**

You cannot get a TPO against another party merely because that person is a jerk (another (crass) way to reiterate that strict compliance with the statute is required)

In the FV context, just as the statute implies, there must be sufficient evidence to prove:

 1. The parties qualify as “family;” and

 2. An act of family violence is alleged.

Clearly, there are all sorts of other issues such as venue, service, etc. but those two requirements must be alleged

The definition of “family violence” can be found at O.C.G.A. § 19-13-1:

As used in this article, the term “family violence” means the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household:

(1) Any felony; or

(2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.

The term “family violence” shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention.

Even where parties have not lived in the same household for over 20 years, if they ***ever*** resided in the same household, the court has jurisdiction. *Jones v. Spruill*, 337 Ga. App. 200 (2016).

**JURISDICTION/VENUE**

O.C.G.A. § 19-13-2 sets forth the jurisdiction for FV TPO actions. That code section is entitled “Jurisdiction” but it partially sounds like venue.

If respondent is a Georgia resident, the superior court in the county where the defendant resides has jurisdiction

If respondent is a non-resident of Georgia, the superior court where the petitioner resides OR the superior court where an act of FV allegedly occurred has jurisdiction

[As an aside, the cases are clear that the Civil Practice Act does not apply – HOWEVER, the final sentence of §19-13-2(b) provides that jurisdiction can lie where an act of family violence allegedly occurred “where the act involving family violence meets the elements for personal jurisdiction provided for under paragraph (2) or (3) of Code Section 9-10-91.” (the Georgia Long Arm Act)] (We love seeming contradictions)

We earlier told you that issues such as jurisdiction/venue are governed by those provisions within the FV Prot. Order statute.

So, if a respondent is alleged to have “stalked” a petitioner via phone, e-mail, social media, where did those crimes “occur?”

The answer depends upon whether you are considering a criminal case involving stalking or a stalking prot. order case which is a civil case.

See *Huggins v. Boyd*, 304 Ga. App. 563 (2010) which decided that “communications” occur where they are sent, not where they are received. Same result in *Anderson v. Deas*, 273 Ga. App. 770 (2005)

BUT: O.C.G.A. § 16-5-94(a)(1) specifically provides the exact opposite to be applicable in stalking criminal cases – “contact” shall be deemed to occur where the communication is received.

The stalking prot. order cases refer to the Long Arm Act (§9-10-91) as a basis for jurisdiction over a nonresident (see *Huggins v. Boyd*, 304 Ga. App 563, 564-565 (2010)). Therefore, a tortious act must have been committed in Georgia by a nonresident to give rise to a stalking prot. order.

Civil cases have a different analysis from venue for the purpose of a criminal case. Venue for criminal cases is where the crime occurred. Civil cases is usually where the defendant resides. Neither §16-5-90 nor §16-5-94 have been modified or amended following either of the decisions in *Huggins* or *Anderson*.

In many different types of civil cases, we come across **venue arguments**. Usually, a defendant is entitled to “home field advantage” whenever he/she is sued. We learned that in law school. However, as we have repeatedly mentioned in other episodes dealing with issues in civil cases, venue can be waived. Jurisdiction cannot be waived but venue can be waived, either expressly or through conduct (i.e. lack of objection). The same is true in Prot. Order cases. *Davis-Redding v. Redding*, 246 Ga. App. 792 (2000).

Let’s be clear – if you have jurisdiction, venue can be waived, expressly or through implication. But you cannot waive jurisdiction –

Remember, a person might “stay” in several different locations – whether a person has “moved” or is merely “staying” somewhere else is usually dictated by a simple phrase, “intent to remain.” Did the person move with an intent to remain in the new location? If so, venue probably lies where the defendant/respondent now resides. If not, (or not established on the record), venue could potentially be found to exist in either county. See *Davis-Redding v. Redding*, 246 Ga. App. 792 (2000).

It is reversible error for a trial judge to sua sponte dismiss a petition for lack of venue. *Davis-Redding v. Redding*, 246 Ga. App. 792 (2000).

**EX PARTE ORDERS**

Let’s all acknowledge that TPO’s are one of the areas that keep judges up at night, second guessing his/her decision.

