

Chapter 9: Federal Domestic Violence Laws

Section 9A: The Violence Against Women Act (VAWA)

*Lisa Beran, Staff Attorney,
KY Domestic Violence Association*

The most significant federal law in the domestic violence context is the 1994 Violence Against Women Act (VAWA). The Act includes several significant advances in domestic violence law. It provides that domestic violence protective orders be given full faith and credit by all states, territories and Indian tribes, and created several new federal crimes.

Full Faith and Credit Provision of the VAWA

Statutory overview

The Full Faith and Credit provision of VAWA, 18 U.S.C. §2265, requires states, territories and Indian tribes to enforce valid protection orders issued by foreign states, territories and Indian tribes as if the orders had been issued by the non-issuing, enforcing state, territory or Indian tribe. In other words, whatever the implications of violating a protection order are in the new state or Indian land, these apply to enforcement of the order from the old state or Indian land. In addition, if the person is ineligible for a protection order in new state but she/he was eligible for the protection order in the old state, the new state must still enforce the foreign order.

Subject Protection Orders

In order to be accorded full faith and credit, the protection order must have been issued by a court which had jurisdiction over the parties and matter under the laws of such state, territory or Indian tribe. Additionally, it must have been issued under circumstances where the defendant was given reasonable notice and the opportunity to be heard sufficient to protect the Respondent's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by state, territory or tribal law, and, in any event, within a reasonable period of time after the order is issued, sufficient to protect the opposing party's right to due process.

The full faith and credit provision applies to 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 temporary and final protection orders issued by civil and criminal courts (other than support or child custody orders) . 18 U.S.C. 2266. In other words, it extends to temporary and final, civil and criminal protection orders.

Enforcement

Foreign, or out-of-state protective orders must be enforced in the same ways that in-state orders are enforced. In Kentucky, all foreign protective orders, whether registered in the LINK system or not, are entitled to a rebuttable presumption of validity. [KRS 403.7529(1)] The Kentucky statute directs that a peace officer shall make an arrest for a violation of a foreign protective order,

in the same manner he/she would for a Kentucky order. The same warrantless arrest provisions are available to a peace officer with foreign protective orders as are with Kentucky EPO/DVOs. [KRS 403.7529(2)] If a foreign order appears to be facially valid, i.e. contain the names of the parties and not be expired, a peace officer is required to enforce it as valid. Until a Kentucky court determines that a foreign order is invalid, it is entitled to full faith and credit enforcement. [KRS 403.7257]

Even if the foreign order provides protections to persons who would not be eligible for protection in the enforcing state, the out-of-state order must be enforced in Kentucky. For example, if persons who are or were intimate partners but never lived together are covered under the issuing state's protective order statute, then the enforcing state must enforce the order even if it would not have been granted initially according to the enforcing state's code.

If the foreign order grants relief that would not be available in protective orders of the enforcing state, the enforcing state must still enforce the foreign order as granted. For example, if the issuing state grants possession of the family vehicle and the abuser tries to take the car from the victim in the enforcing state, the enforcing state must enforce the order even though the relief is not generally available in that state.

If the violation of a protective order is not an arrestable offense in the issuing state but the enforcing state is one that mandates arrest for violation of a protective order, then the police in the enforcing state must arrest just as they would with a protective order issued by their state.

If the maximum duration of an order in the enforcing state is less than the duration in the issuing state, the order must still be enforced by its terms. In Kentucky, orders can be issued for up to three years, in New Jersey they can be issued for a lifetime, while in West Virginia, orders are usually only issued for ninety days. The enforcing state must enforce the order for the full duration specified in the issuing state. So a three-year order from Kentucky must be enforced in West Virginia for the full three years, even though West Virginia's orders expire after ninety days.

In Kentucky, EPO/DVOs can be enforced in two, mutually exclusive, ways. [KRS 403.760(5)] One option is that the violator can be subject to criminal prosecution for a Class A misdemeanor charge of violation of a protective order. [KRS 403.763] In order to be convicted, it must be proved that the defendant intentionally violated a protective order (EPO or DVO) of which he/she had been served or of which he/she had been given notice. The convicted violator may face up to twelve months incarceration.

