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Civil Protection Orders: Increased Access and Narrowed Enforcement

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CIVIL PROTECTION ORDERS: INCREASED ACCESS AND NARROWED ENFORCEMENT

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INTRODUCTION

The statute governing civil protection orders in the District of Columbia is the Intrafamily Offenses Act,[1] which has been in effect since 1970.[2] This statute has been amended frequently over the past 45 years. While some of these changes have been clerical[3] or procedural,[4] there have also been substantive amendments which, *inter alia*, significantly expand both who may file for a protection order and what remedies that petitioner may request and receive. Yet this expansion has coincided with an intense scaling back by the judiciary of who can prosecute alleged violations of protection orders. While the statute continues to enable more individuals to seek civil protection orders with increasingly expansive remedies, the courts are proscribing those victims' abilities to have their orders enforced.

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[1] D.C. CODE §§ 16-1001–06 (2013).

[2] District of Columbia Court Reorganization Act of 1970, 91 Pub. L. No. 91-358, 84 Stat. 473, 545 (1970) (codified as amended at D.C. CODE §§ 16-1001–06 (2013)).

[3] *See, e.g.*, Technical Amendments Act of 2003, D.C. Law 15-105 (2004); Technical Amendments Act of 2008, D.C. Law 17-353 (2008) (renumbering subsections of the Intrafamily Offenses Act).

[4] *See, e.g.*, Domestic Violence Amendment Act of 2006, D.C. Law 16-204 (2007) (clarifying the length of temporary protection orders that expire on days when the court is closed).

I. TWENTY-FIRST CENTURY CHANGES TO THE INTRAFAMILY OFFENSES ACT

During the first fifteen years of the twenty-first century, the Intrafamily Offenses Act was amended nine times. Many of these amendments expanded who could file for a protection order and what remedies may be included in a protection order. Eligibility to petition for a civil protection order was expanded with the Omnibus Public Safety Act of 2006 to include domestic partners, individuals being stalked by respondents with whom they had no other relationship, and individuals being victimized by respondents with whom they at any time shared a common romantic partner.[5] Previously, eligibility had been limited to individuals filing against respondents to whom they were related by blood, legal custody, marriage, with whom they had a child in common, or with whom they had at any time either shared a romantic relationship or shared a residence.[6]

In the Intrafamily Offenses Act of 2008, the D.C. Council again expanded who may file for a civil protection order to "any person who alleges, or for whom is alleged, that he or she is the victim of interpersonal, intimate partner, or intrafamily violence, stalking, sexual assault, or sexual abuse."[7] The terms "interpersonal violence," "intimate partner violence," and "intrafamily violence" were defined in the statute to include all the relationships previously included as well as being related by adoption and being or having been in a strictly sexual relationship. In addition to the earlier addition of stalking, these amendments also added being the victim of sexual assault and sexual abuse to the list of individuals able to file for a civil protection order, regardless of whether any other relationship existed outside of the sexual offense.

The Intrafamily Offenses Act of 2008 also explicitly outlined how minors may access the civil protection order system.[8] These amendments made clear that victims of intrafamily or interpersonal violence may file for a civil protection order on their own at age 16 or older, while victims of intimate partner violence may independently file for a protection order at age 12 or older.[9] Minors falling outside of these categories must have a parent, custodian, or guardian file for a

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[5] Omnibus Public Safety Amendment Act of 2006, D.C. Law 16-306 (2007).
[6] D.C. CODE § 16-1001(5) (1995).
[7] Intrafamily Offenses Act of 2008, D.C. Law 17-368 (2008).
[8] *Id.*
[9] *Id.*

civil protection order on their behalf.[10] This Act also included requirements for serving minor respondents' parents, custodians, or guardians as well as other procedures when either or both of the parties are minors.[11]

