

# **Disarming Domestic Abusers**

**Gaylen L. Box**

**Magistrate**

**Cassia Morton LPC, LSW**

**Domestic Violence Court Coordinator**

**Domestic violence is a widespread societal problem. In response states and Congress have passed laws affording protection to domestic violence victims and punishing offenders. Victims of domestic violence may obtain protection orders, civil and criminal, to keep the perpetrator of violence away from them after the commission of an act of domestic violence. It is at this point in time, when the victim decides to separate from the abuser, that the risk of additional harm is the greatest. “Separation violence”, the act of separating – whether through divorce, by physical or legal separation, or by ending a dating relationship – often triggers an escalation of the violence.<sup>1</sup> If the abuser has access to a firearm, the potential for lethal violence is greater. Research shows that family and intimate partner assaults involving firearms are 12 times more likely to result in death than those that do not involve firearms. Approximately two-thirds of spouse or ex-spouse homicides in this country are committed using guns.<sup>2</sup> One federal study on homicide among intimate partners found that female intimate partners are more likely to be murdered with a firearm than all other means combined.<sup>3</sup>**

## ***The Federal Response***

**In 1994, Congress supplemented state laws protecting the public from dangerous stalkers and domestic violence abusers by making it a federal offense for anyone subject to a qualifying domestic violence restraining order to possess firearms. 18 U.S.C. § 922(g)(8). Congress further strengthened Federal gun laws in 1996 by enacting a ban on gun possession by anyone convicted of a misdemeanor crime of domestic violence (MCDV). 18 U.S.C. § 922(g)(9). Violation of these prohibitions is a federal offense punishable by a fine of \$5,000 and ten years imprisonment.**

**For a state court order to qualify as a restraining order invoking federal firearms prohibitions, the respondent must have had actual notice and an opportunity to participate in the hearing at which the order was issued and the protected person must fall within a certain category of persons entitled to protection. They must be an “intimate partner,” *i.e.* a spouse of the respondent, a former spouse of the respondent, *or* an individual who cohabitates or has cohabitated with the respondent *or* an individual who is the parent of a child of the respondent. Children also fall within the category of protected persons. An adult may petition for protection of a minor child of an intimate partner or a child of the respondent who is being abused by the respondent. An adult child could seek protection from an abusive parent. The order must restrain future conduct that would place the intimate partner or child in reasonable fear of bodily injury, or must restrain the respondent from harassing, stalking, or threatening the intimate partner or child of the respondent or child of the respondent’s intimate partner. The order must also make a finding that the respondent is a credible threat to the physical safety of the intimate partner or child; *or* by its terms, explicitly prohibits the use or attempted use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.**

**A qualifying misdemeanor crime of domestic violence is a federal, state, local or tribal offense, that has as an element of the use or attempted use of force or the threatened use of a deadly weapon and at the time the offense was committed, the defendant was a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.<sup>4</sup> It is not necessary that the underlying statute require as an element any specific relationship between the defendant and the victim. The prohibitions apply under federal law if such a relationship exists as a matter of fact.**

**A person is not considered to have been convicted of a misdemeanor crime of domestic violence unless: (1) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and (2) in the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either: (a) the case was tried by a jury, or (b) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or**

otherwise.

**In addition, a conviction would not be disabling if it has been expunged, set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the jurisdiction in which the proceedings were held provides for the loss of civil rights upon conviction for such an offense). However, if a pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, and the person is not otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing firearms, the person is still subject to these conditions.**

**Aside from the general prohibition against felons possessing firearms contained in *I.C. § 18-3316*, firearms prohibitions imposed by Idaho courts are discretionary with the court. Such restrictions may occur as a condition of pre-trial release, probation or as a part of a civil protection order. In such cases, the decision to ban the possession of firearms is decided on a case by case basis by evaluating the danger presented and the need for firearm prohibition. Federal firearms prohibitions are mandatory and are imposed without the state court's discretion. The determination of whether an individual is subject to federal firearms prohibitions is made solely with reference to the criteria expressed in *18 U.S.C. 922(g)(8)* and *(9)* even though they stem from state court action.**

