

**SUBJECT:** Authorizing protective orders for victims of sexual assault

**COMMITTEE:** Juvenile Justice and Family Issues —favorable, without amendment

**VOTE:** 6 ayes — Dutton, Goodman, Baxter, Hodge, Morrison, Reyna  
0 nays  
3 absent — Castro, Dunnam, J. Moreno

**SENATE VOTE:** On final passage, April 3 — 31-0, on Local and Uncontested Calendar

**WITNESSES:** For — Nancy Flores, Texas Council on Family Violence; Tom Gaylor, Texas Municipal Police Association; Chris Lippincott, Texas Association Against Sexual Assault  
  
Against — Roy A. Getting and Robert L. Green, Jr., Texas Fathers Alliance

**BACKGROUND:** Code of Criminal Procedure, art. 17.292 authorizes a magistrate to issue an order for emergency protection after a defendant is arrested for an offense involving family violence or stalking and is brought before the magistrate. The magistrate must issue an order if the arrest is for an offense that involves serious bodily injury to the victim or the use or exhibition of a deadly weapon during the commission of the assault. The magistrate may issue an order in other cases involving family violence or stalking at the victim's, the peace officer's, or the prosecutor's request, or on its own motion.

An order for emergency protection may prohibit the arrested party from committing acts of family violence or stalking, from communicating directly with the protected person or from communicating a threat to the protected person, from going to or near the residence, place of employment, or child-care facility of the protected person, and from possessing a firearm, among other actions.

Orders for emergency protection remain in effect at least 31 days after the date of issuance and up to the 61st day after the date of issuance.

Family Code, ch. 85 establishes procedures for an applicant to obtain a longer-term protective order, which a court must render if it finds that family violence has occurred and is likely to occur in the future. Family violence means:

- any act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
- abuse by a member of a family or household toward a child of the family or household; or
- dating violence, an act by a person against another person with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the person in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

Protective orders under ch. 85 remain in effect for up to two years and may contain provisions similar to those found in emergency protective orders. Before obtaining a protective order, notice of an application for an order must be served on the respondent, and the court must set a hearing to determine whether family violence has occurred and is likely to occur in the future.

Family Code, ch. 83 provides procedures for an applicant to obtain a temporary *ex parte* order while an application for a protective order is pending under ch. 85. If the court finds from the information in an application for a protective order that there is a clear and present danger of family violence, the court may issue a temporary *ex parte* order without notice to the respondent or a hearing. Such an order is valid for up to 20 days.

Penal Code, sec. 25.07 makes it a Class A misdemeanor (punishable by up to one year in jail and/or a maximum fine of \$4,000) to violate an order for emergency protection or a protective order, but not a temporary *ex parte* protective order. An offense under this statute is a third-degree felony (punishable by two to 10 years in prison and an optional fine of up to

\$10,000) if the defendant previously has been convicted at least twice of violating a protective order, or if the defendant violated the protective order by assaulting or stalking the protected person.

Under the Code of Criminal Procedure, any peace officer may arrest, without warrant, a person who the peace officer has probable cause to believe may have violated a protective order. A peace officer must arrest, without a warrant, a person who the peace officer has probable cause to believe has violated a protective order in the peace officer's presence.

Penal Code, sec. 46.04 makes it a Class A misdemeanor for a person, other than a peace officer, who is the subject of an order for emergency protection or a final protective order under the Family Code to possess a firearm after receiving notice of the order.

It is a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) to commit sexual assault, while it is a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000) to commit aggravated sexual assault.

**DIGEST:**

SB 433 would add provisions to the Code of Criminal Procedure for a victim of sexual assault to obtain a protective order. A person who was a victim of sexual assault or aggravated sexual assault, or a prosecutor acting on behalf of the victim, could file an application for a protective order without regard to the relationship between the applicant and the alleged offender. The application could be filed in district or county court where the applicant or the alleged offender resided.

After a hearing on the application for a protective order, the court would have to decide if there were reasonable grounds to believe that the applicant was the victim of a sexual assault and the subject of a threat that reasonably placed the applicant in fear of further harm from the alleged offender. If so, the court would have to issue a protective order.

To the extent applicable, Family Code provisions relating to protective orders would apply to a protective order issued under SB 433. In its protective order, the court could order the alleged offender to take action necessary or appropriate to prevent or reduce the likelihood of future harm to the applicant

or a member of the applicant's family or household, or it could prohibit the alleged offender from:

- communicating directly or indirectly with the applicant or any member of the applicant's family or household in a threatening or harassing manner;
- going to or near the residence, place of employment or business, or child-care facility or school of the applicant or any member of the applicant's family or household;
- engaging in conduct directed specifically toward the applicant or any member of the applicant's family or household, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person; and
- possessing a firearm, unless the alleged offender is a peace officer actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.

The court would have to describe specifically in the order each prohibited location and the minimum distance from the location that the alleged offender must maintain, unless the applicant had requested that information revealing the locations remain confidential. In the order, the court also could suspend an alleged offender's license to carry a concealed handgun.