The Intrafamily Offenses Act of 2008 also amended the section of the statute enumerating remedies available to petitioners by first revising the language of the existing provisions and also by stating that the trial court may "direct[] the care, custody, or control of a domestic animal in the household."[12] This language was expanded slightly by the Criminal Code Amendment Act of 2010, which included domestic animals belonging to the petitioner or the respondent, or living in their household.[13]

II. SHIFTING CRIMINAL CONTEMPT JURISPRUDENCE

Although there were multiple amendments within the Intrafamily Offenses Act of 2008 that clarify the role of the attorney general and the United States Attorney's Office related to obtaining civil protection orders,[14] very few substantive changes have been made to the statute regarding enforcement of protection orders through the criminal contempt process. The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act of 2002 established that a violation in the District of a valid foreign protection order, like a civil protection order, is chargeable as contempt or as a separate misdemeanor; that any communication made from someone outside of the District to someone inside of the District is considered to be made within the District in order to establish a protection order violation; and that a violation of a consent without admission protection order is punishable by a contempt proceeding or by a separate misdemeanor prosecution.[15] The Intrafamily Offenses Act of 2008 only amended the statute pertaining to contempt by specifying the controlling chapter of the D.C. Code when the alleged violator is a minor.[16] The fines associated with violation of protection orders through either a contempt proceeding or a misdemeanor prosecution were amended to

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[10] *Id.* The amendments also lay out when parents or guardians may file for a civil protection order on behalf of a minor.

[11] *Id.*

[12] *Id.*

[13] Criminal Code Amendment Act of 2010, 58 D.C. Reg. 1174 (2011).

[14] *See, e.g.*, D.C. CODE §§ 16-1002, 16-1003(b)–(c), 16-1005(a-1) (2013).

[15] D.C. CODE § 16-1005(f)–(i) (2013).

[16] D.C. CODE § 16-1005(g-1) (2013).

be consistent with those provided in the Criminal Fine Proportionality Amendment Act of 2012.[17] Despite the D.C. Council making minor revisions to the statute regarding contempt, the District of Columbia Court of Appeals has taken the lead on determining how this mechanism for enforcement may be used.

At the beginning of the twenty-first century, the District of Columbia Court of Appeals' jurisprudence regarding how a victim of domestic violence could enforce her civil protection order was well settled. If an individual against whom a civil protection order had been issued violated that order before it expired, the beneficiary of the protection order could not only file a motion for contempt in the Domestic Violence Unit of Superior Court but they could also prosecute the contempt case themselves, with or without legal representation. During this time, prosecutions for violating a civil protection order could be conducted by the Office of the Attorney General, the private attorney representing the protection order beneficiary, or the beneficiary herself. It was not uncommon for a *pro se* individual to conduct this proceeding, despite the fact that, if found guilty, the defendant could be placed on probation, incarcerated, or both. Even when the Office of the Attorney General served as the prosecutor, it did so in the capacity of the beneficiary's attorney.

This process had been authorized by the court of appeals in the 1994 case *Green v. Green*.[18] In *Green*, the court held that a defendant in a protection order criminal contempt case had no constitutional right to a public prosecutor.[19] The court of appeals found that the Intrafamily Offenses Act reflected the D.C. Council's determination that the beneficiary of a civil protection order should be able to pursue and prosecute criminal contempt charges.[20] Although the court of appeals acknowledged that, in *Young v. United States ex rel. Vuitton et Fils S.A.*, the United States Supreme Court had previously held that attorneys representing a beneficiary of a court order could not be appointed to prosecute a violation of that order,[21] the court of appeals both distinguished the facts in *Green* from those in *Young* and noted that it was not bound by an opinion issued by the Supreme Court

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[17] D.C. CODE § 16-1005(f)–(g) (2013).

[18] Green v. Green, 642 A.2d 1275 (D.C. 1994).

[19] *Id.* at 1281.

[20] *Id.* at 1279.

[21] Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 809 (1987).

pursuant to its supervisory authority.[22] Survivors of domestic violence were thus able to directly seek enforcement of their civil protection orders in D.C. Superior Court through privately prosecuted criminal contempt proceedings.

