

**PROPOSED REVISIONS TO THE DOMESTIC RELATIONS FORMS  
PROPOSAL 2020-006**

**March 3, 2020**

The Domestic Relations Forms Committee has recommended the amendment of Forms 4-963, 4-963A, 4-965, and 4-970 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 2, 2020**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**4-963. Temporary order of protection and order to appear.**

[Family Violence Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978.]

STATE OF NEW MEXICO

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ JUDICIAL DISTRICT

\_\_\_\_\_, Petitioner

v. \_\_\_\_\_ No. \_\_\_\_\_

\_\_\_\_\_, Respondent

**TEMPORARY ORDER OF PROTECTION  
AND ORDER TO APPEAR**

The court has reviewed the sworn petition alleging domestic abuse. The court having considered the petition, **FINDS** that the court has jurisdiction and that there is probable cause to believe that an act of domestic abuse has occurred. The court **ORDERS**:

- 1. Respondent shall not write to, talk to, visit or contact the petitioner in any way except through petitioner's lawyer, if petitioner has a lawyer.
- 2. Respondent shall not abuse the petitioner or the petitioner's household members in any way. "Abuse" means any incident by respondent against petitioner or petitioner's household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or

assault; (4) a threat causing imminent fear of bodily injury; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by a residence or work place; (8) telephone harassment; (9) stalking; (10) harassment; (11) harm or threatened harm to children in any manner set forth above.

3. Respondent shall not ask or cause other persons to abuse the petitioner or the petitioner's household members.

4. Respondent shall not go within \_\_\_\_\_ yards of the petitioner's home or school or work place. Respondent shall not go within \_\_\_\_\_ yards of the petitioner at all times except \_\_\_\_\_. If at a public place, such as a store, respondent shall not go within \_\_\_\_\_ yards of petitioner.

5. Respondent shall not post or cause another to post anything about the other, including the other's family members, significant other, children, or anyone involved in this matter on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat.

~~5.~~ 6. \_\_\_\_\_ (first and last name of party) shall have temporary physical custody of the following child(ren):

Child's Name

Date of Birth

\_\_\_\_\_

\_\_\_\_\_

~~6.~~ 7. With respect to the child(ren) named in the preceding paragraph, *(first and last name of parent)* shall have:

A. No contact with the child(ren) until further order of this court and shall stay \_\_\_\_\_ yards away from the child(ren)'s school.

B. Contact with the child(ren), subject to:

~~7.~~ 8. Neither party shall remove the child(ren) named in the preceding paragraph from the State of New Mexico or disenroll the child(ren) from the child(ren)'s present school during the period of this temporary order of protection.

~~8.~~ 9. The court may decide temporary child and interim support at the hearing listed below. Both parties shall bring to the hearing proof of income in the form of the two latest pay stubs or the federal tax returns from the previous year, proof of work related day-care costs and proof of medical insurance costs for the child(ren).

~~9.~~ 10.

A. Respondent is ordered to immediately leave the residence at \_\_\_\_\_ and to not return until further court order.

B. Law enforcement officers are hereby ordered to evict respondent from the residence at \_\_\_\_\_.

C. Respondent is ordered to surrender all keys to the residence to law enforcement officers.

~~10.~~ 11. Law enforcement officers or \_\_\_\_\_ shall accompany  respondent  petitioner to remove essential tools (*as specified in No. 13*), clothing, and personal belongings from the residence at \_\_\_\_\_.

~~[11.]~~ 12. Neither party shall transfer, hide, add debt to, sell or otherwise dispose of the other's property or the joint property of the parties except in the usual course of business or for the necessities of life. The parties shall account to the court for all such changes to property made after the order is served or communicated to the party. Neither party shall disconnect the utilities of the other party's residence.

~~[12.]~~ 13. This order supersedes any inconsistent prior order in Cause No. \_\_\_\_\_ and any other prior domestic relations order and domestic violence restraining orders between these two parties.

~~[13.]~~ 14. Other: \_\_\_\_\_.

~~[14.]~~ 15. While this order of protection is in effect, petitioner should refrain from any act that would cause the respondent to violate this order. This provision is not intended to and does not create a mutual order of protection. Under Section 40-13-6(D) NMSA 1978, only the restrained party can be arrested for violation of this order.

**HEARING**

IT IS FURTHER ORDERED that the parties shall appear in the \_\_\_\_\_ Judicial District Court, Room \_\_\_\_\_, at \_\_\_\_\_, before \_\_\_\_\_, at \_\_\_\_\_ (a.m.) (p.m.) on \_\_\_\_\_ (date) for hearing on whether an extended order of protection against domestic abuse will be issued. Either party may bring witnesses or evidence and may be represented by counsel at this hearing. Respondent may file a Response to the Petition for Order of Protection from Domestic Abuse, *see* Form 4-962 NMRA, on or before the hearing. If the respondent fails to attend this hearing, an extended order may be entered by default against respondent and a bench warrant may be issued for respondent's arrest. If petitioner willfully fails to appear at this hearing, the petition may be dismissed. This order remains in force until \_\_\_\_\_, \_\_\_\_\_.

**If an order of protection is entered, the restrained party is prohibited from receiving, transporting, or possessing a firearm or destructive device while the order of protection is in place.** If at the hearing the court finds that the restrained party presents a credible threat to the physical safety of the protected party, the court shall order the restrained party (a) to immediately deliver any firearm in the restrained party's possession, care, custody, or control to a law enforcement agency, law enforcement officer, or federal firearms licensee while the order of protection is in effect, and (b) to refrain from purchasing, receiving, or possessing, or attempting to purchase, receive, or possess any firearm while the order of protection is in effect.

**DO NOT BRING ANY CHILDREN TO THE HEARING WITHOUT PRIOR PERMISSION OF THE COURT.**

**ENFORCEMENT OF ORDER**

If the restrained party violates any part of this order, the restrained party may be charged with a crime, arrested, held in contempt of court, fined or jailed.

**SERVICE AND NOTICE TO LAW ENFORCEMENT AGENCIES**

Upon the signing of this order by a district court judge, a law enforcement officer shall serve on the respondent a copy of this order and a copy of the petition. **A LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.**

[ ] I have reviewed the petition for order of protection and made recommendations to the district judge regarding its disposition.

\_\_\_\_\_  
(Signed)

\_\_\_\_\_  
Court telephone number

\_\_\_\_\_  
(Title)

**SO ORDERED:**

\_\_\_\_\_  
District Judge

\_\_\_\_\_  
Date and time approved

**USE [NOTE] NOTES**

1. The temporary order of protection and order to appear requires a proof of return of service. The committee has been informed that each local law enforcement agency has its own return of service form, which will be used for this purpose.

2. Personal service of the temporary order of protection and order to appear will assure that the temporary order is fully enforceable. It is possible that actual notice to the respondent of the content of the temporary order will also suffice to bind the respondent to comply with the order. *Territory of New Mexico v. Clancy*, 7 N.M. 580, 583 (1894).

[Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001; as amended by Supreme Court Order No. 07-8300-020, effective September 17, 2007; by Supreme Court Order No. 08-8300-040, effective December 15, 2008; as amended by Supreme Court Order No. 19-8300-009, effective for all orders issued on or after July 1, 2019; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**4-963A. Temporary order of protection against petitioner and order to appear.**

[Family Violence Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978.]

STATE OF NEW MEXICO

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ JUDICIAL DISTRICT

\_\_\_\_\_, Petitioner

v. No. \_\_\_\_\_

\_\_\_\_\_, Respondent

**TEMPORARY ORDER OF PROTECTION AGAINST PETITIONER  
AND ORDER TO APPEAR**

The court has reviewed the sworn counter-petition alleging domestic abuse. The court having considered the petition, FINDS that the court has jurisdiction and that there is probable cause to believe that an act of domestic abuse has occurred. The court ORDERS:

[ ] 1. Petitioner shall not write to, talk to, visit or contact the respondent in any way except through respondent's lawyer, if respondent has a lawyer.

[ ] 2. Petitioner shall not abuse the respondent or the respondent's household members in any way. "Abuse" means any incident by petitioner against respondent or respondent's household members resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat causing imminent fear of bodily injury; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by a residence or workplace; (8) telephone

harassment; (9) stalking; (10) harassment; (11) harm or threatened harm to children in any manner set forth above.

3. Petitioner shall not ask or cause other persons to abuse the respondent or the respondent's household members.

4. Petitioner shall not go within \_\_\_\_\_ yards of the respondent's home or school or workplace. Petitioner shall not go within \_\_\_\_\_ yards of the respondent at all times except \_\_\_\_\_. If at a public place, such as a store, petitioner shall not go within \_\_\_\_\_ yards of respondent.

5. Petitioner shall not post or cause another to post anything about the other, including the other's family members, significant other, children, or anyone involved in this matter on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat.

~~5.~~ 6. \_\_\_\_\_ first and last name of party) shall have temporary physical custody of the following child(ren):

Child's Name

Date of Birth

\_\_\_\_\_

\_\_\_\_\_

~~6.~~ 7. With respect to the child(ren) named in the preceding paragraph, (*first and last name of parent*) shall have:

A. No contact with the child(ren) until further order of this court and shall stay \_\_\_\_\_ yards away from the child(ren)'s school.

B. Contact with the child(ren), subject to:

~~7.~~ 8. Neither party shall remove the child(ren) named in the preceding paragraph from the State of New Mexico or disenroll them from the child(ren)'s present school during the period of this temporary order of protection.

~~8.~~ 9. The court may decide temporary child and interim support at the hearing listed below. Both parties shall bring to the hearing proof of income in the form of the two latest pay stubs or the federal tax returns from the previous year, proof of work-related daycare costs and proof of medical insurance costs for the child(ren).

~~9.~~ 10.

A. Petitioner is ordered to immediately leave the residence at \_\_\_\_\_ and to not return until further court order.

B. Law enforcement officers are hereby ordered to evict petitioner from the residence at \_\_\_\_\_.

C. Petitioner is ordered to surrender all keys to the residence to law enforcement officers.

~~10.~~ 11. Law enforcement officers or \_\_\_\_\_ shall accompany  respondent  petitioner to remove essential tools (as specified in No. 13), clothing, and personal belongings from the residence at \_\_\_\_\_.

