Overview

Domestic Violence Restraining Orders: Enforcement Issues

Under the federal Violence Against Women Act[1] ("VAWA"), states and tribes are required to provide full faith and credit to qualifying protective orders of each other's courts. This means they must enforce each other's orders as if they were the order of the enforcing State or tribe. In practice, however, things are not so simple. Jurisdictional issues arising from the status of lands where offenses are committed and the individuals involved can affect both state and tribal court's jurisdiction to issue a particular order. Further each law enforcement and judicial system has its own technical and procedural requirements which can affect enforcement of these orders.

Full Faith and Credit

Under VAWA, a protection order must meet the following conditions to be eligible for full faith and credit:

- The order was entered pursuant to a complaint, petition, or motion filed by (or on behalf of) a person seeking protection;
- The court that issued the order had personal jurisdiction over the parties and subject matter jurisdiction over the case; and
- The person against whom the order was issued must have had notice and an opportunity to be heard related to the allegations of abuse and the relief sought[2].

VAWA only applies to certain types of relationships between the petitioner and the person against whom the order is sought. These include:

- A spouse or former spouse of the respondent or defendant;
- A person who lives or who has lived with the respondent or defendant (i.e., who resides or resided together in a sexual or romantic relationship);
- A child of the respondent or defendant, a child of the intimate partner, or a child in common of the respondent or defendant and the intimate partner (including where parental rights have been terminated); and
- A person with whom the respondent or defendant has or had a child in common (regardless of whether they were married or cohabitated).

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[1] See 18 U.S.C. § 2265.

[2] 18 U.S.C. § 2265(b).

Such a relationship does not include:

- Boyfriends or girlfriends who do not live together or have never lived together;
- Elder abuse;
- Siblings who abuse siblings, uncles or uncles who abuse nieces and nephews, grandparents who abuse grandchildren, etc.;
- Roommates, neighbors, or strangers.

Further, due process requires that a person be served with the protective order before it can be enforced against them, so proof of such service is required before law enforcement will take action.

Under VAWA all protective orders that meet these conditions are entitled to full faith and credit and enforcement including:

- Ex Parte (Temporary or emergency) protection orders – these are entitled to full faith and credit when the abuser has notice and has or will have an opportunity to be heard "within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." [3]
- Consent orders - valid protection order issued by a court on behalf of only one party, does not require specific findings of abuse to be enforceable across jurisdictional lines according to federal law. This means that if a survivor files a petition for a protection order and the abuser consents or agrees to entry of the order, even without admitting to the abuse, the order is still entitled to full faith and credit.
- Default orders - orders may be issued without the respondent present. These orders may be entitled to full faith and credit. If respondents do not appear at a scheduled hearing of which they had prior notice or service, as required by law, and the court enters an order against them by default, the order is entitled to full faith and credit once it is served.
- Mutual orders – if a court issues a single protection order that includes prohibitions or relief against both the petitioner and respondent, such as mutual no contact provisions. The full faith and credit provision of VAWA requires special safeguards for enforcement of this type of order across jurisdictional lines. Under the federal law, an order should be enforced only against the respondent and not the petitioner, unless the respondent cross-filed a separate, written pleading, complaint, or petition for a protection order and the

[3] 18 U.S.C. § 2265(b)(2)

issuing court made specific findings that both parties abused each other and were therefore entitled to protection from further abuse[4].

- Included child custody provisions - protection orders often include terms that award temporary custody of minor children to the victim. VAWA is clear that enforcing courts and law enforcement must enforce custody provisions within protection orders. Full faith and credit applies to any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. [5]

- Criminal protection orders - The full faith and credit provision of VAWA applies to valid criminal protection orders. A criminal protection order may be part of pretrial release orders, bail or bond conditions, or be incorporated into conditions of sentencing, probation, or parole.

Note that the enforcing jurisdiction must enforce the valid terms and conditions in the orders from the issuing jurisdiction even if those terms and conditions are not ones available under the laws of the enforcing jurisdiction. This is important when looking at orders being issued by tribal courts and enforced by state or county law enforcement because tribal law may provide for creative civil remedies against non-Indian offenders over whom the tribe may not have criminal jurisdiction.

