

JUDGES GUIDE TO

# Domestic Violence Cases

## CALIFORNIA PROTECTIVE ORDERS

[REVISED 2010]



### ADMINISTRATIVE OFFICE OF THE COURTS

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## JUDICIAL FOREWORD

In the last decade, over 50 laws have been passed, giving the courts broad powers to protect victims, families, and witnesses in cases involving domestic violence and stalking. Although the power to create a restraining order can mean the reality of saving lives, this safety is illusory when protective orders that are created are so vague as to be unenforceable, conflict with other orders, are not served on the perpetrator, or are not properly entered in the CLETS law enforcement system.

This bench handbook was designed by judges for judges to help steer through the maze of choices regarding protective orders—in what court, for how long, including which parties, and to answer a host of other questions that are commonly raised. The benchbook also includes important recommendations from the Final Report of the Domestic Violence Practice and Procedure Task Force (January 2008). The Judicial Council Domestic Violence Practice and Procedure Task Force, appointed by Chief Justice Ronald M. George in 2005, spent two years looking at court practice and procedure in cases involving domestic violence allegations. In addition to the many recommendations specific to protective orders found in this handbook, the Task Force also looked closely at the critical role that court leadership plays in improving the administration of justice in domestic violence cases. Specifically, the Task Force recommends, as ethically appropriate, the court's participation in domestic violence coordinating councils or court-convened committees that provide an opportunity for justice system agencies and community organizations to comment on court practices and procedures relating to domestic violence cases, as well as a mechanism for improving these practices and procedures. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Court Leadership, Working with justice system entities and community organizations, page 11, #2.* We hope this guide encourages judicial officers to make protective orders, when appropriate, to ensure the safety of victims and families, to communicate with other courts, to give law enforcement a more effective tool for the saving of lives, and to work with justice system entities and community organizations to ensure effective court practices that enable parties to obtain, understand, and comply with the court's orders

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June 1, 2010

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## **VIOLENCE AGAINST WOMEN EDUCATION PROJECT**

Domestic violence and sexual assault are critical issues facing family, criminal, and juvenile courts in California. The Violence Against Women Education Project (VAWEP) is an initiative designed to provide the courts with information, educational materials, and training on the court's role in responding to these cases. VAWEP is a collaborative project of the Administrative Office of the Courts (AOC) housed in two of its staff divisions: the Center for Families, Children & the Courts (CFCC) and Education Division/Center for Judicial Education and Research (CJER). The project is funded by the California Emergency Management Agency (CalEMA) with resources from the federal Office on Violence Against Women (OVW). The project's planning committee, comprised of judicial officers, attorneys, victim advocates, and other experts, guides the project staff in identifying key training issues and developing appropriate educational programming. Major efforts for the development and augmentation of educational events and curricula related to domestic violence and sexual assault are currently under way.

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## SCOPE

The primary objective of this bench handbook is to provide California judicial officers with a comprehensive reference guide to the requirements relating to the issuance of protective orders based on a variety of statutory authorities and relating to an array of court departments. This guide contains information about the underlying statutory requirements pertaining to protective orders, situations warranting the issuance of orders, the standards of proof required, the availability of the requested orders, the specific orders includable within the statutory schemes, the duration of the orders, the courts' responsibilities, any applicable firearms' restrictions, service requirements, enforcement of the orders, and other legal and procedural considerations. Each relevant section contains a chart summarizing the basic features of the order, and a general chart in the appendix provides a comparison of these requirements.

The handbook covers orders available under the Domestic Violence Protection Act, including emergency protective orders and temporary restraining orders in the family court, both *ex parte* and after hearing (§§2.1–2.38); proceedings under the Family Law Act and the Uniform Parentage Act (§§3.1–3.2); juvenile court protective orders (§§4.1–4.20); criminal protective orders (§§5.1–5.12); postconviction stalking protective orders (§§6.1–6.10); workplace violence protective orders (§§7.1–7.14); civil harassment protective orders (§§8.1–8.13); elder and dependent adult protective orders (§§9.1–9.10); and private postsecondary educational institution protective orders (§§10.1–10.14). The handbook also discusses conflicting orders in various courts and the required order of enforcement of these orders (§§11.1–11.2).

The handbook also contains a brief section on the full faith and credit that must be afforded to protective orders issued in other states. A fuller treatment of this subject as well as firearms restrictions, cultural considerations, and immigration issues in domestic violence, stalking, and sexual assault cases are contained in other handbooks.

# Chapter 1

## FULL FAITH AND CREDIT

### I. [§1.1] Historical Background

### II. [§1.2] Full Faith and Credit Given to Protective Orders

#### I. [§1.1] HISTORICAL BACKGROUND

Victims of domestic violence often move from state to state for safety reasons. Historically, every move required application for a new protection order, which was too burdensome and dangerous. As a result, Congress included a full faith and credit provision in the Violence Against Women Act (18 USC §2265). This provision requires all states and tribal courts to enforce valid civil and criminal protective orders issued by foreign jurisdictions as if it were the order of the enforcing state or tribe. The main provisions of 18 USC §2265 are listed in §1.2.

#### II. [§1.2] FULL FAITH AND CREDIT GIVEN TO PROTECTIVE ORDERS

A protective order issued by a State, Indian tribe, or territory that has jurisdiction over the parties and subject matter and that gives the respondent reasonable notice and opportunity to be heard shall be given full faith and credit by another State, Indian tribe, or territory and enforced by the law enforcement personnel of the State, Indian tribal government, or territory as if it were the order of the enforcing State, Indian tribe, or territory. 18 USC §2265.

- In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 USC §2265(b)(2).
- Mutual protective orders are not entitled full faith and credit unless both parties present written pleadings seeking a protection order and the court makes a specific finding that both parties are entitled to a protective order. 18 USC §2265(c).
- A State, Indian tribe, or territory cannot require notification to the respondent of a registered or filed protective order from another State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order. 18 USC §2265(d)(1).
- A protective order accorded full faith and credit does not have to be registered or filed before enforcement. 18 USC §2265(d)(2).

- A State, Indian tribe, or territory cannot make available publicly on the Internet any information regarding the registration; filing of a petition for; or issuance of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal, or territorial jurisdiction, if such publication would be likely to reveal the identity and location of the person protected by the order. A State, Indian tribe, or territory can share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes. 18 USC §2265(d)(3).
- Tribal courts have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe. 18 USC §2265(e).

The federal full faith and credit provisions listed above are also found within California's Domestic Violence Prevention Act in Fam C §§6400–6409 (Uniform Interstate Enforcement of Domestic Violence Protective Orders Act). Please refer to §2.36.

# Chapter 2

## DOMESTIC VIOLENCE PREVENTION ACT

### I. Emergency Protective Order (Fam C §§6240–6274)

- A. [§2.1] Overview
- B. [§2.2] Situations Warranting EPO
- C. [§2.3] Standard of Proof
- D. [§2.4] Availability of EPO
- E. [§2.5] Orders Includable in EPO (Fam C §6252)
- F. [§2.6] Duration of EPO (Fam C §6256)
- G. [§2.7] Officer's Responsibility
- H. [§2.8] Processing of EPO
- I. [§2.9] Court's Responsibility Under Domestic Violence Restraining Order System (Fam C §6380)
- J. [§2.10] Firearms Restrictions
- K. [§2.11] Enforcement of EPO
- L. [§2.12] Other Legal and Procedural Considerations
- M. [§2.13] Reference Chart: Emergency Protective Order (Fam C §§6240–6274)

### II. Family Court—Temporary Restraining Order

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- G. [§2.37] Other Legal and Procedural Considerations
- H. [§2.38] Reference Chart: Order After Hearing (Fam C §§6300 et seq)

**I. EMERGENCY PROTECTIVE ORDER (FAM C §§6240–6274)****A. [§2.1] OVERVIEW**

An Emergency Protective Order (EPO) is an order requested by a police officer; a sheriff's officer; a peace officer of the Department of the California Highway Patrol; a peace officer of the University of California Police Department; a peace officer of the California State University and College Police Departments; a peace officer of the Department of Parks and Recreation; a peace officer of the Department of General Services of the City of Los Angeles; a housing authority patrol officer; a peace officer for a district attorney; a parole officer, probation officer, or deputy probation officer; a peace officer of a California Community College police department; or a peace officer employed by a police department of a school district. Fam C §§6215, 6240. The officer contacts the on-call judicial officer by phone and fills out the EPO form on site. See Fam C §6241.

An EPO is valid only if it is issued by a judicial officer, after making the findings required by Fam C §6251 and under a specific request by a law enforcement officer. Fam C §6250.3.

**B. [§2.2] SITUATIONS WARRANTING EPO**

A judge may issue an ex parte EPO when an officer asserts reasonable grounds to believe any of the following:

- A person is in immediate and present danger of domestic violence based on the person's allegation of recent abuse or threat of abuse. Fam C §6250(a).
- Domestic violence is abuse perpetrated against any of the following persons (Fam C §6211):
  - Spouse or former spouse.
  - Cohabitant or former cohabitant.

*Note:* A cohabitant is a person who regularly resides in the household. Fam C §6209. For example, sublessees of different units of a house, who shared some common areas of the house, but who had no romantic or friendly relationship and who were not even previously acquainted, were not “cohabitants” within the meaning of Fam C §6209. The statutory definition of cohabitant as someone who “regularly resides” in the household implies the Legislature intended the Act to protect abuse victims who have some permanency in their living arrangements. The judicial definition of household comports with the dictionary definition of household, which provides “those who dwell under the same roof and compose a family, also a social unit comprised of those living together in the same dwelling.” *O’Kane v Irvine* (1996) 47 CA4th 207, 209, 212, 54 CR2d 549.

- A person with whom the respondent has a dating or engagement relationship (past or present).

*Note:* A dating relationship, as defined by statutory law, means frequent, intimate associations characterized by the expectation of affection or sexual involvement independent of financial considerations. Fam C §6210.

- Parties who have a child together, and the male parent is the presumed father
  - Child of the party, or child subject to a paternity action.
  - Any other person related by consanguinity or affinity in the second degree (related by blood or marriage, *e.g.*, grandparent, grandchild, brother/sister, parent, in-law).
- A child is in immediate and present danger of abuse by a family or household member based on an allegation of recent abuse or threat of abuse. Fam C §6250(b).
  - A child is in immediate and present danger of abduction by a parent or relative based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct or flee with the child. Fam C §6250(c).
  - An elder or dependent adult is in immediate and present danger of abuse based on an allegation of recent abuse or threat of abuse. Fam C §6250(d).

*Note:* An EPO may not be issued solely on allegations of financial abuse. Fam C §6250(d).

- A person is in immediate and present danger of stalking based on the person's allegation that he or she has been willfully, maliciously, and repeatedly followed or harassed by another person. It must be a credible threat made with the intent to place the person who is the target of the threat in reasonable fear for his or her safety or the safety of their immediate family. Pen C §646.91.

TIP: Unlike domestic violence, stalking does not require that the parties have a relationship, as defined in Fam C §6211.

### C. [§2.3] STANDARD OF PROOF

The standard of proof for an EPO is that reasonable grounds have been asserted that (Fam C §6251; Pen C §646.91):

- There is immediate and present danger of abuse, abduction, or stalking.

TIP: Whether the respondent is in custody has no bearing on this factor. You do not know when the respondent will be released.

- The EPO is necessary to prevent the occurrence or recurrence of abuse, abduction, or stalking.

### D. [§2.4] AVAILABILITY OF EPO

An EPO is available 24 hours a day/7 days a week. See Fam C §6241. The procedures for contacting a judge, commissioner, or referee vary from county to county.

### E. [§2.5] ORDERS INCLUDABLE IN EPO (FAM C §6252)

An EPO may include any of the following (Fam C §6252):

- Personal conduct restraints, residence exclusion, and stay away orders. For definition of protective order, see Fam C §6218. Fam C §6252(a).

TIP: Stay away orders may be expanded to include such locations as school, work, and daycare.

- Temporary care and control of a minor child of the parties. Fam C §6252(b).
- Temporary care and control of an endangered child or other children in the household including protections found in Welf & I C §213.5. For discussion of juvenile court protective orders, see §§4.1–4.20. Fam C §6252(c).

- Temporary care and control of a minor child in danger of abduction. Fam C §6252(d).
- Welfare and Institutions Code §15657.03 orders (elder and dependent adult). For discussion of elder and dependent adult protective orders, see §§9.1, 11.2. Fam C §6252(e).
- An EPO issued for stalking may also include civil harassment order protections (CCP §527.6; for discussion, see §§8.1–8.13) and/or workplace violence protections (CCP §527.8; for discussion, see §§7.1–7.14).

Any party enjoined by an EPO is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Fam C §6252.5(a); Pen C §646.91A(a).

#### **F. [§2.6] DURATION OF EPO (FAM C §6256)**

An EPO is effective 5 judicial business days after its issuance or 7 calendar days maximum after its issuance if a weekend or holiday falls within that time period. The count starts the day following the issuance of the EPO. Fam C §6256; Pen C §646.91(g)(1), (2).

#### **G. [§2.7] OFFICER'S RESPONSIBILITY**

If the restrained party can be reasonably located, the officer requesting the EPO must personally serve the order on that person. Fam C §6271(a); Pen C §646.91(h)(1).

The requesting officer must carry a copy of the EPO on their person for the remainder of their shift. Fam C §6273; Pen C §646.91(k).

#### **H. [§2.8] PROCESSING OF EPO**

The officer must give a copy of the EPO to the protected party or, in the case of a minor, the parent or guardian. Fam C §6271(b); Pen C §646.91(h)(2).

As soon as practicable, a copy of the EPO needs to be delivered to the issuing court. Fam C §6271(c); Pen C §646.91(h)(3).

If an officer serves the protective order, the officer has one business day to get the proof of service information into CLETS (California Law Enforcement Telecommunications System). Fam C §6380(d)(1).

#### **I. [§2.9] COURT'S RESPONSIBILITY UNDER DOMESTIC VIOLENCE RESTRAINING ORDER SYSTEM (FAM C §6380)**

The Department of Justice maintains a Domestic Violence Restraining Order System that contains information regarding protective and restraining orders and injunctions. Fam C §6380(e).

Each county must have a procedure for transmitting protective orders into the Domestic Violence Restraining Order System through the California Law Enforcement Telecommunications System of the State Department of Justice, otherwise known as CLETS. The data is transmitted by law enforcement, or with permission of the Department of Justice, court personnel. Fam C §6380(a).

If court personnel receive a proof of service from anyone other than law enforcement, the court clerk has one business day to get the service information into the Domestic Violence Restraining Order System through CLETS, including the name of the person who served the order. If the court is unable to provide the notification through CLETS, then the court has one business day to transmit the proof of service to a law enforcement agency that then has one business day to enter the information into CLETS. Fam C §6380(d)(2).

If the court issues a modification, termination, or extension of a protective order, it must be done on Judicial Council adopted forms and immediately entered into the CLETS system by the designated transmitting agency for the county. Fam C §6380(f).

Only Judicial Council adopted protective order forms are transmitted to the system. However, an exception is made permitting the transmittal of foreign protective orders that are registered. Fam C §6380(i).

#### **J. [§2.10] FIREARMS RESTRICTIONS**

The respondent cannot own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine or both. Pen C §12021(g). For further discussion of firearms restrictions, see §2.31.

A person subject to an emergency protective order under Pen C §646.91 cannot own, possess, purchase, or receive a firearm while the order is in effect. Pen C §646.91(n).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

Before issuing an EPO under Fam C §§6240 et seq, the on-call judge should ask the law enforcement officer who is requesting the order if the officer has asked the victim, alleged abuser, or both, whether a firearm is present at the location. Pen C §13730. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final*

*Report, January 2008), Firearms Relinquishment, Procedures, page 23, #7.*

#### **K. [§2.11] ENFORCEMENT OF EPO**

An intentional and knowing violation of the EPO is a misdemeanor punishable under Pen C §273.6.

If the restrained party willfully disobeys the EPO, then he or she is guilty of contempt of court, a misdemeanor punishable under Pen C §166(a)(4).

Any intentional disobedience of any emergency protective order granted under Pen C §646.91 is punishable under Pen C §166. Punishment under Pen C §646.9, in lieu of punishment under Pen C §646.91, is allowed if a violation of Pen C §646.9 is also pleaded and proven. Pen C §646.91(q).

A restrained party can also be guilty of contempt for disobedience of a lawful order under CCP §1209(a)(5).

If the restrained party purchases or receives or attempts to purchase or receive a firearm while knowing they are subject to the prohibitions in the EPO, then that party is guilty of a misdemeanor. Pen C §12021(g).

#### **L. [§2.12] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

An EPO is issued without prejudice. Fam C §6255.

An EPO issued on the wrong Judicial Council form (out-of-date) or no form, in and of itself, does not make it invalid. Fam C §6221(c).

The fact that the protected person left the home to avoid abuse has no bearing on the availability of an EPO. Fam C §6254. The order is enforceable anywhere in California. Fam C §6381(a).

A protective order issued in a domestic violence criminal case has precedence in enforcement over any civil protective order against the defendant, unless a court issues an EPO in which case the EPO takes precedence in enforcement over any other restraining or protective order, provided the EPO meets the following requirements (Pen C §136.2(e)(2)(A)–(C); Fam C §6383(h)):

1. The EPO is issued to protect one or more individuals who are already protected persons under another restraining or protective order;
2. The EPO restrains the individual who is the restrained person in the other restraining or protective order; and
3. The provisions of the EPO are more restrictive in relation to the restrained person than the provisions of the other restraining or protective order.

**M. [§2.13] REFERENCE CHART: EMERGENCY PROTECTIVE ORDER  
(FAM C §§6240–6274)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
Abuse	Reasonable grounds	Personal conduct restraints	5 judicial business days or 7 days maximum	Pen C §273.6
Child abuse	Immediate and present danger of abuse, abduction, or stalking	Stay away orders		Pen C §166(a)(4)
Child abduction threat		Temporary care and control of a minor child		CCP §1209(a)(5)
		Prohibited from taking action to locate protected party		
Elder abuse	Necessary to prevent the occurrence or recurrence	Elder abuse protections		
Stalking (Pen C §646.91)		Stalking—civil harassment and workplace violence protections		Pen C §12021(g)
		<b>FIREARMS:</b> Cannot own, possess, purchase, or receive		
		<b>AMMUNITION:</b> Cannot own, possess, have in custody or control		Pen C §12316(b)

*1. Prompt response to the requesting peace officer is critical to getting that officer back on patrol.*

*2. Provide clear orders to the officer so that the EPO form is filled out properly.*

*3. Remember—whether the respondent is in custody or the protected person left the home for safety reasons has no bearing on the availability of an EPO and should not be factored into the “immediate and present” danger determination.*

*This is a brief reference chart for an EPO. Please read the full, detailed section in the Protective Order Bench Manual.*

## II. FAMILY COURT—TEMPORARY RESTRAINING ORDER

### A. [§2.14] OVERVIEW

The temporary restraining order and order after hearing (TRO/OAH) restraining orders are the most common restraining orders issued throughout the state. The process is self-initiated by the petitioner in family court. See §§2.24–2.30 for OAH restraining orders.

### B. [§2.15] REQUIRED RELATIONSHIP BETWEEN PARTIES

The petitioner must have a relationship with the respondent that falls into one of the following categories (Fam C §6211):

- Spouse or former spouse.

*Note:* In 2003, the California Domestic Partner Rights and Responsibilities Act was enacted, provisions effective January 1, 2005. Registered and former registered domestic partners have the same rights, protections, and benefits that are granted to spouses and former spouses. They are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law that are imposed on spouses and former spouses. Fam C §297.5(a), (b).

- Cohabitant or former cohabitant.

*Note:* A cohabitant is a person who regularly resides in the household. A former cohabitant is a person who formerly regularly resided in the household. Fam C §6209. For example, sublessees of different units of a house, who shared some common areas of the house, but who had no romantic or friendly relationship and who were not even previously acquainted, were not “cohabitants” within the meaning of Fam C §6209(b). *O’Kane v Irvine* (1996) 47 CA4th 207, 212, 54 CR2d 549.

- Dating or engagement relationship (past or present).

*Note:* A dating relationship means frequent, intimate associations characterized by the expectation of affection or sexual involvement independent of financial considerations. Fam C §6210.

- Parties have a child together, and the male parent is the presumed father.
- Child of the party, or child subject to a paternity action.
- Any other person related by consanguinity or affinity in the second degree (related by blood or marriage, *e.g.*, grandparent, grandchild, brother/sister, parent, in-law).

*Note:* Under CCP §372(b)(1), a minor 12 years of age or older can seek a protective order without a guardian, counsel, or guardian ad litem. The court, by motion or its own discretion, can appoint a guardian ad litem to assist the minor after considering reasonable objections by the minor to specific individuals. The appointment cannot delay the issuance or denial of the order. Before appointment, the court must also consider whether the minor and guardian have divergent interests. If the minor appears without a guardian or guardian ad litem, and the minor is residing with a parent or guardian, the court must send a copy of the order to at least one parent or guardian designated by the minor, unless the court determines notice would be contrary to the best interests of the minor. See CCP §372(b)(2).

### C. [§2.16] STANDARD OF PROOF FOR TROs GENERALLY

If an affidavit shows, to the satisfaction of the court, *reasonable proof* of past act or acts of abuse, then a restraining order may be issued. Fam C §6300. The court is looking for a recent incident of abuse, threat of abuse, stalking, sexual assault, or behavior that can be enjoined under Fam C §6320(d). Fam C §6203.

The court shall consider the application for a DVPA restraining order and may issue all appropriate orders without requiring corroborating evidence. As long as the court does not issue a conflicting order, it should consider the application even when a criminal protective order (CPO) exists. This maximizes safety and enables the court to consider custody and visitation. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 17, #20.*

TIP: The word “recent” is not included in Fam C §6300 or 6203 nor explained by case law. Each request must be looked at in context.

### D. [§2.17] AVAILABILITY OF TRO

#### *Time requirements for issuance or denial*

An ex parte order must be issued or denied on the same day the application is submitted. If the application is submitted too late in the day for effective review, then it must be issued or denied the next day of judicial business, allowing sufficient time for filing. Fam C §§6326, 246.

#### *Reasons for denial*

An order denying a petition for an ex parte order must include the reasons for denying the petition. Fam C §6320.5(a).

