

**Supplement to 2022 Edition of the Maryland Guide to Protective Orders in Maryland
(for Lawyers)**

Section 1. What are Protective Orders?

Md. Family Law Code Ann. § 4-504 et seq.

Prior acts of abuse can be included in a Petition for Protection: “The purpose of the final protective order hearing is to determine whether a final protective order should be issued, not solely to prove that a single act of abuse occurred. In determining whether to issue a protective order, the judge should consider not only evidence of the most recent incident of abuse, but prior incidents which may tend to show a pattern of abuse. Allegations of past abuse provide the court with additional evidence that may be relevant in assessing the seriousness of the abuse and determining appropriate remedies. The legislature expressly recognized this by including the history of abuse between the parties as a factor in ordering at least one remedy, vacation of the home. See § 4-506(e)(5). Admitting prior acts of abuse aids in assessing the need for immediate and future protection. The fact that there is a history of prior abusive acts implies that there is a stronger likelihood of future abuse. *Coburn v. Coburn*, 342 Md. 244, 257-258, 674 A.2d 951, 958, (1996)

Section 2. Grounds for Filing a Protective Order

The grounds for filing a Protective Order now include:

Any act which causes physical Harm

Any act that places someone in fear of serious bodily harm or death

Battery and any non-consented to touching including: pushing, slapping, spitting, or shoving – as defined in CL 3-202 and 3-203

Rape or any sexual assault – as defined in CL 3-303, 3-304, 3-307 or 3-308

False imprisonment – common law definition: the unlawful detention of a person against his will

Abuse of a minor child or a vulnerable adult – as defined in CL 3-602 and 3-604

Stalking - as defined in CL 3-802

The Posting of Revenge Pornography – as defined in CL 3-809

If a threat(s) of serious bodily harm or injury are alleged, the court must consider the perspective of the victim when evaluating the reasonableness of the victim’s fear: “A person who has been subjected to the kind of abuse defined in § 4-501(b) may well be sensitive to non-verbal signals or code words that have proved threatening in the past to that victim but which someone else, not having that experience, would not perceive to be threatening. The reasonableness of an asserted fear emanating from that kind of conduct or communication must be viewed from the perspective of the particular victim. Any special vulnerability or dependence by the victim, by virtue of physical, mental, or emotional condition or

impairment, also must be taken into account.” *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 139, 775 A.2d 1249, 1259-1260, (2001)

If an assault is alleged, there must be evidence of assault as established under the common law of Maryland: “‘assault’ may connote any of three distinct ideas: (1) A consummated battery or the combination of a consummated battery [*382] and its antecedent assault; (2) an attempted battery; and (3) a placing of a victim in reasonable apprehension of an imminent battery.” *Lamb*, 93 Md. App. at 428, 613 A.2d at 404; see also *Harrod v. State*, 65 Md. App. 128, 131, 499 A.2d 959, 961 (1985) (pointing out that the common law crimes of intent to frighten and attempted battery are two distinct crimes). The statutory offense of second-degree assault encompasses three modalities: (1) intent to frighten, (2) attempted battery, and (3) battery. The intent to frighten variety requires that the defendant commit an act with the intent to place another in fear of immediate physical harm, and the defendant had the apparent ability, at that time, to bring about the physical harm. The victim must be aware of the impending battery, see *id.* at 133, 499 A.2d at 961, and there must be an apparent present ability to commit the battery.” *Snyder v. State*, 210 Md. App. 370, 381-382, 63 A.3d 128, 135, (2013)

If abuse of a minor is alleged, there must be evidence of abuse before an Order can be issued: “[the] statute defines ‘abuse’ as the ‘physical or mental injury of a child by any parent . . . under circumstances that indicate the child’s health or welfare is harmed or at substantial risk of being harmed.’” As can be seen, a requisite for meeting the requirements of this definition is a finding of “physical or mental injury.” The trial judge did not find that Jessica suffered any physical or mental injuries as a result of her mother’s acts, nor would such a finding have been justified based on the evidence produced at the August 16, 1999, hearing. Because there was no evidence to support the court’s finding of abuse, the trial judge erred in signing the protective order.” *Musser v. Christie*, 131 Md. App. 200, 206-207, 748 A.2d 1027, 1030-1031, (2000)

If stalking is alleged, an expressed threat is not required to prove emotional distress of victim: “we hold that the critical metric in CR § 3-802(a)(2) is the objective knowledge that the perpetrator’s conduct would cause another person severe emotional distress. We are further persuaded by this interpretation after reviewing other jurisdictions’ similarly worded statutes that do not require any type of express threat or assaultive conduct to satisfy an “emotional distress” element.” *Schiff v. State*, 254 Md. App. 509, 531, 274 A.3d 507, 520, (2022)

Stalking now includes conduct which occurs through electronic communications: See Md. Criminal Law Ann. Code §3-802.

