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SENATE BILL 474

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Linda M. Lopez

ENDORSED BY THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO DOMESTIC ABUSE; REVISING THE FAMILY VIOLENCE PROTECTION ACT; ALLOWING A MINOR TO FILE FOR OR BE RESTRAINED BY AN ORDER OF PROTECTION; REQUIRING PEACE OFFICERS TO ENFORCE ORDERS OF PROTECTION; REVISING STANDARDS AND PROCEDURES; EXPANDING DEFINITIONS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 40-13-2 NMSA 1978 (being Laws 1987, Chapter 286, Section 2, as amended) is amended to read:

"40-13-2. DEFINITIONS.--As used in the Family Violence Protection Act:

A. "continuing personal relationship" means a dating or intimate relationship;

B. "co-parents" means persons who have a child in

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1 common, regardless of whether they have been married or have
2 lived together at any time;

3 C. "court" means the district court of the judicial
4 district where an alleged victim of domestic abuse resides or
5 is found, where the alleged abuser lives or is found or where
6 the alleged abuse occurred;

7 D. "domestic abuse":

8 (1) means an incident of stalking or sexual
9 assault whether committed by a household member or not;

10 (2) means an incident by a household member
11 against another household member consisting of or resulting in:

12 (a) physical harm;

13 (b) severe emotional distress;

14 (c) bodily injury, battery or assault;

15 (d) a threat causing imminent fear of
16 bodily injury by any household member;

17 (e) criminal trespass;

18 (f) criminal damage to property or
19 damage to jointly owned or community property when done with
20 the intent to intimidate, threaten or harass;

21 (g) repeatedly driving by a residence or
22 work place;

23 (h) telephone harassment;

24 (i) harassment; [~~or~~]

25 (j) false imprisonment;

1 (k) interference with communications;

2 (1) larceny or deprivation of property
3 with the intent to intimidate, threaten or harass;

4 (m) cruelty to a domestic pet with the
5 intent to intimidate, threaten or harass; or

6 [(-j)] (n) harm or threatened harm to
7 children as set forth in this paragraph; and

8 (3) does not mean the use of force in self-
9 defense or the defense of another;

10 E. "household member" means a spouse, former
11 spouse, parent, present or former stepparent, present or former
12 parent-in-law, grandparent, grandparent-in-law, child,
13 stepchild, grandchild, co-parent of a child or a person with
14 whom the petitioner has had a continuing personal relationship.
15 Cohabitation is not necessary to be deemed a household member
16 for purposes of this section;

17 F. "minor" means a person under the age of
18 eighteen;

19 [F-] G. "mutual order of protection" means an order
20 of protection that includes provisions that protect both
21 parties;

22 [G-] H. "order of protection" means an injunction
23 or a restraining or other court order granted for the
24 protection of a victim of domestic abuse;

25 [H-] I. "protected party" means a person protected

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1 by an order of protection; and

2 [~~F.~~] J. "restrained party" means a person who is
3 restrained by an order of protection."

4 SECTION 2. Section 40-13-3 NMSA 1978 (being Laws 1987,
5 Chapter 286, Section 3, as amended) is amended to read:

6 "40-13-3. PETITION FOR ORDER OF PROTECTION--CONTENTS--
7 STANDARD FORMS.--

8 A. A victim of domestic abuse may petition the
9 court under the Family Violence Protection Act for an order of
10 protection.

11 B. The petition shall be made under oath [~~or shall~~
12 ~~be accompanied by a sworn affidavit~~] setting out specific facts
13 showing the alleged domestic abuse.

14 C. The petition shall state whether any other
15 domestic action is pending between the petitioner and the
16 respondent.

17 D. If any other domestic action is pending between
18 the petitioner and the respondent, the parties shall not be
19 compelled to mediate any aspect of the case arising from the
20 Family Violence Protection Act unless the court finds that
21 appropriate safeguards exist to protect each of the parties and
22 that both parties can fairly mediate with such safeguards.

23 E. An action brought under the Family Violence
24 Protection Act is independent of any [~~proceeding for annulment,~~
25 ~~separation or divorce~~] other domestic action between the

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1 parties.

