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Family Violence Protective Orders in Texas and Appellate Review: Are They Meant for Each Other.

Manuel C. Maltos

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**FAMILY VIOLENCE PROTECTIVE ORDERS IN TEXAS
AND APPELLATE REVIEW: ARE THEY MEANT
FOR EACH OTHER?**

MANUEL C. MALTOS

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“The finality of judgments for appealability has been a recurring and nagging problem throughout the judicial history of this State”¹

1. N. E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966).

I. INTRODUCTION

The headlines are disturbing. "Husband kills wife" and child before committing suicide.² "Mother kills son," then commits suicide.³ It seems that every time you read the newspaper or turn on the television, there is a story about family violence. Family violence is a serious social problem in Texas and across the nation.⁴ It is estimated that "[o]ne out of every four American women report that they have been physically or sexually assaulted by a husband or boyfriend at some point in their lives."⁵ In 2002, Texas law enforcement agencies received 183,440 reports of family violence.⁶ More staggering is that since 1991, reported incidents of family violence have increased over forty-two percent.⁷ In response to this social problem, the Texas Legislature has developed a system of legal protections for family violence victims.⁸

Particularly, Title Four of the Texas Family Code was enacted to provide emergency assistance to abused spouses and other family members.⁹ Title Four, like many other remedial domestic abuse statutes, provides various civil protective measures.¹⁰ Through Title Four, the legislature provides victims with alternatives to filing criminal charges, tort claims, or

2. Charles Rabin & Nicholas Spangler, *3 Dead in Shooting Rampage: Husband Kills Wife, 2-Year-Old Daughter, Self, Miami Police Say*, MIAMI HERALD, May 18, 2003, at F1; Tom Roeder & Jeremy Meyer, *Man Kills Wife, Sons, Self/ 4 Found Shot Dead Shortly After Wife, Kids Move out of Home*, THE GAZETTE, Sept. 17, 2003, at A1.

3. Joe Hughes et al., *Mother Killed Son, Then Herself Bodies Found in Burned Apartment*, THE SAN DIEGO UNION-TRIBUNE, Dec. 5, 2003, at B1.

4. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 350 (2002).

5. *Id.* (citing PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE AND CENTERS FOR DISEASE CONTROL AND PREVENTION: RESEARCH IN BRIEF, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (Nov. 1998)).

6. TEX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS: THE TEXAS CRIME REPORT 47 (2002), available at <http://www.txdps.state.tx.us/crimereports/02/ch5.pdf> (on file with the *St. Mary's Law Journal*).

7. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 350 (2002).

8. See generally Leota H. Alexander, *Title 4. Protection of the Family*, 21 TEX. TECH L. REV. 1863 (1990) (providing commentaries to the recent changes in Title Four of the Texas Family Code).

9. See *Striedel v. Striedel*, 15 S.W.3d 163, 165 (Tex. App.—Corpus Christi 2000, no pet.) (discussing the purpose of Title Four protective orders); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, no pet.) (per curiam) (recognizing that Title Four protective orders are intended to prevent family violence).

10. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 350 (2002) (stating that protective orders are the "primary civil legal remedy" for those who are victims of family violence).

marriage dissolution, which victims are often not willing to pursue.¹¹ Thus, the primary goal of this legislation is to restrain the escalation of family violence and prevent future abuse.¹² Since its inception, Title Four has been amended several times and has become an effective judicial tool in reducing family violence.¹³ These amendments include specialized relief, such as the twenty-day duration of an immediate *ex parte* order and the addition of protection and relief beyond the abused or battered spouse, to include all members of the present household, as well as those who previously lived in the household.¹⁴

Since Title Four offers broad possibilities in the area of post divorce relief, many practitioners are using protective orders in post divorce situations where family violence or threats of family violence have occurred. Title Four is also useful in dealing with non-marital situations, such as parent abuse, grandparent abuse, and other violent or threatening situations involving members or former members of the same household or extended family relationships.¹⁵ These protective orders are an effective means of mitigating violence when they are crafted in a manner to address the specific problem and when the remedy granted is tailored toward the needs of the applicant.¹⁶

As a result, the effectiveness of a protective order depends upon the nature and scope of the order. Courts have broad discretion in formulating protective orders and can impose strict regulations and restrictions on individuals.¹⁷ For example, a court issuing a protective order may prohibit a party from freely exercising property rights, may evict a party from their jointly owned property, or may even award a party the sole use and

11. *Id.* at 350-51 (asserting that protective orders are civil remedies or alternatives to criminal enforceable orders).

12. *See* TEX. FAM. CODE ANN. § 85.001 (Vernon 2002) (stating that the findings required in order to issue a family violence protective order are that family violence has already occurred and that it is likely to reoccur).

13. *See* JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 350 (2002) (outlining the recent amendments to Family Code legislation).

14. TEX. FAM. CODE ANN. §§ 71.003, 71.005-.006, 83.001-.002 (Vernon 2002).

15. *See* TEX. FAM. CODE ANN. § 71.003 (Vernon 2002) (stating that a family includes "individuals related by consanguinity or affinity . . . without regard to whether those individuals reside together"); *id.* § 71.005 (defining "household" to include those living together without regard to a familial relation); *id.* § 71.006 (defining "member of a household" without mention of relation).

16. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 351 (2002).

17. *See* TEX. FAM. CODE ANN. §§ 85.021, 85.022 (Vernon 2002) (detailing a vast array of restrictions over an individual who commits family violence, including performing "acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence").

possession of such property.¹⁸ Further, the court may order the person who committed family violence to perform acts that “are necessary or appropriate to prevent or reduce the likelihood of family violence.”¹⁹

Due to the clamant circumstances that arise out of family violence, courts must exercise broad discretion in order to protect the victims. However, the combination of such broad judicial discretion over valuable rights may have the effect of setting the stage for judicial overreach. Although constitutional challenges to Title Four orders are scarce in Texas, other jurisdictions have upheld such orders because “domestic violence constitutes a showing of exigent circumstances.”²⁰ As such, appellate jurisdiction over the trial court’s issuance of a protective order is important because “[v]aluable rights are at stake.”²¹

If a protective order is not specific enough, fails to address the particular needs of the applicant, or is overbroad in scope, casting doubts on its effectiveness and purpose, what remedies are available to both the applicant and the party adversely affected? Generally, appellate review is available.²² However, before an appellate court decides an issue on the merits, it must determine whether it has jurisdiction over the appeal.²³ Absent a statutory grant for appeal, the appellate court will have to determine whether the judgment is a final order.²⁴ This classification of

18. *Id.* § 85.021.

19. *Id.* § 85.022.

20. *Ex parte* Flores, No. 08-01-00213-CR, 2003 WL 21716189, at *4 (Tex. App.—El Paso July 25, 2003, pet. struck) (citing *Sanders v. Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989)); *see also* *State v. Doe*, 765 A.2d 518, 528 (Conn. Super. Ct. 2000) (holding that a protective order issued in the absence of an adversarial hearing did not violate due process); *People v. Koertge*, 701 N.Y.S.2d 588, 593-96 (N.Y. Dist. Ct. 1998) (affirming the constitutional validity of a temporary protective order rendered without a full evidentiary hearing). These courts reasoned that the need for expeditious judicial restraint of family violence outweighs the need for assurance of adversarial procedures. *Doe*, 765 A.2d at 527-28; *Koertge*, 701 N.Y.S.2d at 592.

21. *James v. Hubbard*, 985 S.W.2d 516, 517-18 (Tex. App.—San Antonio 1998, no pet.). For example, in this case the appellant was prohibited from attending his place of worship. *Id.* at 518. It is worth noting that this court urged the Supreme Court to resolve the issue revolving around the appealability of protective orders, a task that has yet to be done. *Id.* at 518-19.

22. *See In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.) (determining that a protective order that disposes of all matters at issue between the parties is final and appealable).

23. *See id.* at 474 (stating that jurisdiction over the appeal must be determined first).

24. *See, e.g., Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.—Dallas 1994, writ denied) (finding that the court had jurisdiction over the appeal); *Cook v. Cook*, 886 S.W.2d 838, 839 (Tex. App.—Waco 1994, no writ) (stating that appellate review of interlocutory orders requires statutory authority); *H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678, 679 (Tex. App.—Corpus Christi 1991, writ denied) (dismissing the appeal of a non-final judgment).

protective orders for appellate purposes is an issue that has brought dissension among the Texas Courts of Appeals.²⁵ Currently, this dissension is an issue that the Texas Supreme Court has not addressed and the legislature has not resolved.²⁶ A majority of the Texas Courts of Appeals hold that a protective order is a final appealable order when it disposes of all issues and parties and leaves no further action for the trial court.²⁷ On the other hand, several of their sister courts state that, at least when a protective order is rendered during a pending divorce, such an order is not final, thus the appropriate remedy would be a writ of mandamus.²⁸

Consequently, this Comment is devoted to an analysis of the varying views of the Texas Courts of Appeals on the appealability of a protective order. Part II of this Comment provides a background of the historical development and purpose of protective orders. Part III provides a more in-depth discussion of the arguments for and against the appealability of a protective order, addresses the possible flaws in the arguments, and reviews the viability of the remedies suggested by the courts of appeals.

25. Compare *James*, 985 S.W.2d at 517-18 (holding that protective orders are final judgments and therefore, appealable), with *Normand v. Fox*, 940 S.W.2d 401, 404 (Tex. App.—Waco 1997, no writ) (holding that protective orders are interlocutory, and because they have no express statutory permission for appeal, a writ of mandamus is the appropriate remedy).

26. See *James*, 985 S.W.2d at 518-19 (urging the Supreme Court of Texas to address the dissension over the appealability of a protective order); *Normand*, 940 S.W.2d at 404 n.6 (urging the legislature to address the appealability of a protective order).

27. See, e.g., *Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App.—Waco 2001, no pet.) (holding that a protective order, like a permanent injunction, provides injunctive relief and is a final appealable order as long as it disposes of all parties and issues); *Cooke v. Cooke*, 65 S.W.3d 785, 787 (Tex. App.—Dallas 2001, no pet.) (noting that other courts have held that a protective order is appealable when it has disposed of all parties and issues); *Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (holding that a protective order may be appealed when, like a permanent injunction, it leaves nothing further for the court to act on); *Striedel v. Striedel*, 15 S.W.3d 163, 165 (Tex. App.—Corpus Christi 2000, no pet.) (concluding that an appeal of a protective order met the requirements of a final judgment and was thus appealable); *In re Cummings*, 13 S.W.3d at 475 (addressing the appealability of a protective order); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, no pet.) (per curiam) (holding that a protective order is final and appealable when it has disposed of all parties and issues); *James*, 985 S.W.2d at 517-18 (asserting that a protective order is final and appealable when it has disposed of all parties and issues).

28. See, e.g., *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming the proposition that a protective order is not a final judgment when it is granted while a divorce is pending); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (emphasizing that a protective order granted while a divorce is pending is not a final judgment and consequently not appealable); *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no pet.) (per curiam) (holding that a protective order granted during a pending divorce is not an independent action and thus cannot be appealed because it is interlocutory).

Finally, Part IV concludes by suggesting that a protective order should be subject to accelerated review.

II. BACKGROUND AND HISTORY OF FAMILY VIOLENCE PROTECTIVE ORDERS

A. Origination

Historically, protective orders have been viewed as an effective civil legal recourse for those affected by family violence.²⁹ Title Four of the Texas Family Code governs these protective orders and sets forth the requirements for obtaining such an order. With consistent improvements to Title Four, the legislature has responded to society's decreasing tolerance of family violence.³⁰ For example, in 1989, the definition of "family violence" was expanded to include threats of violence.³¹

Before 1995, the Family Code provided for two types of protective orders.³² Through 1997, the Family Code distinguished between a protective order rendered while a divorce is pending and one rendered in the absence of a divorce proceeding.³³ The Family Code mandated the issuance of a protective order while a divorce is pending pursuant to Section 3.581, and in the absence of a divorce proceeding pursuant to Chapter 71.³⁴ After 1997, the Family Code was amended to provide the broad protections afforded by Title Four to protective orders rendered while a divorce is pending.³⁵ As a result, now the Family Code mandates the issuance of a protective order as provided by Title Four, regardless of whether a divorce is pending.³⁶ In 2001, the legislature further expanded the definition of family violence to encompass victims of dating vio-

29. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 350 (2002).

30. *Id.*

31. *Id.*

32. *See* TEX. FAM. CODE ANN. § 3.581 (Vernon 1994) (indicating that a protective order rendered while a divorce is pending provides limited protections as compared with one rendered without a divorce pending).

33. *Compare id.* § 3.522 (Vernon 1996) (stating that in a petition for divorce or annulment, the petitioner must indicate the existence or application of a "protective order under Chapter 71 or Section 3.581"), *with id.* § 6.405 (Vernon 1997) (stating that a petitioner for divorce or annulment must state whether a protective order rendered or applied for under Title Four (Chapter 71) exists).

34. *Id.* § 71.06 (Vernon 1996).

