



DOMESTIC VIOLENCE FIREARMS PROHIBITION

JUDICIAL & COURT SERVICES: TECHNICAL ASSISTANCE and RESOURCES for OHIO COURTS

FEDERAL AUTHORITY

The 2005 Reauthorization of the Violence Against Women Act (VAWA) requires all jurisdictions receiving VAWA monies to certify that judicial administrative policies and practices include notification to domestic violence offenders of the requirements delineated in 18 USC § 922(g). Failure to certify could result in non-eligibility to receive these monies.

Specifically, 18 USC § 922(g) identifies two instances when the firearms prohibition is triggered due to domestic violence. Pursuant to 18 USC § 922(g)(8), a person subject to a qualifying protection order is prohibited from shipping, transporting, possessing or purchasing any firearm, when the protected party is the person's intimate partner or child of such intimate partner or person. This prohibition stays in place for the duration of the qualifying protection order. The other instance is cited under 18 USC § 922(g)(9), which prohibits a person convicted of a misdemeanor crime of domestic violence from shipping, transporting, possessing or purchasing any firearm or ammunition for life.

For the purpose of clarifying who is an intimate partner in the context of firearms disability, 18 USC § 921(a)(32) defines an "intimate partner," with respect to a person, as any of the following:

- **A spouse of the person**
- **A former spouse of the person**
- **An individual who is a parent of a child of the person, or**
- **An individual who cohabitates or has cohabited with the person.**

A "misdemeanor crime of domestic violence" is defined in 18 USC § 921(a)(33)(A) and includes two critical components. First, the crime must be a recognizable "misdemeanor under federal, state, or tribal law."¹ This component recognizes that most criminal acts of intimate partner violence are not charged as felonies, but most often are charged as misdemeanors. Further, Congress acknowledged in this statute that intimate partner violence escalates in frequency and severity and access to firearms increases the possibility of lethality. The other critical and controversial component is the description of a "crime of domestic violence." The federal code states that the misdemeanor crime of domestic violence

*"has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."*²

Clearly, this component has two aspects: a violent act involving "the use or attempted use of physical force or the threatened use of a deadly weapon" and the commission of the violent act by a person who has a specified domestic relationship with the victim. The United States Supreme Court in *United States v. Hayes*, 555 U. S. 415 (2009), examined the question whether the predicate offense must include as a specific element the existence of a domestic relationship between the offender and victim so that the firearm disability under 18 USC § 922(g)(9) would apply. The Court held that the predicate offense need not specify the domestic relationship as a discrete element of the offense for the firearm disability to

apply under 18 USC § 922 (g)(9).³ In other word, all the prosecution must prove is the occurrence of a violent offense where there is a specified domestic relationship between the offender and victim.⁴

APPLICABILITY TO STATE LAW

To determine whether the firearms disability applies to a particular case, there must exist a qualified domestic relationship between the parties — defendant/respondent and victim/petitioner. In Ohio, the relevant domestic relationships are found under the umbrella of “family or household member” as defined in sections 2919.25 and 3113.31 of the Ohio Revised Code. As defined by statute, “family or household member” means:

- **A spouse, a person living as a spouse, or a former spouse of the offender**
- **A parent or a child of the offender, or another person related by consanguinity or affinity to the offender**
- **A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender, or**
- **The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.**

Although Ohio’s concept of “family or household member” has been well-litigated to clarify the relationships and nuances in this term of art, it does not align easily with much of the terminology used in the federal code in the context of domestic violence and firearms disability. For example, the federal code includes such relationships as: an intimate partner; a 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; and a person similarly situated to a spouse, parent, or guardian of the victim. These terms have no legal significance in Ohio.

Thus, in reconciling state and federal laws for the purpose of providing appropriate notice to persons subject to the firearms disability, the notice requirement applies only in those cases where the victim is related to the offender as follows:

- **A spouse, former spouse, or person living as a spouse of the offender**
- **A child of the offender**
- **A child of a spouse, person living as a spouse, or former spouse of the offender, or**
- **The natural parent of any child of whom the offender is the other natural parent or the putative natural parent.**

Clearly excluded from the qualifying family or household member relationships are instances where the offender is the child (adult or minor) of the victim or other family or household relationships, not described above, asserted by affinity or consanguinity.



WHAT IS A QUALIFYING PROTECTION ORDER?

In Ohio, three types of protection may be qualifying protection orders for the purposes of firearms disability within the context of domestic violence. These are domestic violence temporary protection orders (ORC § 2919.26), domestic violence civil protection orders (ORC § 3113.31), and in some instances civil stalking and sexually oriented offenses protection orders (ORC § 2903.214). *Ex parte* protection orders are not qualifying protection orders,

because notice was not provided to the offender, nor did the offender have an opportunity to be heard.

Civil stalking or sexually oriented offenses protection orders, pursuant to ORC § 2903.214, are qualifying protection orders for the purpose of judicial notice regarding firearms disability only in those cases where a qualifying family or household member relationship is established. A person subject to a protection order under this section where the person is not family or a household member is not firearms disqualified due to domestic violence.