2 F. Remedies granted pursuant to the Family Violence
3 Protection Act are in addition to and shall not limit other
4 civil or criminal remedies available to the parties.

5 G. Standard simplified petition forms with
6 instructions for completion shall be available to all parties.
7 Law enforcement agencies shall keep such forms and make them
8 available upon request to alleged victims of domestic abuse."

9 SECTION 3. Section 40-13-3.2 NMSA 1978 (being Laws 1999,
10 Chapter 142, Section 2, as amended) is amended to read:

11 "40-13-3.2. EX PARTE EMERGENCY ORDERS OF PROTECTION.--

12 A. The district court may issue an ex parte written
13 emergency order of protection when a law enforcement officer
14 [~~states~~] presents to the court in person, by telephone, [~~or~~
15 ~~via~~] by facsimile [~~and files a sworn written statement~~] or
16 other electronic method, a sworn petition setting forth the
17 need for an emergency order of protection and the court finds
18 [~~reasonable grounds~~] probable cause to believe that the alleged
19 victim or the alleged victim's child is in immediate danger of
20 domestic abuse following an incident of domestic abuse. The
21 [~~written statement~~] petition shall include the location and
22 telephone number of the alleged perpetrator, if known.

23 B. A law enforcement officer who receives an
24 emergency order of protection from the court, whether in
25 writing, by telephone, [~~or~~] by facsimile transmission [~~from the~~

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1 ~~court]~~ or by other electronic method, shall:

2 (1) if necessary, pursuant to the judge's oral
3 approval, write and sign the order on an approved form;

4 (2) if possible, immediately serve a signed
5 copy of the order on the restrained party and complete the
6 appropriate affidavit of service;

7 (3) immediately provide the protected party
8 with a signed copy of the order; and

9 (4) provide the original petition, order and
10 return of service to the court by the close of business on the
11 next judicial day.

12 C. The court may grant the following relief in an
13 emergency order of protection upon a probable cause finding
14 that domestic abuse has occurred:

15 (1) enjoin the restrained party from
16 threatening to commit or committing acts of domestic abuse
17 against the protected party or any designated household
18 members;

19 (2) enjoin the restrained party from any
20 contact with the protected party, including harassing,
21 telephoning, contacting or otherwise communicating with the
22 protected party; and

23 (3) grant temporary custody of any minor child
24 in common with the parties to the protected party, if
25 necessary.

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1 D. A district judge shall be available [~~as~~
2 ~~determined by~~] in each judicial district to [~~hear petitions~~
3 ~~for~~] issue emergency orders of protection.

4 E. An emergency order of protection expires
5 seventy-two hours after issuance or at the end of the next
6 [~~judicial~~] day that the district court is open, whichever [~~time~~
7 ~~is latest~~] is later. The expiration date shall be clearly
8 stated on the emergency order of protection.

9 F. A person may appeal the issuance of an emergency
10 order of protection to the court that issued the order. An
11 appeal may be heard as soon as the judicial day following the
12 issuance of the order.

13 G. Upon a proper petition, a district court may
14 issue a temporary order of protection that is based upon the
15 same incident of domestic abuse that was alleged in an
16 emergency order of protection.

17 H. Emergency orders of protection are enforceable
18 in the same manner as other orders of protection issued
19 pursuant to the provisions of the Family Violence Protection
20 Act."

21 SECTION 4. Section 40-13-4 NMSA 1978 (being Laws 1987,
22 Chapter 286, Section 4, as amended) is amended to read:

23 "40-13-4. TEMPORARY ORDER OF PROTECTION--HEARING--
24 DISMISSAL.--

25 A. Upon the filing of a petition for order of

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1 protection, the court shall:

2 (1) immediately [~~grant~~] issue an ex parte
3 temporary order of protection without bond if there is probable
4 cause from the specific facts shown by the [~~affidavit or by~~
5 ~~the~~] verified petition to give the judge reason to believe that
6 an act of domestic abuse has occurred;

7 (2) cause the temporary order of protection
8 together with notice of hearing to be served immediately on the
9 alleged perpetrator of the domestic abuse; and