*Note:* See mandatory form DV-109, Notice of Court Hearing.

An order denying a jurisdictionally adequate petition for an ex parte order must provide the petitioner the right to a noticed hearing on the earliest date that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of the order. At least 5 days before the hearing, the petitioner must serve on the respondent copies of all supporting papers filed with the court, including the application and affidavits. Fam C §6320.5(b).

*Note:* See mandatory form DV-109, Notice of Court Hearing.

The petitioner has the option of waiving his or her right to a noticed hearing. Waiver of the right to a noticed hearing does not preclude the petitioner from refiling a new petition, without prejudice, at a later time. Fam C §6320.5(c).

*Note:* See optional form DV-112, Waiver of Hearing on Denied Request for Temporary Restraining Order.

*Note:* Family Code §6320.5 is a codification of the holding in *Nakamura v Parker* (2007) 156 CA4th 327, 67 CR3d 286. The trial court denied Nakamura's application for a temporary restraining order without any explanation other than a general rubber-stamped denial. The appellate court found that Nakamura's factual allegations did show she was "abused" within the meaning of the DVPA, and the trial court's summary denial, without a hearing, of a facially adequate application for a TRO was an abuse of discretion.

A jurisdictionally adequate petition for an ex parte temporary restraining order under the DVPA may not be summarily denied. The court must either (1) grant the temporary orders requested and set the matter for a noticed hearing, or (2) defer ruling on the matter pending a noticed hearing, in which case the court should consider whether failure to make any of these orders would jeopardize the safety of the petitioner and children (*Nakamura v Parker, supra*). When no temporary order is issued, some petitioners may be concerned that their safety will be compromised if the court sets the matter for a noticed hearing. Therefore, the court should develop a procedure so that the petitioner is informed that he or she may withdraw the petition without prejudice to refiling it at another time. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 15, #11.*

### III. EX PARTE ORDER

#### A. [§2.18] STANDARD OF PROOF FOR EX PARTE ORDERS

In order to prevent a recurrence of domestic violence and allow a period of separation, the court may issue ex parte orders, with or **without notice**, if the affidavit provided to the court shows, to the satisfaction of the court, *reasonable proof of a past act or acts of abuse*. Fam C §6300.

*Reminder:* Abuse is bodily injury or threat of injury, stalking, or sexual assault, or behavior that can be enjoined under Fam C §6320 (see §2.19, below). Fam C §6203.

*Note:* See *In re Marriage of Nadkarni* (2009) 173 CA4th 1483, 93 CR3d 723 (Fam C §6320 lists several types of nonviolent conduct that may constitute abuse within the meaning of the DVPA; therefore abuse does not have to be actual infliction of physical injury or assault. The plain meaning of the phrase “disturbing the peace of the other party” in Fam C §6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party).

Courts should not have a blanket rule or policy regarding notice for every request for an ex parte restraining order. Notifying a proposed restrained person about an applicant’s request for a restraining order can trigger a significant risk of harm to the applicant. As provided in Fam C §6300, the court should determine *on a case-by-case basis*, depending on the circumstances, whether notice of an application for a temporary restraining order should be required, taking into account the level of danger to the applicant. In all cases, applicants should be referred to community services and should be advised of the National Domestic Violence Hotline (1-800-799-SAFE). *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 15, #10.*

In reviewing applications for temporary restraining orders, there should be no rigid time frame for determining what constitutes a relevant “past act of abuse.” Such determinations should be made on a case-by-case basis. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #15.*

**TIP:** The “great or irreparable injury” standard for no notice under Fam C §241 does not apply to orders under Fam C §6300.

**B. [§2.19] ORDERS INCLUDABLE IN EX PARTE ORDERS**

Ex parte orders may be made concerning any of the following matters:

1. **Personal conduct restraints and stay away orders.** Fam C §6320(a).

*Note:* Personal conduct restraints include: no molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including but not limited to, annoying telephone calls as described in Pen C §653m, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or disturbing the peace of the other party. Fam C §6320(a).

*Note:* On a showing of good cause, other family or household members can be included as protected parties. Fam C §6320(a).

When the court issues a restraining order, it should consider whether the order should apply to other named family or household members if good cause is demonstrated (Fam C §6320). *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 17, #18.*

*Note:* See *In re Marriage of Nadkarni* (2009) 173 CA4th 1483, 93 CR3d 723 (Fam C §6320 lists several types of nonviolent conduct that may constitute abuse within the meaning of the DVPA; therefore abuse does not have to be actual infliction of physical injury or assault. The plain meaning of the phrase “disturbing the peace of the other party” in Fam C §6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party).

2. **Protection of animals.** On a showing of good cause, the court may grant the petitioner exclusive care, possession, or control of any animal owned, possessed, leased, kept or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or respondent. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal. Fam C §6320(b).
3. **Residence exclusion.** A party can be excluded from the family dwelling, the dwelling of the other party, the common dwelling of both parties, or the dwelling of the person who has care, custody,

and control of a child to be protected from domestic violence for the period of time and on the conditions the court determines, regardless of who holds legal or equitable title or is the lessee. The court, however, can only order this on a showing of all the following (Fam C §6321(a), (b)):

- a. Facts sufficiently show that the party staying in the dwelling has the right to possession of the premises under color of law.

TIP: A helpful tool to determine “color of law” would be if the person has been in the dwelling long enough that they would be entitled to a 30-day eviction notice. A common situation is when two people live together, and the dwelling is in only one of their names.

- b. The excluded party has assaulted or threatened to assault the petitioner, anyone under the care and control of the petitioner, or a minor child of the parties or petitioner.
- c. Physical or emotional harm would result to the petitioner, anyone under the care and control of the petitioner, or to a minor child of the parties or petitioner.

When a court issues a residence-exclusion order, the court should consider implementing a protocol that allows the respondent to collect his or her belongings without violating the order. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 17, #21.*

4. Restraints the court considers necessary to effectuate the orders in 1. , 2. , and 3. Fam C §6322.
5. Prohibition of disclosure of address or other identifying information of petitioner, child, parent, guardian, or other caretaker of a child. Fam C §6322.5.
6. Temporary custody and visitation of a minor child. Fam C §6323.

Each court should take reasonable steps to expedite the determination of custody and visitation in domestic violence cases. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #17.*

- a. The court must refrain from granting or modifying a custody order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk

that the child will be removed from California. Immediate harm to a child includes domestic violence committed by one parent that is recent or part of a continuing and demonstrated pattern of domestic violence. Fam C §3064(a), (b)(1).

- b. The party requesting custody must establish a parent/child relationship by offering proof of any of the following (Fam C §6323(a)(2)(B)):
- (1) Gave birth to the child.
  - (2) Child is conclusively presumed to be a child of the marriage.

*Note:* Unless the husband is impotent or sterile, the child of a cohabiting married couple is presumed a child of the marriage (Fam C §7540).

- (3) Party has been determined by the court to be a parent of the child under Fam C §7541.
- (4) A legal adoption occurred or is pending.
- (5) A valid voluntary declaration of paternity has been signed at least 60 days before the restraining order application and has not been set aside or rescinded.
- (6) Juvenile court determined there is a parent/child relationship, or a paternity action determined party is parent of child.
- (7) Both parties stipulate in writing or on the record that they are parents of the child.

*Note:* In 2003, the California Domestic Partner Rights and Responsibilities Act was enacted, provisions effective January 1, 2005. Registered and former registered domestic partners have the same rights, protections, and benefits that are granted to spouses and former spouses. They are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law that are imposed on spouses and former spouses. Fam C §297.5(a), (b).

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses. Fam C §297.5(d).

- c. If the restrained party has not established a parent/child relationship, the court may award temporary sole legal and physical custody to the petitioner and no visitation to the restrained party pending establishment of the parent/child

relationship. The court can make this decision when determining what is in the best interests of the child and to limit the child's exposure to potential domestic violence while ensuring the safety of the whole family. Fam C §6323(a)(2)(A).

- d. The court shall not make a finding of paternity at this point in the proceedings, unless this is a Uniform Parentage Act case. Fam C §6323(b).
- e. The court's order is made without prejudice in any future proceeding to establish a parent/child relationship. Fam C §6323(b).
- f. The court's orders must be specific as to day, time, place, and manner of transfer of the child for custody or visitation. The court's order must be designed to limit the child's potential exposure to domestic violence and ensure the safety of all family members. Fam C §6323(c).

*Note:* If the petitioner is staying in a domestic violence shelter, then the specific orders must be designed to prevent disclosure of the shelter or other confidential location.

TIP: Do not make orders that state "reasonable visitation." Do not make orders that state "alternate weekends." Be specific and state first and third weekend of the month from Friday at 6:00 p.m. to Sunday at 6:00 p.m., with the first weekend being the weekend with the first Saturday in it.

- g. When making a decision in the best interests of the child, the court must consider, based on the circumstances of the case, whether supervised custody or visitation is warranted or if custody or visitation should be suspended or denied. Fam C §6323(d).

TIP: If you order supervised visitation to the respondent, do not make the petitioner the supervisor. Remember to consider cost when using professional supervised visitation services.

- h. Family Court Services: Before the hearing, the parties may be ordered to Family Court Services for mediation.

Family Court Services must have a separate written protocol, approved by the Judicial Council, for handling domestic violence cases. Fam C §3170(b).

In a proceeding where there has been a history of domestic violence between the parties or a protective order is in effect, at the request of the party alleging domestic violence

or protected by the protective order, the mediator must meet with the parties separately and at separate times. Fam C §3181.

*Note:* The Family Court Services intake form must provide information regarding this option.

If a protective order has been issued, a support person can accompany the protected party to any mediation orientation or mediation session, including separate mediation sessions. Family Court Services must inform the protected party of the right to have a support person present. If the support person participates in the mediation session, acts as an advocate, or a particular support person's presence is disruptive to the mediation process, the mediator can remove the support person. The support person's presence does not waive confidentiality, and the support person is bound by the confidentiality of mediation. Fam C §6303.

In an appropriate case, a mediator can recommend that a restraining order be issued, pending determination of the controversy, to protect the well-being of the child involved in the controversy. Fam C §3183(c).

- i. Any visitation or custody order issued by a family or juvenile court after a Criminal Protective Order (CPO) must refer to and acknowledge the precedence of enforcement of any appropriate CPO. Pen C §136.2(e)(3).
7. Temporary use, possession, and control of real and/or personal property and payment of any liens or encumbrances due while the order is in effect. Fam C §6324.
8. Restraining married persons from transferring, hypothecating, encumbering, concealing, or in any way disposing of any real or personal property, whether community, quasi-community, or separate property. But if they are done in the usual course of business or for the necessities of life, then they are allowed. If the order is against one party, that party must notify the other party of any proposed extraordinary expenses and must account to the court for those expenses. Fam C §§2045, 6325.

*Note:* In 2003, the California Domestic Partner Rights and Responsibilities Act was enacted, provisions effective January 1, 2005. Registered and former registered domestic partners have the same rights, protections, and benefits that are granted to spouses and former spouses.

They are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law that are imposed on spouses and former spouses. Fam C §297.5(a), (b).

9. Any party enjoined by a TRO is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Fam C §6322.7(a).

### C. [§2.20] FIREARMS RESTRICTIONS (FAM C §6389)

The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through AFS or another appropriate database before issuing a restraining order (including a temporary restraining order). However, failure or inability to conduct the firearms search should not delay issuance of an order. If firearms, whether registered or not, are reported to the court through an AFS database search or by the protected party, the court should so indicate on the temporary restraining order and order after hearing. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #12 & #13.*

It is unlawful for a person subject to a temporary restraining order to own, possess, purchase, or receive any firearms during the term of the protective order. On request of a law enforcement officer, the person subject to the temporary restraining order must immediately relinquish any firearm in that person's immediate possession or control to the control of the officer. If no request is made by law enforcement, the person subject to the temporary restraining order, within 24 hours of being served with the order, must either surrender the firearm to the control of local law enforcement or sell the firearm to a licensed gun dealer. Within 48 hours after receiving the order, the person must file a receipt with the court showing that the firearm was surrendered to local law enforcement or sold to a licensed gun dealer. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine, or both. Pen C §12021(g)(2); Fam C §6389(a), (c)(1), (2).

The application forms for protective orders adopted by the Judicial Council must be amended to require the petitioner to describe the number, types, and locations of any firearms presently known by the petitioner to be possessed and controlled by the respondent. Fam C §6389(c)(3).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge,

magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

*Note:* A search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under Fam C §6389. The person must have been lawfully served with the protective order and failed to relinquish the firearm as required by law. Pen C §1524(a)(11).

#### **D. [§2.21] DURATION OF TRO**

The temporary restraining order is valid until the date of the hearing, which is no later than 20 days from the date of the order or 25 days if good cause is shown to the court. Fam C §242(a).

#### **E. [§2.22] SERVICE OF TRO**

The temporary restraining order must be personally served by someone over the age of 18 who is not a party to the action. See CCP §414.10.

If the temporary restraining order was issued without notice, it must be served on the respondent at least 5 days before the hearing. Fam C §243(b). If the order was issued with notice, then it must be served on the respondent at least 15 days before the hearing. Fam C §243(c). On the petitioner's motion or the court's own motion, the service time can be shortened. Fam C §243(f).

*Note:* If the order was issued without notice, the respondent is entitled, as a matter of right, to one continuance for a reasonable period to respond. Fam C §243(e). The reverse is not true as long as the petitioner gets respondent's papers at least 2 days before the hearing. Fam C §243(g).

Each court should collaborate with law enforcement and processing services to ensure timely and effective personal service of process of restraining orders and entry of proof of services into DVROS. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #13.*

The petitioner may file a request for a reissuance if the respondent could not be served within the required time. Fam C §245.

*Verbal notice is sufficient for enforcement purposes under Pen C §§273.6 and 12021(g).* Fam C §6383. If a law enforcement officer at the scene of a domestic violence incident receives information that a protective order exists, but the petitioner cannot produce a copy of the order, the officer must check the Department of Justice Domestic Violence Restraining Order System through CLETS to verify the existence of the order. Fam C §6383(d). If the officer determines that a protective order has been issued but not served, the officer must immediately notify the respondent of the terms of the order and advise the respondent to go to court to get a copy of the protective order containing the full terms and conditions. Fam C §6383(e).

*Note:* Although verbal notice is sufficient for enforcement purposes, some judicial officers may require actual notice of all of the terms and conditions of the order before conducting a hearing in a civil setting.

**F. [§2.23] REFERENCE CHART: TEMPORARY RESTRAINING ORDER  
(FAM C §§6200 ET SEQ)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
<p><b>Recent incident of:</b> Abuse</p> <p>Threat of abuse</p> <p>Stalking</p> <p>Sexual assault</p> <p><b>If the following relationship exists:</b> Spouse or former spouse</p> <p>Cohabitant or former cohabitant</p> <p>Dating or engagement relationship (past or present)</p> <p>Parties have child together</p> <p>Child of the party or subject to a paternity action</p> <p>Consanguinity or affinity to the 2nd degree</p>	<p>Reasonable proof of past act or acts of abuse</p>	<p>Personal conduct restraints</p> <p>Protection of animals</p> <p>Stay away orders</p> <p>Residence exclusion</p> <p>Other restraints deemed necessary to effectuate the court's order</p> <p>Prohibit address disclosure</p> <p>Temporary custody and visitation of minor child</p> <p>Prohibited from taking action to locate protected party</p>	<p>20 days from the date of the order or 25 days if good cause</p>	<p>Pen C §273.6</p> <p>Pen C §166(a)(4)</p> <p>CCP §1209(a)(5)</p>

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
		<p><b>FIREARMS:</b> Cannot own, possess, purchase, or acquire</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>		<p>Pen C §12021(g)</p> <p>Pen C §12316(b)</p>

*1. An ex parte order must be issued or denied on the same day unless requested late in the day, then the next day.*

*2. An order denying a petition for an ex parte order, under Fam C §6320, must include the reasons for denying the petition.*

*3. An order denying a jurisdictionally adequate petition for an ex parte order, under Fam C §6320, must provide the petitioner the right to a noticed hearing on the earliest date that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of the order. The petitioner has the option to waive the right to a noticed hearing. A petitioner who waives their right to a noticed hearing is not precluded from refiling a new petition, without prejudice, at a later time.*

*4. The ex parte order can be issued without notice.*

*5. Custody/visitation orders must be specific.*

*This is a brief reference chart for a TRO. Please read the full, detailed section in the Protective Order Bench Manual.*

#### IV. FAMILY COURT—ORDER AFTER HEARING

##### A. [§2.24] PRIORITY OF HEARING

The restraining order hearing takes precedence over all other matters on the calendar, except old restraining order matters or matters given special precedence by law. Fam C §244(a).

The court should adhere to the statutory time periods for setting hearings on restraining orders, should endeavor to expedite these proceedings whenever possible to promote public safety, and should avoid unnecessary delays and continuances. Each judge hearing domestic violence restraining order proceedings should conduct appropriate dialogue with self-represented litigants to clarify facts and explain the court's procedures as necessary in the specific case. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Hearings and Services, page 18, #27 & #28.*

##### B. [§2.25] HEARING PREPARATION: SEARCH FOR RESPONDENT'S PRIOR CONVICTIONS OR RESTRAINING ORDERS; USE OF INFORMATION OBTAINED (FAM C §6306)

To enhance public safety, wherever possible, each court should conduct timely criminal background checks on the restrained party and conduct checks for other restraining and protective orders, involving either party, that can be considered by the judicial officer, both at the temporary restraining order stage and at the hearing on the application, as described in Fam C §6306. However, lack of sufficient resources makes it impossible for some courts to conduct these checks, and significant challenges are associated with accessing and navigating the California Department of Justice's (DOJ) databases. Therefore, the DOJ should work with the courts to make records easily accessible and reduce the length of time needed to check records. Courts should access the California Courts Protective Order Registry (CCPOR), the statewide database containing images of restraining and protective orders. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #12.*

Before the hearing, the court must ensure a search is or has been conducted to determine if the respondent (Fam C §6306(a)):

*Note:* The search under Fam C §6306(a) is only applicable in those counties identified by the Judicial Council as having resources currently available or as soon as funds are appropriated. See Stats 2001, ch 572, §7 as to implementation of Fam C §§6300 et seq.

- Has any prior conviction for a violent felony (Pen C §667.5) or a serious felony (Pen C §1192.7).
- Has any prior misdemeanor conviction involving domestic violence, weapons, or other violence.
- Has any outstanding warrants.

*Note:* If the court's search finds an outstanding warrant, the court must immediately notify the appropriate law enforcement of the terms of any protective order or other information found during the search that the court considers appropriate. Law enforcement must take all actions necessary to execute any outstanding warrants against the restrained party. Fam C §6306(e).

- Is currently on probation or parole.

*Note:* If the court's search finds the restrained person is on probation or parole, the court must immediately notify the appropriate probation or parole officer of the terms of any protective order or other information found during the search that the court considers appropriate. As appropriate, the officer must take all necessary action to revoke the restrained party's probation or parole. Fam C §6306(f).

- Has any prior restraining order or violation of a prior restraining order.

All records and databases readily available and reasonably accessible to the court must be searched, including but not limited to (Fam C §6306(a)):

- The Violence Crime Information Network (VCIN).
- The Supervised Release file.
- State summary criminal history maintained by the Department of Justice.
- The FBI nationwide database.
- Locally maintained criminal history records or databases.

If information can be obtained in more than one location, the search does not have to be duplicated.

Before issuing an order or when determining appropriate temporary custody and visitation orders, the court must consider the following information obtained in a search (Fam C §6306(b)(1)):

- Any conviction for a violent felony (Pen C §667.5) or serious felony (Pen C §1192.7).
- Any misdemeanor conviction involving domestic violence, weapons, or other violence.
- Any outstanding warrants.
- Parole or probation status.
- Any prior restraining order.
- Any violation of a prior restraining order.

Information obtained as a result of the search that does not involve a conviction cannot be considered by the court in making a determination regarding the issuance of an order. That information must be destroyed and cannot become part of the public file in this or any other civil proceeding. Fam C §6306(b)(2).

After the court makes its ruling, the parties must be advised that they may request the information, considered under this section, relied on by the court. Fam C §6306(c)(1). The court must admonish the party seeking the information that it is unlawful to willfully release the information under Pen C §§11142 and 13303. Fam C §6306(c)(1). The information must be released to the parties, or upon either party's request, to his or her attorney. Fam C §6306(c)(2). The party seeking the release of information may share the information with counsel, court personnel, and court-appointed mediators for the purpose of seeking judicial review of the court's order. Fam C §6306(c)(3). The information can also be shared in Welf & I C §213.5 (juvenile) court proceedings. Fam C §6306(c)(3).

Any information obtained as a result of the search is confidential and must be maintained separately from the public file; however, a court-appointed mediator or child custody evaluator may access the documents. Fam C §6306(d).

Nothing in Fam C §6306 can delay the granting of an application for an order that may otherwise be granted without the information resulting from the database search. If the court finds that a protective order should be granted on the basis of the affidavit presented with the petition, the court must issue the protective order and must ensure a search is conducted before the hearing. Fam C §6306(g).

The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through AFS or another appropriate database before issuing a restraining order (including a temporary restraining order). However, failure or inability to conduct the firearms search should not delay issuance of an order. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #12.*

### C. [§2.26] ORDERS INCLUDABLE IN ORDER AFTER HEARING (OAH)

In addition to the allowable ex parte orders, the following may be included in the OAH:

*Note:* When determining whether to make any of these orders, the court shall consider whether failure to make any of these orders may jeopardize the safety of the petitioner and the children for whom the custody or visitation orders are sought. The Judicial Council shall provide notice of this provision on any applicable Judicial Council forms. Fam C §6340(a).

1. The court may issue a residence exclusion (Fam C §6321) if the court finds that physical or emotional harm would result to the petitioner; to a person under the care, custody, and control of the petitioner; or to a minor child of the parties or petitioner. Fam C §6340(b).
2. Child support, if (Fam C §6341(a)):

*Note:* When determining whether to make any child support orders, the court shall consider whether failure to make any of these orders may jeopardize the safety of the petitioner and the children for whom child support is requested, including safety concerns related to the financial needs of the petitioner and the children. The Judicial Council shall provide notice of this provision on any applicable Judicial Council forms. Fam C §6341(a).