Unfortunately, there are parties who attempt to gain a strategic advantage in their divorce or custody litigation by attempting to obtain a prot. order.

I have taken an extremely informal poll of other judges concerning whether they receive face-to-face, sworn testimony from petitioners when deciding whether to grant ex parte relief. The results are truly mixed – some judges do and others do not require the petitioner to be sworn before the judge.

Without commenting as to the propriety (or efficiency) of such a process, the statute (§19-13-3) authorizes an ex parte order “upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that FV has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary….” So ex parte relief can be granted when *the petition* sets forth sufficient evidence….

Thinking about it another way, the respondent is entitled to fair notice of what is being alleged – if there are allegations made through verbal testimony not contained within the petition, not sure he/she has received that required notice.

Remember that a verified petition is testimonial evidence – it serves as both a pleading and as evidence. *Jha v. Menkee*, 352 Ga. App. 81 (2019); *Rolland v. Martin*, 281 Ga. 190 (2006).

Judges also seem torn as to whether they will order child support, etc. as part of ex parte relief. If you are conducting a hearing within 30 days, entirely possible that a payment will not come due in the intervening time – and what evidence would you be relying upon in setting child support? Neither party has filed a DRFA.

Some judges choose to insert a clause into the ex parte order that requires all firearms be turned over to law enforcement officials. First, law enforcement is now charged with keeping these firearms safe and undamaged without having a case number to tie the guns to. Second, it is delusional to think that a determined individual cannot find an alternative source for a gun. Third, (and most importantly), I cannot find any statutory authority that would allow the judge to enter such an order. I guess you could argue that the language “court may order such temporary ex parte relief as it deems necessary to protect the petitioner or minor child of the household from violence” is sufficient authority.

Well, §19-13-4 specifically sets forth the authority of the trial judge in issuing an ex parte or final prot. order – and surrendering firearms is not on that list. In *State v. Burgess*, 349 Ga. App. 486 (2019), a criminal case, a judge ordered law enforcement personnel to search the marital residence for firearms pursuant to a protective order. The officers treated the order as a search warrant and found drugs and explosive devices. In n. 20 of that decision, the Court of Appeals made the following observation about whether the judge exceeded his authority in issuing that order in the TPO action:

We question whether such an order is permissible. The plain language of the TPO statute and the available remedies to the trial court are couched in terms of preventing the respondent from approaching, harassing, or contacting the petitioner; assigning property or dividing property between the petitioner and respondent; temporarily setting child custody, visitation, and orders of support between the parties; and ordering temporary intervention services to prevent violence between the parties. There is no language included that would allow a court to take possession of one of the parties' personal belongings without also assigning ownership to the other party in the proceeding. See generally OCGA § 19-13-4. This question need not be determined in this case, however, because this is not an appeal from the TPO.

Consider *Rawcliffe v. Rawcliffe*, 283 Ga. App. 264, 265 (2007) where the Court of Appeals ruled that the trial judge did not have authority to prohibit the respondent from possessing a firearm as part of the decision in a stalking TPO case. And the holding in *State v. Burgess*, supra, found that a TPO order was not the functional equivalent of a search warrant, rendering the search for firearms ordered in the TPO void.

**TIME**

We have already established that the traditional time implications set forth in the Civil Practice Act do not apply.

That’s because they cannot apply, given the strict time limitations set forth in the statutes.

[Shout out to Judge Jesse Stone for teaching me some of these issues that are unique to prot. order cases]

Court can issue ex parte Prot. Order, which we will address in detail in a moment. But, within 10 days after the FILING OF THE PETITION (not the date the ex parte order is entered), but no more than 30 days after petition is filed, a hearing must be conducted where respondent can appear and the petitioner must prove the allegations by a preponderance of the evidence. O.C.G.A. § 19-13-3

If the hearing cannot be conducted in the county where the petition was filed within that 30 day time limit, the hearing can be conducted in any county within the circuit

**IMPORTANT:** If a hearing is not held within 30 days of the filing of the petition, the petition shall stand dismissed unless the parties otherwise agree. O.C.G.A. § 19-13-3(c).

