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HOUSE BILL 434

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Rhonda S. King

AN ACT

RELATING TO DOMESTIC ABUSE; ALLOWING A MINOR TO FILE FOR OR BE RESTRAINED BY AN ORDER OF PROTECTION; REQUIRING PEACE OFFICERS TO ENFORCE ORDERS OF PROTECTION; REVISING STANDARDS AND PROCEDURES; EXPANDING DEFINITIONS; CLARIFYING PROVISIONS OF THE FAMILY VIOLENCE PROTECTION ACT; AMENDING AND ENACTING SECTIONS OF THE FAMILY VIOLENCE PROTECTION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 40-13-2 NMSA 1978 (being Laws 1987, Chapter 286, Section 2, as amended) is amended to read:

"40-13-2. DEFINITIONS.--As used in the Family Violence Protection Act:

A. "co-parents" means persons who have a child in common, regardless of whether they have been married or have lived together at any time;

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1 B. "court" means the district court of the judicial
2 district where an alleged victim of domestic abuse resides or
3 is found, where the alleged abuser lives or is found or where
4 the alleged abuse occurred;

5 C. "dating partner" means a person who is or has
6 been in a relationship of a romantic or intimate nature with an
7 alleged abuser. Factors to be considered in determining the
8 existence of a dating partner relationship include the:

- 9 (1) length of the relationship;
- 10 (2) type of the relationship; and
- 11 (3) frequency of interaction between the
12 persons involved in the relationship;

13 [~~E.~~] D. "domestic abuse":

14 (1) means an incident of stalking or sexual
15 assault whether committed by a household member or not;

16 (2) means an incident by a household member
17 against another household member consisting of or resulting in:

- 18 (a) physical harm;
- 19 (b) [~~severe emotional distress~~] mental
20 anguish;
- 21 (c) bodily injury, battery or assault;
- 22 (d) a threat causing imminent fear of
23 bodily injury by any household member;
- 24 (e) criminal trespass;
- 25 (f) criminal damage to property or

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1 damage to jointly owned or community property when done with
2 the intent to intimidate, threaten or harass;

3 (g) repeatedly driving by a residence or
4 work place;

5 (h) telephone harassment;

6 (i) harassment; [~~or~~]

7 (j) false imprisonment;

8 (k) interference with communications;

9 (l) larceny or deprivation of property;

10 (m) cruelty to animals with the intent
11 to intimidate, threaten or harass; or

12 [~~(j)~~] (n) harm or threatened harm to
13 children as set forth in this paragraph; and

14 (3) does not mean the use of force in self-
15 defense or the defense of another;

16 [~~D.~~] E. "household member" means a spouse; former
17 spouse; family member, including a relative, parent, present or
18 former stepparent, present or former in-law, child or co-parent
19 of a child; dating partner; or a person with whom the
20 petitioner has had a continuing personal relationship.

21 Cohabitation is not necessary to be deemed a household member
22 [~~for purposes of this section~~];

23 F. "mental anguish" means psychological or
24 emotional damage marked by change of behavior or physical
25 symptoms;

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1 G. "minor" means a person under the age of
2 eighteen;

3 ~~[E-]~~ H. "mutual order of protection" means an order
4 of protection that includes provisions that protect both
5 parties;

6 ~~[F-]~~ I. "order of protection" means an injunction
7 or a restraining or other court order granted for the
8 protection of a victim of domestic abuse;

9 ~~[G-]~~ J. "protected party" means a person protected
10 by an order of protection; and

11 ~~[H-]~~ K. "restrained party" means a person who is
12 restrained by an order of protection."

13 Section 2. Section 40-13-3 NMSA 1978 (being Laws 1987,
14 Chapter 286, Section 3, as amended) is amended to read:

15 "40-13-3. PETITION FOR ORDER OF PROTECTION--CONTENTS--
16 STANDARD FORMS.--

17 A. A victim of domestic abuse may petition the
18 court under the Family Violence Protection Act for an order of
19 protection.

20 B. The petition shall be made under oath [~~or shall~~
21 ~~be accompanied by a sworn affidavit~~] setting out specific facts
22 showing the alleged domestic abuse.

23 C. The petition shall state whether any other
24 domestic action is pending between the petitioner and the
25 respondent.