~~[11.]~~ 12. Neither party shall transfer, hide, add debt to, sell or otherwise dispose of the other's property or the joint property of the parties except in the usual course of business or for the necessities of life. The parties shall account to the court for all such changes to property made after the order is served or communicated to the party. Neither party shall disconnect the utilities of the other party's residence.

~~[12.]~~ 13. This order supersedes any inconsistent prior order in Cause No. \_\_\_\_\_ and any other prior domestic relations order and domestic violence restraining orders between these two parties.

~~[13.]~~ 14. Other: \_\_\_\_\_.

~~[14.]~~ 15. While this order of protection is in effect, respondent should refrain from any act that would cause the petitioner to violate this order. This provision is not intended to and does not create a mutual order of protection. Under Section 40-13-6(D) NMSA 1978, only the restrained party can be arrested for violation of this order.

**HEARING**

IT IS FURTHER ORDERED that the parties shall appear in the \_\_\_\_\_ Judicial District Court, Room \_\_\_\_\_, at \_\_\_\_\_, before \_\_\_\_\_, at \_\_\_\_\_ (a.m.) (p.m.) on \_\_\_\_\_ (date) for

hearing on whether an extended order of protection against domestic abuse will be issued. Either party may bring witnesses or evidence and may be represented by counsel at this hearing. Petitioner may file a Response to the Petition for Order of Protection from Domestic Abuse, see Form 4-962 NMRA, on or before the hearing. If the petitioner fails to attend this hearing, an extended order may be entered by default against petitioner and a bench warrant may be issued for petitioner's arrest. If respondent willfully fails to appear at this hearing, the counter-petition may be dismissed. This order remains in force until \_\_\_\_\_,

\_\_\_\_\_. **If an order of protection is entered, the restrained party is prohibited from receiving, transporting, or possessing a firearm or destructive device while the order of protection is in place.** If at the hearing the court finds that the restrained party presents a credible threat to the physical safety of the protected party, the court shall order the restrained party (a) to immediately deliver any firearm in the restrained party's possession, care, custody, or control to a law enforcement agency, law enforcement officer, or federal firearms licensee while the order of protection is in effect, and (b) to refrain from purchasing, receiving, or possessing, or attempting to purchase, receive, or possess any firearm while the order of protection is in effect.

**DO NOT BRING ANY CHILDREN TO THE HEARING WITHOUT PRIOR PERMISSION OF THE COURT.**

**ENFORCEMENT OF ORDER**

If the restrained party violates any part of this order, the restrained party may be charged with a crime, arrested, held in contempt of court, fined or jailed.

**SERVICE AND NOTICE TO LAW ENFORCEMENT AGENCIES**

Upon the signing of this order by a district court judge, a law enforcement officer shall serve on the petitioner a copy of this order and a copy of the counter-petition. **A LAW**

**ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.**

I have reviewed the counter-petition for an order of protection and made recommendations to the district judge regarding its disposition.

\_\_\_\_\_  
(Signed)

Court telephone number \_\_\_\_\_

\_\_\_\_\_  
(Title)

**SO ORDERED:**

\_\_\_\_\_  
District Judge

\_\_\_\_\_  
Date and time approved

**USE [NOTE] NOTES**

1. The temporary order of protection and order to appear requires a proof of return of service. The committee has been informed that each local law enforcement agency has its own return of service form, which will be used for this purpose.

2. Personal service of the temporary order of protection and order to appear will assure that the temporary order is fully enforceable. It is possible that actual notice to the petitioner of the content of the temporary order will also suffice to bind the petitioner to comply with the order. *Territory of New Mexico v. Clancy*, 7 N.M. 580, 583 (1894).

[Approved, effective May 1, 2001; as amended by Supreme Court Order No. 07-8300-020, effective September 17, 2007; by Supreme Court Order No. 08-8300-040, effective December 15, 2008; as amended by Supreme Court Order No. 19-8300-009, effective for all orders issued on or after July 1, 2019; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**4-965. Order of protection, mutual, non-mutual.**

[Click here for PDF version of Order of Protection cover page]

\_\_\_\_\_  
Judicial District  
\_\_\_\_\_  
County, New Mexico

Case No. \_\_\_\_\_ **Order of Protection**

Amended Order

PROTECTED PARTY ( PETITIONER  RESPONDENT)

PROTECTED PARTY IDENTIFIERS

\_\_\_\_\_  
First Middle Last

Date of Birth of Protected Party

And/or on behalf of minor family member(s): (list name and DOB)

Other Protected Persons/DOB

v.

RESTRAINED PARTY			RESTRAINED PARTY IDENTIFIERS				
First	Middle	Last	SEX	RACE	DOB	HT	WT
Relationship to Protected Party:			EYES	HAIR	SOCIAL SECURITY #		
Restrained Party's Address			DRIVERS LICENSE #		STATE	EXP DATE	

Distinguishing Features

**CAUTION:**

- Weapon Involved
- Credible Threat. Firearm Delivery Ordered.

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**THE COURT HEREBY FINDS:**

That it has jurisdiction over the parties and subject matter, and the Restrained Party has been provided with reasonable notice and opportunity to be heard.

- Additional findings of this order follow on succeeding pages.

**THE COURT HEREBY ORDERS:**

- That the above named Restrained Party be restrained from committing further acts of abuse or threats of abuse.
- That the above named Restrained Party be restrained from any contact with the Protected Party.
- Additional terms of this order are as set forth on succeeding pages.

The terms of this order shall be effective until

**WARNINGS TO RESTRAINED PARTY:**

This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands under 18 U.S.C. Section 2265. Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment under 18 U.S.C. Section 2262.

As a result of this order, it is unlawful for you to possess or purchase ammunition or a firearm, including a rifle, pistol or revolver, under 18 U.S.C. Section 922(g)(8) and NMSA 1978, Section 30-7-16, and may be unlawful under 18 U.S.C. Section 921(a)(32). If you have any questions whether federal law makes it illegal for you to possess or purchase a firearm, you should consult an attorney.

Only the court can change this order.

Page 1 of \_\_\_\_

*Judge's signature on last page*

[Family Violence Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978.]

**ADDITIONAL PAGES<sup>1</sup> OF  
ORDER OF PROTECTION**

THIS MATTER came before the court on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ through a hearing on the [ ] petitioner's [ ] respondent's request for an order prohibiting domestic abuse.

The court further **FINDS, CONCLUDES AND ORDERS:**

*(check only applicable paragraphs)*

**1. FINDING OF CREDIBLE THREAT**

[ ] The restrained party presents a credible threat to the physical safety of the protected party or a member of the protected party's household. The court's order regarding relinquishment of firearms is addressed in paragraph five (5) of this order of protection.

[ ] The restrained party presents a credible threat to the physical safety of the protected party, who is a household member.

[ ] The restrained party shall, within forty-eight (48) hours, deliver any firearm in the restrained party's possession, care, custody, or control to a law enforcement agency, law enforcement officer, or federal firearms licensee while the order of protection is in effect, and shall refrain from purchasing, receiving, or possessing, or attempting to purchase, receive, or possess, any firearm while the order of protection is in place.

[ ] The restrained party is responsible for ensuring that the firearm delivery receipt is filed in this case within seventy-two (72) hours of entry of this order.

**2. NOTICE, APPEARANCES AND STATUS**

[ ] Petitioner was present.

[ ] Petitioner was represented by counsel.

[ ] Respondent was present.

[ ] Respondent was represented by counsel.

[ ] Respondent was properly served with a copy of the petition, temporary order of protection prohibiting domestic abuse and order to appear.<sup>2</sup>

[ ] Respondent was properly served with a copy of the petition and order to appear.<sup>2</sup>

[ ] Respondent received actual notice of the hearing and had an opportunity to participate in the hearing.<sup>2</sup>

[ ] Petitioner was properly served with a copy of the counter-petition and order to appear.<sup>2</sup>

[ ] Petitioner was properly served with a copy of the temporary order and order to appear.

[ ] Petitioner received actual notice of the hearing and had an opportunity to participate in the hearing.<sup>2</sup>

[ ] The relationship of the parties is that of an "intimate partner" as defined in 18 USC Section 921 (a)(32). (*See* 3(B) below)

**3. CONSEQUENCES OF ENTRY OF ORDER OF PROTECTION**

Violation of this order by the restrained party can have serious consequences, including:

A. If you violate the terms of this order, you may be charged with a misdemeanor, which is punishable by imprisonment of up to three hundred sixty-four (364) days and a fine of up to one thousand dollars (\$1,000), or both. You may be found in contempt of court.

B. If you receive, transport, or possess a firearm or destructive device while the order of protection is in effect, you may be charged with a misdemeanor, which is punishable by imprisonment for up to three-hundred and sixty-four (364) days and a fine of up to one-thousand dollars (\$1,000.00).

C. If you are the spouse or former spouse of the other party, an individual who cohabitates with or has cohabitated with the other party, or if you and the other party have had a child together, federal law also prohibits you from possessing or transporting firearms or ammunition while this order is in effect. If you have a firearm or ammunition, you should immediately dispose of the firearm or ammunition. Violation of this law is a federal crime punishable by imprisonment for up to ten (10) years and a fine of up to two hundred fifty-thousand dollars (\$250,000).

D. If you are not a citizen of the United States, violation of this order will have a negative effect on your application for residency or citizenship.

**4. FINDING OF DOMESTIC ABUSE**

An act of domestic abuse was committed by [ ] respondent [ ] petitioner that necessitates an order of protection. [ ] Petitioner [ ] Respondent is the protected party under this order.

**5. FINDING THAT THE RESTRAINED PARTY PRESENTS A CREDIBLE THREAT TO THE PROTECTED PARTY'S PHYSICAL SAFETY, ORDER**

Restrained party presents a credible threat to the physical safety of the protected party, who is a household member.