### *The State Response*

**In 1988, the Idaho legislature enacted the Domestic Violence Crime Prevention Act, *I. C. § 39-6301 et seq.* The purpose of the Act was to address domestic violence as a serious crime against society and to assure the victims of domestic violence the protection from abuse which the law, and those who enforce the law, can afford. *I.C. § 39-6301.* The act authorized courts, upon finding domestic violence, to issue protection orders. These orders are generally referred to as Civil Protection Orders or "CPO's". If the protection order is a "qualifying protection order," federal firearms prohibitions apply.**

***Idaho Code § 18-920* also authorizes courts to issue no contact orders in criminal cases. If the criminal no contact order qualifies as a "protection order" under federal law, the person who is subject of the order is likewise prohibited from possessing firearms or ammunition.**

**In 1998, the Idaho Legislature criminalized domestic violence. *Idaho Code § 18-918*. Domestic violence is graded as misdemeanor or felony depending on the injury inflicted or the defendant’s prior convictions. If the crime is a felony, *I.C. § 18-3316* and the general provisions of the Brady Act prohibit the felon from possessing a firearm. If the crime is a misdemeanor, the 1996 amendment to the Brady Act makes it a crime to possess a firearm. The bottom line is that *any* person convicted of a crime of domestic violence, felony or misdemeanor, is prohibited from purchasing or possessing a firearm.**

**An individual charged with a crime of domestic violence may also be prohibited from possessing firearms as a condition of pre-trial release or, if convicted, as a condition of probation. Unlike the restrictions imposed under federal law, which are mandatory, the conditions imposed in conjunction with a criminal case are discretionary with the court.**

**In navigating this maze of interconnected state and federal law, there are numerous intricacies that are not immediately obvious. This article is intended to point out some of those intricacies and to dispel some common misconceptions relating to the application of federal and state firearms prohibitions. It is fairly safe to start with the general assumption that if an individual commits an act of domestic violence then that individual is probably going to lose the right to purchase or possess a firearm. The prohibition may be for the term of a protection order or it may be for life.**

### ***Civil Protection Orders***

**A permanent order issued under *I.C. § 39-6301 et seq.* is a qualifying civil restraining order *if the protected person is an intimate partner or a child of an intimate partner or child of the respondent*. An intimate partner is a spouse of the respondent, a former spouse of the respondent, an individual who is the parent of a child of the respondent, *or* an individual who cohabitates or has cohabitated with the respondent. Petitions brought by or on behalf of someone in a “dating relationship,” as allowed by Idaho law *I.C. 39-6303*, do not qualify because such persons are not “intimate partners” as defined by federal law. Forms approved by the Idaho Supreme Court for use as protection orders identify the relationship between the protected person and respondent on the first page.<sup>5</sup>**

An order issued under *I.C. § 39-39-6301 et seq.* is a qualifying civil restraining order because it is issued *after actual notice and a hearing*.<sup>6</sup> This does not mean that there must have been an actual hearing. The term “hearing” means *an opportunity* to present one’s side of the case. *See e.g. U.S. v. Banks*, 339 F. 3d 267 (E.D. Texas 2003); *U.S. v. Calor*, 340 F.3d 428 (E.D. Kentucky 2003). If the respondent is given the opportunity to appear and present his case and fails to show or waives his hearing or if the defendant appears and stipulates, either on his own or through counsel, to the entry of the order, he has had his “hearing.” This is true whether the stipulation is entered during open court or in the judge’s chambers through counsel.

An order issued under *I.C. § 39-39-6301 et seq.* is a qualifying civil restraining order because it *restrains future conduct*. Under *18 U.S.C. § 922(g)(8)* The protection order is a qualifying order if it restrains future conduct that would place the intimate partner or child in reasonable fear of bodily injury, or restrains the respondent from harassing, stalking, or threatening the intimate partner or child of the respondent or child of the respondent’s intimate partner. Protection order forms approved by the Idaho Supreme Court order that the “Respondent shall not harass, annoy, disturb the peace of, telephone, contact, or otherwise communicate with (either directly or indirectly, in person or through any other person).” Though the language of Idaho orders could be stronger and “explicitly prohibit the use or attempted use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury” as referenced by *18 U.S.C. § 922(g)(8)*, the language used is similar to the federal statute in that it “restrains the respondent from harassing” the protected person.

