

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 434

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

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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underscoring material = new
[bracketed material] = delete

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 ~~[C.]~~ 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

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 with the intent to intimidate, threaten or harass;

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

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

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

17 [~~D.~~] E. "household member" means a spouse; former
 18 spouse; family member, including a relative, parent, present or
 19 former stepparent, present or former in-law, child or co-parent
 20 of a child; dating partner; or a person with whom the
 21 petitioner has had a continuing personal relationship.
 22 Cohabitation is not necessary to be deemed a household member
 23 [~~for purposes of this section~~];

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

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1 symptoms;

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

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

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

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

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

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

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

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

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

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

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1 respondent.

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

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

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

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

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

21 "40-13-3.2. EX PARTE EMERGENCY ORDERS OF PROTECTION.--

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

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1 other electronic method, a sworn petition setting forth the
2 need for an emergency order of protection, and the court finds
3 [~~reasonable grounds~~] probable cause to believe that the alleged
4 victim or the alleged victim's child is in immediate danger of
5 domestic abuse following an incident of domestic abuse. The
6 [~~written statement~~] petition shall include the location and
7 telephone number of the alleged perpetrator, if known.

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

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

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

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

19 (4) provide the original petition, order and
20 return of service to the court by the close of business on the
21 next judicial day.

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

25 (1) enjoin the restrained party from

1 threatening to commit or committing acts of domestic abuse
2 against the protected party or any designated household
3 members;

4 (2) enjoin the restrained party from any
5 contact with the protected party, including harassing,
6 telephoning, contacting or otherwise communicating with the
7 protected party; and

8 (3) grant temporary custody of any minor child
9 in common with the parties to the protected party, if
10 necessary.

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

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

19 F. A person may appeal the issuance of an emergency
20 order of protection to the court that issued the order. An
21 appeal may be heard as soon as the judicial day following the
22 issuance of the order.

23 G. Upon a proper petition, a district court may
24 issue a temporary order of protection that is based upon the
25 same incident of domestic abuse that was alleged in an

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1 emergency order of protection.

2 H. Emergency orders of protection are enforceable
3 in the same manner as other orders of protection issued
4 pursuant to the provisions of the Family Violence Protection
5 Act."

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

8 "40-13-4. TEMPORARY ORDER OF PROTECTION--HEARING--
9 DISMISSAL.--

10 A. Upon the filing of a petition for order of
11 protection, the court shall:

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

17 (2) cause the temporary order of protection
18 together with notice of hearing to be served immediately on the
19 alleged perpetrator of the domestic abuse; and

20 (3) within ten days after the [~~granting~~]
21 issuance of the temporary order of protection, hold a hearing
22 on the question of continuing the order. [~~or~~

23 ~~(4) if an ex parte order is not granted, serve~~
24 ~~notice to appear upon the parties and hold a hearing on the~~
25 ~~petition for order of protection within seventy-two hours after~~

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1 ~~the filing of the petition; provided if notice of hearing~~
2 ~~cannot be served within seventy-two hours, the temporary order~~
3 ~~of protection shall be automatically extended for ten days.~~

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

7 B. As part of a temporary order of protection, the
8 court may:

9 (1) enjoin the restrained party from
10 committing or threatening to commit acts of domestic abuse
11 against the protected party or other household members;

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

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

18 C. If the court does not find probable cause to
19 believe that an act of domestic abuse has occurred, it shall
20 hold a hearing within seventy-two hours of the filing of the
21 petition to allow the petitioner to provide additional evidence
22 of domestic abuse. At the conclusion of the hearing, an order
23 of dismissal or a temporary order of protection shall be
24 issued.

25 D. A temporary order of protection shall be filed

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1 and served without cost to the protected party.

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

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

8 "40-13-5. ORDER OF PROTECTION--CONTENTS--REMEDIES--TITLE
9 TO PROPERTY NOT AFFECTED--MUTUAL ORDER OF PROTECTION.--

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

18 (1) grant sole possession of the residence or
19 household to the protected party during the period the order of
20 protection is effective or order the restrained party to
21 provide temporary suitable alternative housing for the
22 protected party and any children to whom the restrained party
23 owes a legal obligation of support;

24 (2) award temporary custody of any children
25 involved when appropriate and provide for visitation rights,

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1 child support and temporary support for the protected party on
2 a basis that gives primary consideration to the safety and
3 well-being of the protected party and the children. The court
4 may grant unsupervised, supervised or no visitation;

5 (3) order that the restrained party shall not
6 initiate contact with the protected party;

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

14 (5) grant to a party the exclusive possession
15 and control of any animal kept, owned or leased by either party
16 or by a minor child residing in the household of either party.