In a DVPA proceeding when child or spousal support is requested and financial documentation is submitted, the court should consider the request and should order appropriate support at the same time as the restraining order request is considered or as soon thereafter as possible to ensure safety (Fam C §6341(a), (c)). Each court should establish a cooperative relationship with the Department of Child Support Services and take reasonable steps to expedite the award of child and spousal support in domestic violence cases. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January*

2008), *Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders*, page 16, #16.

- a. The parties are married and no other child support order exists; or
- b. Under Fam C §7611, the respondent is the presumed natural father of a minor child who is in the custody of the petitioner.

*Note:* In 2003, the California Domestic Partner Rights and Responsibilities Act was enacted, provisions effective January 1, 2005. One of the new additions under this act provides that registered and former registered domestic partners have the same rights, protections, and benefits and are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law that are granted to and imposed on spouses and former spouses. Fam C §297.5(a), (b). The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses. Fam C §297.5(d).

*Note:* A child support order issued in this case is made without prejudice in a future paternity action. Fam C §6341(b).

3. Spousal support, if the parties are married and no spousal support order exists. Fam C §6341(c).

*Note:* In 2003, the California Domestic Partner Rights and Responsibilities Act was enacted, provisions effective January 1, 2005. One of the new additions under this act provides that registered and former registered domestic partners have the same rights, protections, and benefits and are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law that are granted to and imposed on spouses and former spouses. Fam C §297.5(a), (b). Therefore, registered domestic partners, similar to married parties, may request spousal support.

*Note:* When determining whether to make any spousal support orders, the court shall consider whether failure to make any of these orders may jeopardize the safety of the petitioner, including safety concerns related to the financial needs of the petitioner. The Judicial Council shall provide

notice of this provision on any appellate Judicial Council forms. Fam C §6341(c).

In a DVPA proceeding when child or spousal support is requested and financial documentation is submitted, the court should consider the request and should order appropriate support at the same time as the restraining order request is considered or as soon thereafter as possible to ensure safety (Fam C §6341(a), (c)). Each court should establish a cooperative relationship with the Department of Child Support Services and take reasonable steps to expedite the award of child and spousal support in domestic violence cases. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #16.*

*Note:* A spousal support order issued in this case is made without prejudice in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties. Fam C §6341(d).

**TIP:** Financial constraints are often a reason that victims stay in abusive relationships. Child and spousal support orders should be given if requested.

4. Restitution to the petitioner for (Fam C §6342):

*Note:* An order for restitution cannot include damages for pain and suffering. Fam C §6342(b).

- a. Lost earnings.
  - b. Out-of-pocket expenses including, but not limited to, medical care and temporary housing incurred as a direct result of the abuse or physical injuries sustained from the abuse.
5. Restitution to the respondent for out-of-pocket expenses related to responding to the ex parte order when the facts supporting the order are found to be insufficient. Fam C §6342(a)(2).
6. Restitution paid by the respondent to a public or private agency for reasonable cost of providing services to the petitioner required as a direct result of respondent's abuse or actual injuries sustained from the abuse. Fam C §6342(a)(3).
7. Respondent's participation in a batterer's treatment program, approved by local probation department under Pen C §1203.097. Fam C §6343(a).

*Note:* The court must provide each petitioner with a resource list of referrals to appropriate community domestic violence programs and services. The list must be prepared in consultation with local domestic violence shelters and programs. Fam C §6343(b).

The resources should be available in English and other languages to the extent feasible and could include:

- a. Legal services agencies and pro bono legal resources;
- b. Child support services;
- c. Administrative Office of the Courts (AOC) informational pamphlet and video;
- d. Available victim-witness services or funding;
- e. Appropriate referrals to community domestic violence programs and services, including batterer intervention programs;
- f. Self-help services; and
- g. Other community services, including those providing immigration information.

*Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Assistance for Parties, page 14, #3.*

8. Attorneys' fees and costs to the prevailing party. Fam C §6344.

*Note:* If the petitioner is the prevailing party and cannot afford to pay for the attorney's fees and costs, the court must, if appropriate based on the parties' respective abilities to pay, order that the respondent pay petitioner's attorney's fees and costs for commencing and maintaining the proceeding. Whether the respondent is ordered to pay and what amount will be paid is based on the (1) respective incomes and needs of the parties, and (2) any factors affecting the parties' respective abilities to pay. Fam C §6344(b).

TIP: A current Income and Expense Declaration (form FL-150) and a current Property Declaration (form FL-160) must be served and filed by any party appearing at any hearing at which the court is to determine an issue where such declarations would be relevant. Current means completed within the past three months, providing no facts have changed. When a party is represented by counsel and attorney's fees are requested by either party, the section on the Income and Expense Declaration pertaining to the amount in savings, credit union, certificates of deposit, and money market accounts must be fully completed, as well as the section pertaining to the amount of attorney's fees incurred, currently owed, and the source of money used to pay such fees. Cal Rules of Ct 5.128(a), (b).

*Note:* Legal services organizations funded by the Legal Services Corporation (LSC) can now request attorney fees. On December 16, 2009, President Obama signed into law the FY 2010 Consolidated Appropriations Bill that covers LSC. The legislation lifts the statutory restriction on claiming, collecting, and retaining attorney's fees. Part 1642 of the LSC regulations, which had implemented the previous prohibition on requesting attorney's fees, was suspended on 12/16/09.

#### 9. Custody/Visitation.

Each court should take reasonable steps to expedite the determination of custody and visitation in domestic violence cases. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #17.*

- a. When a parent/child relationship has not been established as discussed above, but a paternity action has been filed, the court may issue custody and visitation orders under the Uniform Parentage Act. Fam C §§7600 et seq. Fam C §6346.
- b. Parent and child counseling—the courts may require parents or any other party involved in the custody or visitation dispute, and the minor child to participate in counseling for not more than one year if the court finds both of the following (Fam C §3190(a)):

Individuals seeking protection in domestic violence cases should not be ordered to attend counseling without careful consideration. Under existing law, a court may not order a protected party to obtain counseling without the consent of the party unless there is a custody or visitation dispute (Fam C §3190). In the event that the court orders counseling under Fam C §3190, the court must make the requisite findings and should order separate counseling sessions under Fam C §3192. Nonmandatory referrals to counseling or related services may be made and should be provided under Fam C §6343, which requires that courts develop resource lists for referrals to appropriate community domestic violence programs and services. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Assistance for Parties, page 14, #6.*

- (1) The dispute poses a substantial danger to the best interests of the child; and

*Note:* One factor to be considered in determining if a dispute poses a substantial danger is any history of domestic violence, within the past 5 years, between the parents, parent and child, parent or parents and other party seeking custody/visitation rights, or other party and child. Fam C §3190(b).

- (2) Counseling is in the best interests of the child.

If counseling is ordered in a case that has a history of abuse by either parent against the child or by one parent against the other parent, and a protective order is in effect, the court may order the counseling separately and at separate times. Each party bears their own counseling cost unless good cause is shown for a different apportionment. The cost for a minor child is apportioned according to Fam C §4062. Fam C §3192.

If the court finds that the financial burden created by the order for counseling does not otherwise jeopardize a party's other financial obligations, the court must fix the cost and must order that the entire cost of the services be borne by the parties in the

proportions the court deems reasonable. Fam C §3190(c).

The court, in its finding, must state reasons why it has found both of the following (Fam C §3190(d)):

- (1) The dispute poses a substantial danger to the best interest of the child, and the counseling is in the best interest of the child.
- (2) The financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations.

The court cannot order the parties to return to court upon the completion of counseling. Any party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling. Fam C §3190(e).

- c. Drug Testing (Fam C §3041.5(a))—the court may order any parent seeking custody of, or visitation with, a child, who is the subject of the proceeding, to undergo testing for the illegal use of controlled substances and the use of alcohol if there is a judicial determination based on a preponderance of the evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship.
  - (1) The evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of a controlled substance.
  - (2) The court shall order the least intrusive method of testing. Substance abuse testing shall be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees.
  - (3) A parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship who has undergone testing has the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or

- guardianship decision. Determining the best interests of the child requires weighing all relevant factors.
- (4) Test results are confidential, shall be maintained as a sealed record in the court file, and may not be released to any person except the court, the parties, their attorneys, the Judicial Council (until completion of its authorized study of the testing process), and any person to whom the court grants access by written order made with prior notice to all parties. Any person with access to the test results cannot disseminate copies or disclose information to unauthorized persons. A breach of the confidentiality of the test results is punishable by civil sanctions not to exceed \$2500.
  - (5) Test results cannot be used for any purpose, including any criminal, civil, or administrative proceeding, except to assist the court in determining the best interest of the child under Fam C §3011, and the content of the order or judgment determining custody or visitation.
  - (6) The court may order either party, or both parties, to pay the costs of the drug or alcohol testing.
  - (7) “Controlled substances” has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.
  - (8) Family Code §3041.5 is effective until January 1, 2013, unless another statute deletes or extends that date. Fam C §3041.5(b).
- d. When determining what is in the best interests of the child, the court must consider a number of factors, including the following:
- (1) The abuse committed by one parent or any other person seeking custody against any of the following (Fam C §3011(b)):
    - (a) Any child to whom he or she is related by blood or affinity (marriage) or with whom he or she had a caretaking relationship, no matter how temporary.
    - (b) The other parent.
    - (c) A parent, current spouse, cohabitant, or dating or engagement relationship.

*Note:* As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration, such as written reports by police, child protective services, social services, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. Fam C §3011(b)(3).

- (2) If the court, despite the allegations in d.(1) above, awards sole or joint custody to the accused parent, the court must state its reasons in writing on the record. Fam C §3011(e)(1). As stated in Fam C §6323, orders regarding custody or visitation must be specific as to time, day, place, and manner of transfer of the child. Fam C §3011(e)(1).

If the parties stipulate in writing or on the record, the above provisions do not apply. Fam C §3011(e)(2).

- e. Family Code §3020 states that frequent and continuing contact with both parents is ideal. But perpetration of child abuse or domestic violence in a household where a child resides is detrimental to that child. The health, safety, and welfare of the child and the safety of all family members are the defining measure.
- f. When the court has made a finding that a person seeking custody has perpetrated domestic violence against the other party seeking custody or against the child or the child's siblings within the previous 5 years, there is a rebuttable presumption against awarding sole or joint physical or legal custody to that party. Fam C §3044 (see full discussion of this section in the Family Law Benchbook).
- g. A party's absence or relocation from the family residence is not a factor in determining custody or visitation if the absence or relocation is because of actual or threatened domestic or family violence by the other party. Fam C §3046(a)(2).

*Note:* This section does not apply if absence or relocation from the family residence is due to a protective order. Fam C §3046(c)(1).

- h. If the court determines there is a risk of abduction of a child, on its own motion or request of a party, the court can take measures to prevent such abduction. To make that determination, the court must consider the risk of abduction of the child, obstacles to location, recovery and return if the child is abducted, and potential harm to the child if he or

she is abducted. The court must consider the following factors when determining if there is a risk (Fam C §3048(b)(1)(A)–(H)):

- (1) Whether a party has a prior history of taking, concealing, enticing away, or withholding a child in violation of a right to custody or visitation of another person.
  - (2) Whether a party has made a previous threat to abduct.
  - (3) Whether a party lacks strong ties to the state.
  - (4) Whether a party has strong familial, emotional, or cultural ties to another country or state, including foreign citizenship. This factor can be considered only if evidence exists in support of another factor.
  - (5) Whether a party has no financial reason to stay in this state, including whether the party is unemployed, is able to work anywhere, or is financially independent.
  - (6) Whether a party has engaged in planning activities that would facilitate removal of the child from the state, such as quitting a job, selling a primary residence, terminating a lease, closing a bank account, hiding or destroying documents, applying for a passport, or requesting birth certificates or medical and school records, or purchasing airplane or other travel tickets, with consideration given to whether a party is carrying out a safety plan to flee from domestic violence.
  - (7) Whether a party has a history of domestic violence, lack of parental cooperation, or child abuse.
  - (8) Whether a party has a criminal record.
- i. If a custody evaluation is going to be ordered, the court may only appoint custody evaluators who have completed the domestic violence and child abuse training program set forth in Fam C §1816 and complied with Cal Rules of Ct 5.220 and 5.230. Fam C §3110.5(a).

*Note:* If there has been a history of domestic violence between the parties or a protective order is in effect, the party alleging domestic violence (in a written declaration under penalty of perjury) or the protected party in the restraining order is entitled to meet separately and at separate times with the evaluator. Fam C §3113.

*Note:* Any visitation or custody order issued by a family or juvenile court after a Criminal Protective Order (CPO) must refer to and acknowledge the precedence of enforcement of any appropriate CPO. Pen C §136.2(e)(3).

10. A provision allowing a victim of domestic violence, on their request, to record prohibited communications made to him or her by the perpetrator. Pen C §633.6(a).
11. Any party enjoined by an OAH is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Fam C §6322.7(a).

TIP: One of the chief differences between the relief available under the DVPA and that available under CCP §527.6 (see §§8.1–8.13) is that the DVPA in Fam C §6342 authorizes the court to order restitution “for loss of earnings and out-of-pocket expenses, including, but not limited to, expenses for medical care and temporary housing, incurred as a direct result of the abuse inflicted by the respondent or any actual physical injuries sustained from the abuse.” See *Oriola v Thaler* (2000) 84 CA4th 397, 412–413, 100 CR2d 822 (potential for such restitution is presumably reason appellant chose to proceed under DVPA even after obtaining injunctive relief under CCP §527.6).

The court should ensure that an order is prepared and provided as soon as possible to all parties who are present at the proceeding. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 16, #14.*

#### **D. [§2.27] AFFIRMATIVE RELIEF AVAILABLE TO RESPONDENT**

The respondent may seek affirmative relief alternative to the petitioner's request, on the same issues raised by the petitioner, by filing a responsive declaration. Fam C §213.

TIP: If the affirmative relief requested by the respondent is a restraining order against the petitioner, a mutual protective order may not be issued unless certain conditions are met (see §2.28). Some judicial officers believe it is a best practice to require that the respondent file his or her own request for a restraining order when seeking a restraining order against the petitioner.

*Note:* Under CCP §372(b)(1), a minor 12 years of age or older may oppose a protective order without a guardian, counsel, or guardian ad litem. The court, by motion or its own discretion, can appoint a guardian ad litem to assist the minor after considering reasonable objections by the minor to specific individuals. The appointment cannot delay the issuance or denial of the order. Before appointment, the court must also consider whether the minor and guardian have divergent interests. If the minor appears without a guardian or guardian ad litem and the minor is residing with a parent or guardian, the court must send a copy of the order to at least one parent or guardian designated by the minor, unless the court determines notice would be contrary to the best interests of the minor. See CCP §372(b)(2).

If an ex parte order is issued without notice and the protective order documents are served 5 days or less before the hearing, the respondent is entitled, as a matter of right, to one continuance, for a reasonable period, to respond to the order. Fam C §243.

**E. [§2.28] ISSUANCE OF MUTUAL PROTECTIVE ORDERS (FAM C §6305)**

The court **may not** issue mutual protective orders unless:

- Both parties personally appear;
- Both parties present written evidence of abuse or domestic violence; and
- The court makes detailed findings of fact that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.

Mutual protective orders are not entitled to full faith and credit unless both parties present written pleadings seeking a protection order and the court makes a specific finding that both parties are entitled to such an order. 18 USC §2265(c).

**F. [§2.29] DURATION OF OAH (FAM C §6345)**

At the court's discretion, the residence exclusion, personal conduct restraints, and stay away orders may be in effect up to 5 years from the date the order is issued. Fam C §6345(a). The other orders are in effect until further order of the court (they are governed by the law relating to their specific topic). Fam C §6345(b).

**TIP:** Remember that custody/visitation/support orders stay in effect until further order of the court. If you want all orders to end on the expiration date, then state this on the record and advise the parties.

*Renewal/Modification/Termination*

A party may request renewal of the protective order for five years or permanently, without a showing of any further abuse since the issuance of the original order. Fam C §6345(a). See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387, in which renewal of a domestic relations protective order requires a finding that there is a “reasonable apprehension of future abuse” if the initial order expires. A protected party is entitled to a renewal of the protective order merely upon request if that request is not contested by the restrained party. If the restrained party does contest, then mere request is not sufficient for renewal. This case defines “reasonable apprehension” by means of several factors.

The Order After Hearing is subject to termination or modification upon written stipulation filed with the court or motion of a party. Fam C §6345(a).

*Note:* If a permanent order is issued, remember that CLETS still requires a termination date to be entered.

If a litigant requests termination or modification of a restraining order, the court should conduct a hearing to determine if the request is entirely voluntary and not a result of coercion or duress and to make sure that the person making the request is in fact the protected party. The court should consider deferring ruling on the request to allow the protected person time to discuss the request for termination or modification with a support person. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Obtaining and Perfecting Orders, page 17, #22.*

Failure to state an expiration date does not invalidate the Order After Hearing. By law, if no expiration date is stated in the order, it will be deemed a three-year order. Fam C §6345(c).

**G. [§2.30] SERVICE OF OAH**

If the respondent was present at the hearing and heard the terms of the order from the court, then that individual is considered served, and a proof of service is not required for enforcement. Fam C §6384(a).

If the respondent was personally served with the temporary restraining order, but did not appear in person or by counsel, then the following applies (see Fam C §6384(a)):

- If the terms of the order are identical to the temporary restraining order, except the expiration date, then service by first-class mail to the most current address known by the court is permissible.

- If, in addition to the expiration date, other terms of the order changed, then the respondent must be personally served by someone over the age of 18 who is not a party to the action. See CCP §414.10.

*Verbal notice is sufficient for enforcement purposes under Pen C §§273.6 and 12021(g). Fam C §6383.* If a law enforcement officer at the scene of a domestic violence incident receives information that a protective order exists, but the petitioner cannot produce a copy of the order, the officer must check the Department of Justice Domestic Violence Restraining Order System through CLETS to verify the existence of the order. If the officer determines that a protective order has been issued but not served, the officer must immediately notify the respondent of the terms of the order and advise the respondent to go to court to get a copy of the protective order containing the full terms and conditions. Fam C §6383(d), (e), (g).

## V. GENERAL PROVISIONS FOR TRO/OAH

### A. [§2.31] FIREARMS RESTRICTIONS (FAM C §6389)

The court (through sheriff, court, or pretrial services) should conduct a firearms search on the proposed restrained person through AFS or another appropriate database before issuing a restraining order (including a temporary restraining order). However, failure or inability to conduct the firearms search should not delay issuance of an order.

If firearms, whether registered or not, are reported to the court through an AFS database search or by the protected party, the court should so indicate on the temporary restraining order and order after hearing. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #12 & #13.*

The respondent cannot own, possess, purchase, or receive any firearms during the term of the protective order. Fam C §6389(a). After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, immediately upon the request of a law enforcement officer, to the control of the officer, or if no request is made by law enforcement, within 24 hours of being served with the order. Fam C §6389(c)(1), (2).

*Note:* If the respondent notifies the court that a firearm is not in his or her immediate possession, the court may limit the order to exclude that

firearm if the judge is satisfied the respondent is unable to gain access to that firearm while the protective order is in effect. Fam C §6389(l).

**Relinquishment.** To comply with the relinquishment order, the respondent may either (Fam C §6389(c)(1), (2)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. Fam C §6389(e).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order.

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. Fam C §6389(h).
- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. Fam C §6389(h).

*Note:* The court may not make this finding until the officer has undergone a mandatory psychological evaluation as ordered by the court. The court may require the officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence. Fam C §6389(h).

If the respondent declines to relinquish any firearms by raising a Fifth Amendment right against self-incrimination argument, the court may grant use immunity for the act of relinquishing the firearm. Fam C §6389(d).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen; (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103; or (3) there is another restraining order against respondent. If the respondent cannot get

the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. Fam C §6389(g).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

*Note:* A search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under Fam C §6389. The person must have been lawfully served with the protective order and failed to relinquish the firearm as required by law. Pen C §1524(a)(11).

## **B. [§2.32] FEDERAL FIREARMS LAW (18 USC §922(g)(8))**

It is unlawful for any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting commerce. 18 USC §922(g)(8).

A qualifying court order is an order (1) issued after notice and hearing giving the restrained party an opportunity to be heard; (2) prohibiting harassing, stalking, threatening, or engaging in conduct that would place an intimate partner or child of the partner or restrained party in reasonable fear of bodily injury; or (3) finding the restrained party presents a credible threat to the physical safety of the intimate partner or child or by its terms prohibits the use, attempted use, or threatened use of physical harm that would reasonably be expected to cause bodily injury. 18 USC §922(g)(8)(A)–(C).

*Note:* An intimate partner is a (1) spouse or former spouse, (2) parent of a child of respondent, or (3) cohabitant or former cohabitant. 18 USC §921(a)(32).

Violation of this prohibition while the order remains in effect is a federal offense punishable by a fine and/or up to ten years' imprisonment. 18 USC §924(a)(2).

**C. [§2.33] ENFORCEMENT OF TRO/OAH**

An intentional and knowing violation of the ex parte order or order after hearing is a misdemeanor punishable under Pen C §273.6.

If the restrained party willfully disobeys the ex parte order or order after hearing, he or she is guilty of contempt of court, a misdemeanor punishable under Pen C §166(a)(4).

A restrained party may also be guilty of contempt for disobedience of a lawful order under CCP §1209(a)(5).

If the restrained party purchases or receives, attempts to purchase or receive, owns, or possesses a firearm while knowing that he or she is subject to the prohibitions in the ex parte order or order after hearing, then the party is guilty of a misdemeanor. Pen C §12021(g).

The court may appoint counsel to represent the petitioner in a proceeding to enforce the protective order. If counsel is appointed, the court may order the respondent to pay reasonable attorneys' fees and costs incurred by the petitioner. Fam C §6386.

A district attorney or city attorney may initiate and pursue a court action for contempt against a party for failing to comply with a court order entered under the Domestic Violence Protection Act. CCP §1218(d).

**D. [§2.34] COURT'S RESPONSIBILITY**

Protective orders must be issued on Judicial Council adopted forms, approved by the Department of Justice. However, failing to use the appropriate forms does not in and of itself make the order unenforceable. Fam C §6221(c).

