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OPINION COMMITTEE

Ms. Elizabeth Robinson
Chair, Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for an Opinion Interpreting Article 5.045 TEX. CODE CRIM. PROC.

Dear Ms. Robinson:

The City of Richardson has requested that my office seek a formal opinion from you.

The City of Richardson would like to know: (1) whether a protective order may, under Chapter 85 of the Family Code and/or Article 17.292 of the Code of Criminal Procedure, include a provision authorizing the perpetrator of family violence to go to the residence shared with the victim to collect his or her personal property while accompanied by a peace officer; and (2) whether Article 5.045 of the Code of Criminal Procedure will immunize peace officers who escort perpetrators of family violence to the residence shared with the victim in accordance with such a protective order?

In Opinion No. JC-0112 (1999) your office concluded that Article 5.045 of the Texas Code of Criminal Procedure protects law enforcement officers, who accompany victims of domestic violence to their residences for the purpose of collecting personal property (even after those victims have vacated the premises) from civil liability for acts or omissions that arise in connection with such assistance. Your office also concluded that the escort of a perpetrator of family violence to the residence shared with the victim, whether or not it violates the terms of protective order, is not the provision of standby assistance contemplated by Article 5.045 of the Code of Criminal Procedure. This opinion however did not specifically address whether a protective order may include a provision authorizing the perpetrator to go to the residence shared with the victim to collect his or her personal property while accompanied by a peace officer, and if so, whether Article 5.045 of the Texas Code of Criminal Procedure will protect the peace officer from civil liability in connection with such assistance.



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Many perpetrators of domestic violence who are under protective orders that include a prohibition of going to or near the residence of the victim need to collect their personal property from the residence shared with the victim. The ability to provide "civil standby" assistance in such instances will preserve the peace, protect the victim and will serve to discourage unescorted visits to the residence when the perpetrator needs his or her personal property. Clearly, no person including the victim or an attorney has the power to authorize a perpetrator under protective order to go to the shared residence of the victim to collect their personal property. Similarly, neither the prosecuting attorney nor a magistrate may authorize what a protective order forbids. Thus, if a protective order exists forbidding a perpetrator of family violence from going to or near the family residence, unless or until that order is formally modified by the Court, a peace officer would indeed be ill advised to escort a perpetrator to the shared residence for the purpose of allowing the perpetrator to collect his or her personal property.

Although your office concluded in Opinion No. JC-0112 that the escort of a perpetrator was not contemplated by Article 5.045 of the Code of Criminal Procedure, the opinion left open the issue of whether a protective order may include a provision which authorizes the perpetrator to go to the shared residence to collect his or her property if accompanied by a police officer. Under such conditions a violation of a protective order would not result. It is imperative that peace officers know whether Article 5.045 of the Code of Criminal Procedure will protect and immunize them from any claims that arise during the course of such assistance. Moreover, even if the Courts later declare that Article 5.045 of the Code of Criminal Procedure does not apply to the escort of a perpetrator of family violence to the residence shared with the victim, peace officers in defense of any claims could still reasonably rely upon the defense of official immunity for state law claims and qualified immunity for any federal claims.

Article 17.292 of the Texas Code of Criminal Procedure and Chapter 85 of the Family Code are silent as to whether the Court may include a provision which would allow the perpetrator of family violence to go to the shared residence to collect his or her personal property while accompanied by a peace officer. Thus, if a protective order may lawfully include such provision peace officers will provide the necessary civil standby assistance if Article 5.045 of the Code of Criminal Procedure will operate to immunize the peace officers in providing such assistance.

Enclosed is a proposed protective order which includes specific authorization for the perpetrator to go to the shared residence one time while accompanied by a peace officer to collect his or her personal property. May a protective order issued pursuant to Article 17.292 of the Code of Criminal Procedure and/or Chapter 85 of the Family Code include the following provision:

"Respondent may go to the above listed residence address on one occasion within twenty-four (24) hours upon release from jail to obtain personal items of immediate necessity while accompanied by a peace officer on civil standby, if approved by the agency. Failure to be accompanied by a peace officer will be a violation of this Order."

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Also will Article 5.045 of the Code of Criminal Procedure protect law enforcement officers who accompany perpetrators of domestic violence to the shared residence with the victim from civil liability for acts or omissions which arise in connection with such assistance and as from civil or criminal liability for any wrongful appropriation of personal property by the perpetrator if a protective order includes the above authorization?

Thank you for your prompt attention to this matter. Please contact my office if I may be of any further assistance or provide any further information in this matter.

Very truly yours,

A handwritten signature in black ink that reads "Florence Shapiro". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Florence Shapiro

FS/ses

enclosure