The other alternative for enforcement of a EPO/DVO is to hold the violator in contempt of the order issued in the district or circuit civil protective order proceedings. The petitioner may file a show cause motion (on available AOC form) to have the respondent summoned to show why he/she should not be held in contempt for violation of the provisions of the EPO/DVO.

[KRS 403.760] These two mutually exclusive enforcement procedures are available in the same manner to address violations of foreign protective orders.

Mutual protection orders

Should the issuing court enter orders of protection against both the plaintiff and the defendant, only the order in favor of the plaintiff/constraining the defendant is entitled to full faith and credit unless the defendant filed a separate petition or pleading seeking such an order and the court made specific findings that the defendant, as well as the plaintiff, was entitled to such an order. This means that a protection order issued in favor of a defendant and against a battered woman who has filed seeking protection should not be given full faith and credit unless the batterer filed a cross or counter petition also seeking an order of protection and the court made specific findings that the defendant was entitled to such an order.

For this reason, it is imperative that advocates fully inform battered women of the ramifications of agreeing to mutual consent orders that include findings of fact that the defendant is entitled to such an order, i.e., that the plaintiff has inflicted acts of abuse upon the defendant.

Implementation

The full faith and credit provision of the VAWA does not prescribe the specific procedures that a battered woman must follow in order to qualify for interstate enforcement. Nevertheless, a number of states have enacted legislation and established procedures to facilitate full faith and credit implementation. A battered woman who is planning to relocate to another state should comply in advance with the new state's procedures to ensure proper enforcement of her foreign order.

Filing or registration of a protection order issued in another state or tribe may help to facilitate enforcement of it, and a number of states have outlined filing/registration procedures in their full faith and credit implementing legislation.

Advantages of filing/registering a protection order include the following:

- a copy will be available to law enforcement or court personnel (depending on which is the designated agency for handling filing/registration) in the event enforcement is necessary and

- the protection order may be entered into the jurisdiction's protection order registry, making it available to responding law enforcement officers even if no paper copy of the order is available at the scene of the violation.

There are also potential disadvantages to a petitioner of filing or registering a protection order.

It is not always clear-cut that a foreign protective order should automatically be filed in the new state. Thought should be given to the woman's particular situation and safety concerns. Once a protective order is registered in the clerk's office of another state, it becomes public record, so it would be possible for a determined and diligent abuser to at least find out to what county the victim had relocated. In Kentucky, police officers are required to enforce facially valid (includes names of both parties and has not expired)

foreign protective orders even if the order is not registered. [See KRS 403.7529] Therefore, in extreme situations, if a client is very concerned about the safety ramifications of registration, a possible alternative would be to contact the local police department to inform them about the situation and to have the client carry the foreign protective order with her at all times. If the protective order was violated and the perpetrator was arrested in the enforcing state, it would then be advisable to have the foreign order authenticated at that point before going to court. [See KRS 403.7524]

Congress amended 2265 in October 2000 to provide clarification regarding registration. The full faith and credit provision now provides the following:

A jurisdiction must enforce a protection order issued in another jurisdiction notwithstanding failure of the petitioner to comply with any filing/registration prerequisite in the enforcing jurisdiction. In other words, a jurisdiction must enforce an unregistered protection order even if its laws, policies, or procedures require registration prior to enforcement.

A jurisdiction may not send notice to a respondent after the filing/registration of a protection order from another jurisdiction, unless the petitioner requests it.

If you are assisting a client who plans to leave Kentucky and move to another state, you can obtain the new state's procedures for enforcement of foreign orders by contacting the clerk's office in the county where the woman plans to relocate, the Kentucky Domestic Violence Association at (502) 695-2444 or the National Center on Full Faith and Credit at 1-800-256-5883, ext. 2.

