

Memorandum 93-04

Subject: Study F-1120 — Prevention of Domestic Violence (Comments of Interested People)

This memorandum discusses comments received by the Commission relating to the domestic violence provisions of the Family Code. Attached to this memorandum is a staff draft of a recommendation that incorporates proposed amendments made in light of the comments received and that also makes minor technical revisions to correct and improve drafting.

At its last meeting the Commission decided to circulate a draft proposal on the concept of including children in the Family Code's coverage of domestic violence and resolving inconsistencies between the Family Code coverage and that of other codes. The Commission has received a number of letters in response to the draft. See Exhibits pp. 1-19.

This memorandum discusses issues relating to the definition and some new issues raised in the letters. The letters also raise some issues that the staff does not discuss in this memorandum, either because the issue is too substantive to be accomplished in this project or because the issue is not related to the domestic violence statutes.

This memorandum also presents issues raised by Judge Joseph Harvey of the Lassen County Superior Court relating to the time requirements for service of papers and for bringing the matter to hearing in cases where an ex parte temporary restraining order is issued. See Exhibits pp. 20-29. Judge Harvey's letter was received independently of the process of circulating the draft. The judge's comments relate both to the Family Code provisions for temporary restraining orders and to temporary restraining orders issued in civil actions generally. Insofar as the judge's comments relate to the Family Code, they are considered here.

Adding to the Family Code Definition

At the October meeting, the Commission decided to get feedback on the proposal that the Family Code's coverage of domestic violence should include violence against children. The issue arose because the restraining order provisions in the Uniform Parentage Act authorized orders to prevent violence against a child who is the subject of the proceeding. The Family Law Act and the

Domestic Violence Prevention Act did not authorize orders to prevent violence directed at a child. In consolidating the provisions from the three acts, this inconsistency had to be resolved. The Commission also considered the concern that other statutes outside the Family Code use different definitions of domestic violence, particularly the Penal Code.

The Commission instructed the staff to prepare a draft of the domestic violence provisions to include children in the Family Code coverage and proposing amendments to conform sections in other codes to use the same definition of domestic violence. The draft was distributed to the appropriate people on the Commission's mailing list in an effort to find out whether this approach would be acceptable and feasible. In addition, the staff felt that it was important to get feedback from children's advocates and law enforcement. The staff consulted Mikki Sorenson (consultant to the Assembly Judiciary Committee) and sent the draft to a number of additional people whose names were provided by Ms. Sorenson. The Commission received eleven letters commenting on the draft. See Exhibits pp. 1-19.

There appears to be general agreement among the people who responded that including children in the definition of domestic violence for purposes of the Family Code's restraining order provisions is appropriate and beneficial. The following specific comments are noteworthy:

(1) K. Murphy Mallinger of the Children's Advocacy Institute (Exhibits p. 1). Ms. Mallinger states that her organization is "relieved and delighted" that violence against children is proposed to be included in the definition of domestic violence.

(2) Valerie R. Kennedy, Legislative Analyst for the Department of Social Services (Exhibits p. 2). Ms. Kennedy states that the Child Welfare Services Program of the Department of Social Services feels "that the reinsertion of children into the definition of 'domestic violence' used for obtaining restraining orders broadens the State's ability to provide protection to children. Furthermore this provision could eliminate or reduce the need to remove children from their homes resulting in a form of 'family preservation' and reduced expenditure for foster care." In addition, the Legal Division of the department reviewed the draft and found "no concerns."

(3) George Anderson, Director of Psychological Services for Adults (Exhibits p. 3). Mr. Anderson states that he supports the proposal to include children in the definition of domestic violence.

He states: “One practical impact of this change will be to foster more communication and coordination between agencies involved in all forms of family violence.”

Limiting Reference to Child

Sheila Kuehl, managing attorney for the California Women’s Law Center, suggests that a bare reference to “a child” is too broad and should be limited to a child of one of the parties to the proceeding, since otherwise these provisions might be applied to all possible instances of violence against children. See Exhibits p. 6. The staff agrees, since these provisions are intended to prevent “domestic” violence, and has added this language to Section 6211. See Fam. Code § 6211 (draft recommendation at p. 11). Similar orders to protect other children could be obtained either from the juvenile court pursuant to Welfare and Institutions Code Section 213.5 or pursuant to Code of Civil Procedure Section 527.6 (the provision for civil harassment orders).

Possible Jurisdictional Conflicts with Juvenile Court

Larry Cory, Assistant County Counsel, Children’s Services Division, for the Office of the County Counsel, Los Angeles, states that his office also agrees that children should be included in the definition of domestic violence, but states that he is concerned “there may be attempts to obtain a restraining order in family law court to circumvent orders made by the juvenile court or in lieu of seeking dependency court protection for the child.” See Exhibits p. 8. Mr. Cory refers the Commission to case and statutory law that states that once a child is made a dependent of the juvenile court, that court retains exclusive jurisdiction over the child in matters involving custody.

While a restraining order proceeding may or may not involve custody, the staff agrees that once a child has been made a dependent of the juvenile court these orders should be obtained from that court to avoid the possibility of “forum shopping” and of conflicting orders. The staff believes that this problem could be solved by revising Family Code Section 6211 so that where a child has been made a dependent of the juvenile court, the Family Code would not apply. Any restraining order would have to be obtained from the juvenile court pursuant to Welfare and Institutions Code Section 213.5 or 304, which provide for similar restraining orders against violence. See Fam. Code § 6211 (draft recommendation at p. 11).

However, the staff is concerned about the question of whether or not the Family Code restraining orders could be used “in lieu of” seeking dependency

court protection for the child. A similar concern was expressed to the staff by telephone by a director of a Family Court Services program. It is not clear how allowing the family court to issue restraining orders to protect children would in any way prevent a case that is appropriate for the juvenile court from being heard in that forum. All of the factors that presently work to channel a case into the juvenile court would still be in place. For example, Penal Code Section 11166 in the Child Abuse and Neglect Reporting Act would still require child care custodians, health practitioners, and employees of a child protective agency to report suspected instances of child abuse to a child protective agency. In addition, as currently drafted, the Family Code provisions for issuance of emergency protective orders still require that a “more permanent” order be obtained from the juvenile court pursuant to Welfare and Institutions Code Section 213.5. See Fam. Code § 6257 (draft recommendation at p. 20). Presumably these orders are issued in the most severe situations and therefore these are the most appropriate cases for hearing by the juvenile court. In sum, the issuance of restraining orders to protect children is an additional means of protection and not a replacement for the juvenile dependency protections.

General Comment Regarding Penal Code Sections

Judge Ronald S. Coen, a Superior Court judge for Los Angeles County, points out discrepancies between definitions relating to domestic violence in the Penal Code and those proposed for the Family Code and notes that these may cause confusion. See Exhibits p. 10. This is the very issue addressed by the proposed amendments to the Penal Code. It is not clear whether the judge received the proposed amendments to the Penal Code sections, since he received the materials from the California Judges Association. However, perhaps it can be inferred from the judge’s letter that he agrees that reconciling the inconsistencies between the various definitions would be beneficial.

Penal Code Section 1000.6 Is Not Applicable to Children

Alana Bowman, Supervising Deputy of the Domestic Violence Unit for the Office of the City Attorney in Los Angeles comments on the proposed revision of Penal Code Section 1000.6, which details the requirements for “diversion” of a person charged with a crime involving domestic violence to batterer’s treatment counseling. See Exhibits p. 13. Ms. Bowman states that expanding this to allow diversion when the crime involves violence against a child would not be appropriate. This is not a problem under the draft, however, since the existing

limitation on diversion would be continued in Penal Code Section 1000.6. See Penal Code Section 1000.6 (draft recommendation at p. 65).

Location of Definitions Applicable to Penal Code Sections

Ms. Kuehl states that she does not think that a crime can be defined by a section in any code other than the Penal Code. See Exhibits p. 7. Specifically, Ms. Kuehl refers to the proposed amendment to Penal Code Section 136.2(g) (penalty for dissuasion or intimidation of a witness). Code of Civil Procedure Section 31 states: “The Penal Code defines and provides for the prosecution of a criminal action.” Still, there are crimes defined in codes other than the Penal Code. See, e.g., Veh. Code § 40000 *et seq.* (specifying the Vehicle Code sections will be punished as misdemeanors). The draft avoids this concern by revising the Penal Code section so that the crime itself is not defined by the Family Code definition. See Penal Code § 136.2 (draft recommendation at p. 56).

It could also be argued that it would be more convenient to have a duplicate set of definitions in the Penal Code. However, two sets of definitions creates the likelihood that one definition will be amended without a similar revision in the other section, thus returning the law to the present situation of inconsistency. This happened again in the 1992 legislative session where Chapter 1209 amended the Penal Code section providing criminal penalties for violating a domestic violence restraining order, but failed to make a corresponding revision of the civil law sections providing for issuance of the orders.

Requirements for Separate Participation in Counseling (Technical Revision of Section 6343)

Ms. Bowman states that Family Code Section 6343 continues an error made in existing Code of Civil Procedure Section 547(d) by requiring both a history of violence and the existence of a restraining order as prerequisites for separate participation in counseling. See Exhibits p. 12. The staff agrees that this was an error in the original statute, since three parallel sections each require either a history of violence or an order. This has been corrected in the draft. See Fam. Code § 6343 & Comment (draft recommendation at p. 27).

Location of Section 6325 (Ex Parte Restraints on Community, Quasi-Community, and Separate Property and Determination of Payment of Debts)

Section 6325 authorizes ex parte orders restraining the use of marital property and ordering payment of debts to be issued in domestic violence proceedings. The section needs to be applicable in proceedings for dissolution, nullity, and

legal separation whether or not the case involves domestic violence. See letters from Dorothy Jonas and Bonnie Sloane of the Los Angeles Women’s Leadership Network (Exhibits p. 14), of Barbara Eiland McCallum of the Law Offices of McCallum & McCallum (Exhibits p. 15), of Sheila Kuehl (Exhibits p. 7) and of Frieda Gordon Daugherty (Exhibits p. 17). The staff has moved the statute to the general provisions for issuance of restraining orders in a dissolution, nullity, or legal separation proceeding and substituted a cross-reference in the domestic violence division. See Fam. Code §§ 2035 (draft recommendation at p. 51) & 6325 (draft recommendation at p. 25).

Ex Parte Visitation Orders Under Domestic Violence Prevention Act

At its last meeting, the Commission decided to resolve a conflict between the former Family Law Act and the Domestic Violence Prevention Act by expanding the authority of the court to issue visitation orders to apply to both married parties and unmarried parties. You will recall that the Family Law Act provided authority to issue visitation orders ex parte in situations involving domestic violence (Civ. Code § 4359(a)(4)), whereas the Domestic Violence Prevention Act cross-referred to the Family Law Act provision, but did not provide authority to issue visitation orders where the parties are not married (Code Civ. Proc. § 546(a)). The Commission concluded that there might be some situations in which visitation might be appropriate and that allowing issuance of the orders where the parents are unmarried was preferable to eliminating the court’s authority altogether. To implement this decision, Section 6323 authorizes visitation without regard to whether the parties were married. See Section 6323 (draft recommendation at p. 25).

Ms. Kuehl states that this approach is not acceptable and that this is a matter of utmost concern. See Exhibits pp. 6-7. Ms. Kuehl argues that the purpose of ex parte domestic violence orders is to make the victim and her children safe and that allowing visitation at this point would not accomplish that goal. In addition, Ms. Kuehl argues that Family Code Section 3064 (the last two sentences of Civil Code Section 4600.1(e)) effectively repealed the authority of courts to issue ex parte visitation orders:

§ 3064. Limitation on ex parte order granting or modifying custody order

3064. The court shall refrain from making an order 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 the State of California. “Immediate harm to the child”

includes having a parent who has committed acts of domestic violence, where the court determines that the acts of domestic violence are of recent origin or are a part of a demonstrated and continuing pattern of acts of domestic violence.

Comment. Section 3064 continues the last two sentences of former Civil Code Section 4600.1(e) without substantive change. Unlike the former section, this section does not contain a reference to the section defining “domestic violence.” This is not a substantive change. See Section 70 (“domestic violence” defined).

Section 3064, if construed broadly, eliminates the court’s authority to grant or modify a custody order ex parte, absent a finding of “immediate harm to the child.” Ms. Kuehl states that since visitation is a limited form of custody it is similarly restricted by the section. Ms. Kuehl argues that since the statute restricting the court’s authority to issue ex parte custody orders was enacted after the statutes providing general authority to issue ex parte custody and visitation orders, the limitation effectively repeals the other sections.

But Section 3064, like existing law, would only eliminate the court’s authority to issue ex parte orders in situations that do not involve domestic violence. Moreover, Ms. Daughtery argues that Section 3064 is too limiting and that the authority of a court to issue ex parte custody orders should be expanded to any case in which the court finds that the order is in the best interest of the child. See Exhibits p. 16.

In an effort at a compromise solution, the staff proposes to add a cross reference to Section 3064 in Section 6323. See Fam. Code § 6323 (draft recommendation at p. 24). Insofar as Section 3064 limits ex parte custody orders in a situation involving domestic violence, it would then similarly limit the court’s authority to issue visitation orders. However, if an acceptable compromise cannot be arrived at, we would be forced to continue the inconsistency in existing law and allow visitation orders where the parties are married, but not where they are unmarried.

Procedural Problems Relating to Restraining Orders

The following issues were raised by Judge Harvey. See Exhibits pp. 20-29. These issues were not included in the Staff Draft of the domestic violence provisions sent out for comment. The discussion that follows was prepared by Bob Murphy. (Other issues raised by Judge Harvey concerning Code of Civil Procedure Sections 527 and 527.6 will be discussed in a future memorandum.)

Before enactment of the Family Code, the procedural rules of Code of Civil Procedure Section 527, applicable to orders to show cause (OSCs) and temporary restraining orders (TROs) in civil actions generally, were incorporated in family law proceedings. See Civ. Code §§ 4359, 4701.1(d), 7020(a); see also Code Civ. Proc. § 545. Exceptions to the general rules of Code of Civil Procedure Section 527 that applied only to family law orders were included in the general section. The new Family Code does not incorporate the general Code of Civil Procedure provision, but rather the new code has a self-contained scheme for these orders, drawn from Code of Civil Procedure Section 527. See Fam. Code §§ 240-245. Judge Harvey describes the following problems in the existing procedural rules as applied to orders intended to prevent domestic violence.

Minimum Time for Service of Application

When a TRO is issued ex parte, the matter is returnable on an OSC for hearing within 20 days or, upon showing good cause, 25 days after the date of the order. See Fam. Code § 242 (draft recommendation at p. 49). Family Code Section 243 requires the “application” for the order, and supporting affidavits and points and authorities, to be served at least two days before the hearing.

Although attorneys often prepare a written application for a TRO, it is not required. 2 California Civil Procedure Before Trial *Injunctions* § 39.88 (Cal. Cont. Ed. Bar 1992). The word “application” in Family Code Section 243 was taken from CCP Section 527. Section 527 requires the complaint to be served, but there is no express requirement in Section 527 that the application be served. The requirement that the application be served seems to require that a written application be made. (An application is included in mandatory Judicial Council forms for proceedings under the Family law Act, Domestic Violence Prevention Act, and Uniform Parentage Act. See CRC Forms 1285.20, 1296.15.)

Section 243 should require service of “any other supporting papers filed with the court” in addition to the affidavits and points and authorities. This would require service of the application if one is filed, but not otherwise. It would also require service of an income and expense declaration when filed and would be consistent with existing practice. See 2 California Civil Procedure Before Trial, *supra*, § 3939; Fam. Code § 243 (draft recommendation at p. 50).

Minimum Time for Service of OSC Issued with Ex Parte TRO

Judge Harvey says some sheriffs require service of an OSC and TRO at least 15 days before the hearing, without statutory authority. Unless “application” in

Family Code Section 243 refers to the OSC, there is no minimum service time for the OSC required by the Family Code. An OSC is essentially a notice of motion. 6 B. Witkin, *California Procedure Proceedings Without Trial* § 43, at 358 (3d ed. 1985); 1 *California Civil Procedure Before Trial Ex Parte Motions and Orders to Show Cause* § 10.5 (3d ed., Cal. Cont. Ed. Bar 1992). An OSC without a TRO appears to be governed by the general 15-day requirement for service of a notice of motion. See Fam. Code § 210; Code Civ. Proc. §§ 1003, 1005(b). The same rule appears to apply when a notice of motion for a preliminary injunction (without a TRO) is used instead of an OSC. 2 *California Civil Procedure Before Trial Injunctions* § 39.43 (3d ed., Cal. Cont. Ed. Bar 1992).

When an OSC is issued with a TRO, the practice is to require the OSC to be served at least two days before the hearing, despite absence of a statutory requirement. See *id* §§ 39.39, 39.43. Two days seems like a reasonable minimum for service of the OSC, since the respondent needs time to prepare for the hearing and Section 243 also entitles the respondent to one continuance for a reasonable period. Codifying the two day rule should eliminate any confusion as to the time required for service. Family Code Sections 242 and 243 should be revised to make clear that when a TRO has been issued pending a hearing on the OSC, the OSC must be served at least two days before the hearing. See Fam. Code §§ 242-243 (draft recommendation at pp. 48-50).

Service of TRO. As with the OSC, the statute specifies no minimum time before the hearing for service of a TRO. The TRO and OSC may be in separate documents, but are usually in a single document. 2 *California Civil Procedure Before Trial*, *supra*, 39.36; 6 B. Witkin, *Provisional Remedies* § 297, at 254 (3d ed. 1985). If they are in separate documents, there seems to be no reason why there should be any minimum service time for the TRO. The purpose of the TRO is to preserve the status quo pending a hearing. 2 *California Civil Procedure Before Trial*, *supra*, § 39.6. Until the TRO is served, it has no effect — the respondent is not required to do or refrain from doing anything. There appears to be no harm in serving the TRO shortly before or at the hearing, or not serving it at all.

Hearing on OSC Despite Void TRO

If a TRO is served but not brought to hearing within the statutory time, the TRO is void. See Fam. Code § 242 (hearing must be within 20 days from date of order, absent showing of good cause). *Agricultural Prorate Commission v. Superior Court*, 30 Cal. App. 2d 154, 85 P.2d 898 (1938). If the TRO is accompanied by an

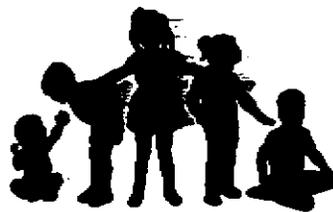
OSC and not brought to hearing within the statutory time, both are void. *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 64 P.2d 738 (1937). Judge Harvey notes the absurdity of making the OSC void just because it is accompanied by a void TRO, when the OSC could be treated as a notice of motion. The staff agrees, and would overrule the *McDonald* case by statute. This could be accomplished by revising Section 242 to add a subdivision stating that if the hearing is not held within the time period the court may still hear the matter, but the temporary restraining order is unenforceable unless reissued. See Fam. Code § 242(b) (draft recommendation at p. 49).

STAFF RECOMMENDATION

The staff requests that the Commission approve the draft recommendation for inclusion in the 1993 Family Code legislation. If it appears that any issue regarding a change made to resolve inconsistencies in existing law is causing concern that cannot be resolved, we will restore existing law.

Respectfully submitted,

Pamela K. Mishey
Staff Counsel



Children's Advocacy Institute

File: _____
Key: _____

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January 11, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Members of the Commission:

Although you requested comments not later than January 8, I hope you will include these comments on the reorganization plan and the domestic violence provisions.

Children's Advocacy Institute is a nonprofit legal research and advocacy organization affiliated with the University of San Diego School of Law. We advocate for the health and well-being of California's children in court, before the Legislature and regulatory agencies, and before the public. One of our major concerns is child abuse. The statutes we are most familiar with (and have successfully proposed amendments to) are the Welfare and Institutions Code (W&I) sections 300 et al., relating to the juvenile dependency administrative and judicial system.

In general, we have concerns about including the dependency statutes in the proposed code with statutes relating to family and probate court. One of our concerns is the effect of separating the W&I supporting provisions in section 100 et al. (Court Appointed Special Advocates), section 200 et al. (general provisions relating to juvenile court), and the later sections which describe the obligations and programs of the Department of Social Services for families and children.

However, specific to the revisions of the domestic violence provisions, we are relieved and delighted that the current draft includes violence against children in the definition of domestic violence (section 6211). We look forward to the final draft of the domestic violence provisions also including children as possible victims.

Sincerely,

K. Murphy Mallinger, JD, PhD,
Staff Counsel

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DEPARTMENT OF SOCIAL SERVICES

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Law Revision Commission
RECEIVED

January 5, 1992

File: F-1120
Key: _____

Pamela K. Mishey
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Pamela:

Thank you for giving the Department of Social Services the opportunity to comment on the draft legislation for revision of the new Family Code. I requested review and comments from our Child Welfare Services Program as well as our Legal Division.

It is the opinion of Child Welfare Services that the reinsertion of children into the definition of "domestic violence" used for obtaining restraining orders broadens the State's ability to provide protection to children. Furthermore this provision could eliminate or reduce the need to remove children from their homes resulting in a form of "family preservation" and reduced expenditures for foster care.

The review by our Legal Division yielded no concerns.

It appears that your Commission has done a thorough job in drafting these revisions. When a job is done well, there seems little else to say. If I can be of further assistance, please let me know.

And a satisfying New Year to you!

Sincerely,

A handwritten signature in cursive script that reads "Valeri R. Kennedy".

Valeri R. Kennedy
Legislative Analyst

**Psychological
Services for
Adults**

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JAN 04 1993

NASW

DEC 04 1992

December 29, 1992

Jonathan Lightman
1016 23rd Street
Sacramento, CA. 95816

Dear Jonathan:

I have carefully reviewed the Staff Draft of the proposed domestic violence legislation. I support all of the proposed changes, especially the reinsertion of children into the definition of " domestic violence". One practical impact of this change will be to foster more communication and coordination between agencies involved in all forms of family violence.

Currently all mental health care providers are required to complete ten hours of training in child abuse. The incorporation of child abuse into the new Family Code will likely lead to expansion of required training to include family violence which logically should have been a part of the training all along. In addition, when child abuse is reported, spousal abuse should be considered. Research in social work has demonstrated the connection between all forms of family violence.

There is one additional change which I feel may be particularly useful. 6343 (a) and 1000.7b.p.c. both relate to counselling services for perpetrators and victims of family violence. However, as currently written, 6343 specifies that counselling services are to be provided by "licensed mental health providers." This same language should be incorporated into 1000.7b. "Batterer's Treatment Counseling services should be provided by licensed mental health counselors." This change in language is needed to simplify and provide a consistent level of training for all service providers.

Thank you for giving me an opportunity to participate in this process.

Sincerely,



George Anderson, L.C.S.W.
Director

Enclosure

§106.7. Application of Chapter—
Notification of Defendant.

(a) If the prosecuting attorney determines that this chapter may be applicable to the defendant, he or she shall advise the defendant and his or her attorney in writing of such determination. This notification shall include:

(1) A full description of the procedures of diversionary investigation.

(2) A general explanation of the roles and authorities of the court, the prosecuting attorney, the probation department, and the community program in the diversion process.

(3) A clear statement that the court may decide in a hearing not to divert such person and that he or she may have to stand trial for the alleged offense.

(4) A clear statement that, for the period of diversion, the diveree may be enjoined from contacting, and shall be enjoined from annoying, molesting, attacking, striking, threatening, harrasing, sexually assaulting, battering, or disturbing the peace of, the victim.

(5) A clear statement that should such person fail in meeting the terms of his or her diversion, or should he or she be convicted of any offense involving violence, he or she may be required, after a court hearing, to stand trial for the original alleged offense.

(6) An explanation of criminal record retention and disposition resulting from participation in the

diversion and the diveree's rights relative to answering questions about his or her arrest and diversion following successful completion of the diversion program.

(b) If the defendant consents and waives his or her right to a speedy trial the court shall refer the case to the probation department. The probation department shall make an investigation and take into consideration the defendant's age, employment and service records, educational background, community and family ties, prior incidents of violence, treatment history, if any, demonstrable motivation, and other mitigating factors in determining whether the defendant is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which community programs the defendant would benefit from and which of those programs would accept the defendant. The probation department shall report its findings and recommendation to the court. Leg.H. 1979 ch. 913, 1980 ch. 1158.

Refs: Cal. Crim. Def. Proc., Ch. 51, "Diversion and Dismissal in Interest of Justice."

JAN 12 1993

File: F-1120

Key: _____

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1992-93
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Constance Dove
Executive Director

January 11, 1992

Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Stan:

The deadline for comments on the proposed shift of code sections pertaining to domestic violence into the Family Code approaches; I thought I should report to you the responses to the material that I received from within CJA.

The response of the CJA Criminal Law and Procedure Committee chair was to review it himself (see enclosed copy of letter) and refer it to two other members of the Committee who see more of these cases. Each of those judges referred it to a local attorney specializing in domestic violence cases, one of whom (see enclosed letter) had already commented to you independently; the other's comments will be a bit late, but will arrive soon.

The two judges from the CJA Family Law Committee who reviewed the package did not see anything needing correction or special attention. They explained that this did not mean the sections should be transported into the Family Code precisely as proposed, but rather that if there were problems they personally did not spot or anticipate them.

Sincerely,

Richard S. Piedmonte
Legislative Coordinator

c: Hon. Ronald Coen
Hon. Patricia Sepulveda
Hon. Patrick J. Morris

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January 8, 1993

Pamela K. Mishey
Staff Counsel
California Law Revision Commission
4000 Middlefield Rd. Ste. D-2
Palo Alto, CA 94303

Dear Pamela,

As we discussed on the phone today, I have a few comments to offer concerning the staff draft of Reorganization of the Domestic Violence Provisions.

Thanks for the opportunity to comment.

1) Page 11: I believe the word "child" which now appears in Section 6211's definition of domestic violence must be modified in some way or else every single instance of child abuse by anyone will now become domestic violence. The meaning of "child" in the definition in the former Uniform Parentage Act was clear because of the context: restraining orders could be issued to protect a child involved in the action. However, simply using the term "child" in a general definition would not be limited.

I suggest adding something like the phrase "of one of the parties" following the word, "child" in the definition.

2) As we discussed, I have a real problem with the way the Code contradicts itself in the matter of the issuance of ex parte custody and visitation orders. Although the Family Law Act originally allowed the issuance of such orders, Civil Code Section 4600.1 was amended at subsection (e) to limit the issuance to circumstances where there was immediate harm likely to the child.

JAN 8 1993
File: F-1120
Key: _____

In addition, in the Domestic Violence Prevention Act, there was specific attention paid to limiting orders to custody only at the ex parte hearing, with no authorization to issue visitation orders. Since the Family Law Act was already in place, and since it allowed ex parte orders for visitation, the best the DVPA could do was limit orders in matters not under the Family Law Act. This led to the anomaly the Commissioners have noted. However, the suggested remedy is not acceptable. The purpose of ex parte orders issued in domestic violence cases is to make the victim and her children safe. Any order for visitation at this point would not accomplish that goal. Consequently, we would be more comfortable if the provision that is now Civil Code Section 4600.1(e), prohibiting ex parte custody orders except where a child is threatened, including circumstances of domestic violence, were to be placed in closer proximity to the general section authorizing such orders. This is a matter of the utmost concern to us. And, since Civil Code Section 4600.1(e) was amended into the Code following any of the other sections authorizing custody and visitation orders, including the one the Commissioners have incorporated at FC§6323, I believe any Court would interpret that as an intended limitation by the Legislature.