Protection orders issued under *I.C. § 39-6301 et seq.* are qualifying orders because they *make specific findings* that there is immediate and present danger of domestic violence to the protected person. Under *18 U.S.C. § 922(g)(8)*, if the protection order makes a finding that the respondent is a credible threat to the physical safety of the intimate partner or child, the order is a qualifying order. Though the language could be more artfully drafted making it clear that it is the respondent that presents the credible threat, the implication is that the danger of domestic violence comes from the respondent.

Idaho law does not specifically authorize the court to seize firearms during the time the protection order is pending. The statute does, however, allow the court to make such orders as are necessary for the protection of the family or household members in conjunction with both the *ex parte* and the permanent orders.<sup>7</sup> Under this “catch all” provision, judges could conceivably order the surrender of firearms as well as any permit to carry weapons during the duration of the order.

The practice for the issuance of CPO’s vary across the state. A petitioner, who may or may not be the alleged victim, because a petition may be filed on behalf of a minor child, obtains the forms for a CPO from the court records clerk. They are also available on-line.<sup>8</sup> In some counties, the petitioner can contact a local advocate or the domestic violence court coordinator for assistance. Once the petition is complete, a judge reviews the file and decides whether to issue a temporary *ex parte* order which is valid for up to 14 days. The judge then sets a hearing, within 14 days, to determine if the temporary order should be extended. Law enforcement then serves the respondent (alleged offender) with notice to appear in court. If law enforcement is unable to serve a respondent within fourteen days, or by the time of the hearing, the judge can either dismiss the order or continue the hearing another fourteen days to allow more time to have the order served. If law enforcement cannot serve the respondent after such continuance, the order is dismissed. When CPO’s are dismissed, the petitioner is encouraged to have a safety plan in place and to call 911 and re-file for a CPO if the threats or acts of violence reoccur.

In a CPO hearing, the judge hears both sides and decides if the respondent poses a credible threat to the protected person(s). Often, both parties appear without an attorney. If one party retains an attorney, the presiding judge can offer a continuance to allow time for the other party to retain counsel or the party can choose to proceed without an attorney. If the petitioner doesn’t appear at the hearing, the order is automatically dismissed. If the respondent is absent at the hearing, the order is defaulted and extended for a specific amount of time deemed appropriate by the judge. In the past, CPO’s were typically issued for ninety days. In 2006 the Idaho legislature authorized judges to extend domestic violence orders for up to one year or, depending on specific circumstances of the case, for a lifetime.<sup>9</sup> Under Idaho Administrative Rule 32, domestic abuse files maintained pursuant to domestic violence crime protection acts, except orders of the court, are exempt from public disclosure.<sup>10</sup>

**When children are involved in CPO's, a temporary parenting plan is generally established to allow for supervised or unsupervised visitations with the non-custodial parent. Temporary parenting plans are issued only for the duration of the CPO. In conjunction with a temporary parenting plan, a direct referral can be made to Child Support Services (CSS) to establish a support order to help minimize the financial burden for the petitioner.**

**Following the extension of a CPO, either party can file a motion to modify, terminate, or renew an order. Before a CPO expires, a petitioner can request an extension. In these proceedings the judge reviews the case file and either grants or denies the motion. The statute grants the respondent fourteen days to object to a modification or extension. If the respondent objects to the extension within fourteen days, a hearing is set for both parties to attend. Under the statute, if the respondent doesn't object within this time frame, the order is modified or extended.<sup>11</sup>**

### ***The National Registry***

**Once a permanent domestic violence protection order is issued, it is entered into a Protection Order File, which is a national registry maintained by the National Crime Identification Center (NCIC). There are different methods for entering protection orders into the national registry.**

**One method involves the court clerk entering CPO party information into the state court data base (ISTARS) and faxing the original to law enforcement.<sup>12</sup> ISTARS information is gathered and coordinated with the Idaho Law Enforcement Telecommunications System (ILETS) at the Bureau of Criminal Identification (BCI) in Meridian, Idaho.<sup>13</sup> The BCI is Idaho's central repository of criminal records, fingerprints, and crime statistics.<sup>14</sup> BCI is a statewide contact for the National Instant Criminal Background Check System (NICS). The two systems coordinate information to determine if an individual is prohibited from purchasing or possessing a firearm and/or ammunition.**