The statute requires that there be some evidence to warrant the issuance of a Protective Order: Petitioner must prove by the preponderance of the evidence that some alleged abuse occurred. See: *Barton v. Hirshberg*, 137 Md. App. 1, 767 A.2d 874 (2001)

Battered Spouse Syndrome may be offered as evidence, but Court not required to accept it: “The General Assembly acknowledged the “Battered Spouse” phenomenon by enacting the Courts and Judicial Proceedings Article of the Maryland Code, Sec. 10-916, which allows criminal defendants to introduce evidence that he or she has been battered, and to put on expert testimony as to the effects of “Battered Spouse Syndrome.” But such recognition by the Assembly does not require that the court, under all circumstances, accept “Battered Spouse Syndrome” as an explanation for a spouse’s failure to complain.” *Ricker v. Ricker*, 114 Md. App. 583, 592, 691 A.2d 283, 287-288, (1997)

Section 4. Types of Relief Granted by the Court

Petitioners may be restricted to the relief prayed for in the Petition they have filed.. For example, Emergency Family Maintenance may not be awarded unless it is specifically requested in the Petition. See Md. Family Law Ann. Code §4-504(b)(5).

Section 6. Personal Jurisdiction – Can a Maryland Court Issue a Protective Order Against Non Resident Respondent?

This is an unsettled question in Maryland. There are no Maryland appellate decisions which have squarely addressed this issue. Some trial courts have found that Md. Family Law Code Ann. § 4-504 section c provides personal jurisdiction over a non resident party as long as Respondent is served with the Temporary Protective Order regardless of where Respondent is located including out of the State. There is also considerable caselaw to the contrary. The case law includes *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 66 S. Ct. 154, (1945) as well as Md. Courts and Judicial Proceedings Code Ann. § 6-201 *et seq.* which provide that to establish in personam jurisdiction due process requires deliberate acts in which the Respondent has availed himself of services or gained protection through the laws of the forum jurisdiction. See also, the UCCJEA which addresses a court's subject matter jurisdiction in child custody cases, specifically answering the question of whether a court has the power to decide a custody case in which more than one state, tribe, or territory is involved. The law specifies which state's court has the power to decide a custody case, but not how either court should decide custody. See Md. Fam. Law Code Ann. § 9.5-101 *et seq.*

Section 8. Recording Conversations: Maryland's Wiretap Statuten

See: Md. Courts and Judicial Proceedings Code Ann. § 10-402

Maryland's Wiretap Statute makes it illegal to record conversations unless all parties consent. Violation of the statute is a felony that carries a potential sentence of five (5) years incarceration and a \$10,000.00 fine.

"It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State."

As a general rule, it is illegal in Maryland to record private conversations without the expressed consent of all parties being recorded: "The Maryland Wiretap Act is codified in Sections 1-401 through 10-414 of the Courts and Judicial Proceedings Article. Under that statute, it is unlawful for any person to:

(1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept, any wire, oral, or electronic communication; (2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication in violation of this subtitle; or (3) Wilfully use, or endeavor to use, the contents of any wire, oral, or electronic communication in violation of this subtitle. Md. Code Ann., Cts. & Jud. Proc. § 10-402 (a). *Malpas v. State*, 695 A.2d 588, 594-595, 116 Md. App. 69, 82-83, (1997)

It does not violate the wiretap act to record a conversation which, while inside a private space, is so loud to be heard with the unaided ear outside that space, the speaker cannot have an expectation of privacy: “To determine whether Craigie had a reasonable expectation of privacy in the statements overheard and recorded in a different dwelling unit, we apply the two-pronged inquiry applicable to search and seizure cases set forth in *Katz v. United States*, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Harlan, J. concurring). We first ask whether Craigie exhibited an actual, subjective expectation of privacy with regard to his statements. If we answer that question in the affirmative, we then ask whether that expectation is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. It is obvious that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Craigie could have no expectation of privacy in statements made in his apartment that were shouted so loudly as to be overheard by persons in the adjacent apartment. We do recognize that the "very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions, society is prepared to recognize his privacy." *United States v. Taborda*, 635 F.2d 131, 138 (2d [***20] Cir. 1980). In this case, however, what Craigie chose to shout could not have been intended as words spoken in private.” *Malpas v. State*, 695 A.2d 588, 595, 116 Md. App. 69, 84, (1997)