10 (3) within ten days after the [~~granting~~]
11 issuance of the temporary order of protection, hold a hearing
12 on the question of continuing the order. [~~or~~

13 ~~(4) if an ex parte order is not granted, serve~~
14 ~~notice to appear upon the parties and hold a hearing on the~~
15 ~~petition for order of protection within seventy-two hours after~~
16 ~~the filing of the petition; provided if notice of hearing~~
17 ~~cannot be served within seventy-two hours, the temporary order~~
18 ~~of protection shall be automatically extended for ten days.~~

19 ~~B. If the court grants a temporary order of~~
20 ~~protection, it may award temporary custody and visitation of~~
21 ~~any children involved when appropriate.]~~

22 B. As part of a temporary order of protection, the
23 court may:

24 (1) enjoin the restrained party from
25 committing or threatening to commit acts of domestic abuse

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1 against the protected party or other household members;

2 (2) enjoin the restrained party from any
3 contact or communication with the protected party; and

4 (3) award temporary custody and visitation of
5 any children when appropriate, giving primary consideration to
6 the safety of the protected party and the best interest of the
7 children. The court may grant unsupervised, supervised or no
8 visitation.

9 C. If the court does not find probable cause to
10 believe that an act of domestic abuse has occurred, it shall
11 hold a hearing within seventy-two hours of the filing of the
12 petition to allow the petitioner to provide additional evidence
13 of domestic abuse. At the conclusion of the hearing, an order
14 of dismissal or a temporary order of protection shall be
15 issued.

16 D. A temporary order of protection shall be filed
17 and served without cost to the protected party.

18 ~~[G.]~~ E. Except for petitions alleging stalking or
19 sexual assault, if the court finds that the ~~[alleged~~
20 ~~perpetrator is]~~ parties are not ~~[a]~~ household ~~[member]~~ members,
21 the court shall dismiss the petition."

22 **SECTION 5.** Section 40-13-5 NMSA 1978 (being Laws 1987,
23 Chapter 286, Section 5, as amended) is amended to read:

24 "40-13-5. ORDER OF PROTECTION--CONTENTS--REMEDIES--TITLE
25 TO PROPERTY NOT AFFECTED--MUTUAL ORDER OF PROTECTION.--

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1 A. Upon finding that domestic abuse has occurred or
2 upon stipulation of the parties, the court shall enter an order
3 of protection ordering the restrained party to refrain from
4 abusing the protected party or any ~~[other]~~ of the protected
5 party's household ~~[member]~~ members. The court shall
6 specifically describe the acts the court has ordered the
7 restrained party to do or refrain from doing. As a part of any
8 order of protection, the court may:

9 (1) grant sole possession of the residence or
10 household to the protected party during the period the order of
11 protection is effective or order the restrained party to
12 provide temporary suitable alternative housing for the
13 protected party and any children to whom the restrained party
14 owes a legal obligation of support;

15 (2) award temporary custody of any children
16 involved when appropriate and provide for visitation rights,
17 child support and temporary support for the protected party on
18 a basis that gives primary consideration to the safety of the
19 protected party and the best interest of the children. The
20 court may grant unsupervised, supervised or no visitation;

21 (3) order that the restrained party shall not
22 initiate contact with the protected party;

23 (4) restrain a party from transferring,
24 concealing, encumbering or otherwise disposing of the other
25 party's property or the joint property of the parties except in

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1 the usual course of business or for the necessities of life and
2 require the parties to account to the court for all such
3 transferences, encumbrances and expenditures made after the
4 order is served or communicated to the restrained party;

5 (5) grant to a party the exclusive or shared
6 possession and control of any domestic pet kept, owned or
7 leased by either party or by a minor child residing in the
8 household of either party. The court may order a party to stay
9 away from the animal and may forbid a party from taking,
10 transferring, concealing, mistreating, harming or disposing of
11 the animal;

12 [~~(5)~~] (6) order the restrained party to
13 reimburse the protected party or any other household member for
14 expenses reasonably related to the occurrence of domestic
15 abuse, including medical expenses, counseling expenses, the
16 expense of seeking temporary shelter, expenses for the
17 replacement or repair of damaged property or the expense of
18 lost wages;

19 [~~(6)~~] (7) order the restrained party to
20 participate in, at the restrained party's expense, professional
21 counseling programs deemed appropriate by the court, including
22 counseling programs for perpetrators of domestic abuse, alcohol
23 abuse or abuse of controlled substances; and

24 [~~(7)~~] (8) order other injunctive relief as the
25 court deems necessary for the protection of a party, including

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1 orders to law enforcement agencies as provided by this section.