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1 D. If any other domestic action is pending between
2 the petitioner and the respondent, the parties shall not be
3 compelled to mediate any aspect of the case arising from the
4 Family Violence Protection Act unless the court finds that
5 appropriate safeguards exist to protect each of the parties and
6 that both parties can fairly mediate with such safeguards.

7 E. An action brought under the Family Violence
8 Protection Act is independent of any [~~proceeding for annulment,~~
9 ~~separation or divorce~~] other domestic action between the
10 parties.

11 F. Remedies granted pursuant to the Family Violence
12 Protection Act are in addition to and shall not limit other
13 civil or criminal remedies available to the parties.

14 G. Standard simplified petition forms with
15 instructions for completion shall be available to all parties.
16 Law enforcement agencies shall keep such forms and make them
17 available upon request to alleged victims of domestic abuse."

18 Section 3. Section 40-13-3.2 NMSA 1978 (being Laws 1999,
19 Chapter 142, Section 2, as amended) is amended to read:

20 "40-13-3.2. EX PARTE EMERGENCY ORDERS OF PROTECTION.--

21 A. The district court [~~may~~] shall issue an ex parte
22 written emergency order of protection when a law enforcement
23 officer states to the court in person, by telephone or via
24 facsimile [~~and files a sworn written statement~~] circumstances
25 setting forth the need for an emergency order of protection,

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1 and the court finds [~~reasonable grounds~~] probable cause to
2 believe that the alleged victim or the alleged victim's child
3 is in immediate danger of domestic abuse following an incident
4 of domestic abuse. [~~The written statement shall include the~~
5 ~~location and telephone number of the alleged perpetrator, if~~
6 ~~known.~~]

7 B. A law enforcement officer who receives an
8 emergency order of protection from the court, whether in
9 writing, by telephone, [~~or~~] by facsimile transmission [~~from the~~
10 ~~court~~] or by other electronic method, shall:

11 (1) if necessary, pursuant to the judge's oral
12 approval, write and sign the order on an approved form;

13 (2) if possible, immediately serve a signed
14 copy of the order on the restrained party and complete the
15 appropriate affidavit of service;

16 (3) immediately provide the protected party
17 with a signed copy of the order; and

18 (4) [~~provide the original order to the court~~
19 ~~by the close of business on the next judicial day~~] forward to
20 the court by the end of the next business day a copy of the
21 emergency order of protection along with a sworn written
22 statement by the officer setting forth the need for the
23 emergency order. The written statement shall include the
24 location and telephone number of the restrained party, if
25 known.

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1 C. The court may grant the following relief in an
2 emergency order of protection upon a probable cause finding
3 that domestic abuse has occurred:

4 (1) enjoin the restrained party from
5 threatening to commit or committing acts of domestic abuse
6 against the protected party or any designated household
7 members;

8 (2) enjoin the restrained party from any
9 contact with the protected party, including harassing,
10 telephoning, contacting or otherwise communicating with the
11 protected party; and

12 (3) grant temporary custody of any minor child
13 in common with the parties to the protected party, if
14 necessary.

15 D. A district judge shall be available [~~as~~
16 ~~determined by~~] in each judicial district to [~~hear petitions~~
17 ~~for~~] issue emergency orders of protection.

18 E. An emergency order of protection expires
19 seventy-two hours after issuance or at the end of the next
20 [~~judicial~~] day the district court is open, whichever [~~time is~~
21 ~~latest~~] is later. The expiration date shall be clearly stated
22 on the emergency order of protection.

23 F. A person may appeal the issuance of an emergency
24 order of protection to the court that issued the order. [~~An~~
25 ~~appeal may be heard as soon as the judicial day following the~~

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1 ~~issuance of the order]~~ The court shall set a hearing on the
2 matter as soon as possible.

3 G. Upon a proper petition, a district court may
4 issue a temporary order of protection that is based upon the
5 same incident of domestic abuse that was alleged in an
6 emergency order of protection.

7 H. Emergency orders of protection are enforceable
8 in the same manner as other orders of protection issued
9 pursuant to the provisions of the Family Violence Protection
10 Act."

