

MONITORING COMMITTEE ON THE ESTABLISHMENT OF THE ORDER OF PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE

Coordinated protocol between the criminal and civil jurisdictional orders for the victims of domestic violence



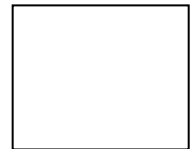
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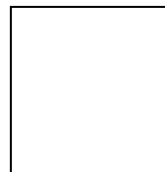
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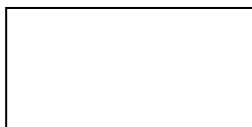
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PREAMBLE

- I -

The Recommendations of the Ministerial Committee of the Council of Europe (2002) 5, of April 31, on the protection of women against domestic violence, refers to the necessity to revise the national policies in order to guarantee the maximum security and protection of the victims (section 3-a), where the importance to guarantee a level of cooperation between all involved institutions was addressed (section 58-e).

The Law 27/2003, of July 31, creates a new instrument aimed at strengthening the protection of the victims of domestic violence through a coordinated and agile action. A greater efficacy of the Order of Protection depends on the coordination of all those that in any way devote efforts to safeguard the rights and legitimate interests of victims living in a vulnerable situation.

Aware of this reality, the second paragraph of the Second Additional Disposition of the Law 27/03 clarifies that it's competency of the Monitoring Commission the "drafting of the far-reaching Protocols for the implementation of the order of protection regulated in this Law. The formulation of adequate coordination mechanisms would guarantee the effectiveness of the protection and security measures adopted by the Courts and Tribunals and by the relevant Public Agencies." On the other hand, the General Protocol for the Establishment of the Order of Protection for Victims of Domestic Violence, as approved by the Monitoring Commission, addresses the relevance of coordination between the criminal and civil jurisdictions.

- II -

The coordination between both jurisdictional orders aims at providing a legal framework to the victim for protection, avoiding the existence of contradicting resolutions; providing the Civil Court an adequate understanding of the actions executed by the Magistrates' Court in domestic violence cases; favouring the adoption of those most suitable rulings. It also facilitates that the corresponding Civil Court could adopt, within a set period the resolutions' ratification, modification or the uplifting of the civil measures announced in an Order of Protection (2nd paragraph of the section 7th in the article 544 of the Criminal Prosecution Law).

An initial component in coordinating jurisdictions consists of the speedy understanding of judicial ruling or resolutions announced in relation to the same victim or familial nucleus, for which seems relevant the proper functioning of the Central Registry for the Victims of Domestic Violence, envisaged in the section 10 of the article 544 of the Criminal Prosecution Law.

- III -

The present Protocol recognizes that the judicial body, aware of the civil process especially when it is a specialized Court on family affairs whether in the testimonial stage or during a Court ruling, is in a better position than the criminal body to adopt civil measures such as the use and enjoyment of the residence, the decision on child custody regime, visitation rights, communication and coexistence with the children and the alimony regime. As such, the actions of the Criminal Court that determines civil measures as part of an Order of Protection is based on the existence of urgent reasons based on an objective situation of risk for the victim that requires the adoption of some of the protection measures" regulated in the article 544 ter of the Criminal Prosecution Law.

- IV -

A considerable amount of criteria and principles of the present Protocol are set to improve the access of information to the victim, mitigating the effects of the so called secondary victimization. Therefore, aspects of section 9 of the article 544 of the Criminal Prosecution Law are not only explained in-depth, but are also relevant for the effective application of the Charter of Citizens Rights within the Judiciary. The Charter was solemnly approved by the plenary of Congress on April 16, 2002 with the unanimity of all Parliamentary Groups.

- V -

Considering the legal assistance is the milestones for the effectiveness of the right to legal defence (article 24 of the Constitution) and to due process (article 9 of the European Covenant of Human Rights), the public authorities should establish the conditions to guarantee such legal aid for the victim and for the accused. This Protocol refers to different components aimed to contribute to the effectiveness of the right to legal defence through attorneys' legal assistance, especially in those cases where civil measures have been requested.

- VI -

Subsequently, the Monitoring Commission for the Establishment of the Order of Protection set the following criteria for the coordination between the criminal and civil jurisdictional orders with the goal of properly protecting the victims of domestic violence.