2 B. The order of protection shall contain a notice
3 that violation of any provision of the order by the restrained
4 party is a criminal offense, constitutes contempt of court and
5 may result in a fine or imprisonment or both.

6 C. If the order of protection supersedes or alters
7 prior orders of the court pertaining to domestic matters
8 between the parties, the order shall say so on its face. If an
9 action relating to child custody or child support is pending or
10 has concluded with entry of an order at the time the petition
11 for an order of protection [~~was filed~~] is heard, the court may
12 enter an initial order of protection [~~but the portion of the~~
13 ~~order dealing with child custody or child support will then be~~
14 ~~transferred to the court that has or continues to have~~
15 ~~jurisdiction over the pending or prior custody or support~~] and
16 temporarily address child custody or child support issues. All
17 long-term issues regarding child custody or child support shall
18 be addressed in the domestic matters action.

19 D. A mutual order of protection shall be issued
20 only in cases where both parties have petitioned the court and
21 the court makes detailed findings of fact indicating that both
22 parties acted primarily as aggressors and that neither party
23 acted primarily in self-defense.

24 E. No order issued under the Family Violence
25 Protection Act shall affect title to any property or allow a

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1 party to transfer, conceal, encumber or otherwise dispose of
2 another party's property or the joint or community property of
3 the parties.

4 F. Either party may request a review hearing to
5 amend an order of protection. An order of protection involving
6 child custody or child support may be modified without proof of
7 a substantial or material change of circumstances.

8 G. An order of protection shall not be issued
9 unless a petition or a counter petition has been filed.

10 H. An order of protection may be issued against a
11 party restrained by a temporary order of protection if, without
12 good cause and after being served with notice or receiving
13 actual notice, the restrained party fails to appear at the
14 hearing to determine whether an order of protection should be
15 issued. If an order of protection is thus issued, a copy of
16 the order shall be mailed to the restrained party."

17 SECTION 6. Section 40-13-6 NMSA 1978 (being Laws 1987,
18 Chapter 286, Section 6, as amended) is amended to read:

19 "40-13-6. SERVICE OF ORDER--DURATION--PENALTY--REMEDIES
20 NOT EXCLUSIVE.--

21 A. An order of protection granted under the Family
22 Violence Protection Act shall be filed with the clerk of the
23 court, and a copy shall be sent by the clerk to the local law
24 enforcement agency. The order shall be [~~personally served upon~~
25 ~~the restrained party, unless the restrained party or the~~

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1 ~~restrained party's attorney was present at the time the order~~
2 ~~was issued]~~ provided to the parties or the parties' attorneys.
3 The order shall be filed and ~~[served]~~ provided to the parties
4 and the local law enforcement agency without cost to the
5 protected party.

6 B. A local law enforcement agency receiving an
7 order of protection from the clerk of the court that was issued
8 under the Family Violence Protection Act shall have the order
9 entered in the national crime information center's order of
10 protection file within seventy-two hours of receipt. This does
11 not include temporary orders of protection entered pursuant to
12 the provisions of Section 40-13-4 NMSA 1978.

13 C. The portion of an order of protection ~~[granted~~
14 ~~by the court]~~ involving custody or support shall be effective
15 for a fixed period of time not to exceed six months. That
16 portion of the order may be extended for good cause upon motion
17 of the protected party for an additional period of time not to
18 exceed six months. ~~[Injunctive orders shall continue until~~
19 ~~modified or rescinded upon motion by either party or until the~~
20 ~~court approves a subsequent consent agreement entered into by~~
21 ~~the parties.]~~

22 D. The portion of an order of protection addressing
23 injunctive relief shall be effective for a fixed period of time
24 identified by the court in the order of protection.

25 E. An order of protection may be extended for good

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1 cause upon a motion and hearing.