11 Section 4. Section 40-13-4 NMSA 1978 (being Laws 1987,
12 Chapter 286, Section 4, as amended) is amended to read:

13 "40-13-4. TEMPORARY ORDER OF PROTECTION--HEARING--
14 DISMISSAL.--

15 A. Upon the filing of a petition for order of
16 protection, the court shall:

17 (1) immediately [~~grant~~] issue an ex parte
18 temporary order of protection without bond if there is probable
19 cause from the specific facts shown by the [~~affidavit or by~~
20 ~~the~~] verified petition to give the judge reason to believe that
21 an act of domestic abuse has occurred; and

22 [~~(2) cause the temporary order of protection~~
23 ~~together with notice of hearing to be served immediately on the~~
24 ~~alleged perpetrator of the domestic abuse; and~~

25 ~~(3)]~~ (2) within ten days after the [~~granting~~]

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1 issuance of the temporary order of protection, hold a hearing
2 on the question of continuing the order. [~~or~~

3 ~~(4) if an ex parte order is not granted, serve~~
4 ~~notice to appear upon the parties and hold a hearing on the~~
5 ~~petition for order of protection within seventy-two hours after~~
6 ~~the filing of the petition; provided if notice of hearing~~
7 ~~cannot be served within seventy-two hours, the temporary order~~
8 ~~of protection shall be automatically extended for ten days.~~

9 ~~B. If the court grants a temporary order of~~
10 ~~protection, it may award temporary custody and visitation of~~
11 ~~any children involved when appropriate.]~~

12 B. As part of a temporary order of protection, the
13 court may:

14 (1) enjoin the restrained party from
15 committing or threatening to commit acts of domestic abuse
16 against the protected party or other household members;

17 (2) enjoin the restrained party from any
18 contact or communication with the protected party; and

19 (3) award temporary custody and visitation of
20 any children when appropriate, giving primary consideration to
21 the safety and well-being of the protected party and children.
22 The court may grant unsupervised, supervised or no visitation.

23 C. If the court does not find probable cause to
24 believe that an act of domestic abuse has occurred, it shall
25 hold a hearing within seventy-two hours of the filing of the

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1 petition to allow the petitioner to provide additional evidence
2 of domestic abuse. At the conclusion of the hearing, an order
3 of dismissal or a temporary order of protection shall be
4 issued.

5 D. A temporary order of protection shall be filed
6 and served without cost to the protected party.

7 [~~G.~~] E. Except for petitions alleging stalking or
8 sexual assault, if the court finds that the [~~alleged~~
9 ~~perpetrator is~~] parties are not [~~a~~] household [~~member~~] members,
10 the court shall dismiss the petition."

11 Section 5. Section 40-13-5 NMSA 1978 (being Laws 1987,
12 Chapter 286, Section 5, as amended) is amended to read:

13 "40-13-5. ORDER OF PROTECTION--CONTENTS--REMEDIES--TITLE
14 TO PROPERTY NOT AFFECTED--MUTUAL ORDER OF PROTECTION.--

15 A. Upon finding that domestic abuse has occurred or
16 upon stipulation of the parties, the court shall enter an order
17 of protection ordering the restrained party to refrain from
18 abusing the protected party or any [~~other~~] of the protected
19 party's household [~~member~~] members. The court shall
20 specifically describe the acts the court has ordered the
21 restrained party to do or refrain from doing. As a part of any
22 order of protection, the court may:

23 (1) grant sole possession of the residence or
24 household to the protected party during the period the order of
25 protection is effective or order the restrained party to

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1 provide temporary suitable alternative housing for the
2 protected party and any children to whom the restrained party
3 owes a legal obligation of support;

4 (2) award temporary custody of any children
5 involved when appropriate and provide for visitation rights,
6 child support and temporary support for the protected party on
7 a basis that gives primary consideration to the safety and
8 well-being of the protected party and the children. The court
9 may grant unsupervised, supervised or no visitation;

10 (3) order that the restrained party shall not
11 initiate contact with the protected party;

12 (4) restrain a party from transferring,
13 concealing, encumbering or otherwise disposing of the other
14 party's property or the joint property of the parties except in
15 the usual course of business or for the necessities of life and
16 require the parties to account to the court for all such
17 transferences, encumbrances and expenditures made after the
18 order is served or communicated to the restrained party;