**Another method of entering the protection order into the national registry is through local law enforcement agencies who serve the order on the respondent. Once served, it is entered into the Protection Order File maintained by NCIC. The "Protection Order File" is not yet complete and**

many states and tribes do not participate in it. Furthermore, even if your jurisdiction participates in the NCIC Protection Order File, it may not be sending all protection orders to the File.<sup>15</sup>

Both methods help ensure that NCIC has accurate information for use in prohibiting an abuser from purchasing or possessing a firearm. Current information is paramount for the National Instant Criminal Background Check NICS when a gun dealer, or Federal Firearm Licensee FFL, calls for a criminal background check for a potential buyer. NICS investigates a buyer's criminal history by contacting NCIC, BCI, and local law enforcement agencies when necessary. Once NICS has adequate information, they confirm the following: transfer may proceed; denied; or delayed pending review. A handgun purchaser may still have to wait for up to three business days if the NICS system fails to positively approve or deny his/her application to purchase a handgun. If the denial is not issued within three days, the transfer may be completed at that time.<sup>16</sup>

### *Full Faith and Credit*

In 1994, the Violence Against Women Act (VAWA) created a federal law granting full faith and credit to protection orders. This law extended full faith and credit to protection orders throughout all of America, including all 50 states, Indian tribal lands, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands and Guam.<sup>17</sup> Through entry into a national database, (the NCIC Protection Order File), CPO's are recognized on a national level and enforced in accordance with the law of the jurisdiction where they are violated. To be enforceable under VAWA, the court which issued the order must have had jurisdiction over the respondent and the person against whom the order was sought must have been provided reasonable notice and opportunity to be heard. "Through its full faith and credit provisions, the Violence Against Women Act is designed to ensure that valid protection orders are enforced in each and every jurisdiction in America. The statute affords important and often lifesaving protection for survivors of domestic violence who cross state or tribal lines – either to go to work visit relatives, or seek safe haven from abuse."<sup>18</sup>

## ***CPO Misconceptions***

**Federal law requires a hearing before a qualifying order can be issued. In many cases, the order is issued without the presentation of recorded testimony, often in chambers in the presence of counsel. The term “hearing” is not defined in the Gun Control Act, however, the *opportunity* to be heard or present one’s side of the case is generally interpreted as a hearing under federal law. *U.S. v. Wilson*, 159 F.3d 280 (7th Cir. 1998) Absence of a formal hearing on the record does not defeat federal firearms prohibitions.**

**A common misconception is that a stipulation by the respondent to the entry of the order without admitting any of the facts effectively avoids the federal firearms prohibitions. This ignores the fact that it is the *finding* that the respondent is a credible threat to the physical safety of the intimate partner or child and the explicit restraint on the respondent not to harass the protected person that invokes the firearms prohibitions. Stipulating to the order without admitting the facts does not prevent the application of the firearms prohibitions.**

**Another misconception is that a state court judge can limit the applicability of the firearms prohibitions. Application of the firearms prohibitions are a matter of federal law. Consequently, a state court judge *cannot* prevent the application of federal law by language in the order that the firearms prohibitions do not apply to a particular type of firearm (hunting rifle); do not apply during a specified period of time (hunting season); or do not apply at all.**

**Under federal law there is no requirement that the court order impose firearms restrictions or advise a respondent of the federal prohibitions relating to firearms possession under a qualifying protection order. *See U.S. v. Mitchell*, 209 F.3d 319 (4<sup>th</sup> Cir.2000), *cert. denied*, 121 S.Ct. 123 (2000).**

***Idaho Code § 39-6301 et seq.* affords a victim of domestic violence the right to a protection order. The statute grants the court discretion to mold the content of the order to fit the situation. *Idaho Code § 39-6306* states that where an application alleges that irreparable injury could result from domestic violence if an order is not issued immediately the court may issue**

an order which, among other things, “restrains any party from committing acts of domestic violence.” Federal firearms prohibitions apply to respondents in protection orders that “restrain the respondent from harassing, stalking, or threatening the intimate partner or child of the respondent or child of the respondent’s intimate partner.” Forms adopted by the Idaho Supreme Court order a respondent not to “harass, annoy, disturb the peace of, telephone, contact, or otherwise communicate with (either directly or indirectly, in person or through any other person).” It is from the intersection of these three rules that the federal firearms prohibitions materialize. They apply to all respondents with the exception of law enforcement officers and members of the military while possessing firearms in their official capacity and last for the duration of the order. *18 U.S.C. § 925(a)(1)*.