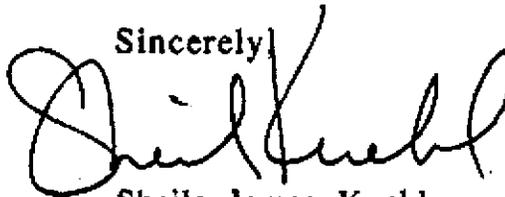
3) Section 6325 should not be limited to the Domestic Violence section. It may appear there, if it is felt to be necessary to authorize such orders under the Domestic Violence Prevention Act, but should also appear somewhere else so that courts know they can issue them in every other case, as well.

4) Page 42: Code of Civil Procedure Section 547.7 does not appear anywhere in the Family Code. I think it actually should go in the general custody provisions, since it instructs any court hearing a family law matter to ascertain whether there are any outstanding restraining orders to be taken into account before issuing what may be contradictory custody orders.

5) Page 56: I do not think that a crime can be "defined" in any code but the Penal Code. The term "domestic violence" can be defined in Section 6211 but the crime is something else.

Thanks again for the opportunity to comment.

Sincerely,



Sheila James Kuehl
Managing Attorney

COUNTY OF LOS ANGELES
 OFFICE OF THE COUNTY COUNSEL
 648 HALL OF ADMINISTRATION
 500 WEST TEMPLE STREET
 LOS ANGELES, CALIFORNIA 90012
 FAX: 1 (213) 617-1142



Law Revision Commission
 RECEIVED

JAN 14 1993

File: F-1120
 Key: _____

DE WITT W. CLINTON, COUNTY COUNSEL

(213) 526-6250
 FAX (213) 881-4560

January 8, 1993

Pamela K. Mishey
 California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Re: **Family Code: Reorganization of Domestic
 Violence Provisions**

Dear Ms. Mishey:

Thank you for the opportunity to review the draft of the reorganization of domestic violence provisions in the Family Code.

We agree that children should be included in the statutory definition of Domestic Violence. However, we are concerned there may be attempts to obtain a restraining order in family law court to circumvent orders made by the juvenile court or in lieu of seeking dependency court protection for a child.

We would also like to remind the Commission that juvenile court has exclusive jurisdiction over dependent children. (In re William T. (1985) 172 Cal.App.3d 790; Welfare and Institutions Code Section 304). Therefore, protection for dependent children should be sought in juvenile court, not in family law court.

Ms. Pamela K. Mishey
January 8, 1993
Page 2

Please contact either Mary Anne Rathmann at
(213) 526-6275 or Joyce Aiello at (213) 526-6188 of our
office with any questions you may have.

Very truly yours,

DE WITT W. CLINTON
County Counsel

BY 
LARRY CORY
Assistant County Counsel
Children's Services Division

LC:ank
p-mishey.201

c: Mary Anne Rathmann
Joyce Aiello

NOV 30 1992



The Superior Court

900 THIRD STREET

SAN FERNANDO, CALIFORNIA 91340

CHAMBERS OF

RONALD S. COEN, JUDGE

TELEPHONE
(818) 898-2624

November 25, 1992

Mr. Richard S. Piedmonte
Legislative Coordinator
California Judges Association
301 Howard Street
Suite 1040
San Francisco, California 94105

Dear Rich:

I have reviewed the materials you sent regarding the proposed codification of the new Family Code prepared by the California Law Revision Commission. I note the following minor discrepancies:

The definition of "abuse" in Penal Code Section 13700(a) does not include "sexual assault." However, this term is included in the definition of "abuse" in Family Code Section 6203. Penal Code Section 12028.5(a)(1) contains the same definition of "abuse" as contained in Penal Code Section 13700(a). This may lead to confusion as to the proper definition in any given situation.

The definition of "domestic violence" in Family Code Section 6211(a) includes "child." The same definition in Penal Code Section 13700(b) does not; although Penal Code Section 12028.5(a)(2) includes "child" in the definition of "Family Violence." Again, this may be confusing.

Other than the above inconsistencies, I have no further comment.

Very truly yours,

RONALD S. COEN



Office of the City Attorney
Los Angeles, California

Law Revision Commission
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CRIMINAL BRANCH
(213) 485-5470

CIVIL BRANCH
(213) 485-6370

TELECOPIER:
(213) 680-3634

JAMES K. HAHN
CITY ATTORNEY

File: F-1120
Key: _____

December 22, 1992

Pamela K. Mishey
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Pamela:

Thank you for the opportunity to review the proposed Family Code. As you can see, my comments are not extensive; I think the Commission has done an excellent job consolodating and reorganizing these sections.

My particular concern lies with the substantial change to Penal Code section 100.6, the Domestic Violence Diversion statute, which proposes to expand the category of defendants elibgible for diversion. This is a hotly debated area of law, and criminal justice policy, and the expansion of the category has been uniformly rejected during previous legislative sessions. I hope the Commission weighs the policy considerations in this area before proceeding in this direction.

Thank you again, and I wish you happy winter holdidays.

Sincerely,

Alana Bowman
Deputy City Attorney
Domestic Violence Unit

RE: Comments on Proposed Family Code
FROM: Alana Bowman, Los Angeles Deputy City Attorney

6220 - Purposes of division

Delete "to enable these persons to seek a resolution of the causes of the violence."

Recommend substitution: "to provide safety for the victims of domestic violence."

Reasoning: Since a criminal assault has been alleged, it is inappropriate to state, as the purpose of this act, that the parties seek to "resolve" situations which result in violence; the real purpose of restraining orders is to make domestic violence victims safe by excluding the perpetrator, or keeping the perpetrator away. Additionally, the language places an equal burden on the victim to "seek a resolution of the cause of the violence," implying that the victim should participate in the batterer's decision to stop the violence.

6343 - Participation in counseling

(a) eliminate "treatment" from last line of first paragraph.

Reasoning: There is no parallel between drug treatment programs and programs for batterers. Batterer programs are based on cognitive reeducation, and not similar to the physical problems related to drugs or alcohol.

(b) Where there has been a history of domestic violence between the parties or and order described...

Reasoning: This language was placed in the statute in error. Either situation should provide sufficient grounds for considering a request for separate counseling.

(b) ...at the request of either party...

Reasoning: A request for separate counseling should be available to either party to ensure the greatest level of safety. Additionally, the preferred criteria for batterer's programs prohibits the attendance of the parties concurrently.

6361 - Statements required

It appears that the language of subsection (b) should parallel the language in 6345 (a).

6381 - enforcement of order

(b) An order issued pursuant to this division is not enforceable by a law enforcement agency of a political subdivision unless the officer enforcing the order has been shown a certified copy of the order or unless that law enforcement agency has received a copy of the order pursuant to section 6380 or has otherwise received a copy of the order or has received a copy of the order through electronic transmission.

Reasoning: Only certified copies should be enforceable in the field since the terms of the orders can be altered and xeroxed to produce the appearance of an enforceable order.

The Department of Justice maintains computer information on all DV orders pursuant to current CCP section 550, and this alternative means for obtaining a copy of the order should be included.

Penal Code Sections

653m (a) should contain additional punctuation:

...who, with intent to annoy,..

1000.6

The proposed language expands the definition of those defendants eligible for domestic violence diversion to include the proposed Family Code definition. The existing definition should be retained since the domestic violence community has consistently sought to narrow, rather than expand, the availability of diversion.

The California Alliance Against Domestic Violence and national domestic violence advocacy community has advocated the elimination of pre-guilty plea diversion statutes altogether since such diversion statutes enable the defendant to avoid admitting the use of abuse, and perpetrating the abuser's belief of being in control.

Many problems exist with diversion, as documented by the Auditor General's report, which enable defendants to manipulate the system, fail to attend programs as ordered, and obtain early termination. The current definition should remain as it currently exists to provide the greatest protection through appropriate guilty pleas rather than diversion.

13700

In the past, the California Alliance Against Domestic Violence, which sponsored this statute, has opposed the expansion of the definition of domestic violence victims.

Los Angeles Women's Leadership Network

American Association of University Women, L.A. * Asian-Pacific Women's Network of Los Angeles * Black Women Lawyers of L.A. * Business and Professional Women (CA) * Comision Femenil Mexicana de Los Angeles * Comision Femenil Mexicana Nacional * Fund for the Feminist Majority * Junior League of L.A. * League of Women Voters, L.A. * National Council of Jewish Women, L.A. * National Women's Political Caucus, L.A. * National Organization for Women, L.A. * Older Women's League * Women For: * Women Lawyers of Los Angeles * Women of Color, Inc. * YWCA of Greater Los Angeles

2447 Century Hill, Los Angeles, CA 90067 / (310) 557-9000 ext. 460

Pamela K. Mishey, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, CA 94303

Law Revision Commission
December 22, 1993
RECEIVED

DEC 22 1993
File: F-1120
Key: _____

Dear Pamela:

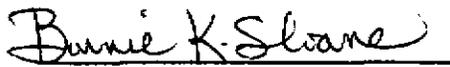
Thank you for sending us a draft of the Law Revision Commission's proposed revisions of Domestic Violence codes.

We do have concerns about the Staff Note to Family Code Section 6325, which mentions a possible relocation of the Section to Division 10. Our reading of the Commission's Staff Note indicates that if this were done, the provisions of Section 6325 would be applicable only in domestic violence cases.

Our contacts in the family law field tell us that, in their experience, the current prohibitions against inappropriate disposal of marital property during dissolution are an important protection for women in all cases, not just those involving domestic violence. Abuses involving community property can economically devastate a dependent spouse; it would seem imprudent to consider limiting this protection.

Since the information provided is so sketchy (who has recommended moving the Section? Why? What benefits would accrue?), perhaps you could furnish more facts that would allow us to discuss the proposal at length with other women leaders. At present, based on the information we have, relocation of Section 6325 is not a change we would support.

Sincerely,


Bonnie K. Sloane, Co-Chair


Dorothy Jonas, Co-Chair

cc: Steering Committee, Coalition for Family Equity
Sheila Kuehl, Managing Director, California Women's Law Center
Joan Patsy Ostroy, Esq., Chair, Executive Committee of the Family Law
Section, Los Angeles County Bar Association
Barbara McCallum, Esq.

MCCALLUM & McCALLUM
901 H STREET, SUITE 310
SACRAMENTO, CALIFORNIA 95814-1808
TELEPHONE (916) 444-7486
IN REPLY REFER TO

Study F-1120
Law Revision Commission
RECEIVED

File: F-1120
Key: _____

December 21, 1992

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94303-4739
ATTN: Pamela K. Mishey, Staff Counsel

Re: STAFF NOTE TO FAMILY CODE SECTION 6325

Dear Ms. Mishey:

In reading the staff note above, I am confused as to its meaning. If you are referring to orders under existing Civil Code §4359, of course they are used independently.

What does restraining the sale or transfer of property have to do with domestic violence? The automatic restraining orders all have a loop hole "except in the usual course of business or for the necessities of life".

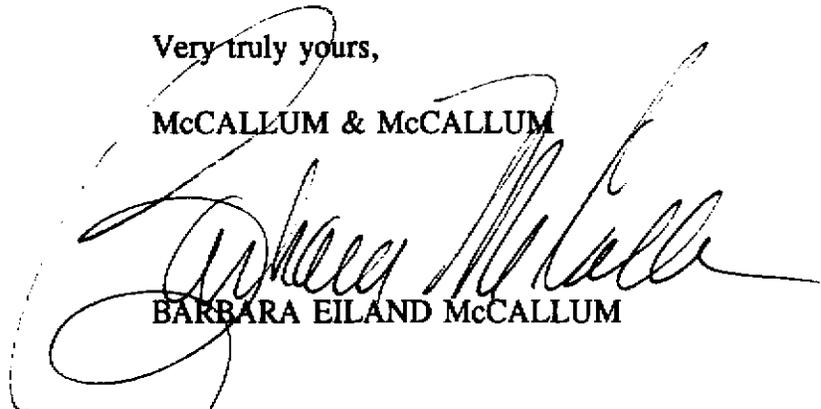
Believe me, very few parties even read these restraining orders, law enforcement discounts them and courts often ignore any assets which are no longer in existence. And if the court does inquire, "I had to sell that to fix my truck, so I could go to work". "I had to sell that to get food et al". So, it becomes necessary to go to the court to get more specific temporary restraining orders.

If I am going to court on an O.S.C. and my client needs any of these orders, I always repeat them, sometimes with more specificity, in the court order signed by the Judge. This one law enforcement will enforce, and the court will more likely enforce.

Therefore, if I am reading your note correctly, that you intend to delete this from the Code under the Dissolution portion and move it to be used under the Domestic Violence section only, I vehemently oppose such a move. It should be in both locations, or written to include both, as it is now.

Very truly yours,

MCCALLUM & McCALLUM



BARBARA EILAND McCALLUM

BEM/st
cc: file, Dorothy Jonas

LAW OFFICES OF
FRIEDA GORDON DAUGHERTY433 NORTH CAMDEN DRIVE · SUITE 1111 · BEVERLY HILLS, CA 90210
TELEPHONE (310) 275-1554 FAX (310) 858-1226FRIEDA GORDON DAUGHERTY*
*CERTIFIED FAMILY LAW SPECIALISTLaw Revision Commission
RECEIVED

December 18, 1992

File: F1090, F1120
Key: _____Pamela Mish, Esq.
Stan Ulrich, Esq.
Nat Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739Re: Domestic Violence Prevention Action
and Child Custody Division of the
Family Code.

Dear Pam, Stan and Nat:

I have had the privilege and opportunity to review both the tentative recommendations for revision of Division 10, "Prevent of Domestic Violence" and for revision of Division 8, "Custody of Children". I will first address Division 10 relating to the former Domestic Violence Prevention Act.

The comment following Section 6201 indicates referral to Section 3064 (Limitation On Ex Parte Order Granting Or Modifying Custody Order) and Section 3100 (Visitation Rights Generally) and Section 3101 (Visitation Rights Of Grandparent or Step-Parent In Dissolution, Nullity Or Legal Separation Proceeding). As you will recall, a conflict exists between the general granting of visitation rights of 3100 and the limitation of visitation rights other than the natural parent to grandparent or step-parent or in a marital situation. If nothing can be done right now to clarify and rectify this conflict as to whom may be allowed visitation rights, then I strongly suggest that your comments, especially provisional comments, indicate the conflict. In addition, I would suggest outlining the current discussion regarding revision of ex parte custody orders to be based on the best interest of the child standard rather than threat of immediate harm to the child.

My next suggestion is in Section 6223, Conditions For Issuance Of The Mutual Restraining Order. It seems to me that the requirement that written evidence will not apply if both parties agree as to any abuse or domestic violence seems vague and

Pam Mish, Esq.
Stan Ulrich, Esq.
Nat Sterling, Executive Secretary
December 18, 1992
Page 2

ambiguous. I would suggest that agreement be either on the record or in writing to clear up this problem.

I would like to respond to the staff note to Section 6325, Restraints On Community, Quasi-Community, And Separate Property In Determination Of Payment of Debts, as follows: This provision cannot be moved to Division 10 if it would mean that it could not be used except in Domestic Violence Restraining Orders. These property restraints are common not only at the inception of an action for dissolution, legal separation or nullity, but also, in ongoing actions predating the current restraining orders in the Summons. It seems to me that, to be consistent, this code section should carve out the exception for retaining legal counsel in the action and that, since sometimes such restraining orders are issued after the commencement of an action for legal separation, dissolution and nullity, these restraining orders are placed in a section which would refer to such situations. In fact, there often is no domestic violence involved in these property restraint orders. I would prefer that this section be moved elsewhere and that a different section be added here which indicates that such restraining orders on property apply as well to domestic violence actions of a married person.

Section 6343, Participation In Counseling, should not be limited to parties who intend to continue to reside after previous instances of domestic violence. In fact, it is reasonable to expect that the perpetrator of domestic violence could continue his or her pattern against another partner if the relationship which is the subject of this action ends. Therefore, counseling should be discretionary with the judicial officer regardless of whether the parties intend to continue the relationship or have had an ongoing relationship where repeated instances of domestic violence has occurred. In sub-sections c and d of this section, regarding the costs of the psychological services or counseling, it seems to me that there should be a priority for payment of counseling above other creditors, except for support obligations. And Section 6344, regarding payment of attorneys' fees and costs, perhaps this section will be moved to a general attorneys' fees area or division, but the issue is raised as to whether it should be payment of reasonable attorneys' fees and costs and whether sanction orders should apply in domestic violence prevention actions.

Section 6361, Statements Required Where Order Included In Judgment, states that the judgment shall state on its face both of the following: "(a) Which provisions of the judgment are orders; (b) The date of expiration of the orders, which shall not be more than three years from the date of the judgment if issued unless

Pam Mish, Esq.
Stan Ulrich, Esq.
Nat Sterling, Executive Secretary
December 18, 1992
Page 3

extended by the Court after notice of hearing." I find it difficult to understand this statute and if I find it difficult then perhaps the unrepresented party might also find it difficult. Does "stating on the face of a judgment" mean on the first page of the judgment or somewhere in the judgment? Perhaps this is clear to everyone else but me.

Section 6386 contains a typo - Appointment Of Counsel And Payment Of Fees, not "If Fees". And then, an issue that I have raised before is whether Section 273.6 of the Penal Code should apply to all domestic violence prevention orders, including property restraint orders.

As to my comments on the Tentative Recommendations on Custody, Division 8, I have the following comments:

First of all, thank you very much for all your hard work in revising both Divisions, which have generally incorporated most of the issues which I have raised over the course of the last year, to the great benefit of the family law bar and bench and family law litigant. Although most of us are not aware of the work that has been done to consolidate and improve existing law, without making substantive change, I state for all of us that this was an unbelievable exercise in balancing of priorities and agendas.

My first of only a few comments is regarding Section 3022, Authority Of Court To Make Custody Orders. It seems to read a little better if "the proceeding" is replaced with "a proceeding" and if after "make such an order for the custody of the child" is added "or children of one or both parties to the proceeding during minority", and "the pendency of a proceeding" should add "included under Section 3021". Not to sound repetitive, I want to bring up the subject of Section 3100 which allows, in the discretion of the court, reasonable visitation rights to any other person having an interest in the welfare of the child. Section 3101 has most likely inadvertently omitted step-parent visitation. Thank you for applying visitation by a grandparent to situations in which the parents of the child are not married. However, by doing that, you have omitted visitation by a step-parent which shows up in subsection c without any prior authority. As you know, it is my personal view that the court should have the discretion to order step-parent visitation also where the step-parent was never legally married to the parent of the child but had a long and close relationship with that child and one in which the Court believes it would be in the best interest of the child to encourage visitation without interfering with the visitation rights of any other person having the legal right to visitation with that child. Finally, in that section comes up the issue of definition of "natural parent",

Pam Mish, Esq.
Stan Ulrich, Esq.
Nat Sterling, Executive Secretary
December 18, 1992
Page 4

in Section 3103(c). You can see that it is very important that we define what the term "natural parent" means for many reasons, as it will come up again and again in the near future in various litigation arenas.

While I have your ear or eye, I would like to point out a very recent case which I read in the Daily Journal, in which the Court of Appeal indicated that the legislature should amend the venue statutes to make venue in legal separation actions proper in any county of filing so long as either party resides in that county at the time the action is commenced (Code of Civil Procedure Sections 395(a) and 395(b); Jerome Forester v. Superior Court of San Luis Obispo County, DAR No. B 068596, Superior Court No. DR 20414, December 10, 1992). There seems to be a glitch in the law where there is no appropriate statute for proper venue in a legal separation action. This may be something the Law Revision Commission can add without opposition, or something in which the legislature may want to take on as one of its amendments in the 1993 session. I just believe it was important to bring the issue to your attention for some study and comment in the next few months.

Thank you very much for your time and effort in this matter and I look forward to working with you again soon in the near future.

Very truly yours,

Frieda Gordon Daugherty
FRIEDA GORDON DAUGHERTY

FGD:ccp
cc: Patsy Ostroy
Patricia Schnegg
Barbara DiFranza
Peter Walzer

WLALA\DV.P.LTR

SUPERIOR COURT OF LASSEN COUNTY

COURTHOUSE, SOUTH LASSEN STREET

SUSANVILLE, CALIFORNIA 96130

August 28, 1992

(916) 257-8311
EXT. 120

JOSEPH B. HARVEY
JUDGE

Law Revision Commission
RECEIVED

File: _____
Key: _____

San Francisco Daily Journal
1390 Market Street, Suite 1210
San Francisco, CA 94102

Re: Service of and hearing on ex parte OSC/TROS

Dear Daily Journal:

Enclosed is a paper I wrote concerning a recurring problem I have had with the service of ex parte temporary restraining orders and orders to show cause. As you can tell from the text, there seems to be some confusion about the matter.

In fact, if I read correctly the notes in my copy of Bancroft-Whitney's Judicial Council Forms Manual, some courts are routinely issuing void restraining orders and orders to show cause by requiring service at least 15 days before the hearing and allowing some additional time to get the documents to the official doing the serving.

I have previously written to the Judicial Council about the problem, but I am not aware that any action has been taken. Hence, I am forwarding this paper to you in the hope that you might find it worthy of publication and that publication might spur someone to take some remedial action.

Very truly yours,


Joseph B. Harvey

cc: Los Angeles Daily Journal
Judicial Council
Calif. Law Revision Commission
Calif. State Sheriffs' Association

HOW TO OBTAIN A VOID RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

Joseph B. Harvey¹

On August 11, 1992, I signed a temporary restraining order (TRO) in a domestic violence action (CCP section 546²). As required by the governing statute, I also signed an order to show cause (OSC) and set the hearing on the OSC on August 31, 1992. About 10 days later, the plaintiff was back at the court with a letter from the sheriff of a different county refusing to serve the OSC/TRO (hereafter, OSC/TRO is used to refer to an order to show cause issued together with an ex parte temporary restraining order) because there was insufficient time before the hearing to serve the papers, and there was no order shortening time.

The letter from the Sheriff was a form letter, and it recited: "Must be served 15 days prior to court date." Typed onto the form letter was the recitation: "Please make sure we have at least 1 weeks [sic] time for service of this paper prior to the 15 days before hearing."

This was not the first time that a sheriff has refused to serve an OSC/TRO issued by this court because it could not be served at least 15 days before the court date. In each case, I have written to the sheriff involved and have informed him not only

¹The author is the Judge of the Superior Court of Lassen County. He was formerly the Assistant Executive Secretary of the California Law Revision Commission and played a major role in the drafting of the California Evidence Code, the California Tort Liability Act, as well as other Law Revision Commission legislation.

²All statute citations hereafter are to the Code of Civil Procedure unless otherwise specifically indicated.

that he is wrong about the service time requirements, but also that he should not be making objections on behalf of defendants and respondents for lack of timely service. I have had to write to one sheriff three times concerning the same problem.

Sheriffs are not the only ones that do not understand the rules relating to the service of OSC/TROs. Attorneys, too, sometimes ask for the issuance of an OSC/TRO with a hearing date set beyond the time permitted by statute, and I have to tell them that the court does not have the authority to do so.

Apparently, part of the problem is that the California State Sheriffs' Association Civil Procedural Manual states, without any qualification, that an ordinary OSC must be served at least 15 days before the court hearing, a domestic violence OSC/TRO must be served at least 15 days before the hearing, and an harassment OSC/TRO must be served at least 10 days before the hearing.

Contributing to the problem is that fact that some of the Judicial Council forms for OSC/TROs provide for an order shortening time for hearing when, as will appear hereafter, in most cases where an OSC/TRO is issued, there is no need for an order shortening time because there is no minimum time limit for service. Similarly, the Uniform Parentage Act, in Civil Code section 7020, in authorizing a court to grant an ex parte TRO in the manner prescribed by Code of Civil Procedure section 527, authorizes the court to "shorten the time for service" when, as will appear hereafter, there is no minimum time for service of an OSC/TRO contained in section 527.

The underlying problem is that the Sheriffs' Association Manual, some sheriffs, and some lawyers (including those who

drafted Civil Code section 7020) do not distinguish between an ordinary OSC and an OSC that has been issued with a TRO. An ordinary OSC, without a TRO, is simply a motion, and is therefore governed by the service requirements for motions generally. (CCP sec. 1003, 1005; Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 213.) Hence, an ordinary OSC, without a TRO, must be served at least 15 days before the date of the court hearing.³ (CCP 1005(b).) The policy that apparently underlies the 15 day minimum notice is that the responding party ought to have at least that much time to prepare an opposition to the motion, and since no TRO has been issued, the responding party suffers no adverse consequence if the hearing is held 15, 20, 25, or even more days after service of the notice of hearing.

Other considerations come into play, however, when an ex parte TRO is granted. Because the responding party, without any prior notice, has been prohibited from doing some things or has been compelled to do some things -- vacate his home, stay away from his children, surrender custody, etc. -- the law requires the matter to be brought to court on the earliest day that the business of the court will permit, and in any event not later than a stated maximum period that varies, depending on the type of proceeding in which the TRO was issued.

³Because an OSC is simply a motion, I have refused to sign an OSC where no TRO is requested since I first became a judge 13 years ago. Because an OSC without a TRO is simply a motion, the moving party can accomplish the same thing -- notice the adverse party to appear in court to respond to an application for an order -- by a notice of motion. I believe it is a waste of judicial time to read an application for and to sign a simple OSC (without a TRO) when the moving party can bring the matter to court just as efficiently with a notice of motion.

In civil cases generally, if a TRO is issued without notice, Code of Civil Procedure section 527 requires that an OSC be issued and a hearing set on the OSC no later than 15 days after the OSC is granted. In family law matters, if an ex parte TRO is issued, section 527 requires the court to issue an OSC setting the matter for hearing no later than 20 days after the TRO is granted. (See also Civ. Code sec. 7020 for the same rule in Uniform Parentage Act proceedings.) In domestic violence proceedings, if an ex parte TRO is issued, the court is required to issue an OSC setting the matter for hearing no later than 20 days after the OSC/TRO is granted. (CCP sec. 546.) In each case, for good cause shown, the court is authorized to add five days to the maximum time within which the hearing must be held.

Inexplicably, where an ex parte TRO is issued to prohibit harassment, an OSC must be issued setting the matter for hearing within 15 days after the filing of the petition. (CCP sec. 527.6.) The word "inexplicably" is used, because until the TRO is granted, the defendant suffers no adverse consequence, i.e., he is not required to do anything and he is not prohibited from doing anything -- so there is no apparent reason why the maximum time for hearing on the harassment OSC/TRO should run from the time the petition is filed.

But it should be noted that each of these statutes establishes a maximum time within which the hearing on the OSC/TRO must be held, which time starts to run at the time the OSC/TRO is granted (or, in the case of an harassment OSC/TRO, when the petition is filed), not when the order is served.

Witkin points out that the hearing on the OSC/TRO may be set

earlier than the maximum time specified in the governing statute. (Witkin, California Procedure (3d ed.), Provisional Remedies, sec. 289.) In fact, none of the governing statutes -- Code of Civil Procedure sections 527, 527.6, and 546, and Civil Code section 7020 -- contains a minimum time limit for service of an OSC/TRO. And McDonald v. Superior Court (1937) 18 CA2d 652 held that an OSC/TRO made returnable on the same day that it was issued and served complied with the requirements of section 527.

Although there is no statutory requirement that an OSC/TRO be served any minimum time before the hearing on the OSC/TRO, section 527 does require the moving party to serve upon the respondent the moving papers and the affidavits to be relied on by the moving party at least two days before the hearing. In McDonald, supra, the moving party had caused the moving papers and affidavits to be served on the respondent (together with a void OSC/TRO) several days before the valid OSC/TRO was issued and served, thus complying with the two day minimum service requirement. Hence, the OSC/TRO could be made returnable on the same day it was signed and served.