19 (5) grant to a party the exclusive possession
20 and control of any animal kept, owned or leased by either party
21 or by a minor child residing in the household of either party.
22 The court may order a party to stay away from the animal and
23 may forbid a party from taking, transferring, concealing,
24 mistreating, harming or disposing of the animal;

25 [~~5~~] (6) order the restrained party to

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1 reimburse the protected party or any other household member for
2 expenses reasonably related to the occurrence of domestic
3 abuse, including medical expenses, counseling expenses, the
4 expense of seeking temporary shelter, expenses for the
5 replacement or repair of damaged property or the expense of
6 lost wages;

7 ~~[(6)]~~ (7) order the restrained party to
8 participate in, at the restrained party's expense, professional
9 counseling programs deemed appropriate by the court, including
10 counseling programs for perpetrators of domestic abuse, alcohol
11 abuse or abuse of controlled substances; and

12 ~~[(7)]~~ (8) order other injunctive relief as the
13 court deems necessary for the protection of a party, including
14 orders to law enforcement agencies as provided by this section.

15 B. The order of protection shall contain a notice
16 that violation of any provision of the order by the restrained
17 party is a criminal offense, constitutes contempt of court and
18 may result in a fine or imprisonment or both.

19 C. If the order of protection supersedes or alters
20 prior orders of the court pertaining to domestic matters
21 between the parties, the order shall say so on its face. If an
22 action relating to child custody or child support is pending or
23 has concluded with entry of an order at the time the petition
24 for an order of protection ~~[was filed]~~ is heard, the court may
25 enter an initial order of protection ~~[but the portion of the~~

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1 ~~order dealing with child custody or child support will then be~~
2 ~~transferred to the court that has or continues to have~~
3 ~~jurisdiction over the pending or prior custody or support~~
4 ~~action]~~ and temporarily address child custody or child support
5 issues. All long-term issues regarding child custody or
6 support shall be addressed in the domestic matters action.

7 D. A mutual order of protection shall be issued
8 only in cases where both parties have petitioned the court and
9 the court makes detailed findings of fact indicating that both
10 parties acted primarily as aggressors and that neither party
11 acted primarily in self-defense.

12 E. No order issued under the Family Violence
13 Protection Act shall affect title to any property or allow a
14 party to transfer, conceal, encumber or otherwise dispose of
15 another party's property or the joint or community property of
16 the parties.

17 F. Either party may request a review hearing to
18 amend an order of protection. An order of protection involving
19 child custody or support may be modified without proof of a
20 substantial or material change of circumstances.

21 G. An order of protection shall not be issued
22 unless a petition or a counter petition has been filed.

23 H. An order of protection may be issued against a
24 party restrained by a temporary order of protection if, without
25 good cause and after being served with notice or receiving

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1 actual notice, the restrained party fails to appear at the
2 hearing to determine whether an order of protection should be
3 issued. If an order of protection is thus issued, a copy of
4 the order shall be mailed to the restrained party."

5 Section 6. Section 40-13-6 NMSA 1978 (being Laws 1987,
6 Chapter 286, Section 6, as amended) is amended to read:

7 "40-13-6. SERVICE OF ORDER--DURATION--PENALTY--REMEDIES
8 NOT EXCLUSIVE.--

9 A. An order of protection granted under the Family
10 Violence Protection Act shall be filed with the clerk of the
11 court, and a copy shall be sent by the clerk to the local law
12 enforcement agency. The order shall be [~~personally served upon~~
13 ~~the restrained party, unless the restrained party or the~~
14 ~~restrained party's attorney was present at the time the order~~
15 ~~was issued] provided to the parties or the parties' attorneys.
16 The order shall be filed and [~~served~~] provided to the parties
17 and the local law enforcement agency without cost to the
18 protected party.~~

19 B. A local law enforcement agency receiving an
20 order of protection from the clerk of the court that was issued
21 under the Family Violence Protection Act shall have the order
22 entered in the national crime information center's order of
23 protection file within seventy-two hours of receipt. This does
24 not include temporary orders of protection entered pursuant to
25 the provisions of Section 40-13-4 NMSA 1978.