### *Criminal No Contact Orders*

Criminal no contact orders are more problematic. Unlike civil protection orders, which are on standardized forms adopted by the Supreme Court, criminal no contact orders are developed locally in each district or county and may vary in form and content. They may or may not include restraining language or factual findings required to invoke federal gun control, they may or may not be issued after notice and opportunity to be heard, and they may or may not be against an intimate partner.

Unlike civil protection orders issued under *Idaho Code § 39-6301 et seq.*, orders issued under *Idaho Code § 18-920* do not require any specific procedures. In fact, they may be issued *ex parte* at the time a warrant of arrest is issued. Like their civil counterpart, the temporary *ex parte* domestic violence order, they lack the notice and opportunity to be heard components and would not trigger federal firearms prohibitions. Once a hearing is held, however, such orders may qualify if the protected person is an “intimate partner,” *i.e.* a spouse of the respondent, a former spouse of the respondent, an individual who is the parent of a child of the respondent, *or* an individual who cohabitates or has cohabitated with the respondent or is a child of the intimate partner or of the respondent. The “hearing” required under federal law has been broadly construed. Basically, any appearance before the court, no matter the reason for the hearing, would satisfy *18 U.S. C. 922 (g) (8)*.<sup>19</sup> The defendant’s arraignment on the charge is likely a “hearing.” The defendant was before the court and could have addressed the no contact order. If this amounts

to actual *notice and opportunity to be heard* the order qualifies if the victim is an “intimate partner” or child of an intimate partner or of the respondent. This is an important distinction because in Idaho a criminal no contact order can be issued to protect someone who is not within this category of protected persons, e.g. a next door neighbor who is battered.

If a criminal no contact order meets federal requirements it is entitled to full faith and credit under VAWA. They are not, however, entered into the NCIC national registry database Protection Order File meaning that the victim may need to produce the order for inspection by law enforcement or file it with the court of the foreign jurisdiction under the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, *I. C. 39-6306A* to obtain protection. Idaho criminal no contact orders are recognized and enforced state-wide and are entered into the Idaho Law Enforcement Telecommunications System (ILETS).

### *Misdemeanor Crimes of Domestic Violence*

In addition to traditional forms of assault and battery, *Idaho Code § 18-918* makes it a separate crime of domestic violence for a person to commit an assault (*I.C. § 18-901*) or battery (*I.C. § 18-903*) on any “household member.” This includes someone who is a spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife. If the resulting injury is “traumatic,” the crime is a felony. If the offense is a third offense within 15 years, the crime is a felony. Otherwise it is a misdemeanor. "Traumatic injury" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force.

All misdemeanor crimes of domestic violence invoke federal firearms prohibitions. Regardless of the name assigned to the conduct, any misdemeanor that has as an element, the use or attempted use of force or the threatened use of a deadly weapon, is a misdemeanor crime of domestic violence if, at the time the offense was committed, the defendant was a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

The Gun Control Act, 18 U.S.C. § 921(a)(33), defines the term “misdemeanor crime of domestic violence.” Determination of whether a local, state or federal crime qualifies is made pursuant to federal law. Typically all misdemeanors that have, as an element, the use or attempted use of physical force, such as assault, battery or even disorderly conduct, may qualify. It is not necessary that the underlying statute require, as an element, any specific relationship between the defendant and the victim. Federal law may also determine what constitutes a “conviction” in firearms cases.