Restrained party shall deliver any firearm in the restrained party's possession, care, custody, or control to a law enforcement agency, law enforcement officer, or federal firearms licensee while the order of protection is in effect, and shall refrain from purchasing, receiving, or possessing, or attempting to purchase, receive, or possess, any firearm while the order of protection is in effect.

**6. DOMESTIC ABUSE PROHIBITED**

The restrained party shall not abuse the other party or members of the other party's household. "Abuse" means any incident by one party against the other party or another household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat by petitioner or respondent causing imminent fear of bodily injury to the other party or any household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by the protected party's or a household member's residence or workplace; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children in any manner set forth above.

The restrained party shall not ask or cause other persons to abuse the other party or any other household members.

**7. CONTACT PROHIBITIONS**

The restrained party shall stay 100 yards away from the other party, the other party's home and any workplace at all times, unless at a public place, where the restrained party shall remain 25 yards away from the other party except as specifically permitted by this order.

The restrained party shall not telephone, talk to, visit, or contact the other party in any way except as follows: \_\_\_\_\_

\_\_\_\_\_.

The parties may contact each other by telephone regarding medical emergencies of minor children;

The restrained party shall not post or cause another to post anything about the protected party, including the protected party's family members, significant other, children, or anyone involved in this matter on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat.

Other: \_\_\_\_\_

The parties may attend joint counseling sessions at the counselor's discretion. *(Unless the court has sealed the protected party's address, include it below.)*

Protected Party

Home address \_\_\_\_\_ City, State, Zip Code \_\_\_\_\_

Work Address \_\_\_\_\_ City, State, Zip Code \_\_\_\_\_

Tribe/Pueblo (if applicable) \_\_\_\_\_ State and Zip Code \_\_\_\_\_

**8. COUNSELING**

Restrained party shall attend counseling at \_\_\_\_\_, contacting that office within five (5) days. The restrained party shall participate in, attend and complete counseling as recommended by the named agency.

Protected party shall attend counseling at \_\_\_\_\_, contacting that office within five (5) days. The protected party shall participate in, attend and complete counseling as recommended by the named agency.

Restrained party shall report to \_\_\_\_\_, for a  drug [and]  alcohol screen by \_\_\_\_\_, \_\_\_\_\_ (date) with the results returned to this court.

Protected party shall report to \_\_\_\_\_, for a  drug [and]  alcohol screen by \_\_\_\_\_, \_\_\_\_\_ (date) with the results returned to this court.

Other counseling requirements: \_\_\_\_\_

**9. CUSTODY**

The court's orders regarding the minor child(ren) are addressed in the Custody, Support and Division of Property Attachment of this order of protection.<sup>3</sup>

**10. PROVISIONS RELATING TO SUPPORT**

The court's orders regarding support issues for the parties are found in the Custody, Support and Division of Property Attachment of this order of protection.<sup>4</sup>

**11. PROPERTY, DEBTS AND PAYMENTS OF MONEY**

The court's orders regarding property, debts and payment of money are found in the Custody, Support and Division of Property Attachment of this order of protection.<sup>4</sup>

**12. PARTIES SHALL NOT CAUSE VIOLATION**

While this order of protection is in effect the protected party should refrain from any act that would cause the restrained party to violate this order. This provision is not intended to and

does not create a mutual order of protection. Under Section 40-13-6 (D) NMSA 1978, only the restrained party can be arrested for violation of this order.

**13. ADDITIONAL ORDERS**

Review hearing. The parties are ordered to appear for a review hearing on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ (a.m.) (p.m.). Failure to appear may result in the issuance of a bench warrant for your arrest or dismissal of this order.

Any party ordered to attend counseling shall bring proof of counseling to the review hearing.

IT IS FURTHER ORDERED<sup>5</sup>: \_\_\_\_\_

**14. NOTICE TO LAW ENFORCEMENT AGENCIES**

**ANY LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.**

\_\_\_\_\_ (name) is ordered to surrender all keys to the residence to law enforcement officers.

Law enforcement officers or \_\_\_\_\_ shall be present during any property exchange.

This order supersedes prior orders in \_\_\_\_\_ County, State of \_\_\_\_\_, Cause No. \_\_\_\_\_ to the extent that there are contradictory provisions.

**15. NOTICE TO PARTIES**

This order does not serve as a divorce and does not permanently resolve child custody or support issues.

To make a request to extend this order, the protected party should return to the court with a copy of this order at least three weeks before this order expires.

**16. RECOMMENDATIONS**

I have:

reviewed the petition for order of protection;

reviewed the counter-petition for order of protection;

conducted hearings on the merits of the petition;

after notice and hearing, I prepared this order as my recommendation to the district court judge regarding disposition of the request for order of protection. If any party disagrees with the recommendations, that party may, but is not required to, file written objections and a request for hearing on those objections with the district court within ten (10) days. A copy of those objections and a request for hearing must be served by mail on the other party.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Title

Court's telephone number: \_\_\_\_\_

The court has reviewed the recommendations and adopts them. This order remains in effect unless and until it is modified by a district court judge or it expires. If objections are filed the court may conduct a hearing to resolve the objections. (*See* Rule 1-053.1(H)(1)(a) NMRA).

**SO ORDERED:**

\_\_\_\_\_  
District Judge

\_\_\_\_\_  
Date

A copy of this order was  hand delivered  faxed  mailed to  respondent  
 respondent's counsel on \_\_\_\_\_ (date)<sup>6</sup>.

A copy of this order was  hand delivered  faxed  mailed to  petitioner  
 petitioner's counsel on \_\_\_\_\_ (date).

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Title

### USE NOTES

1. The first page of this order of protection shall be in the uniform format preceding the heading for additional pages of the order.

2. This order may be entered only after a hearing at which respondent received actual notice and at which respondent had an opportunity to participate if 18 U.S.C. Section 922 is to apply to this order.

3. The federal definition of "intimate partner" under the Gun Control Act, 18 U.S.C. Section 921(a)(32), is narrower than the state definition of "household member" under the Family Violence Protection Act, NMSA1978, Section 40-13-2(E). Thus, while the parties subject to this order must be household members as a matter of state law, the court also must determine whether they are intimate partners and therefore subject to 18 U.S.C. Section 922(g)(8), as described in Paragraph 2(B), above.

4. See Form 4-967 NMRA for the Custody, Support and Division of Property Order attachment.

5. If appropriate, an order providing for restitution may be included in this paragraph.

6. Respondent or petitioner should be served at the time this order is issued, before leaving the courthouse. If a default order is issued, service upon the non-attending party shall be made by mail or by personal service. See Section 40-13-6(A) NMSA 1978.

[Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001; as amended by Supreme Court Order No. 07-8300-020, effective September 17, 2007; by Supreme Court Order No. 08-8300-040, effective December 15, 2008; as amended by Supreme Court Order No. 19-8300-009, effective for all orders issued on or after July 1, 2019; as amended by Supreme Court Order No. 19-8300-015, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — The Family Violence Protection Act provides that "a peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order" of protection entered pursuant to the Act. Section 40-13-6(C) NMSA 1978.

This statute would allow a warrantless misdemeanor arrest for conduct occurring outside the presence of the officer and would not require exigent circumstances in addition to probable cause. That a misdemeanor must occur in the presence of the arresting officer is a long standing common law requirement for a warrantless misdemeanor arrest. *Eg. State v. Luna*, 93 N.M. 773,

777, 606 P.2d 183, 187 (1980). The "exigent circumstances" requirement is mandated by the New Mexico Constitution. *Campos v. State*, 117 N.M. 155, 159, 870 P.2d 117, 121 (1994) ("[F]or a warrantless arrest to be reasonable it must be based upon both probable cause and sufficient exigent circumstances."). Absent the exigent circumstance that the misdemeanor is committed in the presence of the officer, *id.*, ("If an officer observes the person arrested committing a felony, exigency will be presumed."), the New Mexico Constitution appears to bar blanket authority to make warrantless arrests for misdemeanors committed outside the presence of the officer.

The legislature, of course, lacks power to provide by statute for an arrest procedure that violates the New Mexico Constitution. *Campos v. State*, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994). To avoid having the Supreme Court give approval to a form containing language of questionable constitutional validity, the committee did not use the statutory language in the portion of the final order describing the power of a law enforcement officer to make a warrantless arrest for the misdemeanor crime (Section 40-13-6(D) NMSA 1978), of violating the final order of protection. The committee substituted more general language, which does not prejudice the constitutional issue.

The general provisions of the order of protection, including injunctive orders, "shall continue until modified or rescinded . . . or until the court approves a subsequent consent agreement. . . ." Section 40-13-6(B) NMSA 1978. In contrast, "[a]n order of protection . . . involving custody or support shall be effective for a fixed period of time not to exceed six months". *Id.* The custody or support "order may be extended for good cause upon motion . . . for an additional period of time not to exceed six months", *id.*, unless "the order supersedes or alters prior orders of the court" pertaining to child custody or child support. *See* Section 40-13-5(C) NMSA 1978. In the latter situation, "the court may enter an initial order of protection, but the portion of the order dealing with child custody or child support will then be transferred to the court that has or continues to have jurisdiction over the pending or prior custody or support action". *Id.*

**4-970. Stipulated order of protection.**

[Click here for PDF version of Order of Protection cover page]

_____ Judicial District _____ County, New Mexico Case No. _____	<b>Order of Protection</b> <input type="checkbox"/> Amended Order
-----------------------------------------------------------------------	----------------------------------------------------------------------

PROTECTED PARTY ( PETITIONER  RESPONDENT)

--	--	--

First Middle Last

And/or on behalf of minor family member(s): (list name and DOB)

\_\_\_\_\_  
 \_\_\_\_\_

PROTECTED PARTY IDENTIFIERS

Date of Birth of Protected Party

Other Protected Persons/DOB

\_\_\_\_\_  
 \_\_\_\_\_

v.

