# Judicial Exceptions to Protective Orders

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In the published opinion *Armstrong v. Armstrong*, 71 Va. App. 97 (2019), a father in a custody case appealed a Circuit Court's award of joint legal custody of his child. Mr. Armstrong argued that the trial court abused its discretion as a matter of law by ordering joint legal custody despite a protective order that prohibited "contact of any kind" between the parties. Mr. Armstrong argued, not illogically, that two people who cannot have contact cannot jointly make decisions for their children.

The Virginia Court of Appeals disagreed with Mr. Armstrong and found that an order of no contact between two parents does not prevent a trial court from awarding joint legal custody. In the process of making this finding, the Virginia Court of Appeals created a number of exceptions to protective orders that previously did not exist.

**The Facts**

In November of 2017, Mr. Armstrong obtained a protective order against Mrs. Armstrong pursuant to Virginia Code Section 16.1-279.1. The Juvenile Court Order prohibited Mrs. Armstrong from having contact with Mr. Armstrong or the child. Mrs. Armstrong appealed the protective order to the Circuit Court. Following an evidentiary hearing, the Circuit Court modified the protective order to prohibit Mrs. Armstrong from having contact with Mr. Armstrong, but it allowed her to have contact with the child. The protective order was set to expire on December 11, 2019. The parties stipulated that the transcript and evidence from the protective order trial would be admissible in the divorce and custody case.

The ensuing divorce was tumultuous and included various criminal and civil proceedings, including a child abuse claim filed by Mr. Armstrong against Mrs. Armstrong. Ultimately, the Circuit Court granted Mr. Armstrong a divorce on the ground of cruelty.

The Circuit Court also awarded joint legal custody to the parties. Recognizing that a protective order that prohibited contact "of any kind" between Mr. Armstrong and Mrs. Armstrong would inhibit their ability to co-parent, the Circuit Court used its custody ruling to expand the allowable contact between the parties. The Court directed the parties "to communicate concerning the child 'SUBJECT TO THE PROTECTIVE ORDER' with 'no telephone calls, except in emergency situations, or by written agreement." The Circuit Court advised counsel to include a provision in the divorce decree addressing third-party exchanges of the child. Accordingly, the decree provided for exchanges either at daycare or the Family Community Education offices. The decree also reiterated that all communication between the parties was "subject to the protective order."

**Analysis**

The Virginia Court of Appeals began its opinion by noting that Virginia Code Section 20-124.1 does not make direct communication between the parties a prerequisite for joint legal custody. The trial court went on to say that communicating through agreed-upon third parties for the limited purpose of making decisions essential to joint legal custody does not "pierce the protective barrier" that a protective order erects between Mr. Armstrong and Mrs. Armstrong.

Thus, the Virginia Court of Appeals found the first implied exception to protective orders – communications through agreed-upon third parties for the limited purpose of making decisions essential to joint legal custody. Protective orders are generally quite clear that no contact means no contact. How-

ever, now "no contact" does not mean no contact if the parties have joint legal custody and a decision regarding a minor child or children needs to be made. It is unclear whether this new exception applies if one party has sole legal custody (or there is no custody order at all), but there is an important decision to be made regarding a child.

The Virginia Court of Appeals went on to state the following in a footnote: "At oral argument, father conceded that communication through counsel would not violate the protective order." No authority is cited for the proposition that parties can communicate through counsel and not violate a protective order, and no discussion is provided beyond that single sentence. Thus, the Virginia Court of Appeals has explicitly recognized a second implied exception to protective orders – communications through counsel.

Unfortunately, the Virginia Court of Appeals did not provide any insight into the limits of "communication through counsel," if there be any. At a minimum, communications between two counsel when both parties are represented would present no problems. But what if the protected party has no counsel? Can counsel for the prohibited party directly contact the *pro se* protected party in the absence of an express provision in the protective order? Perhaps, but that is not stated anywhere in the Code. And if the answer is no, then a lawyer could put his client in jeopardy of incarceration if he or she were to reach out to the protected party. The Virginia Court of Appeals also did not offer any guidance as to whether there is any limit to the topics that could be addressed through counsel without running afoul of a protective order.

Finally, while stating that communication would be "subject to the protective order," the Circuit Court in *Armstrong* expanded the allowable contact in its ruling on custody and visitation. The Circuit Court found that the parties were to have "no telephone calls, except in emergency situations, or by written agreement." Thus, the Virginia Court of Appeals found third and fourth exceptions to protective orders that can be written into a custody and visitation order– contact in cases of "emergency" (though this term is not defined), and contact by subsequent written agreement.