“The Circuits have differed over whether the federal court must apply the state law to determine whether the state proceedings constitute a conviction when the predicate conviction was in state court. In *United States v. Stober*, 604 F.2d 1274, 1276 (10th Cir.1979), and *United States v. Parker*, 604 F.2d 1327, 1329 (10th Cir.1979), the Tenth Circuit Court of Appeals held that the state determination on whether the proceedings in its court constitute a conviction was to be followed by the federal courts. The First Circuit, however, has indicated that it did not believe “Congress intended the meaning of convicted to depend upon the local law's singularities, if any.” *United States v. Samson*, 533 F.2d 721, 723 (1st Cir.), *cert. denied*, 429 U.S. 845, 97 S.Ct. 126, 50 L.Ed.2d 116 (1976), The Ninth Circuit has stated that whether a person was convicted for the purposes of *section 922(h), title 18*, (a related statute to *section 1202*) is a question of federal, and not state, law. *United States v. Benson*, 605 F.2d 1093, 1094 (9th Cir.1979). In *United States v. Padia*, 584 F.2d 85 (5th Cir.1978), the Fifth Circuit held that state action of setting aside a guilty verdict and expunging a conviction following successful completion of a probation term, did not alter the defendant's status as a convicted felon under federal laws.”<sup>20</sup>

Consequently, a withheld judgment under *Idaho Code § 19-2601* may constitute a conviction under federal law.

**Under federal law, a conviction for a MCDV does not qualify unless the person was represented by counsel - unless he or she knowingly and intelligently waived the right to counsel. Likewise, the conviction does not qualify if the person was entitled to a jury trial and the case was not tried by a jury – unless he or she knowingly and intelligently waived the right to jury trial.**

**The federal firearms prohibition is a *lifetime* prohibition. If, however, the conviction is set aside or expunged by the state court or the person is pardoned or has their civil rights restored then the prohibition no longer applies. In Idaho, a sentence to the custody of the Idaho state board of corrections suspends all civil rights of the person sentenced. *I.C. § 18-310*. Upon satisfactory completion of the sentence, probation, or parole, a persons civil rights are restored. However, *I.C. § 18-310* expressly provides that the restoration of civil rights does not restore a persons right to ship, transport or possess firearms if the underlying crime was felony domestic battery or 36 other specified felonies. Under federal law, if the state’s restoration of civil rights expressly provides that the person may not ship, transport or possess firearms, then the expungment does not remove the federal firearms prohibitions. Consequently, Idaho’s statute restoring civil rights to felons convicted of domestic violence does not eliminate the federal firearms prohibitions.**

**Persons convicted of misdemeanors are not sentenced to the Idaho board of corrections, so their civil rights are not suspended; consequently, no civil rights are restored within the meaning of the Gun Control Act. A person convicted of a MCDV can, however, avoid the firearms prohibition if their conviction is set aside or expunged. *Idaho Code § 19-2604* provides a procedure for setting aside a plea of guilty or conviction and finally dismissing a case upon successful completion of probation. *Idaho Code § 19-2604 (1)* has been referred to as an “expungement” statute by Idaho courts. *See State v. Schumacher*, 131 Idaho at 486, 959 P.2d at 467 and *State v. Hanes* 139 Idaho 392, 79 P.3d 1070 (Idaho App 2003). There is, however, no federal case law deciding if setting aside a conviction and dismissing a case under *I.C. § 19-2604* results in the elimination of federal firearms prohibitions under *18 U.S.C. 922 (g)(9)*. It also results in the anomalous situation where one who is simply fined and not placed on probation suffers a lifetime firearms prohibition with no relief compared to one who presumably committed a more serious offense and was placed on**

probation, has the ability to have their record expunged and the firearms prohibitions removed.

Another anomaly is the fact that one convicted of felony crime of domestic violence is entitled to an “official use” exception, yet one convicted of a misdemeanor crime of domestic violence is not entitled to the exception. The “official” use exception allows those who are in the military and law enforcement officers to possess firearms while on duty. *18 U.S.C. 925(a)(1)*. Consequently, a person with a conviction for felony domestic violence may possess firearms while on duty, yet a person convicted of a less serious misdemeanor crime of domestic violence is not entitled to the official use exception.

