

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 8

SUMMER 2021

ISSUE 3

WHEN IT COMES TO ORDERS OF PROTECTION AND GUNS – LANGUAGE MATTERS

HOW ORDERS OF PROTECTION IN TENNESSEE
MAY NOT BE EFFECTIVELY IMPOSING THE STATE
AND FEDERAL FIREARMS BANS

*Joshua M. Anderson*¹

I. INTRODUCTION

Crime statistics show that there are over 2,000 firearm-related domestic violence incidents in Tennessee every year.² In recognition of the threat that firearms pose to

¹ Joshua M. Anderson is a graduate of the University of Tennessee College of Law. The author would like to thank Professor Jo Ann Lehberger, of the University of Tennessee Domestic Violence Clinic, for her inspiration and guidance in writing this article.

² TENNESSEE BUREAU OF INVESTIGATION, DOMESTIC VIOLENCE 2018 (2019), https://www.tn.gov/content/dam/tn/tbi/documents/tibrs/2018%20Domestic%20Violence_Final.pdf; TENNESSEE BUREAU OF INVESTIGATION, DOMESTIC VIOLENCE 2017 (2018), https://www.tn.gov/content/dam/tn/tbi/documents/tibrs/Domestic%20Violence%202017_Final.pdf; TENNESSEE BUREAU OF

victims of domestic violence, both Congress and the Tennessee General Assembly have enacted firearm bans on individuals that have orders of protection entered against them.³

For the restrictions to apply, however, certain findings and orders must be explicitly in the order of protection, and certain procedures must be followed.⁴ The restrictions also do not apply in all cases: only those involving “intimate partners” as defined by federal law.⁵ In at least one instance in Tennessee, a lack of adherence to these statutes led to a reversal of conviction on appeal.⁶

It is imperative that judges enter orders of protection that carefully track the statutory language.⁷ Tennessee’s court forms should be adapted to serve as a useful tool for this purpose and to ensure compliance on the part of all parties. This article will briefly examine the order of protection firearms restrictions, note some important points to consider in practice, and advocate for reformation of Tennessee order of protection forms to meet the applicable standards.

II. TENNESSEE FIREARMS RESTRICTIONS

Tennessee’s firearm restrictions for orders of protection are really just the federal restrictions. Tennessee Code Annotated § 39-17-1307(f) makes it a Class A misdemeanor⁸ for an individual that is “subject to an order of protection that fully complies with 18 U.S.C. § 922(g)(8)” to possess a firearm.⁹ The main takeaway from this provision is that the text of the statute does not say “substantially

INVESTIGATION, DOMESTIC VIOLENCE 2016 (2017), https://www.tn.gov/content/dam/tn/tbi/documents/Domestic_Violence_2016_final2.pdf.

³ 18 U.S.C. § 922(g)(8) (2021); TENN. CODE ANN. § 39-17-1307(f) (2021).

⁴ *Id.*

⁵ 18 U.S.C. § 922(g)(8) (2021); 18 U.S.C. § 921(32) (2021) (defining the term “intimate partner”).

⁶ *State v. Carman-Thacker*, No. M2014-01859-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 728, at *1 (Tenn. Crim. App. 2015).

⁷ *See* 18 U.S.C. § 922(g)(8) (2021).

⁸ TENN. CODE ANN. § 39-17-1307(f)(4) (2021).

⁹ TENN. CODE ANN. § 39-17-1307(f)(1)(B) (2021).

complies,” it says “fully complies,” meaning each element of the federal statute must be met.¹⁰

Tennessee courts have interpreted this requirement literally.¹¹ The Court of Appeals in *Long v. Brown* held that an order of protection did not fully comply with the Federal law when it did not include the specific federal statutory language.¹² The order did not restrain the respondent as prescribed by law or have the required findings on its face.¹³

III. FEDERAL FIREARMS RESTRICTIONS

18 U.S.C. § 922(g)(8) makes it a crime for anyone that is subject to a court order meeting the statute’s requirements from possessing a firearm.

Importantly, the ban is only applicable to orders that restrain an individual’s conduct towards an “intimate partner.”¹⁴ An “intimate partner” is defined for purposes of this statute as:

with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.¹⁵

“Intimate partner” is notably narrower than the “domestic abuse victim”¹⁶ that is permitted to seek an order of protection under Tennessee law.¹⁷ Even more importantly, “intimate partner” does not categorically encompass the even broader “stalking victim” or “sexual assault victim” that may seek an order of protection in Tennessee.¹⁸ As such, in many Tennessee cases, the firearm restrictions are not applicable

¹⁰ See *Long v. Brown*, No. E2013-00802-COA-R3-CV, 2014 Tenn. App. LEXIS 29, at *20 (Tenn. Ct. App. 2014).