Kentucky's Enabling Legislation

In order to comply with the federal full faith and credit provisions of the VAWA (18 U.S.C. § 2265) and assist the courts of other states in providing full faith and credit to Kentucky protective orders, all protective orders issued in Kentucky pursuant to KRS 403.715 through 403.785 include a statement that certifies that the court had jurisdiction over the parties and the matter, and that reasonable notice and an opportunity to be heard was provided to the respondent. [See KRS 403.751]

If you are assisting a client who has come to Kentucky from another state and has a protective order which was issued in that state, and you and the client decide to register the order in Kentucky, the procedure is described in KRS 403.7521. [See **Kentucky FF&C Procedure Chart**]

The order should be filed with the clerk of any court of competent jurisdiction. You and the client should go to the clerk's office with the foreign protective order. The clerk will provide you with the required AOC form(s) for the affidavit regarding the foreign protective order. Your client must provide the name and location of the issuing court, and certify the validity and status of the order. [KRS 403.7521 (3)(a)]

If the foreign protective order is current and has been certified (usually a statement that the copy is true and correct, a signature by the court clerk and a seal or stamp of the court) by the issuing court, the clerk will present it and the affidavit to the district or circuit judge, who will review the documents and enter onto the affidavit the information necessary to have the order entered into the LINK (Law Information Network of Kentucky) system. After the judge's review, there will be no further verification process and it will be accepted as authentic, current and subject to full faith and credit. [KRS 7521 (4)(a)] The order will be subject to the annual LINK verification process.

If the foreign protective order is current but not certified, a Temporary Foreign Protective Affidavit must be completed. The clerk will present the foreign order, the affidavit and an Order to the judge for review. The judge will read the information and enter the necessary information for the order to be entered into LINK. The order will then be subject to full faith and credit in Kentucky to the extent of a Kentucky EPO (Emergency Protective Order) except that no service is required. It is subject to verification by the clerk, but will be valid for up to fourteen days (with the option to renew for another fourteen days), if the clerk does not receive a certified copy of the foreign order from the issuing court clerk within the original fourteen-day period. [KRS 403.7521 (4)(b)]

Within two business days of the filing of the uncertified order, the Kentucky clerk must contact the issuing court to request the certified copy of the order. If the Kentucky clerk receives the certified order (a facsimile copy is acceptable) the clerk shall have the information entered into LINK and shall notify the client that the order has been certified. [KRS 403.7521 (4)(c)] If the certified copy is not received within the fourteen-day period, the period will be extended for another fourteen days. If the certified copy is not received within the 28 days, the order will be removed from the LINK system. However, the order is still entitled to police enforcement. An additional option if the certified copy is not received within the 28-day period would be for the client to file to obtain a Kentucky EPO/DVO, if the client meets the statutory requirements. If the client has fled to Kentucky to escape domestic violence and meets the relationship requirements of the statute, the court may, after proper application and showing of evidence issue a Kentucky order to the client. [KRS 403.7521 (4)(d)]

The client is not required to pay any court fees for filing the foreign protective order. [KRS 403.7524 (5)] The client is under a continuing obligation to notify the Kentucky court of any change to the foreign order made by the issuing court of which she/he is aware. Any change includes expiration of the order and any modification or vacation of the order.

[KRS 403.7535(1)] If the petitioner intentionally fails to notify the court of any change, that failure would constitute contempt of court. If the failure to notify resulted in a person [respondent] being damaged, the failure may be grounds for a civil action. [KRS 403.7535(4)]

Custody

Protection orders often contain provisions granting custody of the parties' minor children to the petitioner (battered woman). Custody issue questions frequently arise in protective order cases, and the resolution of such issues has important ramifications for the victim's safety and success in leaving the abusive relationship. In order to be safe from further acts of abuse and have time to prepare to leave the relationship, many victims need to have no contact with their abuser. One of the tactics most frequently used by perpetrators to attempt to regain control over the victim is to use the presence of the children to coerce reconciliation. The abuser often threatens to take the children so that she will never see them again, or to wage prolonged custody fights. The reality is that abusers often do carry out on these threats. Additionally, child safety is at issue in the context of domestic violence, whether the children are directly abused or witness the abuse.