35. *See id.* § 6.504 (Vernon 1997) (stating that while a divorce is pending, a court may issue a protective order pursuant to Title Four).

36. *Id.* § 82.005 (Vernon 2003).

lence.³⁷ Further legislative efforts also lengthened the maximum duration of a protective order from one year to two years.³⁸

B. *Obtaining a Protective Order*

A victim of family violence can begin the proceedings for a protective order by filing an application with the local district attorney's office.³⁹ In addition, an adult may apply for a protective order to protect a child from family violence.⁴⁰ The application itself must contain certain information, such as the name and home county of the applicant and the nature of the relationship between the applicant and the person alleged to have committed family violence.⁴¹ At the hearing on the application for a protective order, the applicant must prove two things: (1) that family violence occurred, and (2) that it is likely to occur again.⁴²

The definition of family violence includes physical assault or the threat of a physical assault.⁴³ Although it does not include emotional abuse for an adult, it does encompass emotional abuse to a child because the definitions for abuse and neglect of a child are much broader.⁴⁴ Additionally, it is important to note that there are no time specifications as to when the

37. JOHN J. SAMPSON ET AL., *SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED* 350 (2002).

38. *Id.*

39. TEX. FAM. CODE ANN. § 82.002 (Vernon 2002).

40. *Id.*

41. *Id.* § 82.004.

42. *Id.* § 85.001. The statute mandates that:

- (a) At the close of a hearing on an application for a protective order, the court shall find whether:
 - (1) family violence has occurred; and
 - (2) family violence is likely to occur in the future.
- (b) If the court finds that family violence has occurred and that family violence is likely to occur in the future, the court:
 - (1) shall render a protective order as provided by Section 85.022 applying only to a person found to have committed family violence; and
 - (2) may render a protective order as provided by Section 85.021 applying to both parties that is in the best interest of the person protected by the order or member of the family or household of the person protected by the order.
- (c) A protective order that requires the first applicant to do or refrain from doing an act under Section 85.022 shall include a finding that the first applicant has committed family violence and is likely to commit family violence in the future.

Id.

43. *Id.* § 71.004.

44. See TEX. FAM. CODE ANN. § 261.001 (Vernon 2002) (defining abuse as an emotional or mental injury).

violence occurred.⁴⁵ As long as violence is likely to occur in the future, it is arguably possible to obtain a protective order, irrespective of when the violence occurred.

An applicant may obtain an immediate protective order on the same day the application is filed; no hearing of any kind or notice to the respondent is necessary.⁴⁶ However, the applicant must provide a "detailed description of the facts and circumstances concerning the alleged family violence and the need for the immediate protective order."⁴⁷ If the court finds that there is "clear and present danger of family violence" based upon the applicant's affidavit, then the court "may enter a temporary ex parte order for the protection of the applicant or any other member of the family or household of the applicant."⁴⁸ This temporary ex parte order expires in twenty days, but may be extended for another twenty days.⁴⁹ In the situation where the applicant and the alleged offender live together, the court may even evict the alleged offender from the home.⁵⁰ In such a situation, the applicant must meet additional statutory conditions, such as providing testimony at an ex parte hearing.⁵¹ Following the issuance of the ex parte order, the alleged offender will be served, and the order will state a date and time for a hearing at which the respondent must appear.⁵² At this hearing, the court will determine whether the ex parte order should become a family violence protective order.⁵³ If the court finds that family violence has occurred and is likely to occur again, a family violence protective order is then issued.⁵⁴

C. *Scope*

The Texas Family Code gives the court a list of optional prohibitions and requirements that it may include in the protective order.⁵⁵ For example, the court can prohibit a party from "transferring, encumbering, or otherwise disposing of property . . . that is mutually owned or leased by

45. *See id.* § 85.001 (suggesting no time indication as to when family violence occurred).

46. *Id.* §§ 83.001, 82.043; *see also id.* § 83.007 (stating that the court may recess to grant the respondent an opportunity to be present, but irrespective of his presence, the hearing shall resume before the working day concludes).

47. *Id.* § 82.009.

48. *Id.* § 83.001.

49. TEX. FAM. CODE ANN. § 83.002 (Vernon 2002).

50. *Id.* § 83.006.

51. *Id.*

52. *Id.* § 84.001.

53. *See id.* § 83.001 (stating that a court may enter an ex parte order if it finds a "clear and present danger of family violence" in the application for a protective order).

54. TEX. FAM. CODE ANN. § 85.001 (Vernon 2002).

55. *Id.* §§ 85.021, 85.022.

the parties,”⁵⁶ “grant exclusive possession of a residence to a party,”⁵⁷ and “award to a party the use and possession of specified property that is community property or jointly owned or leased property.”⁵⁸ Additionally, the court can order the alleged offender to participate in counseling or “complete a battering intervention and prevention program.”⁵⁹ The alleged offender can also be required to “perform acts . . . that . . . are necessary or appropriate to prevent or reduce the likelihood of family violence,”⁶⁰ and if applicable, the court “may suspend [the alleged offender’s] license to carry a concealed handgun.”⁶¹

The governing legislative provisions are broad and allow the courts considerable discretion when determining how best to impede family violence.⁶² As a result, the nature and scope of protective orders will vary considerably, depending on the circumstances. The streamlining and general accessibility of protective orders have made them the primary legal method for deterring family violence.⁶³ The increasing use of the protective order and the court’s broad discretion in issuing and forming the order have created a number of legal questions regarding the availability of appellate review.

D. *Appellate Jurisdiction*

1. Texas Appellate Procedure

Generally, only final judgments are appealable.⁶⁴ A final judgment is one that “disposes of all claims and parties then before the court, or it states with unmistakable clarity that it is a final judgment,”⁶⁵ leaving nothing in the suit for further decision.⁶⁶ This rule is commonly known as

56. *Id.* § 85.021.

57. *Id.*

58. *Id.*

59. TEX. FAM. CODE ANN. § 85.022 (Vernon 2002).

60. *Id.*

61. *Id.*

62. *See generally id.* § 85.022 (indicating that a court may require a person subject to a protective order to perform acts that are necessary to prevent or at least reduce the likelihood of future occurrences).

63. *See* JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED 351 (2002) (recognizing that the protective order’s power is due to its quasi-criminal nature).

64. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000); *see also Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) (noting an exception to the general rule for a temporary injunction); *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (confirming the long history of the general appealability rule).

65. *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001) (per curiam).

66. *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985).

the "finality rule."⁶⁷ More precisely, the Texas Supreme Court has stated the rule as:

When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered pursuant to Rule 174, Texas Rules of Civil Procedure, it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.⁶⁸

Thus, an order that is not intrinsically interlocutory and disposes of all issues and parties is a final appealable judgment. In contrast, an interlocutory order is not a final judgment because it "fails to dispose of all issues and parties."⁶⁹ Interlocutory orders are generally not reviewable unless statutorily permissible.⁷⁰ In Texas, the Civil Practice and Remedies Code allows certain interlocutory orders to be appealable.⁷¹ For instance, an order granting or denying a temporary injunction may be appealable as an interlocutory order.⁷² Consequently, a family violence protective order may be reviewed if: (1) it is a final judgment, or (2) it is an interlocutory order and appellate review is statutorily permissible.⁷³

67. See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 198 (Tex. 2001) (referring to the finality rule as one that determines when a judgment is final and appealable).

68. *Aldridge*, 400 S.W.2d at 897-98.

69. *Cooke v. Cooke*, 65 S.W.3d 785, 787 (Tex. App.—Dallas 2001, no pet.).

70. *Sary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998); *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992); *Jack B. Anglin Co. v. Tipps*, 842 S.W. 2d 266, 272 (Tex. 1992).

71. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004); see also *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001) (stating that the legislature intended that Section 51.014 of the Family Code be strictly construed as "a narrow exception to the general rule that only final judgments and orders are appealable").

72. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004).

73. *Id.* Other interlocutory orders that may be appealed include those that:

- (1) appoints a receiver or trustee;
- (2) overrules a motion to vacate an order that appoints a receiver or trustee;
- (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure; . . .
- (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;
- (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, . . . arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;

2. Case Law on Protective Orders

The Violence Against Women Act obligates each state to give full faith and credit to protective orders rendered in other states.⁷⁴ However, full faith and credit generally only applies to final orders, not interlocutory or temporary orders.⁷⁵ Several Texas courts have expressly held that family violence protective orders are interlocutory.⁷⁶ Consequently, under such rulings, family violence protective orders issued in Texas would not be entitled to full faith and credit.

In 2000, this problem was addressed by the National Conference of Commissioners on Uniform State Laws when it promulgated a new uniform act.⁷⁷ The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, which has been adopted by the Texas Legislature, obligates enforcement of all protective orders, whether they are final or interlocutory.⁷⁸ The adoption of this Act, however, did not resolve the issue as to the nature of a family violence protective order.⁷⁹ In that regard, the classification of a protective order remains a disputed issue among the Texas Courts of Appeals.

Initially, in *Normand v. Fox*,⁸⁰ the Tenth District Texas Court of Appeals at Waco addressed whether a family violence protective order was

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code; [or]

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

74. 18 U.S.C.A. § 2265 (West Supp. 1994).

75. U.S. CONST. art. IV § 1; *see also* 47 AM. JUR. 2D *Judgments* § 952 (1995) (stating that “[t]emporary or interlocutory orders of one state generally are not entitled to full faith and credit in another state”).

76. *See, e.g., In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming that a protective order is not a final judgment when it is granted during the pendency of a divorce); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (observing that a protective order granted during pendency of a divorce is not a final judgment and therefore not appealable); *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (holding that a protective order granted during the pendency of a divorce is not an independent action and thus is interlocutory and unappealable).

77. UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROT. ORDERS ACT, prefatory note (2000) (amended 2002) (stating that one of the reasons for enactment of a uniform law was to address questions such as “whether state courts and officers are required to enforce provisions of foreign protection orders that would not be authorized by the law of the enforcing State”), *available at* <http://www.law.upenn.edu/bll/ulc/uiedvoa/2002final.htm>. Although the Violence Against Women Act mandates that states must provide full faith and credit to protection orders, such orders must be valid, as defined in Section 3(d), in order to be subject to interstate enforcement. *Id.*

78. *See id.* (recognizing the interstate enforceability of all protective orders).

79. *Id.* (providing no discussion as to the nature of the protective order).

80. 940 S.W.2d 401 (Tex. App.—Waco 1997, no writ).

subject to appellate review.⁸¹ In this case, the court reviewed its appellate jurisdiction over a protective order issued after the divorce of the parties.⁸² The *Normand* court concluded that protective orders are not appealable for two reasons.⁸³ First, it stated that because the court retained the power to modify the order, it also retained jurisdiction, and therefore such power “clouds the protective order’s finality.”⁸⁴ Second, without statutory authority allowing for review of protective orders, the court was without appellate jurisdiction.⁸⁵ Although the court later reversed itself in *Kelt v. Kelt*,⁸⁶ the explanation provided very little guidance as to the reasoning behind its deviation.⁸⁷ The court simply stated that because “a protective order *should* be subject to appellate review, we have reexamined our prior position.”⁸⁸ Notably, it determined the nature and character of the protective orders by analogizing them with permanent injunctions, thereby making them appealable.⁸⁹

While the *Normand* decision may have been overruled, its reasoning as to the appealability of family violence protective orders remains influential in other appellate courts.⁹⁰ For example, in *Ruiz v. Ruiz*,⁹¹ the court held that a “protective order granted while a divorce action is pending

81. See *Normand v. Fox*, 940 S.W.2d 401, 404 (Tex. App.—Waco 1997, no writ) (concluding that protective orders are interlocutory, non-appealable orders). Although this court later reversed itself, other Texas appellate courts have adopted and continue to uphold its reasoning. See, e.g., *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (agreeing that the power to modify a protective order by a trial court prevents it from being a final, appealable order); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (stating that a protective order is a non-appealable interlocutory order due to the trial court’s ongoing power to modify it).

82. *Normand*, 940 S.W.2d at 404 (Vance, J., dissenting) (discussing when a divorce is final).

83. See *id.* at 403 (examining the reasons why protective orders may not be appealable).

84. *Id.*

85. *Id.* at 402-03.

86. 67 S.W.3d 364 (Tex. App.—Waco 2001, no pet.).

87. See *Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App.—Waco 2001, no pet.) (holding that protective orders are appealable).

88. *Id.*

89. *Id.*

90. See *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming the proposition that because the trial court retains the power to modify a protective order, it is not a final appealable judgment); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (stating that a protective order is a non-appealable interlocutory order “due to the ongoing power and ability of the trial court to revise *any* provision in the protective order at *any* time before it expires”).