Rule 363(c) of the California Rules of Court requires that an OSC/TRO in civil harassment proceedings (CCP sec. 527.6) be served at least 10 days before the hearing. Because the hearing must be set within 15 days from the date the petition was filed, and there is no provision in the statute for extending that 15 days, there is a very narrow window within which to accomplish service. If there is any delay between the time the petition is filed and the OSC/TRO is signed, or if there is any delay in getting the OSC/TRO to the sheriff for service (and there is invariably delay if the OSC/TRO must be sent out of county for service), it is virtually

impossible to effect service within the time limit prescribed by the rule. And if the sheriff returns the document without service, it immediately becomes totally impossible to have a hearing on the OSC within 15 days after the filing of the petition. Fortunately, the governing statutes and rules contain no other minimum service requirements.

The above comments are not simply nit picking. If an OSC/TRO is made returnable beyond the maximum time limit fixed by statute, the OSC/TRO is void, and the court lacks jurisdiction to hear it. (McDonald v. Superior Court (1937) 18 CA2d 652; Agricultural Prorate Comm. v Superior Court (1938) 30 CA2d 154; see also, Witkin, California Procedure (3d ed.), Provisional Remedies, sec. 298.)

In McDonald, supra, the moving party obtained an OSC/TRO returnable one day after the maximum time for hearing permitted by statute. The Court of Appeal held that the OSC/TRO was void and the trial court did not have jurisdiction to hear it. On the merits, the case seems right on the question whether the TRO was void; but the holding that the OSC was also void and the court had no jurisdiction to hear it appears wrong in principle. Since an OSC is simply a motion (CCP sec. 1003; Difani v. Riverside County Oil Co. (1927) 201 Cal. 210,213), if the OSC/TRO is served more than 15 days before the hearing as required by section 1005 (thereby rendering the TRO void), it is difficult to see why the OSC should also be void simply because it is accompanied by a void TRO. "Superfluity does not vitiate." (Civ. Code sec. 3537.) But, nevertheless, the McDonald case held that where a TRO is set for hearing on an OSC beyond the statutory time limit, both the TRO

and the OSC are void and the court lacks jurisdiction to proceed.

Particularly where domestic violence and harassment OSC/TROs are concerned, the courts are often involved with threats of violence, actual violence, and actual or potential serious bodily harm. Frequently, the moving party's only real protection against further violence is the TRO and, after hearing, the subsequent injunction prohibiting the defendant/respondent from coming near. Because the TRO and ensuing injunction often require the violent defendant/respondent to move out of the parties' home, and to remain 50, 100, 300, etc. yards away from the moving party, the protected party can call for police intervention when the defendant/respondent simply approaches and before he (it's usually a "he") gets close enough to inflict actual bodily harm.

Violation of a void order is not a contempt. (Oksner v. Superior Court (1964) 229 CA2d 672.) So, obviously, a void TRO provides a threatened complainant with no protection at all until the hearing on the OSC. And if the court lacks jurisdiction to hear the OSC (as held in McDonald), the injunction issued at the OSC hearing may also be void⁴ and provide the besieged complainant with no protection against the later threatened violence. Thus, the pervasive misunderstanding concerning the hearing and service requirements for an OSC/TRO has a great potential for very serious consequences for complainants who think they have been protected by a TRO or injunction.

⁴West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 CA3d 693 holds that a party may be precluded from challenging the jurisdiction of the trial court in acting on an OSC/TRO where that party participated in the hearing without objection. That holding, of course, does not assist the complainant if the responding party objects or does not appear at all.

To eliminate much of the misunderstanding and confusion concerning the maximum hearing date for an OSC/TRO, the various statutes should be amended to require that the hearing be set within a uniform 21 days (an even three weeks) from the date the OSC/TRO is granted unless good cause for a longer time is shown by affidavit or is stated in the court's order, in which case the maximum should be 28 days (an even four weeks). The provision in the harassment statute (sec. 527.6) that the hearing must be held within 15 days from the time the petition is filed should be repealed. It would greatly simplify practice and procedure for sheriffs, attorneys, and courts if there were just one set of uniform time limits for all OSC/TROs.

The unrealistic 10 day minimum service time in Rule 363(c) of the California Rules of Court should also be repealed. It is unneeded because section 527 now provides that, although the moving party must be ready to proceed on the day set for the hearing and must have served all moving papers at least two days in advance, the responding party is entitled to a reasonable continuance as a matter of course. There is no need for a special service requirement applicable only to an harassment OSC/TRO.

It would also be helpful if the statutes themselves specifically stated that the time required by section 1005(b) for service of a notice of motion does not apply to an OSC/TRO issued under section 527 (civil and family law), 527.6 (harassment), or 546 (domestic violence) or under Civil Code section 7020 (Uniform Parentage Act).

Finally, the confusion engendered by the present statutory scheme would be substantially dispelled if just one statute --

section 527 -- prescribed the procedure for obtaining an OSC/TRO, and the other statutes simply cross-referred to that procedure. That is what Civil Code section 4359 does now so far as family law OSC/TROs are concerned, and there is no reason why the domestic violence, harassment, and Uniform Parentage Act statutes relating to OSC/TROs should not do the same.

In the meantime, attorneys and courts should be aware that existing case law is to the effect that an OSC/TRO returnable after the last date permitted by statute is void, the court does not have jurisdiction to proceed on the OSC, and, hence, both the TRO and any injunction issued at a hearing set beyond the time limit specified by statute are void and unenforceable. (Oksner v. Superior Court (1964) 229 CA2d 672.)

In the meantime, too, sheriffs should simply serve as promptly as possible all OSC/TROs that are given to them for service, and they should not be raising objections to the timeliness of service on behalf of the parties to be served. Doing so, especially when they are wrong, not only delays the court proceedings unnecessarily, but frequently deprives a complainant threatened with violence and serious bodily harm with the needed protection provided by the TRO.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

Family Code:
Reorganization of Domestic Violence Provisions

January 1993

California Law Revision Commission
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January 28, 1993

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation contains proposed legislation to consolidate and reorganization the Family Code provisions dealing with the prevention of domestic violence. The proposed law reconciles inconsistencies among separate bodies of law and makes the following minor substantive changes:

(1) The definition of "domestic violence" in the Family Code is revised to restore a reference to violence against children. In a number codes other than the Family Code, a reference to the Family Code definition of "domestic violence" is substituted for a substantially similar definition in the other code. In some cases this expands the application of the provision to apply to violence against children.

(2) Procedural rules applicable to ex parte restraining orders are clarified. Ex parte restraining orders are required to be returned within 20-25 days. The rules regarding service of the order to show cause and related papers is clarified. Where a matter is not heard within the statutory time period, the court is authorized to hear the matter, but the temporary restraining order is void unless reissued.

(3) The authority to include orders intended to prevent domestic violence in a judgment is broadened.

(4) The authority to issue ex parte visitation orders is made available whether or not the parents are married.

(5) The application of child custody provisions to custody orders issued pursuant to the Domestic Violence Prevention Act is expanded.

This recommendation was prepared pursuant to Resolution Chapter 70 of the Statutes of 1989.

Respectfully submitted,

Arthur K. Marshall
Chairperson

REORGANIZATION OF DOMESTIC VIOLENCE PROVISIONS

Introduction

The Family Code was enacted in 1992 on recommendation of the Law Revision Commission.¹ The code is subject to a delayed operative date of January 1, 1994.² The code consolidates provisions relating to family law dispersed in several existing codes, including the Civil Code, Code of Civil Procedure, Evidence Code, and Probate Code.³

The proposed legislation is the result of further study of the Family Code provisions dealing with prevention of domestic violence. Under existing law, substantially similar provisions for restraining orders intended to prevent domestic violence are included in three separate bodies of law in two codes: the Family Law Act,⁴ the Uniform Parentage Act,⁵ and the Domestic Violence Prevention Act.⁶ The Family Code continues the provisions for obtaining these orders in Division 6 (nullity, dissolution, and legal separation), Division 10 (prevention of domestic violence), and Part 3 of Division 12 (Uniform Parentage Act). The proposed legislation consolidates these provisions in Division 10 and resolves minor discrepancies among them.⁷

Revisions Following Approach of Judicial Council Forms

The Judicial Council is required to draft forms for use in proceedings relating to domestic violence restraining orders.⁸ The forms drafted by the Judicial Council are used to obtain domestic violence related orders pursuant to the Family Law Act, the Uniform Parentage Act, and the Domestic Violence Prevention Act. In many instances, the forms reconcile discrepancies in the three bodies of law. The proposed legislation reconciles discrepancies, where appropriate, by following the approach taken in the applicable Judicial Council form.⁹

Restoring Children to the Definition of "Domestic Violence"

The Uniform Parentage Act provides for orders restraining abuse of a child who is the subject of a proceeding under the act.¹⁰ The definition of domestic violence

1. 1992 Cal. Stat. ch. 162, § 10.

2. 1992 Cal. Stat. ch. 162, § 13.

3. *Family Code*, 22 Cal. L. Revision Comm'n Reports 1, 7 (1992).

4. Part 5 (commencing with Section 4000) of Division 4 of the Civil Code.

5. Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

6. Chapter 4 (commencing with Section 540) of Part 2 of Title 7 of the Code of Civil Procedure.

7. The recommendation would make technical revisions, and would renumber the domestic violence division starting at § 6200 to make room for expansion in the preceding division.

8. Code Civ. Proc. § 543.

9. See Fam. Code §§ 2040, 6224, 6240, 6250, 6302, 6323, 6324, 6340, 7720, *infra*.

10. Civ. Code § 7020.

in the Domestic Violence Prevention Act, however, does not include abuse against children.¹¹ Before being amended in 1990, children were expressly included in the act's definition of domestic violence.¹² The legislative history of the 1990 amendment supports the conclusion that elimination of the reference to children was probably inadvertent.¹³ Accordingly, the proposed legislation revises the definition of domestic violence to include abuse against children. This continues existing law under the Uniform Parentage Act and restores the former law as to children who are not the subject of a proceeding under the Uniform Parentage Act.

Additionally, the proposed legislation revises a number of provisions from other codes, including the Code of Civil Procedure,¹⁴ Evidence Code,¹⁵ Penal Code,¹⁶ and Welfare and Institutions Code,¹⁷ that contain duplicative definitions of terms included in Division 10 of the Family Code. This will eliminate the confusion resulting from the inconsistent definitions. In some cases, this change will make the provision applicable to cases involving violence against children.

Procedural Rules for Ex Parte Restraining Orders

Maximum time for return on an order to show cause. As a general rule ex parte restraining orders are to be made returnable in 15 days, absent a showing of good cause.¹⁸ The Family Code continues the general 15-day rule and makes it subject to exceptions for the Family Code orders that apply a 20-day rule.¹⁹ This approach is confusing and a single 20-day rule should be applied throughout the Family Code.²⁰

Service requirements for order to show cause and supporting papers. The Family Code rules regarding service of an order to show cause, temporary

11. Code Civ. Proc. § 542(b).

12. 1984 Cal. Stat. ch. 1163, §§ 2-3.

13. The Commission is informed by both an Assembly Judiciary Committee consultant and the sponsor of the bill that the bill's intent was to broaden the scope of this definition, not to narrow it. A previous consultant's analysis of the bill similarly shows an intent to expand, not narrow, the scope of the definition, and does not mention omitting children from the definition. See First Supplement to Memorandum 92-56 (8/31/92), on file at the Commission office; Legislative Counsel's Digest of 1990 Cal. Stat. ch. 752.

14. See Code Civ. Proc. §§ 128 (contempt powers of court), 1219 (penalties for contempt), *infra*.

15. See Evid. Code § 1037.7 (victim-counselor privilege), *infra*. For another provision in the Evidence Code referring to these Family Code definitions, see Evid. Code § 1107 (admissibility of expert witness testimony regarding battered women's syndrome), *infra*.

16. For provisions that will be applicable to children, see Penal Code §§ 136.2 (penalty for intimidation of witness), 273.6 (penalty for violation of domestic violence prevention order), 273.7 (penalty for disclosing location of domestic violence shelter), 277 (penalty for child abduction), 653m (penalty for annoying telephone calls), 853.6 (citation and release for misdemeanors), 12028.5 (confiscating weapons at scene of domestic violence), 13700 (definitions for purposes of law enforcement response to domestic violence), *infra*. For provisions that will not be applicable to children, see proposed amendments to Penal Code §§ 273.83 (individuals subject to prosecution by district attorney's "spousal abuser" unit), 1000.6 (diversion of misdemeanant spousal abuser), *infra*.

17. See Welf. & Inst. Code § 18291 ("domestic violence" defined for purposes of the Domestic Violence Centers Act), *infra*.

18. Code Civ. Proc. § 527.

19. Code Civ. Proc. §§ 527 (applying 20-day rule to Civ. Code § 4359), 546(a); Civ. Code §§ 4701.1(d), 7020(a).

20. See Fam. Code § 242 (order to show cause), *infra*.

restraining order, and related papers²¹ are drawn from the rules applicable to civil actions generally.²² These rules are confusing. No minimum time for service is provided, but there is a provision for issuance of an order shortening the time for service. There is no requirement for service of the order to show cause or temporary restraining order, but there is a requirement that the “complaint” be served. The proposed legislation clarifies these matters by requiring the service of the order to show cause and all supporting documents be made within two days of the hearing.²³

Hearing on order to show cause despite void temporary restraining order. If a temporary restraining order is served but not brought to hearing within the statutory time, the temporary restraining order is void.²⁴ If the temporary restraining order is accompanied by an order to show cause and not brought to hearing within the statutory period, both the temporary restraining order and the order to show cause were void.²⁵ If the order to show cause is void, the court lacks jurisdiction to hear the matter. The proposed legislation changes this rule by providing that if a hearing is not held within the statutory time period, the court would be allowed to hear the matter, but the temporary restraining order would be unenforceable unless reissued.²⁶

Authority To Include Orders in Judgment

Under existing law a court may include orders to prevent domestic violence in a judgment for dissolution, nullity, or legal separation,²⁷ and under the Uniform Parentage Act²⁸ judgments. The proposed legislation generalizes this rule, allowing the orders to be included in any judgment under the code. The practical effect of this change is small, since dissolution, nullity, legal separation, and Uniform Parentage Act proceedings will comprise the bulk of those to which the rule will apply. However, where these orders are obtained in a different proceeding, it is reasonable and efficient to allow these orders to be included in the judgment.

21 . See Fam. Code § 240 *et seq.*

22. Code Civ. Proc. § 527.

23 . See Fam. Code § 243, *infra.*

24. See Fam. Code § 242, *infra*; Agricultural Prorate Commission v. Superior Court, 30 Cal. App. 2d 154, 85 P.2d 898 (1938).

25. McDonald v. Superior Court, 18 Cal. App. 2d 652, 64 P.2d 738 (1937).

26. See Fam. Code § 242(b), *infra.*

27. Civ. Code §§ 4458, 4516.

28. Civ. Code § 7021.

Broadened Authority To Issue Ex Parte Visitation Orders

The Family Law Act²⁹ and the Uniform Parentage Act³⁰ provide for issuance of an ex parte visitation order as part of an order intended to prevent domestic violence. The Domestic Violence Prevention Act,³¹ authorizes ex parte visitation orders only where the parties are married. The Judicial Council form for use in proceedings pursuant to the Domestic Violence Prevention Act and the Uniform Parentage Act³² adopts the approach of the Domestic Violence Prevention Act.

The proposed legislation generalizes the approach of the Family Law Act and the Uniform Parentage Act, providing that an ex parte visitation order may be issued whether or not the parties are married.³³ Since issuance of the order is discretionary, there is no reason to prevent a court from issuing an ex parte visitation order in domestic violence cases, where appropriate, solely because a child's parents are not married.

Expanded Application of Custody Provisions

The Domestic Violence Prevention Act authorizes the court to issue custody and visitation orders,³⁴ but does not provide a full set of rules for determining these matters.³⁵ The proposed legislation provides that the main custody provisions of Division 8 apply in the determination of custody or visitation pursuant to the Domestic Violence Prevention Act.³⁶

29. Civ. Code § 4359(a)(4).

30. Civ. Code § 7020(a)(4).

31. Code Civ. Proc. 546(a).

32. See Cal. R. Ct. 1296.10 (rev. Jan. 1, 1991) (order to show cause and temporary restraining order). See also Cal. R. Ct. 1285.05 (rev. July 1, 1991) (temporary restraining order for use in proceeding for dissolution, nullity, or legal separation).

33. See Fam. Code § 6323 (determining temporary custody and visitation), *infra*.

34. Code Civ. Proc. §§ 546(a) & (b), 547(b).

35. Code Civ. Proc. §§ 547.5, 547.7 [as added by 1992 Cal. Stat. ch. 1136, § 6].

36. See Fam. Code § 6222 (matters to be considered when custody or visitation order issued pursuant to Domestic Violence Prevention Act), *infra*.

RECOMMENDED LEGISLATION

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DIVISION 10. PREVENTION OF DOMESTIC VIOLENCE

Note. This draft includes both "Comments" and "Interim Comments." The comments explain the section as if it were enacted. The interim comments are temporary and are included to show differences between the 1992 Family Code legislation and the changes proposed in this draft.

Fam. Code §§ 5500-5807 (repealed), Prevention of domestic violence

SEC. ____ . Division 10 (commencing with Section 5500) of the Family Code is repealed.

Interim Comment. Division 10 of the Family Code is repealed to allow for renumbering and reorganization of the provisions and to allow for expansion of Division 9 (support). The substance of the statutes is continued without substantive change in new Division 10. Sections 5501 and 5505 are omitted. Section 5501 refers to additional definitions applicable to Division 10 and is obsolete, since those definitions are added to new Division 10. Section 5505 defines "protective order" and is restated in Section 6320.

The following table indicates the disposition of each section of old Division 10 in new Division 10.

<i>Repealed</i>	<i>Added</i>	<i>Repealed</i>	<i>Added</i>
5500	6201	5650(a)	6250(a)
5501	omitted	5650(b)	6252(a)-(b)
5505	omitted	5650(c)	6255
5510	6200	5651	6251, 6254
5511	6220	5652	6253
5512	6221	5700(a)	6250(b)
5513	6222	5700(b)	6252(c)
5514	6223	5700(c)	6255
5515	6224	5701	6251, 6254
5516	6225	5702	6253
5517	6226	5703	6257
5518	6229	5750	6340(a)
5519	6227	5751	6340(b)
5520	6228	5752	6341
5530	6300	5753	6342
5531	6301	5754	6343
5550	6320-6325	5755	6344
5551	6302	5756	6345
5552	6321	5800	6380
5600	omitted	5801	6382
5601	6241	5802	6383
5602	6270	5803	6384
5603	6256	5804	6385
5604	6273	5805	6386
5605	6271	5806	6387
5606	6272	5807	6388

Fam. Code §§ 6200-6388 (added). Prevention of domestic violence

SEC. ____ . Division 10 (commencing with Section 6200) is added to the Family Code, to read:

DIVISION 10. PREVENTION OF DOMESTIC VIOLENCE

PART 1. SHORT TITLE AND DEFINITIONS

§ 6200. Short title

6200. This division may be cited as the Domestic Violence Prevention Act.

Comment. Section 6200 continues former Code of Civil Procedure Section 541 without substantive change.

This division collects the substantive provisions for issuance of restraining orders intended to prevent domestic violence. Formerly these substantive provisions were duplicated in substantial part in the former Family Law Act, the Domestic Violence Prevention Act, and the Uniform Parentage Act. Now that these bodies of law have been consolidated in the Family Code, these duplicative provisions have been consolidated and continued in this division. References to the applicable substantive provisions in this division are continued in the division governing dissolution, nullity, or legal separation and in the division governing the Uniform Parentage Act. See Sections 2035, 2040, & 2045 (restraining orders in dissolution, nullity, or legal separation proceeding), 7710, 7720, & 7730 (restraining orders in Uniform Parentage Act proceeding). See also Welf. & Inst. Code § 213.5 (restraining orders during pendency of proceeding to declare minor dependent).

Interim Comment. This section continues Section 5510 without substantive change. The reference to this division as the Domestic Violence Prevention "Act" has been substituted for the reference to the Domestic Violence Prevention "Law." This change conforms this section to other sections in this code and existing Code of Civil Procedure Section 541.

§ 6201. Application of definitions

6201. Unless the provision or context otherwise requires, the definitions in this part govern the construction of this code.

Comment. Section 6201 continues without substantive change and generalizes the introductory clause of former Code of Civil Procedure Section 542. The introductory clause of this section has been added for conformity with other sections in this code. See Section 50 & Comment.

For provisions outside this division that use the definitions in this division, see Sections 213 (responding party's request for affirmative relief alternative to moving party's requested relief), 2335 (evidence of specific acts of misconduct), 3064 (limitation on ex parte order granting or modifying custody order), 3100 (visitation rights generally), 3101 (visitation rights of stepparent or grandparent in dissolution, nullity, or legal separation proceeding), 3111 (separate meetings where history of domestic violence or domestic violence prevention order), 3176 (separate mediation where history of domestic violence), 3177 (separate mediation where domestic violence prevention order), 3192 (separate counseling where protective order against domestic violence), 7604 (pendente lite relief of custody or grant of visitation rights).

§ 6203. “Abuse”

6203. “Abuse” means intentionally or recklessly to cause or attempt to cause bodily injury, or sexual assault, or to place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

Comment. Section 6203 continues former Code of Civil Procedure Section 542(a) without substantive change. For provisions adopting this definition by reference, see Section 3022 (determining best interest of child in custody proceeding); Evid. Code § 1107 (admissibility of expert witness testimony regarding battered women’s syndrome); Penal Code § 13700(a) (law enforcement response to domestic violence).

§ 6205. “Affinity”

6205. “Affinity,” when applied to the marriage relation, signifies the connection existing in consequence of marriage between each of the married persons and the blood relatives of the other.

Comment. Section 6205 is a new provision drawn from Code of Civil Procedure Section 17(9).

§ 6209. “Cohabitant”; “former cohabitant”

6209. “Cohabitant” means a person who regularly resides in the household. “Former cohabitant” means a person who formerly regularly resided in the household.

Comment. Section 6209 continues former Code of Civil Procedure Section 542(c) without change.

§ 6211. “Domestic violence”

6211. “Domestic violence” is abuse perpetrated against any of the following persons:

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A parent, in a proceeding pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12), when the presumption applies that the male parent is the father of a child of the female parent or is the father of the child to be protected.
- (e) A child of a party or a child who is the subject of a proceeding pursuant to the Uniform Parentage Act, if the child has not been declared a dependent of the juvenile court pursuant to Welfare and Institutions Code Section 300.
- (f) Any other person related by consanguinity or affinity within the second degree.

Comment. Section 6211 continues without substantive change and broadens former Code of Civil Procedure Section 542(b). In subdivision (c), the reference to an ongoing dating or engagement relationship has been added. This is drawn from a provision of the definition of domestic violence found in Penal Code Section 13700 as amended by Section 9 of Chapter 1136 of the Statutes of 1992.

In subdivision (e), the reference to “ of a party” and the language excluding a child who has been declared a dependent of the juvenile court have been added. This continues and broadens the provisions of the Uniform Parentage Act that authorized restraining orders to protect children who are the subject of a proceeding pursuant to that act. Where a child has been declared a dependent of the juvenile court, that court has exclusive jurisdiction over the child pursuant to Welfare and Institutions Code Section 364 and may issue orders to protect the child from violence pursuant to Welfare and Institutions Code Section 213.5 or 304.

In subdivision (f), the reference to any “adult” person related by consanguinity or affinity has been omitted.

See Sections 6320 (ex parte order enjoining harassment, threats, and violence), 6321 (ex parte order excluding party from dwelling), 6340 (orders that may be issued after notice and hearing); see also Sections 6203 (“abuse” defined), 6205 (“affinity” defined), 6209 (“cohabitant” and “former cohabitant” defined); Welf. & Inst. Code § 213.5 (issuance of restraining order during pendency of proceeding to determine minor dependent).

For provisions adopting this definition by reference, see Sections 3064 (limitation on ex parte order granting or modifying custody order), 3111 (separate meetings where history of domestic violence or domestic violence prevention order), 3176 (separate mediation permitted where history of domestic violence), 3177 (separate mediation where domestic violence prevention order), 3192 (separate counseling where domestic violence prevention order); Code Civ. Proc. §§ 128 (contempt powers of court), 1219 (punishment for contempt); Evid. Code §§ 1037.7 (victim-counselor privilege), 1107 (admissibility of expert witness testimony regarding battered women’s syndrome); Penal Code §§ 136.2 (penalty for intimidation of witness), 273.6 (penalty for violation of domestic violence prevention order), 273.7 (penalty for disclosing location of domestic violence shelter), 277 (penalty for child abduction), 653m (penalty for annoying telephone calls), 853.6 (citation and release not automatically available for misdemeanor violation of order to prevent domestic violence), 12028.5 (confiscating weapons at scene of domestic violence), 13700 (law enforcement response to domestic violence); Welf. & Inst. Code § 18291 (“domestic violence” defined for purposes of the Domestic Violence Centers Act).

For provisions that adopt this definition by reference, except that application to children is excluded, see Penal Code §§ 273.83 (individuals subject to prosecution by district attorney’s “spousal abuser” unit), 1000.6 (diversion of misdemeanor to counseling).

§ 6213. “Domestic violence prevention order”

6213. “Domestic violence prevention order” means a restraining order, whether issued ex parte, after notice and a hearing, or in a judgment, that does any of the following:

- (a) Enjoins a party from any of the acts described in Section 6320.
- (b) Excludes a party from a dwelling.
- (c) Enjoins a party from specified behavior that the court determines is necessary to effectuate orders under subdivision (a) or (b).

Comment. Section 6213 is a new provision included for drafting convenience. The term “domestic violence prevention order” is used in this division in Sections 6222 (order limiting visitation to situations where third person present), 6225 (court to provide information to parties concerning terms and effect of order), 6227 (support person for victim of domestic violence), 6385 (notice to Department of Justice), 6386 (appointment of counsel and payment if fees and costs to enforce order), 6388 (criminal penalty for violation of order).

For provisions adopting this definition by reference, see Sections 213 (responding party’s request for affirmative relief alternative to moving party’s requested relief), 2335 (evidence of specific acts of misconduct), 3100 (visitation rights generally), 3101 (visitation rights of stepparent or grandparent in dissolution, nullity, or legal separation proceeding), 3111 (separate

meetings where history of domestic violence or domestic violence prevention order), 3177 (separate mediation where domestic violence prevention order), 3192 (separate counseling where domestic violence prevention order), and 7604 (pendente lite relief of custody or grant of visitation rights); Gov't Code § 26841 (fees for protective order); Penal Code § 12021 (firearms); Welf. & Inst. Code §§ 304 (custody of dependent children of the court), 362.4 (juvenile court order concerning custody or visitation).

PART 2. GENERAL PROVISIONS

§ 6220. Purposes of division

6220. The purposes of this division are to prevent the recurrence of acts of violence and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.

Comment. Section 6220 continues former Code of Civil Procedure Section 540 without substantive change. The former section contained a list of persons that duplicated the list in Section 6211. This language has been omitted as surplus. See Section 6211 ("domestic violence" defined). See also Sections 6203 ("abuse" defined), 6205 ("affinity" defined), 6209 ("cohabitant" and "former cohabitant" defined).

Interim Comment. The phrase "and sexual abuse" is added, restoring the language of former Code of Civil Procedure Section 540.

§ 6221. Fees

6221. (a) There is no filing fee for a petition or response relating to an order issued pursuant to this division.