RESTRAINED PARTY			RESTRAINED PARTY IDENTIFIERS				
First	Middle	Last	SEX	RACE	DOB	HT	WT
Relationship to Protected Party: _____			EYES	HAIR	SOCIAL SECURITY #		
_____			<b>Not used in New Mexico</b>				
Restrained Party's Address			DRIVERS LICENSE #		STATE	EXP DATE	
_____			_____		_____	_____	

Distinguishing Features \_\_\_\_\_  
 \_\_\_\_\_

**CAUTION:**  
 Weapon Involved  
 Credible Threat: Firearm Delivery Ordered

**THE COURT HEREBY FINDS:**  
 That it has jurisdiction over the parties and subject matter, and the Restrained Party has been provided with reasonable notice and opportunity to be heard.

Additional findings of this order follow on succeeding pages.  
**THE COURT HEREBY ORDERS:**  
 That the above named Restrained Party be restrained from committing further acts of abuse or threats of abuse.  
 That the above named Restrained Party be restrained from any contact with the Protected Party.  
 Additional terms of this order are as set forth on succeeding pages.

The terms of this order shall be effective until \_\_\_\_\_, \_\_\_\_\_.

**WARNINGS TO RESTRAINED PARTY:**  
 This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands under 18 U.S.C. Section 2265. Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment under 18 U.S.C. Section 2262.  
 As a result of this order, it may be unlawful for you to possess or purchase ammunition or a firearm, including a rifle, pistol or revolver, under 18 U.S.C. Section 922(g)(8) and NMSA 1978, Section 30-7-16, and may be unlawful under 18 U.S.C. Section 921(a)(32). If you have any questions whether federal law makes it illegal for you to possess or purchase a firearm, you should consult an attorney.  
 Only the court can change this order.

*Judge's signature on last page*

## ADDITIONAL PAGES<sup>1</sup> OF STIPULATED ORDER OF PROTECTION

The court further **FINDS, CONCLUDES AND ORDERS:**

### 1. FINDING OF CREDIBLE THREAT

The restrained party presents a credible threat to the physical safety of the protected party or a member of the protected party's household.

The restrained party presents a credible threat to the physical safety of the protected party, who is a household member.

The restrained party shall, within forty-eight (48) hours, deliver any firearm in that party's possession, care, custody, or control to a law enforcement agency, law enforcement officer, or federal firearms licensee while the order of protection is in effect, and shall refrain from purchasing, receiving, or possessing or attempting to purchase, receive, or possess any firearm while the order of protection is in effect.

The restrained party is responsible for ensuring that the firearm delivery receipt is filed in this case within seventy-two (72) hours of entry of this order.

### 2. NOTICE, APPEARANCES AND STATUS

This order was entered on stipulation of the parties.

The relationship of the parties is that of an "intimate partner" as defined in 18 USC Section 921(a)(32). (*See 3 below*). This order may be entered into a federal firearms database.

Petitioner was present.

Petitioner was represented by counsel.

Respondent was present.

Respondent was represented by counsel.

### 3. EFFECT OF STIPULATION TO ORDER OF PROTECTION

Violation of this order can have serious consequences, including:

A. If you violate the terms of this order, you may be charged with a misdemeanor, which is punishable by imprisonment of up to three hundred sixty-four (364) days and a fine of up to one thousand dollars (\$1,000) or both. You may be found to be in contempt of court.

B. If you receive, transport, or possess a firearm or destructive device while the order of protection is in effect, you may be charged with a misdemeanor, which is punishable by imprisonment for up to three-hundred and sixty-four (364) days and a fine of up to one-thousand dollars (\$1,000.00).

C. If you are the spouse or former spouse of the other party, an individual who cohabitates with or has cohabitated with the other party, or if you and the other party have had a child together, federal law prohibits you from possessing or transporting firearms or ammunition while this order is in effect. If you have a firearm or ammunition, you should immediately dispose of the firearm or ammunition. Violation of this law is a federal crime punishable by imprisonment for up to ten (10) years and a fine of up to two hundred fifty-thousand dollars (\$250,000). 18 U.S.C. § 922, *et seq.*

D. If you are not a citizen of the United States, violation of this order will have a negative effect on your application for residency or citizenship.

### 4. DOMESTIC ABUSE PROHIBITED

The restrained party shall not abuse the protected party or members of the protected party's household. "Abuse" means any incident by one party against the other party or another household

member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat causing imminent fear of bodily injury to the other party or any household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by the protected party's or a household members' residence or work place; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children in any manner set forth above.

The restrained party shall not ask or cause other persons to abuse the other party or any other household members.

## 5. CONTACT PROHIBITIONS

Restrained party shall stay 100 yards away from the protected party and the protected party's home and workplace at all times, unless at a public place, where the restrained party shall remain 25 yards away from the protected party except as specifically permitted by this order.

The restrained party shall not telephone, talk to, visit or contact the protected party in any way except as follows:

*(check only applicable paragraphs)*

The parties may contact each other by telephone regarding medical emergencies of minor children;

\_\_\_\_\_

The restrained party shall not post or cause another to post anything about the protected party, including the protected party's family members, significant other, children, or anyone involved in this matter on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat.

The parties may attend joint counseling sessions at the counselor's discretion.

*(Unless the court has entered an order sealing the protected party's address, include it below.)*

### Protected party's addresses:

\_\_\_\_\_ *(home address)*

\_\_\_\_\_ *(work address)*

\_\_\_\_\_ *(city)*

\_\_\_\_\_ *(if applicable, tribe or pueblo)*

\_\_\_\_\_ *(state and zip code)*

## 6. COUNSELING

Petitioner shall attend counseling at \_\_\_\_\_, contacting that office within five (5) days. The petitioner shall participate in, attend and complete counseling as recommended by the named agency.

Respondent shall attend counseling at \_\_\_\_\_, contacting that office within five (5) days. The respondent shall participate in, attend and complete counseling as recommended by the named agency.

Petitioner shall report to \_\_\_\_\_ for a  drug [and]  alcohol screen by \_\_\_\_\_, \_\_\_\_\_ *(date)* with the results returned to this court.

Respondent shall report to \_\_\_\_\_ for a  drug [and]  alcohol screen by \_\_\_\_\_, \_\_\_\_\_ *(date)* with the results returned to this court.

Other counseling requirements: \_\_\_\_\_.

## 7. CUSTODY<sup>2</sup>

The court's orders regarding the minor [child] [children] of the parties are found in the Custody, Support and Division of Property Attachment of this order of protection.

**8. PROVISIONS RELATING TO SUPPORT<sup>2</sup>**

The court's orders regarding support issues for the parties are found in the Custody, Support and Division of Property Attachment of this order of protection.

**9. PROPERTY, DEBTS, PAYMENTS OF MONEY<sup>2</sup>**

The court's orders regarding property, debts and payment of money are addressed in the Custody, Support and Division of Property Attachment of this order of protection.

**10. ADDITIONAL ORDERS**

Review hearing. The parties are ordered to appear for a review hearing on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ (a.m.) (p.m). Failure to appear may result in the issuance of a bench warrant for your arrest or dismissal of this order. Any party ordered to attend counseling shall bring proof of counseling to the review hearing. IT IS FURTHER ORDERED<sup>3</sup>: \_\_\_\_\_

---

**11. PROTECTED PARTY SHALL NOT CAUSE VIOLATION**

While this order of protection is in effect, the protected party should refrain from any act that would cause the restrained party to violate this order. This provision is not intended to and does not create a mutual order of protection. Under Section 40-13-6(D) NMSA 1978 only the restrained party can be arrested for violation of this order.

**12. NOTICE TO LAW ENFORCEMENT AGENCIES**

**ANY LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.**

\_\_\_\_\_ (name) is ordered to surrender all keys to the residence to law enforcement officers.

Law enforcement officers or \_\_\_\_\_ shall be present during any property exchange.

This order supersedes prior orders in \_\_\_\_\_ County, State of \_\_\_\_\_, Cause No. \_\_\_\_\_ to the extent that there are contradictory provisions.

**13. NOTICE TO PARTIES**

This order does not serve as a divorce and does not permanently resolve child custody or support issues.

**14. AGREEMENT OF PARTIES**

Without admitting that domestic abuse has occurred, the parties stipulate to the entry of this order and affirm that they have read and do understand the effects of this order as stated in Paragraph 3.

\_\_\_\_\_  
Protected party's signature

\_\_\_\_\_  
Restrained party's signature

\_\_\_\_\_  
Protected party's counsel, if any

\_\_\_\_\_  
Restrained party's counsel, if any

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**15. RECOMMENDATIONS**

I have:

- reviewed the pleading for order of protection;
- prepared this order as my recommendation to the district court judge regarding disposition of requests for order of protection.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Domestic Violence Commissioner

Court's telephone number: \_\_\_\_\_

**SO ORDERED.**

\_\_\_\_\_  
District Judge

\_\_\_\_\_  
DATE

A copy of this order was  hand delivered  faxed  mailed to  restrained party  restrained party's counsel on \_\_\_\_\_ (date).<sup>3</sup>

A copy of this order was  hand delivered  faxed  mailed to  protected party  protected party's counsel on \_\_\_\_\_ (date).

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Title

**USE NOTES**

1. The first page of this stipulated order of protection form shall be in the uniform format preceding the heading for additional pages of the order.

2. See Form 4-967 NMRA, "Custody, Support and Division of Property Attachment".

3. If appropriate, an order providing for restitution may be included in this paragraph.

4. Restrained party may be served at the time this order is issued. If restrained party is not present at the time this order is issued, service upon restrained party shall be made by delivering a copy to the party. See Section 40-13-6(A) NMSA 1978.

[Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001; April 9, 2002; as amended by Supreme Court Order No. 07-8300-020 effective September 17, 2007; by Supreme Court Order No. 08-8300-040, effective December 15, 2008; as amended by Supreme Court Order No. 19-8300-009, effective for all orders issued on or after July 1, 2019; as amended by Supreme Court Order No. 19-8300-015, effective for all cases pending or filed on

or after December 31, 2019; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.**— This Stipulated Order of Protection is not the same as an Order of Protection entered pursuant to Form 4-965 NMRA. This order provides fewer protections to the parties than does the Form 4-965 Order of Protection. The decreased protection is the result of the fact that the order is not based upon findings of abuse, but is entered without reference to whether abuse has occurred. Nonetheless, there may be occasions when the parties and the court are satisfied that this Stipulated Order of Protection provides adequate relief to the parties.

The general provisions of the order of protection, including injunctive orders, shall "continue until modified or rescinded ... or until the court approves a subsequent consent agreement...." Section 40-13-6(B) NMSA 1978. In contrast, "[a]n order of protection ... involving custody or support shall be effective for a fixed period of time not to exceed six months". *Id.* The custody or support "order may be extended for good cause upon motion ... for an additional period of time not to exceed six months", *id.*, unless "the order supersedes or alters prior orders of the court" pertaining to child custody or child support. *See* Section 40-13-5(C) NMSA 1978. In the latter situation, "the court may enter an initial order of protection, but the portion of the order dealing with child custody or child support will then be transferred to the court that has or continues to have jurisdiction over the pending or prior custody or support action". *Id.*

**Factual Distinction Between Mutual Order of Protection and Stipulated Order of Protection**

The core factual difference between the Form 4-965 NMRA order of protection and this stipulated order of protection is that Form 4-965 NMRA requires the court to make findings that each party has committed an act of domestic abuse. In contrast, this order is entered by the court with no finding of domestic abuse by respondent, but rather, is based solely on the stipulation of the parties that, without admitting to acts of abuse, each party is willing to have the restraining order issued against the restrained party.

[Amended by Supreme Court Order No. 08-8300-040, effective December 15, 2008; as amended by Supreme Court Order No. 19-8300-009, effective for all orders issued on or after July 1, 2019.]



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## Rule Proposal Comment Form

1 message

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mailservices@sks.com <mailservices@sks.com>

Tue, Mar 3, 2020 at 1:33 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name

Jill Johnson Vigil

Phone Number

5755275405

Email

jill@jvjlw.com

Proposal Number

2020-006

Comment

Instead of stating that Respondent cannot post about "the other," it should say cannot post "about Petitioner." It makes it more clear. Likewise, same change on the RO against Petitioner.

Upload

SUPREME COURT OF NEW MEXICO  
FILED

MAR - 3 2020

A handwritten signature in black ink, appearing to be "Jill Johnson Vigil", written over the date stamp.

**Proposed Rule Comment - Proposal 2020-006**

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Gary T. Lombardo <sfedgtl@nmcourts.gov>

Mar 5, 2020 1:49 PM

Posted in group: **nmsupremecourtclerk**

Dear Mr. Moya,

With regard to:

*Proposal 2020-006 - Restrictions on use of social media*

[Forms 4-963, 4-963A, 4-965, and 4-970 NMRA]

The proposed language in the Temporary Order of Protection ought to be made clearer with regard to whom is being identified as the "other," as well as those associated with the "other." My suggested language is as follows, with and without the mark-up:

~~Respondent shall not post or cause another to post anything about the other Petitioner on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat. This prohibition including includes posts about the Petitioner's other's family members, significant other, children, or anyone else involved in this matter who is associated with the Petitioner. on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat~~

Respondent shall not post or cause another to post anything about the Petitioner on any form of social media, including but not limited to Facebook, Twitter, Instagram, or Snapchat. This prohibition includes posts about the Petitioner's family members, significant other, children, or anyone else involved in this matter who is associated with the Petitioner.

I hope this commentary is helpful.

Sincerely,

Gary Lombardo

Court Clinician - Family Court Services

1st Judicial District Court

SUPREME COURT OF NEW MEXICO  
FILED

MAR - 5 2020





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## Rule Proposal Comment Form

1 message

---

**mailservices@sks.com** <mailservices@sks.com>

Fri, Apr 17, 2020 at 4:21 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name

Tom Montoya

Phone Number

5058833070

Email

[tommontoya@aol.com](mailto:tommontoya@aol.com)

Proposal Number

Proposal 2020-006 - Restrictions on use of social media [Forms 4-963, 4-963A, 4-965, and 4-970 NMRA]

Comment

The proposal creates severe prior restraint problems as set forth in Best v. Marino, 2017-NMCA-073, 404 P.3d 450, ¶¶53-57, attached.

The language that Respondent shall not post or cause another to post "anything" about the other, etc., would prohibit positive, appropriate and salutary speech. This language is vague and highly overbroad.

Likewise the language "or anyone involved in this matter", on its face would include witnesses, process services, attorneys and staff on each side, and all Court personnel, to name a few. Again the language is vague and highly overbroad.

This proposal is included in the ex parte form Order which issues on probable cause that domestic abuse has occurred, the definition of which includes a host of prohibited conduct unrelated to speech, and the vague and overbroad provisions may be the predicate to a criminal prosecution.

This Order should only issue after sufficient evidence meets the constitutional standard to restrain the targeted speech.

Upload

Best v. Marino domestic violence social media.pdf



**Best v. Marino domestic violence social media.pdf**

222K

**BEST V. MARINO, 2017-NMCA-073, 404 P.3d 450**

**STEVEN BEST, Petitioner-Appellee,**  
**v.**  
**CAMILLE A. MARINO, Respondent-Appellant.**

Docket No. A-1-CA-34680  
COURT OF APPEALS OF NEW MEXICO  
2017-NMCA-073, 404 P.3d 450  
June 29, 2017, Filed

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Darren M. Kugler, District Judge.  
Certiorari Denied, August 31, 2017, No. S-1-SC-36586. Released for Publication November 7, 2017.

**COUNSEL**

Law Office of Jerold D. Friedman, Jerold Friedman, Cypress, TX, L. Helen Bennett P.C., L. Helen Bennett, Albuquerque, NM, for Appellee.

Bennett J. Baur, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

**JUDGES**

JAMES J. WECHSLER, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, J. MILES HANISEE, Judge.

**AUTHOR:** JAMES J. WECHSLER.

**OPINION****WECHSLER, Judge.**

{1} This appeal arises from a finding of indirect criminal contempt against Respondent Camille Marino for her violation of an order of protection (Order of Protection) issued pursuant to the Family Violence Protection Act (FVPA), NMSA 1978, §§ 40-13-1 through -12 (1987, as amended through 2016). In addition to 179 days incarceration, the district court imposed an almost complete restriction on Respondent’s ability to access the Internet.<sup>1</sup>

{2} Respondent first argues that the Order of Protection is invalid and should be vacated by this Court. She bases this argument on her claim that Petitioner Steven Best did not allege or prove the elements of “stalking” when he obtained the Order of Protection in October 2012. Petitioner argues that Respondent’s argument is an impermissible collateral attack on the Order of Protection and, as a result, this Court should dismiss Respondent’s appeal. Although we agree that Respondent’s argument is subject to the collateral bar rule, we decline to dismiss the appeal outright in light of other potentially meritorious issues raised by Respondent. Respondent additionally argues without development that the district court lacked subject matter jurisdiction

over this action. This argument lacks merit.

{3} Respondent next argues that the restrictions imposed by the Order of Protection violated her First Amendment right to free speech by treating her online activity<sup>2</sup>—which inarguably is speech—as sanctionable conduct. We disagree.<sup>3</sup> As discussed at length herein, the Order of Protection imposes certain restraints on Respondent that could not be imposed on a non-restrained person. As such, the appropriate question on appeal is not whether the government can generally restrict the speech at issue in this case, but whether the district court can restrict Respondent from engaging in such speech. We conclude that it can.

{4} In a related argument, Respondent argues that the district court’s finding of contempt resulted from a due process violation because the Order of Protection failed to provide sufficient notice that her online activity would be considered “contact” constituting a violation. The district court did not, however, conclude that Respondent “contacted” Petitioner in violation of the Order of Protection. It concluded that Respondent’s “harassment of Petitioner” caused “emotional distress.” The Order of Protection restrained Respondent from committing “acts of abuse” and defined “abuse” to include “any incident . . . resulting in . . . severe emotional distress[.]” The appropriate question on appeal, therefore, is not whether Respondent’s online activity was “contact,” but whether Respondent reasonably should have known that her online activity would cause Petitioner to suffer severe emotional distress. We answer this question in the affirmative.

{5} Finally, Respondent argues that the district court’s restriction of her ability to access the Internet is overbroad and violates the First Amendment. We agree. We therefore affirm Respondent’s term of incarceration but reverse the restriction on her ability to access the Internet.

## **BACKGROUND**

{6} Petitioner is a philosophy professor at the University of Texas at El Paso (UTEP) and resides in Anthony, New Mexico. Respondent resides in Wildwood, Florida. Petitioner and Respondent became acquainted through their work in the animal rights movement and maintained a platonic friendship for several years until that friendship deteriorated in August 2012.

{7} On October 15, 2012, Petitioner filed a petition requesting protection from acts of domestic abuse perpetrated by Respondent. His petition alleged that Respondent (1) sent threatening email messages, (2) made threatening telephone calls, (3) left threatening voice messages, and (4) posted slanderous and derogatory statements about Petitioner on her website and Facebook page.

{8} On October 26, 2012, a domestic violence special commissioner (the special commissioner) held a hearing (October 2012 hearing) on Petitioner’s claims. The special commissioner found that Respondent was a “stalker” and recommended that the district court

enter an order of protection. Respondent did not file any objections to the special commissioner's findings or recommendations.

{9} The district court reviewed and adopted the special commissioner's findings and recommendations and entered an Order of Protection using Form 4-965 NMRA, which articulated the terms of the order of protection. The Order of Protection restrained Respondent from "committing further acts of abuse or threats of abuse" and "any contact" with Petitioner and defined "abuse" as:

[A]ny incident by one party against the other party or another household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) threat by . . . Respondent causing imminent fear of bodily injury to the other party or any household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by Petitioner's . . . residence or workplace; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children in any manner set forth above.