The VAWA requires that valid protective orders are to be given full faith and credit by other states. Congress amended the full faith and credit provision in 2000 to clarify that custody and support provisions in protection orders are indeed covered by 2265. This means that relief in a protection order granting temporary custody and/or ordering support payments pursuant to the protection order code or other statutory authority is entitled to full faith and credit. However, it is still advisable for advocates and attorneys assisting petitioners, and judges issuing protection orders, to ensure that custody awards in protection orders comply with the issuing state's Uniform Child Custody Jurisdiction Act (UCCJA) or the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Parental Kidnapping Prevention Act (PKPA). The UCCJA/UCCJEA and the PKPA determine which state has jurisdiction to hear a custody case if the child has relocated from one state to another.

Every state has adopted its own version of the UCCJA, which means that it is state law. Under the UCCJA, there are four possible bases for a state to assert jurisdiction in a custody matter. The first basis is "home state" jurisdiction which is determined by where the child has lived for six (6) consecutive months immediately preceding the filing of the action or, if the child has been wrongfully removed from that state, it remains "home state" for one (1) year. The second is the state where the child and at least one contestant have "significant connections." This basis for jurisdiction, however, may only be invoked if it is in the best interests of the child. The third basis is "emergency" jurisdiction. In order for this to be asserted, it is required that the child be physically present in the state, and in need of protection from abuse, neglect or mistreatment. It may be argued that emergency jurisdiction may be asserted in cases where interstate flight with children occurs because of safety issues. It may be possible to argue that emergency jurisdiction is necessary to protect the child(ren) from abuse or mistreatment. This could apply whether the child has actually been abused by the perpetrator or has witnessed the violence in the home. Finally, the fourth basis for jurisdiction is where the child is physically present and no other state has jurisdiction. The UCCJA holds "home state" and "significant connections" equal in terms of priority.

The PKPA is federal law, and therefore preempts the UCCJA in cases where the PKPA and the state's version of the UCCJA are in conflict. The PKPA applies to all interstate child custody cases and requires states to honor sister states' custody and visitation orders provided they

comply with the Act. Under the PKPA, there are four bases for the state to assert jurisdiction. These are the same as under the UCCJA; however, the PKPA gives "home state" the highest priority. In other words, "significant connections" under the PKPA applies only if "home state" jurisdiction has been waived. Moreover, no other state may assert jurisdiction when another state has continuing jurisdiction under the PKPA.