FIRST.- THE ATTORNEY GENERAL

The General Attorney is called to perform a main role in the coordination between the civil and criminal jurisdictions, and between these jurisdictions with agencies offering social assistance and protection. This last function is especially important in those cases where minors are under threat or at risk of abandonment.

To this effect, it is important to promote within each Attorney General's Office, the coordination between the Courts on duty, those working in functions related to the protection of children and those ascribed to the Civil Court with expertise in family cases.

SECOND.- LEGAL ASSISTANCE

In order to contribute with greater effect to the right to legal defense, consider the following convenient tips:

- a) The specialization in Family Law of the attorney assisting the victim of domestic violence in conformity with the stipulations in sections 40 and 41 of the Citizens Rights Charter.
- b) The assistance to the victim by the attorney during the development of the hearing on the protection order, especially when civil measures will be requested.
- c) The attorney intervening in the hearing to announce the order of protection on the phase of the testimonies as in the execution and in the successive incidents.

In conformity to the aspects set out through legislation, the hearing for the adoption of the order of protection could be held even if the victim has not been assisted by an attorney, although the legal aid will contribute with greater efficiency to the right to legal representation.

The importance of the use of the article 6.3 of the Law 1/1996 is stressed, which regulates the Free of Charge Legal Assistance in order to guarantee the right to legal defence and the equality of conditions between both parts in a legal process,

also the instrument envisaged in the article 21 of the same Law in order to accelerate the Court-appointing of the lawyer or clerk.

The represented institutions of this Commission commit to undertake the necessary steps in relation to the relevant Public Administrations (the Judiciary, Autonomous Communities with competence on subjects of Justice and Bar Associations) for the formation and impulse of duty and court-appointing shifts specialized in domestic violence, as well as to finance the resources needed for such task.

THIRD.- COMMON GROUNDS

1.- The Court on duty could utilize the services of the Check-In Point (Punto de Encuentro) or other assigned space, when it is strictly necessary for the appropriate meeting as part of the custody regime, such as visits, chats and staying with the children; all committed to the execution of the civil measures determined as part of an order of protection.

2.- In the judicial districts with various Check-In Points or similar spaces, the Court on duty will attempt to use the services of the Point closer to the home of the minor.

3.- The institutions represented in this Commission will commit to begin the necessary procedures and steps with the relevant Public Agencies for the creation of new Check-In Points within those judicial districts where they are necessary, or for the improvement of the existent ones.

4.- In those jurisdictions where necessary, a Protocol could be set in place in order to regulate the relations between Check-In Points (“Puntos de Encuentro”) and the Court. This request should be proposed by the corresponding Board of Judges and approved by the Supreme Court Governmental Courtroom. The Judicial Powers’ General Council will be notified of this request and the subsequent process.

FOURTH. –ATTENTION OFFICES FOR VICTIMS AND THE RIGHT TO ACCESS TO INFORMATION

It is necessary to improve the mechanisms directed at offering the victim the information about the requirements, the process and the effects of the order of protection in a clear way. In addition, information on the victims' role during the criminal case and its status should be provided.

Considering the important role of the Attention Offices for Victims as recognized by the General Protocol of July 2003, and being aware of the dispositions in section 22 of the Charter of Citizens Rights before the Judicial System, it is important to regulate the relations between the aforementioned Offices and those judicial, criminal, and civil bodies involved in the execution of an order of protection.

FIFTH.- MATTERS AFFECTING THE CRIMINAL COURT WHEN DICTATING CIVIL MEASURES AS PART OF AN ORDER OF PROTECTION.

5.1.- Testimonies of minor sons and daughters during Court hearings

When the minor sons and daughters are older than twelve (12) years old, or have evident judgment, they could provide valuable information about the family situation and on the domestic violence incidents in the household. In such cases, the Court on duty would evaluate if proceeds to listen to these testimonies, according to the article 9 of the Organic Law 1/1996 of January 15 in the articles 92.2^o of the Civil Code and 770.4^o of the Criminal Prosecution Law, and in the section 27 of the Charter of Citizens Rights before the Judicial System.