91. 946 S.W.2d 123 (Tex. App.—El Paso 1997, no writ).

between the same parties is not a final judgment.”⁹² These courts reason that a protective order in this situation is not a final judgment because the power to modify the order by the trial court calls into question its finality.⁹³

On the other hand, the Second, Fourth, Fifth, Tenth, and Thirteenth District Courts of Appeals affirm the appealability of a protective order by stating that although the trial court retains the power to modify, it is not dispositive on the issue of appellate jurisdiction.⁹⁴ These courts compose the majority and state that a protective order can be a permanent injunction when “the duration of the injunctive relief granted does not depend on any further order of the court.”⁹⁵ Accordingly, in the most notable case, *James v. Hubbard*,⁹⁶ the court reasoned that a protective order is a final judgment if it “disposes of all [the] issues and parties,” thereby making it an appealable judgment.⁹⁷

It is important to note that there is a distinction drawn by this current split of authority. In fact, the appealability of a protective order may de-

92. *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (holding that the granting of a protective order is not appealable).

93. See *Bilyeu*, 86 S.W.3d at 282 (holding that “there is no final judgment due to the ongoing power and ability of the trial court to revise any provision in the protective order”); *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ) (stating that “this modification power clouds the protective order’s finality”); see also *In re K.S.L.-C.*, 109 S.W.3d at 579 (affirming the reasoning in *Bilyeu*).

94. *Kelt*, 67 S.W.3d at 366 (concluding that a protective order provides injunctive relief and is a final appealable order as long as it disposes of all parties and issues); *Cooke v. Cooke*, 65 S.W.3d 785, 787 (Tex. App.—Dallas 2001, no pet.) (holding that a protective order is appealable, not because it is similar to a permanent injunction, but rather because it disposes of all parties and issues); *Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (holding that although a protective order may be modified, the relief “does not depend upon any further order of the court; accordingly, it is a permanent injunction that may be appealed”); *Striedel v. Striedel*, 15 S.W.3d 163, 164 (Tex. App.—Corpus Christi 2000, no pet.) (implying that a protective order can be appealed by granting jurisdiction to the appellant’s contentions over the right to counsel in a protective order hearing); *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.) (reiterating that appealability depends on whether all issues are disposed of); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, no pet.) (per curiam) (holding that a protective order may be appealable when it is a final order); *James v. Hubbard*, 985 S.W.2d 516, 517-18 (Tex. App.—San Antonio 1998, no pet.) (indicating that when an injunction is permanent, it must be appealable).

95. *James*, 985 S.W.2d at 518 (citing *Aloe Vera of Am., Inc. v. CIC Cosmetics Int’l Corp.*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ)).

96. 985 S.W.2d 516 (Tex. App.—San Antonio 1998, no pet.).

97. *James v. Hubbard*, 985 S.W.2d 516, 517 (Tex. App.—San Antonio 1998, no pet.); see also *Cooke*, 65 S.W.3d at 787 (citing *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966)).

pend on whether there is a pending divorce.⁹⁸ Those appellate courts that have characterized a protective order as an interlocutory unappealable order have done so under the context of a pending divorce.⁹⁹ However, the courts making this characterization generally do not provide a clear and discernable justification for this distinction. In fact, much of their reasoning is based on the same argument found in the *Normand* decision: that the power to modify a protective order during the pendency of a divorce is the controlling factor in rendering it a non-appealable interlocutory order.¹⁰⁰

Accordingly, there are two separate arguments as to why a protective order rendered while a divorce is pending is a non-appealable interlocutory order. First, the *Normand* court stated that the power to modify a protective order retains jurisdiction in the trial court and thus “clouds the protective order’s finality.”¹⁰¹ Second, the *Ruiz* court similarly stated that, at least while a divorce is pending, a protective order is a non-appealable order because it fails to dispose of all issues and parties.¹⁰² On the other hand, *James* and its progeny hold that a protective order is the

98. Compare *In re K.S.L.-C.*, 109 S.W.3d at 579 (affirming that a protective order rendered while a divorce is pending “is not a final appealable order”), *Bilyeu*, 86 S.W.3d at 282 (stating that at least when a divorce is pending a protective order is not a final judgment), and *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (holding that “a protective order granted while a divorce action is pending between the same parties is not a final judgment”), with *Kelt*, 67 S.W.3d at 366 (concluding that a protective order provides injunctive relief and is a final appealable order as long as it disposes of all parties and issues), *Cooke*, 65 S.W.3d at 787 (holding that a protective order is appealable not necessarily because it is similar to a permanent injunction but rather because it disposes of all parties and issues), *Pena*, 61 S.W.3d at 531 (holding that although a protective order may be modified, the relief “does not depend upon any further order of the court; accordingly, it is a permanent injunction that may be appealed”), *Striedel*, 15 S.W.3d at 164 (implying that a protective order can be appealed by granting jurisdiction to appellant’s contentions over the right to counsel in a protective order hearing), *In re Cummings*, 13 S.W.3d at 475 (holding that an expired protective order can be appealed), *Winstett*, 22 S.W.3d at 510 (holding that a protective order “in underlying divorce proceeding was final and appealable”), and *James*, 985 S.W.2d at 517-18 (indicating that permanent injunctions are appealable).

99. See, e.g., *In re K.S.L.-C.*, 109 S.W.3d at 579 (affirming that a protective order rendered while a divorce is pending “is not a final appealable order”); *Bilyeu*, 86 S.W.3d at 282 (stating that at least when a divorce is pending, a protective order is not a final judgment); *Ruiz*, 946 S.W.2d at 124 (holding that a “protective order granted while a divorce action is pending between the same parties is not a final judgment”).

100. See *In re K.S.L.-C.*, 109 S.W.3d at 579 (holding that the trial court’s power to modify precludes a protective order from being a final appealable order); *Bilyeu*, 86 S.W.3d at 282 (holding that the trial court retains jurisdiction through its power to modify, and consequently, a protective order cannot be a final appealable order).

101. *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ).

102. *Ruiz*, 946 S.W.2d at 124.

equivalent of a permanent injunction and therefore is final because it disposes of all issues and parties.¹⁰³

Ultimately, one may argue that once a protective order is deemed unappealable, there is still a remedy available through a writ of mandamus or modification of the protective order. The analysis in this Comment will explore the viability of these proposed remedies, including a standard appeal. The analysis will also provide the reasoning and policy behind the current distinction within the Courts of Appeals regarding the appealability of a protective order outside and within a divorce proceeding. Finally, the proposal encompasses what courts and the legislature view as the solution to the problem: enacting legislation that would place family violence protective orders on an expeditious timeframe for appellate review.¹⁰⁴

III. ANALYSIS

A. *Application Filed Before Other Suit Is Filed*

There are two reasons that a family violence protective order may be non-ancillary or independent to an underlying suit for dissolution of marriage. First, the Family Code prohibits a court from dismissing or delaying a hearing on an application for a protective order on the basis that a suit for dissolution of marriage has been subsequently filed.¹⁰⁵ Second, in the event that a protective order is issued before a dissolution or suit affecting the parent-child relationship is filed, the court rendering such order, on a motion either by the court or a party, may transfer the protective order if it is “in the interest of justice . . . or [is] for the safety or convenience of a party or a witness.”¹⁰⁶ Ultimately, a protective order can be filed and issued before a suit for dissolution is filed. Consequently, if it can be filed in the absence of a suit for dissolution, a protective order is not an inherent part of the suit.

B. *Application Filed After Final Order Is Rendered in Other Suit*

When a final order in a suit for dissolution of marriage or suit affecting the parent-child relationship has been issued, a subsequent filing of a pro-

103. *James*, 985 S.W.2d at 517-18; *see also Kelt*, 67 S.W.3d at 366 (determining that a protective order operates to provide injunctive relief and is final and appealable); *Pena*, 61 S.W.3d at 531 (classifying a protective order as an appealable permanent injunction).

104. *See Ruiz*, 946 S.W.2d at 124 n.1 (holding that a protective order is not appealable, but agreeing with the Tenth District Court of Appeals at Waco that a “legislative provision allowing for accelerated appeal of Chapter 71 protective orders would resolve the problem of non-reviewability inherent in these actions”).

105. TEX. FAM. CODE ANN. § 85.061 (Vernon 2002).

106. *Id.* § 85.064.

tective order presents two possible options. First, if the protective order is filed in the county that rendered the final order, then the protective order will be filed in the same court that executes the final order.¹⁰⁷ Alternatively, if it is filed in another county, it would need to be filed in a court with jurisdiction to render protective orders.¹⁰⁸ In the latter situation, the protective order is still subject to transfer if it is “in the interest of justice . . . or [is] for the safety or convenience of a party or a witness.”¹⁰⁹ If a protective order is filed after or before a suit for dissolution, it is an independent claim in which all issues and parties can be disposed of upon finalization of its hearing.¹¹⁰ Thus, a protective order filed before or after a suit for dissolution of marriage can be a final judgment subject to appellate review.¹¹¹

C. *Application Filed During Suit for Dissolution of Marriage or a Suit Affecting Parent-Child Relationship (SAPCR)*

The Texas Family Code provides that “[a] protective order in a suit for dissolution of a marriage must be in a separate document.”¹¹² Previously the legislature mandated the issuance of a protective order, while a divorce is pending, through the chapter on suits for dissolution.¹¹³ Now protective orders issued while a divorce is pending are governed by the section addressing protective orders.¹¹⁴ Further, a court is prohibited from dismissing an application for a protective order on the basis that a divorce proceeding is pending in a different court.¹¹⁵ Ostensibly, a protective order and a suit for dissolution of marriage can be independent legal actions while a divorce is pending.

The purpose of making this distinction in the Family Code is to accommodate two conflicting policies: first, maintaining convenient accessibil-

107. *Id.* § 85.063.

108. *Id.*

109. *Id.* § 85.064.

110. *In re Marriage of Blitstein*, 569 N.E.2d 1357, 1360 (Ill. App. Ct. 1991). In addition, although the courts that hold that a protective order is not appealable do so only when there is a divorce pending, there is skepticism about its appealability in any circumstance. See *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 n.4 (Tex. App.—Austin 2002, no pet.) (questioning “whether these orders are properly appealable in any event”).

111. See, e.g., *Striedel v. Striedel*, 15 S.W.3d 163, 165 (Tex. App.—Corpus Christi 2000, no pet.) (affirming the appealability of a protective order issued while the parties were still married); *In re Cummings*, 13 S.W.3d 472, 474 (Tex. App.—Corpus Christi 2000, no pet.) (adopting the rule, as promulgated by the Fourth Court of Appeals, that a protective order is a final judgment for appellate jurisdiction purposes).

112. TEX. FAM. CODE ANN. § 85.004 (Vernon 2002).

113. *Id.* § 71.06 (Vernon 1996).

114. *Id.* § 82.005 (Vernon 2003).

115. *Id.* § 85.061.

ity to the courts for victims of family violence; and second, determining, in the event of conflicting orders, which court order supersedes.¹¹⁶ The *Ruiz* court argued that a close relationship exists between a protective order and the potential issues in a suit for dissolution of marriage.¹¹⁷ The court's holding stated that a protective order is an interlocutory order if it is issued while a divorce is pending because it is governed by the subsection on temporary orders.¹¹⁸ Such orders are interlocutory because they serve to protect not only the parties, but also the pending litigation.

As a result, the finality of the protective order is at least questionable because the protective order serves as the means to preserve the issues and parties within a suit for dissolution or SAPCR for final adjudication. In this situation, the suit for dissolution of marriage or SAPCR are dependent upon a protective order for the final disposition of all parties and issues. Thus, at least in this scenario, a protective order is an interlocutory order because it is the equivalent of a temporary order.¹¹⁹ A temporary order under the Family Code merely serves as a tool for the preservation of the parties' property during a suit for dissolution¹²⁰ and is expressly labeled as a non-appealable interlocutory order.¹²¹ Additionally, *Ruiz* holds that the terms in a divorce decree prevail over those in a protective order.¹²² Unfortunately, this assertion, as will be discussed later in the analysis, is inconsistent with Title Four.

116. JOHN J. SAMPSON ET AL., *SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED* 350 (2002) (discussing the reasons for recognizing the protective order and the suit for dissolution of marriage as separate legal actions).

117. *See Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (declaring that both the original protective order and the divorce proceeding include similar issues). *But see In re Marriage of Blitstein*, 569 N.E.2d at 1360 (holding that a protective order issued during the pendency of a divorce “is a separate claim and is not an ancillary part of the claim for dissolution”). It is important to note that in both of these cases the protective order and the dissolution of marriage were consolidated, yet their holdings are contradictory.

118. *See Ruiz*, 946 S.W.2d at 124 (asserting that protective orders issued while a divorce is pending are governed by the statutory language in temporary orders). *But see* TEX. FAM. CODE ANN. § 82.005 (Vernon 2003) (mandating that the issuance of protective orders while a divorce is pending is specifically governed by Title Four, subchapter D).

119. *See* TEX. FAM. CODE ANN. §§ 6.501, 6.502 (Vernon Supp. 2004) (stating that the court may render a temporary order when a suit for dissolution is pending to protect the parties and preserve their property).

120. *See id.* §§ 6.501-.502 (explaining that the order is used to preserve property and to protect the parties).

121. *Id.* § 6.507.

