



DRAFTING AN ENFORCEABLE TRIBAL PROTECTION ORDER AGAINST A MEMBER-INDIAN DEFENDANT *INFORMATION GUIDE AND CHECKLIST*

Using This Checklist: The following general information guide and checklist suggests topics/issues for advocates to discuss with each victim relative to preparing to file a Tribal protection order and drafting a Tribal protection order in Tribal court cases involving Tribal members. Generally speaking, Tribal courts have civil jurisdiction over members for matters arising in Indian country and the U.S. Supreme Court has held that Tribal courts have exclusive jurisdiction over a suit by any person against a Tribal member for a cause of action arising in Indian country.¹² This Information Guide and Checklist would apply in cases where a non-member attempts to obtain a civil protection order against a member (a member of the federally recognized tribe that is issuing the Tribal protection order) or when a member attempts to obtain a civil protection order against a member. In addition to inherent Tribal civil authority over members, VAWA 2013 sets forth that tribes have jurisdiction to issue civil protection orders involving all persons for matters arising in Indian country or otherwise within the authority of the tribe.³ Ultimately, the relevant Tribal code will establish the civil and/or criminal jurisdiction the Tribal court against a backdrop of federal restrictions placed upon Tribal jurisdiction by federal statute or federal case law.

For criminal enforcement of a Tribal protection order, note that tribes have criminal jurisdiction over all Indians (member Indians and non-member Indians).⁴ Note that each victim will present with varying danger/safety factors and the

¹ *Williams V. Lee*, 358 U.S. 217 (1959). Note, however this case may have been overruled or weakened in *Nevada v. Hicks*, 533 U.S. 353 (2001) (finding that a tribe may not exercise jurisdiction over state officers investigating an off-reservation crime when the officers executed a search warrant at a tribal member's home located on trust land within the reservation.)

² Indian country is defined at 18 U.S.C. 1151.

³ 18 U.S.C. 2265(e).

⁴ 25 U.S.C. 1301 (2).

importance of ongoing lethality assessments and safety planning cannot be overstated. Additionally, victim-centered advocacy requires that the victim determine what remedies and options are needed.

Caution: The information provided is not legal advice and advocates should take care to consult with attorneys that are trained in the subject matter and trauma-informed, victim-centered service delivery. The checklist is not jurisdiction specific, so the advocate should consult local Tribal rules, statutes and procedures in applicable jurisdictions and consult with legal counsel who will explain any applicable federal restrictions and other relevant legal matters. The following checklist does not include the language necessary to invoke the federal firearms prohibition.⁵

A. Tribal Statutory Review:

Please place the Tribal constitution and/or Tribal statutory citation in the blanks below.

- 1) Subject matter jurisdiction over civil matters involving member Indians has been reviewed. This would include scenarios where a member seeks to obtain a civil protection order against a member and when a non-member seeks to obtain a civil protection order against a member. Citation: _____.
- 2) Personal jurisdiction over member-respondent in civil matters has been reviewed. Citation: _____.
- 3) Statutes pertaining to how to serve the member-respondent have been reviewed. Citation: _____.
- 4) Timelines setting forth the time-period for a full hearing have been reviewed. Citation: _____.
- 5) Party qualifies to file a protection order under the Tribal statute. Citation: _____.
- 6) Parties meet any residency requirement under the Tribal statute. Citation: _____.
- 7) Parties meet any relationship requirement under the statute. Citation: _____.
- 8) Elements necessary to meet the requirements of the Tribal protection order statute have been reviewed with client.

⁵ Gun Control Act, 18 USC 922(g)(8) and (d)(8).

- 9) Remedies necessary to meet the needs of the client have been reviewed and are allowed by the Tribal protection order statute. (this includes custody of the children)
- 10) The statute that offers protection from disclosure of client information, client's location, address and other identifying information that may compromise safety has been reviewed.
- 11) Protection Order forms located in the Tribal statutes or Tribal court forms have been gathered.

B. Drafting the Style or Heading of the Protection Order:

- 1) Court exercising jurisdiction is identified and contact information such as address and phone number to the court is listed.
- 2) Names of the parties are listed and spelled correctly (include any aliases).
- 3) Type of case is listed (for example: petition for a protection order, emergency *ex parte* protection order, permanent protection order).
- 4) Court docket number appears on the document unless the document is a petition and the clerk will assign a docket number and place the docket number on the petition.
- 5) National Crime Information Center (NCIC) identifiers are listed on the document (usually a small grid on the face of the document that includes information such as respondent's date of birth, race, height, weight, hair color, eye color and scars/tattoos). This information is critical when entering the protection order into the NCIC POF or other federal/state data base.