The testimony of the minor, if appropriate, will be required considering his/her situation or developmental challenges and ensuring that minor does not go to Court unnecessarily. Other ways in which the presence of minors can be facilitated is through the use of communication resources such as closed circuit television, videoconferences, etc. (item 26 of the Charter of Citizens before the Justice System). Likewise, other similar measures should be adopted to avoid the contact or confrontation between the aggressor and the victim, her children and other family members (third paragraph of item four of article 544 in the Law of Criminal Prosecution).

5.2. –The protection of the victim during the processing of the order of protection: the precautionary measure of protection.

According to the last subsection of article 544 ter. 4,4^o “the Examining Magistrates' Court will be able to adopt at any time during the evolution of the case the precautionary measures envisioned in the article 544 bis”.

It is indispensable to highlight the important function that the application of precautionary measures of protection could perform as envisioned in the article 544 bis of the Criminal Prosecution Law in order to protect the victim during the processing of the order of protection. The precautionary measures of protection could be applied at any time from the beginning of the criminal prosecution to the passing of the committal announced on the aforementioned order.

On the other hand, the measures in articles 544 bis of the Criminal Prosecution Law could be effective in giving protection to the victim in those cases in which the hearing for the adoption of the protection order cannot be held after being scheduled because the aggressor has not been located.

5.3. – Provision of food

1. – The establishment of food provision entails important protection effects for the victim and the family in cases of domestic violence.

2. –For the adoption of measures of civil nature related to the provision of food, it is important to facilitate the Court on duty the quick and expedited access to information on the financial ability of the family, especially through databases or information and communications technology. It will be appropriate to establish new agreements or other legal mechanisms or the improvement of the ones currently in place¹.

¹ The Agreements signed by the General Council of the Judicial Power (“Consejo General del Poder Judicial”- CGPJ-) currently in effect are the following:

??, * The Agreement of Collaboration of June 27, 2003 between the General Council of the Judicial Power and the Department of Justice, Employment and Social Security of the Basque Country, the Treasure of Social Security, the National Institute of Social Security and Social Institute of the Navy on the disclosure of data Tribunals and Courts.

3. – Eligibility requirement charts for the allocation of food supply is also used and disseminated by the Court on duty and by the other judiciary instances.

5.4.- Information for the victim

5.4.1.- Offering of actions: complementary roles

?? * The Agreement of Collaboration between the General Council of Judicial Power and the National Institute of Statistics in subjects of disclosure of data and personal information to Courts and Tribunals June 18, 2003.

?? * The Agreement of Collaboration between the General Council of Judicial Power, the Advisory Board of the Presidency and Technological Innovation of the Government of the Autonomous Community of Canary Islands, The General Treasury of the Social Security, The National Institute of Social Security and the Social Institute of the Navy on disclosure of data to Tribunals and Courts of March 17, 2003.

?? * The Agreement of Collaboration of March 17, 2003 between the General Council of Judicial Power, the Ministry of Justice, Interior and Local Administration of the Autonomous Government of Galicia, the General Treasury of Social Security, the National Institute of the Social Security and the Social Institute of the Navy on the disclosure of data to Courts and Tribunals.

?? * The Agreement of Collaboration March 17, 2003 between the General Council of Judicial Power, the Ministry of the Presidency, Justice and the Interior of the Government of Navarra, the General Treasury of Social Security, the National Institute of Social Security and the National Institute of Social Security and the Social Institute of the Navy on the disclosure of data to Courts and Tribunals.

?? * The Agreement of Collaboration of March 17, 2003 between the General Council of Judicial Power, the General Treasury of Social Security, the National Institute of Social Security and the Social Institute of the Navy on the disclosure of data to Courts and Tribunals.

?? * The Agreement of December 13, 2002 between the City Hall of Palma and the General Council of Judicial Power for the consultation and publishing of personal data through the Judicial Offices of the Courts of Palma to incorporate the personal information to those judicial proceedings requiring such information.

?? * Addendum of May 17, 2001 to the Agreement enacted by the General Directive of Registries and the Notaries and the General Direction of Traffic on the interconnection of information technology of the Registry of Motor Vehicles and the Registry of Personal Assets of May 10, 2000.

?? * Agreement signed in May 10, 2000 between the General Directive of Traffic and the General Directive of the Registries and the Notaries on the interconnection of information technology of the Registry of Motor Vehicles and the Registry of Personal Assets.