122. *See Ruiz*, 946 S.W.2d at 124 (holding that a protective order issued while a divorce is pending does not dispose of all parties and issues); *Normand v. Fox*, 940 S.W.2d 401, 404-05 (Tex. App.—Waco 1997, no writ) (stating that temporary orders are subordinate to the terms and conditions of a divorce decree). *But see* JOHN J. SAMPSON ET AL., *SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED* 374 (2002) (stating that a

1. Issues Among Suit for Dissolution and Protective Orders

In a suit for dissolution of marriage, questions of grounds for a divorce, child custody, child support, spousal maintenance, and division of property are ancillary elements and not separate claims of a single action for dissolution.¹²³ These issues are interrelated in a suit for dissolution of marriage.¹²⁴ Consequently, an order resolving any one of these issues would not be final and thus, non-appealable until the other pending issues have been resolved.

In contrast, a request for a family violence protective order is not an ancillary part of a suit for dissolution, nor does it arise exclusively from such a proceeding.¹²⁵ A protective order can arise during a suit for dissolution; however, it can also arise before, after, and even completely outside of the marital relationship context.¹²⁶ There are instances where the existence of family violence can affect the outcome of a suit for dissolution of marriage and a SAPCR.¹²⁷ For example, the grounds for a suit for dissolution can be based on either a no fault or an alternatively pleaded at fault divorce. In the instance where a party files for divorce

protective order's terms and conditions prevail over those of a pending divorce or SAPCR); *see also* TEX. FAM. CODE ANN. § 85.025 (Vernon 2002) (mandating that the duration of a protective order is limited to two years or less if stated by the order); *id.* § 85.062 (indicating that the issuance of a protective order is not limited to the court that has control over the suit for dissolution).

123. *See* TEX. FAM. CODE ANN. § 85.062 (Vernon 2002) (indicating that a protective order and a dissolution of marriage do not need to be consolidated). The statute states:

- (a) If a suit for dissolution of a marriage or suit affecting the parent-child relationship is pending, a party to the suit may apply for a protective order against another party to the suit by filing an application:
 - (1) in the court in which the suit is pending; or
 - (2) in a court in the county in which the applicant resides if the applicant resides outside the jurisdiction of the court in which the suit is pending.

Id.

124. *See In re Marriage of Blitstein*, 569 N.E.2d 1357, 1360 (Ill. App. Ct. 1991) (noting that issues pertaining to child custody, community property division, and child support are ancillary elements of a suit for dissolution).

125. *See* TEX. FAM. CODE ANN. §§ 85.061-.063 (Vernon 2002) (indicating that a protective order can be independently filed during, after, or before a suit for dissolution or SAPCR); *In re Marriage of Blitstein*, 569 N.E.2d at 1360 (stating that a protective order is not always an inherent part to a divorce proceeding); *Normand*, 940 S.W.2d at 405 (Vance, J., dissenting) (concluding that an independently issued protective order should be subject to appellate review).

126. *See* TEX. FAM. CODE ANN. § 82.002 (Vernon 2002) (listing the people who can file for a protective order).

127. *See id.* § 6.002 (Vernon Supp. 2004) (stating that a court may grant a divorce "if the other spouse is guilty of cruel treatment"); *id.* § 153.131 (Vernon 2002) (stating that a history of family violence rebuts the presumption that a parent should be named as joint management conservator).

solely because of cruelty, a protective order can help to establish the basis for such divorce. However, cruelty is usually not solely pleaded, but rather is pleaded in the alternative to insupportability, which is a no fault basis.¹²⁸ Additionally, it is not always pleaded to obtain protection; pleading cruelty can be advantageous in a potential custody battle and in the division of community property.¹²⁹

If there are children from a marriage, a suit for dissolution will involve a SAPCR to determine, among other things, the custody of the children.¹³⁰ In determining custody, the court is statutorily obligated to presume that appointment of the parents as joint managing conservators is in the children's best interest.¹³¹ However, the existence of a history of family violence committed within two years prior to suit, or during its pendency, rebuts that presumption.¹³² The rendering of a protective order does not necessarily mean that the presumption of joint management has been rebutted. The standards of family violence in rebutting the joint management presumption and in rendering a protective order are different.¹³³ In a protective order, there is no time limit as to when the violence took place, but rather that it took place at one point and it is likely to reoccur.¹³⁴ In a custody dispute, the presumption may be rebutted only after a conclusive showing that family violence actually took place within the previous two years.¹³⁵ Therefore, the rendering of a protective order does not necessarily rebut this presumption.

Further, the rendition of a protective order does not necessarily mean that cruelty as the sole ground for a divorce will be established, since the

128. JOHN J. SAMPSON ET AL., *SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED* 65 (2002).

129. *Id.* (discussing the uses of a "cruelty" allegation in a dissolution of marriage suit).

130. *See* TEX. FAM. CODE ANN. § 6.406 (Vernon 1998) (requiring mandatory joinder of a SAPCR if there are children under age eighteen born or adopted during the marriage); *id.* § 153.131(b) (Vernon 2002) (recognizing that the initial presumption is that appointment of the child's parents as joint managing conservators is in the child's best interest).

131. *Id.* § 153.131(b) (Vernon 2002).

132. *Id.* § 153.004 (Vernon Supp. 2004).

133. *Compare id.* § 153.004(a) (indicating that a history of family violence that has occurred within the last two years prior to the filing or during the suit automatically rebuts the presumption of joint management conservatorship), *with id.* §§ 81.001, 85.001 (Vernon 2002) (stating that a protective order will be rendered when family violence has taken place in the past, with no regard to time period, if it is likely to reoccur). It should be noted that the issuance of a protective order, while not determinative, can be used as evidence of family violence when the order is issued within two years prior to the filing "or during the pendency of the suit" to determine conservatorship. *Id.* § 153.004(f) (Vernon Supp. 2004).

134. *Id.* §§ 81.001, 85.001 (Vernon 2002).

135. TEX. FAM. CODE ANN. § 153.004 (Vernon Supp. 2004).

burden of proof for such ground is by a preponderance of the evidence.¹³⁶ In a suit for dissolution, the court will divide all community property in a “just and right” manner.¹³⁷ This does not necessarily mean an equal distribution, but rather the court may consider various factors in its determination of what is “just and right,” such as the fault in the divorce.¹³⁸ Moreover, the court is not required to consider fault in the divorce when considering what is a “just and right” distribution of community property.¹³⁹ Potentially, a protective order rendered during a suit for dissolution may not influence the outcome of the divorce decree. What *Ruiz* ultimately determined is that because there is at least a potential for the rendition of a protective order to influence several ancillary issues of a suit for dissolution of marriage or a SAPCR, it cannot be a final order.¹⁴⁰

Consequently, the issue becomes whether a court can determine the nexus, if any, between a protective order and the determination of the ancillary issues in a pending suit for dissolution. If the court can prospectively determine that there is no relationship between the issues resolved in a family violence protective order and those yet to be resolved in a suit for dissolution, then the protective order may be a final judgment if it has disposed of all issues and parties.¹⁴¹ In the alternative, if the court determines that there is a relationship between the issues resolved in a protec-

136. See *Foley v. Foley*, 350 S.W.2d 890, 893 (Tex. Civ. App.—El Paso 1961, no writ) (indicating that a cruelty finding is based on a preponderance of the evidence standard).

137. TEX. FAM. CODE ANN. § 7.001 (Vernon 1998).

138. See *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980) (holding that courts may consider the fault of the divorce in determining what is a just and right division of community property). In addition, there are numerous courts of civil appeals that have recognized the ability of a court to consider fault in the division of community property. *In re Marriage of Butler*, 543 S.W.2d 147, 149 (Tex. Civ. App.—Texarkana 1976, writ dismissed); *Hopkins v. Hopkins*, 540 S.W.2d 783, 787 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Dietz v. Dietz*, 540 S.W.2d 418, 420 (Tex. Civ. App.—El Paso 1976, no writ); *Currie v. Currie*, 518 S.W.2d 386, 390 (Tex. Civ. App.—San Antonio 1974, writ dismissed); *Cooper v. Cooper*, 513 S.W.2d 229, 234 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ); *Roberson v. Roberson*, 420 S.W.2d 495, 503 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ); *Middlesworth v. Middlesworth*, 380 S.W.2d 790, 792 (Tex. Civ. App.—Fort Worth 1964, no writ); *Duncan v. Duncan*, 374 S.W.2d 800, 802 (Tex. Civ. App.—Eastland 1964, no writ); *Venezia v. Venezia*, 227 S.W.2d 881, 882 (Tex. Civ. App.—Galveston 1950, no writ); *Hendrick v. Hendrick*, 222 S.W.2d 281, 284 (Tex. Civ. App.—Amarillo 1949, no writ).

139. See *Young*, 609 S.W.2d at 761 (stating that a court may, but is not required to, consider fault in the property division at divorce).

140. See *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (stating that the protective order rendered while a divorce is pending is not an independent action because it includes “issues of child custody, support, and property division”).

141. See *Normand v. Fox*, 940 S.W.2d 401, 405 n.6 (Tex. App.—Waco 1997, no writ) (recognizing that protective orders entered under Title Four of the Family Code are not

tive order and a suit for dissolution or SAPCR, then it would be essential to determine whether a protective order serves as evidence or if it is used to preserve the status quo of the subject matter that is pending. If it is to provide evidence of the existence of family violence, then the court independently and irrespective of the existence of a protective order will have to determine whether family violence occurred. As mentioned above, the rendering of a protective order is not dispositive since it has different requirements in establishing family violence than in the contexts of child custody,¹⁴² spousal maintenance,¹⁴³ grounds for divorce,¹⁴⁴ and division of community property.¹⁴⁵

On the other hand, if the protective order is entered into to provide the framework between the parties' dealings with each other, their children, their property, and their financial obligations during the pendency of their marriage dissolution, then such an order is inherently an ancillary element.¹⁴⁶ In this situation, the protective order would essentially be serving the purpose of a temporary restraining or injunctive order.¹⁴⁷ Consequently, the protective order would be an ancillary tool of the pending suit and a dependent action. Here, the protective order and the

final, and calling upon the legislature to act to make such an order a final order that the court can take on accelerated review).

142. See TEX. FAM. CODE ANN. § 153.131 (Vernon 2002) (stating that a "history of family violence involving the parents of a child" rebuts the presumption that appointment of the parents as joint managing conservators is in the child's best interest). The burden here is different from a protective order because it requires an actual finding of a history of family violence and does not require that such violence be likely to reoccur in the future. Compare *id.* (requiring only that there be a finding of a history of violence to remove the presumption), with *id.* § 85.001 (requiring both that there has been family violence and that it is likely to occur again in the future).

143. See TEX. FAM. CODE ANN. § 8.051 (Vernon Supp. 2004) (stating that spousal maintenance may be ordered when the spouse from whom maintenance is sought has been convicted of a criminal offense that involves family violence that took place within the last two years or during the pendency of the divorce). The burden here is different from the protective order context since a protective order has no time period as to when the family violence took place. *Id.* § 85.001 (Vernon 2002).

144. See *id.* § 6.002 (Vernon 1998) (stating that a divorce may be granted on the basis of cruel treatment); *Foley v. Foley*, 350 S.W.2d 890, 893 (Tex. Civ. App. 1961) (indicating that the burden of proof for a finding of cruelty is by a preponderance of the evidence).

145. See *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980) (permitting the consideration of fault when dividing community property in a dissolution of marriage). A finding of fault in a divorce proceeding must be by a preponderance of the evidence, which is a greater burden than what is required to obtain a protective order.

146. See *Normand*, 940 S.W.2d at 404 n.5 (claiming that orders that are meant to "protect[] the status quo until the trial court has an opportunity to adjudicate the dispute" are interlocutory non-appealable orders).

147. See TEX. FAM. CODE ANN. § 6.501 (Vernon 1998) (stating that a restraining order's purpose is to ensure the "preservation of the property").

pending suit are not mutually exclusive since the former is merely a necessary tool for the adjudication of the issues and parties. Thus, a protective order would not dispose of all issues and parties in this situation.¹⁴⁸ Further, the protective order would be the equivalent of a temporary injunction, since its purpose would be to preserve the status quo between the parties.¹⁴⁹

It is important to note that when *Ruiz* was decided, the legislature mandated the issuance of protective orders, while a divorce is pending, through the section addressing temporary orders.¹⁵⁰ The section on temporary orders expressly stated that an order "issued under this section . . . is not subject to interlocutory appeal."¹⁵¹ After 1996, the legislature amended the Family Code, mandating the issuance of protective orders through Title Four instead of the section governing temporary orders. Title Four, unlike the section on temporary orders, is silent on the classification of protective orders for purposes of appeal.¹⁵² The significance of this change illustrates why the reasoning in *Ruiz* may no longer be applicable. This is because, apparently, the *Ruiz* decision seems to analogize family violence protective orders issued during a pending divorce with temporary restraining and injunctive orders.¹⁵³

2. Temporary Orders Versus Family Violence Protective Orders

The legislature provides a similar remedy to that of protective orders while a suit for dissolution is pending in temporary restraining and injunctive orders.¹⁵⁴ For example, after the filing of a suit for dissolution of

148. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (recognizing the similarities between a protective order and a temporary order).