Courts must provide informational packets with the protective order forms that describe local court procedures and maps and how to return a proof of service (including mailing addresses and fax numbers). Also, the packet must state that the orders are enforceable anywhere in any state and general information about agencies in other jurisdictions that can be contacted for purposes of enforcement. Fam C §6380(g).

**CLETS Entry**

Each county must have a procedure for transmitting protective orders into the Domestic Violence Restraining Order System through the California Law Enforcement Telecommunications System of the State Department of Justice, otherwise known as CLETS. The data is transmitted by law enforcement or, with permission of the Department of Justice, court personnel. Fam C §6380(a).

As required by Fam C §6380, each court should ensure that all required domestic violence restraining orders and proofs of service as defined under Fam C §§6218 and 6320 are entered into the DVROS via CLETS within one business day and memorialized on mandatory Judicial Council
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forms. The statutory scheme contemplates that these orders should be entered into DVROS so that law enforcement agencies will have access to the orders, thus maximizing enforcement. Moreover, under federal law (see generally 18 USC ch 44), any order that purports to prohibit specific threatening conduct carries with it mandatory firearms restrictions that should not be obviated by a state court or by stipulations of the parties. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Court and Case Management, page 19, #36.*

If an officer serves the protective order, the officer has one business day to get the proof of service information into CLETS. Fam C §6380(d)(1). If court personnel receive a proof of service from anyone other than law enforcement, the court has one business day to get the service information into CLETS. Fam C §6380(d)(2). If the court is unable to provide the notification through CLETS, then the court has one business day to transmit the proof of service to a law enforcement agency that then has one business day to enter the information into CLETS. Fam C §6380(d)(2).

If the court issues a modification, termination, or extension of a protective order, it must be done on Judicial Council adopted forms and immediately entered into the CLETS system by the designated transmitting agency for the county. Fam C §6380(f).

Only Judicial Council adopted protective order forms and foreign protective orders that are registered are transmitted to the system. Fam C §6380(i).

### **Non-CLETS Restraining Orders**

**TIP:** A non-CLETS restraining order should not be issued because it does not provide adequate information for enforcement, cannot be entered into the Department of Justice Restraining Order System, and can only be enforced through a contempt proceeding. Firearms prohibitions would only apply if the order qualifies under federal law, whether it's a CLETS or non-CLETS order.

Courts should decline to approve or make domestic violence restraining orders that cannot be entered into DVROS or CLETS, commonly referred to as “non-CLETS” orders. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Prevention Act Restraining Orders, Court and Case Management, page 20, #37.*

**E. [§2.35] FEES**

A fee waiver form must be provided with the protective order forms. All protective order forms are to be provided free of charge. Fam C §6380(g).

There is no filing fee for an application, responsive pleading, or order to show cause that seeks to obtain, modify, or enforce a protective order or other filings necessary to obtain or give effect to the protective order. There is no fee for a subpoena filed in connection with the application, responsive pleading, or order to show cause. Fam C §6222.

There is no fee for reissuance of the order unless the order had been dissolved three times previously. Fam C §245(c).

*Note:* A fee waiver for service can also be granted under CCP §527.6(p) if any of the following conditions apply: (1) The protective order is based on stalking as prohibited by Pen C §646.9; (2) the protective order is based on a credible threat of violence resulting from a threat of sexual assault; or (3) the protective order is issued under Fam C §6222.

The court clerk must provide five free certified, stamped, and endorsed copies of the protective order and five free copies of any extensions, modifications, or terminations of the order. Fam C §6387.

**F. [§2.36] ENFORCEABILITY OF FOREIGN PROTECTIVE ORDERS**

A foreign protective order is valid and enforceable in California if it meets all of the following criteria (Fam C §6402(d)):

- Identifies the protected party and the respondent.
- Is currently in effect.
- Was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state.
- Was issued after respondent was given reasonable notice and the respondent had an opportunity to be heard before the order was issued. If the order was ex parte, the respondent must have had notice and opportunity to be heard within a reasonable time after issuance of the order.

*Note:* Absence of any of the above criteria is an affirmative defense in an enforcement action. Fam C §6402(f).

The foreign protective order will be enforced under California laws. California will also enforce terms of a valid foreign protective order that a California tribunal would normally lack power to provide. Fam C §6402(a). Also, custody and visitation orders contained in the protective order will be enforced if the orders were issued in accordance with the

jurisdictional requirements governing custody and visitation orders in the issuing state. Fam C §6402(c).

Provisions of a foreign mutual protective order favoring a respondent will only be enforced in California if (Fam C §6402(g)):

- The respondent filed a written pleading seeking protective order in the issuing state.
- The tribunal in the issuing state made specific findings in favor of the respondent.

#### *Registration*

Foreign protective orders do not have to be registered in California. Fam C §6403(d). However, a person can request the court to register the order. This is often recommended so that the order can be entered into the Domestic Violence Restraining Order System. The form to register and the filing of the registration is at no cost to the individual. After the foreign protective order is registered, it must be sealed, and access is only allowed to law enforcement, the person who registered the order on written request with proof of identification, the defense after arraignment on criminal charges involving an alleged violation of the order, or on further order of the court. Fam C §6404.

A tribunal of California may not enforce a foreign protective order if the tribunal of the issuing state does not recognize the standing of a protected individual to seek enforcement. Fam C §6402(b).

### **G. [§2.37] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

A petition is valid and an order enforceable without explicitly stating the address for the petitioner's residence, workplace, school, childcare location, or child's school. Fam C §6225.

The protective order is enforceable anywhere in California. Fam C §6381(a).

*Note:* Federal Full Faith and Credit—a protective order issued by a state, Indian tribe, or territory that has jurisdiction over the parties and subject matter and that gives the respondent reasonable notice and opportunity to be heard must be given full faith and credit by another state, Indian tribe, or territory and enforced as if it were the order of the enforcing state, Indian tribal government, or territory. 18 USC §2265(a), (b).

A protective order may not be denied because a petitioner vacated the household to avoid abuse, and if the petitioner is married to the respondent, it may not be denied because a petition for dissolution, for nullity of marriage, or for legal separation has not been filed. Fam C §6301(b).

A victim of domestic violence can select any individual to act as a support person during the protective order proceedings. Fam C §6303(a).

The support person is present to provide comfort and a sense of safety during the proceedings. Fam C §6303(a). This individual is not a legal adviser and may not give legal advice. Fam C §6303(a). If the party is not represented by counsel, the support person may accompany the party to the counsel table during the proceedings. Fam C §6303(b), (d). The court has discretion to remove the support person from the courtroom if it would be in the interest of justice to do so or the court believes the support person is prompting, swaying, or influencing the party they are supporting. Fam C §6303(e).

When both parties are present at a protective order proceeding, the court must inform both parties of the terms of the order, including the firearms prohibition and penalty for violation. Fam C §6304.

The court shall inform parties of the terms of the restraining order, including notice that the restrained person is prohibited from owning, possessing, purchasing, receiving, or attempting to own, possess, purchase, or receive a firearm or ammunition, including notice of the penalty for violation (see Fam C §304). *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Civil Court Restraining Orders, page 24, #14.*

A protective order is valid and enforceable even if the petitioner invites or consents to contact with the respondent. The orders can only be changed by another court order. Pen C §13710(b).

**H. [§2.38] REFERENCE CHART: ORDER AFTER HEARING (FAM C §§6300 ET SEQ)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
<p><b>Recent incident of:</b> Abuse</p> <p>Threat of abuse</p> <p>Stalking</p> <p>Sexual assault</p> <p><b>If the following relationship exists:</b> Spouse or former spouse</p> <p>Cohabitant or former cohabitant</p> <p>Dating or engagement relationship (past or present)</p> <p>Parties have child together</p> <p>Child of the party or subject to a paternity action</p> <p>Consanguinity or affinity to the 2nd degree</p>	<p>Reasonable proof of past act or acts of abuse</p>	<p>Ex parte orders plus:</p> <p>Child Support</p> <p>Spousal Support</p> <p>Restitution</p> <p>Respondent's participation in a batterer's treatment program</p> <p>Attorney's fees and costs</p> <p>Prohibited from taking action to locate protected party</p> <p><b>FIREARMS:</b> Cannot own, possess, purchase, or acquire</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>	<p>Residence exclusion, personal conduct, and stay away 5 years from the date of the order; other orders in effect until further order of the court</p>	<p>Pen C §273.6</p> <p>Pen C §166(a)(4)</p> <p>CCP §1209(a)(5)</p> <p>Pen C §12021(g) 18 USC §922(g)(8)</p> <p>Pen C §12316(b)</p>

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

- 1. Remember to do a search on the respondent's past criminal and restraining order history before the hearing.*
- 2. Custody/Visitation orders must be specific.*
- 3. Do not issue mutual protective orders unless orders meet Fam C §6305 criteria.*
- 4. Avoid issuing non-CLETS restraining orders that do not provide any real protection.*
- 5. When both parties are present at the hearing, inform both of the OAH terms, including the firearms prohibition and penalty for violation.*

*This is a brief reference chart for an OAH. Please read the full, detailed section in the Protective Order Bench Manual.*

## **Chapter 3**

# **ORDERS UNDER FAMILY LAW ACT AND UNIFORM PARENTAGE ACT**

- I. **[§3.1] Family Law Act (Summary) (Fam C §§2045, 2047, 2049)**
- II. **[§3.2] Uniform Parentage Act (Summary) (Fam C §§7710, 7720, 7730)**

### **I. [§3.1] FAMILY LAW ACT (SUMMARY) (FAM C §§2045, 2047, 2049)**

The summons in a dissolution or legal separation contains standard restraining orders that do the following (Fam C §2040(a)(1)–(4)):

- Restrain both parties from removing minor children of the parties from the state without written consent of the other party or court order.
- Restrain both parties from disposing of any real or personal property, whether community, quasi-community, or separate, without written consent of the other party or court order.
- Restrain both parties from doing anything with any insurance held for the benefit of the parties and their children for whom support may be ordered.
- Restrain both parties from creating or modifying nonprobate transfers without written consent of the other party or court order.

In addition to the standard restraining orders described above, a party may request an ex parte protective order as described in the Domestic Violence Prevention Act. Fam C §2045.

After notice and a hearing, the court may issue an order after hearing as described in the Domestic Violence Prevention Act. Mutual protective orders may not be issued unless they meet the requirements of Fam C §6305 of the Domestic Violence Prevention Act. Fam C §2047. See §2.28.

A judgment may include a protective order as defined in Fam C §6218 and any other restraining orders as provided in Fam C §§6360 et seq. Fam C §2049. For discussion of protective orders under the Domestic Violence Prevention Act, see §§2.1–2.37.

## **II. [§3.2] UNIFORM PARENTAGE ACT (SUMMARY) (FAM C §§7710, 7720, 7730)**

In a parentage action, where the parties have never been married but are co-parents of a minor child, the summons contains a standard temporary restraining order restraining all parties from removing the minor child from the state without written consent of the other party or court order. Fam C §7700.

In addition to the standard restraining orders described above, a party may request an ex parte protective order as described in the Domestic Violence Prevention Act. Fam C §7710.

After notice and a hearing, the court may issue an order after hearing as described in the Domestic Violence Prevention Act. Mutual protective orders may not be issued unless they meet the requirements of Fam C §6305 (see §2.27) of the Domestic Violence Prevention Act. Fam C §7720.

A judgment may include a protective order as defined in Fam C §6218 and any other restraining orders as provided in Fam C §§6360 et seq. Fam C §7730. For discussion of protective orders under the Domestic Violence Prevention Act, see §§2.1–2.37.

# Chapter 4

## JUVENILE COURT PROTECTIVE ORDERS (Welf & I C §§213.5, 304, 362.4, 726.5)

### I. [§4.1] Overview and Applicability

### II. Ex Parte Order (Temporary Restraining Order)—Step One

- A. [§4.2] Application and Issuance of Ex Parte Orders
- B. [§4.3] Notice Requirement and Standard of Proof
- C. [§4.4] Orders Includable in Dependency Filing (Welf & I C §213.5)
- D. [§4.5] Orders Includable in Wardship Filing (Welf & I C §213.5(b))
- E. [§4.6] Duration of Temporary Restraining Order
- F. [§4.7] Court's Responsibility
- G. [§4.8] Service of TRO

### III. Order After Hearing (OAH)—Step Two

- A. [§4.9] Hearing Procedure
- B. [§4.10] Hearing Preparation: Search for Respondent's Prior Convictions or Restraining Orders; Use of Information Obtained (Fam C §6306)
- C. [§4.11] Admissible Information
- D. [§4.12] Permissible Orders
- E. [§4.13] Duration of OAH
- F. [§4.14] Service of OAH
- G. [§4.15] Court's Responsibility
- H. [§4.16] Enforcement of TRO/OAH
  - I. [§4.17] Firearms Restrictions (Fam C §6389)
  - J. [§4.18] Federal Firearms Law (18 USC §922(g)(8))
  - K. [§4.19] Other Legal and Procedural Considerations
  - L. [§4.20] Reference Chart: Juvenile Court Protective Orders (Welf & I C §§213.5, 304, 362.4, 726.5)

### I. [§4.1] OVERVIEW AND APPLICABILITY

A protective order may be issued when a dependency petition has been filed (Welf & I C §213.5; Cal Rules of Ct 5.620, 5.630), when a child is made a dependent of the court (Welf & I C §304; Cal Rules of Ct 5.620, 5.630), and when juvenile court has terminated its jurisdiction over a minor child adjudged a dependent of the court (Welf & I C §362.4).

Welfare and Institutions Code §362.4 provides that when the juvenile court is terminating its jurisdiction over a minor child, the protective order may only be issued if there is a pending dissolution, legal separation,

nullity, or paternity action between the minor child's parents, or if custody orders have been entered. In addition to the protective order, the juvenile court can issue custody and visitation orders regarding the minor child. If there are pending proceedings, the juvenile court order must be filed in that action. If there is no pending action or existing custody order, the juvenile court order may be used as the sole basis for opening a file in superior court where the parent granted custody resides. The document is transmitted to the identified superior court and a file is opened and assigned a case number without any filing fees. After a juvenile court custody order is filed, the clerk must send a copy of the order (with case number), by first-class mail, to the juvenile court and the parents. These orders are not confidential. Welf & I C §362.4.

A protective order can be issued when a wardship petition has been filed (Welf & I C §213.5(b); Cal Rules of Ct 5.625, 5.630) and anytime when the minor is a ward of the juvenile court or the juvenile court has terminated its jurisdiction over a minor child adjudged a ward of the court (Welf & I C §726.5).

Welfare and Institutions Code §726.5(a) provides that when the juvenile court is terminating its jurisdiction over a minor child, the protective order may only be issued if there is a pending dissolution, legal separation, nullity, custody, or paternity action between the minor child's parents, or if custody orders have been entered. In addition to the protective order, the juvenile court may issue parentage, custody, and visitation orders regarding the minor child. Welf & I C §726.5(a). Custody and/or parentage orders must follow the respective Family Code sections. Welf & I C §726.5(a). If the juvenile court issues orders, the superior court handling the pending matter between the parents must receive notice of that order. Welf & I C §726.5(b). The notice must be filed in the pending action, and all parties must be notified by first-class mail. Welf & I C §726.5(b). Once the juvenile court order is filed in the pending action, that court may modify or terminate the order. Welf & I C §726.5(c). If there is no pending action or existing custody order, the juvenile court order may be used as the sole basis for opening a file in the superior court where the parent granted custody resides. Welf & I C §726.5(d). The document is transmitted to the identified superior court and a file is opened and assigned a case number without any filing fees. Welf & I C §726.5(d). After a juvenile court custody order is filed, the clerk must send a copy of the order (with case number), by first-class mail, to the juvenile court and the parents. Welf & I C §726.5(e). These orders are not confidential. Welf & I C §726.5(f).

## **II. EX PARTE ORDER (TEMPORARY RESTRAINING ORDER)—STEP ONE**

### **A. [§4.2] APPLICATION AND ISSUANCE OF EX PARTE ORDERS**

After a petition has been filed to declare a child a dependent or ward of juvenile court, the court may issue ex parte orders. Welf & I C §213.5.

Restraining order applications may be made orally at any scheduled hearing regarding the child, by written application, or by the court's own motion. The written application must be on Judicial Council forms. Cal Rules of Ct 5.630(b).

### **B. [§4.3] NOTICE REQUIREMENT AND STANDARD OF PROOF**

The ex parte orders may not be issued without notice to the opposing party unless the following two conditions are met (CCP §527(c)):

1. Facts show great or irreparable injury will result to the applicant before the matter can be heard; and
2. The applicant or the applicant's attorney, certifies one of the following under oath:
  - a. That within a reasonable time the applicant or the applicant's attorney notified the opposing party or the opposing party's attorney the time and where the application would be made.
  - b. The applicant or the applicant's attorney, despite a good faith attempt, was unable to notify the opposing party and specify what efforts were made to contact the opposing party.
  - c. For specified reasons, the applicant should not be required to notify the opposing party or the opposing party's attorney.

The court must consider all documents submitted with the application and may review the contents of the juvenile court file regarding the child. Cal Rules of Ct 5.630(f)(1).

### **C. [§4.4] ORDERS INCLUDABLE IN DEPENDENCY FILING (WELF & I C §213.5)**

The juvenile court may issue ex parte orders in the dependency filing that (Welf & I C §213.5(a); Cal Rules of Ct 5.630(e)):

1. Enjoin any person from molesting, attacking, threatening, sexually assaulting, stalking, or battering the child or any other child in the household.
2. Exclude any person from the dwelling of the person who has care, custody, and control of the child, regardless of which party holds legal or equitable title or is the lessee of the residence.

*Note:* The court must find the following to make this order: (1) Facts are sufficient to show that the party who will stay in the dwelling has a right under color of law to possession of the premises; (2) the removed party has assaulted or threatened to assault the other party, any person under the care, custody, and control of that party, or minor child of the parties or other party; and (3) physical or emotional harm would result to the other party, any person under the care, custody, and control of that party, or minor child of the parties or other party. Welf & I C §213.5(e).

3. Enjoin any person from behavior, including contacting, threatening, or disturbing the peace of the child, that is necessary to effectuate the order.
4. Enjoin any person from contacting, threatening, molesting, attacking, striking, sexually assaulting, stalking, battering, or disturbing the peace of any parent, legal guardian, or current caretaker of the child regardless of whether the child resides with that person.

*Note:* In *In re Brittany K.* (2005) 127 CA4th 1497, 26 CR3d 487, a grandmother was enjoined from stalking her grandchildren who were in a foster home. On appeal, she argued that Welf & I C §213.5(a) was unconstitutionally vague, “unreasonable and arbitrary,” because “it provides no guidelines whatsoever for deciding what ‘stalking’ means.” The court found that Welf & I C §213.5(a) is not constitutionally vague. The court specifically stated:

On the basis of the definitions of the word used in the Penal and Civil Codes, the ordinary dictionary definitions of the term in common usage, and the clarifying language found in section 213.5 itself, we conclude that the term “stalking,” as utilized in section 213.5, does not refer exclusively to the act of literally following someone, although it certainly includes that conduct. Instead, it refers broadly to conduct that is designed to “follow” a particular person in a more general sense, as in to pursue, monitor, watch or keep that person under surveillance for no legitimate purpose, and with the consequent effect of seriously harassing, alarming, annoying, tormenting, or terrorizing the person being followed, pursued, monitored, watched or kept under surveillance.

*Note:* In *In re Cassandra B.* (2004) 125 CA4th 199, 22 CR3d 686, a dependency proceeding, the superior court issued a restraining order against the mother and subsequently issued an order at disposition maintaining the restraining order in full force and effect. The mother appealed from both orders.

In the first appeal, she contended that the restraining order was not supported by substantial evidence, and the juvenile court acted in excess of its jurisdiction in issuing it. The second appeal challenged the court's order at disposition to maintain the restraining order in full force and effect. The court held that the first, but not the second, appeal was within the statutory time limit. In terms of the first appeal, the court found that there was substantial evidence to issue the restraining order and affirmed the juvenile court order.

The court rejected the mother's assertion that evidence must be present to impose a restraining order under the plain meaning of Welf & I C §213.5(a). The mother further contended that her behavior did not constitute "molesting." She asserted that the term "molest" in Welf & I C §213.5 refers to sexual abuse. The court found that molest does not refer exclusively to sexual misconduct, and there was ample evidence before the juvenile court that the mother was "molesting" Cassandra under the court's definition.

5. Any party enjoined by a Juvenile Court Protective Order is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Welf & I C §213.7(a).

**D. [§4.5] ORDERS INCLUDABLE IN WARDSHIP FILING  
(WELF & I C §213.5(b))**

The juvenile court may issue ex parte orders in the wardship filing that (Welf & I C §213.5(b); Cal Rules of Ct 5.630(e)):

1. Enjoin any person from molesting, attacking, striking, sexually assaulting, stalking, or battering the child or any other child in the household.
2. Exclude any person from the dwelling of the person who has care, custody, and control of the child.
3. Enjoin the child from contacting, threatening, stalking, or disturbing the peace of any person the court finds to be at risk from the conduct of the child, or with whom association would be detrimental to the child.
4. Any party enjoined by a Juvenile Court Protective Order is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Welf & I C §213.7(a).

**E. [§4.6] DURATION OF TEMPORARY RESTRAINING ORDER**

If the temporary restraining order is granted without notice, the order is good for 15 days, or upon a good cause showing to the court, 20 days from the date of issuance. Welf & I C §213.5(c); Cal Rules of Ct 5.630(g).

**F. [§4.7] COURT'S RESPONSIBILITY**

The TRO must be prepared on Judicial Council form JV-250 and must state the expiration date on the face of the order. Cal Rules of Ct 5.630(f)(2), (h)(3); Welf & I C §213.5(f).

These orders will be entered into the Domestic Violence Restraining Order System through use of CLETS. Welf & I C §213.5(j).

**G. [§4.8] SERVICE OF TRO**

The temporary restraining order must be personally served by someone over the age of 18 who is not a party to the action. See CCP §414.10.

The court, on its own motion or that of the petitioner's, may shorten the time for service on the restrained party. Welf & I C §213.5(c); Cal Rules of Ct 5.630(g)(1). Similarly, the court, on its own motion or that of the petitioner's, may reissue an order that could not be served on time. Welf & I C §213.5(c); Cal Rules of Ct 5.630(g)(2).