Federal firearms prohibitions apply even though the misdemeanor crime of domestic violence predated the 1996 effective date of the act. For example, one convicted of a MCDV in 1994 is subject to the prohibitions of *18 U.S.C. 922(g)(9)* without violating *ex post facto* prohibitions. “To fall within the *ex post facto* prohibition, a law must be retrospective – that is ‘it must apply to events occurring before its enactment’ – and it ‘must disadvantage the offender affected by it’ by altering the definition of criminal conduct or increasing the punishment for the crime.” *Lance v. Mathis* 519 U.S. 433 (1997). The federal law criminalizes the possession of firearms by those with a MCDV when that possession occurs after the effective date of the law.

As with qualifying protection orders, a state court is not required to notify a defendant pleading guilty to a MCDV of the collateral federal firearms consequences before accepting the plea. *See e.g. U.S. v. Mitchell* 209 F.3<sup>rd</sup> 319 (4<sup>th</sup> Cir. 2000), cert denied 121 S.Ct. 123 (2000).

### *Risky Orders*

There are a variety of orders that could unexpectedly result in federal firearms prohibitions. Any order involving spouses, former spouses, individuals who are parents of a child of the other party, *or* individuals who cohabit or who have cohabited with the other party, run the risk of federal firearms prohibitions if they become subject to a court order that *restrains future conduct* that would place the intimate partner or child in reasonable fear of bodily injury, or restrains the other party from harassing, stalking, or threatening the intimate partner or child *or* which

*make specific findings* that there is immediate and present danger of domestic violence to the other party. Most courts issue joint prohibitive orders under *I.R.C.P. 65(g)* upon the filing of a divorce. If the order restrains future conduct in manner consistent with *18 U.S.C. 922(g)(8)* it may invoke federal firearms prohibitions as to both parties.

### *Conclusion*

The combination of guns and domestic violence can be lethal. Those who commit domestic violence are subject to a variety of restrictions on their ability to possess firearms. During the pendency of a qualifying civil protection order, they may not possess guns, if the order is a qualifying order. Criminal no contact orders may also result in federal firearms prohibitions. After a conviction for a misdemeanor crime of domestic violence, the right to possess firearms is suspended and courts, in the exercise of their discretion, may prohibit the possession of firearms as a condition of pre-trial release or probation. Courts may also include prohibitions in civil protection orders banning the respondent's possession of firearms.

From the perspective of deterrence, the loss of the ability to possess firearms may or may not prevent acts of domestic violence. Such acts are typically emotionally charged or result from a condition of the personality that is not easily altered by any sort of cognitive process that weighs the consequences of abusive acts. Idaho courts are not required to notify defendants in criminal cases or respondents in civil cases of the firearms prohibitions. It is unlikely that all potential abusers know of the firearms prohibitions that attach to a conviction for a MCDV or the temporary firearms prohibitions relating to a respondent in a CPO or NCO. Absent widespread knowledge of the firearms prohibitions consequent to acts of domestic abuse, the deterrent effect of federal firearms prohibitions is probably secondary to the benefit of protecting victims.

From the perspective of protecting of victims of domestic violence, firearms prohibitions provide a legal basis for disarming abusers. Though the law provides for it, there are no established procedures in Idaho to effectively remove firearms from abusers. Any such procedures should require disclosure to the court by the victim or the perpetrator of the existence of weapons or permits to carry weapons. Courts should be cautious in ordering firearms to be turned over to third persons. Such a

relinquishment may still be considered “constructive possession” if the owner of the firearm, “knowingly has the power and the intention at a given time to exercise dominion and control over [the firearm] . . . , either directly, or through others.” See *United States v. Quilling* 261 F.3d 707,, 712 (7<sup>th</sup> Cir. 2001). A better procedure would be to require the firearms be turned over to law enforcement. Such procedures would need to take into consideration facilities for storage of weapons and, at the conclusion of the prohibition period, procedures for the return of firearms assuring that the person to receive the firearms is otherwise qualified to possess it.

The interaction of state and federal laws disarming domestic abusers can be complex. To effectively deter domestic violence, potential abusers need to know that one of the consequences of their actions will be a prohibition against firearms possession. To effectively protect victims, they should be aware of prohibitions against the possession of firearms by abusers under state and federal law. In this way, the purpose of laws can be better achieved and domestic violence can be addressed as a serious crime against society and assure victims of domestic violence the protection from abuse which the law and those who enforce the law can afford.