JUDICIAL NOTICE OF FIREARMS DISABILITY

To apply federal law to Ohio's proceedings, the Ohio Revised Code requires courts to provide oral or written notice about firearms disability to offenders in two instances — those who are subject to a qualifying protection order and those who may be convicted of a misdemeanor offense of violence against a qualifying family or household member.

The Supreme Court of Ohio included the firearms disability notice in the warning pages — Sup. R. Forms 10.01-G and 10.03-H — to be attached to the corresponding protection order. The judicial notice of firearms disability requirement is separate and distinct to the court's assessment and determination whether the offender must surrender any deadly weapons, including firearms, to the designated law enforcement agency. Even in those instances where the relationship of the offender is not one of a qualifying family or household member, the court may determine that the safety of the protected party and community are at risk by the offender's continued possession of a deadly weapon. In such instances, the court is in its right to order any firearms to be surrendered to law enforcement.

In criminal proceedings, state law appears to suggest that the firearms disability notice must be provided during arraignment.⁵ However, federal law is silent on this particular point. The Supreme Court of Ohio has promulgated Sup. R. Form 10.04-A to provide written notice regarding firearms disability to a person facing a possible conviction of a misdemeanor offense of violence against a qualifying family or household



member. This form is applicable and relevant in those instances where the court does not provide oral notice.

Although the Ohio Revised Code and Rules of Superintendence are clear that notice must be provided to defendants facing a misdemeanor conviction due to an offense of violence against a qualifying family or household member, failure to provide said notice is not a defense to vacate the defendant's plea.⁶

The US Supreme Court's decision in *Hayes* clarified the meaning of "crime of domestic violence." For the purpose of firearms disqualification, a crime of domestic violence would appear not to be limited to a charge of domestic violence under ORC § 2919.25, but it indeed refers to any misdemeanor offense of violence⁷ against a qualifying family or household member. Furthermore, ORC § 2943.033, which directs criminal courts to provide judicial firearms disability notices in relevant cases, makes reference to "offenses of violence" in line with the *Hayes* decision. If the offender's and victim's relationship is not evident, this may require the court to inquire about the existence of relevant relationships to assess the appropriateness of providing the judicial notice.

Lastly, because federal and state law requires notice must be given on two separate instances — upon the issuance of a qualifying protection order and prior to conviction of a misdemeanor crime of domestic violence — a criminal court issuing a domestic violence temporary protection order at arraignment cannot substitute the notice required for the issuance of a protection order for the one to be provided prior to the a conviction of a misdemeanor offense of violence.⁸ Although the net effect of both notices is to advise the defendant about the federal firearms disability, the relative impact of each notice on a person's life is distinct. Therefore, the notices must be treated and given individually.

IMPLICATIONS FOR COURTS

Courts have a duty to provide notice to offenders regarding their possible firearms disability.⁹ This duty does not extend to conferring with the offender about possible applicable exception nor does it include explaining the implications of the notice to the offender. Although the enforcement of the firearms disability falls squarely on the FBI, the court's involvement in providing due notice to domestic violence offenders can have a significant impact in the community's safety.

Upon the expiration of the protection order, a person who has been subject to a protection order may motion the court to return any firearm confiscated as a result of the protection order. The court is well-advised to require law enforcement to conduct a thorough background check to ascertain no impediments exist to grant such an order. Law enforcement's background check should not be limited to ascertaining convictions under ORC § 2919.25 or other intuitive prohibition, but also include checks on convictions for an offense of violence where the qualifying family or household member relationship is established.¹⁰ Because the latter is an important part of the background check to determine the person's eligibility to have any firearms returned, the court should consider instituting local procedures to make readily identifiable the existence of the qualifying family or household member relationship in the judgment entry or other court documents consulted in the process of a background check.

SUPREME COURT DOMESTIC VIOLENCE PROGRAM

Recognizing the importance of effective and sound domestic violence practices from the judiciary, the Supreme Court of Ohio established the Domestic Violence Program within its Judicial & Court Services Division in 2007.

The Supreme Court Domestic Violence Program:

- *Promotes coordination and communication among courts that issue domestic violence protection orders and other relevant orders*
- *Supports standard domestic violence and stalking protection order forms and practices*
- *Disseminates cutting-edge domestic violence practices, policies and procedures*
- *Tracks trends in domestic violence and stalking cases*
- *Develops trainings and other educational opportunities to highlight current trends in the domestic violence field.*

The Domestic Violence Program is supported by the Supreme Court Advisory Committee on Domestic Violence. For more information, contact the Supreme Court of Ohio Domestic Violence Program at:

614.387.9408 or

www.supremecourt.ohio.gov/JCS/domesticViolence/.

ENDNOTES

- 1 18 USC § 921(a)(33)(A)(i)
- 2 18 USC § 921(a)(33)(A)(ii)
- 3 US v. Hayes, 555 U.S. 415, 4-5 (2009)
- 4 Ibid.
- 5 ORC § 2943.033(C)
- 6 ORC § 2943.033(C)
- 7 ORC § 2901.01(A)(9)
- 8 ORC § 2943.033(C); 18 USC §§ 922(g)(8)-(9)
- 9 ORC §§ 2943.033(C), 2903.214(F2), and 3113.31(F)(2)
- 10 See US v. Hayes, 555 U.S. 415, 4-5 (2009)