(b) Fees otherwise payable by a petitioner to a law enforcement agency for serving an order obtained under this division may be waived in any case in which the petitioner has requested a fee waiver on the initiating petition and has filed a declaration that demonstrates, to the satisfaction of the court, the financial need of the petitioner for the fee waiver.

(c) The declaration required by subdivision (b) shall be on one of the following forms:

(1) The form formulated and adopted by the Judicial Council for litigants proceeding in forma pauperis pursuant to Section 68511.3 of the Government Code, but the petitioner is not subject to any other requirements of litigants proceeding in forma pauperis.

(2) Any other form that the Judicial Council may adopt for this purpose pursuant to Section 6228.

(d) In conjunction with a hearing pursuant to this division, the court may issue an order for the waiver of fees otherwise payable by the petitioner to a law enforcement agency for serving an order obtained under this division.

Comment. Section 6221 continues former Code of Civil Procedure Section 546.5 without substantive change. In subdivision (a), the reference to an "order issued pursuant to this division" has been substituted for the former reference to a "protective order, restraining order, or a permanent injunction." This is not a substantive change. In subdivisions (b) and (d), references to

“this division” have been substituted for the former reference to “this section.” The former reference was unclear, since former Code of Civil Procedure Section 546.5 did not provide for the issuance of orders. The reference has been corrected to include any of the orders issued under the Domestic Violence Prevention Act, this division of the Family Code.

§ 6222. Matters to be considered when custody or visitation order issued pursuant to Domestic Violence Prevention Act

6222. A custody or visitation order made pursuant to this division is subject to Part 2 (commencing with Section 3020) of Division 8 (custody of children).

Comment. Section 6222 continues without substantive change and generalizes former Code of Civil Procedure Sections 547.5 and 547.7 [as added by 1992 Cal. Stat. ch. 1136, § 6]. The scope of the section is expanded to cover all orders for custody or visitation, rather than temporary orders only. The reference to the provisions of Part 2 of Division 8 has been added. This provides a complete set of rules for determining custody or visitation in a proceeding pursuant to the Domestic Violence Prevention Act. See also Sections [3030] (custody and unsupervised visitation prohibited where parent convicted under certain Penal Code provisions), [3031] (custody or visitation should not be inconsistent with restraining orders), 3100(b) (limiting visitation to situation where third party present), 3131 (action by district attorney where child taken or detained in violation of visitation order); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Interim Comment. The section is rewritten to expand application of the section to all orders, rather than temporary orders only. The reference to Part 2 of Division 8 is added.

§ 6223. Conditions for issuance of mutual restraining order

6223. A mutual restraining order enjoining the parties from any of the acts described in Section 6320 may not be issued unless both parties personally appear and each party presents written evidence of abuse or domestic violence. In this case, written evidence is not required if both parties agree that this requirement does not apply.

Comment. Section 6223 continues without substantive change former Code of Civil Procedure Section 545.5, the second paragraph of former Civil Code Section 4359(a), and former Civil Code Section 7020(f). [As each of the former provisions was amended by 1992 Cal. Stat. ch. 1136, §§ 1, 4, 5.] The reference to Section 6320 has been substituted for a specific list of acts. This is not a substantive change, since Section 6320 duplicates the omitted list. See also Sections 6203 (“abuse” defined), 6211 (“domestic violence” defined).

Interim Comment. The section is amended to reflect changes made by 1992 Cal. Stat. ch. 1136 §§ 1, 4, 5.

§ 6224. Required statements in order

6224. An order issued pursuant to this division shall state, on its face, the date of expiration of the order and the following statements in substantially the following form:

“This order is effective when made. The law enforcement agency shall enforce it immediately on receipt. It is enforceable anywhere in California by any law enforcement agency that has received the order or is shown a copy of the order. If proof of service on the restrained person has not been received, the law

enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it.”

Comment. Section 6224 continues without substantive change former Code of Civil Procedure Section 552, the first sentence of former Civil Code Section 4359(c), and former Civil Code Section 7020(c). This section generalizes the requirements of the former sections to apply to all orders issued pursuant to this division. This is not a substantive change. See Cal. R. Ct. 1285.05 (rev. July 1, 1987) (temporary restraining order in dissolution, nullity, or legal separation proceeding), 1296.10 (rev. Jan. 1, 1991) (order to show cause and temporary restraining order in proceeding pursuant to Domestic Violence Prevention Act or Uniform Parentage Act), 1296.29 (new July 1, 1991) (restraining order after hearing in dissolution, nullity, or legal separation or in proceedings under Domestic Violence Prevention Act or Uniform Parentage Act).

§ 6225. Information to parties concerning terms and effect of order

6225. The court, in issuing a domestic violence prevention order pursuant to this division where both parties are present in court, shall inform both the petitioner and the respondent of the terms of the order, including notice that the respondent is prohibited from purchasing or receiving or attempting to purchase or receive a firearm and including notice of the penalty for violation.

Comment. Section 6225 continues former Code of Civil Procedure Section 550(f) without substantive change. The reference to “domestic violence prevention order” has been substituted for the reference to an order “predicated on” what are now Sections 6320-6322. This is not a substantive change, since “domestic violence prevention order” has been defined to include the same orders. See Section 6213 (“domestic violence prevention order” defined). See also Gov’t Code § 12021(g) (penalty for violation of firearm prohibition in restraining order).

§ 6226. Explicit statement of address not required

6226. A petition for an order pursuant to this division is valid and the order is enforceable without explicitly stating the address of the petitioner or the petitioner’s place of residence, school, employment, the place where the petitioner’s child is provided child care services, or the child’s school.

Comment. Section 6226 generalizes and continues the last sentence of former Code of Civil Procedure Section 545 without substantive change. This section has been expanded to apply to orders contained in a judgment. The references to “petitioner” have been substituted for the former references to “applicant.” This is not a substantive change.

§ 6227. Support person for victim of domestic violence

6227. (a) It is the function of a support person to provide moral and emotional support for a person who alleges he or she is a victim of domestic violence in the proceedings specified in this section.

(b) The support person shall assist the person who alleges he or she is a victim of domestic violence in feeling more confident that he or she will not be injured or threatened by the other party during the proceedings where the person who alleges he or she is a victim of domestic violence and the other party must be present in close proximity. The support person is not present as a legal advisor and shall not give legal advice.

(c) A support person may accompany either party to any proceeding to obtain a domestic violence prevention order. Where the party is not represented by an attorney, the support person may sit with the party at the table that is generally reserved for the party and the party's attorney.

(d) Notwithstanding any other provision of law to the contrary, if a court has issued a domestic violence prevention order, a support person may accompany a party protected by the domestic violence prevention order during a mediation session held pursuant to an action or proceeding under this code. The agency charged with providing family court services shall advise the party protected by the order of the right to have a support person during mediation. A mediator may exclude a support person from a mediation session if the support person participates in the mediation session, or acts as an advocate, or the presence of a particular support person is disruptive or disrupts the process of mediation. The presence of the support person does not waive the confidentiality of the mediation, and the support person is bound by the confidentiality of the mediation.

(e) In a proceeding subject to this section, a support person may accompany a party in court where there are allegations or threats of domestic violence and, where the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and the party's attorney.

(f) Nothing in this section precludes a court from exercising its discretion to remove a person from the courtroom who it believes is prompting, swaying, or influencing the party protected by the order.

Comment. Section 6227 generalizes and continues former Civil Code Section 4351.6 without substantive change. The phrase "domestic violence prevention order" has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. Section 6213 defines "domestic violence prevention order" to include the orders formerly referred to, except Code of Civil Procedure 527.6, which provides for similar orders in situations not covered by this division. This is not a substantive change, since, insofar as former Civil Code Section 4351.6 applied to Code of Civil Procedure Section 527.6, the former section is continued in new subdivision (f) of Code of Civil Procedure Section 527.6. See Code Civ. Proc. § 527.6 (civil harassment orders) & Comment. See also Section 6211 ("domestic violence" defined).

In subdivision (d), a reference to "action or proceeding under this code" has been substituted for the former reference to "action or proceeding under this part," meaning the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code). This is not intended as a substantive change.

Former Civil Code Section 4351.6(e) has been omitted. This is not a substantive change, since the former subdivision duplicated a provision that is continued in Section 6227(b).

§ 6228. Judicial Council forms and instructions

6228. The Judicial Council shall prescribe the form of the orders and any other documents required by this division and shall promulgate instructions for applying for orders under this division.

Comment. Section 6228 continues without substantive change former Code of Civil Procedure Section 543, the first sentence of the third paragraph of subdivision (b) and the first sentence of

the fourth paragraph of subdivision (c) of former Code of Civil Procedure Section 546, and the last paragraph of former Civil Code Section 4359(a).

§ 6229. Remedies cumulative

6229. The remedies provided in this division are in addition to any other civil or criminal remedies that may be available to the petitioner.

Comment. Section 6229 continues former Code of Civil Procedure Section 549 without substantive change. The word "petitioner" has been substituted for "plaintiff" to conform to revisions made to former law. See 1990 Cal. Stat. ch. 752.

PART 3. EMERGENCY PROTECTIVE ORDERS

CHAPTER 1. GENERAL PROVISIONS

§ 6240. Definitions

6240. As used in this part:

(a) "Emergency protective order" means an ex parte order issued under this part.

(b) "Judicial officer" means a judge, commissioner, or referee designated under Section 6241.

(c) "Law enforcement officer" means one of the following officers who requests or enforces an emergency protective order under this part:

(1) A police officer.

(2) A sheriff's officer.

(3) A peace officer of the Department of Parks and Recreation, as defined in subdivision (g) of Section 830.2 of the Penal Code.

Comment. Section 6240 is a new section that defines several terms for the purposes of this part relating exclusively to emergency protective orders. The terms "judicial officer" and "law enforcement officer" are consistent with the Judicial Council form for the emergency protective order. See Cal. R. Ct. 1295.90 (rev. Jan. 1, 1992).

Provisions concerning emergency protective orders relating to domestic violence from former Code of Civil Procedure Section 546(b) and provisions concerning emergency protective orders relating to child abuse from former Code of Civil Procedure Section 546(c) have been unified to the extent practicable in this part. This approach is consistent with the unified Judicial Council form for the emergency protective order.

§ 6241. Designation of judicial officer to orally issue ex parte emergency protective order

6241. The presiding judge of the superior court in each county shall designate at least one judge, commissioner, or referee to be reasonably available to issue orally, by telephone or otherwise, emergency protective orders at all times whether or not the court is in session.

Comment. Section 6241 continues without substantive change the first sentence of the first paragraph of former Code of Civil Procedure Section 546(b). See Section 6240(b) ("judicial officer" defined by reference to this section). See also Section 6240(a) ("emergency protective order" defined).

CHAPTER 2. ISSUANCE AND EFFECT OF EMERGENCY PROTECTIVE ORDER

§ 6250. Grounds for ex parte emergency protective order

6250. A judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe either or both of the following:

(a) That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.

(b) That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.

Comment. Section 6250 continues without substantive change the second sentence of the first paragraph of subdivision (b) and the second sentence of the first paragraph of subdivision (c) of former Code of Civil Procedure Section 546. In subdivision (a), the phrase "by the person against whom the order is sought" has been added. This is not intended as a substantive change. See Sections 6203 ("abuse" defined), 6211 ("domestic violence" defined).

With regard to orders issued under subdivision (b), the effect of the definition of "law enforcement officer" in Section 6240(c) is to provide authority for park police to seek orders in child abuse situations. This is consistent with the Judicial Council form for the emergency protective order. See Cal. R. Ct. 1295.90 (rev. Jan. 1, 1992).

See also Sections 6240(a) ("emergency protective order" defined), 6240(b) ("judicial officer" defined).

§ 6251. Finding required to issue order

6251. An emergency protective order may be issued only if the judicial officer finds both of the following:

(a) That reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists or that a child is in immediate and present danger of abuse.

(b) That an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence or child abuse.

Comment. Section 6251 continues without substantive change the first sentence of the second paragraph of subdivision (b) and the first sentence of the second paragraph of subdivision (c) of former Code of Civil Procedure Section 546. See also Sections 6203 ("abuse" defined), 6211 ("domestic violence" defined), 6240(a) ("emergency protective order" defined), 6240(b) ("judicial officer" defined).

§ 6252. Orders included in emergency protective order

6252. An emergency protective order may include any of the following specific orders as appropriate:

(a) Orders provided in Sections 6320, 6321, and 6322.

(b) An order determining the temporary care and control of any minor child of the endangered person and the person against whom the order is sought.

(c) An order authorized in Section 213.5 of the Welfare and Institutions Code, including provisions placing the temporary care and control of the endangered child and any other minor children in the family or household with the parent or guardian of the endangered child who is not a restrained party.

Comment. The introductory clause and subdivisions (a) and (b) of Section 6252 continue without substantive change the third sentence of the first paragraph of former Code of Civil Procedure Section 546(b). A reference to "child" has been substituted for "children." This is not a substantive change. See Section 10 (singular includes plural).

The introductory clause and subdivision (c) continue without substantive change the second sentence of the first paragraph of former Code of Civil Procedure Section 546(c). The reference to the "legal" guardian has been omitted as surplus. This conforms with terminology in the Probate Code. See Prob. Code §§ 2350(b), 2400(b) ("guardian" defined).

See also Sections 6203 ("abuse" defined), 6211 ("domestic violence" defined), 6240(a) ("emergency protective order" defined).

§ 6253. Contents of order

6253. An emergency protective order shall include all of the following:

(a) A statement of the grounds asserted for the order.

(b) The date and time the order expires.

(c) The address of the superior court for the district or county in which the endangered person resides.

(d) The following statements, which shall be printed in English and Spanish:

(1) "To the Protected Party: This order will last only until the date and time noted above. If you wish to seek continuing protection, you will have to apply for an order from the court, at the address noted above. You may seek the advice of an attorney as to any matter connected with your application for any future court orders. The attorney should be consulted promptly so that the attorney may assist you in making your application."

(2) "To the Restrained Party: This order will last until the date noted above. The protected party may, however, obtain a more permanent restraining order from the court. You may seek the advice of an attorney as to any matter connected with the application. The attorney should be consulted promptly so that the attorney may assist you in responding to the application."

(e) In the case of an endangered child, the following statement, which shall be printed in English and Spanish: "This order will last only until the date and time noted above. A more permanent restraining order under Section 213.5 of the Welfare and Institutions Code may be applied for from the court, at the address noted above. You may seek the advice of an attorney in connection with the application for a more permanent restraining order."

Comment. Section 6253 continues without substantive change the parts of the second paragraphs of subdivisions (b) and (c) of former Code of Civil Procedure Section 546 that enumerated the contents of an emergency protective order. The language concerning attorney advice in subdivision (e) has been conformed to the language of subdivision (d)(1). See also Section 6240(a) ("emergency protective order" defined).

§ 6254. Availability of emergency protective order

6254. The fact that the endangered person has left the household to avoid abuse does not affect the availability of an emergency protective order.

Comment. Section 6254 continues without substantive change the seventh paragraph of subdivision (b) and the seventh paragraph of subdivision (c) of former Code of Civil Procedure Section 546. The endangered person may be an adult or a child. See also Section 6203 ("abuse" defined), 6240(a) ("emergency protective order" defined).

§ 6255. Issuance of ex parte emergency protective order

6255. An emergency protective order shall be issued without prejudice to any party.

Comment. Section 6255 continues without substantive change the last sentence of the first paragraph of subdivision (b) and the last sentence of the first paragraph of subdivision (c) of former Code of Civil Procedure Section 546. See also Section 6240(a) ("emergency protective order" defined).

§ 6256. Expiration of order

6256. An emergency protective order expires not later than the close of judicial business on the second day of judicial business following the day of its issuance.

Comment. Section 6256 continues without substantive change the sixth paragraph of subdivision (b) and the third sentence of the first paragraph of subdivision (c) of former Code of Civil Procedure Section 546. See also Section 6240(a) ("emergency protective order" defined).

§ 6257. Application for more permanent restraining order

6257. If an emergency protective order concerns an endangered child, the child's parent or guardian who is not a restrained party, or a person having temporary custody of the endangered child, may apply for a more permanent restraining order under or Section 213.5 of the Welfare and Institutions Code.

Comment. Section 6257 continues the third paragraph of former Code of Civil Procedure Section 546(c) without substantive change. For provisions relating to orders concerning endangered children, see Section 6250(b), 6251(a), 6252(b)-(c). See also Section 6240(a) ("emergency protective order" defined). The reference to the "legal" guardian has been omitted as surplus. This conforms with terminology in the Probate Code. See Prob. Code §§ 2350(b), 2400(b) ("guardian" defined).

CHAPTER 3. DUTIES OF LAW ENFORCEMENT OFFICER

§ 6270. Reducing order to writing and signing order

6270. A law enforcement officer who requests an emergency protective order shall reduce the order to writing and sign it.

Comment. Section 6242 continues without substantive change the second sentence of the second paragraph of subdivision (b) and the second sentence of the second paragraph of subdivision (c) of former Code of Civil Procedure Section 546. The requirement of this section is satisfied by use of the Judicial Council form. See Cal. R. Ct. 1295.90 (rev. Jan. 1, 1992). See also Sections 6240(a) ("emergency protective order" defined), 6240(c) ("law enforcement officer" defined).

§ 6271. Service, filing, and delivery of order

6271. A law enforcement officer who requests an emergency protective order shall do all of the following:

(a) Serve the order on the restrained party, if the restrained party can reasonably be located.

(b) Give a copy of the order to the protected party or, if the protected party is a minor child, to a parent or guardian of the endangered child who is not a restrained party, if the parent or guardian can reasonably be located, or to a person having temporary custody of the endangered child.

(c) File a copy of the order with the court as soon as practicable after issuance.

Comment. Section 6271 continues without substantive change the fifth paragraph of subdivision (b) and the sixth paragraph of subdivision (c) of former Code of Civil Procedure Section 546. References to the “legal” guardian have been omitted as surplus. This conforms with terminology in the Probate Code. See Prob. Code §§ 2350(b), 2400(b) (“guardian” defined).

See Section 6252 (b)-(c) (orders concerning endangered child). See also Sections 6240(a) (“emergency protective order” defined), 6240(c) (“law enforcement officer” defined).

§ 6272. Means of enforcement; protection of officer from liability

6272. (a) A law enforcement officer shall use every reasonable means to enforce an emergency protective order.

(b) A law enforcement officer who acts in good faith to enforce an emergency protective order under this section is not civilly or criminally liable.

Comment. Section 6272 continues without substantive change the last paragraph of subdivision (b) and the last paragraph of subdivision (c) of former Code of Civil Procedure Section 546. See also Sections 6240(a) (“emergency protective order” defined), 6240(c) (“law enforcement officer” defined).

§ 6273. Officer to carry copies of order

6273. A law enforcement officer who requests an emergency protective order under this part shall carry copies of the order while on duty.

Comment. Section 6273 continues without substantive change the fourth paragraph of subdivision (b) and the fifth paragraph of subdivision (c) of former Code of Civil Procedure Section 546. See also Sections 6240(a) (“emergency protective order” defined), 6240(c) (“law enforcement officer” defined).

Interim Comment. This version of Section 6273 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. The phrase “while on duty” is added, restoring the language of former Code of Civil Procedure Section 546.

PART 4. RESTRAINING ORDERS

CHAPTER 1. GENERAL PROVISIONS

§ 6300. Issuance on affidavit showing reasonable proof of past act or acts of abuse

6300. If an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse, a restraining order may be granted pursuant to this

division, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved.

Comment. Section 6300 continues the first sentence of former Code of Civil Procedure Section 545 without substantive change. The former reference to a "temporary" restraining order has been omitted, for consistency with other sections in this part. This is not a substantive change. See also Sections 6203 ("abuse" defined), 6211 ("domestic violence" defined).

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2.

§ 6301. Persons who may be granted restraining order

6301. (a) A restraining order may be granted pursuant to this division to any person described in Section 6211.

(b) The right to petition for relief shall not be denied because the petitioner has vacated the household to avoid abuse, and in the case of a marital relationship, notwithstanding that a petition for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, has not been filed.

Comment. Section 6301 continues the second and third sentences of former Code of Civil Procedure Section 545 without substantive change. A reference to Section 6211 has been substituted for the reference to former Code of Civil Procedure Section 542. This is not a substantive change, since the relevant part of the former section is continued in Section 6211. The former reference to a "temporary" restraining order has been omitted, for consistency with other sections in this part. This is not a substantive change. See also Section 6203 ("abuse" defined).

§ 6302. Notice in restraining order

6302. A restraining order shall set forth on its face a notice in substantially the following form:

"NOTICE TO RESTRAINED PARTY: If you do not appear at the court hearing specified herein, the court may grant the requested orders for a period of up to 3 years without further notice to you."

Comment. Section 6302 continues the second paragraph of Code of Civil Procedure Section 546(a) and former Civil Code Section 4359(d) without substantive change. A reference to "restrained party" has been substituted for a former reference to "defendant" in former Code of Civil Procedure Section 546(a). The former reference to "Petitioner/Respondent" in former Civil Code Section 4359(d) has been replaced by the reference to "Restrained Party." This is not a substantive change. See Cal. R. Ct. 1296.10 (rev. Jan. 1, 1991) (order to show cause and restraining order). The former reference to a "temporary" restraining order has been omitted, for consistency with other sections in this part. This is not a substantive change.

CHAPTER 2. EX PARTE ORDERS

§ 6320. Enjoining harassment, threats, and violence

6320. The court may issue an ex parte order enjoining a party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, contacting repeatedly by mail with the intent to harass, or disturbing

the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family and household members.

Comment. Section 6320 restates without substantive change former Code of Civil Procedure Section 542(d) and part of the first sentence of former Code of Civil Procedure Section 546(a), and continues without substantive change former Civil Code Sections 4359(a)(2) and 7020(a)(1). A reference to the “superior” court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

The language preventing “contacting repeatedly by mail with the intent to harass” has been added. This language has been drawn from an amendment to Penal Code Section 273.6 made by Sections 1 and 2 of Chapter 1209 of the Statutes of 1992.

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2. See also Section 6223 (conditions for issuance of mutual restraining order).

§ 6321. Exclusion from dwelling

6321. The court may issue an ex parte order excluding one party from the family dwelling, the dwelling of the other spouse, the common dwelling of both parties, or the dwelling of the party 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 which party holds legal or equitable title or is the lessee of the dwelling, on a showing of all of the following:

(a) Facts sufficient for the court to ascertain that the petitioner has a right under color of law to possession of the premises.

(b) The party to be excluded has assaulted or threatens to assault the other party or any other person under the care, custody, and control of the other party, or any minor child of the parties or of the other party.

(c) Physical or emotional harm would otherwise result to the other party, to any person under the care, custody, and control of the other party, or to any minor child of the parties or of the other party.

Comment. Section 6321 restates without substantive change part of the first sentence of Code of Civil Procedure Section 546(a), and continues without substantive change the last paragraph of former Code of Civil Procedure Section 546(a) and former Civil Code Sections 4359(a)(3) and 7020(a)(2). This section supersedes the third part of former Civil Code Section 5102(a). The reference to “the common dwelling of both parties” is drawn from former Civil Code Section 7020(b). This is not intended as a substantive change, but rather is added to clarify application of the section to unmarried parties. A reference to the “superior” court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2.

§ 6322. Enjoining additional specified behaviors

6322. The court may issue an ex parte order enjoining a party from specified behavior that the court determines is necessary to effectuate orders under Section 6320 or 6321.

Comment. Section 6322 restates without substantive change part of the first sentence of former Code of Civil Procedure Section 546(a), and continues without substantive change former Civil Code Sections 4359(a)(6) and 7020(a)(3). A reference to the “superior” court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2.

§ 6323. Determining temporary custody and visitation

6323. Subject to Section 3064, the court may issue an ex parte order determining the temporary custody of a minor child and the right of a party to visit the child on the conditions the court determines.

Comment. Section 6323 restates without substantive change part of the first sentence of Code of Civil Procedure Section 546(a), and continues without substantive change former Civil Code Sections 4359(a)(4) and 7020(a)(4). Former Code of Civil Procedure Section 546(a) did not provide authorization to determine visitation of a child where the petitioner and respondent were not married. Former Civil Code Sections 4359(a)(4) and 7020(a)(4) allowed an ex-parte determination of visitation by a party. This section continues and generalizes the rule provided in the former Civil Code sections. The reference to Section 3064 has been added. To the extent the authority of the court to issue custody orders ex parte is limited by Section 3064, this limitation also applies to visitation, since it is a limited form of custody. A reference to the “superior” court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2. See also Sections 11 (reference to married person includes formerly married person), 6222 (order limiting visitation to situations where third person present); Cal. R. Ct. 1285.05 (rev. July 1, 1991) (temporary restraining order), 1296.10 (rev. Jan. 1, 1991) (order to show cause and temporary restraining order).

Interim Comment. This section expands the courts authority to order visitation to situations involving unmarried parties. The originally proposed Section 6323 tracks the Judicial Council form intended for use in proceedings arising from the Domestic Violence Prevention Act and the Uniform Parentage Act, which did not expressly provide for a determination of visitation. See Cal. R. Ct. 1296.10 (rev. Jan. 1, 1991) (order to show cause and temporary restraining order). However, it is appropriate to authorize issuance of visitation orders whether or not the parties are unmarried. The reference to Section 3064 is added. To the extent the authority of the court to issue custody orders ex parte is limited by Section 3064, this limitation also applies to visitation, since it is a limited form of custody.

§ 6324. Determining temporary use of property

6324. The court may issue an ex parte order determining the temporary use, possession, and control of real or personal property of the parties.

Comment. Section 6324 restates without substantive change part of the first sentence of Code of Civil Procedure Section 546(a), and continues without substantive change part of former Civil Code Section 4359(a)(5). Former Code of Civil Procedure Section 546(a) did not provide for issuance of an ex parte order determining temporary use of property for unmarried parties. This section has been generalized to allow this order. This is not a substantive change, since the Judicial Council form allows this order. See Cal. R. Ct. 1296.10 (rev. Jan. 1, 1991) (order to show cause and temporary restraining order). A reference to the “superior” court has been omitted as

surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2.

§ 6325. Restraints on community, quasi-community, and separate property and determination of payment of debts

6325. The court may issue ex parte orders restraining community, quasi-community, and separate property and determining the payment of liens or encumbrances as provided in Section 2035.

Comment. Section 6325 restates without substantive change part of the first sentence of Code of Civil Procedure Section 546(a).

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2. See also Section 11 (reference to married person includes formerly married person).

CHAPTER 3. ORDERS ISSUABLE AFTER NOTICE AND HEARING

§ 6340. Orders that may be issued ex parte may also be issued after notice and hearing

6340. After notice and a hearing, the court may issue any of the following orders:

(a) Subject to subdivision (b), an order described in Chapter 2 (commencing with Section 6320).

(b) An order excluding one party from the family dwelling, the dwelling of the other spouse, the common dwelling of both parties, or the dwelling of the party who has care, custody, and control of a child to be protected from domestic violence when the court finds that physical or emotional harm would otherwise result to the other party, to a person under the care, custody, and control of the other party, or to a minor child of the parties or of the other party.

Comment. Section 6340 generalizes and continues without substantive change former Code of Civil Procedure Section 547(a), the last part of former Civil Code Section 5102(a), and the first two sentences of former Civil Code Section 7020(b), except that the reference in former Civil Code Section 7020(b) to issuance of a visitation order has been omitted. This is not a substantive change. Subdivision (a) authorizes issuance, after notice and hearing, of any order that may be issued ex parte, and Section 6323 authorizes issuance of an ex parte visitation order. In subdivision (b), the phrase "when the court finds" has been substituted for inconsistent references in the former sections to a "showing" by the petitioner and a "finding" by the court.