In 2000, the court of appeals decided *In re Peak*, in which it adopted the holdings in *Young* in the context of a criminal contempt proceeding of a non-domestic violence civil restraining order.[23] *Peak* specifically recognized that contempt of civil protection orders fell outside of its holding[24] and the practice of domestic violence survivors privately prosecuting violations of their civil protection orders continued throughout the first decade of the twenty-first century.

In 2008, the court returned to this question in *In re Robertson* (*Robertson I*), where it affirmed the constitutionality of a contempt prosecution by the Office of the Attorney General (OAG), despite the OAG having directly represented the survivor in her underlying civil protection order hearing.[25] The court of appeals held that, pursuant to the Intrafamily Offenses Act, contempt prosecutions for violations of protection orders were actually brought in the name of the private individuals who sought to enforce their orders.[26] Because the court of appeals found that these cases did not constitute public actions but rather private actions seeking enforcement of court orders, the court found that the practice of private prosecutions in the domestic violence context did not run afoul of any prohibition against private prosecutions.[27] As such, the court of appeals was also able to find that the private prosecutor in this case was not bound to an earlier plea agreement prohibiting the United States from pursuing charges against the defendant based on the actions that constituted the protection order violation.[28]

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[22] *Green*, 642 A.2d at 1278.

[23] *In re* Peak, 759 A.2d 612 (D.C. 2000).

[24] *See id.* at 620 (concluding that "except under the special circumstances presented in *Green*, or in some other unusual situation, the court may not appoint counsel for a party who benefits from a court order to prosecute a criminal contempt proceeding arising from alleged noncompliance with that order."). The court went on to note that its decision "casts no doubt on the propriety of the contempt procedures authorized in that context by the Superior Court's Intra-Family rules." *Id.* at 620 n. 16 (citation omitted).

[25] *In re* Robertson, 940 A.2d 1050 (D.C. 2008).

[26] *Id.* at 1058.

[27] *Id.* at 1057–58.

[28] *Id.* at 1059–60.

Appellant John Robertson petitioned this decision to the United States Supreme Court, which granted a writ of certiorari limited to the question of whether a private individual can, in their own name, prosecute an action for contempt.[29] The Supreme Court then dismissed the writ as improvidently granted after hearing oral arguments.[30] Despite this dismissal, Chief Justice John Roberts wrote a strongly worded dissent arguing that the case should have been decided by the Court and that the answer to the question posed by the case must be no.[31] In his dissent, joined by three other justices, Chief Justice Roberts vehemently discredits the court of appeals' holdings that civil protection order contempt cases do not constitute criminal cases and that they may be brought by private individuals rather than pursuant to the power of the government.[32]

Despite a majority of the Supreme Court deciding not to reach a decision in the case, the panel of judges on the D.C. Court of Appeals that had initially decided *Robertson I* decided en banc to amend the decision. In *Robertson II*, the court held that contempt cases for violations of civil protection orders cannot be brought in the name of a private individual and must instead be brought in the name of the United States.[33] The court of appeals also held, however, that pursuant to the intrafamily offenses statutory framework, the prosecution in *Robertson* was actually brought in the name of the sovereign despite the victim's attorneys acting as the prosecution.[34] Where *Robertson I* sidestepped *Young*'s ambit by declaring intrafamily contempt proceedings as private matters, *Robertson II* cites to dicta in *Young* to recast these contempt proceedings as exercises of trial court judges' authority to enforce their orders.[35] Rather than overturning *Green*, however, the court in *Robertson II* relied specifically on language in *Green* when discussing the statutory framework underpinning contempt proceedings in civil protection order cases—as in *Green*, the court of appeals underscored the D.C. Council's determination that

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[29] Robertson v. U.S., *ex rel.* Watson, 558 U.S. 1090 (2009).

[30] Robertson v. U.S., *ex rel.* Watson, 560 U.S. 272 (2010).