Jurisdictional Issues Affecting State Courts

Generally under federal law, states are prohibited from exercising civil or criminal jurisdiction over Indians in "Indian country." [6] In California, however, this jurisdictional scheme was altered by Public Law 280 enacted by Congress in 1953. PL 280 transferred federal criminal jurisdiction and conferred some civil jurisdiction on states and state courts in the six mandatory Public Law 280 states. California is a Public Law 280 State. Public Law 280 is now codified in federal law as 28 U.S.C. § 1360 regarding civil jurisdiction and 18 U.S.C. § 1162 regarding criminal jurisdiction. PL-280's grant of jurisdiction to the state of California and California State Court is not unlimited, however. PL-280 contains several important limitations. Only state criminal prohibitory laws apply in Indian Country. Civil regulatory laws do not apply. Further the State has no authority under PL-280 to regulate the use of trust property or tribal lands.[7] So, civil protective orders made by a state court may not apply against an Indian in Indian Country.

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[4] 18 U.S.C. § 2265(c)

[5] 18 U.S.C. § 2266(5)(B)

[6] "Indian Country" is defined in 18 U.S.C. § 1151

[7] See 28 USC 1360 (b)

Orders, which purport to regulate the use of trust property such as stay away or move out orders do not apply against an Indian in Indian Country.

Jurisdictional Issues Affecting Tribal Courts

As a general rule, Indian tribes are sovereign nations with the authority to prosecute Indians who commit crimes within tribal jurisdiction.[8] Tribes generally lack jurisdiction to prosecute non-Indians.[9] The lack of criminal jurisdiction over non-Indians is a severe limitation on tribe's ability to address family violence on their lands as the majority of abusers are non-native.[10]

Congress recently passed the Violence Against Women Reauthorization Act of 2013, or "VAWA 2013" which addresses in part the concern about tribe's lack of jurisdiction over non-Indian abusers in Indian Country. VAWA 2013 recognizes tribes' inherent power to exercise "special domestic violence criminal jurisdiction" over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. This new law generally takes effect on March 7, 2015, but there are a number of pre-requisites to a tribe's exercise of this expanded jurisdiction.

Under existing law, the general rule is that tribal law enforcement officers may arrest Indian offenders who violate protection orders (regardless of the issuing jurisdiction). However, they generally do not have authority to arrest non-Indian offenders. Although tribal courts do not have criminal jurisdiction over non-Indians, tribal police usually have authority to stop, detain, transport, and expel non-Indian offenders even in the absence of criminal jurisdiction. Tribal law enforcement officers can also detain and deliver non-Indian perpetrators to state or federal authorities that do have criminal jurisdiction over them. Tribal law enforcement that are deputized by state or county law enforcement, as several California tribal law enforcement agencies are, may also enforce state law in addition to tribal law.

Barriers to Enforcement

VAWA was enacted by Congress in 1994 to address the problem of states' inconsistent enforcement of domestic violence laws. Congress amended the act in 2000, 2005, and 2013.

States are required by federal law to recognize and enforce tribal domestic violence protection orders. (See 18 U.S.C. § 2265 and California's Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Fam. Code, §§ 6400–6409).) Under these laws, a protective order issued by a tribal or sister-state court is entitled to full faith and credit.

Verification Procedure Through CARPOS/CLETS

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[8] Cohen, *Handbook of Federal Indian Law*, § 9.04

[9] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)

[10] See *Native American Statistical Abstract: Violence and Victimization*

Despite the full faith and credit mandate, county law enforcement agencies do not enforce tribal protective orders unless they can be verified in the Department of Justice California Restraining and Protective Orders System (CARPOS) through California Law Enforcement Telecommunications System (CLETS).

Hit Confirmation Procedure (also known as double hit)

Because CARPOS/CLETS data are entered into the National Crime Information Center (NCIC), the local law enforcement officer must check the state system (CARPOS/CLETS) and then verify this information in the state system. This is a federal requirement of the National Crime Information Center (NCIC), contained in the NCIC Operational Manual, Section 3.5, which requires a hit confirmation.[11] County law enforcement follows this procedure to verify that a tribal protective order is valid and current. This verification is accomplished by the officer contacting the agency that entered the data, which in turn checks its law enforcement agency's local record management system. This hit confirmation may result in unnecessary delays, placing the safety of the protected person at risk of being revictimized.