¹¹ *Id.*; Carman-Thacker, 2015 Tenn. Crim. App. LEXIS 728 at *20.

¹² *Brown*, 2014 Tenn. App. LEXIS 29 at *20.

¹³ *Id.*

¹⁴ 18 U.S.C. § 922(g)(8) (2021).

¹⁵ 18 U.S.C. § 921(32) (2021).

¹⁶ TENN. CODE ANN. § 36-3-601(5) (2021).

¹⁷ TENN. CODE ANN. § 36-3-602(a) (2021).

¹⁸ *Id.*

because the parties are not “intimate partners” as defined by federal law.

For the restrictions to be applicable, the order must have been “issued after a hearing of which [the respondent] received actual notice, and at which [the respondent] had an opportunity to participate”¹⁹ The requirement of notice and hearing with an opportunity to be heard is why the firearms ban is not applicable for *ex parte* orders of protection – which are issued at the initiation of a petition and prior to a full hearing.²⁰

The federal statute also requires the terms of the order to include several explicit findings and restrictions.²¹ An order of protection must:

include a finding that the person it is entered against “represents a credible threat to the physical safety of such intimate partner or child”²²

restrain the person from “harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child”²³

“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”²⁴

¹⁹ 18 U.S.C. § 922(g)(8)(A) (2021).

²⁰ *See* TENN. CODE ANN. § 36-3-605 (2021).

²¹ 18 U.S.C. § 922(g)(8) (2021).

²² 18 U.S.C. § 922(g)(8)(C)(i) (2021).

²³ 18 U.S.C. § 922(g)(8)(B) (2021).

²⁴ 18 U.S.C. § 922(g)(8)(C)(ii) (2021).

If these requirements are met by the order of protection, then the federal firearms ban (and thus the state ban) is effective against the respondent.

IV. TENNESSEE DISPOSSESSION AND DISCLOSURE REQUIREMENTS

Upon the issuance of an order of protection that effectuates the firearms restrictions, the respondent has forty-eight (48) hours to dispossess themselves of any firearms in their possession “by any lawful means.”²⁵ They also must complete an “affidavit of firearms dispossession,” attesting that they have complied with this requirement.²⁶ Knowingly failing to dispossess a firearm is itself a crime, punishable as a Class A misdemeanor for each violation.²⁷

An order of protection is required to specifically order and instruct a respondent about dispossession of firearms.²⁸ Tennessee Code Annotated § 36-3-625(b) provides that the court must order the respondent:

To terminate the respondent’s physical possession of the firearms in the respondent’s possession by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms, within forty-eight (48) hours;

To complete and return the affidavit of firearm dispossession form created pursuant to subsection (e), which the court may provide the respondent or direct the respondent to the administrative office of the courts’ website; and

That if the respondent possesses firearms as business inventory or that are registered under the National Firearms Act (26 U.S.C. §§

²⁵ TENN. CODE ANN. § 36-3-625(b)(1) (2021).

²⁶ TENN. CODE ANN. § 36-3-625(d) (2021).

²⁷ TENN. CODE ANN. § 39-13-113(h)(1) (2021).

²⁸ TENN. CODE ANN. § 36-3-625(b) (2021).

5801 et seq.), there are additional statutory provisions that may apply and shall include these additional provisions in the content of the order.

Additionally, if the order meets the standards of 18 U.S.C. § 922(g)(8), the order on its face must provide the respondent with disclosures set out in the statute informing them about the dispossession, the prohibition of possessing a firearm, and that possessing a firearm or failing to dispossess of one is a violation of the law.²⁹

Recognizing the importance of respondents receiving disclosures about restrictions before their hearing, the General Assembly specifically required that the administrative office of the courts include disclosures in their promulgated petition for an order of protection form.³⁰ The petition must include language that is “substantially similar” to that which is provided in the statute itself.³¹

V. FAILURE TO ADHERE TO STATUTORY LANGUAGE LEADS TO INEFFECTIVE ORDERS OF PROTECTION

In *State v. Carman-Thacker*, the Tennessee Court of Criminal Appeals reversed a conviction of twelve counts of unlawful possession of a firearm and twelve counts of violating an order of protection, when the underlying order did not meet the requirements of 18 U.S.C. § 922(g)(8).³² The defendant, in that case, had an order of protection entered against her that had been brought by her niece.³³ The order of protection did contain “subtitles’ that prohibited her from possessing firearms.”³⁴ However, the court concluded that a niece, who had not cohabitated with the defendant, was not an “intimate partner” for purposes of the federal statute.³⁵

²⁹ TENN. CODE ANN. § 36-3-625(a) (2021).