In light of the specific conduct alleged, the district court modified the definition of "contact" on Form 4-965. As a result, the Order of Protection stated that Respondent "shall not telephone, talk to, visit or contact [Petitioner] in any way . . . including social media[.]"

On July 1, 2014, Petitioner filed an affidavit of violation, in which he alleged: Since the filing of th[e O]rder [of Protection], the Respondent has used social media to harass the Petitioner. She has caused severe emotional distress. The Respondent has used her websites, social media (including [F]acebook, [T]witter, [P]interest), and blogging to carry out revenge styled postings, including numerous damaging pictures of [Petitioner] and making outrageous/false accusations against him. These posts are intended to harm [Petitioner's] career, charitable causes, and personal life. This has occurred on numerous dates between the issuance of the [O]rder of [P]rotection and the date of this filing[.]

{10} This affidavit triggered a hearing before the special commissioner. Petitioner introduced sixteen exhibits—consisting of screen captures of Respondent's website and Facebook page—purported to represent merely a fraction of Respondent's online activity since October 2012. Petitioner also introduced an email message sent directly from Respondent to Petitioner on November 8, 2012. The special commissioner found that Respondent violated the Order of Protection by "contacting [Petitioner], by using social media to harass him, by using social media to stalk him, and by using social media to cause severe emotional distress." As a result of these findings, the special commissioner recommended sanctions and certified the matter to the district court for a criminal contempt hearing.

{11} Respondent filed objections to the special commissioner's recommendations. The district court scheduled a hearing to resolve Respondent's objections, which the district court stated was a "hearing de novo" on the special commissioner's recommendations.

{12} Both parties testified, and Petitioner introduced twenty-eight exhibits—again consisting of screen captures of Respondent’s online activity. Petitioner also introduced three email messages sent directly from Respondent to Petitioner on November 4, 2012 and November 8, 2012. In these exhibits, Respondent referred to Petitioner as (1) “the grand high exalted drug-addicted hypocrite,” (2) “a drug-addled imbecile,” (3) “a sexist, racist woman beater,” and (4) “UTEP junkie professor.” One exhibit threatened to “hold [Petitioner] accountable” and to make him “pay dearly.” Other exhibits threatened to “expose” and to “neutralize” Petitioner. Still others contained song lyrics with obliquely violent imagery. Many of the exhibits included photographs of Petitioner snorting prescription drugs (drug photos). Petitioner also testified that: (1) Respondent continued to directly contact Petitioner by telephone and email after the entry of the Order of Protection; (2) Respondent mailed a package containing written materials to Petitioner’s home address after the entry of the Order of Protection; and (3) Petitioner’s girlfriend received two telephone calls from an unknown individual alleging that the caller was driving through Anthony, New Mexico with the intent to kill Petitioner and his cats.

{13} Inexplicably, the district court did not discuss the possibility that Respondent’s direct contact of Petitioner—by telephone, postal service, and email—constituted a violation of the Order of Protection. Instead, it focused its ruling expressly on exhibits related to Respondent’s online activity. In its oral ruling, the district court cited specific exhibits that it found to violate the Order of Protection. Its second amended order memorialized its oral ruling and referred to Respondent’s use of “social media and the [I]nternet to engage in a sustained pattern of stalking and harassment of Petitioner[,] including . . . emotional distress to Petitioner.” It sentenced Respondent to 179 days incarceration with credit for time served. It also ordered that Respondent “shall not use the [I]nternet or any social media for any purpose other than contacting her attorney or accountant.” (Emphasis omitted.) This appeal resulted.

{14} On June 13, 2016, Respondent filed a request for this Court to designate the state of New Mexico as the real party in interest. This request was denied.<sup>4</sup>

### COLLATERAL ATTACK

{15} Respondent’s first argument on appeal is that the Order of Protection is invalid and should be vacated by this Court because Petitioner did not allege or prove the elements of “stalking” when he obtained the Order of Protection in October 2012. Petitioner claims that Respondent is not now permitted to attack the validity of the Order of Protection after a finding of contempt. We agree with Petitioner.

{16} This issue was addressed in *State v. Bailey*, in which the defendant defied an injunctive order that required him to obtain a driver’s license and registration prior to operating his vehicle. 1994-NMCA-107, ¶ 3, 118 N.M. 466, 882 P.2d 57. After the defendant refused to comply with the injunction, the district court found him in contempt. *Id.* On appeal, this Court held that the district court lacked authority to issue the injunction but upheld the finding of contempt. *Id.* ¶¶ 6, 11. We based our holding on the “collateral bar rule,” which precludes

litigants “from challenging [a] contempt citation by a collateral attack on the injunction.” *Id.* ¶ 11. We additionally noted that “[t]he method of correcting error is by appeal, and not by disobedience.” *Id.* (internal quotation marks and citation omitted).

{17} Respondent claims that, during the October 2012 hearing, Petitioner failed to prove that Respondent’s actions constituted “stalking” as provided in Section 40-13-2(D)(1) and that Petitioner’s principal concern was for his reputation rather than his physical safety. Section 40-13-2(D)(1) limits acts of “domestic abuse” by non-household members to “stalking” and “sexual assault.” Petitioner did not allege that he was a victim of sexual assault. As such, to justify restraint under the FVPA, Petitioner’s burden at the October 2012 hearing was to prove that Respondent’s conduct constituted “stalking.”

{18} The special commissioner expressly found Respondent to be a “stalker.” Rule 1-053.1 NMRA provided Respondent with an opportunity to challenge the special commissioner’s findings, including whether sufficient evidence supported the special commissioner’s finding that Respondent was a “stalker,” before the district court adopted the special commissioner’s recommendations and entered the Order of Protection. *See* Rule 1.053.1(H)(1)(b) (“If the party files timely, specific objections to the recommendations, the [district] court shall conduct a hearing appropriate and sufficient to resolve the objections.”). Respondent did not file objections to the special commissioner’s recommendations. In the absence of objections from Respondent, the district court adopted the special commissioner’s recommendations and entered the Order of Protection. The collateral bar rule precludes a restrained party from challenging the merits of an injunction after a finding of contempt. Respondent’s argument presents such a challenge and is, therefore, precluded.

## SUBJECT MATTER JURISDICTION

{19} In an associated claim, brought pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, Respondent argues that the district court lacked subject matter jurisdiction over this action. The issue of subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Lasley v. Baca*, 1981-NMSC-041, ¶ 13, 95 N.M. 791, 626 P.2d 1288. We review questions of subject matter jurisdiction de novo. *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 8, 139 N.M. 625, 136 P.3d 1035.

{20} “[D]istrict courts are courts of general jurisdiction having the power to hear all matters not excepted by the constitution and those matters conferred by law.” *State ex rel. Foy v. Austin Capital Mgmt.*, 2015-NMSC-025, ¶ 7, 355 P.3d 1 (internal quotation marks and citation omitted). “The only relevant inquiry in determining whether the court has subject matter jurisdiction is to ask whether th[e] kind of claim . . . advance[d] falls within the general scope of authority conferred upon such court by the constitution or statute.” *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576 (internal quotation marks and citation omitted).

{21} Petitioner alleged that he was a victim of domestic abuse and that Respondent perpetrated that abuse. Section 40-13-3(A) confers jurisdiction to the district court in the judicial district in which an alleged victim of domestic abuse lives. Respondent does not contest either of these points on appeal. As a result, the district court had subject matter jurisdiction over this action.

### FREE SPEECH RIGHTS OF RESTRAINED PERSONS

{22} Respondent next argues that her online activity is protected speech and is, therefore, not sanctionable. As indicated above, we address this argument by considering whether the state is permitted to sanction Respondent’s online activity given the limitations placed on her First Amendment rights by the Order of Protection. “Whether a statement is privileged under the First Amendment presents a question of law for the court to determine.” *Kimbrell v. Kimbrell*, 2013-NMCA-070, ¶ 32, 306 P.3d 495 (alteration, internal quotation marks, and citation omitted), *rev’d on other grounds*, 2014-NMSC-027, 331 P.3d 915. We review questions of constitutional law de novo. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 26, 356 P.3d 564, *aff’d* 2016-NMSC-027, 376 P.3d 836.

{23} The First Amendment to the United States Constitution prohibits the government from enacting laws “abridging the freedom of speech.” *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 22, 309 P.3d 53. That said, neither the United States nor the New Mexico Constitution provides an absolute right to free speech. *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (holding that certain categories of speech, including “advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words’; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent” are not protected by the First Amendment (citations omitted)); *City of Albuquerque v. Pangaea Cinema LLC*, 2012-NMCA-075, ¶ 24, 284 P.3d 1090 (holding that “First Amendment rights are not immune from governmental regulation” (internal quotation marks and citation omitted)), *rev’d sub nom. on other grounds by State, City of Albuquerque v. Pangaea Cinema LLC*, 2013-NMSC-044, 301 P.3d 604; *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶¶ 8-10, 114 N.M. 537, 843 P.2d 839 (holding that (1) Article II, Section 17 of the New Mexico Constitution does not provide an “absolute right” to free speech, and (2) “the state may constitutionally regulate . . . speech”).

{24} The state has broad power to limit a person’s liberty interests based on that person’s prior conduct. *See Black’s Law Dictionary* 935 (10th ed. 2014) (defining “liberty interest” as “[a]n interest protected by the due-process clauses of state and federal constitutions”). Under the most extreme circumstances, the state may incarcerate a person for the remainder of the person’s natural life. *See NMSA 1978, § 31-18-14* (2009) (“When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole.”). The state may restrict a convicted felon’s right to vote or to possess a firearm. *See NMSA 1978, § 31-13-1(A)* (2005) (“A person

who has been convicted of a felony shall not be permitted to vote in any . . . election held pursuant to the provisions of the Election Code[.]”); NMSA 1978, § 30-7-16(A) (2001) (“It is unlawful for a felon to receive, transport or possess any firearm or destructive device in this state.”). It may also restrict the movements of convicted sex offenders within the state. *See* NMSA 1978, § 29-11A-4(B), (F) (2013) (requiring convicted sex offenders to register each and any new physical address with the county sheriff). The rationale underlying such statutes is that the public interest is served by limiting a convicted felon’s ability to engage in certain activity—even though that limitation burdens the exercise of the person’s inherent rights.<sup>5</sup> *See, e.g., Lewis v. United States*, 445 U.S. 55, 61 (1980) (stating that Congress’s intent in prohibiting the possession of firearms by felons was directly related to “the problem of firearm abuse by felons”); *see also Kane v. City of Albuquerque*, 2015-NMSC-027, ¶ 9, 358 P.3d 249 (holding that “the right to vote is fundamental”); *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865 (describing “the right to bear arms, freedom of speech, [and] freedom of the press” as “inherent rights, enjoyed by all New Mexicans”).