17 The court may order a party to stay away from the animal and
18 may forbid a party from taking, transferring, concealing,
19 mistreating, harming or disposing of the animal;

20 [~~5~~] (6) order the restrained party to
21 reimburse the protected party or any other household member for
22 expenses reasonably related to the occurrence of domestic
23 abuse, including medical expenses, counseling expenses, the
24 expense of seeking temporary shelter, expenses for the
25 replacement or repair of damaged property or the expense of

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1 lost wages;

2 ~~[(6)]~~ (7) order the restrained party to
3 participate in, at the restrained party's expense, professional
4 counseling programs deemed appropriate by the court, including
5 counseling programs for perpetrators of domestic abuse, alcohol
6 abuse or abuse of controlled substances; and

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

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

14 C. If the order of protection supersedes or alters
15 prior orders of the court pertaining to domestic matters
16 between the parties, the order shall say so on its face. If an
17 action relating to child custody or child support is pending or
18 has concluded with entry of an order at the time the petition
19 for an order of protection ~~[was filed]~~ is heard, the court may
20 enter an initial order of protection ~~[but the portion of the~~
21 ~~order dealing with child custody or child support will then be~~
22 ~~transferred to the court that has or continues to have~~
23 ~~jurisdiction over the pending or prior custody or support~~
24 ~~action]~~ and temporarily address child custody or child support
25 issues. All long-term issues regarding child custody or

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underscored material = new
[bracketed material] = delete

1 support shall be addressed in the domestic matters action.

2 D. A mutual order of protection shall be issued
3 only in cases where both parties have petitioned the court and
4 the court makes detailed findings of fact indicating that both
5 parties acted primarily as aggressors and that neither party
6 acted primarily in self-defense.

7 E. No order issued under the Family Violence
8 Protection Act shall affect title to any property or allow a
9 party to transfer, conceal, encumber or otherwise dispose of
10 another party's property or the joint or community property of
11 the parties.

12 F. Either party may request a review hearing to
13 amend an order of protection. An order of protection involving
14 child custody or support may be modified without proof of a
15 substantial or material change of circumstances.

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

18 H. An order of protection may be issued against a
19 party restrained by a temporary order of protection if, without
20 good cause and after being served with notice or receiving
21 actual notice, the restrained party fails to appear at the
22 hearing to determine whether an order of protection should be
23 issued. If an order of protection is thus issued, a copy of
24 the order shall be mailed to the restrained party."

25 Section 6. Section 40-13-6 NMSA 1978 (being Laws 1987,

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1 Chapter 286, Section 6, as amended) is amended to read:

2 "40-13-6. SERVICE OF ORDER--DURATION--PENALTY--REMEDIES
3 NOT EXCLUSIVE.--

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

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

21 C. The portion of an order of protection [~~granted~~
22 ~~by the court~~] involving custody or support shall be effective
23 for a fixed period of time not to exceed six months. That
24 portion of the order may be extended for good cause upon motion
25 of the protected party for an additional period of time not to

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1 exceed six months. [~~Injunctive orders shall continue until~~
 2 ~~modified or rescinded upon motion by either party or until the~~
 3 ~~court approves a subsequent consent agreement entered into by~~
 4 ~~the parties.~~]

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

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

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

15 [~~E.~~] G. State courts shall give full faith and
 16 credit to tribal court orders of protection and orders of
 17 protection issued by courts of other states. A protection
 18 order issued by a state or tribal court against one who has
 19 petitioned, filed a complaint or otherwise filed a written
 20 pleading for protection against abuse by a spouse or [~~intimate~~]
 21 dating partner is not entitled to full faith and credit if:

22 (1) no cross or counter petition, complaint or
 23 other written pleading was filed seeking such a protection
 24 order; or

25 (2) a cross or counter petition has been filed

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1 and the court did not make specific findings that each party
2 was entitled to such an order.

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

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

19 [H.] J. In addition to charging the ~~[person]~~
20 restrained party with violating an order of protection, a peace
21 officer shall file all other possible criminal charges arising
22 from an incident of domestic abuse when probable cause exists.

23 [I.] K. The remedies provided in the Family
24 Violence Protection Act are in addition to any other civil or
25 criminal remedy available to the protected party or the state."

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

3 "[NEW MATERIAL] MINORS.--

4 A. An order of protection may be issued to protect
5 or restrain a minor.

6 B. A minor who is fourteen years of age or older
7 may petition for an order of protection or a temporary order of
8 protection on the minor's own behalf if the minor files a
9 petition:

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

13 (2) containing allegations of stalking or
14 sexual assault.

15 C. A minor who is taken into the emergency custody
16 of the children, youth and families department due to
17 allegations of abuse or neglect shall be placed in accordance
18 with the provisions of the Abuse and Neglect Act."

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

21 "40-13-7. LAW ENFORCEMENT OFFICERS--EMERGENCY
22 ASSISTANCE--LIMITED LIABILITY--PROVIDING NOTIFICATION TO
23 VICTIMS WHEN AN ALLEGED PERPETRATOR IS RELEASED FROM
24 DETENTION--STATEMENT IN JUDGMENT AND SENTENCE DOCUMENT.--

25 A. A person who allegedly has been a victim of

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1 domestic abuse may request the assistance of a local law
2 enforcement agency.

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

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

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

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

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

24 (5) arresting the alleged perpetrator when
25 appropriate and including a written statement in the attendant

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

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

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

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

25 [~~D.~~] E. Any law enforcement officer responding to a

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

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

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

12 "40-13-9. DOMESTIC VIOLENCE SPECIAL COMMISSIONERS--
13 APPOINTMENT--QUALIFICATIONS.--

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

18 B. A domestic violence special commissioner shall:

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

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

24 (3) conform to Canons 21-100 through 21-500
25 and 21-700 of the Code of Judicial Conduct as adopted by the

1 supreme court. Violation of any such canon shall be grounds
2 for dismissal of any domestic violence special commissioner."

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

5 "40-13-10. SPECIAL COMMISSIONERS--POWERS--DUTIES.--

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

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

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

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

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

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

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