?? * The Agreement Framework of Collaboration of July 14, 1998 between the General Directive of Traffic and the General Council of the Judicial Power to expedite and streamline communications.

?? * The Agreement of Collaboration of May 27, 1998 between the General Council of the Judicial Power and the Ministry of the Economy and Internal Revenues in matters of disclosure of taxes information by the State Agency of Revenue Administration for Courts and Tribunals.

When the victim soliciting the order of protection appears in front of the Magistrates' Court on duty, the first action will be to assure that the needed information about the order of protection and the contents of article 776 of the Criminal Prosecution Law is provided in a clear and simple way. Secondly, the victim will be asked if she wants to solicit measure of civil nature explained in item 7, article 544 of the Criminal Prosecution Law. Brochures with information on the workings and contact information of these offices will be provided in those judicial jurisdictions where there are Attention Offices for Victims.

If the victim has the intention of requesting civil measures, the Court will inform immediately and before the hearing begins following the following steps:

- a) The victim will be asked for the existence of any previous civil case where civil measures had to be adopted for the victim or the family. If the victim affirms that such a case existed, the data on that case will be fully reviewed.
- b) The victim should be asked if needs a pro bono lawyer. he victim will be advised of the option of being represented by a pro bono lawyer and the lawyer should be assigned to a case when necessary according to the established guidelines and procedures as stipulated by the article 6.3 of the Law 1/1996 January 10, about the legal aide free of cost in order to guarantee the equal access to justice.

5.4.2.- Notification of the ruling on an order of protection

Once the ruling is announced, the Court will proceed to notify the parties and the Attorney Generals' Office.

While notifying the victim of the ruling of the order of protection containing civil measures according to item 7 of the article 544 ter of the Criminal Prosecution Law the victim will be informed in a clear and simple way of the following aspects of the ruling:

- a) The content of the ruling, explaining the characteristics of the concrete measures ordered by the Court.
- b) That the civil measures contained in the order of protection will be enacted for 30 days, proceeding to explain the rest of the contents of the second

paragraph of the subsection 7 of article 544 ter of the Law of Criminal Prosecution.

The Office of Attention to Victims will preferably execute the actions described in the latter in those jurisdictions and hours they are on duty without being detrimental to the notification of the ruling by the judicial body announcing the order of protection.

3.-The judicial body announcing the order of protection should remit a copy of the resolution to the Attention Office for Victims as soon as possible. All these without hindering the announcement of the ruling to the corresponding Point established to the effects of the subsection 8 in article 544 ter of the Criminal Prosecution Law or the notification to the Judicial Police.

4.- All modifications to the procedural and penal situation of the aggressor will be communicated to the victim and the Judicial Police.

SIXTH.- THE PROTECTION OF THE VICTIM BY THE CIVIL JURISDICTIONAL ORDER

6.1.- Ratification, modification or lifting of civil measures by the Family or Magistrates' Court

As mentioned in article 544 ter.7.2 LECR, the civil measures contained in the order of protection will span 30 days. If within this period the victim or legal representative files a familial case in the civil jurisdiction, the measures in place will remain for 30 days after filing the lawsuit. In this sense, the measures should be ratified, modified or lifted by the relevant Magistrates' Court.

Within a case of order of protection, and once the lawsuit is referred for ratification, modification or lifting of the civil measures announced, the Civil Court will execute the previous or ongoing precautionary proceeding for the relevant civil suit.

6.2.- Actions of the Civil or Family Court for the protection of the victims of domestic violence

6.2.1.- Role of the jurisdictional civil order

The important role of Civil and Family Courts is well-known for the prevention of violence within the family, and to contribute to the protection of the victims of domestic violence.

6.2.2.- When the Civil Court is aware of a domestic violence case

When the Civil Court knows of a family case and has suspicions that this might be a possible case of domestic violence, it should follow these steps:

- a) The victim will be informed of the requisites, content and workings of the order of protection. Also the order of protection request form, contact information and general guidelines of the nearest Office for the Attention of Victims within the appropriate jurisdiction should be provided to the victim.
- b) Without hindering the actions of the Civil Court, and according to the application of the Civil Prosecution Law and the article 158 of the Civil Court, the Civil Court will send the testimonies of relevant individuals to the Magistrates' Court in order to inform about the domestic violence case. This procedure should be executed following the guidelines adapted to the aspects of the Instruction 3/2003 of April 9 of the Plenary of the General Council of the Judicial Power.
- c) In all cases, the Attorney General will instruct on the corresponding actions to be undertaken by the criminal judiciary body.