[31] *Id.* at 273 (Roberts, C.J., dissenting) (arguing that "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government.").

[32] *Id.* at 275–81.

[33] *In re* Robertson, 19 A.3d 751, 755 (D.C. 2011).

[34] *Id.* at 755–56.

[35] *Id.* at 761.

survivors of violence should be able to enforce their civil protection orders through a contempt proceeding.[36]

Robertson II evinces the tension between the court of appeals' acceptance of legislative history and policy arguments in favor of broad enforcement for civil protection orders and its recognition that criminal contempt proceedings cannot be categorized as private proceedings. The court's new focus on criminal contempt proceedings as a vindication of judges' authority enabled the court to acknowledge the involvement of sovereign power in these cases, even though this power stemmed from the judicial rather than the executive branch.

The *Robertson II* decision was met with a great deal of confusion at the trial court level. Defense counsel flooded the court with motions to dismiss open contempt cases that were being privately prosecuted and survivors' ability to enforce their own orders depended heavily on which judge happened to hear the case. Some judges continued to allow private people to prosecute contempt of civil protection orders in the name of the United States, while others insisted that these cases must be prosecuted by either the Office of the Attorney General or the United States Attorney's Office, the latter of which prosecutes the vast majority of criminal cases in the District of Columbia.

A month after the *Robertson II* decision came out, the court of appeals amended its decision in another civil protection order contempt case: *In re Shirley*.[37] *Shirley* posed two questions: whether the trial court had jurisdiction to hold the defendant in contempt and whether consent by the beneficiary of the civil protection order effectively constituted a defense for violations thereof.[38] The court of appeals affirmed the criminal contempt conviction and held that consent is not a defense to a protection order violation.[39] The court relied on the language in *Robertson II* concerning the involvement of the sovereign and the authority of a court to enforce its order to refute the appellant's claim that, because the holder of a protection order had a private right to enforce their order, they also had the ability to modify or vacate their order privately.[40] In its discussion of the trial court's authority in the civil protection order criminal contempt

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[36] *Id.* at 760.

[37] *In re* Shirley, 28 A.3d 506 (D.C. 2011).

[38] *Id.* at 507.

[39] *Id.* at 513.

[40] *Id.* at 511 (citing to both the fact that these cases must be brought pursuant to the government's sovereign power and the nature of these cases as a function of the court's authority to enforce its orders).

context, the court also noted that trial court judges may decide to hold evidentiary hearings and determine whether an individual is in contempt of a protection order even if the beneficiary of that order is not asking the court to do so.[41] In denying the appellant's claim that protection orders can be both modified and enforced privately, the court of appeals underscored the expansive authority granted to trial court judges adjudicating protection order criminal contempt cases.

By 2012, the court of appeals began circumscribing this broad articulation of authority. In response to two cases consolidated for appeal in which a trial court judge, relying explicitly on *Robertson II* and *Shirley*, prosecuted indirect criminal contempts of civil protection orders himself, the court of appeals clarified how these cases may and may not proceed.[42] In *In re Jackson*, the court not only held that a judge may not act in the capacity of a prosecutor in a protection order contempt case but also that a judge must both initially seek out a public prosecutor and safeguard the due process rights of the defendant in these cases.[43] Regarding a public prosecutor, *Jackson*—citing *Young* extensively—specifically noted that if neither the United States Attorney's Office nor the Office the Attorney General decided to prosecute a case, the judge may appoint a private prosecutor but that prosecutor must be a disinterested representative of the United States.[44] The court specifically noted that a survivor's private attorney should not be appointed to this role.[45] In addition the right to a neutral prosecutor, the court of appeals expressed the importance of the defendant in protection order contempt cases being afforded other elements of due process, including notice of the underlying violations, an impartial judge, a lawyer, and the right to confront the prosecution's witnesses.[46] Reiterating its focus on defendants' due process rights in intrafamily contempt cases, shortly after *Jackson* the court of appeals reversed a contempt conviction on the grounds that the defendant did not have proper notice that his drug use could trigger a contempt proceeding.[47]