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1 C. The portion of an order of protection [~~granted~~
2 ~~by the court~~] involving custody or support shall be effective
3 for a fixed period of time not to exceed six months. That
4 portion of the order may be extended for good cause upon motion
5 of the protected party for an additional period of time not to
6 exceed six months. [~~Injunctive orders shall continue until~~
7 ~~modified or rescinded upon motion by either party or until the~~
8 ~~court approves a subsequent consent agreement entered into by~~
9 ~~the parties.~~]

10 D. The portion of an order of protection addressing
11 injunctive relief shall be effective for a fixed period of time
12 identified by the court in the order of protection.

13 E. An order of protection may be extended for good
14 cause upon a motion and hearing.

15 ~~[D.]~~ F. A peace officer shall arrest without a
16 warrant and take into custody a restrained party whom the peace
17 officer has probable cause to believe has violated an order of
18 protection that is issued pursuant to the Family Violence
19 Protection Act or entitled to full faith and credit.

20 ~~[E.]~~ G. State courts shall give full faith and
21 credit to tribal court orders of protection and orders of
22 protection issued by courts of other states. A protection
23 order issued by a state or tribal court against one who has
24 petitioned, filed a complaint or otherwise filed a written
25 pleading for protection against abuse by a spouse or [~~intimate~~]

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1 dating partner is not entitled to full faith and credit if:

2 (1) no cross or counter petition, complaint or
3 other written pleading was filed seeking such a protection
4 order; or

5 (2) a cross or counter petition has been filed
6 and the court did not make specific findings that each party
7 was entitled to such an order.

8 [~~F.~~] H. A restrained party convicted of violating
9 an order of protection granted by a court under the Family
10 Violence Protection Act is guilty of a misdemeanor and shall be
11 sentenced in accordance with Section 31-19-1 NMSA 1978. Upon a
12 second or subsequent conviction, an offender shall be sentenced
13 to a jail term of not less than seventy-two consecutive hours
14 that shall not be suspended, deferred or taken under
15 advisement.

16 [~~G.~~] I. In addition to any other punishment
17 provided in the Family Violence Protection Act, the court shall
18 order a person convicted to make full restitution to the party
19 injured by the violation of an order of protection and shall
20 order the person convicted to participate in and complete a
21 [~~program of professional~~] domestic violence offender treatment
22 or intervention program or other appropriate counseling, at the
23 person's own expense, if possible.

24 [~~H.~~] J. In addition to charging the [~~person~~]
25 restrained party with violating an order of protection, a peace

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1 officer shall file all other possible criminal charges arising
2 from an incident of domestic abuse when probable cause exists.

3 ~~[F.]~~ K. The remedies provided in the Family
4 Violence Protection Act are in addition to any other civil or
5 criminal remedy available to the protected party or the state."

6 Section 7. A new section of the Family Violence
7 Protection Act is enacted to read:

8 "[NEW MATERIAL] MINORS.--

9 A. An order of protection may be issued to protect
10 or restrain a minor.

11 B. A minor who is fourteen years of age or older
12 may petition for an order of protection or a temporary order of
13 protection on the minor's own behalf if the minor files a
14 petition:

15 (1) for protection against a dating partner,
16 co-parent or someone with whom the minor has had a continuing
17 personal relationship; or

18 (2) containing allegations of stalking or
19 sexual assault."

20 Section 8. Section 40-13-7 NMSA 1978 (being Laws 1987,
21 Chapter 286, Section 7, as amended) is amended to read:

22 "40-13-7. LAW ENFORCEMENT OFFICERS--EMERGENCY
23 ASSISTANCE--LIMITED LIABILITY--PROVIDING NOTIFICATION TO
24 VICTIMS WHEN AN ALLEGED PERPETRATOR IS RELEASED FROM
25 DETENTION--STATEMENT IN JUDGMENT AND SENTENCE DOCUMENT.--

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1 A. A person who allegedly has been a victim of
2 domestic abuse may request the assistance of a local law
3 enforcement agency.

