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Colonel J. R. Buckalew, Superintendent
Department of Public Safety
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309

Dear Colonel Buckalew:

You have requested an Attorney General's Opinion concerning the powers and duties of the Department [now Division] of Public Safety in regard to serving protective orders in domestic violence prevention cases. Specifically, you have asked:

Are domestic violence protective orders, issued pursuant to West Virginia Code § 48-2A-1 et seq., criminal in nature thus avoiding the prohibitions on serving civil process contained in West Virginia Code § 15-2-12?

We conclude that W. Va. Code § 15-2-12 does not prohibit the State Police from serving domestic violence protective orders.

West Virginia Code, Chapter 48, Article 2A, entitled "Prevention of Family Violence," was last amended by the passage on March 7, 1992, of Enrolled Committee Substitute for House Bill No. 4389, commonly known as the "Family Protection Act of 1992." The protective orders in question are now described in two Code sections as follows:

§ 48-2A-5. Temporary orders of court; hearings; persons present.

(a) Upon filing of a verified petition under this article, the court may enter such temporary orders as it may deem necessary to protect the petitioner or minor children from abuse, and, upon good cause shown, may do so ex parte without the necessity of bond being given by the petitioner. . . . Following such proceeding, the court shall order a copy of the petition to be served immediately upon the respondent, together with a copy of

any temporary order issued pursuant to the proceedings, notice setting forth the time and place of the full hearing and a statement of the right of the respondent to be present and to be represented by counsel. Copies of any order made under the provisions of this section shall also be issued to the petitioner, and any law-enforcement agency having jurisdiction to enforce the order, including the city police, the county sheriff's office and local office of the state police within twenty-four hours of the entry of the order. . . .

(b) Within five days following the issuance of the court's temporary order, a full hearing shall be held at which the petitioner must prove the allegation of abuse by a preponderance of the evidence, or such petition shall be dismissed. . . .

§ 48-2A-6. Protective orders.

(a) At the conclusion of the hearing and if the petitioner has proven the allegations of abuse by a preponderance of the evidence, then the court shall issue a protective order which shall direct the respondent to refrain from abusing the petitioner and/or the minor children

. . . .

(d) Certified copies of any order made under the provisions of this section shall be issued to the petitioner, the respondent and any law-enforcement agency having jurisdiction to enforce the order, including the city police, the county sheriff's office or local office of the division of public safety within twenty-four hours of the entry of the order.

You have expressed concern that service of these orders by members of the Division of Public Safety [the West Virginia State Police] may be prohibited by the provisions of W. Va. Code § 15-2-12, which provides, in relevant part:

(b) The superintendent and each of the officers and members of the division [of public safety] are hereby empowered:

. . . .

(2) To serve criminal process issued by any court or magistrate anywhere within this state (they shall not serve civil process)

.
(c) Members of the division of public safety . . . may apprehend and bring before any court or magistrate having jurisdiction of such matters, anyone violating any of the provision of chapters twenty, sixty and sixty-one of this code They shall serve and execute warrants for the arrest of any person and warrants for the search of any premises issued by any properly constituted authority, and shall exercise all of the powers conferred by law upon a sheriff. They shall not serve any civil process or exercise any of the powers of such officer in civil matters.

W. Va. Code § 15-2-12 (Supp. 1992) (emphasis added).

Pursuant to the above-quoted statute, members of the Division of Public Safety are empowered to serve and execute criminal process, but are prohibited from delivering any civil process.

Without regard to the aforesaid prohibition, the Family Protection Act appears to require all law enforcement officers to serve domestic violence protective orders as follows:

Notwithstanding any other provision of this code to the contrary, all law-enforcement officers are hereby authorized to serve all pleadings and orders filed or entered pursuant to this article on Sundays and legal holidays. No law-enforcement officer shall refuse to serve any pleadings or orders entered pursuant to this article.

W. Va. Code § 48-2A-9(a) (Supp. 1992) (emphasis added).

Should domestic violence orders be considered "civil process" within the meaning of W. Va. Code § 15-2-12, then its provisions would appear to be in conflict with W. Va. Code § 48-2A-9(a), as the former prohibits service of civil process, while the latter requires all "law enforcement officers" to serve such orders.