149. *Id.* The proposition that the purpose of a temporary injunction "is to preserve the status quo of the litigation's subject matter pending a trial on the merits" is firmly established in Texas. *Id.*; *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978), *rev'd on other grounds*, 620 S.W.2d 561 (Tex. 1981); *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961); *City of Lubbock v. Stubbs*, 160 Tex. 111, 327 S.W.2d 411, 414-15 (1959); *Matagorda County Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 100 (Tex. App.—Corpus Christi 2001, no pet.); *Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 343 (Tex. App.—Austin 2001, no pet.); *McDill Columbus Corp. v. Univ. Woods Apartments, Inc.*, 7 S.W.3d 923, 926-27 (Tex. App.—Texarkana 2000, no pet.); *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, writ denied); *Alamo Sav. Ass'n of Tex. v. Forward Constr. Corp.*, 746 S.W.2d 897, 899 (Tex. App.—Corpus Christi 1988, writ dismissed w.o.j.).

150. TEX. FAM. CODE ANN. § 71.06 (Vernon 1996).

151. *Id.* § 3.58(g) (Vernon 1994).

152. *Id.* § 82.005 (Vernon 1997); *id.* § 82.005 (Vernon 2003).

153. See *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (stating that the protective order "does not dispose of all issues in the case and must be classified, for purposes of appeal, as an unappealable interlocutory order").

154. TEX. FAM. CODE ANN. § 6.501 (Vernon 1998). The statute states:

marriage, a court may grant a temporary restraining order “for the preservation of the property and for the protection of the parties as necessary.”¹⁵⁵ In addition, the court may grant a temporary injunction to prohibit the use, disposition, or transferring of the parties’ property and may even appoint a receiver for the preservation and protection of their property.¹⁵⁶ In essence, the purpose of a temporary order is to maintain the “status quo” so that a trial on the merits may then fairly dispose of the issues and parties.¹⁵⁷ The courts define status quo “as being the last, actual, peaceable, non-contested status that preceded the pending contro-

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- (a) After the filing of a suit for dissolution of a marriage, on the motion of a party or on the court’s own motion, the court may grant a temporary restraining order without notice to the adverse party for the preservation of the property and for the protection of the parties as necessary, including an order prohibiting one or both parties from:
- (1) intentionally communicating by telephone or in writing with the other party by use of vulgar, profane, obscene, or indecent language or in a coarse or offensive manner, with intent to annoy or alarm the other;
 - (2) threatening the other, by telephone or in writing, to take unlawful action against any person, intending by this action to annoy or alarm the other;
 - (3) placing a telephone call, anonymously, at an unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication with the intent to annoy or alarm the other;
 - (4) intentionally, knowingly, or recklessly causing bodily injury to the other or to a child of either party;
 - (5) threatening the other or a child of either party with imminent bodily injury;
 - (6) intentionally, knowingly, or recklessly destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of the parties or either party with intent to obstruct the authority of the court to order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage;
 - (7) intentionally falsifying a writing or record relating to the property of either party;
 - (8) intentionally misrepresenting or refusing to disclose to the other party or to the court, on proper request, the existence, amount, or location of any property of the parties or either party;
 - (9) intentionally or knowingly damaging or destroying the tangible property of the parties or either party; or
 - (10) intentionally or knowingly tampering with the tangible property of the parties or either party and causing pecuniary loss or substantial inconvenience to the other.

Id.

155. *Id.*

156. *Id.* § 6.502 (Vernon Supp. 2004).

157. *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975).

versy.”¹⁵⁸ Combined, these remedies appear to be the functional equivalent of a protective order.¹⁵⁹

Perhaps the most substantive difference is that protective orders require family violence to have taken place and that it be likely to reoccur,¹⁶⁰ whereas temporary orders can be granted upon the motion of either party while a divorce is pending.¹⁶¹ Further, the Family Code requires protective orders to be in a document separate from the suit for dissolution, while requests for temporary orders can be included in the petition for dissolution.¹⁶² Accordingly, temporary orders exist only until a final decree is entered, and are subordinate to the terms of such final order.¹⁶³ In addition, temporary orders cannot end if a suit for dissolution is pending.¹⁶⁴ Protective orders as enacted prevail even while a dissolution of marriage or a SAPCR is pending.¹⁶⁵ Although the Family Code language may appear to classify temporary orders as temporary injunctions, which may be subject to interlocutory appeal, in this situation the statute specifically states that “[a]n order under this subchapter, except an order appointing a receiver, is not subject to interlocutory ap-

158. *Id.*

159. Compare TEX. FAM. CODE ANN. § 6.501 (Vernon 1998) (enumerating the restrictions that can be imposed on an individual during the pendency of a divorce), *with id.* § 85.022 (Vernon 2002) (enumerating the restrictions that a court may impose on an individual who committed family violence).

160. *Id.* §§ 81.001, 85.001 (Vernon 2002).

161. *Id.* §§ 6.501-.502 (Vernon 1998 & Supp. 2004).

162. Compare *id.* § 85.004 (Vernon 2002) (indicating that “[a] protective order in a suit for dissolution of a marriage must be in a separate document”), *with id.* §§ 6.501-.502 (Vernon 1998 & Supp. 2004) (providing no indication of the need to separate temporary orders and a suit for dissolution of marriage).

163. See *Normand v. Fox*, 940 S.W.2d 401, 404-05 (Tex. App.—Waco 1997, no writ) (Vance, J., dissenting) (stating that temporary orders will “expire with the entry of the final divorce decree which supersedes the temporary orders” (citing *Coke v. Coke*, 802 S.W.2d 270, 273 (Tex. App.—Dallas 1990, writ denied))); *Rafferty v. Finstad*, 903 S.W.2d 374, 378 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (stating that once a decree is rendered, temporary orders are no longer “valid, subsisting orders” (citing *Ex parte Grothe*, 581 S.W.2d 296, 297 (Tex. Civ. App.—Austin 1979, orig. proceeding))).

164. See *Brines v. McIlhaney*, 596 S.W.2d 519, 523 (Tex. 1980) (stating that a temporary injunction “operates until dissolved by an interlocutory order or until the final hearing”).

165. See JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 374 (2002) (stating that a protective order's terms and conditions prevail over those of a pending divorce or SAPCR); *see also* TEX. FAM. CODE ANN. § 85.025 (Vernon 2002) (noting that the duration of a protective order is limited to two years or less if stated by the order); *id.* § 85.062 (indicating that the issuance of a protective order is not limited to the court that has jurisdiction over the suit for dissolution).

peal.”¹⁶⁶ Consequently, appellate review of these temporary orders must be done through a writ of mandamus.¹⁶⁷

In contrast, family violence protective orders are not always used to preserve the status quo of the subject matter pending in a suit for dissolution of marriage.¹⁶⁸ Consequently, they are not always temporary injunctions since they may operate beyond the pendency of the suit and in fact are more analogous with permanent injunctions.¹⁶⁹ More importantly, protective orders include further provisions or restrictions that are expressly prohibited in temporary orders, such as excluding a spouse from the residence.¹⁷⁰

Thus, the holding in *Ruiz*, which states that protective orders issued during a pending divorce are not final appealable orders, is overly broad. It is potentially over-inclusive because a protective order is not always used to preserve the issues and parties in a suit, but rather to impose permanent restrictions for the purpose of preventing future violence. Although in some instances a protective order may serve as a temporary injunction, it is by its nature a permanent injunction. In addition, in *Ruiz*, the protective order and the divorce proceeding were consolidated into a single proceeding, an event that is not always exclusive.¹⁷¹

In contrast, there are instances where there is no relationship between the issues resolved in a protective order and those awaiting resolution in a suit for dissolution. In fact, they can be separate, independent documents, simultaneously filed in different courts.¹⁷² If the legislature allows

166. TEX. FAM. CODE ANN. § 6.507 (Vernon 1998).

167. *Cook v. Cook*, 886 S.W.2d 838, 839 (Tex. App.—Waco 1994, no writ) (citing *Post v. Garza*, 867 S.W.2d 88, 89 (Tex. App.—Corpus Christi 1993, orig. proceeding)); *see also* *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (per curiam) (holding that a writ of mandamus is the appropriate remedy to challenge an interlocutory order).

168. *See* TEX. FAM. CODE ANN. § 85.022 (Vernon 2002) (indicating that the restrictions exist primarily to prohibit the escalation of family violence, not to protect the property of the parties); *cf. id.* § 6.501 (Vernon 1998) (stating that the purpose of a temporary restraining order is “for the preservation of the property and for the protection of the parties as necessary”).

169. *See* *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000) (stating that “when an injunction is effective for a fixed period of time it is a permanent rather than a temporary injunction” (citing *Aloe Vera of Am., Inc. v. CIC Cosmetics Int’l Corp.*, 517 S.W.2d 433, 436 (Tex. Civ. App.—Dallas 1974, no writ))).

170. *See* TEX. FAM. CODE ANN. § 6.501 (Vernon 1998) (stating that a temporary restraining order cannot include a provision that “excludes a spouse from occupancy of the residence where that spouse is living except as provided in a protective order made in accordance with Title 4”).

171. *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam).

172. *See* TEX. FAM. CODE ANN. § 85.004 (Vernon 2002) (stating that a protective order within a divorce proceeding “must be in a separate document”); *id.* § 85.062 (allowing

for this, it is cognizant that protective orders and a suit for dissolution may be separate, independent actions. The option to transfer is available, but only if it is “(1) in the interest of justice; or (2) for the safety or convenience of a party or a witness,” and not because a suit for dissolution and a protective order are dependent claims.¹⁷³ Further, amendments to the Family Code, following the *Ruiz* decision, no longer mandate the issuance of protective orders under the section dealing with temporary interlocutory orders, but rather through Title Four.¹⁷⁴ Consequently, those courts that continue to uphold the reasoning in *Ruiz* fail to recognize the development of the law.

D. *Modification Precludes Finality*

Normand and its progeny state that the legislature’s decision to reserve in the trial court the broad power to modify any provision of the protective order by including or excluding any item at any time clearly prevents the order from being an appealable, final judgment.¹⁷⁵ Further, other modification orders within the Family Code are legislatively designated as “new suits,” thus making both the original and modified orders final and reviewable, while protective orders lack this legislative designation.¹⁷⁶ These courts are essentially arguing that the power to modify an order precludes a judgment from being final. Additionally, these courts imply that an appeal would infringe upon the trial court’s ability to modify a protective order, and as a result would hinder its effectiveness.¹⁷⁷ Thus, under this rationale, a protective order issued during the pendency of a divorce will be a non-appealable interlocutory order.

In addition, the progeny of the *Normand* decision may essentially be arguing that the ability to modify a protective order during the pendency

a person to file for a protective order in his county of residence while a suit for divorce is pending in another county).

173. *Id.* § 85.064.

174. Compare *id.* § 71.06 (Vernon 1996) (mandating that the issuance of protective orders while a divorce is pending is governed by the section dealing with temporary interlocutory orders, Section 3.581), with *id.* § 82.005 (Vernon 2003) (declaring that the governing section for protective orders issued while a divorce is pending is Subchapter D, Chapter 85 of Title Four).

175. *Normand v. Fox*, 940 S.W.2d 401, 404 (Tex. App.—Waco 1997, no writ); see also *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (stating that the power to modify casts doubts on the finality of a protective order).

176. *Bilyeu*, 86 S.W.3d at 282; *Normand*, 940 S.W.2d at 403; see also *Striedel v. Striedel*, 15 S.W.3d 163, 168 (Tex. App.—Corpus Christi 2000, no pet.) (Yanez, J., dissenting) (determining that the power to modify designates protective orders as interlocutory).

177. See *Striedel*, 15 S.W.3d at 168 (Yanez, J., dissenting) (stating that the “nature of a protective order and the ills it seeks to eradicate require” modification to be available); see also *Bilyeu*, 86 S.W.3d at 282 (concurring with the dissenting opinion in *Striedel*).

of a divorce is necessary for the proper adjudication of all the issues and parties. For example, in *Bilyeu v. Bilyeu*,¹⁷⁸ the court states:

We conclude that there is no final judgment due to the ongoing power and ability of the trial court to revise *any* provision in the protective order at *any* time before it expires. We concur with the dissenting opinion in *Striedel* that there are sound reasons for the trial court to maintain its ongoing modification power over the issues and parties.¹⁷⁹

Under this theory, a protective order is the equivalent of a temporary order since it serves to preserve the status quo for appropriate adjudication.¹⁸⁰ However, this line of logic fails to recognize that a protective order is not always used to preserve the pending issues and parties.¹⁸¹

Additionally, the courts that have followed *Normand* seem to argue that allowing an appeal would prevent the trial court from modifying an existing order.¹⁸² Further, the courts claim that an appeal would prevent the trial court from providing relief that is tailored and revised to suit dynamic conditions and often volatile circumstances of the pending suit.¹⁸³ Although safety of the parties is the primary concern in protective orders, nothing prevents a trial court from modifying an order that has otherwise been appealed.¹⁸⁴ In contrast, there are also policy concerns associated with the inappropriate issuance of protective orders due to the social stigma and legal repercussions that they carry.¹⁸⁵ In fact, because of the social stigma and legal repercussions, even an expired protective order has been held to be appealable under the exception that it is “capable of repetition [and] evading review.”¹⁸⁶

Furthermore, the fact that the legislature has labeled other suits subject to modification within the Family Code and has not done so to protective

178. 86 S.W.3d 278 (Tex. App.—Austin 2002, no pet.).