In 2013, the court of appeals reversed a pre-*Robertson II* contempt conviction in which the defendant was prosecuted by a *pro se*

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[41] *Id.* at 512 (citing Adams v. Ferreira, 741 A.2d 1046, 1047 (D.C. 1999)).
[42] *In re* Jackson, 51 A.3d 529 (D.C. 2012).
[43] *Id.* at 531.
[44] *Id.* at 539.
[45] *Id.* at 540.
[46] *Id.* at 541.
[47] *In re* Jones, 51 A.3d 1290 (D.C. 2012).

beneficiary of a protection order.[48] In order to reverse the conviction in *In re Taylor*, the court first found that the prosecution in this case was so egregious that it satisfied the court's test for plain error.[49] The court found that this process violated both *Robertson II*'s requirement that the case be brought on behalf of the sovereign and *Jackson*'s mandate that the case be prosecuted by a disinterred attorney.[50] Because the prosecutor in *Taylor* was a *pro se* individual who received guidance from the judge, the trial court judge also violated *Jackson*'s prohibition against active judicial involvement in the prosecution of criminal defendants.[51] Although the court noted that the decision to exercise its discretion and reverse the conviction was specifically tied to the facts in this case,[52] such open-ended language refers only to whether the court would reverse previously decided cases involving *pro se* private prosecutions. The court of appeals' discussion of *Robertson II* and *Jackson* leave no doubt that the era of *pro se* prosecutions and prosecutions by interested counsel has ended.

CONCLUSION

At the trial court level, criminal contempt prosecutions for violations of civil protection orders have become homogenized. While a *pro se* individual can still file a motion for criminal contempt, the trial court judge will immediately ascertain whether the Office of the Attorney General or the United States Attorney's Office will prosecute the contempt allegations. If either agency decides to pursue the contempt charges, the case proceeds as a criminal matter. If both agencies decline to prosecute (for substantive or discretionary reasons or due to a conflict of interest),[53] the trial court may then either dismiss the contempt charges or appoint a special prosecutor. In the limited

[48] *In re* Taylor, 73 A.3d 85 (D.C. 2013).

[49] *Id.* at 89–90.

[50] *Id.* at 98.

[51] *Id.*

[52] *Id.* at 104.

[53] It is worth underscoring that, while some decisions by government agencies not to prosecute are based on the merits of the allegations, other decisions are made based on considerations including conflicts of interest, available resources, and challenges with investigating the claims. While a decision based on the merits of the allegations after a thorough investigation does not require further review by a private prosecutor, having more information about the nature of the government's decision may aid a judge in determining whether to appoint a private prosecutor to investigate criminal contempt allegations that have been denied by the government.

time since the contempt jurisprudence has resettled, trial court judges have not yet begun to appoint private prosecutors to represent the sovereign with any regularity. Although a local law firm has agreed to accept appointments for private prosecutions in domestic violence contempt proceedings,[54] this resource is not consistently utilized—rather, judges are often dismissing contempt allegations once government agencies have opted not to prosecute. Some survivors are left unable to enforce their civil protection orders.

As the D.C. Council has continued to make the civil protection order increasingly accessible and far-reaching, the courts have witnessed an influx of both petitioners seeking protection orders and beneficiaries of orders seeking enforcement. Rather than mirror the D.C. Council's expansive approach to providing access to the protection order system, the court of appeals has taken a limiting approach in determining how violations of these orders may be prosecuted. While the trial court is exploring solutions to this mismatch, some survivors whose protection orders have been violated are unable to have their orders enforced and their abusive partners remain unaccountable.

[54] José López, Associate Judge, D.C. Superior Court, Domestic Violence Division, District of Columbia Bench Bar Dialogue (June 10, 2014) (stating that a private law firm has been trained to accept private prosecution appointments).