



Domestic Violence & Prohibited Firearm Possessors

BY DEBBIE WEECKS

In a recent issue of ARIZONA ATTORNEY, Judge George Anagnost spoke of the right to possess firearms, whether arising under the Second Amendment or under Arizona's own Declaration of Rights.¹ The nature and limitations of the right to bear firearms were discussed there in the context of the ruling last Supreme Court Term in the *Heller* case.² He explained that the United States Supreme Court parted from the view of a collective militia in favor of finding an individual right of gun ownership.

This article expands on the issue of individual rights to possess firearms in the context of both orders of protection and misdemeanor domestic violence convictions. It examines the current statutory framework surrounding protective orders³ and prohibited possession of firearms.

Orders of Protection

Title 13 of the Arizona Revised Statutes, § 3601 *et seq.*, permits an Arizona court to issue an *ex parte* order of protection ("OP"), with provision then for the respondent to request a hearing after being served with the OP. The purpose of the order is to protect an alleged victim from an act of domestic violence. The petitioner often is the person seeking protection, but third parties may bring petitions to protect another (for instance, in situations involving custodians and guardians). The issuance of such order is not a conviction of a crime, and likewise, the lack of requesting a hearing is not an admission.

The order may include a requirement for a respondent to surrender weapons and ammunition and not to possess those throughout the term of the order. The order is good for one year, unless "revoked"⁴ after hearing. The legal standard for such prohibited possessor standard without hearing, at the *ex parte* stage, is that the court finds "credible threat" to the safety of the petitioner or other designated person.

An OP may be issued upon reasonable cause to believe that there has been even one instance of domestic violence within a year (or longer period if good cause) or that domestic violence will occur without the order. The burden to keep an order in place at hearing is not very high, defined in the Arizona Rules of Protective Order Procedure as a preponderance of the evidence. (Ariz.R.P.O.P., Rule 8(F)).

This differs from injunctions against harassment (requiring a series of acts of harassment) or workplace injunctions under Title 12 (§§ 1809, 1810, respectively). "Domestic violence" in OP situations means that there is a relationship of a type outlined in the statute and that the act would constitute one of the listed crimes. In that regard, the list would surprise many readers. It includes crimes not commonly brought to mind.⁵

Integration of Family Law

Often overlooked is the integration of the term "domestic violence" as used in Title 13 cases (the criminal code, encompassing OPs) and in family law cases (such as child custody, divorce and paternity). Of note is that A.R.S. § 25-403.03 prohibits joint custody of a child upon a finding of "significant domestic violence pursuant to section 13-3601" or a finding of a significant history of domestic violence. There is some statutory disconnect in that Title 13's criteria do not require "significant" domestic violence for an OP to issue. And § 403.03(A) only addresses joint custody, not sole custodianship to the perpetrator.⁶ (For more on the issue of custody in Title 25, see "Leveling the Family Court Playing Field," p. 22.)

In the event that a respondent to an OP is also a party to a family law case, that respondent may become a prohibited possessor of firearms either by an *ex parte* order under state law during the term of such order or pursuant to federal law if an OP is sustained after hearing. The latter, caused by the "Brady" law, is avoidable in a family law case.

In regard to a respondent to an OP with a pending family law case, there is a choice available to the parties and court to place any restrictions upon the respondent within the family court temporary or permanent orders, and at the same time to revoke or vacate the OP. This option may be desirable when use of firearms is not a threat and permitting firearms possession is arguably necessary (*e.g.*, hunters, security guards or others who would have legitimate reasons to so possess but for whom there is not a recognized statutory exception in the federal law).

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domestic violence & our courts

Such issuance of possessor prohibition by court order under Title 12 or 25 remains an area of future appellate review in light of other recent federal case law.

Firearms-Prohibited Possessor Statutes

Some federal law pre-empts state laws, which might otherwise permit possession of firearms. Examples include the Brady Handgun Violence Prevention Act,⁷ after a hearing on an OP, or the Lautenberg Amendment to the Gun Control Act of 1968, following indictment or conviction for a felony or following conviction for a misdemeanor crime of domestic violence.⁸ (Note that Lautenberg and Brady are not interchangeable.)

Lautenberg

The Lautenberg Amendment contains §§ 922(d)(9) and (g)(9), passed in 1996, which was part of the Omnibus Consolidated Appropriations Act of 1997.

18 U.S.C. § 922(d)(9) prohibits the sale or disposal of firearms to someone when there is “reasonable cause to believe” that the recipient has been convicted of a misdemeanor crime of domestic violence.