2 [D-] F. A peace officer shall arrest without a
3 warrant and take into custody a restrained party whom the peace
4 officer has probable cause to believe has violated an order of
5 protection that is issued pursuant to the Family Violence
6 Protection Act or entitled to full faith and credit.

7 [E-] G. State courts shall give full faith and
8 credit to tribal court orders of protection and orders of
9 protection issued by courts of other states. A protection
10 order issued by a state or tribal court against one who has
11 petitioned, filed a complaint or otherwise filed a written
12 pleading for protection against abuse by a spouse or intimate
13 partner is not entitled to full faith and credit if:

14 (1) no cross or counter petition, complaint or
15 other written pleading was filed seeking such a protection
16 order; or

17 (2) a cross or counter petition has been filed
18 and the court did not make specific findings that each party
19 was entitled to such an order.

20 [F-] H. A restrained party convicted of violating
21 an order of protection granted by a court under the Family
22 Violence Protection Act is guilty of a misdemeanor and shall be
23 sentenced in accordance with Section 31-19-1 NMSA 1978. Upon a
24 second or subsequent conviction, an offender shall be sentenced
25 to a jail term of not less than seventy-two consecutive hours

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1 that shall not be suspended, deferred or taken under
2 advisement.

3 ~~[G.]~~ I. In addition to any other punishment
4 provided in the Family Violence Protection Act, the court shall
5 order a person convicted to make full restitution to the party
6 injured by the violation of an order of protection and shall
7 order the person convicted to participate in and complete a
8 ~~[program of professional]~~ domestic violence offender treatment
9 or intervention program or other appropriate counseling, at the
10 person's own expense, if possible.

11 ~~[H.]~~ J. In addition to charging the ~~[person]~~
12 restrained party with violating an order of protection, a peace
13 officer shall file all other possible criminal charges arising
14 from an incident of domestic abuse when probable cause exists.

15 ~~[I.]~~ K. The remedies provided in the Family
16 Violence Protection Act are in addition to any other civil or
17 criminal remedy available to the protected party or the state."

18 **SECTION 7.** A new section of the Family Violence
19 Protection Act is enacted to read:

20 "[NEW MATERIAL] MINORS.--

21 A. An order of protection may be issued to protect
22 or restrain a minor.

23 B. A minor who is fourteen years of age or older
24 may petition for an order of protection or a temporary order of
25 protection on the minor's own behalf if the minor files a

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1 petition:

2 (1) for protection against a co-parent or
3 someone with whom the minor has had a continuing personal
4 relationship; or

5 (2) containing allegations of stalking or
6 sexual assault.

7 C. A minor who is taken into the emergency custody
8 of the children, youth and families department due to
9 allegations of abuse or neglect shall be placed in accordance
10 with the provisions of the Abuse and Neglect Act."

11 SECTION 8. Section 40-13-7 NMSA 1978 (being Laws 1987,
12 Chapter 286, Section 7, as amended) is amended to read:

13 "40-13-7. LAW ENFORCEMENT OFFICERS--EMERGENCY
14 ASSISTANCE--LIMITED LIABILITY--PROVIDING NOTIFICATION TO
15 VICTIMS WHEN AN ALLEGED PERPETRATOR IS RELEASED FROM
16 DETENTION--STATEMENT IN JUDGMENT AND SENTENCE DOCUMENT.--

17 A. A person who allegedly has been a victim of
18 domestic abuse may request the assistance of a local law
19 enforcement agency.

20 B. A local law enforcement officer responding to
21 the request for assistance shall be required to take whatever
22 steps are reasonably necessary to protect the victim from
23 further domestic abuse, including:

24 (1) advising the victim of the remedies
25 available under the Family Violence Protection Act; the right

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1 to file a written statement, a criminal complaint and a request
2 for an arrest warrant; and the availability of domestic
3 violence shelters, medical care, counseling and other services;

4 (2) upon the request of the victim, providing
5 or arranging for transportation of the victim to a medical
6 facility, ~~[or]~~ place of shelter or family advocacy center;