This section generalizes the former sections as follows:

(1) The former Family Law Act, applicable to proceedings for dissolution, nullity, and legal separation, did not contain a provision for orders after hearing, except in the case of former Civil Code Section 5102 which provided for orders excluding a party from a dwelling. This section makes it clear that any of the orders described in Section 6320 may be issued after notice and hearing in a proceeding for dissolution, nullity or legal separation. This is not a substantive change. See Cal. R. Ct. 1296.29 (new July 1, 1991) (restraining order after hearing).

(2) Former Civil Code Section 7020(b) did not provide for orders determining the temporary use of property in a proceeding under the Uniform Parentage Act. This section generalizes former Code of Civil Procedure Section 547(a) which provided for these orders as between unmarried

parties in a proceeding under the Domestic Violence Prevention Act. This is not a substantive change. See Cal. R. Ct. 1296.31E (new Jan. 1, 1992) (domestic violence miscellaneous orders attachment).

Interim Comment. Subdivision (c), authorizing issuance of a visitation order after notice and hearing is omitted. This section is unnecessary, since the authorization for ex parte orders is generalized. See Section 6323 (determination of custody and visitation).

§ 6341. Payment of child support by presumed father

6341. (a) After notice and a hearing, where there exists a presumption that the respondent is the natural father of a minor child pursuant to Section 7611, and the child is in the custody of the petitioner, the court may order a party to pay an amount necessary for the support and maintenance of the child if the order would otherwise be authorized in an action brought pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

(b) An order made pursuant to this section shall be without prejudice in an action brought pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

Comment. Section 6341 continues former Code of Civil Procedure Section 547(b) without substantive change. The short title of the uniform act has been added before the citation. This is not a substantive change.

§ 6342. Payment of restitution for loss of earnings and out-of-pocket expenses

6342. After notice and a hearing, the court may issue any of the following orders:

(a) An order that restitution be paid to the petitioner 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 therefrom.

(b) An order that restitution be paid by petitioner for out-of-pocket expenses incurred by a party as a result of any order issued ex parte which is found by the court to have been issued on facts shown at a noticed hearing to be insufficient to support the order.

(c) An order that restitution be paid by respondent to any public or private agency for the reasonable cost of providing services to the petitioner required as a direct result of the abuse inflicted by the respondent or any actual injuries sustained therefrom.

(d) An order for restitution under this section shall not include damages for pain and suffering.

Comment. Section 6342 continues former Code of Civil Procedure Section 547(c) and the last two sentences of former Civil Code Section 7020(b) without substantive change. References to "petitioner" have been substituted for the former references to "family or household member" in the former Code of Civil Procedure section. References to "petitioner" have been substituted for references to "plaintiff" in the former Civil Code section. These are not intended as a substantive changes. See also Section 6203 ("abuse" defined).

Interim Comment. This version of Section 6342 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. This section is amended to substitute “petitioner” for “family or household member” in subdivisions (a) and (c). See discussion in Memo 92-67.

§ 6343. Participation in counseling

6343. (a) Subject to subdivision (d), after notice and a hearing, the court may issue an order requiring any party to participate in counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, where it is shown that the parties intend to continue to reside in the same household or have continued to reside in the same household after previous instances of domestic violence. The court may also order a restrained party to participate in batterer’s treatment counseling.

(b) Where there has been a history of domestic violence between the parties or a domestic violence prevention order is in effect, at the request of the party protected by the order, the parties shall participate in counseling separately and at separate times.

(c) The court shall fix the costs and shall order the entire cost of the services to be borne by the parties in such proportions as the court deems reasonable.

(d) Before issuing the court order requiring counseling, the court shall find that the financial burden created by the court order for counseling does not otherwise jeopardize a party’s other financial obligations.

Comment. Section 6343 continues former Code of Civil Procedure Section 547(d) without substantive change. In subdivision (b), the reference to domestic violence prevention order has been substituted for the former reference to “protective” order. The requirements for meeting separately with the counselor have been revised to provide that either a history of violence or the existence of a restraining order is sufficient. These are not intended to be substantive changes and are consistent with other sections in the code. See Sections 3113 (separate meetings with court appointed investigator), 3181 (separate meetings with mediator), 3192 (separate meetings with counselor appointed in custody proceeding). See also Section 6211 (“domestic violence” defined).

§ 6344. Payment of attorney’s fees and costs

6344. After notice and a hearing, the court may issue an order for the payment of attorney’s fees and costs of the prevailing party.

Comment. Section 6344 continues former Code of Civil Procedure Section 547(e) without substantive change. See also Sections 270-275 (general provisions for attorney’s fees and costs).

§ 6345. Duration of restraining order granted after notice and hearing

6345. (a) A restraining order granted after notice and a hearing pursuant to this division, in the discretion of the court, shall have a duration of not more than three years, unless otherwise terminated or extended by further order of the court either on written stipulation filed with the court or on the motion of any party.

(b) The failure to state the expiration date on the face of the form creates an order with a duration of three years from the date of issuance.

(c) Nothing in this section prohibits parties, by written stipulation, from creating domestic violence restraining orders with a permanent duration.

Comment. Section 6345 continues and former Code of Civil Procedure Section 548 and the third sentence of former Civil Code Section 7020(b) without substantive change. In subdivision (a), the requirement that the stipulation be written has been generalized. Former Civil Code Section 7020(b) did not contain a writing requirement, but rather allowed stipulation by "mutual consent." In subdivision (c), the reference to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code) has been omitted. This expands application of this subdivision to all domestic violence orders.

Interim Comment. This version of Section 6345 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. This section is amended to reflect changes made by 1992 Cal. Stat. ch. 149, § 1.

CHAPTER 4. ORDERS INCLUDED IN JUDGMENT

§ 6360. Orders included in judgment

6360. A judgment entered under this code may include any of the orders described in Sections 6320, 6321, and 6322.

Comment. Section 6360 continues without substantive change and generalizes the first sentences of former Civil Code Sections 4458, 4516, and 7021. The former sections applied only to judgments pursuant to the former Family Law Act and the Uniform Parentage Act, whereas this section allows the inclusion of these orders in any judgment under this code. See also Sections 6380 (transmittal to local law enforcement agency), 6388 (criminal penalty for violation of order).

§ 6361. Statements required where order included in judgment

6361. If an order is included in a judgment pursuant to Section 6360, the judgment shall state on its face both of the following:

(a) Which provisions of the judgment are the orders.

(b) The date of expiration of the orders, which shall be not more than three years from the date the judgment is issued unless extended by the court after notice and hearing.

Comment. Section 6361 continues without substantive change and generalizes the second sentences of former Civil Code Sections 4458, 4516, and 7021. The former sections applied only to judgments pursuant to the former Family Law Act and the Uniform Parentage Act, whereas this section allows the inclusion of these orders in any judgment under this code. See also Sections 6380 (transmittal to local law enforcement agency), 6388 (criminal penalty for violation of order).

PART 5. REGISTRATION AND ENFORCEMENT OF ORDERS

§ 6380. Transmittal to local law enforcement agency

6380. The court shall order the petitioner or the attorney for the petitioner to deliver, or the county clerk to mail, a copy of an order issued pursuant to this division, or an extension, modification, or termination of the order, and any subsequent proof of service, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency designated by the petitioner or the attorney for the petitioner having jurisdiction over the residence of the petitioner, the residence of a party with care, custody, and control of a child to be protected from domestic violence, and other locations where the court determines that acts of domestic violence against the petitioner and any other person protected by the order are likely to occur.

Comment. Section 6380 continues without substantive change the first sentence of the first paragraph of former Code of Civil Procedure Section 550(a), the first sentence of the first paragraph of former Civil Code Section 4359(b), the first sentence of former Civil Code Section 7020(e), and the third sentences of former Civil Code Sections 4458, 4516, and 7021. The reference to other locations where the court determines that acts of violence against “any other person protected by the order” are likely to occur has been added. This conforms this section to Section 6320 which allows the court to extend the protection of the order to other named family and household members. See also Section 6211 (“domestic violence” defined).

§ 6381. Enforcement of order

6381. (a) Notwithstanding Section 6380 and subject to subdivision (b), an order issued pursuant to this division is enforceable in any place in this state.

(b) An order issued pursuant to this division is not enforceable by a law enforcement agency of a political subdivision unless that law enforcement agency has received a copy of the order pursuant to Section 6380 or has otherwise received a copy of the order or the officer enforcing the order has been shown a copy of the order.

Comment. Section 6381 generalizes and continues the last paragraph of former Civil Code Section 4359(b) without substantive change. The former section applied only to the former Family Law Act.

§ 6382. Availability of information concerning order

6382. Each appropriate law enforcement agency shall make available to any law enforcement officer responding to the scene of reported domestic violence, through an existing system for verification, information as to the existence, terms, and current status of an order issued pursuant to this division.

Comment. Section 6382 continues without substantive change the first sentence of the second paragraph of former Code of Civil Procedure Section 550(a), the last sentence of the first paragraph of former Civil Code Section 4359(b), and the last sentence of former Civil Code Section 7020(e). See also Section 6211 (“domestic violence” defined).

§ 6383. Service of restraining order by law enforcement officer

6383. (a) A domestic violence prevention order issued pursuant to this division may, on request of the petitioner, be served on the respondent by any law enforcement officer who is present at the scene of reported domestic violence involving the parties to the action.

(b) The moving party shall provide the officer with an endorsed copy of the order and a proof of service which the officer shall complete and transmit to the issuing court.

(c) It is a rebuttable presumption that the proof of service was signed on the date of service.

Comment. Section 6383 generalizes and continues without substantive change the last two sentences of the second paragraph of former Code of Civil Procedure Section 550(a), former Code of Civil Procedure Section 550(h), former Civil Code Section 4359(e), and former Civil Code Section 7020(g). The reference to a “domestic violence prevention order” has been substituted for former references to specific orders found in the former Civil Code provisions. This is not a substantive change, since “domestic violence prevention orders” are defined to include the same orders. See Section 6213 (“domestic violence prevention order” defined). The reference to “domestic violence prevention order” also supersedes the use of the phrase “restraining order against domestic violence” used in former Code of Civil Procedure Section 550(a). See also Section 6211 (“domestic violence” defined).

§ 6384. When personal service not required

6384. (a) If a person named in a restraining order issued pursuant to this division 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 that order.

(b) The judicial forms for restraining orders shall contain a statement in substantially the following form:

“NO ADDITIONAL PROOF OF SERVICE IS REQUIRED IF THE FACE OF THIS FORM INDICATES THAT BOTH PARTIES WERE PERSONALLY PRESENT AT THE HEARING WHERE THE ORDER WAS ISSUED.”

Comment. Subdivision (a) of Section 6384 continues former Code of Civil Procedure Section 550(e) without substantive change. In subdivision (a), a reference to this division has been substituted for the former reference to “this section.” The former reference was unclear, since former Code of Civil Procedure Section 550 did not provide for the issuance of orders. The reference has been corrected to include any of the orders issued under the Domestic Violence Prevention Act, now this division of the Family Code.

Subdivision (b) of Section 6384 continues former Code of Civil Procedure Section 550(g) without substantive change. The former reference to “temporary restraining orders or restraining orders issued after a hearing” has been replaced by a reference to “restraining orders.” This is not a substantive change.

§ 6385. Notice to Department of Justice

6385. (a) Except as provided in subdivision (b), on receipt of a copy of a domestic violence prevention order issued pursuant to this division, together with

the subsequent proof of service thereof, the local law enforcement agency having jurisdiction over the residence of the petitioner shall immediately notify the Department of Justice regarding the name, race, date of birth, and other personal descriptive information as required by a form prescribed by the Department of Justice, the date of issuance of the order, and the duration of the order or its expiration date.

(b) Proof of service of the order is not required for the purposes of this section if the order indicates on its face that both parties were personally present at the hearing where the order was issued and that, for the purpose of Section 6384, no proof of service is required.

(c) The failure of the petitioner to provide the Department of Justice with the personal descriptive information regarding the person restrained does not invalidate the restraining order.

(d) If a court issues a modification, extension, or termination of the order described in subdivision (a), the court shall notify the law enforcement agency having jurisdiction over the residence of the petitioner. The law enforcement agency shall then immediately notify the Department of Justice.

(e) There is no civil liability on the part of, and no cause of action arises against, an employee of a local law enforcement agency or the Department of Justice, acting within the scope of employment, if a person described in subdivision (g) of Section 12021 of the Penal Code unlawfully purchases or receives or attempts to purchase or receive a firearm and a person is injured by that firearm or a person who is otherwise entitled to receive a firearm is denied a firearm and either wrongful action is due to a failure of a court to provide the notification provided for in this section.

Comment. Section 6385 continues former Code of Civil Procedure Section 550(b)-(d) without substantive change. The word "petitioner" has been substituted for "plaintiff" to conform to revisions made to former law. See 1990 Cal. Stat. ch. 752. The former section has been revised to correct cross-references. The reference to "domestic violence prevention order" has been substituted for the reference to an order based on what are now Sections 6320-6322. This is not a substantive change, since "domestic violence prevention order" has been defined to include the same orders. See Section 6213 ("domestic violence prevention order" defined). See also Section 6225 (court to provide information to parties concerning terms and effect of order); Penal Code § 12021(g) (criminal penalty for acquiring firearm while subject to restraining order against domestic violence).

§ 6386. Appointment of counsel and payment of fees and costs to enforce order

6386. (a) The court may, in its discretion, appoint counsel to represent the petitioner in a proceeding to enforce the terms of a domestic violence prevention order issued pursuant to this division.

(b) In a proceeding in which private counsel was appointed by the court pursuant to subdivision (a), the court may order the respondent to pay reasonable attorney's fees and costs incurred by the petitioner.

Comment. Section 6386 restates former Code of Civil Procedure Section 553 without substantive change. The words “petitioner” and “respondent” have been substituted for “plaintiff” and “defendant” to conform to revisions made to former law. See 1990 Cal. Stat. ch. 752. The reference to “domestic violence prevention order” has been substituted for the reference to an order based on what are now Sections 6320-6322. This is not a substantive change, since “domestic violence prevention order” has been defined to include the same orders. See Section 6213 (“domestic violence prevention order” defined). See also Sections 270-275 (general provisions for attorney’s fees and costs).

§ 6387. Clerk to provide petitioner with copies of order

6387. The court shall order the county clerk to provide, without cost, to a petitioner five certified, stamped, and endorsed copies of an order, and of an extension, modification, or termination of an order issued pursuant to this division.

Comment. Section 6387 continues without substantive change the last sentence of the first paragraph of former Code of Civil Procedure Section 550(a).

§ 6388. Criminal penalty for violation of order

6388. A willful and knowing violation of a domestic violence prevention order issued pursuant to this division is a crime punishable under Section 273.6 of the Penal Code.

Comment. Section 6388 continues without substantive change former Code of Civil Procedure Section 551, the last sentence of former Civil Code Section 4359(c), former Civil Code Section 7020(h), and the last sentences of former Civil Code Section 4458, 4516, and 7021. The reference to “domestic violence prevention order” has been substituted for the reference to an order based on what are now Sections 6320-6322. This is not a substantive change, since “domestic violence prevention order” has been defined to include the same orders. See Section 6213 (“domestic violence prevention order” defined).

ADDITIONAL REVISIONS

CIVIL CODE

Civ. Code § 1799.98 (technical amendment). Bona fide purchaser of property sold pursuant to enforcement of security interest

SEC. ____ . Section 1799.98 of the Civil Code is amended to read:

1799.98. (a) Nothing in this title shall be construed to make applicable or affect or operate as a waiver of any of the provisions of any of the following:

(1) Title 13 (commencing with Section 2787) of Part 4 of Division 3 this code.

(2) Parts 1 (commencing with Section 700), 2 (commencing with Section 760), 3 (commencing with Section 900), and 4 (commencing with Section 1100) of Division 4 of the Family Code.

(3) Sections 4301 and 4302 of the Family Code.

~~(4) Subdivision (c) of Section 2035 of the Family Code.~~

(b) The delivery of notice pursuant to Section 1799.91 is not evidence that the person to whom the notice was delivered entered or did not enter the transaction in the capacity of a surety.

Comment. Section 1799.98 is amended to substitute references to the Family Code provisions that replaced the former Civil Code provisions.

Interim Comment. Section 1799.98 is amended to delete a cross-reference. Family Code Section 2035(c) is repealed and consolidated with similar provisions applicable to unmarried parties in Family Code Section 6021. The omission of this cross-reference from this section is not a substantive change. See Fam. Code § 753 (excluding one spouse from other's dwelling).

Civ. Code § 4359 (repealed). Ex parte protective orders; delivery to local law enforcement agency; enforcement; violations; penalty

SEC. ____ . Section 4359 of the Civil Code is repealed.

~~4359. (a) During the pendency of any proceeding under Title 2 (commencing with Section 4400) or Title 3 (commencing with Section 4500) of this part, upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the superior court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life, and if the order is directed against a party, requiring him or her to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures; (2) enjoining any party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party, and, in the discretion of the court, upon a showing of good cause, other named family and household members; (3) excluding one party from the family dwelling or from the dwelling of the other, for the period of time and upon the conditions as the court may determine, regardless of which party~~

~~holds legal or equitable title, or is the lessee of the dwelling, upon a showing that the party to be excluded has assaulted or threatens to assault the other party or any other person under the care, custody, or control of the other party, or any minor child of the parties or of the other party, and that physical or emotional harm would otherwise result to the other party or any person under the care, custody, or control of the other party, or to any minor child of the parties or of the other party as provided in Section 5102; (4) Determining the temporary custody of any minor children of the marriage, and the right of a party to visit the minor children upon the conditions as the court may determine; (5) determining the temporary use, possession, and control of real or personal property of the parties and the payment of any liens or encumbrances coming due during the pendency of the order; and (6) enjoining a party from specified behavior which the court determines is necessary to effectuate orders under paragraph (2) or (3).~~

~~A mutual restraining order specified in paragraph (2) may only be issued if both parties personally appear and each party presents written evidence of abuse or domestic violence specified in paragraph (2). In this case, written evidence shall not be required if both parties agree that this requirement shall not apply.~~

~~Any order issued pursuant to this section shall state on its face the date of expiration of the order.~~

~~The Judicial Council shall promulgate forms and instructions for applications for orders and orders granted pursuant to this section.~~

~~(b) The court shall order the party who obtained the order or the attorney for that party to deliver or the clerk to mail a copy of any order, or extension, modification, or termination thereof, granted pursuant to subdivision (a), by the close of the business day on which the order, extension, modification, or termination was granted, and any subsequent proof of service thereof, to each local law enforcement agency designated by the party or the attorney for the party, having jurisdiction over the residence of the party and other locations where the court determines that acts of domestic violence against the party are likely to occur. Each appropriate law enforcement agency shall make available through an existing system for verification, information as to the existence, terms, and current status of any order issued pursuant to subdivision (a) to any law enforcement officer responding to the scene of reported domestic violence.~~

~~Notwithstanding the foregoing, an order issued pursuant to this section is enforceable in any place in this state. However, an order issued pursuant to this section is not enforceable by a law enforcement agency of a political subdivision unless that law enforcement agency has received a copy of the order pursuant to this subdivision, has otherwise received a copy of the order, or the officer enforcing the order has been shown a copy of the order.~~

~~(c) Each order granted pursuant to this section shall state on its face that it is enforceable in any place in this state by any law enforcement agency that has received a mailed notice as provided by subdivision (b), by any other law~~

~~enforcement agency that has received the order, or by any officer who has been shown the order. Any willful and knowing violation of any order granted pursuant to paragraph (2), (3), or (6) of subdivision (a) shall be a misdemeanor punishable under Section 273.6 of the Penal Code.~~

~~(d) The temporary restraining order specified in paragraph (2) of subdivision (a) shall state on its face a notice in substantially the following form:~~

~~“NOTICE TO PETITIONER/RESPONDENT: If you do not appear at the court hearing specified herein, the court may grant the requested orders for a period of up to 3 years without further notice to you.”~~

~~(e) Any restraining order against domestic violence issued pursuant to paragraph (2), (3), or (6) of subdivision (a) may, upon the request of the moving party, be served upon the responding party by any law enforcement officer who is present at the scene of reported domestic violence involving the parties to the action. The moving party shall provide the officer with an endorsed copy of the order and a proof of service which the officer shall complete and transmit to the issuing court.~~

~~Comment. Former Section 4359 [as amended by 1992 Cal. Stat. ch. 1136, § 1] is continued without substantive change in Part 4 (commencing with Section 6300) and Part 5 (commencing with Section 6380) of Division 10 of the Family Code.~~

~~Civ. Code § 7020 (repealed). Ex parte protective orders; delivery to local law enforcement agency; enforcement; violations; penalty~~

~~SEC. ____.~~ Section 7020 of the Civil Code is repealed.

~~7020. (a) During the pendency of any proceeding under this part, upon application in the manner provided by Section 527 of the Code of Civil Procedure, the superior court may issue ex parte orders (1) enjoining any party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party or the minor child; (2) excluding one party from the dwelling of the party who has care, custody, and control of the child upon showing that the party to be excluded has assaulted or threatens to assault the other party or the minor child, and that physical or emotional harm would otherwise result to the party or the minor child; (3) enjoining a party from specified behavior which the court determines is necessary to effectuate orders under paragraph (1) or (2); and (4) determining the temporary custody of any minor child who is the subject of a proceeding under this part and the right of a party to visit the minor child upon the conditions as the court may determine. In the case in which a temporary restraining order is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why the order should not be granted, on the earliest day 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 the temporary restraining order is granted. The court may on motion of the plaintiff or on its own motion shorten the time for service on the defendant of the order to show cause.~~

~~(b) The court may issue upon notice and a hearing any of the orders set forth in subdivision (a). After notice and a hearing, the court may order the exclusion of one party from the common dwelling of both parties or from the dwelling of the party who has care, custody, and control of the minor child upon a showing only that physical or emotional harm would otherwise result to the party or the minor child. Any restraining order granted pursuant to this subdivision shall remain in effect, in the discretion of the court, not to exceed three years, except as provided in Section 7021, unless otherwise terminated by the court, extended by mutual consent of the parties, or extended by further order of the court on the motion of any party. Upon notice and a hearing, the court may also issue (1) an order that restitution be paid to the plaintiff 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 or any actual physical injuries sustained therefrom, (2) an order that restitution be paid by the plaintiff for out-of-pocket expenses incurred by a party as a result of any order issued ex parte which is found by the court to have been issued upon facts shown at a noticed hearing to be insufficient to support the order, or (3) an order requiring the defendant to pay any public or private agency for the reasonable cost of providing services to the plaintiff required as a direct result of the abuse inflicted by the defendant or any injuries sustained therefrom. An order for restitution under this section shall not include damages for pain and suffering.~~

~~(c) Any order issued pursuant to subdivision (a) or (b) shall state on its face the date of expiration of the order.~~

~~(d) The temporary restraining order shall set forth on its face a notice in substantially the following form:~~

~~“NOTICE TO DEFENDANT; If you do not appear at the court hearing specified herein, the court may grant the requested orders for a period of up to 3 years without further notice to you.”~~

~~(e) The court shall order the party who obtained the order or the attorney for the party to deliver or the clerk to mail a copy of any order, or extension, modification, or termination thereof, granted pursuant to subdivision (a) or (b), by the close of the business day on which the order, extension, modification, or termination was granted, and any subsequent proof of service thereof, to each local law enforcement agency designated by the party or the attorney for the party, having jurisdiction over the residence of the party who has care, custody, and control of the minor child and any other locations where the court determines that acts of domestic violence against the party and the minor child are likely to occur. Each appropriate law enforcement agency shall make available through an existing system for verification, information as to the existence, terms, and current status of any order issued pursuant to subdivision (a) or (b) to any law enforcement officer responding to the scene of reported domestic violence.~~

~~(f) A mutual restraining order specified in paragraph (1) of subdivision (a) may only be issued if both parties personally appear and each party presents written evidence of abuse or domestic violence specified in paragraph (1) of subdivision (a). In this case, written evidence shall not be required if both parties agree that this requirement shall not apply.~~

~~(g) Any restraining order against domestic violence issued pursuant to paragraph (1), (2), or (3) of subdivision (a) may, upon the request of the moving party, be served upon the responding party by any law enforcement officer who is present at the scene of reported domestic violence involving the parties to the action. The moving party shall provide the officer with an endorsed copy of the order and a proof of service which the officer shall complete and transmit to the issuing court.~~

~~(h) Any willful and knowing violation of any order granted pursuant to subdivision (a) or (b) shall be a misdemeanor punishable under Section 273.6 of the Penal Code.~~

Comment. Former Section 7020 [as amended by 1992 Cal. Stat. ch. 1136, § 4] is continued without substantive change in Part 4 (commencing with Section 6300) and Part 5 (commencing with Section 6380) of Division 10 of the Family Code.

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 128 (amended). Powers and duties of courts

SEC. ____ Section 128 of the Code of Civil Procedure is amended to read:

128. (a) Every court shall have the power to do all of the following:

- (1) To preserve and enforce order in its immediate presence.
- (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.
- (3) To provide for the orderly conduct of proceedings before it, or its officers.
- (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.
- (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.
- (6) To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code.
- (7) To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.
- (8) To amend and control its process and orders so as to make them conform to law and justice.

(b) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting an attorney, his or her agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of

the court's order, the violation of which is the basis of the contempt except for the conduct as may be proscribed by subdivision (b) of Section 6068 of the Business and Professions Code, relating to an attorney's duty to maintain respect due to the courts and judicial officers.

(c) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting a public safety employee acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes.

(d) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting the victim of a sexual assault, where the contempt consists of refusing to testify concerning that sexual assault, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "sexual assault" means any act made punishable by Section 261, 262, 264.1, 285, 286, 288, 288a, or 289 of the Penal Code.

(e) Notwithstanding Section 1211 or any other law, if an order of contempt is made affecting the victim of domestic violence, where the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence shall be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt.

As used in this subdivision, "domestic violence" means ~~abuse perpetrated against any of the following:~~

~~(1) A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship.~~

~~(2) A person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code) "domestic violence" as defined in Section 6211 of the Family Code.~~

(f) Notwithstanding Section 1211 or any other provision of law, no order of contempt shall be made affecting a county government or any member of its governing body acting pursuant to its constitutional or statutory authority unless the court finds, based on a review of evidence presented at a hearing conducted for this purpose, that either of the following conditions exist.:

(1) That the county has the resources necessary to comply with the order of the court.

(2) That the county has the authority, without recourse to voter approval or without incurring additional indebtedness, to generate the additional resources necessary to comply with the order of the court, that compliance with the order of the court will not expose the county, any member of its governing body, or any other county or any other county officer to liability for failure to perform other constitutional or statutory duties, and that compliance with the order of the court will not deprive the county of resources necessary for its reasonable support and maintenance.

Comment. Subdivision (e) of Section 128 is amended to substitute a reference to the Family Code provision defining "domestic violence." The Family Code definition is the same as the definition formerly included in this provision, except that the Family Code definition applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment.

Interim Comment. Subdivision (f) continues the language added to the section by Section 2 of Chapter 697 of the Statutes of 1992.

Code Civ. Proc. § 527.6 (technical amendment). Temporary restraining order and injunction prohibiting harassment

SEC. ____ Section 527.6 of the Code of Civil Procedure is amended to read:

527.6. (a) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order, and an injunction prohibiting harassment as provided in this section.

(b) For the purposes of this section, "harassment" is a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. 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. "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. Constitutionally protected activity is not included within the meaning of "course of conduct."

(c) Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with subdivision (a) of Section 527. A temporary restraining order may be granted with or without notice upon an affidavit which, to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff. A temporary restraining order granted under this section shall remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court.