---

<sup>1</sup> Florida Governors Task Force on Domestic and Sexual Violence, Florida Mortality Review Project Report, at 44 table 7 1977 as quoted in Firearms and Domestic Violence, Darren Mitchell and Susan Carbon, Summer 2002 Court Review.

<sup>2</sup> Firearms and Domestic Violence, Darren Mitchell and Susan Carbon, Summer 2002 Court Review; Mitchell and Carbon cited L.E. Saltzman et al., Weapon Involvement and injury Outcomes in Family and Intimate Assaults, 267 J. AMER. MED. ASS'N. 3043 (1992); Johns Hopkins University, Center for Gun Policy and Research, *Factsheet; Firearm Injury and Death in the United States* (revised April 2002) and U.S. Department of Justice Bureau of Justice Statistics *Homicide Trends in the U.S.; “Intimate Homicide”* <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> visited by this author May 17, 2007

<sup>3</sup> K.M. Grassel et al., *Association between Handgun Purchase and Mortality from Firearm Injury*, Injury Prevention 9 (2003): 50.

<sup>4</sup> Public Law 109-162(119 Stat.2960)January 5, 2006 Amendment to include MCDV “under tribal law”

<sup>5</sup> The long form protection order can be found at:  
<http://www.courtselfhelp.idaho.gov/documents/docs304/DV%208-1%20long%20form%20Civil%20Protection%20Order.rtf>

<sup>6</sup> Firearms prohibitions to not apply to ex parte protection orders because 18 U.S.C. § 922(g)(8) requires the order be issued after a hearing that the respondent had actual notice of and an opportunity to participate.

<sup>7</sup> “Upon a showing that there is an immediate and present danger of domestic violence to the petitioner the court may, if requested, order for a period not to exceed one (1) year that:

---

(e) Other relief be ordered as the court deems necessary for the protection of a family or household member, including orders or directives to a peace officer, as allowed under this chapter;” I.C. 39-6306. Idaho Code § 39-6308 (Temporary *Ex Parte Orders*) contains identical language.

<sup>8</sup> [http://www.courtselfhelp.idaho.gov/forms\\_new.asp?Cat\\_ID=36](http://www.courtselfhelp.idaho.gov/forms_new.asp?Cat_ID=36)

<sup>9</sup> I.C. §39-6306.

<sup>10</sup> I.C.A.R. 32(d)(13).

<sup>11</sup> I.C. §39-6311(4)(1).

<sup>12</sup> I.C.A.R. 32 (a) Idaho Statewide Trial Court Automated Records System (ISTARS).

<sup>13</sup> Idaho Law Enforcement Telecommunication System (ILETS) Southern Idaho Regional Communications Center (page 2). <http://www.sircomm.com/faq.htm>.

<sup>14</sup> Idaho State Police, *Bureau of Criminal Identification*, 1-208-884-7130, <http://www.isp.state.id.us/identification/index.html>.

<sup>15</sup> National Center on Full Faith and Credit, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, Pennsylvania Coalition Against Domestic Violence (page 6) [www.vaw.umn.edu](http://www.vaw.umn.edu).

<sup>16</sup> 18 U.S.C. § 921, *Brady Handgun Prevention Act*, 1993, Pub. L. No. 103-159.

<sup>17</sup> National Center on Full Faith and Credit, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, Pennsylvania Coalition Against Domestic Violence (page 4) [www.vaw.umn.edu](http://www.vaw.umn.edu).

<sup>18</sup> National Center on Full Faith and Credit, *Increasing Your Safety: Full Faith and Credit for Protection Orders*, Pennsylvania Coalition Against Domestic Violence (page 2) [www.vaw.umn.edu](http://www.vaw.umn.edu).

<sup>19</sup> E-mail correspondence with Fanny L. Haslebacher, Assistant General Counsel FBI-OGC-AIU, May 22, 2007 on file with author.

<sup>20</sup> *U.S. v. Woods* 696 F.2d 566 (C.A.Mo.,1982)