Note the ability for the parties to agree to extend beyond the 30 day window per statute

**ONLY EXCEPTION:** § 19-13-3(e): “If the court finds a party is avoiding service to delay a hearing, the court may delay dismissal of the petition for an additional 30 days.”

We have pre-printed forms that we must use for these proceedings. One of those forms is a continuance order. I previously thought that meant we could continue a case beyond the 30 day window for good cause shown. THAT IS WRONG! (Thanks to Judge Stone for helping me/making me re-read the statute)

See *Rhoden v. Rhoden*, 359 Ga. App. 353 (2021); *Herbert v. Jordan*, 348 Ga. App. 538 (2019); *White v. Raines*, 331 Ga. App. 853 (2015).

Remember, we started this episode talking about the fact that because these are statutory provisions that did not exist at common law, they must be strictly construed. The 30 day deadline is an absolute! (unless there is an agreement or respondent is evading service and the court finds that to be true)

We are still in the wake of the state-wide **judicial emergency**. What happens if there is a local emergency or a state-wide emergency declared?

The emergency declaration because of weather, pandemic, etc. only tolls the 30 day limitation – when lifted after 2 days, for example, the hearing must be conducted within 32 days of the date of filing of the petition. *Copeland v. Copeland*, 361 Ga. App. 125 (2021) (state-wide emergency declaration); *Smith v. Smith*, 350 Ga. App. 647 (2019) (2 day weather local emergency).

**APPLICABLE STANDARD/EVIDENCE/FINAL HEARING**

The respondent must have a reasonable opportunity to respond to the allegations contained in the complaint. The burden of proof is on the petitioner. *White v. Raines*, 331 Ga. App. 853, 856 (2015).

Failing to conduct a timely hearing where the petitioner is sworn as a witness, respondent has the opportunity to cross-examine the petitioner and respondent may provide evidence, if desired, must result in a dismissal. Unless the parties agree otherwise, merely calling the parties together and then continuing the case until the criminal case is resolved “to maintain status quo” is tantamount to conducting no hearing at all. *White v. Raines,* supra.

There is a misconception that the alleged act of FV/Stalking must be “fairly recent.” As you might imagine, that language is not a part of either statute.

As noted in *Lewis v. Lewis*, 316 Ga. App. 67 (2012), there is no element of the statutes in question that require that the petitioner prove that the alleged act of FV/Stalking occurred “fairly recently.” Now, if the alleged bad act occurred a long time ago and was an isolated incident, that fact may weigh heavily on the court’s determination as to whether the bad act “occurred in the past and may occur in the future” as required under §19-13-3(b). See *Lewis v. Lewis*, supra. where the form used in Gwinnett County at the time included language that suggested the bad act was likely to recur in the *near* future – not a part of the statute.

Quote from *Lewis v. Lewis*: “The recency of past violence may, of course, bear upon the likelihood of future violence, but a ‘reasonably recent’ act of violence is not absolutely required. After all, there might be a good reason in some cases to believe that past violence, although fairly remote, is now likely to recur, such as, for instance, when someone has been gone far away for a long time but now has returned.” *Lewis*, at 69-70.

If you are considering a grant of the petition, please think about logistics. Does a party work at the only hospital in town? Does a party live on a main thoroughfare that the other party would have to drive by to get anywhere? Do they attend the same school, work at the same place, etc.? Can you fashion a restraining order that keeps them away from one another at “the club” on a Saturday night but allows them to both maintain their jobs at the factory?

Please look at O.C.G.A. § 19-13-4(a) which specifically lists the types of relief that can be made a part of the 12 Month Prot. Order.

One of the things the judge cannot do is require the respondent to forfeit personal property. The example in *Sullivan v. Kubanyi*, 361 Ga. App. 255 (2021) was a drone. I think this broad statement would apply to other personal property such as firearms. (see *Rawcliffe v. Rawcliffe*, 283 Ga. App. 264, 266 (2007).