³⁰ TENN. CODE ANN. § 36-3-604(c) (2021).

³¹ *Id.*

³² *Carman-Thacker*, 2015 Tenn. Crim. App. LEXIS 728 at *19-20.

³³ *Id.* at *19.

³⁴ *Id.* at *7.

³⁵ *Id.* at *19-20.

The court vacated the convictions and dismissed all charges.³⁶

In *Long v. Brown*, the respondent attacked an order of protection entered against him on various grounds, including that the disclosures of Tennessee Code Annotated § 36-3-625(a) were not in the order.³⁷ The appellate court concluded that the disclosures were not required because the order of protection did not fully comply with the provisions 18 U.S.C. § 922(g)(8).³⁸

These two cases illustrate the importance of making sure that the proper findings and other requirements are met in an order of protection – otherwise the order is wholly ineffective in prohibiting applicable respondents from possessing firearms. Lack of accuracy leads to costly, needless litigation, as in *Long v. Brown*,³⁹ or a defendant who otherwise would have been successfully convicted for violating an order of protection, instead going without consequence, as in *State v. Carman-Thacker*.

This should also serve as a harbinger for cases in which a petitioner and respondent seek an agreed order with no findings of facts or only certain restrictions provided for in the order. If it is the parties' or court's intent that the firearm restrictions be in effect, the order must still meet the requirements of 18 U.S.C. § 922(g)(8) – otherwise, the ban is not applicable. This also highlights an even larger problem that is outside the scope of this article, as orders of protection must meet certain requirements and contain certain findings to be generally effective at all.⁴⁰

³⁶ *Id.* at *20.

³⁷ *Brown*, 2014 Tenn. App. LEXIS 29 at *19-20.

³⁸ *Id.* at *20.

³⁹ A case that, interesting enough, the petitioner would likely have been an “intimate partner” and otherwise met the requirements of 18 U.S.C. § 922(g)(8) if the facial requirements were met in the order. See *Carman-Thacker*, 2015 Tenn. Crim. App. LEXIS 728 at *1 (the petitioner was “the man with whom [respondent] had lived for approximately 27 years”).

⁴⁰ See TENN. CODE ANN. § 39-13-113(f) (2021).

VI. TENNESSEE NEEDS TO MODIFY ITS ORDER OF PROTECTION FORM

The Tennessee Administrative Office of the Courts promulgates a variety of forms that may be used in order of protection cases.⁴¹ This is done, admirably, to assist local clerks of court in their duty to provide forms to petitioners necessary to seek an order of protection⁴² and for the Office to meet its statutory requirements,⁴³ including those relating to firearm restrictions.⁴⁴ Notably, several local courts use their own forms,⁴⁵ though state law requires that the forms provided by the Administrative Office of the Courts be used exclusively by all courts.⁴⁶

The state order of protection form, as it is promulgated at the date of this publication, does not meet all the facial requirements of 18 U.S.C. § 922(g)(8) necessary to effectuate the firearms ban.⁴⁷ The form does a good job of clearly defining the relationship of the petitioner and respondent for purposes of the “intimate partner” determination.⁴⁸ The form includes a default finding that the “Respondent was given reasonable notice of the hearing and an opportunity to be heard,”⁴⁹ seemingly meeting the requirement of 18 U.S.C. § 922(g)(8)(A), – though it deviates from the term “actual notice” in the federal statute.⁵⁰ The form also includes another default finding that “there is credible evidence that Respondent is a threat to the safety of the Petitioner and [] Petitioner’s Minor Children.”⁵¹ This

⁴¹ See TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, ORDER OF PROTECTION FORMS, <https://www.tncourts.gov/programs/self-help-center/forms/order-protection-forms> (last visited December 11, 2020).

⁴² TENN. CODE ANN. § 36-3-604(a) (2021).

⁴³ TENN. CODE ANN. § 36-3-604(b) (2021).

⁴⁴ TENN. CODE ANN. § 36-3-604(c) (2021).