Concurrently, § 922(g)(9) provides for prohibited possessor status upon conviction of a misdemeanor crime of domestic violence. That section requires that the defendant had counsel or knowingly, intelligently and voluntarily waived that right.⁹

In instances in which a domestic violence conviction is set aside, the prohibited possessor status is not necessarily set aside. For instance, § 921(33)(B)(ii) states that if the conviction has been “expunged or set aside,” the person shall be considered not to have been convicted of the offense unless the order provides restrictions on the continued shipping, transport, possession or receipt of firearms. In Arizona, then, set-aside is governed by A.R.S. § 13-907, which is in judicial discretion and should not be set aside if the criminal offense involved infliction of serious physical injury, use or exhibition of a deadly weapon or dangerous instrument, or involved a victim under the age of 15.


If an individual is so deemed a prohibited possessor, § 925(c) permits petition to the Attorney General for relief from that status. If such application is denied, judicial review is available.

Brady

Section § 922(d)(8) prohibits the sale or disposal of firearms to someone when there is “reasonable cause to believe” that the recip-

ient is subject to an OP if it was issued after hearing with notice and opportunity to participate; and either there was a finding of “credible threat” to the safety of an intimate partner or child, or “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.”

Section 922(g)(8) provides for prohibited possessor status upon the same findings. Upon a court’s sustaining an OP after hearing, Brady will be triggered in most circumstances. There is an exception under the Gun Control Act applicable to Brady, but not applicable to Lautenberg. The exceptions in § 925 include that the prohibited possessor status does not apply to the “United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.” (§ 925(a)(1)), or for “military training or in competitions.”¹⁰

In the past six months, the Ninth Circuit has reviewed § 922(g)(8) and concluded “The right to keep and bear arms is ‘deeply rooted in this Nation’s history and tradition.’”¹¹ Consequently, in our circuit, it has been determined that the Second Amendment applies to the states and localities under the due process clause of the U.S. Constitution. 

endnotes

- George T. Anagnost, *The Arizona Constitution: Sources, Structure & Interpretive Cases*, ARIZ. ATT’Y, Mar. 2009, at 14.
- District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).
- Excluded are other types of protective orders unrelated to the domestic violence debate (*e.g.*, guardianships and conservatorships of minors or adults under Titles 8, 14, and 36 of the Arizona Revised Statutes. See chapter 145, HB 2532, Senate Engrossed for new law on prohibited possessor and restoration of rights related to those found to be mentally ill under A.R.S. § 13-924.).
- The Arizona Rules of Protective Order Procedure call for the judicial officer to state a basis at the conclusion of hearing for “continuing, modifying or revoking” the protective order. (Ariz.R.P.O.P., Rule 8.G.). Rule

- addressing appeals, uses the word “quashed” rather than “revoked.”
- The list encompasses statutory numbers that correlate to: dangerous crimes against children; endangerment; threatening or intimidating; assault; aggravated assault; custodial interference; unlawful imprisonment; kidnapping; criminal trespass; criminal damage; interference with judicial proceedings; disorderly conduct; use of a phone to terrify, intimidate, threaten, harass, annoy or offend; harassment; aggravated harassment; stalking; surreptitiously photographing, videotaping, filming or digitally recording a person; aggravated domestic violence; and child or vulnerable adult abuse.
- Custody can be legal (decision making) or physical (primary caregiver status), as defined in A.R.S. § 25-402. Failure to

- delineate means that “joint custody” encompasses either or both of legal and physical under those definitions, leaving uncertainty of the true meaning of § 403.03(A), affected by *Hurd v. Hurd*, No. 1 CA-CV 07-0342 (Ariz. Ct. App. July 23, 2009).
- short title of the 1993 amendment, which included amendment to §§ 922 and 924.
- See 18 U.S.C. § 922(d)(1), (g)1, indicating “punishable by imprisonment for a term exceeding one year,” which is necessarily a “felony” in Arizona. See also 18 U.S.C. § 921, defining “misdemeanor crime of domestic violence” at § 921(33).
- For the most recent reading outlining predicate domestic violence elements, see *United States v. Hayes*, No. 07-608, slip op. (U.S.S.C. Feb. 24, 2009).
- There is some uncertainty

- whether this exemption for law enforcement applies to individuals against whom an OP has been sustained after hearing and opportunity to be heard. It would make little sense to have the exception unless it were applicable to individuals, inasmuch as there would not be any such order issued against an organization. The exception regarding “competitions” is not well explained, and could thwart the purpose of the prohibited possessor statutes were any respondent otherwise subject to Brady permitted to claim she is just part of a competition this afternoon. There is further support for a law enforcement exception interpretation applicable to individual officers in light of the *Heller* decision discussed at some length by Judge Anagnost, *supra* note 1.
- Nordhake v. King*, 563 F.3rd 439 (9th Cir. 2009).