C. Protection Order Introductory Paragraph:

- 1) State which judge presiding over the case.
- 2) State date court hearing is being held.
- 3) State the names of parties appearing and indicate whether the appearance is with or without counsel (note that counsel may include a Tribal lay advocate where Tribal code allows).
- 4) State whether each party is a member Indian or a non-member (Indian or non-Indian) and indicate Tribal affiliation if applicable.
- 5) Name the filing or pleading that brings this matter before the court and the date the pleading was filed.
- 6) State whether each party resides in Indian country (18 USC §1151)⁶ and the county (if required by Tribal statutes).

⁶ 18 U.S.C. 1151. Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether

- 7) State attorneys' names and addresses and which party each attorney represents (if applicable).
- 8) Cite to applicable Tribal constitutional provisions and Tribal statutes listed above.

D. Subject Matter Jurisdiction Language In the Protection Order:

- 1) Tribal constitution and Tribal code provisions provide the Tribal court with authority to hear civil protection order cases should be clearly stated in the protection order (citation should be listed in section "A" above).
- 2) If the protection order contains custody or visitation provisions, list the Tribal code provision that provides subject matter jurisdiction for the court to issue custody or visitation provisions. Also list whether the child is enrolled with any tribe and the child's date of birth.
- 3) Clearly state the Violence Against Women Act (VAWA) reinforces Tribal court civil jurisdiction to issue protection orders over all persons in matters arising in Indian country or otherwise within the authority of the tribe (18 USC §2265 (e)). Full faith and credit for protection orders is codified at 18 USC §2265 (a) and (b).⁷

within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

⁷ 18 USC §2265 (e): "For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe." *Note that the text states full tribal civil authority to issue protection orders involving any person in matters arising anywhere in the Indian country or otherwise within the authority of the tribe so arguably this is a federal statute that. Therefore, the issue of jurisdiction may revolve around where the domestic violence (as that term is defined in tribal law and may include fear or emotional abuse) has or continues to occur. Additionally, for tribes with checkerboarded land bases the use of the Montana v. United States, 450 U.S. 544 (1981) factors should establish subject matter jurisdiction where domestic violence has occurred outside of Indian country, but where the domestic violence continues on Indian lands. Though Montana addressed the tribe's civil regulatory authority over non-members on non-Indian fee land within a reservation, the case has been extended to apply to the tribe's authority to adjudicate matters involving non-members on fee land in Indian country via Strait v. A-1 Contractors, 520 U.S. 438 (1997) and upheld in Plains Commerce Bank v. Long Family Land and Cattle Co., (554 U.S. 316 (2008). In Plains Commerce Bank, the Court narrowly construed Montana's first factor to matters that had a discernable effect on a tribe or its members and narrowly construed the second factor to require a showing of more than injury to the tribe, but required a showing that the issue would imperil the subsistence of the tribal community (a catastrophic consequence). The Montana factors may also establish subject matter jurisdiction in cases where 18 USC §2265(e) is held not to have relaxed federal restrictions placed on tribal subject matter jurisdiction over non-members on non-Indian lands within a tribe's reservation via the Montana case.*

E. Jurisdiction Over the Parties⁸

- 1) Whether the member/ respondent is a member of the tribe.
- 2) Whether the member/respondent has been served with a copy of the petition for a protection order and the notice of hearing in Indian country. (If not, list the place of service).
- 3) Detail the member/respondent's contacts with the tribe. (For instance, work, live, visit, or attend functions).

F. Due Process

- 1) Member/Respondent has been served with a copy of the petition requesting a protection order in the manner provided by Tribal law. Be sure the affidavit or proof of service becomes a part of the court file.
- 2) Timelines regarding hearings have been adhered to according to Tribal law, OR the judge has made a good cause finding (with language in the order) to allow the timelines to vary and the judge's timelines are being followed.
- 3) Member/Respondent appeared in person with/without counsel, did not appear despite being duly served, or did not appear and was not served.
- 4) Member/Respondent was provided a copy of the petition for a protection order, notice of the day/time of the hearing and supporting documents, and was provided an opportunity to be heard and ask questions of the petitioner in open court.

⁸ Personal jurisdiction over a respondent usually requires that the party respondent has certain minimum contacts with the forum in which the court sits. International Shoe v Washington, 326 US 310 (1945). Note that federal caselaw may not apply directly to Indian country, but this case is cited to provide guidance as to what the federal and state systems view as minimum contacts. Recall that 18 USC §2265 (e) requires personal jurisdiction over the respondent, but that term is not defined in the federal statute. Note that there is a split among circuit courts. Some courts require the respondent have contacts with the forum exercising jurisdiction while other courts are finding that domestic violence cases are akin to status cases. These are similar to custody cases and do not require personal contacts with the forum. See Cody J. Jacobs, *The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction*, Vol. 6 UCLA Law Rev. Issue 3, (Dec. 2017).