Without detriment of the competencies of the Magistrates' Courts under the article 544 ter of the Criminal Prosecution Law, and when the victim submits the order of protection request to the Civil Court to be instructed about the matter, the following steps should be followed:

- a) In these cases, the civil judicial body will immediately forward the information to the relevant Magistrates' Court on duty. Afterwards, the relevant Magistrates' Court will send the testimony of the decision ruled on the requested order of protection, and of others that might be relevant to the workings of the Court.

- b) In all cases, the Civil Court will be able to adopt measures under article 771.2 of the Civil Prosecution Law, or articles 773 or 774 of the aforementioned Law.

SEVENTH. – COORNIDATION BETWEEN THE JUDICIAL, CRIMINAL AND CIVIL BODIES

In this subsection, specific criteria and guidelines are explained that might be helpful in the execution of the activities without detriment of the competencies of the General Council for the Judicial Power and other member institutions of the Monitoring Committee.

7.1.- Modification of the measures previously agreed by the civil judicial body

1. – With a broader scope and according to item 7 of article 544 ter of the Criminal Prosecution Law, the criminal body ruling on an order of protection will not be able to modify civil measures previously agreed by a jurisdictional body and without detriment of the consequences of such penal measures over the civil measures.

2.-According to item 7 of article 544 ter of the Criminal Prosecution Law, the Criminal Court ruling on an order of protection will be able to modify or complement measures previously adopted for the protection of minors by the Civil Court under article 158 of the Civil Code. As a norm, the criminal body will specify in the ruling that such measures are temporary and without detriment of the determination of the relevant civil judicial body in charge of working on the case.

If this is the case, the judicial body that will set the order of protection should remit to the jurisdictional civil body knowing the basis of the case as stated in the Order of Protection Request Form. This order of protection notice should clearly state the following: “Urgent: Domestic Violence”.

The mentioned testimony should be delivered to the civil body the next working day following the date when the order of protection was granted. If this protocol becomes impossible because the Court is in another jurisdiction or for other reasons, the penal body will remit by fax or by any other information and

communications technology device without detriment of sending the testimony via regular mail.

3.- Once the testimony is received by the civil judicial body, this body will inform the parties involved and the Attorney General the next working day, which could instruct the parties the next appropriate procedural steps without hindering its own role as a civil body according to article 158 of the Civil Code.

7.2.- Inexistence of previous civil proceedings

1.- The filling of a lawsuit requesting the ratification, modification or lifting of civil measures could be done in the Office of the Dean or other Common Service made for the expedited processing of civil suits.

2.- In those judicial jurisdictions with Magistrates' Court and Courts on duty, the guidelines for task sharing could assigned the competence to ratify, modify or lift the civil measures to the Court that announced the order of protection when it was on duty.

3.- The Deans' Office and the Common Services that could be enacted to expedite the processing of civil suits, will urgently prioritize the actions on this kind of situation. The procedure paperwork should be stamped with a distinctive mark with the statement "Urgent: Domestic Violence".

4.- The civil judges will prioritize the processing of domestic violence cases, strictly following strictly the deadlines imposed by current legislation.

5.- The Monitoring Commission of the Order of Protection will be consulted for the adoption of guidelines to further develop relevant legal instruments that could be put into effect for the expedited processing of civil procedures.

EIGHT.- DEVELOPMENT THROUGH LEGAL INSTRUMENTS AND COLLABORATION PROTOCOLS

The principles and criterion explained in this Protocol could be further developed through legal instruments enabled by each of the institutions and public administrations acting from its specific competences.

Likewise, protocols of collaboration could be established within a jurisdiction or at the Autonomous Community level. These protocols should aim at improving the application of the order of protection when the institutions and other public bodies mentioned in article 47.4,1 of the Guidelines of the General Council of the Judicial Power 5/1995 of June 7, are in charge of offering social or health services within the framework enacted by this Protocol.