179. *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.).

180. See TEX. FAM. CODE ANN. § 6.501 (Vernon 1998) (stating that temporary orders can be obtained after filing a suit for dissolution of marriage for the purpose of preserving property).

181. See *Magill v. Sheffield*, 612 S.W.2d 677, 679 (Tex. Civ. App.—Dallas 1981) (indicating that a protective order proceeding is an independent remedy).

182. *Bilyeu*, 86 S.W.3d at 280.

183. *Striedel*, 15 S.W.3d at 168 (Yanez, J., dissenting).

184. *Normand v. Fox*, 940 S.W.2d 401, 405 (Tex. App.—Waco 1997, no writ) (Vance, J., dissenting) (stating that “[o]nce modified, the new order would also be final, assuming it disposed of all issues and parties”).

185. *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.).

186. *Id.*

orders is not conclusive of its finality.¹⁸⁷ Alternatively, even if modifications of protective orders are not new suits, this does not preclude an original order from being a final judgment.¹⁸⁸ Consequently, it is possible for a trial court to provide modification relief to address the dynamic conditions associated with protective orders and offer appellate review to at least the original order.

On the other hand, the *Normand* decision and its progeny question whether a protective order would be appealable in any instance before, during, or even after a suit for dissolution of marriage.¹⁸⁹ Although recent decisions have limited their holdings to when there is a pending divorce, they nevertheless state doubts as to the appealability of protective orders in any instance.¹⁹⁰ The power to modify a protective order exists irrespective of whether a suit for dissolution of marriage is pending.¹⁹¹

Thus, by reasoning that the power to modify calls into question the finality of a protective order, *Normand* and its progeny imply that a protective order is interlocutory regardless of when it is issued.¹⁹² Such a holding would mean that all protective orders are not appealable because they are subject to being modified.¹⁹³ Yet, permanent injunctions and

187. See *James v. Hubbard*, 985 S.W.2d 516, 518 (Tex. App.—San Antonio 1998, no pet.) (stating that the power to modify is of “no consequence”). The fact that the court is able to modify the protective order is precisely why it is a permanent injunction. *Id.* (citing *Smith v. O’Neill*, 813 S.W.2d 501, 502 (Tex. 1991)).

188. *James*, 985 S.W.2d at 518; *Normand*, 940 S.W.2d at 405 (Vance, J., dissenting).

189. See *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (holding that a protective order granted during a pending divorce is not an independent action and thus cannot be appealed because it is interlocutory); see also *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming the *Normand* court’s reasoning that the power to modify precludes a protective order from being a final judgment).

190. See *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 n.4 (Tex. App.—Austin 2002, no pet.) (questioning the appealability of a protective order in any situation).

191. See TEX. FAM. CODE ANN. § 87.001 (Vernon 2002) (allowing an existing order to be modified upon the motion of either party).

192. See *In re K.S.L.-C.*, 109 S.W.3d at 579 (affirming the *Normand* court’s reasoning that the power to modify precludes a protective order from being a final judgment); *Bilyeu*, 86 S.W.3d at 282 (agreeing with the *Normand* court that a protective order is not appealable because of the trial court’s power to modify).

193. See TEX. FAM. CODE ANN. § 87.001 (Vernon 2002) (indicating that all protective orders are subject to modification); *Normand*, 940 S.W.2d at 402-03 (asserting that the power to modify a protective order precludes it from being a final judgment even when there is no suit for dissolution pending). In *Bilyeu*, the court expressly limited its holding to apply only when the protective order is rendered while a divorce is pending. *Bilyeu*, 86 S.W.3d at 282 n.4. However, the court stated that because of the volatile circumstances associated with family violence, the trial court needed to retain its power to modify. *Id.* Such reasoning would also appear applicable to when a suit for dissolution is not pending, since volatile circumstances are due to family violence and not to the pendency of a suit.

temporary injunctions are subject to appeal.¹⁹⁴ This reasoning is also over-inclusive because it prohibits appellate review of those protective orders that are final judgments. For instance, a protective order that has no relation to a suit for dissolution may have disposed of all parties and issues, yet under *Normand*, it will be deemed a non-appealable interlocutory order. Moreover, under this reasoning, a protective order rendered when there is no suit for dissolution pending may also be deemed a non-appealable interlocutory order.¹⁹⁵

In any event, the standards of review on appeal are rigorous and in effect would be limited to situations where there is a lack of factual or legal sufficiency or a clear abuse of discretion.¹⁹⁶ As a result of the discretionary language found in Title Four, review of the trial court's actions would be limited.¹⁹⁷ Primarily, an appellate review would be centered on legal findings and whether they are supported by probative evidence,¹⁹⁸ as well as factual findings and whether they are "so against the great weight and preponderance of the evidence as to be clearly wrong and unjust."¹⁹⁹ In that regard, appellate review may be limited to only the extreme situations where a protective order should not have been rendered or is no longer needed.²⁰⁰ As a result, allowing an appeal would

194. See *Aloe Vera of Am., Inc. v. CIC Cosmetics Int'l Corp.*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ) (noting that a permanent injunction is appealable when all issues are disposed of); see also TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (a)(4) (Vernon Supp. 2004) (authorizing the appeal of an order granting or denying a temporary injunction); *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 928 (Tex. 1995) (affirming an appeal of a permanent injunction).

195. See *Normand*, 940 S.W.2d at 402-03 (holding that a protective order issued with no suit pending is a non-appealable interlocutory order).

196. See *In re Cummings*, 13 S.W.3d 472, 476-77 (Tex. App.—Corpus Christi 2000, no pet.) (indicating the standards of review for an appealed protective order on both legal and factual insufficiency grounds).

197. TEX. FAM. CODE ANN. §§ 85.021, 85.022 (Vernon 2002) (stating that the court may issue a protective order based on the surrounding circumstances).

198. *In re Cummings*, 13 S.W.3d at 476.

199. *Id.* at 477 (citing *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996)).

200. *Id.* at 476 (indicating that for a factual insufficiency challenge to an issuance of a protective order, a reversal would be granted only if the findings "are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust" (citing *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996))). Additionally, legal insufficiency challenges impose a high burden on the appellant. See *id.* (stating that in reviewing the evidence within the record it is considered "in a light most favorable to the party in whose favor the verdict has been rendered" (citing *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998))). Furthermore, in a legal insufficiency challenge, trial court findings will be upheld if they are supported by any probative evidence. *Id.* (citing *Southern States Transp., Inc. v. State*, 774 S.W.2d 639, 640 (Tex. 1989)). However, when the evidence amounts to suspicion, its legal effect amounts to no evidence. *Id.* (citing *Kindred v. Con/Chem., Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

provide a better balance between the policy concerns associated with issuing an inappropriate protective order and the safety concerns of the parties involved.²⁰¹

In contrast, the majority's position is more in line with the finality rule. The character and nature of a protective order is that of a permanent injunction. Through this analogy, a protective order may be a final appealable judgment. Conversely, the fact that a trial court may modify the order in the future does not mean that the issues presented in the original order have not been decided.²⁰² Further, under the minority's reasoning, protective orders that are final judgments may be precluded from appellate review. The Supreme Court of Texas addressed the problem of final judgments being deemed interlocutory by discerning the finality rule.²⁰³ Consequently, the reasoning in *Normand* and its progeny fails to follow established precedent when it comes to determining the finality of a judgment.²⁰⁴

E. *Protective Orders Are Permanent Injunctions*

Protective orders, like permanent injunctions, serve to "restrain motion and to enforce inaction."²⁰⁵ An injunction is permanent when "the duration of the injunctive relief granted does not depend on any further order of the court."²⁰⁶ Further, the nature of an order is determined by the

201. See *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (indicating that the trial court's power to modify should not be interfered with in order to effectively address the safety concerns normally associated with family violence); *In re Cummings*, 13 S.W.3d at 475 (holding that an expired protective order can be appealed because of its collateral consequences, such as the social stigma and the legal consequences it carries).

202. See *Cooke v. Cooke*, 65 S.W.3d 785, 788 (Tex. App.—Dallas 2001, no pet.) (asserting that the trial court's power to modify does not mean it has not "disposed of all the issues").

203. See *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (discussing the reoccurring problem of judgments, intended to be final, being held interlocutory because of poor draftsmanship).

204. See *id.* (stating that a judgment is final and appealable when it has disposed of all parties and issues); W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY'S L.J. 1, 7 (2002) (stating that only the supreme court can modify or abrogate precedent (citing *Lubbock County v. Trammel's Lubbock Bails Bonds*, 80 S.W.3d 580, 585 (Tex. 2002))).

205. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) (citing *Boston v. Garrison*, 152 Tex. 253, 256 S.W.2d 67, 70 (1953)); *In re City of Dallas*, 977 S.W.2d 798, 804 (Tex. App.—Fort Worth 1998, no pet.) (citing *Boston*, 256 S.W.2d at 70); *R.I.O. Sys., Inc. v. Union Carbide Corp.*, 780 S.W.2d 489, 493 (Tex. App.—Corpus Christi 1998, writ denied).

206. *James v. Hubbard*, 985 S.W.2d 516, 518 (Tex. App.—San Antonio 1998, no pet.). This rule has been widely recognized and applied by Texas appellate courts. *Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.); *Striedel v. Striedel*, 15 S.W.3d

“character and function,” irrespective of its title or its duration.²⁰⁷ A protective order by its nature is meant to restrict motion and enforce inaction.²⁰⁸ As previously stated, its duration can go beyond the rendition of

163, 164 (Tex. App.—Corpus Christi 2000, no pet.); *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.); *Aloe Vera of Am., Inc. v. CIC Cosmetics Int'l Corp.*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ).

207. See *James*, 985 S.W.2d at 518 (citing *In re Johnson*, 961 S.W.2d 478, 480 n.1 (Tex. App.—Corpus Christi 1997, no writ)).

208. See TEX. FAM. CODE ANN. § 85.022 (Vernon 2002) (discussing the extent of protective order prohibitions and restrictions). The statute enumerates the restrictions and inactions, some of which include the authority of a court to order a person who committed family violence to:

- (1) complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, . . . ;
 - (2) counsel with a social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor if a program under Subdivision (1) is not available; or
 - (3) perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence.
- (b) In a protective order, the court may prohibit the person found to have committed family violence from:
- (1) committing family violence;
 - (2) communicating:
 - (A) directly with a person protected by an order or a member of the family or household of a person protected by an order, in a threatening or harassing manner;
 - (B) a threat through any person to a person protected by an order or a member of the family or household of a person protected by an order; and
 - (C) if the court finds good cause, in any manner with a person protected by an order or a member of the family or household of a person protected by an order, except through the party's attorney or a person appointed by the court;
 - (3) going to or near the residence or place of employment or business of a person protected by an order or a member of the family or household of a person protected by an order;
 - (4) going to or near the residence, child-care facility, or school a child protected under the order normally attends or in which the child normally resides; and
 - (5) engaging in conduct directed specifically toward a person who is a person protected by an order or a member of the family or household of a person protected by an order, including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the person.

Id.

a divorce decree.²⁰⁹ In that regard, it is not a temporary injunction, but rather a permanent injunction.²¹⁰

When a protective order disposes of all parties and issues, it is the equivalent of a final judgment.²¹¹ The power to modify does not negate the fact that some protective orders may dispose of all parties and issues.²¹² Consequently, the power to modify “does not convert an otherwise final order into an interlocutory one.”²¹³ The rule as to what determines a final judgment is well established in Texas jurisprudence.²¹⁴ Moreover, precisely because a protective order is a permanent injunction, it is subject to being “reviewed, opened, vacated or modified by the trial court upon a showing of changed circumstances.”²¹⁵ Notably, temporary

209. See TEX. FAM. CODE ANN. § 85.025 (Vernon 2002) (indicating that a protective order can last up to two years by law or as otherwise stated in the order by the court); JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 374 (2002) (stating that when a divorce decree and a protective order conflict, a protective order prevails over both a suit for dissolution or a SAPCR).