**III. ORDER AFTER HEARING (OAH)—STEP TWO****A. [§4.9] HEARING PROCEDURE**

A restraining order hearing may be held simultaneously with any other regularly scheduled hearings to declare a child a dependent or ward of the juvenile court or subsequent hearings regarding the dependent child or ward. Welf & I C §213.5(a); Cal Rules of Ct 5.630(h)(1).

**B. [§4.10] HEARING PREPARATION: SEARCH FOR RESPONDENT'S PRIOR CONVICTIONS OR RESTRAINING ORDERS; USE OF INFORMATION OBTAINED (FAM C §6306)**

Before the hearing, the court must ensure a search is or has been conducted to determine if the respondent (Welf & I C §213.5(k); Cal Rules of Ct 5.630(i)(1)–(3)):

1. Has any prior conviction for a violent felony (Pen C §667.5) or a serious felony (Pen C §1192.7).
2. Has any prior misdemeanor conviction involving domestic violence, weapons, or other violence.
3. Has any outstanding warrants.

*Note:* If the court's search finds an outstanding warrant, the court must immediately notify the appropriate law enforcement of the terms of any

protective order or other information found during the search that the court considers appropriate. Law enforcement must take all actions necessary to execute any outstanding warrants against the restrained party. Welf & I C §213.5(k)(3)(A).

4. Is currently on probation or parole.

*Note:* If the court's search finds the restrained person is on probation or parole, the court must immediately notify the appropriate probation or parole officer of the terms of any protective order or other information found during the search that the court considers appropriate. As appropriate, the officer must take all necessary action to revoke the restrained party's probation or parole. Welf & I C §213.5(k)(3)(B).

5. Has any prior restraining order or violation of a prior restraining order.

All records and databases readily available to the court must be searched, including but not limited to (1) the Violence Crime Information Network (VCIN), (2) the supervised release file, (3) state summary criminal history maintained by the Department of Justice, (4) the FBI nationwide database, and (5) locally maintained criminal history records or databases. If information can be obtained in more than one location, the search does not have to be duplicated. Fam C §6306(a).

*Note:* The search under Fam C §6306(a) is only applicable in those counties identified by the Judicial Council as having resources currently available or as soon as funds are appropriated. See Stats 2001, ch 572, §7 as to implementation of Fam C §§6300 et seq.

### **C. [§4.11] ADMISSIBLE INFORMATION**

At the hearing, proof may be by application and any attachments, additional declarations and documentary evidence, the contents of the juvenile court file, testimony, or any combination of these. Cal Rules of Ct 5.630(f)(1).

### **D. [§4.12] PERMISSIBLE ORDERS**

The juvenile court may issue orders following notice and hearing, any of the orders specified in Welf & I C §213.5(a), (b), and (c), and any orders previously discussed in §§4.4–4.6, above. Cal Rules of Ct 5.630(e).

*Note:* In *In re Brittany K.* (2005) 127 CA4th 1497, 26 CR3d 487, a grandmother was enjoined from stalking her grandchildren who were in a foster home. On appeal she argued that Welf & I C §213.5(a) was unconstitutionally vague, “unreasonable and arbitrary,” because “it provides no guidelines whatsoever for deciding what ‘stalking’ means.”

The court found that Welf & I C §213.5(a) is not constitutionally vague. The court specifically stated

On the basis of the definitions of the word used in the Penal and Civil Codes, the ordinary dictionary definitions of the term in common usage, and the clarifying language found in section 213.5 itself, we conclude that the term “stalking,” as utilized in section 213.5, does not refer exclusively to the act of literally following someone, although it certainly includes that conduct. Instead, it refers broadly to conduct that is designed to “follow” a particular person in a more general sense, as in to pursue, monitor, watch or keep that person under surveillance for no legitimate purpose, and with the consequent effect of seriously harassing, alarming, annoying, tormenting, or terrorizing the person being followed, pursued, monitored, watched or kept under surveillance.

*Note:* In *In re Cassandra B.* (2004) 125 CA4th 199, 22 CR3d 686, a dependency proceeding, the superior court issued a restraining order against the mother and subsequently issued an order at disposition maintaining the restraining order in full force and effect. The mother appealed from both orders.

In the first appeal, she contended that the restraining order was not supported by substantial evidence, and the juvenile court acted in excess of its jurisdiction in issuing it. The second appeal challenges the court’s order at disposition to maintain the restraining order in full force and effect. The court held that the first, but not the second, appeal was within the statutory time limit. In terms of the first appeal, the court found that there was substantial evidence to issue the restraining order and affirmed the juvenile court order.

The court rejected the mother’s assertion that evidence must be present to impose a restraining order under the plain meaning of Welf & I C §213.5(a). The mother further contends that her behavior did not constitute “molesting.” She asserts that the term “molest” in Welf & I C §213.5 refers to sexual abuse. The court found that molest does not refer exclusively to sexual misconduct, and there was ample evidence before the juvenile court that the mother was “molesting” Cassandra under the court’s definition.

<p><b>TIP:</b> Any custody and visitation orders must adhere to Fam C §6323(c) and (d). Welf &amp; I C §213.5(l). The court order must specify time, day, place, and manner of transfer of the child, and shelter locations must be kept confidential. Fam C §6323(c). The court must also determine if it would be in the best interests</p>
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of the child to have custody or visitation supervised, suspended, or denied. Fam C §6323(d).

#### **E. [§4.13] DURATION OF OAH**

The order after hearing, at the discretion of the court, is effective no longer than 3 years from the date of the hearing unless terminated by the court, or extended by the court on a party's motion or mutual consent of all parties to the restraining order. Welf & I C §213.5(d); Cal Rules of Ct 5.630(h), (j).

#### **F. [§4.14] SERVICE OF OAH**

The OAH is personally served by someone over the age of 18 who is not a party to the action. See CCP §414.10.

If the respondent was personally served with the temporary restraining order, but did not appear in person or by counsel (Welf & I C §213.6(a)), and if the terms of the OAH are identical to the temporary restraining order, except the expiration date, then service by first-class mail to the most current address known by the court is permissible.

#### **G. [§4.15] COURT'S RESPONSIBILITY**

The OAH must be prepared on Judicial Council form JV-250 and must state the expiration date on the face of the order. Cal Rules of Ct 5.630(f)(2), (h)(3); Welf & I C §213.5(f).

The court must order a designated person or attorney to mail a copy of any order (or any subsequent modification, termination, or extension) and any subsequent proof of service to each law enforcement agency that has jurisdiction over the residence of the person who has the care, custody, and control of the child and other locations where the court determines acts of domestic violence or abuse against the child or children could likely occur. Welf & I C §213.5(g).

These orders will be entered into the Domestic Violence Restraining Order System through use of CLETS. Welf & I C §213.5(j).

#### **H. [§4.16] ENFORCEMENT OF TRO/OAH**

A willful and knowing violation of the juvenile protective order is a misdemeanor punishable under Pen C §273.65; Welf & I C §213.5(h); Cal Rules of Ct 5.630(k).

If the restrained party willfully disobeys the ex parte order or order after hearing, then he or she is guilty of contempt of court, a misdemeanor punishable under Pen C §166(a)(4).

A restrained party can also be guilty of contempt for disobedience of a lawful order under CCP §1209(a)(5).

If the restrained party purchases or receives, attempts to purchase or receive, owns, or possesses a firearm while knowing they are subject to

the prohibitions in the ex parte order or order after hearing, then he or she is guilty of a misdemeanor. Pen C §12021(g).

#### I. [§4.17] FIREARMS RESTRICTIONS (FAM C §6389)

The respondent cannot own, possess, purchase, or receive any firearms during the term of the protective order. Fam C §6389(a). After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, immediately upon the request of a law enforcement officer, to the control of the officer, or if no request is made by law enforcement, within 24 hours of being served with the order. Fam C §6389(c)(1), (2).

*Note:* If the respondent notifies the court that a firearm is not in his or her immediate possession, the court may limit the order to exclude that firearm if the judge is satisfied the respondent is unable to gain access to that firearm while the protective order is in effect. Fam C §6389(l).

**Relinquishment.** To comply with the relinquishment order, the respondent may either (Fam C §6389(c)(1), (2)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. Fam C §6389(e).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order.

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. Fam C §6389(h).
- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. Fam C §6389(h).

*Note:* The court may not make this finding until the officer has undergone a mandatory psychological evaluation as ordered by the court. The court

may require the officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence. Fam C §6389(h).

If the respondent declines to relinquish any firearms by raising a Fifth Amendment right against self-incrimination argument, the court may grant use immunity for the act of relinquishing the firearm. Fam C §6389(d).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. Fam C §6389(g).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

*Note:* A search warrant may be issued when the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under Fam C §6389. The person must have been lawfully served with the protective order and failed to relinquish the firearm as required by law. Pen C §1524(a)(11).

#### **J. [§4.18] FEDERAL FIREARMS LAW (18 USC §922(g)(8))**

It is unlawful for any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting commerce. 18 USC §922(g)(8).

A qualifying court order is an order (1) issued after notice and hearing, giving the restrained party an opportunity to be heard; (2) prohibiting harassing, stalking, threatening, or engaging in conduct that would place an intimate partner or child of the partner or restrained party

in reasonable fear of bodily injury; or (3) finding the restrained party presents a credible threat to the physical safety of the intimate partner or child or by its terms prohibits the use, attempted use, or threatened use of physical harm that would reasonably be expected to cause bodily injury. 18 USC §922(g)(8)(A)–(C).

*Note:* An intimate partner is a (1) spouse or former spouse, (2) parent of a child of respondent, or (3) cohabitant or former cohabitant. 18 USC §921(a)(32).

Violation of this prohibition while the order remains in effect is a federal offense punishable by a fine and/or up to 10 years' imprisonment. 18 USC §924(a)(2).

#### **K. [§4.19] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

A failure to issue the juvenile court protective order on the Judicial Council forms does not, in and of itself, make the order unenforceable. Welf & IC §213.5(i).

A social worker assigned to provide child welfare services, family reunification services, or other services to a dependent child of the juvenile court may seek a restraining order against the parent or parents of the minor child if, for good cause shown after an ex parte hearing, there has been at least one threat of physical harm towards the social worker or any member of the social worker's family, and the person making the threat has the ability to carry it out. A violation of this order is contempt. Welf & IC §340.5.

Any visitation or custody order issued by a family or juvenile court after a Criminal Protective Order (CPO) must refer to and acknowledge the precedence of enforcement of any appropriate CPO. Pen C §136.2(e)(3).

If a restraining order has been issued by the juvenile court under Welf & IC §213.5, no court other than a criminal court may issue any order contrary to the juvenile court's restraining order. Cal Rules of Ct 5.630(l).

**L. [§4.20] REFERENCE CHART: JUVENILE COURT PROTECTIVE ORDERS (WELF & I C §§213.5, 304, 362.4, 726.5)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
Dependency or Wardship	<p><b>TRO:</b></p> <p>The request may be oral or written; court considers all documents and juvenile court file</p> <p><b>OAH:</b></p> <p>Court considers written documents, juvenile court file and testimony</p>	<p>Dependency: (any person)</p> <p>Personal conduct restraints Residence exclusion</p> <p>Wardship: (any person)</p> <p>Personal conduct restraints Residence exclusion</p> <p>Prohibited from taking action to locate protected party</p> <p><b>FIREARMS:</b> Cannot own, possess, purchase, or acquire</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>	<p>Ex parte:</p> <p>15 days or 20 days if good cause</p> <p><b>OAH:</b></p> <p>3 years from the date of the hearing</p>	<p>Pen C §273.65</p> <p>Pen C §166(a)(4)</p> <p>CCP §1209(a)(5)</p> <p>Pen C §12021(g) 18 USC §922(g)(8)</p> <p>Pen C §12316(b)</p>

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*1. Remember to do a search on the respondent's past criminal and restraining order history before the hearing, if identified by Judicial Council as having resources currently available or as soon as funds appropriated.*

*2. The TRO and OAH must be prepared on Judicial Council forms and must state the expiration date on the face of the order.*

*3. If ordering custody/visitation, the order must be specific, shelter locations must be kept confidential, and is it in the best interests of the child to have visitation supervised, suspended, or denied.*

*4. Designate someone to mail a copy of the protective order and any proof of service to applicable law enforcement.*

*This is a brief reference chart for a Juvenile Court Protective Order. Please read the full, detailed section in the Protective Order Bench Manual.*

# **Chapter 5**

## **CRIMINAL PROTECTIVE ORDER (CPO)**

### **(Pen C §136.2)**

- I. **[§5.1] Applicability**
- II. **[§5.2] Parties Protected**
- III. **[§5.3] Applicants**
- IV. **[§5.4] Requirements and Standard of Proof**
- V. **[§5.5] Availability of Order**
- VI. **[§5.6] Orders Includable in CPO**
- VII. **[§5.7] Duration of CPO**
- VIII. **[§5.8] Service of CPO**
- IX. **[§5.9] Court's Responsibility**
- X. **[§5.10] Firearms Restrictions**
- XI. **[§5.11] Enforcement of CPO**
- XII. **[§5.12] Terms of Probation**
- XIII. **[§5.13] Modification or Termination**
- XIV. **[§5.14] Reference Chart: Criminal Protective Order  
(Pen C §136.2)**

#### **I. [§5.1] APPLICABILITY**

The court is required to consider issuing a stay away order in every criminal domestic violence case. Pen C §136.2(e)(1).

#### **II. [§5.2] PARTIES PROTECTED**

The protected party is a victim or witness to whom harm or intimidation or dissuasion has occurred or is reasonably likely to occur. Pen C §136.2(a).

#### **III. [§5.3] APPLICANTS**

Any court with jurisdiction over a criminal matter may issue orders on its own motion or on the application of the district attorney, victim, or witness to the court. See Pen C §136.2(a), (e).

#### **IV. [§5.4] REQUIREMENTS AND STANDARD OF PROOF**

A court must have jurisdiction over a criminal matter in order to issue the protective order. The order may be issued on a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Pen C §136.2(a).

In any case in which a complaint, information, or indictment charging a crime of domestic violence, as defined in Pen C §3700, has been filed, the court may consider, in determining whether good cause exists, the underlying nature of the offense charged, and the information provided to the court under Pen C §273.75. Pen C §136.2(h).

Note that in *People v Stone* (2004) 123 CA4th 153, 19 CR3d 771, the court required additional evidence that a victim or witness had been intimidated or dissuaded from testifying or that there was a likelihood that it would occur. It is not clear whether this would apply in a case involving a domestic violence crime. Since the adoption of this recommendation, Pen C §136.2(h) was added to Pen C §136.2 to provide clarification regarding the application of *People v Stone* to domestic violence cases. Although *People v Stone* may be distinguishable in domestic violence cases, the question has yet to be addressed in a published opinion. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Criminal Procedure, Pretrial, page 35, #18.*

TIP: In the 2007–2008 legislative session, Pen C §136.2(h) was added to Pen C §136.2 to provide clarification regarding the application of *People v Stone* to domestic violence cases. Penal Code §136.2(h) clarifies that the underlying nature of the offense charged can be a sufficient basis for determining whether good cause exists to issue a criminal protective order. In addition, it allows the court to consider the relevant criminal history information regarding the defendant, which is already provided to the court at arraignment for the purpose of making the good cause determination under Pen C §136.2. In her arguments in support of the Pen C §136.2(h) amendment, the author states “*People v Stone’s* interpretation of Penal Code 136.2 is too narrow and does not provide the criminal court with sufficient authority to protect victims of domestic violence. Before *People v Stone*, most criminal courts did not interpret PC 136.2 in this narrow way. Many courts continued to read PC 136.2 to authorize them to protect victims of domestic violence whenever they find good cause to believe that the victim is in danger of future harm based on the facts underlying the charged offense.” Penal Code §136.2(h) codifies this practice. *AB 1771 (Ma), 2007–2008 legislative session, author’s arguments in support of AB 1771.*

## V. [§5.5] AVAILABILITY OF ORDER

The order is available anytime during the criminal case, through termination of the court’s jurisdiction over the case. See Pen C §136.2.

## VI. [§5.6] ORDERS INCLUDABLE IN CPO

A CPO may include any of the following:

- Any order issued under Fam C §6320. Pen C §136.2(a)(1).

*Note:* Family Code §6320 includes personal conduct restraints and stay away orders.

- An order that a defendant must not violate any provision of Pen C §136.1. It is a violation of Pen C §136.1 to:
  - Knowingly and maliciously prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
  - Knowingly and maliciously attempt to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
- An order that any person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the courtroom of the court, must not violate any provisions of Pen C §136.1. Pen C §136.2(a)(3).
- An order that a person described in Pen C §136.2 must have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose. Pen C §136.2(a)(4).
- An order calling for a hearing to determine if an order as described in Pen C §136.2(a)(1)–(4), inclusive, should be issued. Pen C §136.2(a)(5).
- An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the victim's or witness's household as determined by the court. Pen C §136.2(a)(6).
- Any orders protecting victims of violent crime from contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant. Pen C §136.2(a)(7)(A).

In a case involving children, a court that issues a CPO either pretrial or as a term of probation should consider whether to provide for peaceful contact between the restrained person and the protected person for the safe exchange of the children under an existing or future family law order. For this purpose, the court may consider whether to check the appropriate box on the Judicial Council mandatory form, Criminal Protective Order—Domestic Violence (CR-160). *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Criminal Procedure, Protective Orders Generally, page 40, #54.*

- An order prohibiting the defendant from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the order is in effect. Pen C §§136.2(d)(3), 12021(g).

Any party enjoined by a CPO is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Pen C §136.3(a).

*Note:* If a court does not issue an order in a case where the defendant is charged with a crime of domestic violence, the court on its own motion must consider issuing a protective order that provides as follows (Pen C §136.2(a)(7)(B)(i)):

The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect. Pen C §136.2(a)(7)(B)(i)(I).

The defendant shall relinquish any firearms that he or she owns or possesses. Pen C §136.2(a)(7)(B)(i)(II).

## VII. [§5.7] DURATION OF CPO

The order remains in effect until the defendant is no longer subject to the court's jurisdiction. See Pen C §136.2.

CPOs issued under Pen C §136.2 expire on or before the date that criminal jurisdiction over the defendant terminates (*People v Stone* (2004) 123 CA4th 153, 19 CR3d 771). If criminal jurisdiction over the defendant terminates early, a Notice of Termination of Protective Order in Criminal Proceedings (CR-165) must be entered in DVROS within one business day. However, new legislation, effective January 1, 2008, provides for the issuance of a CPO for a period of up to 10 years for conviction of certain specified domestic violence crimes whether or not the defendant is sentenced to probation or state prison (see AB 289; Stats 2007, ch 582). *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Domestic Violence Criminal Procedure, Protective Orders Generally, page 41 #59.*

Orders under Pen C §203.097 are probationary orders, and the court has jurisdiction as long as the defendant is on probation. Pen C §1203.097(a)(2).

If a defendant is convicted under Pen C §273.5(a), the sentencing court must consider issuing a no-contact restraining order, which may be valid for 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation. Pen C §273.5(i).

**TIP:** These orders should still have specific termination dates so that law enforcement does not have any concerns about enforcement. However, they must be terminated upon acquittal, dismissal, nonprobationary sentence, or a state prison sentence, except as defined in Pen C §273.5 or §646.9. Courts should develop a system to monitor the case to its conclusion and terminate orders when appropriate.

## VIII. [§5.8] SERVICE OF CPO

No personal service is required as long as the defendant is present. The defendant is given a written copy at the time of the hearing.

## IX. [§5.9] COURT'S RESPONSIBILITY

It is not uncommon in domestic violence cases to find the same parties in different courts at the same time, such as criminal, juvenile, and family courts. For a discussion of conflicting orders, see §§11.1–11.2.

Within one business day after the criminal protective order is issued, the court must transmit the order to the Department of Justice in accordance with Fam C §6380. Pen C §136.2(a)(7)(A). As to transmittal of the order, see §2.9.

All interested parties must receive a copy of the orders. Pen C §136.2(e)(1).

Any visitation or custody order issued by a family or juvenile court after a Criminal Protective Order (CPO) must refer to and acknowledge the precedence of enforcement of any appropriate CPO. Pen C §136.2(e)(3).

The court has the responsibility to transmit the modification, extension, or termination orders made under Pen C §136.2 to the same agency that entered the original protective order into the Domestic Violence Restraining Order System. Pen C §136.2(a)(7)(A).

A court order not on forms adopted by the Judicial Council, is still enforceable. Pen C §136.2(a)(7)(C).

A family or juvenile court, consistent with the protocol established in Pen C §136.2(e)(3), may order custody and visitation with respect to the defendant and his or her minor children as long as those orders do not conflict with the criminal order. Pen C §136.2(e)(3).

Each county must establish a protocol to provide for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims by January 1, 2004. Cal Rules of Ct 5.500(c); Pen C §136.2(f). See Appendix B for the text of Cal Rules of Ct 5.500. The protocol must include a way to appropriately communicate and ensure information sharing between criminal, family, and juvenile courts concerning orders and cases that involve the same parties and permit a family or juvenile court order to coexist with a criminal court protective order subject to the following:

- Any order that permits contact between the restrained person and his or her children must provide for the safe exchange of the children and must not contain language that violates a no-contact order issued by the criminal court. Pen C §136.2(f)(1).
- Safety of all parties must be the courts' main concern. Pen C §136.2(f)(2).

## **X. [§5.10] FIREARMS RESTRICTIONS**

The defendant cannot own, possess, purchase, or receive any firearms during the term of the protective order. Pen C §12021(g).

The court should orally advise the defendant about state and federal firearms and ammunition prohibitions and the requirement for timely relinquishment. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Procedures, page 23, #9.*

**Relinquishment.** CCP §527.9; Pen C 136.2(d)(2).

After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b).

To comply with the relinquishment order, the respondent may either (CCP §527.9(b)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527.9(b).

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. CCP §527.9(f).
- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. CCP §527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local

law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. CCP §527.9(e).

The following summarizes the applicable provisions of the Federal Firearms Law (18 USC §922(g)(8)):

It is unlawful for any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting commerce. 18 USC §922(g)(8).