Of course, if at all possible, statutes must be construed to avoid a conflict between them, State v. Sims, 144 W. Va. 72, 105 S.E.2d 886 (1958), as the Legislature is presumed to know all laws relating to the subject matter:

"A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing

law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908).¹ Syl. pt. 1, State ex rel. Simpkins v. Harvey, [172] W. Va. [312], 305 S.E.2d 268 (1983). Syl. Pt. 3, Shell v. Bechtold, 175 W. Va. 789, 338 S.E.2d 393 (1985).

Syl. pt. 1, Lee v. W. Va. Teachers Retirement Board, 186 W. Va. 441, 413 S.E.2d 96 (1991).

There are at least three ways which have been suggested to us of avoiding a conflict between these statutes. The first is to determine that the State Police are not "law enforcement officers" within the meaning of W. Va. Code § 48-2A-9(a), and are thus not subject to its mandatory language. This, in our opinion, is at odds with the common understanding of the term "law enforcement officer" and its definition in other sections of the West Virginia Code. See, e.g., W. Va. Code § 30-29-1. Further, another paragraph of the same statute authorizes the Governor's Committee on Crime, Delinquency and Correction to "promulgate rules for state . . . law enforcement officers . . . with respect to domestic violence." W. Va. Code § 48-2A-9(g) (Supp. 1992) (emphasis added). It seems obvious to us that the State Police would be considered "state law enforcement officers" under any definition of the term.

The second suggested way to resolve the conflict is to determine that the second sentence in W. Va. Code § 48-2A-9(a), "[n]o law-enforcement officer shall refuse to serve any pleadings or orders entered pursuant to this article," is only meant to reemphasize the inapplicability of the statutes prohibiting service on Sundays and holidays. Prior to the 1992 amendments, W. Va. Code § 48-2A-9(a) had only included the first sentence quoted previously.¹ It was therefore unclear whether the statute was intended to supersede other statutes such as W. Va. Code § 15-2-12, or merely those statutes such as W. Va. Code § 56-3-16, which generally prohibits the service of civil process or orders on Sunday, and W. Va. Code §§ 2-2-1 and 2-2-2, which prohibit the holding of court or the performance of any official act on a Saturday, Sunday or legal holiday.

¹"Notwithstanding any other provision of this code to the contrary, all law-enforcement officers are hereby authorized to serve all pleadings and orders filed or entered pursuant to this article on Sundays and legal holidays." W. Va. Code § 48-2A-5(a) (Supp. 1991).

Due to conflicting interpretations of the pre-1992 version of W. Va. Code § 48-2A-9(a) some members of the Division of Public Safety refused to serve protective orders without an opinion from our office or a court order setting forth their obligations under the domestic violence statute. In light of this recent history it is apparent that the reluctance of law enforcement officers to serve such orders was not based on statutes prohibiting service on Sundays and legal holidays, but rather was based on W. Va. Code § 15-2-12. Thus, we think it more probable that the addition of the second sentence to W. Va. Code § 48-2A-9(a) in 1992 was intended to resolve the ongoing dispute over service by the State Police, rather than as mere surplusage reemphasizing the apparently noncontroversial requirement that the orders be served on Sundays and legal holidays.

Lastly, the conflict may be resolved by determining that domestic violence orders are not "civil process" within the meaning of W. Va. Code § 15-2-12. For the reasons hereinafter set forth, we believe this to be a reasonable resolution of the conflict and consistent with legislative intent.

The statutory domestic violence procedures have both civil and criminal characteristics. West Virginia Code § 48-2A-3(d) (Supp. 1992) states, in part:

Any petition filed under the provisions of this article shall be given priority over any other civil action before the court except actions in which trial is in progress, and shall be docketed immediately upon filing. . . .

Under this provision, domestic violence petitions are characterized as civil, but are clearly not in the same category as "other civil actions."²

²An April 13, 1990, letter from Ted Philyaw, Administrative Director of the Courts, W. Va. Supreme Court of Appeals, to the Department of Public Safety stated: "It is, of course, true that domestic violence cases are placed on the civil docket in all magistrate courts. These are not, however, civil cases. . . . A protective order issued by a magistrate court is not a form of civil process. To the contrary, it is a court order enforceable by all law enforcement officers in the manner of criminal cases." We do not attach controlling significance to this letter, although it does represent an interpretation by a judicial administrator charged with supervising the implementation of certain of the statute's provisions.