**{25}** Orders of protection are essentially justified by the same rationale. The purpose of an order of protection is to prevent future harm to a protected party by a restrained party. *See United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) (“The sole function of an action for injunction is to forestall future violations.”); Section 40-13-5(A)(7) (providing that the district court may order “injunctive relief as [it] deems necessary for the protection of a party”). To achieve this result, it is constitutionally permissible to limit a restrained party’s ability to engage in certain activity—including the exercise of his or her right to free speech.

**{26}** The Order of Protection limited Respondent’s right to speak and publish freely only inasmuch as it restrained her from (1) directly contacting Petitioner, and (2) causing Petitioner to suffer severe emotional distress. *See* § 40-13-5(A) (authorizing the district court to enjoin a restrained party from abusing a protected party); Form 4-965 (prohibiting a restrained party from contacting a protected party and/or from “committing further acts of abuse[,]” and defining “[a]buse” as “any incident . . . resulting in . . . severe emotional distress”). Placing such limitations on Respondent—as the restrained party under the Order of Protection—is not an unconstitutional limitation on her First Amendment rights.

**{27}** Respondent argues, by citing to *Kimbrell*, 2013-NMCA-070, that a district court must affirmatively find that speech alleged to violate an injunctive order actually constitutes “a true threat or similar unprotected speech” prior to imposing any type of sanction. Respondent’s interpretation of *Kimbrell* is not persuasive in the present case.

**{28}** *Kimbrell* arose from a highly contentious custody dispute, in which the father filed numerous motions to remove, and at least one disciplinary complaint against, the guardian ad litem (the GAL). *Id.* ¶ 2. In response to his fifth motion to remove the GAL, the district court ordered the father to “refrain from filing any complaint, motion, or other ‘device’ pertaining to the GAL without leave of the court.” *Id.* ¶ 4.

{29} The father in *Kimbrell* sought leave to file another disciplinary complaint against the GAL. *Id.* ¶ 5. The district court instead entered a preliminary injunction that reprimanded the father for “improper” behavior and enjoined him “from communicating with the media, the Department of Justice, or the [c]hildren’s biological parents regarding his complaints about the GAL.” *Id.* The father then formed an organization called “Stop Court Abuse of Children” (SCAC), through which he filed another disciplinary complaint against the GAL without the leave of the district court. *Id.* He also published the newly-filed disciplinary complaint and other related materials (collectively, the materials) on SCAC’s website. *Id.*

{30} The GAL in *Kimbrell* requested that the district court issue a permanent injunction requiring the father to remove the materials from the Internet. *Id.* ¶ 6. At the hearing on this request, the GAL argued that the materials were defamatory. *Id.* The father argued that the requested injunction would violate the First Amendment. *Id.*

{31} The district court ordered the father to remove the materials but did not determine that the materials were defamatory at trial or in its order. *Id.* ¶¶ 7, 43. Instead, the district court ruled that publication of the materials on the Internet “harass[ed] and intimidate[d] the GAL in the exercise of her duties.” *Id.* ¶ 43 (alteration and internal quotation marks omitted). This Court reversed, stating that “freedom of speech can only be limited where the speech is not protected” and holding that the district court’s order failed to “address[] or establish[] the existence of the requisite elements of defamation[.]” *Id.* ¶¶ 44, 45.

{32} Our reading of *Kimbrell* indicates that the issue on appeal in *Kimbrell* arose not from a violation of the preliminary injunction, but from the GAL’s request that the district court require the father to remove allegedly defamatory materials from the Internet. As such, *Kimbrell* is distinguishable because, unlike the present case, the materials—or speech—at issue were not previously subject to an injunctive order.

{33} The district court in this case found Respondent to be a “stalker” in October 2012. Respondent did not appeal or otherwise contest this finding prior to the date on which Petitioner filed his affidavit of violation. Because she is a “stalker,” Respondent is subject to the restraints imposed by the FVPA and the Order of Protection. Those restraints included valid limitations on her First Amendment rights.

{34} The district court, therefore, was not required to find that Respondent’s online activity constituted defamation or harassment or stalking or some otherwise unprotected speech. Instead, it needed only to conclude that Respondent’s online activity violated the Order of Protection by causing Petitioner to suffer severe emotional distress. Similarly, on appeal, we need not determine whether Respondent’s online activity constituted unprotected speech, but instead we need only determine whether sufficient evidence supports a finding that Respondent’s online activity caused Petitioner to suffer severe emotional distress.<sup>6</sup>

## SUFFICIENCY OF THE EVIDENCE

{35} “Sufficient evidence, in a criminal contempt proceeding, is proof beyond a reasonable doubt.” *In re Stout*, 1984-NMCA-131, ¶ 11, 102 N.M. 159, 692 P.2d 545. A “reasonable doubt” is one “that would make a reasonable person hesitate to act in the graver and more important affairs in life.” UJI 14-5060 NMRA. We review the evidence in contempt proceedings “in the light most favorable to the verdict.” *State v. Cherryhomes*, 1992-NMCA-111, ¶ 9, 114 N.M. 495, 840 P.2d 1261.

{36} As described above, Petitioner introduced numerous exhibits that demonstrated the content of Respondent’s online activity. Of these exhibits, the district court emphasized that those containing the drug photos and referring to Petitioner as “a junkie” violated the Order of Protection. Its second amended order found that Respondent “used social media and the [I]nternet to engage in a sustained pattern of stalking and harassment of Petitioner[,] including . . . emotional distress.” It is the emotional distress portion of the district court’s finding that we consider in this opinion.

{37} No New Mexico appellate court has interpreted the meaning of “severe emotional distress” as that phrase is used in the FVPA. Its meaning, therefore, presents a question of statutory interpretation, which we review de novo. *State v. Powels*, 2003-NMCA-090, ¶ 3, 134 N.M. 118, 73 P.3d 256.

{38} When a statute leaves a word or phrase undefined, “[t]he words . . . should be given their ordinary meaning absent clear and express legislative intention to the contrary.” *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234, 880 P.2d 845. “We give words their ordinary meaning, and if the statute is clear and unambiguous, we refrain from further statutory interpretation.” *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405 (internal quotation marks and citation omitted). Appellate courts often refer to dictionary definitions to ascertain the ordinary meaning of statutory language. *See State v. Nick R.*, 2009-NMSC-050, ¶ 18, 147 N.M. 182, 218 P.3d 868 (using dictionary definition in statutory interpretation).

{39} *Webster’s Dictionary* defines “severe” as “of a great degree or an undesirable or harmful extent.” *Webster’s Third New Int’l Dictionary* 2081 (3rd ed. 1993). It defines “emotion” as “the affective aspect of consciousness” and “emotional” as “relating to emotion[.]” *Id.* at 742. Finally, it defines “distress” as “anguish of body or mind” and “a painful situation[.]” *Id.* at 660.

{40} These definitions clarify that “severe emotional distress” is characterized by great harm to a person’s mental health and well-being. This conclusion is consistent with our Supreme Court’s declaration—also in the context of an intentional tort—that “severe emotional distress” is that which “a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances.” *Trujillo v. N. Rio Arriba Elec. Coop., Inc.*, 2002-NMSC-004, ¶ 28, 131 N.M. 607, 41 P.3d 333 (internal quotation marks and citation omitted). Considering the context in which the FVPA uses the phrase “severe emotional distress,” we conclude that it unambiguously describes the prohibited conduct. *See Robinson v.*

*Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to . . . the specific context in which that language is used[.]”).

{41} The evidence demonstrated Respondent’s widespread publication of the drug photos on the Internet. The drug photos were often accompanied by statements claiming that Petitioner was a “junkie,” a “drug-addled imbecile,” and a “drug-addicted hypocrite.” Petitioner testified to the impact of Respondent’s online activity on his emotional well-being, stating that he (1) felt like “a person ha[d] . . . hijacked [his] life,” (2) “go[es] to bed at night wondering what’s coming next,” (3) “had nightmares,” and (4) “talked about suicide.” Viewing the evidence in the light most favorable to the verdict, sufficient evidence supports a finding that Respondent’s online activity resulted in severe emotional distress, characterized by great harm to Petitioner’s mental health and well-being.

{42} We note that the district court found that Petitioner suffered emotional distress without explicitly finding that the emotional distress was severe.<sup>7</sup> On appeal, however, “there is a presumption of correctness in the rulings and decisions of the trial court and the party claiming error must clearly show error.” *State v. Carlos A.*, 1996-NMCA-082, ¶ 8, 122 N.M. 241, 923 P.2d 608. The district court concluded that Respondent violated the Order of Protection, which required the level of severe emotional distress. Respondent does not find fault with the language of the finding on appeal. The district court’s finding was sufficient under the circumstances.

{43} The Order of Protection validly limited Respondent’s First Amendment rights. Because Respondent’s online activity violated the Order of Protection, she was subject to sanction by the district court.

#### **NOTICE OF CONDUCT CONSTITUTING A VIOLATION OF THE ORDER OF PROTECTION**

{44} Respondent next argues that the district court’s finding of contempt resulted from a due process violation because the Order of Protection did not provide sufficient notice that her online activity was “contact” that would constitute a violation. We review questions related to due process protections de novo. *State v. Tafoya*, 2010-NMCA-010, ¶ 7, 147 N.M. 602, 227 P.3d 92. As indicated above, we address Respondent’s argument by considering not whether her online activity was “contact” as that word is commonly used, but whether she reasonably should have known that her online activity would cause Petitioner to suffer severe emotional distress.