If granted, the form orders available on the Clerk’s Cooperative website (www.gsccca.org) allow the judge to determine all of the issues associated with the TPO – issues such as possession of vehicles, child custody, support (child support and spousal support, etc.). I usually add some language to the “other” section at the end of the form order that prevents the parties from referencing the other party on social media, contacting the other party via social media. And I ensure that the parties are prohibited from referencing one another “directly or indirectly.”

The Order needs to be served upon the respondent in a manner that is later “provable.” (i.e. if there is a future violation, proof needs to be made that the respondent was served with the order).

Any order that is granted must be transmitted to the Registry. (Clerk handles that). See *Birchby v. Carboy*, 311 Ga. App. 538 (2011); O.C.G.A. § 19-13-52 and 53(b).

The court has the authority to order that the respondent enroll and complete a Family Violence Intervention Program (“FVIP”). There is a list of approved providers at the website of the Georgia Commission on Family Violence. (<https://gcfv.georgia.gov/locations/certified-family-violence-intervention-program>)

Of course, if warranted, the court has the authority to grant reasonable attorney fees under § 19-13-4(a)(10).

**WHAT IS A “PERMANENT” ORDER?**

We talk about “permanent” prot. orders, but what can you order as the presiding judge?

O.C.G.A. § 19-13-4(c) provides that the judge may issue an order with 12 months’ duration.

However, upon a motion of petitioner and notice to respondent, the court may convert that “12 Month Prot. Order” into a 3 year order or a truly permanent order.

But you cannot simply make the initial determination that a 3 year or permanent prot. order is the best course.

***Birchby v. Carboy***

There are times when hearing a TPO action where the judge becomes convinced of two things: 1) the evidence does not justify the issuance of a “permanent” Prot. Order; and 2) that the parties need to avoid contact with one another. What to do?

Judge could always simply deny the petition. But future contact may well land the parties back before the court.

In *Birchby v. Carboy*, 311 Ga. App. 538 (2011), the Court of Appeals held that if the petitioner consents, the court can enter a “civil” restraining order like one anticipated by O.C.G.A. § 9-11-65.

The issue in *Birchby* was that the petitioner did not CONSENT to the conversion of the FV TPO action into a civil restraining order

Be aware that if the judge finds there was insufficient evidence to find that the FV or stalking prot. order could be issued, the judge is also prohibited from issuing a “civil restraining order” because there was not sufficient evidence to warrant such relief. *Rhoden v. Rhoden*, 359 Ga. App. 353 (2021).

The key is the petitioner’s consent!

**MODIFICATION**

“A family violence protective order is a type of continuing judgment that is subject to future modification by the restrained party based on a change in circumstances.” *Dalenberg v. Dalenberg*, 325 Ga. App. 833 (2014).

*Mandt v. Lovell,* 293 Ga. 807, 809–810 (2013) (trial court has discretion to decrease duration of protective order when appropriate and to terminate such order when material change in circumstances occurs); cited in *Charman v. Palmer*, 328 Ga. App. 222, 226 (2014).

**STALKING**

You may have noticed that up until this point, we have discussed FV Prot. Orders in great detail. Now, we are going to shift to Stalking Prot. Orders.

The reason we focused so much time and attention on FV Orders is because the stalking statutes (O.C.G.A. § 16-5-90 et. seq.) specifically refer to the FV Prot. Order statutes for direction as to issues such as jurisdiction, the relief that may be granted, etc. [In other words, the “how” questions are to be answered within the FV Prot. Order statutes]. See O.C.G.A. § 16-5-94.

Stalking is defined in §16-5-90(a)(1): “A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person.”

So, what does “harassing and intimidating” mean? Luckily, also defined in the same statute: " the term ‘harassing and intimidating’ means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose.”

You will notice “course of conduct” and “pattern.” The cases say that a single incident of such conduct will not support a finding of stalking. *Burke v. State*, 287 Ga. 377 (2010); *Bodi v. Ryan*, 358 Ga. App. 267 (2021).

See *Kaufman v. State*, 344 Ga. App. 347, 351 (2018) (“And this Court has held that the phrase “course of conduct” dictates that “a pattern of behavior must be shown, but such a pattern may include the prior history between the parties.”)

The cases use words such as “ongoing,” and “repetitious.” Therefore, to issue a stalking prot. order, there must be a “pattern” of behavior.