⁴⁵ The author is aware that at least Knox County and Davidson County Courts currently use their own forms.

⁴⁶ TENN. CODE ANN. § 36-3-604(d) (2021).

⁴⁷ See TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, FORM #OP2018-7 (07/01/19), http://www.tncourts.gov/sites/default/files/docs/order_of_protection_7.1.2019.pdf (last visited December 11, 2020).

⁴⁸ TENNESSEE ADMINISTRATIVE OFFICE OF THE COURT, *supra* note 46, at 1.

⁴⁹ TENNESSEE ADMINISTRATIVE OFFICE OF THE COURT, *supra* note 46, at 2.

⁵⁰ See 18 U.S.C. § 922(g)(8)(A) (2021).

⁵¹ TENNESSEE ADMINISTRATIVE OFFICE OF THE COURT, *supra* note 46, at 2.

seeks to fulfill the requirements of 18 U.S.C. § 922(g)(8)(C)(i), though it does not use the exact language “represents a credible threat to the *physical* safety of such intimate partner or child.”⁵²

Notably absent from the order of protection form are the explicit orders that restrain the person from “harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child”⁵³ The order form’s terms also do not explicitly prohibit “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”⁵⁴

While the Sixth Circuit, in an unpublished opinion, indicated that more broad terms like “abuse” might satisfy some of the above requirements,⁵⁵ other courts have taken a more literal approach.⁵⁶ The New Hampshire Supreme Court in *Magoon v. Thoroughgood* held that when a trial court did not use the “explicit” language provided for in 18 U.S.C. § 922(g)(8) – which in contrast was used in New Hampshire’s state domestic violence form – the trial court erred in barring the respondent from being returned his firearms.⁵⁷

While one might speculate how Tennessee courts or federal courts might interpret Tennessee’s form provisions and whether they meet the federal standards, it is also important for purposes of full faith and credit to consider how other states might construe them. This is an idea that did not pass by the General Assembly which admonished the Administrative Office of the Courts that “[t]o the extent

⁵² 18 U.S.C. § 922(g)(8)(C)(i) (2021)(emphasis added).

⁵³ 18 U.S.C. § 922(g)(8)(B) (2021).

⁵⁴ 18 U.S.C. § 922(g)(8)(C)(ii) (2021).

⁵⁵ *United States v. Hopper*, 28 F. App’x 376, 379 (6th Cir. 2001) (“Although ‘domestic violence and abuse’ is language which may contemplate a broader range of activity than physical assault, we believe that the language is sufficiently explicit so as to include actual, attempted and threatened physical force within its meaning.”)

⁵⁶ *Magoon v. Thoroughgood*, 148 N.H. 139 (N.H. 2002).

⁵⁷ *Id.* at 143.

possible, the forms shall be uniform with those promulgated by surrounding states so that Tennessee forms may be afforded full faith and credit.”⁵⁸ Other states currently have order of protection forms that track the federal statutory language exactly.⁵⁹

For Tennessee courts to ensure that applicable orders of protection effectuate the state/federal firearms ban on respondents and to ensure other states give full faith and credit to these orders, the Tennessee Administrative Office of the Courts should modify its order of protection form to track the exact language provided for in the federal statutes. The Tennessee judiciary should also require that all local courts abide by the requirement⁶⁰ that they use these uniform state forms in practice.

VII. CONCLUSION

When it comes to the state and federal firearms bans – it matters what language is used in the findings, restrictions, and other terms of an order of protection. 18 U.S.C. § 922(g)(8) provides specific requirements of what an order must include, and it narrowly defines who such an order applies against.⁶¹ Judges and practitioners should pay close attention to what is written, check marked, and included in a form order of protection. The Tennessee Administrative Office of the Courts should also modify Tennessee’s forms to ensure they are a useful tool in this practice.

⁵⁸ TENN. CODE ANN. § 36-3-604(b) (2021).

⁵⁹ *See, e.g.*, GA. SUPER. CT. CLERKS’ COOP. AUTH., FAMILY VIOLENCE TWELVE MONTH PROTECTIVE ORDER ADDED - 09/18/2014, https://www.gscca.org/docs/familyviolencedocuments/sc16_family_violence_twelve_month_protective_order.pdf?sfvrsn=c27bca28_2 (last visited December 11, 2020).

⁶⁰ TENN. CODE ANN. § 36-3-604(d) (2021).

⁶¹ *See also* 18 U.S.C. § 921(32) (2021).