(d) Within 15 days of the filing of the petition, a hearing shall be held on the petition for the injunction. The defendant may file a response which explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint

under this section. At the hearing, the judge shall receive such testimony as is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three 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 under this section.

(e) Nothing in this section shall preclude either party from representation by private counsel or from appearing on his or her own behalf.

(f) In a proceeding under this section where there are allegations or threats of domestic violence, a support person may accompany a party in court and, where the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and his or her attorney. The support person is present to provide moral and emotional support for a person who alleges he or she is a victim of domestic violence. The support person is not present as a legal advisor and shall not give legal advice. The support person shall assist the person who alleges he or she is a victim of domestic violence in feeling more confident that he or she will not be injured or threatened by the other party during the proceedings where the person who alleges he or she is a victim of domestic violence and the other party must be present in close proximity. Nothing in this subdivision precludes the court from exercising its discretion to remove the support person from the courtroom if the court believes the support person is prompting, swaying, or influencing the party assisted by the support person.

(g) Upon filing of a petition for an injunction under this section, the defendant shall be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition.

(h) The court shall order the plaintiff or the attorney for the plaintiff to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, granted under this section, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency shall make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported harassment.

(i) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

(j) Any willful disobedience of any temporary restraining order or injunction granted under this section is punishable pursuant to Section 273.6 of the Penal Code.

(k) This section does not apply to any action or proceeding covered by Title 1.6C (commencing with Section 1788) of the Civil Code or by ~~Part 4 (commencing with Section 240) of Division 2~~ Division 10 (commencing with

Section 6200) of the Family Code. Nothing in this section shall preclude a plaintiff's right to utilize other existing civil remedies.

(l) The Judicial Council shall promulgate forms and instructions therefor, rules for service of process, scheduling of hearings, and any other matters required by this section. The petition and response forms shall be simple and concise.

Comment. New subdivision (f) of Section 527.6 continues the substance of former Civil Code Section 4351.6 insofar as it applied to a proceeding under Section 527.6. Subdivisions designations have been adjusted for the insertion of new subdivision (f).

New subdivision (k) is amended to replace the former Civil Code and Code of Civil Procedure references with a reference to the Family Code.

Interim Comment. The reference to Part 4 (commencing with Section 240) of Division 2 is replaced by a reference to Division 10 (Domestic Violence Prevention Act). This is not a substantive change. Section 240 (as enacted by 1992 Cal. Stat. ch. 162) contains cross-references to the orders restraining domestic violence, which are consolidated and continued in a new Division 10. Section 240 is amended and generalized to apply to all ex parte restraining orders issued pursuant to the Family Code, except those included in a summons.

Code Civ. Proc. § 529 (technical amendment). Undertaking when injunction granted

SEC. ____ Section 529 of the Code of Civil Procedure is amended to read:

529. (a) On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined such damages, not exceeding an amount to be specified, as the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved.

(b) This section does not apply to any of the following persons:

(1) Either spouse against the other in a proceeding for legal separation or dissolution of marriage.

(2) The applicant for an order described in ~~Section 240~~ Division 10 (commencing with Section 6200) of the Family Code.

(3) A public entity or officer described in Section 995.220.

Comment. Subdivision (b) of Section 529 is amended to replace the former Code of Civil Procedure and Civil Code provisions with a reference to the Family Code provisions that have replaced them. The reference to "applicant" has been substituted for the former reference to "plaintiff." This is not a substantive change.

Interim Comment. The reference to Part 4 (commencing with Section 240) of Division 2 is replaced by a reference to Division 10 (Domestic Violence Prevention Act). This is not a substantive change. Section 240 (as enacted by 1992 Cal. Stat. ch. 162) contains cross-references to the orders restraining domestic violence, that are consolidated and continued in a new Division 10. Section 240 is amended and generalized to apply to all ex parte restraining orders issued pursuant to the Family Code, except those included in a summons.

Code Civ. Proc. § 545.5 (repealed). Conditions of issuance of mutual restraining order

SEC. _____. Section 545.5 of the Code of Civil Procedure is repealed.

~~545.5. A mutual restraining order enjoining the parties from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party, and, in the discretion of the court upon a showing of good cause, other named family and household members, may only be issued if both parties personally appear and each party presents written evidence of abuse or domestic violence as defined in Section 542. In this case, written evidence shall not be required if both parties agree that this requirement shall not apply.~~

Comment. Former Section 545.5 [as amended by 1992 Cal. Stat. ch. 1136, § 5] is continued in Family Code Section 6223 without substantive change.

Code Civ. Proc. § 547.7 (repealed). Custody and visitation orders should not be inconsistent with restraining or protective orders

SEC. _____. Section 547.7 of the Code of Civil Procedure is repealed.

~~547.7. In a proceeding concerning the custody of, or visitation with, a minor under this chapter, the court is encouraged to make a reasonable effort to ascertain whether or not any civil restraining orders or criminal protective orders are in effect which concern the parties or the minor. The court is encouraged not to make a custody or visitation order which is inconsistent with the civil restraining order or criminal protective order, unless the court makes all of the following findings:~~

~~(a) The custody or visitation order cannot be made consistent with the civil restraining order or criminal protective order.~~

~~(b) The custody or visitation order is in the best interest of the minor.~~

Comment. Former Section 547.7 [as added by 1992 Cal. Stat. ch. 1136, § 6] is continued without substantive change. in Family Code Section 3031 [see *Family Code: Child Custody* (December 1993)] and a cross-reference is added to the domestic violence provisions. See Fam. Code § 6222.

Code Civ. Proc. § 548 (repealed). Duration of domestic violence restraining order

SEC. _____. Section 548 of the Code of Civil Procedure is repealed.

~~548. (a) Any restraining order granted after notice and a hearing pursuant to this chapter, in the discretion of the court, shall have a duration of not more than three years, unless otherwise terminated or extended by further order of the court either on written stipulation filed with the court or on the motion of any party.~~

~~(b) The failure to state the expiration date on the face of the form shall create an order with a duration of three years from the date of issuance.~~

~~(c) Nothing in this section shall prohibit parties, by written stipulation, from creating domestic violence restraining orders arising under the Family Law Act (Part 5 (commencing with Section 4000) of Division 4 of the Civil Code) with a permanent duration.~~

Comment. Former Section 548 [as amended by 1992 Cal. Stat. ch. 149, § 1] is continued in Family Code Section 6345 without substantive change. See Fam. Code § 6345 Comment.

Code Civ. Proc. § 917.7 (technical amendment). Stay of proceedings

SEC. _____. Section 917.7 of the Code of Civil Procedure is amended to read:

917.7. The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the ~~Juvenile Court Law~~ juvenile court law, or in a special proceeding, or the provisions of a judgment or order for the temporary exclusion of a party from ~~the family dwelling or the dwelling of the other party a dwelling~~, as provided in the Family Code. However, the trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods as to it may appear appropriate. Further, in the absence of a writ or order of a reviewing court providing otherwise, the provisions of the judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of 30 days from the entry of the judgment or order and are subject to any further stays ordered by the trial court, as herein provided.

Comment. Section 917.7 is amended to omit the former reference to Civil Code Section 4359. A general reference to “a dwelling” has been substituted for the former reference specific dwellings. These are not substantive changes. For provisions of the Family Code relating to the temporary exclusion of a party from a dwelling, see, e.g., Fam. Code §§ 2035, 2040, 2045, 6321, 6340, 6360, 7710, 7720, 7730.

Interim Comment. This section is amended to substitute a general reference to “a dwelling,” for the list of specific dwellings. This allows the Family Code provisions to control the type of dwellings that will be at issue, preventing a conflict from arising in the future where, for example, the Family Code statute would be amended to change the list of dwellings, but a similar revision is not made to this provision in the Code of Civil Procedure.

Code Civ. Proc. § 1219 (amended). Punishment for contempt

SEC. _____. Section 1219 of the Code of Civil Procedure is amended to read:

1219. (a) Except as provided in subdivisions (b) and (c), when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.

(b) Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt when the contempt consists of refusing to testify concerning that sexual assault.

(c) In a finding of contempt for a victim of domestic violence who refuses to testify, the court shall not incarcerate the victim, but may require the victim to attend up to 72 hours of a domestic violence program for victims or require the victim to perform up to 72 hours of appropriate community service, provided that in a subsequent finding of contempt for refusing to testify arising out of the same case, the court shall have the option of incarceration pursuant to subdivision (a).

(d) As used in this section:

(1) "Sexual assault" means any act made punishable by Section 261, 262, 264.1, 285, 286, 288, 288a, or 289 of the Penal Code.

(2) "Domestic violence" means abuse perpetrated against any of the following:

(A) ~~A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship.~~

(B) ~~A person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code) "domestic violence" as defined in Section 6211 of the Family Code.~~

Comment. Subdivision (d)(2) of Section 1219 is amended to substitute a reference to the Family Code provision defining "domestic violence." The Family Code definition is the same as the definition formerly included in this provision, except that the Family Code provision applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. For the special provisions applicable to child witnesses, see Code Civ. Proc. 1219.5 (referral to probation officer where minor in contempt); Penal Code §§ 1346-1348.5 (examination of child victims of abuse).

EVIDENCE CODE

Evid. Code § 1037.7 (amended). Domestic violence

SEC. ____ . Section 1037.7 of the Evidence Code is amended to read:

1037.7. (a) ~~"Domestic violence" is abuse perpetrated against a family or household member, or against a person as provided in subdivisions (d) and (e).~~

(b) ~~"Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to herself, himself, or another.~~

(c) ~~"Family or household member" means a spouse, former spouse, parent, child, any other adult person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who within the last six months regularly resided in the household.~~

(d) ~~A person who is the parent of a minor child where (1) there exists the presumption that the male parent is the father of any minor child of the female parent pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code, and (2) one parent has perpetrated abuse as defined in subdivision (b) against the other parent.~~

(e) ~~A person who is in, or has been in, a dating, courtship, or engagement relationship and abuse as defined in subdivision (b) has been perpetrated against that person by the person with whom they have had a dating, courtship, or engagement relationship~~ As used in this article, "domestic violence" means "domestic violence" as defined in Section 6211 of the Family Code.

Comment. Section 1037.7 is amended to substitute a reference to the Family Code provision defining "domestic violence" for the former definitions of "abuse," "domestic violence," and "family or household member." This is not a substantive change, since the Family Code definition of "domestic violence" continues the substance of the omitted definitions. See Fam.

Code § 6211 (“domestic violence” defined) & Comment. See also Fam. Code §§ 6203 (“abuse” defined), 6209 (“cohabitant” and “former cohabitant” defined).

Evid. Code § 1107 (technical amendment). Expert testimony regarding battered women’s syndrome

SEC. ____ Section 1107 of the Evidence Code is amended to read:

1107. (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women’s syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women’s syndrome shall not be considered a new scientific technique whose reliability is unproven.

(c) For purposes of this section, “abuse” is defined in Section 6203 of the Family Code and “domestic violence” are is defined as provided in Sections 55 and 70 in Section 6211 of the Family Code.

(d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.

Comment. Subdivision (c) of Section 1107 is amended to substitute references to the provisions of the Family Code that replaced the relevant provisions of former Code of Civil Procedure Section 542.

Interim Comment. This section is amended to correct cross-references to Family Code sections renumbered due to reorganization and consolidation of the Family Code provisions dealing with domestic violence.

FAMILY CODE

Fam. Code § 55 (repealed). “Abuse”;

SEC. ____ Section 55 of the Family Code is repealed.

~~55. “Abuse” means intentionally or recklessly to cause or attempt to cause bodily injury, or sexual assault, or to place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.~~

Interim Comment. Former Section 55 is continued in Section 6203 without substantive change. Under existing law this definition applies only to the Domestic Violence Prevention Act. Section 55 generalized this definition to apply to the entire Family Code. Section 6203 returns to the existing scheme and applies this definition only to the Domestic Violence Prevention Act. See Section 6201 (application of definitions). Where this term is used in the Family Code, but outside the Domestic Violence Prevention Act, the definition is made expressly applicable by use of a cross-reference. See Section 6203 Comment.

Fam. Code § 57 (repealed). “Affinity”;

SEC. ____ . Section 57 of the Family Code is repealed.

~~57. “Affinity,” when applied to the marriage relation, signifies the connection existing in consequence of marriage between each of the married persons and the blood relatives of the other.~~

Interim Comment. Former Section 57 is continued in Section 6205 without substantive change. Under existing law this definition applies only to the Domestic Violence Prevention Act. Section 57 generalized this definition to apply to the entire Family Code. Section 6205 returns to the existing scheme and applies this definition only to the Domestic Violence Prevention Act. See Section 6201 (application of definitions).

Fam. Code § 60 (repealed). “Cohabitant” “former cohabitant”

SEC. ____ . Section 60 of the Family Code is repealed.

~~60. “Cohabitant” means a person who regularly resides in the household. “Former cohabitant” means a person who formerly regularly resided in the household.~~

Interim Comment. Former Section 60 is continued in Section 6209 without substantive change. Under existing law this definition applies only to the Domestic Violence Prevention Act. Section 60 generalized this definition to apply to the entire Family Code. Section 6209 returns to the existing scheme and applies this definition only to the Domestic Violence Prevention Act. See Section 6201 (application of definitions).

Fam. Code § 70 (repealed). “Domestic violence”

SEC. ____ . Section 70 of the Family Code is repealed.

~~70. “Domestic violence” is abuse perpetrated against any of the following:~~

~~(a) A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship.~~

~~(b) A person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female parent pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).~~

Interim Comment. Former Section 70 is continued in Section 6211 without substantive change. Under existing law this definition applies only to the Domestic Violence Prevention Act. Section 70 generalized this definition to apply to the entire Family Code. Section 6211 returns to the existing scheme and applies this definition only to the Domestic Violence Prevention Act. See Section 6201 (application of definitions). Where this term is used in the Family Code, but outside the Domestic Violence Prevention Act, the definition is made expressly applicable by use of a cross-reference. See Section 6211 Comment.

Fam. Code § 75 (repealed). “Domestic violence prevention order”

SEC. ____ . Section 75 of the Family Code is repealed.

~~75. “Domestic violence prevention order” means any of the following:~~

~~(a) An order made pursuant to subdivision (b), (c), or (d) of Section 2035 (order in pending dissolution, nullity, or legal separation proceeding).~~

~~(b) An order made pursuant to Section 2045 (order in judgment in dissolution, nullity, or legal separation proceeding).~~

~~(c) An order described in subdivision (b), (c), or (d) of Section 2035 made pursuant to subdivision (a) or (b) of Section 5550 (ex parte order under Domestic Violence Prevention Act).~~

~~(d) An order issued under Part 4 (commencing with Section 5600) of Division 10 (ex parte emergency protective order under Domestic Violence Prevention Act).~~

~~(e) An order described in subdivision (b), (c), or (d) of Section 2035 made pursuant to subdivision (a) or (b) of Section 5750 (order after notice and hearing made under Domestic Violence Prevention Act).~~

~~(f) An order made pursuant to subdivision (a), (b), or (c) of Section 7710 (ex parte order under Uniform Parentage Act).~~

~~(g) An order described in subdivision (a), (b), or (c) of Section 7710 made pursuant to Section 7720 (order after notice and hearing under Uniform Parentage Act).~~

~~(h) An order included in the judgment pursuant to Section 7750 (Uniform Parentage Act).~~

Interim Comment. Former Section 75 is continued in Section 6213 without substantive change. Under existing law this definition applies only to the Domestic Violence Prevention Act. Section 75 generalized this definition to apply to the entire Family Code. Section 6213 returns to the existing scheme and applies this definition only to the Domestic Violence Prevention Act. See Section 6201 (application of definitions). Where this term is used in the Family Code, but outside the Domestic Violence Prevention Act, the definition is made expressly applicable by use of a cross-reference. See Section 6213 Comment.

Fam. Code § 240 (repealed). Application of provisions of this part

SEC. ____. Section 240 of the Family Code is repealed.

~~240. Except as otherwise provided by law, this part applies to an order under any of the following provisions:~~

~~(a) Article 2 (commencing with Section 2035) of Chapter 4 of Part 1 of Division 6 (ex parte protective orders in proceedings for dissolution, nullity, or legal separation).~~

~~(b) Chapter 4 (commencing with Section 3600) of Part 1 of Division 9 (spousal and child support during pendency of proceeding).~~

~~(c) Part 3 (commencing with Section 5530) of Division 10 (Domestic Violence Prevention Act).~~

~~(d) Chapter 6 (commencing with Section 7700) of Part 3 of Division 12 (Uniform Parentage Act).~~

Interim Comment. Former Section 240 is generalized in new Section 240. This section applied only to specified restraining orders. New Section 240 is expanded to apply to all ex parte restraining orders issued under this code, except for orders issued in a summons pursuant to Part 3 (commencing with Section 231) of this division. See, e.g., Sections 4620 (ex parte restraining order in proceeding to secure deposit of assets), 6320-6325 (ex parte restraining order in proceeding under Domestic Violence Prevention Act).

Fam. Code § 240 (added). Application of provisions of this part

SEC. ____ Section 240 is added to the Family Code, to read:

240. (a) Except as provided in subdivision (b), this part applies where a temporary restraining order is issued without notice under this code.

(b) This part does not apply to a temporary restraining order issued pursuant to Part 3 (commencing with Section 231).

Comment. Section 240 generalizes and continues without substantive change the fourth sentence of former Code of Civil Procedure Section 545. The former section required that ex parte restraining orders issued pursuant to the Domestic Violence Prevention Act be obtained in the manner provided for in Code of Civil Procedure Section 527. The provisions of Part 4 (commencing with Section 240) of Division 2 of the Family Code are drawn from and supersede the provisions of Code of Civil Procedure Section 527, insofar as that section formerly applied to ex parte restraining orders issued under this code. See also Section 210 (general rules of practice and procedure); Code Civ. Proc. §§ 527(b) (section not applicable to this part), 529 (exemption from undertaking requirement).

Fam. Code § 241 (amended). Granting temporary order without notice

SEC. ____ Section 241 of the Family Code is amended to read:

241. Except as provided in Section ~~5530~~ 6300, an order described in Section 240 may not be granted without notice to the respondent unless it appears from facts shown by the affidavit in support of the application for the order, or in the application for the order, that great or irreparable injury would result to the petitioner before the matter can be heard on notice.

Comment. Section 241 is a new provision drawn from a part of the first sentence of the last paragraph of Code of Civil Procedure Section 527(a). The introductory clause has been added to Section 241 to recognize that Section 6300 provides for the issuance of an order under Division 10 (Prevention of Domestic Violence) on an affidavit showing reasonable proof of a past act of abuse. The reference to a "verified" application has been omitted as surplus. See Section 212 (pleadings to be verified). The reference to "petitioner" has been substituted for the former reference to "applicant." This is not a substantive change.

Interim Comment. Section 241 is revised to correct a cross-reference.

Fam. Code § 242 (repealed). Order to show cause

SEC. ____ Section 242 of the Family Code is repealed.

~~242. (a) Except as provided in subdivision (b), if an order described in Section 240 is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why a permanent order should not be granted, on the earliest day that the business of the court will permit, but not later than 15 days or, if good cause appears to the court, 20 days from the date of the order.~~

~~(b) The matter shall be made returnable not later than 20 days or, if good cause appears to the court, 25 days from the date of the order, in an order under:~~

~~(1) Article 2 (commencing with Section 2035) of Chapter 4 of Part 1 of Division 6;~~

~~(2) Division 10 (commencing with Section 5500).~~

~~(3) Article 2 (commencing with Section 7710) of Chapter 6 of Part 3 of Division 12.~~

~~(c) The court may on motion of the applicant or on its own motion shorten the time for service on the respondent of the order to show cause in an order under:~~

~~(1) Division 10 (commencing with Section 5500).~~

~~(2) Article 2 (commencing with Section 7710) of Chapter 6 of Part 3 of Division 12.~~

Interim Comment. Former Section 242 is restated in new Section 242. This section was intended to continue existing, inconsistent rules. The 15- or 20-day rule was drawn from Code of Civil Procedure 527, which provides the rule for civil actions generally. However, existing law made exceptions for ex parte orders in proceedings for dissolution, nullity, and legal separation, for ex parte orders pursuant to the Domestic Violence Prevention Act, and for ex parte orders in proceedings under the Uniform Parentage Act. For each of these the 20- or 25-day rule applied. In addition, orders shortening time were expressly allowed for orders under the Domestic Violence Prevention Act and the Uniform Parentage Act, but not for orders in proceedings for dissolution, nullity, or legal separation. This approach has been simplified by applying a single set of rules.

Fam. Code § 242 (added). Order to show cause

SEC. ____. Section 242 is added to the Family Code, to read:

242. (a) Except as provided in subdivision (b), if an order described in subdivision (a) of Section 240 is granted without notice, the matter shall be made returnable on an order requiring cause to be shown why a permanent order should not be granted, on the earliest day 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.

(b) If a hearing is not held within the time provided in subdivision (a), the court may nonetheless hear the matter, but the temporary restraining order described in subdivision (a) of Section 240 is unenforceable unless reissued under Section 245.

Comment. Subdivision (a) of Section 242 continues without substantive change the third sentence of the last paragraph of former Code of Civil Procedure Section 527(a), the second sentence of former Code of Civil Procedure Section 546(a), and the second sentence of former Civil Code Section 7020(a).

Subdivision (b) is new. Under subdivision (b), if a hearing is not held within the time provided in subdivision (a), the court may hear the order to show cause as though it were a notice of motion, and may hear the application for a long term order. This changes the result in *McDonald v. Superior Court*, 18 Cal. App. 2d 652, 64 P.2d 738 (1937). A temporary restraining order issued without notice that is not heard within the time prescribed by subdivision (a) and not reissued is unenforceable. This is consistent with *Agricultural Prorate Commission v. Superior Court*, 30 Cal. App. 2d 154, 85 P.2d 898 (1938).

Interim Comment. Section 242 is amended to do the following:

(1) To delete from subdivision (b) the provision for shortening time. This provision is continued in Section 243 without substantive change.

(2) To add a sentence permitting the court to hear an order to show cause not served within the statutory time, and provided that a temporary restraining order issued without notice is unenforceable unless reissued.

Fam. Code § 243 (amended). Readiness for hearing; continuance; counter-affidavits

SEC. ____ Section 243 of the Family Code is amended to read:

243. (a) When the matter first comes up for hearing, the applicant must be ready to proceed and,

(b) If a temporary restraining order has been issued without notice pending the hearing, the applicant must have served on the respondent, at least two days before the hearing, a copy of the application and of any each of the following:

(1) The order to show cause.

(2) The application and the affidavits to be used in the application and a copy of the and points and authorities in support of the application.

(3) Any other supporting papers filed with the court.

~~(c) If the applicant fails to comply with this subdivision subdivisions (a) and (b), the court shall dissolve the order.~~

~~(b) The (d) If service is made under subdivision (b), the respondent is entitled, as of course, to one continuance for a reasonable period, to respond to the application for the order.~~

(e) On motion of the petitioner or on its own motion, the court may shorten the time provided in this section for service on the respondent.

(f) The respondent may, in response to the order to show cause, present affidavits relating to the granting of the order, and if the affidavits are served on the applicant at least two days before the hearing, the applicant is not entitled to a continuance on account of the affidavits.

Comment. Section 243 is a new provision. Subdivisions (a)-(d) and (f) are drawn from the fourth, fifth, and sixth sentences of the last paragraph of Code of Civil Procedure Section 527(a). Section 243 is amended to require that the order to show cause be served within two days of the hearing, and to broaden the requirement that the "application" be served to include any supporting papers filed with the court. This would include the application and the income and expense declaration, if filed, consistent with existing practice. See also Section 240 (application of provisions of this part).

Subdivision (e) continues without substantive change the third sentences of former Code of Civil Procedure Section 546(a) and former Civil Code Section 7020(a). The reference to "applicant" has been substituted for the former reference to "plaintiff." This is not a substantive change.

If an order to show cause is issued without an accompanying ex parte temporary restraining order, the provisions of this chapter are not applicable. See Section 240 (application of provisions of this part). The order to show cause would be subject to the time requirements of a notice motion. See Fam. Code § 210 (general rules of practice and procedure); Code Civ. Proc. 1003, 1005(b).

See also Section 240 (application of provisions of this part).

Interim Comment. Section 243 is amended to require that the order to show cause be served within two days of the hearing, and to broaden the requirement that the "application" be served to include any supporting papers filed with the court. This would include the application and the income and expense declaration, if filed, consistent with existing practice. See 2 California Civil Procedure Before Trial *Injunctions* §§ 39.39, 39.43, 39.88 (Cal. Cont. Ed. Bar 1992). Section 243 is also amended to add subdivision (f) which replaces the same requirement formerly in Section 242.

Fam. Code § 753 (technical amendment). Excluding one spouse from other’s dwelling

SEC. ____ . Section 753 of the Family Code is amended to read:

753. Notwithstanding Section 752, except as provided in Article 2 (commencing with Section 2035), Article 3 (commencing with Section 2040), or Article 4 (commencing with Section 2045) of Chapter 4 of Part 1 of Division 6, neither spouse may be excluded from the other’s dwelling.

Comment. Section 753 restates the second part of former Civil Code Section 5102(a) without substantive change.

Interim Comment. Cross-references to Articles 3 and 4 of Chapter 4 of Part 1 of Division 6 are added to this section. This is not a substantive change. Article 2 (as enacted by 1992 Cal. Stat. ch. 162) provides for an order excluding a spouse from a dwelling either ex parte or after notice and hearing. New Article 2 includes only ex parte orders and Article 3 includes orders after notice and hearing. Article 4 provides for exclusion orders to be included in a judgment. The reference to this article is new and is added to provide a complete set of references to sections that provide for these orders.

Fam. Code §§ 2035-2043 (repealed). Ex parte orders

SEC. ____ . Article 2 (commencing with Section 2035) of Chapter 4 of Part 1 of Division 6 of the Family Code is repealed.

Interim Comment. Former Article 2 of Chapter 4 of Division 6 of the Family Code is repealed to allow for consolidation and reorganization of the provisions in Division 10 (Prevention of Domestic Violence). The substance of the statutes is continued without substantive change in new Division 10.

The following table indicates the disposition of each of the former sections in new Division 10.

<i>Repealed</i>	<i>Added</i>	<i>Repealed</i>	<i>Added</i>
2035	6320-6325	2039	6382
2036	6223	2040	6381
2036.5	6340(b)	2041	6383
2037(a)-(b)	6224	2042	6388
2037(c)	6302	2043	6228
2038	6380		

Fam. Code § 2035 (added). Ex parte orders

SEC. ____ . Article 2 (commencing with Section 2035) is added to Chapter 4 of Part 1 of Division 6 of the Family Code, to read:

Article 2. Ex Parte Orders

§ 2035. Ex parte orders during pendency of proceeding

2035. During the pendency of the proceeding, on application of a party the court may issue ex parte any of the following orders:

(a) An order restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or

personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life, and if the order is directed against a party, requiring that party to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures.

(b) An order determining payment of any liens or encumbrances coming due during the pendency of the order.

(c) Any other restraining order as provided in Chapter 2 (commencing with Section 6320) of Part 4 of Division 10.

Comment. Subdivisions (a) and (b) of Section 2035 restate without substantive change former Civil Code Section 4359(a)(1) and part of former Civil Code Section 4359(a)(5). A reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The former reference to Code of Civil Procedure Section 527 has been omitted. This is not a substantive change. See Section 240 & Comment.

Subdivision (c) is new and has been added to provide a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains other substantive provisions for the issuance of ex parte restraining orders. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence).