At common law, a civil action is "[o]ne which seeks the establishment, recovery, or redress of private and civil rights. . . . Civil suits relate to and affect only individual rights whereas criminal prosecutions involve public wrongs." Black's Law Dictionary 312 (4th ed. 1968). Criminal process is issued "to compel a person to answer for a crime or misdemeanor." Id. at 448. The Family Protection Act is clearly calculated to redress public wrongs as well as to protect individual rights. In amending the family violence statute, the 1992 Legislature stated:

This article shall be liberally construed and applied to promote the following purposes:

- (1) To assure victims of family violence the maximum protection from abuse that the law can provide;
- (2) To create a speedy remedy to discourage violence against family members with whom the abuser has continuing contact;
- (3) To expand the ability of law-enforcement officers to assist victims, to enforce the family violence law effectively, and to prevent further abuse;
- (4) To facilitate equal enforcement of criminal law by deterring and punishing violence against family members; and
- (5) To recognize that battering is a crime that will no longer be excused or tolerated.

W. Va. Code § 48-2A-1(b) (Supp. 1992) (emphasis added).

As quoted above, the Legislature's purposes for enacting H.B. 4389 included empowering law-enforcement officers with additional means to enforce what had traditionally been characterized as criminal wrongs against family members, and battering is expressly recognized as a crime which the Family Protection Act is intended to prevent. Moreover, W. Va. Code § 48-2A-7 provides a criminal sanction (contempt) as a means of enforcement, as follows:

- (a) Upon violation of any order issued pursuant to this article, the court shall, upon the filing of a petition for contempt by the petitioner, issue an order to show cause why the respondent should not be held in contempt of court and set a time for a hearing thereon within five days of the filing of said motion.

(b) Notwithstanding any other provision of law to the contrary, any sentence for contempt hereunder may include imprisonment up to thirty days and a fine not to exceed one thousand dollars or both. In lieu of confinement, the court may allow the contemnor to post bond as surety for the faithful compliance with the orders of the court.

W. Va. Code § 48-2A-7 (Supp. 1992).

A contempt of court is "criminal" if it is punishable by imprisonment and offers the contemnor no opportunity to purge himself and thereby obtain release from confinement, or if the punishment is calculated to redress a public wrong as opposed to a means of enforcing a purely private civil right on behalf of a litigant. State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981). West Virginia Code § 48-2A-7, quoted above, contemplates criminal contempt proceedings.

Characterizing a temporary or permanent protective order as "criminal process" is therefore at least arguably consistent with the above discussed provisions, because their purpose is to compel a person to answer for public crimes involving domestic violence, including battering, and a violation thereof is punishable via a criminal contempt by fine and/or imprisonment.

Legislative intent on these issues has been illuminated by legislative rules issued by the Governor's Committee on Crime, Delinquency and Correction. As previously noted, to further define the duties of law enforcement officers under the family violence statute, the Legislature provided in W. Va. Code § 48-2A-9(g) (Supp. 1992):

The governor's committee on crime, delinquency and correction shall develop and promulgate rules for state, county and municipal law-enforcement officers and law-enforcement agencies regarding the duties of law-enforcement officers and law-enforcement agencies with respect to domestic violence. . . .

The agency thus charged with interpreting the statute, the Governor's Committee on Crime, Delinquency and Correction, has promulgated a Legislative Rule³ that provides in part as follows:

³Title 149, Code of State Rules, Series 3, Police Response to Domestic Violence (effective August 27, 1992). This rule was approved by the Legislature on March 14, 1992. W. Va. Code § 64-9-9(b); 1992 W.Va. Acts 1748, First Extraordinary Session.

2.1. The principal purpose of these rules and regulations is to establish guidelines and procedures to be followed by police officers and other personnel involved in the police response to domestic calls. For purposes herein, the term "police officer" shall refer to any city police officer, sheriff, sheriff's deputy, or West Virginia State Police.

149 CSR 3, § 149-3-2, Rule 2.1 (1992) (emphasis added).

3.2. Domestic violence protective orders are to be considered criminal in nature. Any and all law enforcement officers who are sworn officers in the State of West Virginia shall be responsible for the initial service of all protective orders in order to ensure the most prompt service of the protective order.