4 B. A local law enforcement officer responding to
5 the request for assistance shall be required to take whatever
6 steps are reasonably necessary to protect the victim from
7 further domestic abuse, including:

8 (1) advising the victim of the remedies
9 available under the Family Violence Protection Act; the right
10 to file a written statement, a criminal complaint and a request
11 for an arrest warrant; and the availability of domestic
12 violence shelters, medical care, counseling and other services;

13 (2) upon the request of the victim, providing
14 or arranging for transportation of the victim to a medical
15 facility, [~~or~~] place of shelter or family advocacy center;

16 (3) upon the request of the victim,
17 accompanying the victim to the victim's residence to obtain the
18 victim's clothing and personal effects required for immediate
19 needs and the clothing and personal effects of any children
20 then in the care of the victim;

21 (4) upon the request of the victim, assist in
22 placing the victim in possession of the dwelling or premises or
23 otherwise assist in execution, enforcement or service of an
24 order of protection;

25 (5) arresting the alleged perpetrator when

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1 appropriate and including a written statement in the attendant
2 police report to indicate that the arrest of the alleged
3 perpetrator was, in whole or in part, premised upon probable
4 cause to believe that the alleged perpetrator committed
5 domestic abuse against the victim and, when appropriate,
6 indicate that the party arrested was the predominant aggressor;
7 and

8 (6) advising the victim when appropriate of
9 the procedure for initiating proceedings under the Family
10 Violence Protection Act or criminal proceedings and of the
11 importance of preserving evidence.

12 C. Upon the request of a protected party and in
13 accordance with the terms of an order of protection or a
14 temporary order of protection, a local law enforcement officer
15 shall, in addition to providing assistance pursuant to
16 Subsection B of this section, assist in the enforcement of the
17 terms of the order, including placing a party in possession of
18 a residence and placing any minor child with the party awarded
19 custody in accordance with the order.

20 [~~C.~~] D. The jail or detention center shall make a
21 reasonable attempt to notify the arresting law enforcement
22 agency or officer when the alleged perpetrator is released from
23 custody. The arresting law enforcement agency shall make a
24 reasonable attempt to notify the victim that the alleged
25 perpetrator is released from custody.

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1 ~~[D-]~~ E. Any law enforcement officer responding to a
2 request for assistance under the Family Violence Protection Act
3 is immune from civil liability to the extent allowed by law.
4 Any jail, detention center or law enforcement agency that makes
5 a reasonable attempt to provide notification that an alleged
6 perpetrator is released from custody is immune from civil
7 liability to the extent allowed by law.

8 ~~[E-]~~ F. A statement shall be included in a judgment
9 and sentence document to indicate when a conviction results
10 from the commission of domestic abuse."

11 Section 9. Section 40-13-9 NMSA 1978 (being Laws 2005,
12 Chapter 30, Section 1) is amended to read:

13 "40-13-9. DOMESTIC VIOLENCE SPECIAL COMMISSIONERS--
14 APPOINTMENT--QUALIFICATIONS.--

15 A. A domestic violence special commissioner shall
16 be appointed by and serve at the pleasure of the chief judge of
17 the judicial district to which the ~~[officer]~~ commissioner is
18 assigned.

19 B. A domestic violence special commissioner shall:

20 (1) be an attorney licensed to practice law in
21 New Mexico;

22 (2) have a minimum of three years experience
23 in the practice of law and be knowledgeable in the area of
24 domestic relations and domestic violence matters; and

25 (3) conform to Canons 21-100 through 21-500

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1 and 21-700 of the Code of Judicial Conduct as adopted by the
2 supreme court. Violation of any such canon shall be grounds
3 for dismissal of any domestic violence special commissioner."

4 Section 10. Section 40-13-10 NMSA 1978 (being Laws 2005,
5 Chapter 30, Section 2) is amended to read:

6 "40-13-10. SPECIAL COMMISSIONERS--POWERS--DUTIES.--

7 A. A domestic violence special commissioner shall
8 perform the following duties in carrying out the provisions of
9 the Family Violence Protection Act:

10 (1) review petitions for orders of protection
11 and motions to enforce, modify or terminate orders of
12 protection;

13 (2) if deemed necessary, interview
14 [~~petitioners~~] the parties. Any interview shall be on the
15 record;

16 (3) conduct hearings on the merits of
17 petitions for orders of protection and motions to enforce,
18 modify or terminate orders of protection; and

19 (4) prepare recommendations to the district
20 court regarding petitions for orders of protection and motions
21 to enforce, modify or terminate orders of protection.

22 B. [~~All orders must be signed by a district court~~
23 ~~judge before the recommendations of a domestic violence special~~
24 ~~commissioner become effective~~] A domestic violence special
25 commissioner's recommendations are not effective until they are

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reviewed and adopted as an order of the court."

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