Using a custody and visitation order to modify an existing protective order is problematic. The Virginia Code provides a specific mechanism to dissolve or modify a protective order. Virginia Code Section 16.1-279.1(G) says the following: "Either party may at any time file a written motion with the court requesting a hearing to dissolve or modify the order. Proceedings to dissolve or modify an order shall be given precedence on the docket of the court." In the Armstrong case, however, there was no motion to dissolve or modify filed. Instead, the Circuit Court simply modified the protective order via a custody order. In addition, the Circuit Court empowered the parties to expand their contact by telephone by written agreement with no court intervention.

The enforcement problems that arise from deviating from the official means of modifying protective orders are obvious. Pursuant to Virginia Code Section 16.1-279.1(F), protective orders are entered into the Virginia Criminal Information Network. A police officer who is investigating an allegation of a violation of a protective order will have access to that protective order and consider it on the terms set forth in it. In contrast, custody orders are not entered into the Virginia Criminal Information Network. Written agreements between the parties are also not entered into the Virginia Criminal Information Network. Any such modifications to a protective order will not be readily available to an investigating officer unless the parties provide it. This could lead to an improper arrest for a charge that requires active jail time for any person convicted.[1]

**Conclusion**

The *Armstrong* case and the struggles of the trial and appellate court to deal with a protective order in the context of custody and visitation illustrate what family law practitioners and judges already know – protective orders hamper effective co-parenting and make it difficult for parties to move forward. Protective orders may be necessary and appropriate to protect a person from harm. However, protec-

tive orders can work against other worthy goals of the Virginia Code, such as actively supporting the child's contact and relationship with both parents, promoting the ability of each parent to cooperate and resolve matters affecting children, and settling disputes without the need for contested hearings.

So how should counsel, clients and courts proceed when dealing with a protective order in the context of custody and visitation proceedings? First, the court should take all reasonable steps, including the issuance of a protective order, to ensure the safety of parties and children. Once that is done, however, the detrimental impact of protective orders upon efforts to co-parent need to be addressed.

There are a number of practical steps that can be taken. First, the protective order could include specifics as to how parties may communicate about the children. The phrase "contact by text and email only for the purpose of discussing the welfare and visitation of the children" fits neatly on the protective order form and can allow co-parenting without jeopardizing safety.

Second, the protective order can include specifics as to what contact the parties may have with each other and for what purposes. Expressly allowing contact at neutral exchange points, or in the context of co-parenting counseling, or in the context of a settlement conference with counsel present, or through designated third parties can help parties move forward without jeopardizing safety.

Third, courts should consider what length of time a protective order should be kept in place. Protective orders can be imposed for up to two years. However, two years is a maximum, not a minimum. And it should be noted that even if a court finds that an act of family abuse as defined in Virginia Code Section 16.1-228 occurred, the court is not required to enter the protective order at all. Virginia Code Section 16.1-279.1 says, "In case of family abuse... the court may issue a protective order...." (emphasis added). A protective order may not be appropriate for an act of family abuse that was relatively minor, context specific, and for which the evidence suggests that a repeat is unlikely. Alternatively, the entry of a protective order does not require the court to limit contact. The protective order could simply state that there are to be no further acts of family abuse without limiting contact between the parties in any way.

Finally, counsel and the courts should be reluctant to take shortcuts and create implied exceptions to a protective order without following the statutory process. Protective orders were created to protect people from serious physical or mental harm. When courts create exceptions to a protective order that do not exist in the Code or the body of the protective order itself, they send the message that "no contact" does not really mean "no contact," and that there are times when the protective order can be ignored.

That may mean that a party has to file a motion to dissolve or modify the protective order and notice it for hearing on the same day as the custody and visitation trial.[2] That may mean filing an appeal to Circuit Court and then consolidating the appeal with the Circuit Court divorce and custody proceedings. That may mean dissolving the protective order and putting limits for acceptable restrictions on contact within the body of a custody/visitation order. All of these methods can be time-consuming, expensive, confusing to the parties, and cumbersome for the courts to address. Given, however, that the safety of the petitioner and the liberty of the respondent are at stake, courts should keep protective orders as simple, clear, and free from subjective interpretation as possible. ❖

### *Endnotes*

**1.** A court can add language to a protective order that says "No contact with petitioner except as provided for in any custody and visitation order of a court of competent jurisdiction." An investigating police officer would thereby at least be alerted that such an order may exist. The best practice, however, is to have a protective order that stands on its own terms, if possible.

**2.** Whether or not a circuit court can assume concurrent jurisdiction over a final JDR protective order that was not appealed for the purpose of dissolution or modification will have to be a discussion for another day.