

STATE OF TENNESSEE  
OFFICE OF THE  
ATTORNEY GENERAL  
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NASHVILLE, TENNESSEE 37202

January 19, 2010

Opinion No. 10-06

Ex Parte Order of Protection

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**QUESTIONS**

1. Does a judge or magistrate, who issues an ex parte order of protection upon determining that there is a substantial risk of immediate harm to the petitioner, have the discretion to order the respondent to vacate a residence shared with the petitioner pending a hearing?
2. Does a judge or magistrate have the authority to hold a respondent in contempt of court for returning to the shared residence in violation of the judge or magistrate's specific order?

**OPINIONS**

1. Yes. A judge or magistrate's authority to issue an ex parte order of protection includes discretionary authority to issue reasonable directives crafted to ensure the order's principle goal of protecting the petitioner from the abusive acts of the respondent.
2. Yes. A judge has legal authority to issue an order of contempt and could cite the respondent for contempt who returns to the residence in direct violation of a judge or magistrate's order. Magistrates, however, are only granted authority to issue an order of protection, and, therefore, lack the authority to conduct contempt proceedings.

**ANALYSIS**

1. Tennessee Code Annotated § 36-3-601, *et seq.*, commonly referred to as the domestic abuse statute, gives "courts" the power to issue ex parte orders of protection when petitioned by an aggrieved party. The statute's definition of "court" includes "judicial commissioners, magistrates, and other officials with the authority to issue an arrest warrant in the absence of a judge for purposes of issuing ex parte orders of protection when a judge . . . is not available." Tenn. Code Ann. § 36-3-601(3)(D). The General Assembly enacted § 36-3-601, *et seq.*, to provide domestic abuse victims with enhanced protections from domestic abuse, and to ensure the enforcement of the domestic abuse laws to protect victims from further abuse. Tenn. Code Ann. § 36-3-618. The statute gives the courts power to issue ex parte orders of protection

for good cause, including circumstances presenting an “immediate and present danger of abuse to the petitioner.” Tenn. Code Ann. § 36-3-605(a).

You have asked whether a judge or magistrate’s authority to issue an ex parte order of protection after determining that there is a substantial risk of immediate harm to the petitioner includes discretion to order the respondent to immediately vacate the residence shared with the petitioner pending a hearing on the merits. Generally, all courts have the power to “control, in furtherance of justice, the conduct of its officers, and all other persons connected with a proceeding before it, in every matter pertaining to the proceeding.” Tenn. Code Ann. § 16-1-102. A condition requiring the respondent to temporarily vacate the shared residence furthers the interest of justice by protecting the petitioner from abuse until the court has had the opportunity to hold a hearing on the merits of the petition which, pursuant to state law, must occur within fifteen days. *See* Tenn. Code Ann. § 36-3-605(b). Accordingly, this Office is of the opinion that a judge or magistrate issuing an ex parte order of protection has the authority to order a respondent to immediately vacate the residence pending a hearing. That authority, however, cannot be exercised to permanently bar the respondent from the shared residence by “evicting” the respondent until both parties have been given the opportunity to be heard by the court. *See* Tenn. Code Ann. § 36-3-606(a).

2. You have asked whether a judge or magistrate has the authority to hold a respondent in contempt for violating a requirement in an ex parte order of protection requiring the respondent to vacate a residence shared with the petitioner. Under Tennessee law, the contempt power of the courts is purely statutory. *Korvalinka v. Chattanooga-Hamilton County Hosp. Authority*, 249 S.W.3d 346, 354 (Tenn. 2008); *see also*, Tenn. Code Ann. § 16-1-103 (“For the effectual exercise of its powers, every court is vested with the power to punish for contempt as provided for in this code”). The General Assembly has codified the circumstances under which a court may exercise its contempt powers:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:


- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
- (2) The willful misbehavior of any of the officers of such courts, in their official transactions;
- (3) The willful disobedience or resistance of any officer of such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court;


(5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or

(6) Any other act or omission declared a contempt by law.

Tenn. Code Ann. § 29-9-102. The Court of Appeals has recently held that any person who violates an ex parte order of protection can be held in criminal contempt. *See Dockery v. Dockery*, 2009 WL 3486662 (Tenn. Ct. App., Oct. 29, 2009). This Office is therefore of the opinion that a judge has authority to hold a respondent in contempt for violating an express directive in an order of protection to temporarily vacate a shared residence pending a hearing.

Authority to hold the respondent in contempt under these circumstances, however, would not extend to a magistrate. "Judicial commissioners, magistrates, or other officials with the authority to issue an arrest warrant may not conduct a hearing or issue an extended order of protection." Op. Tenn. Att'y Gen. No. 01-027 (Feb. 27, 2001). Tennessee law requires that any person charged with criminal contempt be provided adequate notice of the charge and afforded a hearing. *See* Tenn. R. Crim. P. 42(b). Because a magistrate authorized to issue an ex parte order of protection lacks the authority to conduct a hearing pertaining to the order, a magistrate cannot hold a respondent in contempt for violating an ex parte order of protection.

  
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Requested by:

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