210. See *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) (holding that “it is the character and function of an order that determines its classification”); *Brines v. McIlhaney*, 596 S.W.2d 519, 523 (Tex. 1980) (stating that a temporary injunction “operates until dissolved by an interlocutory order or until the final hearing”); see also *J.C. Matlock v. Data Processing Sec., Inc.*, 618 S.W.2d 327, 328 (Tex. 1981) (determining that a temporary injunction’s purpose is to preserve that status quo until there is a trial on the merits); *Aloe Vera of Am., Inc.*, 517 S.W.2d at 435 (noting that an order providing injunctive relief is permanent if “the duration of the injunctive relief granted does not depend on any further order of the court”). The proposition that the purpose of a temporary injunction is “to preserve the status quo” of the litigation’s subject matter pending a trial on the merits is firmly established in Texas. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978), *rev'd on other grounds*, 620 S.W.2d 561 (Tex. 1981); *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961); *City of Lubbock v. Stubbs*, 160 Tex. 111, 327 S.W.2d 411, 414-15 (1959); *Matagorda County Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 100 (Tex. App.—Corpus Christi 2001, no pet.); *Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 343 (Tex. App.—Austin 2001, no pet.); *Munson v. Milton*, 948 S.W.2d 813, 815 (Tex. App.—San Antonio 1997, writ denied); *Alamo Sav. Ass'n of Tex. v. Forward Constr. Corp.*, 746 S.W.2d 897, 899 (Tex. App.—Corpus Christi 1988, writ *dism'd w.o.j.*).

211. *Striedel*, 15 S.W.3d at 165; *In re Cummings*, 13 S.W.3d at 474-75; *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, pet. denied) (*per curiam*); *James*, 985 S.W.2d at 517-18.

212. See *City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (stating that a trial court may modify permanent injunctions after a showing of changed conditions (citing *Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991))).

213. *Cooke v. Cooke*, 65 S.W.3d 785, 788 (Tex. App.—Dallas 2001, no pet.).

214. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

215. *Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991).

injunctions are subject to appellate review as an exception to the general rule prohibiting interlocutory appeal.²¹⁶

In analyzing both views of this issue, there are several valid contentions that may ultimately lead to a uniform understanding of the nature and appealability of a protective order. For instance, the minority's position illustrates that a protective order can serve as a temporary order, which renders it interlocutory and non-appealable.²¹⁷ On the other hand, the majority points out that a protective order does not always serve as a temporary order and in fact may be an independent final injunction.²¹⁸ It is in these cases that the order should be subject to an appeal.

In that regard, the appealability of a protective order may depend on two factors. First, if the protective order is rendered while a suit for dissolution or a SAPCR is pending, the court should determine whether the order's purpose is to maintain the status quo of the pending litigation.²¹⁹ If so, then such an order is a temporary injunction or in effect, a temporary order under the Family Code.²²⁰ As a result, it would be an interloc-

216. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 2004); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *Aloe Vera of Am., Inc. v. CIC Cosmetics Int'l Corp.*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ).

217. See *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (asserting that a protective order issued in an underlying divorce is not an independent action and therefore not appealable); see also *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming the conclusion of the *Ruiz* and *Bilyeu* courts); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 281 (Tex. App.—Austin 2002, no pet.) (agreeing with the *Ruiz* decision).

218. *In re Marriage of Blitstein*, 569 N.E.2d 1357, 1360 (Ill. App. Ct. 1991); see also *Cooke v. Cooke*, 65 S.W.3d 785, 789 (Tex. App.—Dallas 2001, no pet.) (upholding the appealability of a protective order when it is a final independent claim); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, no pet.) (per curiam) (indicating that a protective order is appealable because it is a final independent claim); *Normand v. Fox*, 940 S.W.2d 401, 405 (Tex. App.—Waco 1997, no writ) (Vance, J., dissenting) (stating that the legislature should address the appealability of a protective order by providing an appellate remedy for independently granted protective orders).

219. See *Ruiz*, 946 S.W.3d at 124 (indicating that a protective order filed when a divorce proceeding is pending is governed by the section in the Family Code covering temporary orders). See generally TEX. FAM. CODE ANN. §§ 6.501-.502 (Vernon Supp. 2004) (outlining the use and purposes of temporary orders when there is a suit for dissolution pending, including for the purpose of preserving the parties property); see also *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (stating that the purpose of a temporary injunction “is to preserve the status quo of the litigation’s subject matter pending a trial on the merits”).

220. See TEX. FAM. CODE ANN. §§ 6.501-.502 (Vernon Supp. 2004) (indicating that the character and function of temporary orders, when there is a suit for dissolution pending, is primarily to preserve the property of the parties); *Butnaru*, 84 S.W.3d at 204 (stating that a temporary injunction’s purpose is to preserve the status quo for pending litigation); *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992) (stating that the

utory non-appealable order, at least through the duration of the underlying suit.²²¹ On the other hand, if the order is not for the purpose of maintaining the status quo between the parties, or if there is no suit pending, then the court will have to determine whether it has disposed of all the issues and parties.²²² In this situation, the protective order is an independent claim, and courts should refrain from following the minority's reasoning and adhere to the finality rule.

Currently, the potential remedies to a challenge of the issuance or scope of a protective order are modification,²²³ motion to vacate (after its first year),²²⁴ writ of mandamus,²²⁵ or an appeal.²²⁶ Ultimately, the current remedies may be ill suited due to their inherent limitations and the nature and character of a protective order.²²⁷

classification of an order for appellate purposes is determined by the character and function, not its form or title).

221. See TEX. FAM. CODE ANN. § 6.507 (Vernon 1998) (stating that temporary orders under the Family Code are non-appealable interlocutory orders).

222. See *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (holding that a judgment is final when it has disposed of all parties and issues); *Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App.—Waco 2001, no pet.) (holding that a protective order is a final appealable order when it has disposed of all parties and issues); *Cooke*, 65 S.W.3d at 789 (concluding that a protective order is final not because it is a permanent injunction, but rather when it disposes of all issues and parties); *Striedel v. Striedel*, 15 S.W.3d 163, 164-65 (Tex. App.—Corpus Christi 2000, no pet.) (holding that a protective order should be appealable when it has disposed of all issues and parties); *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.) (affirming that a protective order is appealable when it has disposed of all issues and parties); *Winsett*, 22 S.W.3d at 510 (holding that a protective order is final and appealable when it has disposed of all parties and issues); *James v. Hubbard*, 985 S.W.2d 516, 517 (Tex. App.—San Antonio 1998, no pet.) (adhering to the finality rule by stating that a protective order should be appealable when it disposes of all issues and parties).

223. See TEX. FAM. CODE ANN. § 87.001 (Vernon 2002) (stating that the court, upon a motion of any party, may modify a protective order to include or exclude any item within certain restrictions).

224. See *id.* § 85.025(b) (indicating that a person contesting the continuing need of a protective order can file a motion after the first anniversary of the date when the order was rendered).

225. See *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (affirming that a protective order issued when a divorce is pending can only be reviewed through the procedure of mandamus); *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App.—El Paso 1997, no writ) (per curiam) (holding that a writ of mandamus is the proper review remedy for a protective order that is issued while a divorce is pending).

226. *Kelt*, 67 S.W.3d at 366; *Cooke*, 65 S.W.3d at 787-88; *Striedel*, 15 S.W.3d at 164-65; *Winsett*, 22 S.W.3d at 510; *James*, 985 S.W.2d at 518.

227. See *Normand v. Fox*, 940 S.W.2d 401, 405 (Tex. App.—Waco 1997, no writ) (Vance, J., dissenting) (arguing that an abuse of discretion standard of review in a writ of mandamus is a heavy burden and that the delay in a standard appeal carries the risk of the issues becoming moot).

F. *Viability of Remedies*

1. Modification/Motion to Vacate

Ostensibly, a party with a claim against the nature and scope of a protective order can find some relief in requesting a modification or a motion to vacate the order.²²⁸ However, several limitations may preclude this remedy as a possible option. First, modification is limited in jurisdiction to the court that rendered the protective order or a court to which the protective order can be transferred.²²⁹ As a result, if a party is asserting that the court abused its discretion in rendering the protective order, it is doubtful that the same court that issued the order will agree. Additionally, modification is generally limited to situations in which the complaining party can show that the conditions have changed.²³⁰ Second, at least during the first year, the trial court has jurisdiction only to modify and not to vacate such an order.²³¹ Consequently, within the first year, if a party is claiming that a protective order should not have been rendered or that conditions that were present are no longer in existence, modification would be an ill suited remedy. Therefore, one would have to wait a year before filing a motion to vacate the order.²³²

2. Writ of Mandamus

In determining that family violence orders rendered during the pendency of a divorce are interlocutory, the court of appeals concluded that the appropriate remedy is a writ of mandamus.²³³ Although mandamus provides greater expediency, its review is strictly limited to an abuse of discretion standard.²³⁴ Although an abuse of discretion may be the standard of review in a regular appeal, some courts state that a mandamus

228. TEX. FAM. CODE ANN. § 87.001 (Vernon 2002).

229. *Id.* §§ 85.065, 87.001 (stating that the court rendering the protective order or the court which the order is transferred to has the power to modify).

230. *City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (per curiam) (citing *Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991)).

231. *See* TEX. FAM. CODE ANN. § 85.025(b) (Vernon 2002) (indicating that a person subject to “a protective order may file a motion not earlier than the first anniversary of the date on which the order was rendered requesting that the court review the protective order and determine whether there is a continuing need for the order”).

232. *See id.* (explaining that a motion to change or modify a protective order is not possible unless the protective order has been in effect for at least one year).

233. *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.); *see also* *Normand v. Fox*, 940 S.W.2d 401, 404 (Tex. App.—Waco 1997, no writ) (concluding that “[m]andamus is an appropriate remedy to challenge interlocutory orders not subject to appeal”).

234. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); *James v. Hubbard*, 985 S.W.2d 516, 519 (Tex. App.—San Antonio 1998, no pet.) (Stone, J., dissenting) (discussing H.B. 2811, which states that if a person cannot appeal a protective order,

proceeding requires a heightened abuse of discretion, one where extraordinary circumstances demand mandamus relief.²³⁵ Consequently, mandamus may not be granted unless the complaining party is able to prove not only error by the trial court, but also that extraordinary circumstances exist to compel mandamus relief.

In determining whether there was an abuse of discretion, during a mandamus proceeding the appellate court will give deference to the trial court's actions with regard to factual matters.²³⁶ Only if the trial court acted in a manner "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law" will mandamus be issued.²³⁷ While it has been pointed out that a family violence protective order will be issued when there has been family violence and it is likely to reoccur, the nature and scope may be entirely within the discretion of the court.²³⁸ Consequently, if the facts support the rendering of a family violence protective order, the appellate court will be limited to reviewing only the controlling legal principles.²³⁹ As pointed out, the statute allows the trial court to order any acts that it deems necessary, which provides wide discretion in determining legal sufficiency.²⁴⁰ However, under a writ of mandamus, the appellate court will not exercise review based on legal or factual insufficiency. The court's narrow standard of review fails to address the most controversial aspect of a family violence protective order: its factual and legal sufficiency. Further, it presents a potentially higher standard of review than a standard appeal's abuse of discretion standard of review.

he "has no rights of appeal other than application for writ of mandamus, which limits the complaining party's right of review to an assertion that the court abused its discretion").

235. See *Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997) (orig. proceeding) (stating that no extraordinary circumstances were shown indicating that the appellate review was inadequate); *CSR, Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) (orig. proceeding) (holding that there was an abuse of discretion on behalf of the trial court and that mandamus was justified due to extraordinary circumstances).

236. See *Walker*, 827 S.W.2d at 839-40 (stating that factual challenges will not be remedied through mandamus).

237. *Id.* at 839 (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d at 916, 917 (Tex. 1985) (orig. proceeding)).

238. See TEX. FAM. CODE ANN. §§ 85.001, 85.021-.022 (Vernon 2002) (stating that a court can order a person found to have committed family violence and where there is a likelihood for it to reoccur to acts that are "necessary or appropriate to prevent or reduce the likelihood of family violence"). The trial court's determination of what is necessary will probably be based on the particular facts of each case. As a result, as long as those acts are within guiding legal principles, irrespective of its factual sufficiency, it is unlikely that an appellate court will challenge the trial court's ruling.

239. *Walker*, 827 S.W.2d at 838-40 (noting that a "[t]rial court has no 'discretion' in determining what the law is or applying the law to the facts").

240. TEX. FAM. CODE ANN. § 85.022 (Vernon 2002).

3. Standard Appeal

Conversely, a standard appeal is also an ill suited remedy because in most instances, a protective order will expire before a decision is reached, making it moot.²⁴¹ The duration of a protective order should not exceed two years, but it may be less.²⁴² The *Normand* court and its progeny strongly assert that the trial court's retention of the power to modify precludes a protective order from appeal.²⁴³ Otherwise, the trial court would not be able to modify the order if it were up on appeal.²⁴⁴ However, this is not the test for determining the finality of a judgment.²⁴⁵ If a judgment disposes of all parties and issues, it is a final judgment.²⁴⁶ The power to modify, as with permanent injunctions, does not make an order that disposes of all parties and issues interlocutory.²⁴⁷

Alternatively, in the event that an appeal does interfere with the power to modify, it would be due to the delay in a standard appeal. Therefore, this argument only lends support to the proposition that a standard appeal is not appropriately suited for a family violence protective order.²⁴⁸ This does not mean that the appellate courts lack jurisdiction.²⁴⁹ The status of a protective order is determined by “[t]he disposition of the parties and issues, not the retention of jurisdiction.”²⁵⁰ On the contrary, appellate courts should have jurisdiction over final orders. Appellate jurisdiction, however, should be granted to independent protective orders, not solely because they are permanent injunctions, but rather because they

241. See *Normand v. Fox*, 940 S.W.2d 401, 404 n.6 (Tex. App.—Waco 1997, no writ) (explaining the likelihood of the issues becoming moot).