A qualifying court order is an order (1) issued after notice and hearing, giving the restrained party an opportunity to be heard; (2) prohibiting harassing, stalking, threatening, or engaging in conduct that would place an intimate partner or child of the partner or restrained party in reasonable fear of bodily injury; or (3) finding the restrained party presents a credible threat to the physical safety of the intimate partner or child or by its terms prohibits the use, attempted use, or threatened use of physical harm that would reasonably be believed to cause bodily injury. 18 USC §922(g)(8)(A)–(C).

*Note:* An intimate partner is a (1) spouse or former spouse, (2) parent of a child of respondent, or (3) cohabitant or former cohabitant. 18 USC §921(a)(32).

Violation of this prohibition while the order remains in effect is a federal offense punishable by a fine and/or up to 10 years' imprisonment. 18 USC §924(a)(2).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* [Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in *Ritchie v Konrad* applies to CCP §527.9.] See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically

activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

The court should ask the prosecutor if he or she has reason to believe that the defendant owns or possesses a firearm or ammunition. If the court finds that there is reason to believe that the defendant owns or possesses a firearm or ammunition, the court should set a review hearing within 48 hours of service of the protective order on the defendant to determine whether a relinquishment or sale receipt was filed (CCP §527.9). The court may wish to set the review hearing within 24 hours of service when logistically feasible. The court should order the restrained person to personally appear at the review hearing unless a sale or relinquishment receipt is filed within the statutory time frame. If the restrained person indicates under oath that he or she no longer owns or possesses any firearms that are entered in his or her name in the AFS database, the court should order the restrained person to submit form FD 4036, *Notice of No Longer in Possession* (NLIP), to the DOJ. The court should order the restrained person to submit a report of an allegedly lost or stolen firearm to local law enforcement and present proof of the report to the court. When the court has reason to believe that the defendant still owns or possesses a firearm or ammunition, even if the restrained person has filed a receipt, NLIP, or other type of sale or relinquishment notice, the court should consider holding a review hearing.

If no receipt, NLIP, or other notice has been filed or provided, and defendant appears in court at the scheduled hearing, the court should hold a hearing on the firearms issue and (1) issue a search warrant if one is requested, provided the court finds probable cause; (2) increase bail; (3) revoke release on own recognizance (OR); or (4) set a probation revocation hearing. If no receipt, NLIP, or other notice has been filed or provided, and the defendant does not appear for the court hearing, the court should issue a no-bail bench warrant. *Domestic Violence Practice and Procedure Task Force: Recommended Guidelines and Practices (Final Report, January 2008), Firearms Relinquishment, Procedures, page 24, #10 & #11.*

**Firearms Relinquishment Procedures (Cal Rules of Court 4.700, effective July 1, 2010)***Setting Review Hearing:*

At any hearing where the court issues a criminal protective order, the court must consider all credible information, including information provided on behalf of the defendant, to determine if there is good cause to believe that the defendant has a firearm within his or her immediate possession or control. Cal Rules of Ct 4.700(c)(1).

If the court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control, the court must set a review hearing to ascertain whether the defendant has complied with the requirement to relinquish the firearm as specified in CCP §527.9. Unless the defendant is in custody at the time, the review hearing should occur within two court days after issuance of the criminal protective order. If circumstances warrant, the court may extend the review hearing to occur within 5 court days after issuance of the criminal protective order. The court must give the defendant an opportunity to present information at the review hearing to refute the allegation that he or she owns any firearms. If the defendant is in custody at the time the criminal protective order is issued, the court should order the defendant to appear for a review hearing within two court days after the defendant's release from custody. Cal Rules of Ct 4.700(c)(2).

If the proceeding is held under Pen C §136.2, the court may, under Pen C §977(a)(2), order the defendant to personally appear at the review hearing. If the proceeding is held under Pen C §1203.097, the court should order the defendant to personally appear. Cal Rules of Ct 4.700(c)(3).

*Review Hearing:*

If the court has issued a criminal protective order under Pen C §136.2, and at the review hearing:

1. If the court finds that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's release on own recognizance is appropriate. Cal Rules of Ct 4.700(d)(1)(A).
2. If the defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant. Cal Rules of Ct 4.700(d)(1)(B).

If the criminal protective order is issued as a condition of probation under Pen C §1203.097, and the court finds at the review hearing that the

defendant has a firearm in, or subject to, his or her immediate possession or control, the court must proceed under Pen C §1203.097(a)(12). Cal Rules of Ct 4.700(d)(2).

In any review hearing to determine whether a defendant has complied with the requirement to relinquish firearms as specified in CCP §527.9, the burden of proof is on the prosecution. Cal Rules of Ct 4.700(d)(3).

## **XI. [§5.11] ENFORCEMENT OF CPO**

Any intentional and knowing violation of an order (including a CPO) issued under Fam C §6320 is a misdemeanor. Pen C §273.6(a), (c)(1).

A violation of a criminal protective order issued under Pen C §136.2 is a misdemeanor contempt of court, punishable by imprisonment for no more than one year in county jail, a fine of a maximum of \$1000, or both the imprisonment and fine. Pen C §166(c).

*Note:* If a CPO is a condition of probation and the order is violated, it may be charged as a probation violation. Pen C §1203.097(a)(2).

**TIP:** When a defendant is out of custody pending trial, and has violated the protective order, another enforcement option, in addition to additional charges, is to revoke the defendant's bail or OR status and incarcerate through the trial.

If the prohibitions of Pen C §136.1 are listed on the criminal order and violated by the defendant, the defendant will be punished by no more than one year in county jail or prison. Pen C §136.1(a).

The criminal protective order is enforceable anywhere in California. Fam C §6381(a).

A protective order issued in a domestic violence criminal case has precedence in enforcement over any civil protective order against the defendant, unless a court issues an EPO in which case the EPO takes precedence in enforcement over any other restraining or protective order, provided the EPO meets the following requirements (Pen C §136.2(e)(2)(A)–(C); Fam C §6383(h)):

1. The EPO is issued to protect one or more individuals who are already protected persons under another restraining or protective order;
2. The EPO restrains the individual who is the restrained person in the other restraining or protective order; and
3. The provisions of the EPO are more restrictive in relation to the restrained person than the provisions of the other restraining or protective order.

## XII. [§5.12] TERMS OF PROBATION

If a person is granted probation for a crime in which the victim is a person defined in Fam C §6211, the terms of probation must include a criminal protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay away conditions. Pen C §1203.097(a)(2).

Probation must also include that the victim receive notice of the disposition of the case. Pen C §1203.097(a)(3).

TIP: Prosecutors should provide the victim with this notice because they have (or have access to) the victim's address, and the court often does not. Moreover, if the court were to give this notice, the notice, including the victim's address, could become a publicly accessible court record that may jeopardize the victim's safety. *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases: Final Report of the Domestic Violence Practice and Procedure Task Force (January 2008).*

## XIII. [§5.13] MODIFICATION OR TERMINATION

Before there is any modification or termination of a protective order involving domestic violence as defined in Fam C §6211, a hearing must be held in open court before a judge. The prosecuting attorney must be given 5 days' written notice and an opportunity to be heard. Pen C §1203.3(b)(1).

The court may limit or terminate a protective order that is a condition of probation in a case involving domestic violence, as defined in Fam C §6211. In determining whether to limit or terminate the protective order, the court must consider if there has been any material change in circumstances since the crime for which the order was issued, and any issue that relates to whether there exists good cause for the change, including, but not limited to, consideration of the following (Pen C §1203.3(b)(6)(A)–(I)):

1. Whether the probationer has accepted responsibility for the abusive behavior perpetrated against the victim.
2. Whether the probationer is currently attending and actively participating in counseling sessions.
3. Whether the probationer has completed parenting counseling or attended alcoholics or narcotics counseling.
4. Whether the probationer has moved from the state or is incarcerated.

5. Whether the probationer is still cohabiting or intends to cohabit with any subject of the order.

6. Whether the defendant has performed well on probation including consideration of any progress reports.

7. Whether the victim desires the change, and if so, the victim's reasons, and whether the victim has consulted a victim advocate and whether the victim has prepared a safety plan and has access to local resources.

8. Whether the change will impact any children involved, including consideration of any child protective services information.

9. Whether the ends of justice will be served by limiting or terminating the order.

The court may wish to consider conducting its inquiry in an alternate setting, such as requesting a waiver of the defendant's appearance and conducting a reported chambers interview with the victim, or requesting a probation officer or domestic violence counselor to conduct the interview. *Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases: Final Report of the Domestic Violence Practice and Procedure Task Force (January 2008).*

If criminal jurisdiction over the defendant terminates early, a Notice of Termination of Protective Order in Criminal Proceedings (CR-165) must be entered into DVROS within one business day. Pen C §136.2(c).

**TIP:** Notice of this termination should be given to the victim, who may otherwise be unaware that the protective order has ended.

**XIV. [§5.12] REFERENCE CHART: CRIMINAL PROTECTIVE ORDER (PEN C §136.2)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
To protect a victim or witness in a criminal case	A good cause belief that harm, intimidation, or dissuasion of a victim or witness has occurred or is likely to occur	Personal conduct restraints Stay away orders Defendant must not violate Pen C §136.1 (dissuading a witness) Any other person, other than the defendant, must not violate Pen C §136.1 Witness protection Prohibited from taking action to locate protected party  <b>FIREARMS:</b> Cannot own, possess, purchase, or receive  <b>AMMUNITION:</b> Cannot own, possess, have in custody or control	Until defendant is no longer subject to the court's jurisdiction  Pen C §273.5(i), Post-conviction Order—see #3 below.	Pen C §136.1(a) Pen C §166(c) Pen C §273.6(a), (c)(1) CCP §1209(a)(5)  Pen C §12021(g) 18 USC §922(g)(8)  Pen C §12316(b)

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*1. The criminal protective order must be entered into CLETS within one business day after the order.*

*2. All interested parties should receive a copy of the order.*

*3. If a defendant is convicted under Pen C §273.5(a), the sentencing court must consider issuing a no-contact restraining order, which may be valid for 10 years, as determined by the court. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation. Pen C §273.5(i).*

*This is a brief reference chart for a CPO. Please read the full, detailed section in the Protective Order Bench Manual.*

# **Chapter 6**

## **POSTCONVICTION STALKING**

### **PROTECTIVE ORDERS (Pen C §646.9(k))**

- I. [§6.1] Applicability**
- II. [§6.2] Parties Protected**
- III. [§6.3] Applicants**
- IV. [§6.4] Requirements, Standard of Proof, and Availability of Orders**
- V. [§6.5] Orders Includable in Postconviction Protective Order**
- VI. [§6.6] Duration of Order**
- VII. [§6.7] Enforcement of Order**
- VIII. [§6.8] Reference Chart: Postconviction Stalking Protective Order (Pen C §646.9(k))**

#### **I. [§6.1] APPLICABILITY**

Penal Code §646.9 defines the crime of stalking and specifies punishment, and Pen C §646.9(k) authorizes issuing a protective order for a victim of stalking.

#### **II. [§6.2] PARTIES PROTECTED**

The restraining order may prohibit contact with the victim or the victim’s immediate family. Pen C §646.9(a), (k). “Immediate family” means any spouse, parent, child, any person related by consanguinity or affinity with the second degree, or any other person who regularly resides in the household or within the past six months regularly resided in the household. Pen C §646.9(l).

#### **III. [§6.3] APPLICANTS**

The sentencing court must consider issuing the restraining order at the time of sentencing. See Pen C §646.9(k).

#### **IV. [§6.4] REQUIREMENTS, STANDARD OF PROOF, AND AVAILABILITY OF ORDERS**

In order for the restraining order to issue, the defendant must be found guilty of stalking as defined in Pen C §646.9(a), and the sentencing court must determine whether the protective order will issue. The orders are available at the time of sentencing. Pen C §646.9(k).

## V. [§6.5] ORDERS INCLUDABLE IN POSTCONVICTION PROTECTIVE ORDER

Following a conviction for stalking, the court may order the defendant to have no contact with the victim. Pen C §646.9(k).

## VI. [§6.6] DURATION OF ORDER

The order is valid for up to 10 years. The length of the order is based on the (1) seriousness of the facts before the court, (2) the probability of future violations, and (3) the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation. Pen C §646.9(k).

## VII. [§6.7] ENFORCEMENT OF ORDER

If any person commits the crime of stalking as defined in Pen C §646.9(a), and there is a restraining order, injunction, or other court order prohibiting stalking behavior against the same party, punishment is two, three, or four years in state prison. Pen C §646.9(b).

*Note:* “Other court order” includes a stay-away order issued as a condition of probation. *People v Corpuz* (2006) 38 C4th 994, 135 P3d 995, 44 CR3d 360.

Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by a court, including orders pending trial, is contempt of court and a misdemeanor. Pen C §166(a)(4).

<p><b>TIP:</b> If you make a Pen C §646.9(k) order, you need to terminate a Pen C §136.2 order.</p>
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**VIII. [§6.8] REFERENCE CHART: POSTCONVICTION  
STALKING PROTECTIVE ORDER (PEN C  
§646.9(k))**

<b>WHEN</b>	<b>PROOF</b>	<b>ORDERS</b>	<b>DURATION</b>	<b>ENFORCEMENT</b>
After defendant found guilty of stalking; order made at sentencing	A conviction of the defendant of the charge of stalking	Personal conduct restraints  Stay away orders	May be valid up to 10 years	Pen C §166(a)(4)  Pen C §166(c)  Pen C §646.9(b)  CCP §1209(a)(5)

*All interested parties should receive a copy of the order.*

*This is a brief reference chart for a postconviction stalking protective order. Please read the full, detailed section in the Protective Order Bench Manual.*

# **Chapter 7**

## **WORKPLACE VIOLENCE PROTECTIVE ORDER (CCP §527.8)**

- I. [§7.1] Applicability**
- II. [§7.2] Parties Protected**
- III. [§7.3] Applicants**
- IV. [§7.4] Requirements**
- V. [§7.5] Standard of Proof**
- VI. [§7.6] Time of Availability**
- VII. [§7.7] Orders Includable in Workplace Violence Protective Order**
- VIII. [§7.8] Duration of Order**
- IX. [§7.9] Service of Order**
- X. [§7.10] Delivery of Copy of Order; Court's Responsibility**
- XI. [§7.11] Firearms Restrictions**
- XII. [§7.12] Enforcement of Workplace Violence Protective Order**
- XIII. [§7.13] Other Legal and Procedural Considerations**
- XIV. [§7.14] Reference Chart: Workplace Violence Protective Order (CCP §527.8)**

### **I. [§7.1] APPLICABILITY**

An employer may obtain a temporary restraining order and an injunction for an employee who has suffered an unlawful act of violence or a credible threat of violence from any individual that can reasonably be construed to be carried out or to have been carried out at the workplace. At the discretion of the court, an employer may also obtain a temporary restraining order and injunction for any number of other employees at the workplace and, if appropriate, other employees at other workplaces of the employer. CCP §527.8(a). See *USS-Posco Indus. v Edwards* (2003) 111 CA4th 436, 4 CR3d 54 (an employer subjected to generalized threats of workplace violence may obtain relief under CCP §527.8 on behalf of an employee who is logical target of threats, even if employee was not specifically identified by harasser).

## II. [§7.2] PARTIES PROTECTED

A temporary restraining order and injunction may include an employee and on a showing of good cause, other named family or household members who reside with the employee. CCP §527.8(e).

## III. [§7.3] APPLICANTS

The temporary restraining order and injunction is initiated by the employer of the employee allegedly subjected to an act of violence or threat of violence. The terms “employer” and “employee” are as defined in Lab C §350 and CCP §527.8(d).

## IV. [§7.4] REQUIREMENTS

The employer must prove:

- The employee has suffered unlawful violence or a credible threat of violence. CCP §527.8(a), (e).
- The violence or threat of violence can reasonably be construed to have occurred in the workplace. CCP §527.8(a).

*Note:* A workplace violence protection order may not be issued if defendant is engaged in a constitutionally protected activity or legitimate labor dispute. CCP §527.8(c).

## V. [§7.5] STANDARD OF PROOF

The standard of proof for an injunction under CCP §527.8 is clear and convincing evidence. CCP §527.8(f). See *Scripps Health v Marin* (1999) 72 CA4th 324, 334–336, 85 CR2d 86 (reversing order granting permanent injunction under CCP §527.8 when evidence was insufficient to establish reasonable probability that elderly hospital patient’s son, who had allegedly assaulted employee of health care provider during dispute regarding care for patient, was likely to commit further acts of violence against employees of provider when son had made no prior or subsequent threats of violence, and patient had since transferred her health insurance, making it unlikely she would have to return to facility aligned with provider). The purpose of injunctive relief is to prevent future or threatened harm.

For a temporary restraining order to issue, the employer must submit an affidavit showing reasonable proof that the employee suffered unlawful violence or a credible threat of violence and that great or irreparable harm would result to the employee. CCP §527.8(e).

## VI. [§7.6] TIME OF AVAILABILITY

**Temporary Restraining Order.** The order is available *ex parte* if the plaintiff files an affidavit that shows reasonable proof of unlawful violence or threats of violence and great or irreparable harm would result to an employee. CCP §527.8(e).

**Injunction.** The injunction is available after a hearing. CCP §527.8(f).

## VII. [§7.7] ORDERS INCLUDABLE IN WORKPLACE VIOLENCE PROTECTIVE ORDER

The court may order that defendant must stay away from employee, employee's residence, employee's place of work, and employee's children's school or childcare. See Judicial Council form WV-140.

The court may also order that the defendant must not assault, batter, or stalk employee; follow or stalk employee to and from work; follow employee during hours of employment; telephone or send correspondence to the employee; and enter the workplace of the employee. See Judicial Council form WV-140.

Any party enjoined by a Workplace Violence Protective Order is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. CCP §527.10(a).

## VIII. [§7.8] DURATION OF ORDER

**Temporary Restraining Order.** At the court's discretion, the duration of the temporary restraining order is not to exceed 15 days unless otherwise modified or terminated by the court. CCP §527.8(e).

**Injunction.** The duration of the injunction is for a maximum of three years. CCP §527.8(f).

*Note:* The plaintiff may apply for renewal of the injunction at any time within 3 months of its expiration by filing a new petition. CCP §527.8(f).

## IX. [§7.9] SERVICE OF ORDER

Upon filing for an injunction, defendant must be personally served with a copy of the petition, TRO, and notice of hearing of the petition. CCP §527.8(h). Service must be made at least 5 days before the hearing. CCP §527.8(h).

The court may, for good cause, on motion of the plaintiff or on its own motion, shorten the time for service on the defendant. CCP §527.8(h).

## X. [§7.10] DELIVERY OF COPY OF ORDER; COURT'S RESPONSIBILITY

Plaintiff or plaintiff's attorney must deliver a copy of the TRO or injunction by close of the business day on which the order was granted to law enforcement agencies within the court's discretion and as requested by plaintiff. CCP §527.8(i).

The order must be transmitted to the Department of Justice in accordance with Fam C §6380(b). CCP §527.8(o). For further discussion of transmittal, see §2.9.

**TIP:** If your court enters other protective orders into CLETS or has a procedure for assisting with entering these orders, you should consider providing the same service for workplace violence protective orders.

## XI. [§7.11] FIREARMS RESTRICTIONS

The defendant cannot own, possess, purchase, or receive any firearms during the term of the protective order. Pen C §12021(g).

**Relinquishment.** CCP §§527.9, 527.8(j)(2).

After issuing a protective order, the court must order of the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b).

To comply with the relinquishment order, the respondent may either (CCP §527.9(b)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527.9(b).

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then

the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. CCP 527.9(f).

- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. CCP §527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. CCP §527.9(e).

The following summarizes the applicable provisions of the Federal Firearms Law (18 USC §922(g)(8)):

It is unlawful for any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting commerce. 18 USC §922(g)(8).

A qualifying court order is an order (1) issued after notice and hearing giving the restrained party an opportunity to be heard, (2) prohibiting harassing, stalking, threatening, or engaging in conduct that would place an intimate partner or child of the partner or restrained party in reasonable fear of bodily injury, (3) finding the restrained party presents a credible threat to the physical safety of the intimate partner or child or by its terms prohibits the use, attempted use, or threatened use of physical harm that would reasonably be believed to cause bodily injury. 18 USC §922(g)(8)(A)–(C).

*Note:* An intimate partner is a (1) spouse or former spouse, (2) parent of a child of respondent, or (3) cohabitant or former cohabitant. 18 USC §921(a)(32).

Violation of this prohibition while the order remains in effect is a federal offense punishable by a fine and/or up to 10 years' imprisonment. 18 USC §924(a)(2).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* [Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in *Ritchie v Konrad* applies to CCP §527.9.] See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

## **XII. [§7.12] ENFORCEMENT OF WORKPLACE VIOLENCE PROTECTIVE ORDER**

Any intentional and knowing violation of a protective order issued under CCP §527.8 is a misdemeanor punishable by a fine of not more than \$1000 or by imprisonment in a county jail for not more than one year, or both the fine and imprisonment. Pen C §273.6.

## **XIII. [§7.13] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

The order is enforceable anywhere in California. Fam C §6381(a).

Orders issued by the court but not on forms adopted by the Judicial Council are enforceable. CCP §527.8(n).

There is no filing fee for a petition that alleges that a person has inflicted or threatened violence against an employee of the petitioner, or stalked the employee, or acted or spoke in any other manner that has placed the employee in reasonable fear of violence, and that seeks protective or restraining orders or injunctions restraining stalking or future violence or threats of violence. CCP §527.8(p).

No fee will be paid for filing a response to a petition alleging these acts. CCP §527.8(p).