149 CSR 3, § 149-3-3, Rule 3.2 (1992) (emphasis added).⁴

In light of this rule, which requires legislative approval as part of the rule-making process, we conclude that the Legislature intended that a domestic violence temporary order or protective order not be considered "civil process" for purposes of W. Va. Code § 15-2-12, although the character of the overall proceedings is both civil and criminal. Given this conclusion, W. Va. Code § 15-2-12 would not prevent West Virginia State Police officers from serving these orders. The language of the second sentence of W. Va. Code § 48-2A-9(a), added in 1992 by H.B. 4389, serves to clarify the intent of the Legislature in this regard.

Two additional principles of statutory construction support this conclusion. First, remedial statutes should be liberally construed in order to effectuate their purpose. State ex rel. City of Wheeling Retirees Association, Inc. v. City of Wheeling, 185 W. Va. 380, 407 S.E.2d 384 (1991); Carolina Lumber Company v. Cunningham, 156 W. Va. 272 (1972). The Family Protection Act is remedial. Second, even if a conflict exists between W. Va. Code § 48-2A-9(a) and § 15-2-12 the last enacted statute, W. Va. Code § 48-2A-9(a), must control. State ex rel. Dept. of Health and

⁴At the time the rule was initially filed by the Committee on June 28, 1991, former W. Va. Code §§ 48-2A-5 and 48-2A-6 (Supp. 1991) referred to both the initial order and any order entered following a hearing as a "protective" order. The Family Protection Act of 1992 changed this language slightly to make a clearer distinction between the two types of orders -- those issued before and after a full hearing. Therefore, we conclude that the term "protective order" in this rule is intended to apply to both "temporary" and "final" orders under the amended statute.

Human Resources, etc. v. W. Va. Public Employees Retirement System, 183 W. Va. 39, 393 S.E.2d 677 (1990); State v. Ball, 175 W. Va. 652, 337 S.E.2d 310 (1985).

Accordingly, we are of the opinion that West Virginia Code § 48-2A-9(a), as amended, requires that members of the Division of Public Safety serve these protective orders, regardless of the language of W. Va. Code § 15-2-12. The clear intent of the West Virginia Legislature was that no law-enforcement officer may refuse to serve any domestic violence order.

A final matter that necessarily follows from the foregoing discussion is the involvement by members of the Division of Public Safety in the enforcement of these orders, once they have been served upon the respondent. An Attorney General's Opinion issued on June 2, 1975, concluded:

While members of the Department [Division of Public Safety] may not serve original process in civil cases, they may serve criminal processes issued by the court in the enforcement of its orders where violation of said orders places a party in contempt of the court.

56 Op. Att'y Gen. 188, 193 (1975). As previously noted, W. Va. Code § 48-2A-7 provides for enforcement of domestic violence protective orders through criminal contempt proceedings. Section 48-2A-10(c) (Supp. 1992) states that "[w]here a law-enforcement officer observes a violation of a valid order, he or she may immediately arrest the subject of the order." In addition, W. Va. Code §§ 48-2A-5(a) and 48-2A-6(d) (Supp. 1992) explicitly recognize the authority of the "local office of the state police" to enforce a temporary or final protective order.

We are therefore additionally of the opinion that members of the Division of Public Safety may arrest persons for violating domestic violence protective orders, and may serve process in contempt proceedings to enforce such orders.

After reviewing the appropriate authorities, we have reached the following conclusions:

(1) Although the procedure for obtaining a domestic violence protective order has both civil and criminal characteristics, domestic violence orders do not constitute "civil process" within the meaning of W. Va. Code § 15-2-12.

(2) The provisions of Chapter 48, Article 2A of the West Virginia Code, as amended, and the rules promulgated thereunder, require that officers and members of the Division of Public Safety serve domestic violence protective orders.

(3) Members of the Division of Public Safety may also serve process to enforce a domestic violence protective order, and may arrest persons for violating such orders.

SUMMARY

A domestic violence protective order issued pursuant to Chapter 48, Article 2A, of the West Virginia Code is not a "civil process" within the meaning of W. Va. Code § 15-2-12 (Supp. 1992), and members of the West Virginia Division of Public Safety are therefore required by W. Va. Code § 48-2A-9(a) (Supp. 1992) to serve such an order, notwithstanding the provisions of W. Va. Code § 15-2-12. They may also make arrests and serve process in contempt proceedings for violations of domestic violence protective orders.

Very truly yours,

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By



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