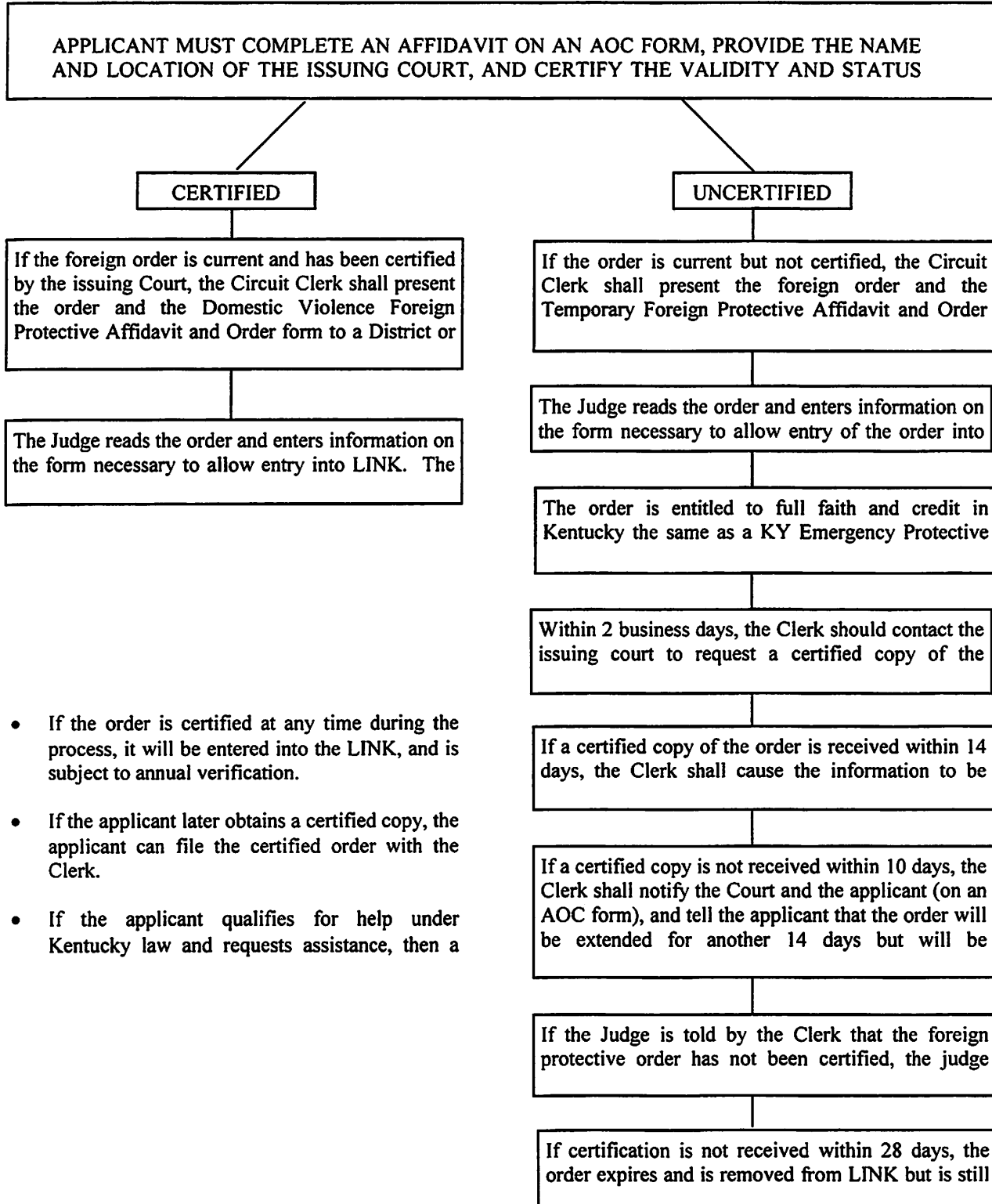
A few states have also adopted the UCCJEA, which attempts to eliminate inconsistent state interpretations of the UCCJA and the PKPA, and to harmonize the two statutes by (1) giving "home state" jurisdiction priority over "significant connections" jurisdiction; (2) clarifying when "emergency" jurisdiction may be exercised, including when it is necessary in an emergency to protect the child "because the child, or a sibling or a parent of the child is subjected to or threatened with mistreatment or abuse;" (3) giving the state that entered the decree exclusive continuing jurisdiction to modify a decree; and (4) providing a broad definition of "child custody proceeding" that includes virtually all cases involving custody or visitation, including domestic violence protection order proceedings.

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KENTUCKY FULL FAITH AND CREDIT PROCEDURE

Law enforcement officers are authorized to enforce foreign orders whether or not the order is entered into the LINK system. Officers can enforce the order based on the information on the document in the victim's possession. If the order has not expired and the action of the alleged perpetrator violates the terms of the order, the officer should enforce the order even if it has not been registered in this State. Officers acting in good faith are immune from criminal and civil liability.

SB 105 establishes a system for registering foreign protective orders in Kentucky. The following process will be used:



- If the order is certified at any time during the process, it will be entered into the LINK, and is subject to annual verification.
- If the applicant later obtains a certified copy, the applicant can file the certified order with the Clerk.
- If the applicant qualifies for help under Kentucky law and requests assistance, then a