Section 13. Custody of Children and Visitation

In cases involving more than one state, the Uniform Child Custody Jurisdiction and Enforcement Act, Md. Code Ann., Fam. Law § 9.5-101 et seq. (UCCJEA) governs the determination of child custody in a Protective Order case or other Family Law matter.

Section 14. Interplay Between A Related Family Law Case and Instant Protective Order Case

Maryland Rule 3-326 - permits a District Court Judge to transfer a protective order case to the Circuit Court if there is a related family law matter pending in the Circuit Court.

Md. Family Law Ann. Code §4-507(b)(3), a final Protective Order is always subject to an order entered in the Circuit Court in a family law case.

Section 15. Children Testifying as Witnesses in Court

Under Maryland Rule 5-601 children are generally considered competent to testify but if there is a question of competence, the Court must determine the competence of the child: “The age of a child is not the test used to determine if a child is competent to testify. *Matthews*, 106 Md. App. at 741, 666 A.2d at 919. Rather, the test is “whether the witness has intelligence enough to make it worthwhile to hear him [or her] at all and whether he [or she] feels a duty to tell the truth.” *Brandau v. Webster*, 39 Md. App. 99, 104, 382 A.2d 1103, 1106 [*149] (1978). The trial court must determine the child's “capacity to observe, understand, recall, and relate happenings while conscious of a duty to speak the truth.” *Jones v. State*, 68 Md. App. 162, 166-67, 510 A.2d 1091, 1094 (1986). 5 Professor Wigmore states the essential requirements as: (1) capacity for observation; (2) capacity for recollection; (3) capacity for communication, including ability “to understand questions put and to frame and express intelligent answers;” and, (4) a sense of moral responsibility to tell the truth.” *Perry v. State*, 381 Md. 138, 148-149, 848 A.2d 631, 637, (2004)

Section 16. Child Protective Services and Adult Protective Services Issues

“Factual findings” of the DSS report are admissible as a public record as an exception to the hearsay rule under Maryland Rule 5-803(8).

Section 17. Victim of a Violation of a Protective Order arises in two ways: Indirect civil contempt and a criminal prosecution for failure to comply under 4-509 Family law article.

If A Court finds a person to be in constructive civil contempt of a Protective Order and it must then provide a framework to coerce future compliance with the Order: “an order holding a person in constructive civil contempt is not valid unless it: (1) imposes a sanction; (2) includes a purge provision that gives the contemnor the opportunity to avoid the sanction by taking a definite, specific action of which the contemnor is reasonably capable; and (3) is designed to coerce the contemnor's future compliance with a valid legal requirement rather than to punish the contemnor for past, completed conduct. Moreover, and critical to our analysis here, to serve the coercive purpose of civil contempt, the sanction must be distinct from the purge provision and the valid legal requirement the court seeks to enforce.” *Breona C. v. Rodney D.*, 253 Md. App. 67, 74, 263 A.3d 1090, 1094, (2021)

The Court has the authority to address violations of an expired Protective Order over violations that occurred while the Order was still in effect: “§ 4-506(g) does not prohibit a court from enforcing or otherwise addressing violations of an expired protective order when the acts or omissions that constituted the violations occurred while the protective order was in effect.” *Torboli v. Torboli*, 119 Md. App. 684, 689, 705 A.2d 1186, 1188, (1998)

The Court may view the mutual actions of parties, such as reconciliation, as a modification of the order: “although the statute provides a legal route for modifying a protective order, we believe that the parties can modify the order by their conduct, just as was the case as to alimony in the *Thomas*. case” *Torboli v. Torboli*, 127 Md. App. 666, 677, 736 A.2d 400, 406, (1999)

In a prosecution for violations of a Protective Order, only the Order itself may be introduced into evidence. The Court may not allow the introduction into evidence of Petitioner's allegations contained in the Petition or the underlying facts giving rise to the filing or granting of the Order itself, as such evidence constitutes propensity evidence excluded by Rule 5-404(b). *Boyd v. State*, 399 Md 457, 924 A.2d 1112, (2007).