Tribal Access to CARPOS/CLETS

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[11] National Crime Information Center (NCIC) Manual Section 3.5 Hit Confirmation Procedures. Any agency which receives a record(s) in response to an NCIC inquiry must confirm the hit on any record(s) which appears to have been entered for the person or property inquired upon prior to taking any of the following actions based upon the hit NCIC record: 1) arresting the wanted person, 2) detaining the missing person, 3) seizing the stolen property, or 4) charging the subject with violating a protection order. Additionally, an agency detaining an individual on local charges where the individual appears identical to the subject of the wanted person record and is within the geographical area of extradition must confirm the hit.

Confirming a hit means to contact the agency that entered the record to:

1. Ensure that the person or property inquired upon is identical to the person or property identified in the record;
2. Ensure that the warrant, missing person report, protection order, or theft report is still outstanding; and
3. Obtain a decision regarding: 1) the extradition of a wanted person when applicable, 2) information regarding the return of the missing person to the appropriate authorities, 3) information regarding the return of stolen property to its rightful owner, or 4) information regarding the terms, conditions, and service of a protection order.
   Note: The source documents used for hit confirmation may be electronic if the local agency has implemented the controls required by the CTA for electronic documents supporting NCIC records.
4. Determine if the entering agency wants the record to be located when the missing person was identified by partial body parts.

Unfortunately, most tribal courts and law enforcement agencies in California do not have access to CARPOS/CLETS, or other similar law enforcement data bases. Nor do tribes have their own databases.

Fees Associated With Orders

VAWA also prohibits states, tribes, and territories that receive certain types of federal funds from imposing fees on protection order issuance and implementation. In other words, courts cannot charge for filing, issuance, service, witness subpoenas, registration, and other costs associated with protection orders. The prohibition requires law enforcement to serve protection orders on respondents without any payment of service fees by survivors both within the issuing jurisdiction and in enforcing states, tribal lands, and territories. Sometimes, lack of resources and knowledge of the law results in fees imposed.

Inter-Court Cooperation: Exploring Solutions Together to Improve Enforcement

Registration

The California Tribal Court/State Court Forum initiated a solution, which attempts to work around the challenge that tribes do not have access to enter data into CARPOS/CLETS and county law enforcement will not enforce a tribal protective order unless it is in this database. Although registration of a tribal protective order is not a pre-requisite to enforcement[12], rule 5.386 of the California Rules of Court requires state courts, on request by a tribal court, to adopt a written procedure or local rule permitting the fax or electronic filing of any tribal court protective order entitled under Family Code section 6404 to be registered. Under this rule, if a tribal court in California elects to send (electronically or otherwise) its protective order to a California state court to register it, then after it is registered, it is automatically entered into CARPOS/CLETS the same way that a state court or sister state protective order is. See link for examples of local written procedures or rules: http://www.courts.ca.gov/17422.htm.

Unfortunately, despite this work-around, tribal court judges report instances where their orders were not enforced because they had not been entered into CARPOS/CLETS. In some jurisdictions, the presiding judge of the superior court and the chief judge of the tribal court revisit the local procedure with local law enforcement to ensure it is working efficiently.

Preventing Redundant and Conflicting Orders

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[12] VAWA explicitly states that registration or filing of protection orders cannot be a prerequisite for enforcement (18 U.S.C. § 2265(d) (2)). In California registration and enforcement of out of state protective orders, which include protective orders issued by tribal courts both inside and outside California is governed generally by Family Code §§ 6400 – 6409. These confirm that registration of foreign protection orders is not required, and that such an order that is valid on its face should be enforced by law enforcement.

Through the California Courts Protective Order Registry, which is a dedicated online database of the State Judicial Branch, state courts and tribal courts can view each other's protective orders. The courts that have access are better able to protect the public, particularly victims of domestic violence, and avoid issuing redundant or conflicting orders. Learn more at www.courts.ca.gov/15574.htm.