

Honorable Wendy Million
Tucson City Court
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Chair, Committee on the Impact
of Domestic Violence and the Courts

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)
)
PETITION FOR ADOPTION) Supreme Court No. R-15-0010
OF AMENDMENTS TO THE)
ARIZONA RULES OF PROTECTIVE) **Reply in Opposition to Comment**
ORDER PROCEDURE AND THE) **Filed by Karen Duckworth-Barnes**
ARIZONA RULES OF FAMILY LAW)
PROCEDURE)
_____)

The Committee on the Impact of Domestic Violence and the Courts (CIDVC), by a consensus of its members, has authorized the Honorable Wendy A. Million, CIDVC chair, to file this reply to a comment to CIDVC’s Petition No. R-15-0010.

DISCUSSION

CIDVC does not support this commenter’s recommendations. Adopting these suggestions would further intimidate victims who are already apprehensive and fearful, quite possibly deterring them from seeking assistance from the courts. Discouraging a person from speaking up by issuing prefatory and stern warnings of

dire consequences if the person's evidence is not sustained in a courtroom would have a chilling effect.

The specter of false allegations in protective orders to gain advantage in Title 25 family law cases or other proceedings is raised in this comment. While it is not inconceivable that a litigant could attempt to do this, the Rules of Protective Order Procedure are not the appropriate place to sanction this behavior.

The Rules of Protective Order Procedure are exactly that—*procedural* rules that are narrowly drawn to address only the issuance, hearing, and service of protective orders. The rules do not confer on the court any jurisdiction over either party for the purposes of determining legal decision-making, parenting time, or other determinations appropriate for a family law court.

The commenter focuses on the Comment to Rule 5(b)(1), which reads:

A protective order must never be used as a way to modify, amend, affect or diminish a parent's rights to legal decision-making or parenting time as previously granted in a legal-decision making decree or parenting time order from a court of competent jurisdiction ... unless the judicial officer makes a finding (that the child was harmed or involved in the domestic violence).

The quoted language is a Comment, not a court rule. Comments to rules are intended to provide useful cautionary or explanatory information to judicial officers. Comments are not legal warnings to plaintiffs or additional legal requirements under the rules.

This proposal asks the judicial officer to make assumptions—that if the parties have a child together, the plaintiff must be trying to get an advantage in a family law matter, has manufactured allegations of abuse or violence, does not really fear the defendant, and is not a “true victim,” as labeled by the commenter.

The legal process, established by statute, is designed to afford protection to “true victims” and for those persons “legitimately in fear of domestic violence.” A.R.S. § 13-3601 lists 30 acts, any one of which, when combined with one of the seven statutory relationships, equals domestic violence. For an *ex parte* Order of Protection, the statute establishes the reasonable cause standard that domestic violence *has* occurred or *may* occur. A victim is not required to have already endured abuse before being granted a protective order.

The rules set out procedures to be followed to aid a judicial officer in ascertaining whether there is a legal basis—reasonable cause—upon which to issue an *ex parte* protective order. For example, the rules require a plaintiff who is requesting a protective order to file a verified petition, to be placed under oath, and to be personally questioned by the judicial officer. If the plaintiff does not present sufficient evidence to establish reasonable cause, an order will not be issued.

If an order is issued, the law then provides due process to every defendant, with the right to a contested hearing on the order within 5 to 10 days of a request. In a contested hearing, the plaintiff bears the burden of proving the allegations in

the petition by a preponderance of the evidence. This is the typical standard of proof in a civil case, not a lesser burden created just for protective order proceedings. If the plaintiff cannot carry that burden, the court will dismiss the order. However, a decision to dismiss a protective order does not mean that the plaintiff made false allegations and is not a “true victim,” only that the allegations could not be substantiated by a preponderance of the evidence.

An unsubstantiated allegation is not necessarily a false allegation. But this proposal offers no guidance on how to determine whether an allegation is unsubstantiated—possibly true but unable to be confirmed or corroborated—or whether it is knowingly and intentionally false. The commenter suggests that the rules be amended to sanction a plaintiff if someone (an undesignated court or a person) finds that the allegations in the petition are false. This very remedy was proposed to the legislature in the 2014 session under SB1411, which failed.

This proposal also confuses the jurisdictional authority of municipal and justice courts with that of the superior court. In FY2014, Arizona courts issued 29,085 Orders of Protection. Of those orders—18,884 or 65 percent—were issued by limited jurisdiction courts, which have no authority over legal decision-making or parenting time issues.

A judicial officer in a limited jurisdiction court must find out whether there is a pending family court matter. If there is no pending family law case, the

plaintiff can file a protective order petition in any court. If there is a pending family law case, the limited jurisdiction court will refer the plaintiff to the superior court where the family law case was filed, unless there are exigent circumstances under which the limited jurisdiction court should issue the order.

Finally, the commenter asks that proposed Rule 39 be modified to include other costs of defending against allegations in the petition. Rule 39 allows the judicial officer to award costs and attorney fees related to the cost of action, meaning the costs directly related to obtaining the protective order or defending against it. The commenter seeks to broaden the scope of the Rules of Protective Order Procedure by including monetary awards for damages tangentially and speculatively incurred as a result of any unmeritorious claim.

CONCLUSION

For the reasons stated above, CIDVC respectfully asks the Court to grant CIDVC's Petition R-15-0010 without the commenter's suggestions.

Respectfully submitted this 24th day of June, 2015.

/s/ _____
Honorable Wendy A. Million
Magistrate, Tucson City Court