**STALKING PROT. ORDER**

As we mentioned, almost all of the “mechanics” relating to a stalking prot. order are based upon the provisions of the FV Prot. Order statutes. But there is one statutory provision that bears recognition.

O.C.G.A. § 16-5-94(a) provides: “(a) A person who is not a minor who alleges stalking by another person may seek a restraining order by filing a petition alleging conduct constituting stalking as defined in Code Section 16-5-90. A person who is not a minor may also seek relief on behalf of a minor by filing such a petition.”

We have seen a recent trend of high school students’ parents seeking stalking prot. orders on behalf of high school students who are allegedly being bullied at the local high school by other students.

We have also seen a rash of prot. order requests aimed at neighbors or other people who live within the petitioner’s neighborhood.

Remember, there is no requirement that the petitioner and respondent be “family” as there is with FV prot. orders.

**DATING VIOLENCE PROTECTIVE ORDERS**

Something brand new and the form petitions and orders have just recently been released.

O.C.G.A. § 19-13A-1 provides that when the parties are in a “dating relationship,” a protective order may issue upon proof of “dating violence.”

“Dating relationship” defined as a committed romantic relationship characterized by a level or intimacy that is not associated with mere friendship or between persons in an ordinary business, social, or educational context; provided, however, that such term shall not require sexual involvement. (§19-13a-1(1))

“Dating violence” defined as the occurrence of one or more of the following acts between persons through whom a current pregnancy has developed or persons currently, or within the last six months were, in a dating relationship:

 a) any felony; or

b) commission of the offenses of simple battery, battery, simple assault, or stalking.

This statute became effective 7/1/2021

These actions are to be heard in superior court – in the county where the respondent resides (if a resident). If nonresident respondent, in the county where the petitioner resides OR where the act or injury occurred provided the evidence would support a finding of jurisdiction under the Long Arm Act (§9-10-91(2) or (3))

Same time constraints as provided for in the FV prot. order statutes (but set forth fully in §19-13A-3)

The mechanics are a bit different from the FV or stalking provisions:

§19-13A-4(a)(1)

(a)(1) In order to determine if a protective order alleging dating violence shall be granted, ***the court shall provide findings of fact*** establishing that:

(A) There is a committed romantic relationship between the parties that is not associated with mere friendship or ordinary business, social, or educational fraternization;

(B) Factors exist which corroborate the dating relationship;

(C) The parties developed interpersonal bonding above a mere casual fraternization;

(D) The length of the relationship between the parties is indicative of a dating relationship;

(E) The nature and frequency of the parties' interactions, including communications, indicate the parties intended to be in a dating relationship;

(F) The parties by statement or conduct demonstrated an affirmation of their relationship to others; ***or***

(G) Both parties have acknowledged the dating relationship.

Luckily, the form orders have blanks for judges to check if they find these required findings to have been alleged/proven. Whew!

**Well let’s recap what we’ve learned today. I know this was a multi-part episode and I apologize for the length but we thought it important to cover lots of different issues relating to protective orders.**

*These are CIVIL cases. There are clearly similarities between these cases and criminal cases but there is an entirely different burden of proof.*

**I frequently warn the parties that what is said in a prot. order hearing can be used in other types of proceedings (and I always have them taken down by a court reporter).**

*There are clear and defined procedures which must be followed in all of these different types of protective order cases. And time is of the essence – failure to conduct the final hearing on a timely basis renders any order that might be produced as a result of a non-timely final hearing is simply a nullity.*

**We have a new type of action, “dating violence” prot. orders, which have some of the same features as FV or stalking actions – but which require some specific findings by the trial judge.**

*Remember that this episode was suggested by a listener. You too can have your great idea kicked around by the two of us by sending your ideas to* *goodjudgepod@gmail.com**. Visit our website, goodjudgepod.com, for copies of the outlines for all of our episodes.*

**Well, with all of those shameless requests for ideas and essentially begging for listeners to rate and review our little podcast, that wraps up today’s episode. I’m Wade Padgett**

*And I’m Tain Kell…if we don’t see you around here, we’ll see you around, hear?*