**XIV. [§7.14] REFERENCE CHART: WORKPLACE VIOLENCE  
PROTECTIVE ORDER (CCP §527.8)**

<b>WHEN</b>	<b>PROOF</b>	<b>ORDERS</b>	<b>DURATION</b>	<b>ENFORCEMENT</b>
Employer applies when employee has suffered an unlawful act of violence or credible threat of violence in the workplace	<p><b>TRO:</b> Reasonable proof</p> <p><b>OAH:</b> Clear and convincing evidence</p>	<p>Personal conduct restraints</p> <p>Stay away orders</p> <p>Prohibited from taking action to locate protected party</p> <p><b>FIREARMS:</b> Cannot own, possess, purchase, or receive</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>	<p><b>TRO:</b> 15 days, unless otherwise modified or terminated by the court</p> <p><b>OAH:</b> 3 years</p>	<p>Pen C §273.6</p> <p>CCP §1209(a)(5)</p> <p>Pen C §12021(g) 18 USC §922(g)(8)</p> <p>Pen C §12316(b)</p>

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*This is a brief reference chart for a workplace protective order. Please read the full, detailed section in the Protective Order Bench Manual.*

## **Chapter 8**

# **CIVIL HARASSMENT PROTECTIVE ORDER (CCP §527.6)**

- I. **[§8.1] Applicability and Parties Protected**
- II. **[§8.2] Requirements**
- III. **[§8.3] Standard of Proof**
- IV. **[§8.4] Availability of Order**
- V. **[§8.5] Orders Includable in Civil Harassment Protective Order**
- VI. **[§8.6] Duration of Order**
- VII. **[§8.7] Service of Order**
- VIII. **[§8.8] Officer's Responsibility**
- IX. **[§8.9] Court's Responsibility**
- X. **[§8.10] Firearms Restrictions**
- XI. **[§8.11] Enforcement of Civil Harassment Protective Order**
- XII. **[§8.12] Other Legal and Procedural Considerations**
- XIII. **[§8.13] Reference Chart: Civil Harassment Protective Order (CCP §527.6)**

### **I. [§8.1] APPLICABILITY AND PARTIES PROTECTED**

A person who has suffered harassment as defined in CCP §527.6(b) may seek a temporary restraining order and an injunction to prevent harassment. No special relationship between the applicant and respondent is required.

*Note:* These actions are brought by persons, not businesses. See *Diamond View Ltd. v Hertz* (1986) 180 CA3d 612, 616–617, 225 CR 651 (a limited partnership is not a person for purposes of CCP §527.6 because the legislative history of the section and the statement of legislative intent enacted with it indicates it applies only to noticed persons, as does the section's requirement that the victim of harassment suffer substantial emotional distress, an emotional state exhibited only by natural persons).

On a showing of good cause, the plaintiff's family or household members who reside with the plaintiff may also be protected. CCP §527.6(c).

## II. [§8.2] REQUIREMENTS

The plaintiff must show that he or she has suffered harassment, which is defined as (CCP §527.6(b)):

- Unlawful violence: An assault or battery, or stalking (Pen C §646.9), but not lawful self-defense or defense of others; or
- Credible threat of violence: A knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose; or
- A knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person and that serves no legitimate purpose (CCP §527.6(b)(3)):
  - The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. For example, there was sufficient evidence that a former patient’s harassment caused a psychologist “significant emotional distress” so as to obtain a TRO against ongoing harassment under CCP §527.6 even when the psychologist did not directly testify on that issue. *Ensworth v Mullvain* (1990) 224 CA3d 1105, 1110–1111, 274 CR 447 (circumstantial evidence showed psychologist had been followed and spied on, that she received repeated phone calls and threatening letters, including one in which patient alluded to committing suicide in psychologist’s presence, and psychologist’s declaration in support of petition stated that harassment caused significant emotional distress).
  - The course of conduct is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail.
  - Constitutionally protected activity is not included within the meaning of course of conduct.

## III. [§8.3] STANDARD OF PROOF

**Temporary Restraining Order.** The order is available if the plaintiff shows reasonable proof of harassment of the plaintiff by the

defendant, and that great or irreparable harm would result to the plaintiff. CCP §527.6(c).

**Injunction.** The injunction is available if the court finds by clear and convincing evidence that unlawful harassment exists. CCP §527.6(d).

See *Russell v Douvan* (2003) 112 CA4th 399, 5 CR3d 137 (reaffirmed the long-standing principle that a prohibitory injunction may not issue unless the court finds that there is a threat of future harm).

#### IV. [§8.4] AVAILABILITY OF ORDER

**Temporary Restraining Order.** The order is available in accordance with CCP §527, except to the extent CCP §527.6 provides a rule that is inconsistent with CCP §527.

The TRO must not be granted without notice to the opposing party, unless both of the following requirements are satisfied (CCP §527(c)):

- It is shown by the affidavit or verified complaint that great or irreparable injury will result before the matter can be heard; and
- Applicant or applicant's attorney certifies one of the following under oath:
  - Within a reasonable time before the application, the applicant informed the opposing party of the time and where the application would be made; or
  - Applicant in good faith attempted to notify the opposing party but was unable to do so; or
  - For reasons specified, the applicant should not be required to so inform the opposing party or opposing party's attorney.

The TRO may be issued with or without notice upon an affidavit to the satisfaction of the court, which shows reasonable proof of harassment of the plaintiff by the defendant and that great or irreparable harm would result to the plaintiff. CCP §527.6(c).

**Injunction.** The injunction is available after a hearing. CCP §527.6(d).

#### V. [§8.5] ORDERS INCLUDABLE IN CIVIL HARASSMENT PROTECTIVE ORDER

A Civil Harassment Protective Order may include any of the following:

- No contact: Defendant must not contact, molest, harass, attack, telephone, threaten, sexually assault, batter, contact by mail with the intent to harass, stalk, destroy personal property, or disturb the peace of a party or other named family and household members.

- Stay away orders: Defendant must stay away from plaintiff, others listed as protected, plaintiff's residence, plaintiff's work, children's school, and any other persons or places included in the order.

Any party enjoined by a CHO is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. CCP §527.10(a).

*Note:* Distinction from Domestic Violence Prevention Act order: The court may not make kick-out orders or support orders for a civil harassment order. See *Oriola v Thaler* (2000) 84 CA4th 397, 412–413, 100 CR2d 822 (potential for restitution under DVPA “for loss of earnings and out-of-pocket expenses, including, but not limited to, expenses for medical care and temporary housing, incurred as a direct result of the abuse inflicted by the respondent or any actual physical injuries sustained from the abuse” was presumably reason appellant chose to proceed under DVPA even after obtaining injunctive relief under CCP §527.6).

## VI. [§8.6] DURATION OF ORDER

**Temporary Restraining Order.** Not to exceed 15 days or if court finds good cause, not to exceed 22 days. CCP §527.6(c).

**Injunction.** The duration of the injunction is for a maximum of three years. CCP §527.6(d).

*Note:* At anytime within 3 months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction. CCP §527.6(d).

## VII. [§8.7] SERVICE OF ORDER

When filing for a petition for an injunction, the defendant must be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition. Service must be made at least 5 days before the hearing. The court may for good cause, on motion of the plaintiff or on its own motion, shorten the time for service on the defendant. CCP §527.6(g).

## VIII. [§8.8] OFFICER'S RESPONSIBILITY

An order issued under CCP §527.6 on the plaintiff's request must be served on the defendant by a law enforcement officer who is present at the scene of reported harassment involving the parties to the proceeding. The plaintiff must provide the officer with an endorsed copy of the order and a

proof of service that the officer must complete and send to the issuing court. CCP §527.6(h).

*Verbal notice is sufficient for enforcement purposes under Pen C §§273.6 and 12021(g).* A law enforcement officer must immediately attempt to verify the existence of an order when the officer is at a scene of an incident of harassment and there is a protective order, or a person who has been taken into custody is the subject of the order and the protected person cannot produce a certified copy of the order. If the law enforcement officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of the terms of the order and enforce the order. CCP §527.6(h).

*Note:* Although verbal notice is sufficient for enforcement purposes, some judicial officers may require actual notice of all of the terms and conditions of the order before conducting a hearing in a civil setting.

## **IX. [§8.9] COURT'S RESPONSIBILITY**

Information on a restraining order or injunction issued by a court must be transmitted to the Department of Justice in accordance with Fam C §6380. CCP §527.6(n).

The plaintiff or the plaintiff's attorney must deliver a copy of each temporary restraining order or injunction, or modification or termination by the close of the business day on which the order was granted to the law enforcement agencies within the court's discretion as requested by the plaintiff. CCP §527.6(h).

## **X. [§8.10] FIREARMS RESTRICTIONS**

The defendant cannot own, possess, purchase, or receive any firearms during the term of the protective order. Pen C §12021(g).

**Relinquishment.** CCP §§527.9, 527.6(k)(2).

After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b).

To comply with the relinquishment order, the respondent may either (CCP §527.9(b)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and

surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527.9(b).

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. CCP 527.9(f).
- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. CCP 527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. CCP §527.9(e).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* [Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in

*Ritchie v Konrad* applies to CCP §527.9.] See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

## **XI. [§8.11] ENFORCEMENT OF CIVIL HARASSMENT PROTECTIVE ORDER**

Any intentional and knowing violation of a protective order as defined in CCP §527.6 is a misdemeanor punishable by a fine of not more than \$1000 or by imprisonment in a county jail for not more than one year, or both the fine and imprisonment. Pen C §273.6.

## **XII. [§8.12] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

A support person may accompany a party in court if there are allegations or threats of domestic violence. CCP §527.6(f).

The prevailing party may be awarded court costs and attorneys' fees. CCP §527.6(i).

An order issued by a court shall be issued on forms adopted by the Judicial Council under the civil harassment provisions. CCP §527.6(m). Failure to issue the order on Judicial Council forms shall not render the order unenforceable for that reason.

There is no filing fee for a petition that alleges that a person has inflicted or threatened violence against the petitioner, stalked the petitioner, or acted or spoke in any other manner that has placed the petitioner in reasonable fear of violence, and there is no fee for a subpoena alleging these acts. CCP §527.6(p). There is also no fee for filing a response to a petition alleging the preceding acts. CCP §527.6(p).

There is no fee for service of process of a protective order, restraining order, or injunction if any of the following conditions apply (CCP §527.6(p)(1)):

- Order is based upon stalking. Pen C §646.9.
- Order is based upon a credible threat of violence resulting from a threat of sexual assault. Educ C §1036.2.
- Order is issued under Fam C §6222.

TIP: Civil harassment cases involving neighbors or school acquaintances when the harassment has not been of a violent nature are often amenable to some form of alternate dispute resolution.

The order is enforceable anywhere in California. Fam C §6381(a).

**XIII. [§8.13] REFERENCE CHART: CIVIL HARASSMENT  
PROTECTIVE ORDER (CCP §527.6)**

<b>WHEN</b>	<b>PROOF</b>	<b>ORDERS</b>	<b>DURATION</b>	<b>ENFORCEMENT</b>
Person has suffered harassment	<p><b>TRO:</b> Reasonable proof</p> <p><b>OAH:</b> Clear and convincing evidence</p>	<p>Personal conduct restraints</p> <p>Stay away orders</p> <p>Prohibited from taking action to locate protected party</p> <p><b>FIREARMS:</b> Cannot own, possess, purchase, or receive</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>	<p><b>TRO:</b> 15 days or 22 days if good cause</p> <p><b>OAH:</b> 3 years</p>	<p>Pen C §273.6</p> <p>CCP §1209(a)(5)</p> <p>Pen C §12021(g)</p> <p>Pen C §12316(b)</p>

**Unlike a Domestic Violence Prevention Act order, the court may not make a support or residence exclusion order.**

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*This is a brief reference chart for a CHO. Please read the full, detailed section in the Protective Order Bench Manual.*

## **Chapter 9**

# **ELDER AND DEPENDENT ADULT PROTECTIVE ORDER (Welf & I C §15657.03)**

- I. [§9.1] **Applicability and Parties Protected**
- II. [§9.2] **Requirements and Standard of Proof**
- III. [§9.3] **Availability of Order**
- IV. [§9.4] **Orders Includable in Elder or Dependent Adult Abuse Protective Order**
- V. [§9.5] **Duration of Order**
- VI. [§9.6] **Service of Order**
- VII. [§9.7] **Firearms Restrictions**
- VIII. [§9.8] **Enforcement of Elder or Dependent Adult Abuse Protective Order**
- IX. [§9.9] **Other Legal and Procedural Considerations**
- X. [§9.10] **Reference Chart: Elder or Dependent Adult Abuse Protective Order (Welf & I C §15657.03)**

### **I. [§9.1] APPLICABILITY AND PARTIES PROTECTED**

An elder or dependent adult who has suffered abuse as defined in Welf & I C §15610.07 (see §9.2) may seek protective orders as provided in Welf & I C § 15657.03. Welf & I C § 15657.03(a).

“Elder” and “dependent” adults are defined respectively as:

- Elder adult means any person residing in California, 65 years of age or older. Welf & I C §15610.27.
- Dependent adult means any person between the ages of 18 and 64 years of age who resides in California and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities has diminished because of age, or who is between those ages and is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Welf & I C §15610.23(a).

## II. [§9.2] REQUIREMENTS AND STANDARD OF PROOF

To obtain the elder or dependent adult protective order, there must be reasonable proof of a past act or acts of abuse. Welf & I C §15657.03(c).

“Abuse” means either (Welf & I C §15610.07):

- Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm, pain, or mental suffering; or
- The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

*Note:* See *Bookout v Nielsen* (2007) 155 CA4th 1131, 67 CR3d 2 (protective orders issued under the Elder Abuse and Dependent Adult Civil Protection Act require proof by a preponderance of the evidence of a past act or acts of elder abuse).

*Note:* See *Gdowski v Gdowski* (2009) 175 CA4th 128, 95 CR3d 799 (a protective order under the Elder Abuse and Dependent Adult Civil Protection Act may issue on the basis of evidence of past abuse, without any particularized showing that the wrongful acts will be continued or repeated).

## III. [§9.3] AVAILABILITY OF ORDER

**Temporary Restraining Order.** Upon filing a petition for protective order under Welf & I C §15657.03, the petitioner may obtain a temporary restraining order in accordance with CCP §527, except to the extent that Welf & I C §15657.03 provides a rule that is inconsistent.

The TRO must not be granted without notice to the opposing party, unless both of the following requirements are satisfied (CCP §527(c)):

- It is shown by the affidavit or verified complaint that great or irreparable injury will result before the matter can be heard; and
- Applicant or applicant’s attorney certifies one of the following under oath:
  - Within a reasonable time before the application, the applicant informed the opposing party of the time and where the application would be made; or
  - Applicant in good faith attempted to notify the opposing party but was unable to do so; or
  - For reasons specified, the applicant should not be required to so inform the opposing party or opposing party’s attorney.

An order may be issued with or without notice, to restrain any person for the purpose of recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult. Welf & I C §15657.03(c).

**Injunction.** The injunction is available after a hearing. Welf & I C §15657.03(e).

#### **IV. [§9.4] ORDERS INCLUDABLE IN ELDER OR DEPENDENT ADULT ABUSE PROTECTIVE ORDER**

**Temporary Restraining Order.** The TRO may include:

- An order enjoining a party from abusing; intimidating; molesting; attacking; striking; stalking; threatening; sexually assaulting; battering; harassing; telephoning, including, but not limited to, annoying telephone calls as described in Pen C §653m; destroying personal property; contacting, either directly or indirectly, by mail or otherwise; or coming within a specified distance of; or disturbing the peace of the petitioner. Welf & I C §15657.03(b)(1).
- An order excluding a party from the petitioner's residence or dwelling, except that this order must not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded or is in the name of the party to be excluded and any other party besides the petitioner. Welf & I C §15657.03(b)(2).
  - The court, however, may issue an ex parte order excluding a party from the petitioner's residence or dwelling only on a showing of all of the following (Welf & I C §15657.03(d)(1)):
    - Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.
    - That the party to be excluded has assaulted or threatens to assault the petitioner, other named family or household members of the petitioner, or conservator of the petitioner.
    - That physical or emotional harm would otherwise result to the petitioner, other named family or household members, or conservator of the petitioner.
- An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in Welf & I C §15657.03(b)(1) or (2). Welf & I C §15657.03(b)(3).

Any party enjoined by an Elder or Dependent Adult Abuse Protective Order is prohibited from taking any action to obtain the address or location

of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Welf & I C §15657.04(a).

**Injunction.** Upon notice and hearing, the court may issue the following:

- An order enjoining a party from abusing; intimidating; molesting; attacking; striking; stalking; threatening; sexually assaulting; battering; harassing; telephoning, including, but not limited to, annoying telephone calls as described in Pen C §653m; destroying personal property; contacting, either directly or indirectly, by mail or otherwise; or coming within a specified distance of; or disturbing the peace of the petitioner. Welf & I C §15657.03(b)(1).
- An order excluding a party from the petitioner's residence or dwelling, except that this order must not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded or is in the name of the party to be excluded and any other party besides the petitioner, provided that the court may issue, after notice and hearing, an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the other party. Welf & I C §15657.03(b)(2), (d)(1).
- An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in Welf & I C §15657.03(b)(1) or (2). Welf & I C §15657.03(b)(3).
- An award of court costs and attorney fees, if any, to the prevailing party. Welf & I C §15657.03(n).

Any party enjoined by an Elder or Dependent Adult Abuse Protective Order is prohibited from taking any action to obtain the address or location of a protected party or a protected party's family members, caretaker, or guardian unless there is good cause not to make that order. Welf & I C §15657.04(a).

## V. [§9.5] DURATION OF ORDER

**Temporary Restraining Order.** No later than 20 days or if good cause appears to the court, 25 days from the date the temporary restraining order is granted, unless the order is otherwise modified or terminated by the court. Welf & I C §15657.03(d)(2).

**Injunction.** The duration of the injunction is for a maximum of three years. Welf & I C §15657.03(f).

At the request of a party, the orders may be renewed for three years or permanently without a showing of any further abuse since the issuance of the original order. Welf & I C §15657.03(f).

## VI. [§9.6] SERVICE OF ORDER

The respondent must be personally served with a copy of the petition, notice of the hearing or order to show cause, temporary restraining order, if any, and any affidavits in support of the petition. Service must be made at least 5 days before the hearing. The court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent. Welf & I C §15657.03(g).

If the respondent, after a hearing, has not been served personally with the order but has received actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement of the order. Welf & I C §15657.03(i)(1).

If the respondent is personally served with the order and notice of hearing with respect to a restraining order or protective order, but the person does not appear at the hearing, either personally or by counsel, and the terms and conditions of the restraining order or protective order are identical to the temporary restraining order, except for the duration of the order, then the restraining order or protective order may be served on the person by first-class mail sent to that person at the most current address available to the court for that person. Welf & I C §15657.03(i)(2).

The court may reissue an order upon the filing of an affidavit by the applicant that the respondent could not be served within the time required by statute. The duration of the reissued order is for no longer than 20 days, or if good cause appears to the court, 25 days from the date of reissuance of the order. The reissuance order must state on its face the expiration date of the order. Welf & I C §15657.03(h).

A law enforcement officer at the scene of reported abuse involving the parties to the proceeding may serve an order upon the respondent if requested by the petitioner and the following applies (Welf & I C §15657.03(j)(1)–(4)):

- The respondent does not need to be in custody.
- The petitioner must provide the officer with an endorsed copy of the order and a proof of service.
- The officer must complete the proof of service and send it to the issuing court.

*Verbal notice is sufficient for enforcement purposes under Pen C §273.6.* On being informed at the scene of an incident of abuse that a protective order has been issued under Welf & I C §15657.03 or that a

person who has been taken into custody is a respondent to that order, a law enforcement officer must immediately attempt to verify the existence of the order if the protected person cannot produce a certified copy of it. If the law enforcement officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of the terms of the order and enforce the order. Welf & I C §15657.03(j)(3), (4).

*Note:* Although verbal notice is sufficient for enforcement purposes, some judicial officers may require actual notice of all of the terms and conditions of the order before conducting a hearing in a civil setting.

## VII. [§9.7] FIREARMS RESTRICTIONS

It is unlawful for a person subject to an Elder and Dependent Adult Protective Order to own, possess, purchase, or receive any firearms during the term of the protective order. A violation of this prohibition is a misdemeanor punishable by a maximum of one year in jail or a \$1000 fine or both. Pen C §12021(g)(1)–(2); Welf & I C §15657.03(o)(1), (4).

*Note:* The firearms prohibition does not apply to a case consisting solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse. Welf & I C §15657.03(o)(2).

**Relinquishment.** CCP §527.9; Welf & I C §15657.03(o)(3). After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b).

To comply with the relinquishment order, the respondent may either (CCP §527.9(b)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527(b).

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the

current employer cannot reassign the respondent to a position that does not require a firearm. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. CCP 527.9(f).

- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. CCP 527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after expiration of the order unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. CCP §527.9(e).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* [Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in *Ritchie v Konrad* applies to CCP §527.9.] See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

### **VIII. [§9.8] ENFORCEMENT OF ELDER OR DEPENDENT ADULT ABUSE PROTECTIVE ORDER**

Any willful disobedience of any temporary restraining order or restraining order after hearing is granted under Welf & I C §15657.03 is punishable under Pen C §273.6. Welf & I C §15657.03(n).

### **IX. [§9.9] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

There is no filing fee for a petition, response, or paper seeking the reissuance, modification, or enforcement of a protective order. Welf & I C §15657.03(l).

Petitioners are not required to pay a fee for law enforcement to serve an order issued under Welf & I C §15657.03. Welf & I C §15657.03(m); Govt C §6103.2(b)(4).

The petitioner or petitioner's attorney must deliver, or the clerk of the court must mail, a copy of an order, a reissuance, extension, modification, or termination of the order, and any subsequent proof of service, by the close of the business day on which the order, reissuance, extension, modification, or termination was made, to each law enforcement agency designated by the petitioner or any additional law enforcement agencies within the court's discretion as are requested by the petitioner. Welf & I C §15657.03(j)(1).

The order is enforceable anywhere in California. Fam C §6381(a).

The prevailing party in any action brought under Welf & I C §15657.03 may be awarded court costs and attorney fees, if any. Welf & I C §15657.03(n).

**TIP:** If a petitioner can qualify for a Domestic Violence Prevention Act (DVPA) protective order, the petitioner may want to file under that section due to less restrictive residence exclusion provisions that do not exist under the elder and dependent adult protective order. For discussion of DVPA protective orders, see §§2.1–2.38.