{45} “There is no question that New Mexico district courts have the power to hold a litigant in contempt for disobeying a direct order.” *Bailey*, 1994-NMCA-107, ¶ 6. Such power is, however, subject to due process considerations. *See Concha v. Sanchez*, 2011-NMSC-031, ¶ 26, 150 N.M. 268, 258 P.3d 1060 (“A criminal contempt defendant is . . . entitled to due process protections of the criminal law[.]”). This Court has previously concluded that due process is satisfied in a criminal contempt proceeding when “an order existed that was sufficient to put [the defendant] on notice of what was required of him.” *Cherryhomes*, 1992-NMCA-111, ¶ 10.

{46} Form 4-965 contains fourteen numbered parts. Part 4 is titled “DOMESTIC ABUSE PROHIBITED.” Part 5 is titled “CONTACT PROHIBITIONS.” Both parts are intended to provide the restrained party with notice of the conduct that is prohibited.

{47} Respondent claims that Part 5 of the Order of Protection is impermissibly vague because it does not place her on notice that “posting about [Petitioner] on her own website or a third-party’s Facebook page would be considered ‘contacting’ [Petitioner].” The generic version of Form 4-965 provides that one or both parties “shall not telephone, talk to, visit or contact the other party in any way except as follows” and includes blank space for the special commissioner or district court to include exceptions. In the present case, the district court modified Form 4-965 to provide that “Respondent . . . shall not telephone, talk to, visit or contact the other party in any way including social media.” Respondent’s argument centers on the meaning of the word “contact.”

{48} The Order of Protection does not clearly define whether Respondent’s online activity would constitute “contact” as that term is commonly used.<sup>8</sup> Ultimately, we need not decide in this case whether Respondent’s online activity constituted “contact” as prohibited in Part 5 of the Order of Protection.

{49} Part 4 of the Order of Protection expressly prohibited “abuse,” which it defined as “any incident by one party against the other party . . . resulting in . . . severe emotional distress.” Whether this language provides sufficient notice of the conduct prohibited by the Order of Protection presents a question of statutory interpretation. This Court reviews questions of statutory interpretation *de novo*. *Powels*, 2003-NMCA-090, ¶ 3.

{50} Having just analyzed the meaning of “severe emotional distress” in the context of the FVPA, we decline to undertake the same analysis here. The Order of Protection prohibited Respondent from engaging in conduct that would cause Petitioner to suffer severe emotional distress. Petitioner is a university professor. Respondent repeatedly used the drug photos to imply that Petitioner had a substance abuse problem. Such intent is demonstrated by her characterization of Petitioner as a “junkie” and a “drug-addled imbecile.”

{51} Respondent argues that the substance of her online activity was not intended to reach Petitioner. This argument is disingenuous. Respondent and Petitioner both worked in the animal rights arena. Respondent’s website was accessible by the public, and she posted the same content on public Facebook pages. It is unreasonable for Respondent to assert that Petitioner could have remained unaware of her online activity in light of his ongoing work in the animal rights movement.

{52} A reasonable person would understand that Respondent’s online activity would cause Petitioner to suffer severe emotional distress as we have defined that phrase above. Therefore, Part 4 of the Order of Protection provided Respondent with sufficient notice that her online activity could constitute a violation even if it did not constitute “contact” as that word is

commonly used.

## PRIOR RESTRAINT

{53} Respondent finally argues that the district court’s restriction of her ability to access the Internet is overbroad and violates the First Amendment. “A statute is unconstitutionally overbroad if it criminalizes speech that is protected by the [F]irst [A]mendment.” *State v. Gattis*, 1986-NMCA-121, ¶ 10, 105 N.M. 194, 730 P.2d 497. We review questions of constitutional law de novo. *Morris*, 2015-NMCA-100, ¶ 26.

{54} As discussed above, the First Amendment prohibits laws that abridge freedom of speech. *Elane Photography*, 2013-NMSC-040, ¶ 22. “Prior restraint” is a related term and “is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.” *Kimbrell*, 2013-NMCA-070, ¶ 40 (emphasis, internal quotation marks, and citation omitted). Prohibitions on prior restraint ensure that “the government may not enjoin or restrain a particular expression prior to its judicial review[.]” *Fawcett*, 1992-NMCA-075, ¶ 8.

{55} The district court’s restriction of Respondent’s ability to access the Internet is a clear prior restraint on her First Amendment right to speech. In discussing the Internet generally, the United States Supreme Court has stated that, “[f]rom the publisher’s point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997). It is, simply put, the modern-day town square. *See* Bill Gates, *Business @ the Speed of Thought: Succeeding in the Digital Economy* 131 (1st ed. 1999) (“By enabling people to shop, get news, meet each other, be entertained, and gossip in ways we’re only now beginning to understand, the Internet is becoming the town square for the global village of tomorrow.”); Stephen W. Bosky, Note, *Defamation in the Internet Age: Missouri’s Jurisdictional Fight Begins With Baldwin v. Fischer-Smith*, 56 St. Louis U.L.J. 587, 587 (2012) (same).

{56} “Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as first amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property—which the Constitution explicitly or implicitly guarantees.” *Marrujo v. N.M. Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747. To uphold a restriction that deprives an individual of such a right, the state must show “that the restriction . . . supports a compelling state interest, and that the legislation accomplishes its purposes by the least restrictive means.” *Id.* The almost complete restriction of Respondent’s ability to access the Internet imposed by the district court is not the least restrictive means by which to address the harm in this case. *See, e.g., United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001) (affirming conditions of release that require the probationer to obtain permission from his probation officer before accessing the Internet); *United States v. White*, 244 F.3d 1199, 1206-07 (10th Cir. 2001) (describing filtering software that restricts the user’s ability to access blacklisted content and cautioning against sanctions that

prohibit the use of any computer).

**{57}** Petitioner does not argue that either consideration is met in this case. Instead, he requests that we (1) allow the restriction to stand until such a time as Respondent “exhausts her remedies with the district court,” or (2) affirm on public policy grounds. Having concluded that the almost complete restriction of Respondent’s ability to access the Internet violates the First Amendment, we decline Petitioner’s requests.

## CONCLUSION

**{58}** Respondent’s online activity violated the Order of Protection by causing Petitioner to suffer severe emotional distress. We therefore affirm the district court’s sentence of 179 days incarceration. However, the district court’s restriction of Respondent’s ability to access the Internet is unconstitutionally overbroad. We reverse that restriction. In doing so, we remind Respondent that the Order of Protection remains in effect and that she remains subject to a finding of contempt for online activity that causes Petitioner to suffer severe emotional distress.

**{59} IT IS SO ORDERED.**

**JAMES J. WECHSLER, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Judge**

**J. MILES HANISEE, Judge**

## OPINION FOOTNOTES

<sup>1</sup> The district court’s order allowed Respondent to access the Internet to contact her attorney and her accountant. All other access was prohibited.

<sup>2</sup> Throughout this opinion we use the phrase “online activity” to describe Respondent’s posting of statements and photographs related to Petitioner on (1) Respondent’s own website; (2) Respondent’s own Facebook and other social media pages; and (3) third-party controlled Facebook and other social media pages. Our use of the phrase “online activity” does not include email messages sent directly by Respondent to Petitioner, which we consider separately.

<sup>3</sup> Substantial evidence supports a finding that Respondent violated the Order of Protection by directly contacting Petitioner by telephone, email, and postal service. See *State v. Smith*, 2016-NMSC-007, ¶ 19, 367 P.3d 420 (“Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” (internal quotation marks and citation omitted)). Although we could simply affirm the district court’s contempt finding under the right-for-any-reason doctrine, we instead elect to address the questions that arise from its finding that Respondent’s online activity constituted a violation of the Order of Protection.

<sup>4</sup> Although we acknowledge the potential merits of Respondent’s argument, Respondent failed to

preserve the issue at trial, and we decline to review the question for the first time on appeal. See Rule 1-093(D)(2) NMRA (“The court shall appoint the district court to prosecute the criminal contempt for the state.”); *State v. Frazier*, 1973-NMCA-127, ¶ 7, 85 N.M. 545, 514 P.2d 302 (holding that alleged errors that are neither jurisdictional nor fundamental may not be raised for the first time on appeal).

<sup>5</sup> Although Respondent was not convicted of “stalking,” we conclude that the district court’s finding is analogous to a conviction for the purposes of this opinion.

<sup>6</sup> As additional support for her “true threat or other unprotected speech” argument, Respondent provides citation to extrajurisdictional statutes, including N.Y. Penal Law § 240.30 and Conn. Gen. Stat. § 53A-183 (2017), and cases interpreting those statutes, including *People v. Dupont*, 107 A.D.2d 247, 252 (N.Y. App. Div. 1985) and *State v. Nowacki*, 111 A.3d 911, 928 (Conn. App. Ct. 2015). Because we are analyzing Respondent’s online activity through the lens of the restraints placed upon her by the Order of Protection, neither the statutes nor cases cited by Respondent are pertinent to our analysis.

<sup>7</sup> The district court, however, did find that Respondent “harassed” Petitioner. Criminal harassment is defined, in pertinent part, as conduct that “would cause a reasonable person to suffer substantial emotional distress.” NMSA 1978, § 30-3A-2(A) (1997).

<sup>8</sup> Although it appears likely that this deficiency resulted from the district court’s lack of familiarity with the nuances of various social media platforms, it is perhaps an indication that the FVPA is not well-suited to address the issue of cyberstalking. Other jurisdictions have enacted statutes that are more narrowly-tailored to the conduct at issue in this case. See, e.g., Wash. Rev. Code § 9.61.260(1)(b) (2004) (“A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, . . . makes an electronic communication to such other person or a third party . . . repeatedly whether or not conversation occurs[.]”).