For general provisions relating to ex parte restraining orders, see Part 4 (commencing with Section 240) of Division 2. See also Sections 2000 (application of part), 6227 (support person for victim of domestic violence).

Fam. Code § 2040 (added). Orders issuable after notice and hearing

SEC. ____. Article 3 (commencing with Section 2040) is added to Chapter 4 of Part 1 of Division 6 of the Family Code, to read:

Article 3. Orders Issuable After Notice and Hearing

§ 2040. Orders issuable after notice and hearing

2040. After notice and a hearing, the court may issue a restraining order as provided in Chapter 3 (commencing with Section 6340) of Part 4 of Division 10.

Comment. Section 2040 is new. This section provides a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains the substantive provisions for the issuance of restraining orders after notice and hearing. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence). The former Family Law Act, applicable to dissolution, nullity, and legal separation proceedings, did not contain a general provision for the issuance of restraining orders after notice and hearing, despite a provision for issuance of an order excluding a party from a dwelling after notice and hearing. The addition of this general provision is not a substantive change. See Cal. R. Ct. 1296.29 (new July 1, 1991) (restraining order after hearing).

See also Sections 2000 (application of part), 6227 (support person for victim of domestic violence).

Fam. Code § 2045 (repealed). Orders included in judgment

SEC. ____. Article 3 (commencing with Section 2045) of Chapter 4 of Part 1 of Division 6 of the Family Code is repealed.

Interim Comment. Former subdivisions (a) and (b) of Section 2045 are continued in Chapter 4 (commencing with Section 6360) of Part 4 of Division 10 without substantive change. Former

subdivisions (b) and (c) are continued without substantive change in Sections 6380 and 6388. New Section 2045 is added to refer to the general domestic violence statute.

Fam. Code § 2045 (added). Orders included in judgment

SEC. ____ Article 4 (commencing with Section 2045) is added to Chapter 4 of Part 1 of Division 6 of the Family Code, to read:

Article 4. Orders Included in Judgment

§ 2045. Orders included in judgment

2045. A judgment entered in the proceeding may include a restraining order as provided in Chapter 4 (commencing with Section 6360) of Part 4 of Division 10.

Comment. Section 2045 is new. This section provides a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains the substantive provisions for issuance of restraining orders in a judgment. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence). See also Sections 2000 (application of part), 6227 (support person for victim of domestic violence).

Fam. Code § 3022 (technical amendment). Factors considered in determining best interest of child

SEC. ____ Section 3022 of the Family Code is amended to read:

3022. In making a determination of the best interest of the child in a proceeding under this division, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent against the child or against the other parent. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, abuse “against the child” means “child abuse” as defined in Section 11165.6 of the Penal Code and abuse “against the other parent” means “abuse” as defined in Section ~~55~~ 6203 of this code.

(c) The nature and amount of contact with both parents.

Comment. Section 3022 continues former Civil Code Section 4608 without substantive change. A reference to this division has been substituted for a narrower reference to “this title,” which referred to former Title 4 (commencing with former Civil Code Section 4600) of the former Family Law Act. This is not intended as a substantive change. See also Sections 3040 (order of preference in awarding custody), 3041 (additional requirements for custody award to nonparent), 3042 (consideration of wishes of child in custody case), 3043 (nomination of guardian by parent), 3044 (parent convicted under certain Penal Code provisions), 3080 (presumption for joint custody where parents agree to joint custody).

Interim Comment. This section is amended to correct a cross-reference.

Fam. Code §§ 7700-7750 (repealed). Protective and temporary custody orders

SEC. ____ Chapter 6 (commencing with Section 7700) of Part 3 of Division 12 the Family Code is repealed.

CHAPTER 6. PROTECTIVE AND TEMPORARY CUSTODY ORDERS

Interim Comment. Former Chapter 6 of Part 3 of Division 12 of the Family Code is repealed to allow for consolidation and reorganization of the provisions in Division 10 (prevention of domestic violence). The substance of the former statutes is continued without substantive change in new Chapter 6 of Division 12 and in new Division 10.

The following table indicates the disposition of each of the former sections in new Division 10.

<i>Repealed</i>	<i>Added</i>	<i>Repealed</i>	<i>Added</i>
7700	7700	7740	6380
7710	6320-6325	7741	6382
7711	6223	7742	6383
7720	6340(a), 6342	7743	6388
7721	6340(b)	7750(a)	6360
7722	6345	7750(b)	6361
7730	6224	7750(c)	6380
7731	6302	7750(d)	6388

Fam. Code §§ 7700-7730 (added). Restraining orders

SEC. ____ Chapter 6 (commencing with Section 7700) is added to Part 3 of Division 12 of the Family Code, to read:

CHAPTER 6. RESTRAINING ORDERS

Article 1. Orders in Summons

§ 7700. Temporary restraining order in summons

7700. In addition to the contents required by Section 412.20 of the Code of Civil Procedure, in a proceeding under this part the summons shall contain a temporary restraining order restraining all parties, without the prior written consent of the other party or an order of the court, from removing from the state any minor child for whom the proceeding seeks to establish a parent and child relationship.

Comment. Section 7700 continues without substantive change the first sentence and the last part of the last sentence of the first paragraph of former Code of Civil Procedure Section 412.21(b). The reference to "children" has been omitted as surplus. See Section 10 (singular includes plural). For general provisions governing restraining orders in summons, see Sections 231-235.

Interim Comment. This section continues without change existing Section 7700. It is repealed and added to allow for repeal of Chapter 6 in its entirety.

Article 2. Ex Parte Orders

§ 7710. Ex parte restraining orders

7710. During the pendency of a proceeding under this part, on application of a party the court may issue an ex parte restraining order as provided in Chapter 2 (commencing with Section 6320) of Part 4 of Division 10.

Comment. Section 7710 is new. This section provides a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains the substantive provisions for the issuance of ex parte restraining orders. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence).

Article 3. Orders Issuable After Notice and Hearing

§ 7720. Orders issuable after notice and hearing

7720. After notice and a hearing, the court may issue a restraining order as provided in Chapter 3 (commencing with Section 6340) of Part 4 of Division 10.

Comment. Section 7720 is new. This section provides a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains the substantive provisions for the issuance of restraining orders after notice and hearing. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence).

The former provisions for issuance of orders after notice and hearing in a proceeding under the Uniform Parentage Act did not provide for issuance of the orders in Sections 6343 (counseling) or 6344 (attorneys fees and costs). However, the Judicial Council form used for orders after hearing applies to proceedings under the Uniform Parentage Act and allows for attorneys fees and costs. See Cal. R. Ct. 1296.31 (rev. Jan. 1, 1992) (findings and order after hearing). Since, the counseling order could be obtained by unmarried parties under the Domestic Violence Prevention Act, allowing the order in proceedings under the Uniform Parentage Act is not a substantive change.

Article 4. Orders in Judgment

§ 7730. Orders included in judgment

7730. A judgment entered in the proceeding may include a restraining order as provided in Chapter 4 (commencing with Section 6360) of Part 4 of Division 10.

Comment. Section 7730 is new. This section provides a reference to the chapter in Division 10 (Domestic Violence Prevention Act) that contains the substantive provisions for the inclusion of restraining orders in a judgment. See Section 6200 Comment (consolidation of substantive provisions regarding issuance of restraining orders intended to prevent domestic violence).

GOVERNMENT CODE

Gov't Code § 26833.5 (technical amendment). Certified copies of order under certain domestic relations laws

SEC. ____. Section 26833.5 of the Government Code is amended to read:

26833.5. No fee shall be charged to an indigent plaintiff for certified copies of any order issued pursuant to any of the following:

(a) Article 2 (commencing with Section 2035), Article 3 (commencing with Section 2040), or Article 4 (commencing with Section 2045) of Chapter 4 of Part 1 of Division 6 of the Family Code.

(b) Division 10 (commencing with Section 5500) of the Family Code.

(c) Article 2 (commencing with Section 7710), or Article 3 (commencing with Section 7720), or Article 4 (commencing with Section 7730) of Chapter 6 of Part 3 of Division 12 of the Family Code.

Comment. Section 26833.5 is amended to substitute references to the Family Code provisions that replaced the former Civil Code and Code of Civil Procedure provisions. The references to restraining orders included in a judgment have been added.

Interim Comment. In subdivision (a), cross-references to Articles 3 and 4 of Chapter 4 of Part 1 of Division 6 are added. This is not a substantive change. Article 2 (as enacted by 1992 Cal. Stat. ch. 162) provides for orders issued either ex parte or after notice and hearing. New Article 2 includes only ex parte orders and Article 3 includes orders after notice and hearing. Article 4 provides for orders to be included in a judgment. The reference to this article is new and is added to provide a complete set of references to sections that provide for these orders.

In subdivision (c), the reference to Article 4 is added. Article 4 provides for orders to be included in a judgment. The reference to this article is new and is added to provide a complete set of references to sections that provide for these orders.

Gov't Code § 26841 (technical amendment). Fees for protective order

SEC. ____ . Section 26841 of the Government Code is amended to read:

26841. The superior court in any county may increase the fee for the filing of any paper in response to an order or an application for ~~an order described in subdivision (b) or (c) of Section 2035 of the Family Code, issued pursuant to that section, or issued to any person in accordance with Division 10 (commencing with Section 5500)~~ a domestic violence prevention order as defined in Section 6213 of the Family Code, by five dollars (\$5), upon the adoption of a resolution to that effect by the board of supervisors. The five dollars (\$5) shall be disposed of pursuant to the provisions of Chapter 5 (commencing with Section 18290) of Part 6 of Division 9 of the Welfare and Institutions Code.

Comment. Section 26841 is amended to substitute a reference to “a domestic violence prevention order as described in Section 6213 of the Family Code” for the references to former provisions in the Code of Civil Procedure and Civil Code. This is not a substantive change.

Interim Comment. Section 26841 is amended to correct a cross-reference. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

PENAL CODE

Penal Code § 136.2 (amended). Penalty for intimidation or dissuasion of victim or witness

SEC. ____ . Section 136.2 of the Penal Code is amended to read:

136.2. Upon a good cause belief that intimidation or dissuasion of a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following:

(a) An order that a defendant shall not violate any provision of Section 136.1.

(b) An order that a 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, shall not violate any provisions of Section 136.1.

(c) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under such reasonable restrictions as the court may impose.

(d) An order calling for a hearing to determine if an order as described in subdivisions (a) to (c), inclusive, should be issued.

(e) 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. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness.

For purposes of this subdivision, "immediate family members" include the spouse, children, or parents of the victim or witness.

(f) Any order protecting victims of violent crime from contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant.

Any person violating any order made pursuant to subdivisions (a) to (f), inclusive, may be punished for any substantive offense described in Section 136.1, or for a contempt of the court making the order. No finding of contempt shall be a bar to prosecution for a violation of Section 136.1. However, any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed upon conviction of an offense described in Section 136.1. Any conviction or acquittal for any substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act.

(g) In all cases where the defendant is charged with a crime of pursuant to Section 273.5, 273.6, or any other section based on acts constituting domestic violence, as defined in Section 13700 6211 of the Family Code, the court shall consider issuing the above-described orders on its own motion. In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue.

(h) On or before July 1, 1991, the Judicial Council shall adopt forms for orders under this section.

Comment. Subdivision (g) of Section 136.2 is amended to substitute a reference to the Family Code provision defining "domestic violence." The Family Code definition is the same as the Penal Code definition formerly referred to, except that the Family Code definition applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. See also Fam. Code §§ 6203 ("abuse" defined), 6209 ("cohabitant" and "former cohabitant" defined).

Penal Code § 273.6 (amended). Willful violation of court order

SEC. ____ Section 273.6 of the Penal Code is amended to read:

273.6. (a) A willful and knowing violation of any of the court orders described in subdivision (c), when obtained pursuant to the Family Code or Section 527.6 of the Code of Civil Procedure is a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than one year or by both the fine and imprisonment.

(b) In the event of a violation of subdivision (a) which results in a physical injury, the person shall be imprisoned in the county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

(c) Subdivisions (a) and (b) shall apply to the following court orders:

~~(1) An order enjoining any party from molesting, attacking, striking, threatening, sexually assaulting, battering, harassing, or disturbing the peace of the other party, or other named family and household members.~~

~~(2) An order excluding one party from the family dwelling or from the dwelling of the other.~~

~~(3) An order enjoining a party from specified behavior which the court determined was necessary to effectuate the orders under subdivision (a) or (d) a domestic violence prevention order as defined in Section 6213 of the Family Code.~~

(d) A second or subsequent conviction for a violation of an order issued pursuant to subdivision (a) occurring within seven years of a prior conviction for a violation of such an order and involving an act of violence or "a credible threat" of violence as defined in subdivision (b) of Section 139 is punishable by imprisonment in the county jail not to exceed one year, or in the state prison for 16 months or two or three years.

(e) The prosecuting agency of each county shall have the primary responsibility for the enforcement of orders issued pursuant to the provisions listed in subdivisions (a), (b), and (d).

Comment. Subdivision (a) of Section 273.6 is amended to substitute a reference to the Family Code for the references to the former Civil Code and Code of Civil Procedure provisions. In subdivision (c), a reference to the Family Code provision defining "domestic violence prevention order" is substituted for the former list of specific orders. The Family Code provision contains the same list, except that it authorizes issuance of an order enjoining telephoning. See Fam. Code § 6213 ("domestic violence prevention order" defined).

Staff Note. This section is amended by 1992 Cal. Stat. ch. 1209 to add "contacting repeatedly by mail with the intent to harass." This is continued in Family Code Section 6320, which is included in Section 6213 by cross-reference.

Penal Code § 273.83 (amended). Individuals subject to special abuser prosecution effort

SEC. ____. Section 273.83 of the Penal Code is amended to read:

273.83. (a) An individual shall be the subject of a spousal abuser prosecution effort who is under arrest for any act or omission described in ~~subdivisions (a) and (b) of Section 13700~~ Section 6203 of the Family Code against a person described in Section 6211 of the Family Code, except that for the purposes of this chapter those persons do not include a child.

(b) In applying the spousal abuser selection criteria set forth in subdivision (a), a district attorney shall not reject cases for filing exclusively on the basis that there is a family or personal relationship between the victim and the alleged offender.

(c) In exercising the prosecutorial discretion granted by Section 273.85, the district attorney shall consider the number and seriousness of the offenses currently charged against the defendant.

Comment. Subdivision (a) of Section 273.83 is amended to substitute references to the Family Code provisions defining "abuse" and "domestic violence." The Family Code definitions are the same as the Penal Code definitions formerly referred to, except that the Family Code definition of "abuse" includes "sexual assault" and the definition of "domestic violence" applies to children. See Fam. Code §§ 6203 ("abuse" defined), 6211 ("domestic violence" defined) & Comment. See also Fam. Code Section 6209 ("cohabitant" and "former cohabitant" defined). However, this provision is also amended to make clear that, for purposes of this chapter, the broader definition of "domestic violence" is not applicable. For the provisions authorizing a special abuser prosecution unit in cases involving violence against a child, see Penal Code § 999q-999y (child abusers).

Penal Code § 277 (amended). Child concealment

SEC. ____. Section 277 of the Penal Code is amended to read:

277. In the absence of a court order determining rights of custody or visitation to a minor child, every person having a right of custody of the child who maliciously takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child, shall be punished by imprisonment in the county jail for a period of not more than one year, a fine of one thousand dollars (\$1,000), or both, or by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars (\$10,000), or both.

A subsequently obtained court order for custody or visitation shall not affect the application of this section.

As used in this section, "good cause" means a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm. "Good cause"

also includes the good faith and reasonable belief by a person with a right of custody of the child who has been the victim of domestic violence by another person with a right of custody of the child, that the child, if left with the other person, will suffer immediate bodily injury or emotional harm. The person who takes, detains, or conceals the child shall file a report with the district attorney's office of his or her action, and shall file a request for custody, within a reasonable time in the jurisdiction where the child had been living, setting forth the basis for the immediate bodily injury or emotional harm to the child. The address of the parent, or a person who has been granted access to the minor child by a court order, who takes, detains, or conceals the child, with good cause, shall remain confidential until released by court order.

As used in this section:

(a) "Domestic violence" means ~~abuse perpetrated against any of the following persons:~~

~~(1) A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the person has had a dating or engagement relationship.~~

~~(2) A person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female parent pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code) "domestic violence" as defined in Section 6211 of the Family Code.~~

(b) "Emotional harm" includes having a parent who has committed domestic violence against the parent who is taking and concealing the child.

Comment. Subdivision (a) of Section 277 is amended to substitute a reference to the Family Code provision defining "domestic violence." The Family Code definition is the same as the definition formerly included in this provision, except that the Family Code applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. See also Sections 6203 ("abuse" defined), 6209 ("cohabitant" and "former cohabitant" defined).

Penal Code § 653m (amended). Penalty for repeated, annoying telephone calls

SEC. ____. Section 653m of the Penal Code is amended to read:

653m. (a) Every person who with intent to annoy telephones another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor.

(b) Every person who makes repeated telephone calls with intent to annoy another person at his or her residence, is, whether or not conversation ensues from making the telephone call, guilty of a misdemeanor.

Nothing in this subdivision shall apply to telephone calls made in good faith.

(c) Every person who makes repeated telephone calls with the intent to annoy another person at his or her place of work, is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in a

county jail for not more than one year, or by both the fine and imprisonment. Nothing in this subdivision shall apply to telephone calls made in good faith. This subdivision applies only if one or both of the following circumstances exist:

(1) There is a temporary restraining order, an injunction, or any other court order, or any combination of these court orders, in effect prohibiting the behavior described in this section.

(2) The person makes repeated telephone calls with the intent to annoy another person at his or her place of work, totaling more than 10 times in a 24-hour period, whether or not conversation ensues from making the telephone call, and the repeated phone calls are made to the work place of ~~an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the person has a child or has had a dating or engagement relationship or is having a dating or engagement relationship~~ a person described in Section 6211 of the Family Code.

(d) Any offense committed by use of a telephone as provided in this section may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(e) Subdivision (a), (b), or (c) is violated when the person acting with intent to annoy makes a telephone call requesting a return call and performs the acts prohibited under subdivision (a), (b), or (c) upon receiving the return call.

(f) If probation is granted, or the execution or imposition of sentence is suspended, for any person convicted under this section, the court may order as a condition of probation that the person participate in counseling.

Comment. Subdivision (c)(2) of Section 653m [as amended by 1992 Cal. Stat. ch. 1136, § 7] is amended to substitute a reference to the Family Code provision defining "domestic violence" for the list of person formerly included in the provision. The Family Code definition lists the same persons, except that the Family Code definition also applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. See also Sections 6203 ("abuse" defined), 6209 ("cohabitant" and "former cohabitant" defined).

Penal Code § 853.6 (amended). Substantive rules regarding citation and release for misdemeanors

SEC. ____ . Section 853.6 of the Penal Code is amended to read:

853.6. (a) In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter. If the person is released, the officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of the person, the offense charged, and the time when, and place where, the person shall appear in court. If, pursuant to subdivision (i), the person is not released prior to being booked and the officer in charge of the booking or his or her superior determines

that the person should be released, the officer or superior shall prepare a written notice to appear in a court.

In any case in which a person is arrested for a misdemeanor violation of a protective court order involving domestic violence, as defined in ~~subdivision (b) of Section 13700~~ Section 6211 of the Family Code, the person shall be taken before a magistrate instead of being released according to the procedures set forth in this chapter, unless the arresting officer determines that there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested.

Nothing in this subdivision shall be construed to affect a defendant's ability to be released on bail or on his or her own recognizance.

(b) Unless waived by the person, the time specified in the notice to appear shall be at least 10 days after arrest if the duplicate notice is to be filed by the officer with the magistrate.

(c) The place specified in the notice shall be the court of the magistrate before whom the person would be taken if the requirement of taking an arrested person before a magistrate were complied with, or shall be an officer authorized by that court to receive a deposit of bail.

(d) The officer shall deliver one copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his or her written promise to appear in court as specified in the notice by signing the duplicate notice which shall be retained by the officer. Upon the signing of the duplicate notice, the arresting officer shall immediately release the person arrested from custody.

(e) The officer shall, as soon as practicable, file the duplicate notice, as follows:

(1) It shall be filed with the magistrate if the offense charged is an infraction.

(2) It shall be filed with the magistrate if the prosecuting attorney has previously directed the officer to do so.

(3) The duplicate notice and underlying police reports in support of the charge or charges shall be filed with the prosecuting attorney in cases other than those specified in paragraphs (1) and (2).

If the duplicate notice is filed with the prosecuting attorney, he or she, within his or her discretion, may initiate prosecution by filing the notice or a formal complaint with the magistrate specified in the duplicate notice within 25 days from the time of arrest. If the prosecution is not to be initiated, the prosecutor shall notice to the person arrested at the address on the notice to appear. The failure by the prosecutor to file the notice or formal complaint within 25 days of the time of the arrest shall not bar further prosecution of the misdemeanor charged in the notice to appear. However, any further prosecution shall be preceded by a new and separate citation or an arrest warrant.

Upon the filing of the notice with the magistrate by the officer, or the filing of the notice or formal complaint by the prosecutor, the magistrate may fix the amount of bail which in his or her judgment, in accordance with Section 1275, is reasonable and sufficient for the appearance of the defendant and shall indorse upon the notice a statement signed by him or her in the form set forth in Section 815a. The defendant may, prior to the date upon which he or she promised to appear in court, deposit with the magistrate the amount of bail set by the magistrate. At the time the case is called for arraignment before the magistrate, if the defendant does not appear, either in person or by counsel, the magistrate may declare the bail forfeited, and may, in his or her discretion, order that no further proceedings shall be had in the case, unless the defendant has been charged with violation of Section 374.3 or 374.7 of this code or of Section 11357, 11360, or 13002 of the Health and Safety Code, or a violation punishable under Section 5008.7 of the Public Resources Code, and he or she has previously been conflicted of a violation of that section or a violation which is punishable under that section, except in cases where the magistrate finds that undue hardship will be imposed upon the defendant by requiring him or her to appear, the magistrate may declare the bail forfeited and order that no further proceedings be had in the case.

Upon the making of the order that no further proceedings be had, all sums deposited as bail shall immediately be paid into the county treasury for distribution pursuant to Section 1463.

(f) No warrant shall be issued for the arrest of a person who has given a written promise to appear in court, unless and until he or she has violated that promise or has failed to deposit bail, to appear for arraignment, trial, or judgment or to comply with the terms and provisions of the judgment, as required by law.

(g) The officer may either book the arrested person prior to release or indicate on the citation that the arrested person shall appear at the arresting agency to be booked or indicate on the citation that the arrested person shall appear at the arresting agency to be fingerprinted prior to the date the arrested person appears in court. If it is indicated on the citation that the arrested person shall be booked or fingerprinted prior to the date of the person's court appearance, the arresting agency at the time of booking or fingerprinting shall provide the arrested person with verification of the booking or fingerprinting by either making an entry on the citation or providing the arrested person a verification form established by the arresting agency. If it is indicated on the citation that the arrested person is to be booked or fingerprinted, the magistrate, judge, or court shall, before the proceedings begin, order the defendant to provide verification that he or she was be booked or fingerprinted by the arresting agency. If the defendant cannot produce verification, the magistrate, judge, or court shall require that the defendant be booked or fingerprinted by the arresting agency before the next court appearance, and that the defendant provide the verification at the next court

appearance unless both parties stipulate that booking or fingerprinting is not necessary.

(h) A peace officer shall use the written notice to appear procedure set forth in this section for any misdemeanor offense in which the officer has arrested a person without a warrant pursuant to Section 836 or in which he or she has taken custody of a person pursuant to Section 847.

(i) Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease, in which case the arresting officer may release the person, or the arresting officer shall indicate, on a form to be established by his or her employing law enforcement agency, which of the following was a reason for the nonrelease:

(1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.

(2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.

(4) There were one or more outstanding arrest warrants for the person.

(5) The person could not provide satisfactory evidence of personal identification.

(6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.

(7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

The form shall be filed with the arresting agency as soon as practicable and shall be made available to any party having custody of the arrested person, subsequent to the arresting officer, and to any person authorized by law to release him or her for custody before trial.

(j) Once the arresting officer has prepared the written notice to appear and has delivered a copy to the person arrested, the officer shall deliver the remaining original and all copies as provided by subdivision (e).

Any person, including the arresting officer and any member of the officer's department or agency, or any peace officer, who alters, conceals, modifies, nullifies, or destroys, or causes to be altered, concealed, modified, nullified, or

destroyed, the face side of the remaining original or any copy of a citation that was retained by the officer, for any reason, before it is filed with the magistrate or with a person authorized by the magistrate to receive deposit of bail, is guilty of a misdemeanor.

If, after an arrested person has signed and received a copy of a notice to appear, the arresting officer determines that, in the interest of justice, the citation or notice should be dismissed, the arresting agency may recommend, in writing, to the magistrate that the charges be dismissed. The recommendation shall cite the reasons for the recommendation and shall be filed with the court.

If the magistrate makes a finding that there are grounds for dismissal, the finding shall be entered in the record and the charges dismissed.

Under no circumstances shall a personal relationship with any officer, public official, or law enforcement agency be grounds for dismissal.

(k) For purposes of this section, the term "arresting agency" includes any other agency designated by the arresting agency to provide booking or fingerprinting services.

Comment. The second paragraph of subdivision (a) of Section 853.6 [as amended by 1992 Cal. Stat. ch. 1105, § 1] is amended to substitute a reference to the Family Code provision defining "domestic violence." The Family Code definition is the same as the Penal Code definition formerly referred to, except that the Family Code definition applies to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. See also Fam. Code §§ 6203 ("abuse" defined), 6209 ("cohabitant" and "former cohabitant" defined).

Penal Code § 1000.6 (amended). Application of chapter authorizing diversion of misdemeanor defendant in domestic violence case

SEC. ____ . Section 1000.6 of the Penal Code is amended to read:

1000.6. (a) Upon the determination of the judge presiding, this chapter shall apply whenever a case is before the court upon an accusatory pleading for an act of domestic violence which is charged as, or reduced to, a misdemeanor and all of the following apply to the defendant:

(1) The defendant has no conviction for any offense involving violence within seven years prior to the alleged commission of the charged divertible offense.

(2) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.

(3) The defendant has not been diverted pursuant to this chapter within five years prior to the charged divertible offense. Notwithstanding the foregoing, the provisions of this chapter are not applicable to a person who is charged with a violation of subdivision (a) of Section 245, Section 273.5, as added by Chapter 912 of the Statutes of 1977.

(b) The prosecuting attorney shall, and the defense attorney may, review his or her file to determine whether or not paragraphs (1) or (3), inclusive, or subdivision (a) are applicable to the defendant. If the defendant is found eligible, the

prosecuting attorney shall notify the court, the defendant, and the defense attorney, and the defense attorney may move that the defendant be diverted pursuant to this chapter. If the defendant is found by the prosecuting attorney to be ineligible for diversion, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney.

(c) No admission of guilt shall be required of a defendant in order for this chapter to be applicable.