**X. [§9.10] REFERENCE CHART:  
ELDER OR DEPENDENT ADULT ABUSE  
PROTECTIVE ORDER (WELF & I C §15657.03)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
Any elder or dependent adult who has suffered abuse	Reasonable proof of a past act or acts of abuse	<p><b>TRO:</b></p> <p>Personal conduct restraints</p> <p>Stay away orders</p> <p>Residence exclusion</p> <p>Prohibited from taking action to locate protected party</p> <p><b>OAH:</b></p> <p>Same as above</p> <p><b>FIREARMS:</b></p> <p>Cannot own, possess, purchase, or receive</p> <p><b>AMMUNITION:</b></p> <p>Cannot own, possess, have in custody or control</p>	<p><b>TRO:</b></p> <p>20 days or 25 days if good cause</p> <p><b>OAH:</b></p> <p>3 years</p>	<p>Pen C §273.6</p> <p>Pen C §12021(g)</p> <p>CCP §1209(a)(5)</p> <p>Pen C §12316(b)</p>

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*This is a brief reference chart for an Elder and Dependent Adult Protective Order. Please read the full, detailed section in the Protective Order Bench Manual.*

# **Chapter 10**

## **PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTION PROTECTIVE ORDER (CCP §527.85)**

- I. [§10.1] **Applicability**
- II. [§10.2] **Parties Protected**
- III. [§10.3] **Applicants**
- IV. [§10.4] **Requirements**
- V. [§10.5] **Standard of Proof**
- VI. [§10.6] **Time of Availability**
- VII. [§10.7] **Orders Includable in Private Postsecondary  
Educational Institution Protective Order**
- VIII. [§10.8] **Duration of Order**
- IX. [§10.9] **Service of Order**
- X. [§10.10] **Delivery of Copy of Order; Court's  
Responsibility**
- XI. [§10.11] **Firearms Restrictions**
- XII. [§10.12] **Enforcement of Private Postsecondary  
Educational Institution Protective Order**
- XIII. [§10.13] **Other Legal and Procedural Considerations**
- XIV. [§10.14] **Reference Chart: Private Postsecondary  
Educational Institution Protective Order (CCP  
§527.85)**

*Note:* Private Postsecondary Educational Institution Protective Order forms are in development. When the forms are completed, they will be effective January 1, 2011.

### **I. [§10.1] APPLICABILITY**

A chief administrative officer of a postsecondary educational institution or an officer or employee designated by the chief administrative officer to maintain order on the school campus or facility may, with the written consent of the student, obtain a temporary restraining order and an injunction on behalf of a student who has suffered a credible threat of violence made off the school campus or facility from any individual that can reasonably be construed to be carried out or to have been carried out at the school campus or facility. CCP §527.85(a).

## II. [§10.2] PARTIES PROTECTED

A temporary restraining order and injunction may include a student or any number of other students at the campus or facility who are similarly situated. In the discretion of the court, on a showing of good cause, a temporary restraining order or injunction may also include other named family or household members who reside with the student. CCP §527.85(a), (d).

## III. [§10.3] APPLICANTS

The temporary restraining order and injunction is initiated by the chief administrative officer of a postsecondary educational institution or an officer or employee designated by the chief administrative officer to maintain order on the school campus or facility, on behalf of a student who has suffered a credible threat of violence made off the school campus or facility. CCP §527.85(a).

### *Definitions*

A “chief administrative officer” means the principal, president, or highest ranking official of the postsecondary educational institution. CCP §527.85(b)(1).

A “student” means an adult currently enrolled in or applying for admission to a postsecondary educational institution. CCP §527.85(b)(5).

A “postsecondary educational institution” means a private institution of vocational, professional, or postsecondary education. CCP §527.85(b)(4).

A “credible threat of violence” means a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose. CCP §527.85(b)(3).

“Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including any of the following (CCP §527.85(b)(2)):

1. Following or stalking a student to or from school.
2. Entering the school campus or facility.
3. Following a student during school hours.
4. Making telephone calls to a student.
5. Sending correspondence to a student by any means, including, but not limited to, the use of the public or private mails, interoffice mail, fax, or computer e-mail.

“Unlawful violence” means any assault or battery, or stalking as prohibited in Pen C §646.9, but shall not include lawful acts of self-defense or defense of others. CCP §527.85(b)(6).

#### IV. [§10.4] REQUIREMENTS

The postsecondary educational institution must prove:

- The student has suffered a credible threat of violence made off the school campus or facility. CCP §527.85(a).
- The credible threat of violence can be reasonably construed to be carried out or to have been carried out at the school campus or facility. CCP §527.85(a).

*Note:* A court is not permitted to issue a postsecondary educational institution protection order or injunction to prohibit defendant from engaging in speech or other activities that are constitutionally protected, protected by CCP §527.3 (concerning labor disputes), or protected by any other provision of law. CCP §527.85(c).

#### V. [§10.5] STANDARD OF PROOF

For a temporary restraining order to issue, the plaintiff must submit an affidavit showing reasonable proof that the student has suffered a credible threat of violence made off the school campus or facility by the defendant, and that great or irreparable harm would result to the student. CCP §527.85(d).

At the hearing on the petition for the injunction, the court must find by clear and convincing evidence that the defendant made a credible threat of violence off the school campus or facility before issuing an injunction. CCP §527.85(e).

#### VI. [§10.6] TIME OF AVAILABILITY

**Temporary Restraining Order.** The order is available *ex parte* if the plaintiff files an affidavit that shows reasonable proof that a student has suffered a credible threat of violence made off the school campus or facility by the defendant, and that great or irreparable harm would result to the student. CCP §527.85(d).

**Injunction.** The injunction is available after a hearing. CCP §527.85(e).

#### VII. [§10.7] ORDERS INCLUDABLE IN PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTION PROTECTIVE ORDER

The court may make orders prohibiting further threats of violence. CCP §527.85(e).

The judge shall receive any testimony that is relevant and may make an independent inquiry. CCP §527.85(e).

If the defendant is a current student of the entity requesting the injunction, the judge shall receive evidence concerning the decision of the postsecondary institution's decision to retain, terminate, or otherwise discipline the defendant. CCP §527.85(e).

### VIII. [§10.8] DURATION OF ORDER

**Temporary Restraining Order.** At the court's discretion, the duration of the temporary restraining order is not to exceed 15 days unless otherwise modified or terminated by the court. CCP §527.85(d).

**Injunction.** The duration of the injunction is for a maximum of three years. CCP §527.85(e).

*Note:* The plaintiff may apply for renewal of the injunction at any time within 3 months of its expiration by filing a new petition. CCP §527.85(e).

### IX. [§10.9] SERVICE OF ORDER

Upon filing a petition for an injunction, defendant must be personally served with a copy of the petition, TRO, if any, and notice of hearing of the petition. CCP §527.85(g). Service must be made at least 5 days before the hearing. CCP §527.85(g).

The court may, for good cause, on motion of the plaintiff or on its own motion, shorten the time for service on the defendant. CCP §527.85(g).

### X. [§10.10] DELIVERY OF COPY OF ORDER; COURT'S RESPONSIBILITY

Plaintiff or plaintiff's attorney must deliver a copy of each TRO or injunction (or modification or termination thereof) granted, by the close of the business day on which the order was granted, to law enforcement agencies within the court's discretion and as requested by the plaintiff. CCP §527.85(h)(1).

The order must be transmitted to the Department of Justice in accordance with Fam C §6380(b). CCP §527.85(n). For further discussion of transmittal, see §2.9.

<p><b>TIP:</b> If your court enters other protective orders into CLETS or has a procedure for assisting with entering these orders, you should consider providing the same service for private postsecondary educational institution protective orders.</p>
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## XI. [§10.11] FIREARMS RESTRICTIONS

The defendant who is subject to a protective order under this section cannot own, possess, purchase, receive, or attempt to purchase or receive any firearms while the protective order is in effect. CCP §527.85(i)(1); Pen C §12021(g).

**Relinquishment.** CCP §§527.9, 527.85(i)(2).

After issuing a protective order, the court must order the respondent to relinquish all firearms in the respondent's immediate possession and control, or subject to the respondent's possession or control, within 24 hours of being served with the order. CCP §527.9(a), (b).

To comply with the relinquishment order, the respondent may either (CCP §527.9(b)):

- Sell the firearm to a licensed gun dealer; or
- Surrender control of the firearm to local law enforcement.

*Note:* Local law enforcement may charge a storage fee that does not exceed the actual cost of storage. "Actual cost" means expenses directly related to taking possession of a firearm, storing the firearm, and surrendering possession of the firearm to a licensed dealer or to the person relinquishing the firearm. CCP §527.9(c).

The respondent must file a receipt of sale or surrender to the court within 48 hours after receiving the order. CCP §527.9(b).

The following exemptions to the firearms restrictions apply:

- *Employment.* If the respondent can show (1) a particular firearm is necessary as a condition of continued employment, and (2) the current employer cannot reassign the respondent to a position that does not require a firearm, then the court may grant an exemption. If the court grants this exemption, then the court must order that the firearm will only be in the respondent's possession during scheduled work hours and travel to and from work. CCP §527.9(f).
- *Peace Officer.* If carrying a firearm by a peace officer is necessary as a (1) condition of employment and (2) his or her personal safety depends on carrying the firearm, then the court may allow the officer to carry a firearm on or off duty if the court finds by a preponderance of the evidence that the officer does not pose a threat of harm. *Note:* Before making this finding, the court shall require a mandatory psychological evaluation of the peace officer and may require the peace officer to enter into counseling or other remedial treatment program to deal with any propensity for domestic violence. CCP §527.9(f).

If the court must continue a hearing because of a relinquishment request, the protective orders should be continued or the issue bifurcated and the protective order granted pending the hearing. CCP §527.9(b).

During the period of the relinquishment order, the respondent is entitled to make one sale of all firearms that are in the possession of local law enforcement. A licensed gun dealer, who presents a bill of sale, shall be given possession of those firearms, at the storage location, within five days of presentation of the bill of sale. CCP §527.9(g).

**Expiration of relinquishment order.** If the firearms were stored with local law enforcement, then the firearms must be returned to the respondent within 5 days after the order expires unless the law enforcement agency determines that (1) the firearm has been stolen, (2) the respondent is in a prohibited class for possession of firearms under Pen C §§12021 and 12021.1 and Welf & I C §§8100 and 8103, or (3) there is another restraining order against respondent. If the respondent cannot get the firearm back and is the legal owner, the respondent is entitled to sell it to a licensed gun dealer. CCP §527.9(e).

The following summarizes the applicable provisions of the Federal Firearms Law (18 USC §922(g)(8)):

- It is unlawful for any person subject to a qualifying court order to transport, receive, or possess any firearm or ammunition in or affecting interstate or foreign commerce. 18 USC §922(g)(8).
- A qualifying court order is an order (1) issued after notice and hearing, giving the restrained party an opportunity to be heard; (2) prohibiting harassing, stalking, threatening, or engaging in conduct that would place an intimate partner or child of the partner or restrained party in reasonable fear of bodily injury; and (3) finding that the restrained party presents a credible threat to the physical safety of the intimate partner or child or by its terms prohibits the use, attempted use, or threatened use of physical harm that would reasonably be believed to cause bodily injury. 18 USC §922(g)(8)(A)–(C).

*Note:* An intimate partner is a (1) spouse or former spouse, (2) parent of a child of respondent, or (3) cohabitant or former cohabitant. 18 USC §921(a)(32).

Violation of this prohibition while the order remains in effect is a federal offense punishable by a fine and/or up to 10 years' imprisonment. 18 USC §924(a)(2).

The respondent cannot own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition. Pen C §12316(b)(1). Ammunition includes, but is not limited to, any bullet, cartridge,

magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence. Pen C §12316(b)(2).

*Note:* Because the language in CCP §527.9 was modeled after and generally mirrors the language in Fam C §6389, arguably the holding in *Ritchie v Konrad* applies to CCP §527.9. See *Ritchie v Konrad* (2004) 115 CA4th 1275, 10 CR3d 387 (Fam C §6389 does not empower the court to disable or modify the firearm prohibition because it automatically activates when a court imposes or renews any of the enumerated forms of protective orders; the only grant of discretion is Fam C §6389(h), which is limited to a special class of restrained parties, and even that discretion is sharply circumscribed).

## **XII. [§10.12] ENFORCEMENT OF PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTION PROTECTIVE ORDER**

Any intentional disobedience of any temporary restraining order or injunction granted under this section is punishable under Pen C §273.6. CCP §527.85(j); Pen C §273.6.

## **XIII. [§10.13] OTHER LEGAL AND PROCEDURAL CONSIDERATIONS**

The defendant may file a response that explains, excuses, justifies, or denies the alleged credible threats of violence or may file a cross-complaint under this section. CCP §527.85(e).

Code of Civil Procedure §527.85 does not preclude either party from representation by private counsel or from appearing on his or her own behalf. CCP §527.85(f).

Orders issued by the court but not on forms adopted by the Judicial Council are enforceable. CCP §527.85(m).

There is no filing fee for a petition that alleges that a person has threatened violence against a student of the petitioner, or stalked the student, or acted or spoken in any other manner that has placed the student in reasonable fear of violence, and that seeks protective or restraining order or injunction restraining stalking or future violence or threats of violence. CCP §527.85(o).

No fee will be paid for filing a subpoena filed in connection with a petition alleging these acts and no fee shall be paid for filing a response to a petition alleging these acts. CCP §527.85(o).

There shall be no fee for the service of process of a temporary restraining order or injunction to be issued under this section if either of the following conditions apply (CCP §527.85(p)(1)(A)–(B)):

1. The temporary restraining order or injunction issued under this section is based upon stalking, as prohibited by Pen C §646.9.
2. The temporary restraining order or injunction issued under this section is based upon a credible threat of violence.

**XIV. [§10.14] REFERENCE CHART: PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTION PROTECTIVE ORDER (CCP §527.85)**

WHEN	PROOF	ORDERS	DURATION	ENFORCEMENT
Private postsecondary educational institution applies when student has suffered a credible threat of violence off campus	<p><b>TRO:</b> Reasonable proof</p> <p><b>OAH:</b> Clear and convincing evidence</p>	<p>Prohibiting further threats of violence</p> <p><b>FIREARMS:</b> Cannot own, possess, purchase, or receive</p> <p><b>AMMUNITION:</b> Cannot own, possess, have in custody or control</p>	<p><b>TRO:</b> 15 days, unless otherwise modified or terminated by the court</p> <p><b>OAH:</b> 3 years</p>	<p>Pen C §273.6 CCP §1209(a)(5)</p> <p>Pen C §12021(g) 18 USC §922(g)(8)</p> <p>Pen C §12316(b)</p>

*See the Judges Guide to Firearms and Full Faith and Credit for full details on federal firearms prohibitions.*

*This is a brief reference chart for a private postsecondary educational institution protective order. Please read the full, detailed section in the Protective Order Bench Manual.*

# Chapter 11

## CONFLICTING ORDERS

### I. [§11.1] Overview

### II. [§11.2] Order of Enforcement

#### I. [§11.1] OVERVIEW

It is not uncommon in domestic violence cases to find the same parties in different courts at the same time, such as criminal, juvenile, and family courts.

To alleviate the problem of conflicting orders, particularly between criminal and civil, each local court must have a protocol as of 1/1/04 (modeled on Cal Rules of Ct 5.450) that provides for the timely coordination of all orders against the same defendant and in favor of the same victim or victims. Pen C §136.2(f). Please see the discussion below in §11.2.

**TIP:** Until your court adopts a protocol, it is advisable to ask one or both parties if there are any orders already issued by other courts and try to verify the existence of other court orders.

The problem of conflicting orders is complex, and courts have developed various approaches to resolving the issue. The complexity of this problem makes it difficult to provide a uniform approach about how to avoid conflicts in the absence of a local protocol. This emphasizes the vital importance of local protocols, which can take into account resources and technology, and provide effective guidance on communication between the various courts in the same jurisdiction. The goal is to avoid conflicting orders without creating new barriers for individuals seeking protection through the courts.

#### II. [§11.2] ORDER OF ENFORCEMENT

If there is more than one civil order regarding the same parties, a peace officer must enforce the order that was issued last. Fam C §6383(h).

If there are both civil and criminal orders regarding the same parties, the peace officer must enforce the criminal order issued last. Fam C §6383(h).

A protective order issued in a domestic violence criminal case has precedence in enforcement over any civil protective order against the defendant, unless a court issues an EPO in which case the EPO takes precedence in enforcement over any other restraining or protective order, provided the EPO meets the following requirements (Pen C §136.2(e)(2)(A)–(C); Fam C §6383(h)):

1. The EPO is issued to protect one or more individuals who are already protected persons under another restraining or protective order;
2. The EPO restrains the individual who is the restrained person in the other restraining or protective order; and
3. The provisions of the EPO are more restrictive in relation to the restrained person than the provisions of the other restraining or protective order.

Custody and visitation orders may be issued by juvenile or family court, between the defendant and his or her minor children, if the orders meet the following *protocol* requirements (Pen C §136.2(f); Cal Rules of Ct 5.450):

- Each local court must have a protocol by 1/1/04 (modeled on Cal Rules of Ct 5.450) that provides for the timely coordination of all orders against the same defendant and in favor of the same victim or victims.
- The protocol must include, but is not limited to, the following requirements (Pen C §136.2(f)):
  - Provide mechanisms for assuring appropriate communication and information sharing between criminal, family, and juvenile courts; and
  - Permit a family or juvenile court order to coexist with a criminal court protective order subject to the following conditions:

Any order permitting contact between the restrained party and his or her children cannot contain language that violates a criminal court's "no contact order" and must ensure the safe exchange of the children.

Family or juvenile court must specify time, day, place, and manner of transfer of the child. The court's paramount concern must be the safety of all parties.

While a child is under the jurisdiction of juvenile court, all issues regarding his or her custody must be heard by juvenile court. Welf & I C §304; Cal Rules of Ct 5.620(a), 5.630(l).

*Note:* If a restraining order has been issued by the juvenile court under Welf & I C §213.5, no court other than a criminal court may issue any order contrary to the juvenile court's restraining order.

A TRO/OAH issued in family court supersedes the standard family law restraining orders on the Family Law and Uniform Parentage Act summons. Cal Rules of Ct 5.110(c).

TIP: If criminal charges are pending against a defendant/respondent who appears to oppose the civil protective order, the court should advise the defendant of his or her Fifth Amendment rights and continue the temporary orders past the criminal court date.

*Reminder:* Ex parte orders are issued without prejudice.

**APPENDIX A: EMERGENCY PROTECTIVE ORDER**

<http://www.courtinfo.ca.gov/forms/documents/epo001.pdf>

**APPENDIX B: CALIFORNIA RULES OF COURT 5.450**

[http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title\\_5.pdf](http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_5.pdf)

**APPENDIX C: RULE 19 OF SAN FRANCISCO  
SUPERIOR COURT LOCAL RULES**

<http://www.sfsuperiorcourt.org/Modules/ShowDocument.aspx?documentid=1>

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## APPENDIX D: CALIFORNIA PROTECTIVE ORDER GUIDE

<i><b>TYPE OF ORDER</b></i>	<i><b>STATUTE</b></i>	<i><b>PROOF</b></i>	<i><b>ORDERS</b></i>		<i><b>DURATION</b></i>
Emergency Protective Order	Fam C §§6240–6274  Pen C §646.91	Reasonable Grounds	Personal conduct restraints, Stay away	Temp. care/control of minor child, Firearms restrictions, Address location restrictions, Ammunition restrictions	5 judicial business days or 7 days maximum
Temporary Restraining Order	Fam C §§6200 et seq, 6300 et seq	Reasonable Proof	Personal conduct restraints, Stay away, Residence exclusion  Protection of animals	Temp. custody/visitation of minor child, Firearms restrictions, Address location restrictions, Ammunition restrictions	20 days from the date of order or 25 days if good cause
Order After Hearing	Fam C §§6200 et seq	Reasonable Proof	Ex parte orders + Child support and spousal support	Restitution, Batterer’s treatment, Firearms restrictions, Address location restrictions, Ammunition restrictions	5 years
Juvenile	Welf & I C §§213.5, 304, 362.4, 726.5	Court considers all documents	Personal conduct restraints, Residence exclusion	Firearms restrictions, Address location restrictions, Ammunition restrictions	Ex parte—15 days or 20 days if good cause; OAH—3 years
Criminal Protective Order	Pen C §136.2	Good Cause Belief	Personal conduct restraints, Stay away	Firearms restrictions, Address location restrictions, Ammunition restrictions	Until defendant is no longer subject to court’s jurisdiction
Stalking	Pen C §646.9(k)	Conviction of defendant	No contact		Up to 10 years
Workplace	CCP §527.8	TRO—Reasonable Proof OAH—Clear and Convincing	Personal conduct restraints, Stay away	Firearms restrictions, Address location restrictions, Ammunition restrictions	TRO—15 days  OAH—3 years

<b><i>TYPE OF ORDER</i></b>	<b><i>STATUTE</i></b>	<b><i>PROOF</i></b>	<b><i>ORDERS</i></b>		<b><i>DURATION</i></b>
Civil Harassment	CCP §527.6	TRO— Reasonable OAH—Clear and Convincing	Personal conduct restraints, Stay away	Firearms restrictions, Address location restrictions, Ammunition restrictions	TRO—15 days or 22 if good cause; OAH—3 years
Elder and Dependent Adult	Welf & I C §15657.03	Reasonable Proof	Personal conduct restraints, Stay away	Residence exclusion, Firearms restrictions, Address location restrictions, Ammunition restrictions	TRO—20 days or 25 if good cause OAH—3 years
Private Postsecondary Educational Institution Protective Order	CCP §527.85	TRO— Reasonable Proof OAH—Clear and Convincing	Prohibiting further threats of violence	Firearms restrictions, Ammunition restrictions	TRO—15 days  OAH—3 years

*Family Law Act and Uniform Parentage Act—same as TRO and OAH*

*This chart is designed as a quick reference guide. Full details regarding each protective order can be found in the Protective Order Bench Manual.*

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**JUDGES GUIDE TO DOMESTIC VIOLENCE CASES**  
**California Protective Orders**

**Evaluation/Questions**

Optional Information:

Name: \_\_\_\_\_

Court: \_\_\_\_\_

Jurisdiction: \_\_\_\_\_

Full Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

We would appreciate your candid comments on the *Judges Guide to Domestic Violence Cases: California Protective Orders*. We are especially interested in any errors or omissions you may have detected in the text.

1. The following pages or sections contain mistakes as follows (*please describe and provide page or section reference*):

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2. Further information about protective orders is needed in a subsequent revision of the guide as follows (*please describe in detail*):

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3. I have the following questions regarding the material presented:

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4. I have the following comments about the desk aid for judges, *Emergency Protective Order Quick Reference Guide*:

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5. Overall, I would rate this handbook as:

- Excellent
- Very Good
- Average
- Needs Improvement

Please fax or mail to:

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Thank you!