7 (3) upon the request of the victim,
8 accompanying the victim to the victim's residence to obtain the
9 victim's clothing and personal effects required for immediate
10 needs and the clothing and personal effects of any children
11 then in the care of the victim;

12 (4) upon the request of the victim, assist in
13 placing the victim in possession of the dwelling or premises or
14 otherwise assist in execution, enforcement or service of an
15 order of protection;

16 (5) arresting the alleged perpetrator when
17 appropriate and including a written statement in the attendant
18 police report to indicate that the arrest of the alleged
19 perpetrator was, in whole or in part, premised upon probable
20 cause to believe that the alleged perpetrator committed
21 domestic abuse against the victim and, when appropriate,
22 indicate that the party arrested was the predominant aggressor;
23 and

24 (6) advising the victim when appropriate of
25 the procedure for initiating proceedings under the Family

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1 Violence Protection Act or criminal proceedings and of the
2 importance of preserving evidence.

3 C. Upon the request of a protected party and in
4 accordance with the terms of an order of protection or a
5 temporary order of protection, a local law enforcement officer
6 shall, in addition to providing assistance pursuant to
7 Subsection B of this section, assist in the enforcement of the
8 terms of the order, including placing a party in possession of
9 a residence and placing any minor child with the party awarded
10 custody in accordance with the order.

11 [~~E.~~] D. The jail or detention center shall make a
12 reasonable attempt to notify the arresting law enforcement
13 agency or officer when the alleged perpetrator is released from
14 custody. The arresting law enforcement agency shall make a
15 reasonable attempt to notify the victim that the alleged
16 perpetrator is released from custody.

17 [~~D.~~] E. Any law enforcement officer responding to a
18 request for assistance under the Family Violence Protection Act
19 is immune from civil liability to the extent allowed by law.
20 Any jail, detention center or law enforcement agency that makes
21 a reasonable attempt to provide notification that an alleged
22 perpetrator is released from custody is immune from civil
23 liability to the extent allowed by law.

24 [~~E.~~] F. A statement shall be included in a judgment
25 and sentence document to indicate when a conviction results

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1 from the commission of domestic abuse."

2 SECTION 9. Section 40-13-9 NMSA 1978 (being Laws 2005,
3 Chapter 30, Section 1) is amended to read:

4 "40-13-9. DOMESTIC VIOLENCE SPECIAL COMMISSIONERS--
5 APPOINTMENT--QUALIFICATIONS.--

6 A. A domestic violence special commissioner shall
7 be appointed by and serve at the pleasure of the chief judge of
8 the judicial district to which the ~~[officer]~~ commissioner is
9 assigned.

10 B. A domestic violence special commissioner shall:

11 (1) be an attorney licensed to practice law in
12 New Mexico;

13 (2) have a minimum of three years experience
14 in the practice of law and be knowledgeable in the area of
15 domestic relations and domestic violence matters; and

16 (3) conform to Canons 21-100 through 21-500
17 and 21-700 of the Code of Judicial Conduct as adopted by the
18 supreme court. Violation of any such canon shall be grounds
19 for dismissal of any domestic violence special commissioner."

20 SECTION 10. Section 40-13-10 NMSA 1978 (being Laws 2005,
21 Chapter 30, Section 2) is amended to read:

22 "40-13-10. SPECIAL COMMISSIONERS--POWERS--DUTIES.--

23 A. A domestic violence special commissioner shall
24 perform the following duties in carrying out the provisions of
25 the Family Violence Protection Act:

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1 (1) review petitions for orders of protection
2 and motions to enforce, modify or terminate orders of
3 protection;

4 (2) if deemed necessary, interview
5 ~~[petitioners]~~ the parties. Any interview shall be on the
6 record;

7 (3) conduct hearings on the merits of
8 petitions for orders of protection and motions to enforce,
9 modify or terminate orders of protection; and

10 (4) prepare recommendations to the district
11 court regarding petitions for orders of protection and motions
12 to enforce, modify or terminate orders of protection.

13 B. ~~[All orders must be signed by a district court~~
14 ~~judge before the recommendations of a domestic violence special~~
15 ~~commissioner become effective]~~ A domestic violence special
16 commissioner's recommendations are not effective until they are
17 reviewed and adopted as an order of the court."