G. FINDINGS OF FACT⁹

- 1) Detail facts that demonstrate petitioner is a proper person to request a protection order under Tribal law.
- 2) Detail facts that demonstrate petitioner meets any residency requirements (if any).
- 3) Detail the relationship necessary to obtain a protection order (if any).
- 4) Detail facts of service of the petition for a protection order, notice of hearing on the respondent, and member/respondent was provided an opportunity to be heard regarding the allegations.
- 5) Detail facts that demonstrate the member/respondent is a member of the tribe exercising jurisdiction in this case.
- 6) Detail all facts the judge believes to be true regarding the allegations set forth in the petition for a protection order.
- 7) Detail all the facts the judge believes to be true regarding the oral testimony during the hearing.
- 8) Detail all facts the judge believes to be true regarding any additional evidence admitted during the hearing.
- 9) Detail all facts the judge believes is necessary to support the requested remedies.

H. CONCLUSIONS OF LAW

- 1) Judicial determination that all findings of facts listed in Section “G” above support the necessary conclusions of law:
 - a. Conclude subject matter jurisdiction is proper over the civil case.
 - b. Conclude personal jurisdiction over the member/respondent is proper.
 - c. Conclude due process regarding service of the petition for a protection order and notice of hearings are properly made on the member/respondent, and hearing timelines have been established.
 - d. Conclude the petitioner allowed to file a petition for a protection order pursuant to Tribal law.
 - e. Conclude residency requirements (if any) have been met.
 - f. Conclude whether relationship requirement (if any) has been met.

⁹ Recall that the findings of fact are critical to the case and may alert law enforcement to the level of physical violence and/or lethality related to the case. The findings of fact may also engage presumptions regarding custody and visitation and may provide some of the elements necessary for holding a non-Indian batterer accountable for violations of the protection order that occurred in Indian country if the enforcing tribe is exercising Special Domestic Violence Criminal Jurisdiction. The findings of fact may also bolster a habitual offender charge in the federal system by providing details on the violence. Consider requesting that the judge make these findings of fact in the protection order. If necessary, have a prepared order with findings of fact ready for the judge as a convenience courtesy.

- g. Conclude that domestic violence has occurred as that term is defined in Tribal law.
- h. Conclude the petitioner (and possibly the children) need(s) protection or conclude that addressing the custody of the children is in the best interest of the children.

I. Remedies

- 1) Cite to the remedies section of the Tribal code.
- 2) Tailor each remedy to meet the needs of the victim and/or children with safety at the forefront of the remedy.
- 3) Draft each remedy tightly enough to withstand the scrutiny of a prosecutor who must demonstrate a violation of the remedy beyond a reasonable doubt in cases of criminal enforcement or tightly enough for civil enforcement purposes.

J. Other Matters

- 1) The clerk or other personnel should be instructed to enter the protection order in NCIC POF or other national or state criminal justice registry.
- 2) The federal/state/Tribal database should note that the protection order has been served on the member/respondent in the manner provided by Tribal law and assure proof of service of the final order is in the court file.
- 3) Provide warnings in the protection order and verbal warnings from the court that the protection order is entitled to full faith and credit across all jurisdictional boundaries and cite to federal and Tribal law including any child custody provisions.
- 4) Provide warnings in the protection order and verbal warnings to the member/respondent that indicate possible criminal sanctions for violations and any applicable Tribal firearm prohibitions.
- 5) Provide warnings to the member/respondent in the protection order and verbal warnings that the protection order is directed to the respondent, the petitioner cannot violate the protection order.
- 6) Cover sheet that closely mirrors the state protection order cover sheet if tribe determines that is best for enforcement purposes outside of Indian country.
- 7) The advocate should instruct the victim on where to store or hold certified copies of the protection order.
- 8) Mutual, Cross or Counter Protection orders are not favored and must adhere to 18 USC 2265 (c) for full faith and credit enforcement purposes.

Common Terms¹⁰:

Emergency Protection Order- a temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Member Indian: as used in this document, a Tribal member of the federally recognized Indian tribe issuing the Tribal protection order.

Non-member Indian: as used in this document, an Indian that is a member of a federally recognized Indian tribe not issuing the Tribal protection order.

Petition for a Protection Order-the document making the request to the court for a protection order

Petitioner-individual making a request of the court

Respondent- individual being sued or accused in court

Protection Order- a court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining order and protection order interchangeably.

Temporary Protection Order- a temporary protection order that will expire in a short time, usually ordered after hearing only the Petitioner's side of the story, without notice to the respondent.

Violence Against Women Act (VAWA) Protection Order: The term "protection order" includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court whether obtained by filing and independent action or as a pendent elite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, Tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking found at 18 U.S.C. §2266(5).

¹⁰ For additional information on protection orders, including definitions, please contact the National Center on Protection Orders and Full Faith & Credit.

Permanent Protection Order- a final court order that is issued to prevent acts of domestic violence against a person or to prevent a person from stalking, intimidating, or harassing another person. Orders are issued by both civil and criminal state courts. The terminology referring to a protection order and the information contained in them vary from jurisdiction to jurisdiction. This checklist uses the terms restraining orders and protection orders interchangeably.

This project was supported by Grant No. 2016-TA-K052 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.