242. TEX. FAM. CODE ANN. § 85.025 (Vernon 2002).

243. *Normand*, 940 S.W.2d at 403; see also, e.g., *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (noting that an order that remains subject to modification is not final); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (explaining that the power to modify the order makes the judgment not final).

244. See *Bilyeu*, 86 S.W.3d at 282 (holding that a protective order is not a final judgment since the trial court retains its plenary power to modify).

245. See *James v. Hubbard*, 985 S.W.2d 516, 517 (Tex. App.—San Antonio 1998, no pet.) (holding that protective orders are final and appealable); see also *Cooke v. Cooke*, 65 S.W.3d 785, 788 (Tex. App.—Dallas 2001, no pet.) (concluding that the power to modify an order does not make it interlocutory).

246. *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985); *Cooke*, 65 S.W.3d at 788.

247. See *Cooke*, 65 S.W.3d at 788 (stating that the ability to modify does not indicate a lack of finality in the order).

248. See *Normand*, 940 S.W.2d at 405 (Vance, J., dissenting) (rejecting the majority reasoning that the power to modify precludes a protective order from appeal, and stating that “neither an ordinary appeal nor mandamus may provide effective appellate review”).

249. See *Cooke*, 65 S.W.3d at 788 (asserting that the ability to modify does not imply that the trial court has failed to dispose of all issues and parties).

250. See *id.* (indicating that a permanent injunction is appealable only when it adheres to the finality rule).

have disposed of all parties and issues.²⁵¹ Moreover, appellate jurisdiction should consider the policy concerns over an improperly issued protective order since “[v]aluable rights are at stake.”²⁵² The problem lies in the delay in a standard appeal.²⁵³ The delay may possibly infringe on the trial court’s power to modify and further cause the issues on appeal to become moot.²⁵⁴ The legislature can resolve this issue by making family violence protective orders subject to an accelerated appeal.²⁵⁵

IV. PROPOSAL

The arguments for and against a family violence protective order being subject to appeal have brought dissension among the Texas Courts of Appeals.²⁵⁶ The trend of thought seems to be that a family violence protective order that disposes of all parties and issues should be subject to

251. *See id.* (holding that a protective order may be appealable if it disposes of all issues and parties, not simply because it can be classified as a permanent injunction); *see also Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App.—Waco 2001, no pet.) (adopting the proposition that a protective order is a final judgment when it disposes of all parties and issues); *Striedel v. Striedel*, 15 S.W.3d 163, 165 (Tex. App.—Corpus Christi 2000, no pet.) (holding that a protective order is appealable when it has disposed of all parties and issues).

252. *James v. Hubbard*, 985 S.W.2d 516, 518 (Tex. App.—San Antonio 1998, no pet.); *see also In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.) (noting that a protective order carries social stigma along with legal repercussions, since the determination of child custody can consider family violence).

253. *See Normand v. Fox*, 940 S.W.2d 401, 404 n.6 (Tex. App.—Waco 1997, no writ) (indicating that the delay in a standard appeal may cause the issues within a protective order to become moot).

254. *See id.* (advocating for accelerated appeal of protective orders as a solution to potential mootness problems).

255. *See id.* (urging the legislature to make protective orders final and subject to accelerated appeal).

256. *Compare In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.) (affirming the *Normand* court’s reasoning that the power to modify precludes a protective order from being a final judgment), *and Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (finding that a protective order issued during the pendency of a divorce is not a final judgment because the court retained power to modify), *with Kelt*, 67 S.W.3d at 366 (concluding that a protective order should be subject to review, characterizing it as an injunction that disposes of all parties and issues, and is therefore appealable), *Cooke v. Cooke*, 65 S.W.3d 785, 788 (Tex. App.—Dallas 2001, no pet.) (disagreeing that the power to modify precludes finality, and holding that a protective order is final and appealable when it disposes of all parties and issues), *Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (finding the protective order to be a permanent injunction that is final and appealable), *Striedel v. Striedel*, 15 S.W.3d 163, 165 (Tex. App.—Corpus Christi 2000, no pet.) (determining that the protective order met the requirements of a final judgment, and therefore, was appealable), *In re Cummings*, 13 S.W.3d at 475 (finding that although the trial court retained power to modify, the protective order disposed of all parties and issues, and therefore, it was final and appealable), *and*

appeal.²⁵⁷ Opponents, however, maintain that because the trial court retains jurisdiction, a family violence protective order is interlocutory.²⁵⁸ Recent decisions continue to illustrate that the classification of a protective order for purposes of appeal is still unclear among the Texas Courts of Appeals.²⁵⁹ Since the outcome of this debate ultimately determines the scope of review, the Texas Supreme Court or the Texas Legislature should address this issue.²⁶⁰

Whether a family violence protective order is interlocutory should depend solely on the disposition of all parties and issues.²⁶¹ However, a standard appeal, just like a writ of mandamus, fails to provide an appropriate review.²⁶² Because of the delay in a standard appeal and the limited scope of review in a writ of mandamus, family violence protective orders should be subject to an accelerated timetable.²⁶³ The legislature has attempted to institute such a timetable on various occasions, but has

Winsett v. Edgar, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, pet. denied) (per curiam) (holding that a protective order is a final, appealable order).

257. See *B.C. v. Rhodes*, 116 S.W.3d 878, 885 (Tex. App.—Austin 2003, no pet.) (holding that as long as a protective order disposes of all issues and parties, it is appealable, notwithstanding the trial court's power to modify). This is the same appellate court that held in *Bilyeu* that a protective order issued while a divorce is pending is not appealable because of the trial court's power to modify. *Bilyeu*, 86 S.W.3d at 282. Notably, in *Rhodes*, Chief Justice Law dissented, stating that the majority's holding was contrary to their holding in *Bilyeu*. *Rhodes*, 116 S.W.3d at 885.

258. *Normand*, 940 S.W.2d at 404; see also *In re K.S.L.-C.*, 109 S.W.3d at 579 (affirming the *Normand* court's reasoning that the power to modify precludes a protective order from being a final appealable judgment); *Bilyeu*, 86 S.W.3d at 282 (echoing the *Normand* court by holding that a protective order is not appealable because of the trial court's power to modify).

259. See *Ulmer v. Ulmer*, No. 14-03-00125-CV, 2003 WL 1988848, at *1 (Tex. App.—Houston [14th Dist.] May 1, 2003, no pet. h.) (per curiam) (holding that a protective order is a non-appealable interlocutory order). On reconsideration, the court then held that a protective order that gives injunctive relief and disposes of all issues is final and appealable. *Ulmer v. Ulmer*, No. 14-03-00125-CV, 2004 WL 253509, at *1 (Tex. App.—Houston [14th Dist.] Feb. 12, 2004, no pet. h.) (en banc); see also *Rhodes*, 116 S.W.3d at 887 (holding that a protective order that disposes of all issues and parties is appealable despite the trial court's power to modify). Although in the latter case the protective order was rendered between two nonmarital parties, the dissent felt that the power to modify should preclude a protective order from being final. *Id.* at 887 (Law, J., dissenting).

260. See *Normand*, 940 S.W.2d at 405 (Vance, J., dissenting) (urging the legislature to take action and make protective orders subject to accelerated review because, among other reasons, the alternative, mandamus, is limited to only an abuse of discretion standard).

261. *N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (stating that a final judgment is one that has disposed of all issues and parties).

262. *Normand*, 940 S.W.2d at 404 n.6.

263. *Id.*

not succeeded.²⁶⁴ A legislative provision allowing accelerated appeal would resolve the contested debate and the “problem of non-reviewability inherent in these actions.”²⁶⁵

Furthermore, an accelerated appeal would provide a better balance between the policy concerns of both sides of this issue. The majority of the courts of appeals argue that a protective order’s relief is injunctive,²⁶⁶ infringes on substantive rights,²⁶⁷ and as a collateral consequence, carries a social stigma and possible legal repercussions.²⁶⁸ In contrast to the theory that a protective order should be appealable, the minority’s position is that the protective order seeks to eradicate certain ills in society and that modification is necessary to serve this goal.²⁶⁹ Accordingly, they state that an appeal would prevent a trial court from modifying a protective order.²⁷⁰ An accelerated appeal would provide expedient appellate relief limiting the delay and the appellate court’s jurisdiction over the protective order.²⁷¹ Thus, such an accelerated appeal would limit the interference with the trial court’s power to modify and would provide appellate review outside of the abuse of discretion context.

264. Tex. H.B. 1741, 77th Leg., R.S. (2001); Tex. H.B. 2786, 76th Leg., R.S. (1999); Tex. H.B. 2811, 75th Leg., R.S. (1997). These bills would have made protective orders subject to accelerated appeal. *Id.* Notably, the bills state that an appeal would not affect the trial court’s ability to modify, vacate, or expand the order. *Id.*

265. Ruiz v. Ruiz, 946 S.W.2d 123, 124 n.1 (Tex. App.—El Paso 1997, no writ) (per curiam); see also *Normand*, 940 S.W.2d at 404 (Vance, J., dissenting) (urging the Texas Legislature to provide for accelerated review of protective orders).

266. See *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App.—Corpus Christi 2000, no pet.) (holding that a protective order is final and appealable because it is not dependent upon further orders by the trial court (citing *James v. Hubbard*, 985 S.W.2d 516, 518 (Tex. App.—San Antonio 1998, no pet.))).

267. See *James*, 985 S.W.2d at 518 (stating that appellate jurisdiction over a protective order is a significant issue because valuable rights are involved).

268. *In re Cummings*, 13 S.W.3d at 475. This court also notes that a protective order has the potential to influence valuable rights, such as parental rights. *Id.*

269. See *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (concurring with the dissenting opinion of *Striedel* that there are “sound reasons” for a trial court to maintain the power to modify the protective order); *Striedel v. Striedel*, 15 S.W.3d 163, 168 (Tex. App.—Corpus Christi 2000, no pet.) (Yanez, J., dissenting) (stating that “[t]he nature of a protective order and the ills it seeks to eradicate require the relief it provides to be tailored and [revised] to suit unique and volatile circumstances”). The *Bilyeu* court states this as the primary reason for a trial court to maintain the power to modify, unimpeded by other court actions. *Bilyeu*, 86 S.W.3d at 282.

270. *In re K.S.L.-C.*, 109 S.W.3d 577, 579 (Tex. App.—Tyler 2003, no pet.); *Bilyeu*, 86 S.W.3d at 282; *Normand*, 940 S.W.2d at 404.

271. See TEX. R. APP. P. 26.1 (stating that a standard appeal notice may be filed up to ninety days after the judgment has been signed; however, with an accelerated appeal, notice “must be filed within 20 days”).

V. CONCLUSION

As previously discussed, only those family violence protective orders that dispose of all parties and issues should be subject to appeal. Unfortunately, the simplicity of this rule is deceiving, and those courts that have labeled protective orders as final have provided very little guidance in making such a determination. However, by analogizing permanent injunctions to protective orders, the courts were able to discern their finality.²⁷² This analogy is valid because, like a protective order, permanent injunctions generally involve substantive rights, are subject to modification, and the duration of the injunctive relief does not depend on any further court action.²⁷³ The appealability of a protective order is important because valuable rights are at risk. Therefore, the legislature should clarify the appealability of protective orders by providing accelerated review of independently granted protective orders.²⁷⁴ In doing so, the legislature would serve the interest behind both sides of this issue and further provide judicial clarity to Texas courts.

272. *See Pena v. Garza*, 61 S.W.3d 529, 531 (Tex. App.—San Antonio 2001, no pet.) (holding that a protective order is appealable because, like a permanent injunction, the relief that it provides does not depend on any further court action); *see also Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App.—Waco 2001, no pet.) (concluding that a protective order provides injunctive relief and is a final appealable order as long as it disposes of all parties and issues); *Cooke v. Cooke*, 65 S.W.3d 785, 787 (Tex. App.—Dallas 2001, no pet.) (determining that a protective order is appealable not because it is similar to a permanent injunction, but because it disposes of all parties and issues); *In re Cummings*, 13 S.W.3d at 475 (reasoning that a permanent injunction is final and appealable if it disposes of all parties and issues, and because the protective order also disposes of all issues, it is final and appealable); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App.—Fort Worth 1999, no pet.) (per curiam) (finding that a protective order is final and appealable); *James*, 985 S.W.2d at 517-18 (refusing to treat a family violence protective order, which is a type of permanent injunction, differently than any other final permanent injunction, and therefore holding that it is final and appealable).

273. *See Aloe Vera of Am., Inc. v. CIC Cosmetics Int'l Corp.*, 517 S.W.2d 433, 435 (Tex. Civ. App.—Dallas 1974, no writ) (holding that an injunction is permanent if the duration is not dependent upon any further court action).

274. *Normand*, 940 S.W.2d at 404.