If the court found from the information contained in an application for a protective order that there was a clear and present danger of a sexual assault or other harm to the applicant, the court, without further notice to the alleged offender and without a hearing, could enter a temporary *ex parte* order for the protection of the applicant or any other member of the applicant's family or household. The protective order, including a temporary *ex parte* order, would have to contain a warning that a person who violated it could be punished by contempt of court; that no person, including the applicant, could give permission to anyone to ignore or violate any provision; and that it was unlawful for anyone except a peace officer to possess a firearm or ammunition.

With the exception of temporary *ex parte* orders, all other protective orders would have to contain a warning that a violation of the order by commission

of a prohibited act could be punishable by a fine of up to \$4,000 or by confinement in jail for up to a year, or both.

SB 433 would create a criminal offense of violation of a protective order issued on the basis of sexual assault. It would be a Class A misdemeanor to violate such a protective order by knowingly:

- communicating directly or indirectly with the applicant or any member of the applicant's family or household in a threatening or harassing manner;
- going to or near the residence, place of employment or business, or child-care facility or school of the applicant or any member of the applicant's family or household; or
- possessing a firearm.

The bill would amend Code of Criminal Procedure, art. 14.03 to allow any peace officer, without a warrant, to arrest a person the officer has probable cause to believe has committed a criminal offense of violation of protective order issued on the basis of sexual assault, and to require a peace officer to arrest, without a warrant, a person the peace officer has probable cause to believe has committed such a violation in the officer's presence.

SB 433 would amend the section of the Penal Code relating to unlawful possession of a firearm to include people who are subject to protective orders on the basis of sexual assault among those who cannot possess a firearm.

The bill would take effect on September 1, 2003.

**SUPPORTERS  
SAY:**

SB 433 logically would extend the list of those who can apply for a protective order to include sexual assault victims who do not have a familial, household, or dating relationship with the offender. A large percentage of rape victims are not in a dating relationship with the perpetrator, yet they desperately need the security of a protective order, particularly when they attend the same college or live in the same apartment complex as the offender. Protective orders have been proven effective, and applicants are less likely to suffer future violence once an order is in place. The courthouse door should remain open for victims of sexual assault crimes who do not happen to be in the same household or in a dating relationship with the offender. Victims of sexual

assault often are stalked by their offenders, particularly when they live near one another.

SB 433 would contain adequate safeguards to protect the rights of alleged offenders. To issue a temporary *ex parte* order, the court would have to find a clear and present danger of a sexual assault or other harm to the applicant, similar to the requirement for an *ex parte* order under the Family Code. In the case of a final order, the court would have to hold a hearing after notice to the respondent and would have to find reasonable grounds to believe that the applicant was the victim of a sexual assault and was the subject of a threat that reasonably placed the applicant in fear of further harm. Courts would have to make specific findings before rendering protective orders and effectively could weed out applications that were without merit.

Protective orders rendered under the Family Code already apply against people who are never charged with or convicted of a criminal offense. For example, an applicant who was the victim of family violence might obtain a protective order, which contains a different standard of proof than a criminal conviction, but never obtain a conviction against the alleged offender for a number of reasons. Protective orders are a separate remedy, and it would be inappropriate to require a criminal conviction to obtain a protective order.

Orders for emergency protection are not sufficient to protect victims of sexual assault. A magistrate may issue these orders only after the defendant has been arrested for stalking, and the orders are valid only for up to two months. Furthermore, not all perpetrators who commit sexual assault stalk their victims to the extent that they commit the criminal offense of stalking, which is difficult to prove. Preventing a protective order respondent from possessing a firearm is a requirement of federal law.

**OPPONENTS  
SAY:**

The Legislature should not expand the category of people who may be subjected to a protective order. Protective orders seriously infringe upon respondents' rights by prohibiting them from going to or near certain locations and by prohibiting them from possessing firearms. The Legislature should draw the line at family, household, or dating relationships, because respondents in those situations, who are likely to know the applicants' habits and routines, pose the greatest threat to their security. Violating a protective order carries serious consequences, such as criminal prosecution and

contempt proceedings, and these remedies should not be expanded to people who are strangers to the alleged victim.

SB 433 inappropriately would allow alleged victims to obtain protective orders against those who have not necessarily been charged with or convicted of sexual assault. The alleged victim could obtain a protective order merely by establishing “reasonable grounds” that he or she was the victim of a sexual assault and the subject of a threat that placed the applicant in fear of further harm. If the alleged perpetrator was a student at the same college as the applicant, he or she might have to withdraw from school or transfer to another school if a protective order was rendered, simply because an allegation of sexual assault was made. Temporary protective orders pose particular risks of abuse, because no hearing is required before these orders are issued. The state might never bring sexual assault charges against the alleged offender, or he or she might be acquitted at trial, but the protective order still would stand.

Orders for emergency protection under current law are sufficient to address the threat posed by sexual assault perpetrators who then stalk their alleged victims. A magistrate may issue an order for emergency protection, which has effect for 31 to 61 days, at a defendant’s appearance after arrest for an offense of family violence or stalking.