

## CHAPTER 8 – FAILURE TO PROSECUTE, DISMISSALS AND WITHDRAWALS

### **A. FAILURE TO PROSECUTE AND DISMISSAL BY THE COURT**

#### **PROTOCOL 8-1**

If the plaintiff does not appear for the scheduled final hearing, the court should determine that appropriate notice was given to the plaintiff; and upon satisfying itself of this requirement, the case shall be dismissed for lack of prosecution. Said dismissal shall be with prejudice to the plaintiff's right to file a new petition based upon the same allegations except for good cause shown, but without prejudice as to any new allegations.

**NOTE:** The court may consider the facts alleged in the original filing as evidence of a history of abuse in any future proceedings.

#### **PROTOCOL 8-2**

In any case where an order or petition is dismissed, all parties and the law enforcement agencies that received copies of the earlier orders shall be notified.

**NOTE:** Police should be notified by a copy of the order that the dismissal was due to a failure to appear by the plaintiff.

#### **PROTOCOL 8-3**

If the plaintiff fails to meet his or her burden of proof at the time of the final hearing, the case will be dismissed with prejudice.

### **B. WITHDRAWALS OF PROTECTIVE ORDERS**

A plaintiff may request a withdrawal of the Domestic Violence Petition at any time whether before or after the issuance of final orders. In considering the issue of the withdrawal of protective orders, it is important to keep the historical context in mind. Protective orders were designed to provide voluntary access to a judicial system where a plaintiff could obtain protection when criminal action was either not appropriate, not required or not available. It was designed to allow victims of domestic violence the opportunity to obtain protection which they helped to fashion for their own safety and well-being. Protective orders involve private parties; no state action is involved. Thus, if a victim who voluntarily seeks protection of the court wishes to terminate the court-sanctioned protection, such request should be granted, barring exceptional circumstances. The court should be mindful of the safety needs of the children as well as of the adult plaintiff.

#### **PROTOCOL 8-4**

If the Court does not grant a request for a temporary protective order but instead schedules the matter for final hearing without issuing any temporary orders, the plaintiff may withdraw the request and the case may be closed immediately, without notice to the defendant. See Protocol 5-20.

#### **PROTOCOL 8-5**

The plaintiff must complete a written request to withdraw the protective order, whether it is a temporary or final order. The plaintiff must also provide proof of identity (such as a driver's license). If the plaintiff is represented by counsel, counsel shall be notified of the plaintiff's request to vacate the order prior to any action by the court. Counsel may also be allowed to file the request to withdraw on behalf of the plaintiff. See Protocol 5-11 for information on plaintiff identification.

### **PROTOCOL 8-6**

Where possible, the clerk should arrange for a face to face meeting where the judge should ascertain whether the request is voluntarily made. If possible, the judge who issued the order should be the one to address the request for the withdrawal. The court may act on the motion or schedule the motion for a hearing. The plaintiff should be reminded by the clerk that the orders remain in effect until vacated. If a hearing is scheduled, the defendant **shall not** be notified.

#### *COMMENT*

Although a hearing is not required, it is best practice for staff to contact an advocate to be present with the plaintiff at the time of the withdrawal. The advocate can assist with safety planning. The purpose of the brief hearing is to allow the court the opportunity to determine whether the victim has considered all possible alternatives to withdrawing the protective order to ensure his or her safety.

#### *COMMENT*

It is important to remember that when a plaintiff files a request for a temporary *ex parte* protective order, it is deemed an emergency. However, a request to withdraw is not. Thus, it is reasonable to wait a short period of time so that an advocate may be present to assist with safety planning, and so that a judge may speak directly with the plaintiff.

#### *COMMENT*

When a request for dismissal is made, there is always a concern that a plaintiff is acting out of a fear of the defendant or as a result of a threat made by the defendant. While a plaintiff has an absolute right to withdraw the petition, the court should attempt to ensure that the plaintiff is not simply acting in response to coercion, fear or outside pressure. The court may refer the plaintiff to the local crisis center for assistance.

Court staff are not trained advocates. Safety planning is an integral skill and function of local domestic violence crisis centers. However, a plaintiff shall not be required to meet with an advocate before withdrawing an order. The goal is to encourage the victim to meet with an advocate for safety planning, but not to mandate a meeting as a condition of the withdrawal.

### **PROTOCOL 8-7**

When a protective order is vacated, withdrawn or modified, the clerk must notify the local law enforcement agency by transmitting a copy of the order forthwith to said agency. The clerk should follow the same transmittal protocol established for temporary orders. The clerk should also transmit the order to the Administrative Office of the Courts forthwith, via computer or facsimile, for entry into the Protective Order Registry and NCIC.

### **PROTOCOL 8-8**

The Court and/or staff shall advise the plaintiff that the withdrawal of the civil protection order has no bearing on any criminal protective bail order.