(d) As used in this chapter “domestic violence” means ~~intentionally or recklessly causing or attempting to cause bodily injury to a family or household member or placing a family or household member in reasonable apprehension of imminent serious bodily injury to himself or herself or another.~~

~~(e) As used in this chapter “family or household member” means a spouse, former spouse, parent, any other person related by consanguinity, or any person who regularly resides or who within the previous six months regularly resided in the household. “Family or household member” does not include a child “domestic violence” as defined in Section 6211 of the Family Code. For purposes of this chapter, “domestic violence” does not include violence against a child.~~

Comment. Subdivision (d) of Section 1000.6 is amended to substitute a reference to the Family Code provision defining “domestic violence,” for consistency with other Penal Code sections. See Penal Code §§ 136.2 (penalty for intimidation or dissuasion of victim or witness), 273.6 (willful violation of court order), 237.83 (individuals subject to special abuser prosecution effort), 277 (child concealment), 653m (penalty for repeated, annoying telephone calls), 853.6 (substantive rules regarding citation and release for misdemeanors), 12021 (firearms), 12025.5 (justifiable violations of Section 12025), 12028.5 (custody of firearms or other deadly weapon), 12031 (carrying loaded firearms), 12076 (registration requirements for purchaser or transferee of firearm), 13700 (definitions). Subdivision (e), which formerly defined “family or household member” has been omitted. The Family Code definition of “domestic violence” is substantively the same as the definitions formerly included in this provision, except that the Family Code definition includes the following matters:

(1) “Sexual assault” is included in the definition of “abuse,” that is applicable to the Family Code definition of “domestic violence.” See Fam. Code §§ 6203 (“abuse” defined), 6211 (“domestic violence” defined).

(2) The six month limitation on former cohabitants has been removed from the definition of “former cohabitant” that is applicable to the Family Code definition of “domestic violence.” See Fam. Code §§ 6209 (“cohabitant” and “former cohabitant” defined), 6211 (“domestic violence” defined).

(3) The Family Code definition of “domestic violence” applies to children. See Fam. Code § 6211 (“domestic violence” defined) & Comment. However, the last sentence of subdivision (d) has been added to make clear that for purposes of this chapter, violence against children is not included in the definition of “domestic violence.” This continues the substance of the final sentence of former subdivision (e). For the provision authorizing diversion in cases involving children, see Penal Code §§ 1000.12-1000.18 (child abuse and neglect counseling).

Penal Code § 12021 (technical amendment). Firearms

SEC. ____ . Section 12021 of the Penal Code is amended to read:

12021. (a) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in Section 12001.6, or who is addicted to the use of any narcotic drug, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 12001.6, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(c)(1) Except as provided in subdivision (a) or paragraph (2) of this subdivision, any person who has been convicted of a misdemeanor violation of Section 136.5, 140, 171b, 171c, 171d, 241, 243, 244.5, 245, 245.5, 246.3, 247, 417, 417.2, 626.9, subdivision (b) or (d) of Section 12034, subdivision (a) of Section 12100, 12320, or 12590 and who, within 10 years of the conviction, owns, or has in his or her possession or under his or her custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine. The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. However, the prohibition in this paragraph may be reduced, eliminated, or conditioned as provided in paragraph (2).

(2) Any person whose continued employment or livelihood is dependent on the ability to legally possess a firearm, who is subject to the prohibition imposed by this subdivision because of a conviction prior to the effective date of the amendments which added this paragraph to this section, at any time until January 1, 1993, may petition the court for relief from this prohibition. The court may reduce or eliminate the prohibition, impose conditions on the elimination or reduction of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate. In making its decision, the court may consider the petitioner's continued employment, the interest of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner. It is the intent of the Legislature in enacting this paragraph to permit persons who were convicted of an offense specified in this subdivision prior to the effective date of the amendments which added this paragraph to this section to seek relief from the prohibition imposed by this subdivision.

(d) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, or has in his or her possession or under his or her custody or control, any firearm but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine. The court, on forms provided by the Department of Justice, shall notify the department of persons subject to this subdivision. The notice shall include a copy of the order of probation and a copy of any minute order or abstract reflecting the order and conditions of probation.

(e) Any person who (1) is alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, (2) is found to be a fit and proper subject to be dealt with under the juvenile court law, and (3) is subsequently adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code shall not own, or have in his or her possession or under his or her custody or control, any firearm until the age of 30 years. A violation of this subdivision shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine. The juvenile court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. Notwithstanding any other law, the forms required to be submitted to the department pursuant to this subdivision may be used to determine eligibility to acquire a firearm.

(f) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars (\$1,000), or received both punishments.

(g) Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is subject to a ~~restraining order issued pursuant to Division 10 (commencing with Section 5500) of the Family Code and predicated on subdivision (b), (c), or (d) of Section 2035~~ domestic violence prevention order as defined in Section 6213 of the Family Code, is guilty of a public offense, which shall be punishable by imprisonment in the state prison or in a county jail not exceeding one year, by a fine not exceeding one thousand dollars (\$1,000), or both that imprisonment and fine. This subdivision does not apply unless the copy of the

restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating (1) that the person is prohibited from purchasing or receiving or attempting to purchase or receive a firearm and (2) specifying the penalties for violating this subdivision, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in Section ~~5516~~ **6225** of the Family Code. However, this subdivision does not apply if the firearm is received as part of the disposition of community property pursuant to Division 7 (commencing with Section 2500) of the Family Code.

Comment. Subdivision (g) of Section 12021 is amended to substitute references to the Family Code provisions that replaced the former Civil Code provisions. The reference to former Code of Civil Procedure Section 550(f) is replaced by a reference to Family Code Section 6225, which requires the court to give the respondent notice that the respondent is prohibited from purchasing or receiving or attempting to purchase or receive a firearm, including a notice of the penalty for violation. The reference to “domestic violence prevention order as defined in Section 6213 of the Family Code” has been substituted for the reference to orders under specific sections of the Code of Civil Procedure and the Civil Code. This is not a substantive change, since Section 6213 defines “domestic violence prevention order” to include these orders.

Interim Comment. Section 12021 is amended to correct a cross-reference. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Penal Code § 12025.5 (technical amendment). Justifiable violations of Section 12025

SEC. ____ . Section 12025.5 of the Penal Code is amended to read:

12025.5. A violation of Section 12025 is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This section may not apply when the circumstances involve a mutual restraining order issued pursuant to ~~Sections 2035 and 2036 of the Family Code, or Sections 5514 and 5550 of the Family Code, or Sections 7710 and 7714~~ **Division 10 (commencing with Section 6200)** of the Family Code, absent a factual finding of a specific threat to the person’s life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to defendants charged with violating Section 12025 or of committing other similar offenses.

Upon trial for violating Section 12025, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

Comment. Section 12025.5 is amended to substitute a reference to the Family Code provisions that replaced the former Civil Code provision and to include similar mutual restraining orders issued under other domestic violence provisions. The word “mutual” has been substituted for “reciprocal” to conform to the terminology of the Family Code provisions. See also Fam. Code § 6223 (conditions for issuance of mutual restraining order).

Interim Comment. Section 12025.5 is amended to correct the cross-references. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Penal Code § 12028.5 (amended). Custody of firearm or other deadly weapon

SEC. ____ . Section 12028.5 of the Penal Code is amended to read:

12028.5. (a) As used in this section, the following definitions shall apply:

(1) ~~“Abuse” means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.~~

(2) ~~“Family violence” has the same meaning as domestic violence as defined in subdivision (b) of Section 13700, and also includes any abuse perpetrated against a family or household member.~~

(3) ~~“Family or household member” means a spouse, former spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides or who regularly resided in the household.~~

~~The presumption applies that the male parent is the father of any child of the female pursuant to the Uniform Parentage Act (Part 7 (commencing with Section 7000) of Division 4 of the Civil Code).~~

(4) (1) ~~“Deadly weapon” means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.~~

(2) ~~“Domestic violence” means “domestic violence” as defined in Section 6211 of the Family Code.~~

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a member of the University of California Police Department, as defined in subdivision (c) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (d) of Section 830.2, and a peace officer of the Department of Parks and Recreation, as defined in subdivision (g) of Section 830.2, who is at the scene of a **family domestic** violence incident involving a threat to human life or a physical assault, may take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (e), if a firearm or other deadly weapon is not retained for use as

evidence related to criminal charges brought as a result of the family domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within 72 hours following the initial seizure, except as provided in subdivision (c), the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any firearm or other deadly weapon which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(d) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, or by a peace officer of the Department of Parks and Recreation, as defined in subdivision (g) of Section 830.2, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (i), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(e) In those cases where a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 10 days of the seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

(f) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family domestic violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(g) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(h) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(i) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(j) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section.

Comment. Subdivision (a) of Section 12028.5 [as amended by 1992 Cal. Stat. ch. 1136, § 8], is amended to substitute a reference to the Family Code provision defining "domestic violence" for the former definitions of "abuse," "family violence," and "family or household member." The Family Code definition is substantively the same as the definitions formerly included in this provision, since the Family Code definition of "domestic violence" has been broadened to apply to children. See Fam. Code § 6211 ("domestic violence" defined) & Comment. The Family Code definition of domestic violence also continues the substance of the omitted definition of "abuse," except that the Family Code provision defining "abuse" to include "sexual assault" is broader. See Fam. Code §§ 6203 ("abuse" defined). See also Fam. Code § 6209 ("cohabitant" and "former cohabitant" defined).

Penal Code § 12031 (technical amendment). Carrying loaded firearms; misdemeanor; punishment; exceptions

SEC. ____. Section 12031 of the Penal Code is amended to read:

12031. (a) (1) Except as provided in subdivision (b), (c) or (d), every person who carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor.

(2) Notwithstanding subdivisions 2 and 3 of Section 836, a peace officer may make an arrest without a warrant:

(A) When the person arrested has violated this section, although not in the officer's presence.

(B) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.

(3) (A) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 12001.6, or of any crime made punishable under this chapter, shall serve a term of at least three months in a county jail, or, if granted probation, or if the execution or imposition of sentence is suspended, it shall be a condition thereof that he or she be imprisoned for a period of at least three months.

(B) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this subdivision or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this subdivision, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by such a disposition.

(b) Subdivision (a) shall not apply to any of the following:

(1) Peace officers listed in Section 830.1 or 830.2, whether active or honorably retired, other duly appointed peace officers, honorably retired peace officers listed in subdivision (c) of Section 830.5, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any of those officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer. Any peace officer described in this paragraph who has been honorably retired shall be issued an identification certificate by the agency from which the officer has retired. The issuing agency may charge a fee necessary to cover any reasonable expenses incurred by the agency in issuing certificates pursuant to this paragraph and paragraph (3).

Any officer retired after January 1, 1981, shall have an endorsement on the identification certificate stating that the issuing agency approves the officer's carrying of a loaded firearm.

No endorsement or renewal endorsement issued pursuant to paragraph (2) shall be effective unless it is in the format set forth in subparagraph (D) of paragraph (1) of subdivision (a) of Section 12027, except that any peace officer listed in subdivision (f) of Section 830.2 or in subdivision (c) of Section 830.5, who is retired between January 2, 1981, and on or before December 31, 1988, and who is authorized to carry a loaded firearm pursuant to this section, shall not be required to have an endorsement in the format set forth in subparagraph (D) of paragraph

(1) of subdivision (a) of Section 12027 until the time of the issuance, on or after January 1, 1989, of a renewal endorsement pursuant to paragraph (2).

(2) A retired peace officer who retired after January 1, 1981, shall petition the issuing agency for renewal of his or her privilege to carry a loaded firearm every five years. An honorably retired peace officer, described in paragraph (1), retired prior to January 1, 1981, shall not be required to obtain an endorsement from the issuing agency to carry a firearm. The agency from which a peace officer is honorably retired may, upon initial retirement of the peace officer, or at any time subsequent thereto, deny or revoke, for good cause, the retired officer's privilege to carry a firearm.

(3) An honorably retired peace officer listed in subdivision (c) of Section 830.5 authorized to carry loaded firearms by this subdivision shall meet the training requirements of Section 832 and shall qualify with the firearm at least annually. The individual retired peace officer shall be responsible for maintaining his or her eligibility to carry a loaded firearm. The Department of Justice shall provide subsequent arrest notification pursuant to Section 11105.2 regarding honorably retired peace officers listed in subdivision (c) of Section 830.5 to the agency from which the officer has retired.

(4) Members of the military forces of this state or of the United States engaged in the performance of their duties.

(5) Persons who are using target ranges for the purpose of practice shooting with a firearm or who are members of shooting clubs while hunting on the premises of those clubs.

(6) The carrying of pistols, revolvers, or other firearms capable of being concealed upon the person by persons who are authorized to carry those weapons pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4.

(7) Armored vehicle guards, as defined in Section 7521 of the Business and Professions Code, (A) if hired prior to January 1, 1977; or (B) if hired on or after that date, if they have received a firearms qualification card from the Department of Consumer Affairs, in each case while acting within the course and scope of their employment.

(8) Upon approval of the sheriff of the county in which they reside, honorably retired federal officers or agents of federal law enforcement agencies including, but not limited to, the Federal Bureau of Investigation, the Secret Service, the United States Customs Service, the Federal Bureau of Alcohol, Tobacco, and Firearms, the Federal Bureau of Narcotics, the Drug Enforcement Administration, the United States Border Patrol, and officers or agents of the Internal Revenue Service who were authorized to carry weapons while on duty, who were assigned to duty within the state for a period of not less than one year, or who retired from active service in the state.

Retired federal officers or agents shall provide the sheriff with certification from the agency from which they retired certifying their service in the state, the nature of their retirement, and indicating the agency's concurrence that the retired federal officer or agent should be accorded the privilege of carrying a loaded firearm.

Upon approval, the sheriff shall issue a permit to the retired federal officer or agent indicating that he or she may carry a loaded firearm in accordance with this paragraph. The permit shall be valid for a period not exceeding five years, shall be carried by the retiree while carrying a loaded firearm, and may be revoked for good cause.

The sheriff of the county in which the retired federal officer or agent resides may require recertification prior to a permit renewal, and may suspend the privilege for cause. The sheriff may charge a fee necessary to cover any reasonable expenses incurred by the county.

(c) Subdivision (a) shall not apply to any of the following who have completed a regular course in firearms training approved by the Commission on Peace Officer Standards and Training:

(1) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also, under the express terms of the charter, (A) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (B) are not less than 18 years of age nor more than 40 years of age, (C) possess physical qualifications prescribed by the commission, and (D) are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by the police commission.

(2) The carrying of weapons by animal control officers or zookeepers, regularly compensated as such by a governmental agency when acting in the course and scope of their employment and when designated by a local ordinance or, if the governmental agency is not authorized to act by ordinance, by a resolution, either individually or by class, to carry the weapons, or by persons who are authorized to carry the weapons pursuant to Section 607f of the Civil Code, while actually engaged in the performance of their duties pursuant to that section.

(3) Harbor police officers designated pursuant to Section 663.5 of the Harbors and Navigation Code.

(d) Subdivision (a) shall not apply to any of the following who have been issued a certificate pursuant to Section 12033. The certificate shall not be required of any person who is a peace officer, who has completed all training required by law for the exercise of his or her power as a peace officer, and who is employed while not on duty as a peace officer.

(1) Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation, or

delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

(2) Guards of contract carriers operating armored vehicles pursuant to California Highway Patrol and Public Utilities Commission authority (A) if hired prior to January 1, 1977; or (B) if hired on or after January 1, 1977, if they have completed a course in the carrying and use of firearms which meets the standards prescribed by the Department of Consumer Affairs.

(3) Private investigators and private patrol operators who are licensed pursuant to Chapter 11.5 (commencing with Section 7512) of, and alarm company operators who are licensed pursuant to Chapter 11.6 (commencing with Section 7590) of, Division 3 of the Business and Professions Code, while acting within the course and scope of their employment.

(4) Uniformed security guards or night watch persons employed by any public agency, while acting within the scope and in the course of their employment.

(5) Uniformed security guards, regularly employed and compensated in that capacity by persons engaged in any lawful business, and uniformed alarm agents employed by an alarm company operator, while actually engaged in protecting and preserving the property of their employers or on duty or en route to or from their residences or their places of employment and security guards and alarm agents en route to or from their residences or employer-required range training. Nothing in this paragraph shall be construed to prohibit cities and counties from enacting ordinances requiring alarm agents to register their names.

(6) Uniformed employees of private patrol operators and private investigators licensed pursuant to Chapter 11.5 (commencing with Section 7512) of Division 3 of the Business and Professions Code while acting within the course and scope of their employment.

(e) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

(f) As used in this section, "prohibited area" means any place where it is unlawful to discharge a weapon.

(g) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case which holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(h) Nothing in this section shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that property.

(i) Nothing in this section shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, provided that the hunting at that place and time is not prohibited by the city council.

(j)(1) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. As used in this subdivision, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

(2) A violation of this section is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This paragraph may not apply when the circumstances involve a mutual restraining order issued pursuant to ~~Sections 2035 and 2036 of the Family Code, or Sections 5514 and 5550 of the Family Code, or Sections 7710 and 7711~~ Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to defendants charged with violating Section 12025 or of committing other similar offenses.

Upon trial for violating this section, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(k) Nothing in this section is intended to preclude the carrying of a loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest.

(l) Nothing this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.

Comment. Subdivision (j)(2) of Section 12031 is amended to substitute a reference to the Family Code provisions that replaced former Civil Code Section 4359 and to include similar mutual restraining orders issued under other domestic violence provisions. The word "mutual" has been substituted for "reciprocal" to conform to the terminology of the Family Code provisions. See also Fam. Code § 6223 (conditions for issuance of mutual restraining order).

Interim Comment. Section 12031 is amended to correct the cross-references. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Penal Code § 12076 (technical amendment). Registration requirements for purchaser or transferee of firearm

SEC. _____. Section 12076 of the Penal Code is amended to read:

12076. (a) The purchaser or transferee of any firearm shall be required to present clear evidence of his or her identity and age, as defined in Section 12071, to the dealer, and the dealer shall require him or her to sign his or her current legal name and affix his or her residence address and date of birth to the register in quadruplicate. The salesperson shall affix his or her signature to the register in quadruplicate as a witness to the signature and identification of the purchaser or transferee. Any person furnishing a fictitious name or address or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the register and any person violating any provision of this section is guilty of a misdemeanor.

(b) Two copies of the original sheet of the register, on the date of sale or transfer, shall be placed in the mail, postage prepaid, and properly addressed to the Department of Justice in Sacramento. The third copy of the original shall be mailed, postage prepaid, to the chief of police, or other head of the police department, of the city or county wherein the sale or transfer is made. Where the sale or transfer is made in a district where there is no municipal police department, the third copy of the original sheet shall be mailed to the sheriff of the county wherein the sale or transfer is made.

The third copy for firearms, other than pistols, revolvers, or other firearms capable of being concealed upon the person shall be destroyed within five days of receipt and no information shall be compiled therefrom.

(c) The department shall examine its records, as well as those records that it is authorized to request from the State Department of Mental Health pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code.

If the department determines that the purchaser or transferee is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, it shall immediately notify the dealer and the chief of the police department of the city or county in which the sale or transfer was made, or if the sale or transfer was made in a district in which there is no municipal police department, the sheriff of the county in which the sale or transfer was made, of that fact.

If the department determines that the copies of the register submitted to it pursuant to subdivision (b) contain any blank spaces or inaccurate, illegible, or

incomplete information, preventing identification of the purchaser or transferee or the pistol, revolver, or other firearm to be purchased or transferred, or if any fee required pursuant to subdivision (d) is not submitted by the dealer in conjunction with submission of copies of the register, the department may notify the dealer of that fact. Upon notification by the department, the dealer shall submit corrected copies of the register to the department, or shall submit any fee required pursuant to subdivision (d), or both, as appropriate and, if notification by the department is received by the dealer at any time prior to delivery of the firearm to be purchased or transferred, the dealer shall withhold delivery until the conclusion of the waiting period described in Sections 12071 and 12072.

(d) The Department of Justice may charge the dealer a fee sufficient to reimburse all of the following:

(1)(A) The department for the cost of furnishing this information. All money received by the department pursuant to this section shall be deposited in the Dealers' Record of Sale Special Account of the General Fund, which is hereby created, to be available, upon appropriation by the Legislature, for expenditure by the department to offset the costs incurred pursuant to this section and Section 12289.

(B) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(2) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by the amendments to Section 8103 of the Welfare and Institutions Code, made by the act which also added this paragraph.

(3) The State Department of Mental Health for the costs resulting from the requirements imposed by the amendments to Section 8104 of the Welfare and Institutions Code made by the act which also added this paragraph.

(4) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(5) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (b) (a) of Section 550 of the Code of Civil Procedure 6385 of the Family Code created by the act which also added this paragraph.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

The fee established pursuant to this subdivision shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by the act which added paragraph (2) to this subdivision, the costs of the State Department of Mental Health for complying with the requirements imposed

by the act which added paragraph (3) to this subdivision, the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by the act which added paragraph (4) to this subdivision, the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision ~~(b)~~ (a) of Section ~~550 of the Code of Civil Procedure~~ 6385 of the Family Code created by the act which added paragraph (5) to this subdivision, and the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code created by the act which added paragraph (6) to this subdivision.

(e) (1) The Department of Justice may charge a fee sufficient to reimburse it for each of the following:

(A) For the actual costs associated with the preparation, sale, processing, and filing of forms or reports required or utilized pursuant to Section 12078 if neither a dealer nor a law enforcement agency acting pursuant to Section 12084 is filing the form or report.

(B) For the actual processing costs associated with the submission of a Dealers' Record of Sale to the department by a dealer or of the submission of a LEFT to the department by a law enforcement agency acting pursuant to Section 12084 if the waiting period described in Sections 12071, 12072, and 12084 does not apply.

(C) For the actual costs associated with the preparation, sale, processing, and filing of reports utilized pursuant to subdivision (l) of Section 12078.

(2) If the department charges a fee pursuant to subparagraph (B) of paragraph (1) of this subdivision, it shall be charged in the same amount to all categories of transaction that are within that subparagraph.

(3) Any costs incurred by the Department of Justice to implement this subdivision shall be reimbursed from fees collected and charged pursuant to this subdivision. No fees shall be charged to the dealer pursuant to subdivision (d) or to a law enforcement agency acting pursuant to paragraph (6) of subdivision (d) of Section 12084 for costs incurred for implementing this subdivision.

(f) All money received by the department pursuant to this section shall be deposited in the Dealers' Record of Sale Special Account of the General Fund, which is hereby created, to be available, upon appropriation by the Legislature, for expenditure by the department to offset the costs incurred pursuant to this section and Section 12289.

(g) Only one fee shall be charged pursuant to this section for a single transaction on the same date for the sale or transfer of any number of firearms that are not pistols, revolvers, or other firearms capable of being concealed upon the person or for the taking of possession of those firearms.

(h) Only one fee shall be charged pursuant to this section for a single transaction on the same date for taking title or possession of any number of firearms pursuant to subdivision (i) of Section 12078.

(i) Whenever the Department of Justice acts pursuant to this section as it pertains to firearms other than pistols, revolvers, or other firearms capable of being concealed upon the person, the department's acts or omissions shall be deemed to be discretionary within the meaning of the California Tort Claims Act pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

Comment. Paragraphs (5) and (6) of Section 12076(d) [as amended by Cal. Stat. ch. 1326, § 8] are amended to substitute references to the Family Code provisions that replaced former Code of Civil Procedure Section 550(b).

Interim Comment. Section 12076 is amended to correct the cross-references. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Penal Code § 13700 (amended). Definitions; law enforcement response to domestic violence

SEC. ____. Section 13700 of the Penal Code is amended to read:

13700. As used in this title:

(a) ~~“Abuse” means intentionally or reckless causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.~~

(b) (a) “Domestic violence” means “domestic violence” as defined in Section 6211 of the Family Code. ~~is abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.~~

(e) (b) “Officer” means any officer or employee of a local police department or sheriff’s office, any peace officer of the Department of Parks and Recreation, as defined in subdivision (g) of Section 830.2, any peace officer of the University of California Police Department, as defined in subdivision (c) of Section 830.2, or any peace officer of the California State University Police Department, as defined in subdivision (d) of Section 830.2.

(d) (c) “Victim” means a person who is a victim of domestic violence.

Comment. Subdivision (a) of Section 13700 [as amended by 1992 Cal. Stat. ch. 1136, § 9] is amended to substitute a reference to the Family Code provision defining “domestic violence” for the provisions formerly defining “abuse,” and “domestic violence.” The Family Code definition of “domestic violence” is the same as the definition formerly included in this provision, except that the Family Code definition of “domestic violence” applies to children. See Fam. Code § 6211 (“domestic violence” defined) & Comment. The Family Code definition of domestic violence also continues the substance of the omitted definition of “abuse,” except that the Family Code provision defining “abuse” to include “sexual assault” is broader. See Fam. Code § 6203 (“abuse” defined). See also Fam. Code § 6209 (“cohabitant” and “former cohabitant” defined).

WELFARE AND INSTITUTIONS CODE

Welf. & Inst. Code § 304 (technical amendment). Custody of dependent child of the court

SEC. _____. Section 304 of the Welfare and Institutions Code is amended to read:

304. When a minor has been adjudged a dependent child of the juvenile court pursuant to subdivision (c) of Section 360, no other division of any superior court may hear proceedings pursuant to Part 2 (commencing with Section 3020) of Division 8 of the Family Code regarding the custody of the minor. While the minor is a dependent child of the court all issues regarding his or her custody shall be heard by the juvenile court. In deciding issues between the parents or between a parent and a guardian regarding custody of a minor who has been adjudicated a dependent of the juvenile court, the juvenile court may review any records that would be available to the domestic relations division of a superior court hearing such a matter. The juvenile court, on its own motion, may issue an order directed to either of the parents enjoining any action specified in ~~subdivision (b), (c), or (d)~~ of Section ~~2035 6213~~ of the Family Code. The Judicial Council shall adopt forms for these restraining orders. These form orders shall not be confidential and shall be enforceable in the same manner as any other order issued pursuant to ~~Section 2035~~ Division 10 (commencing with Section 6200) of the Family Code.

This section shall not be construed to divest the domestic relations division of a superior court from hearing any issues regarding the custody of a minor when that minor is no longer a dependent of the juvenile court.

Comment. Section 304 is amended to substitute references to the Family Code provisions that replaced the former Civil Code provisions. The reference to Section 6213 is broader than the former reference. Section 6213 includes an order restraining specific acts, excluding a party from a dwelling, and restraining additional behavior necessary to enforce the first two orders. The former reference did not include the order restraining additional behavior.

Interim Comment. Section 304 is amended to correct the cross-references. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Welf. & Inst. Code § 362.4 (technical amendment). Juvenile court order concerning custody or visitation

SEC. _____. Section 362.4 of the Welfare and Institutions Code is amended to read:

362.4. When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, and proceedings for the declaration of the nullity or dissolution of the marriage, or for legal separation, of the minor's parents, or proceedings to establish the paternity of the minor child brought under the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code, are pending in the superior court of any county, or an order has been entered with regard to the custody of that minor, the juvenile court on its own

motion, may issue an order directed to either of the parents enjoining any action specified in ~~subdivision (b), (c), or (d)~~ of Section 2035 6213 of the Family Code or determining the custody of, or visitation with, the child.

Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court. The order of the juvenile court shall be filed in the proceeding for nullity, dissolution, or legal separation, or in the proceeding to establish paternity, at the time the juvenile court terminates its jurisdiction over the minor, and shall become a part thereof.

If no action is filed or pending relating to the custody of the minor in the superior court of any county, the juvenile court order may be used as the sole basis for opening a file in the superior court of the county in which the parent, who has been given custody, resides. The court may direct the parent or the clerk of the juvenile court to transmit the order to the clerk of the superior court of the county in which the order is to be filed. The clerk of the superior court shall, immediately upon receipt, open a file, without a filing fee, and assign a case number.

The clerk of the superior court shall, upon the filing of any juvenile court custody order, send by first-class mail a copy of the order with the case number to the juvenile court and to the parents at the address listed on the order.

The Judicial Council shall adopt forms for any custody or restraining order issued under this section. These form orders shall not be confidential.

Comment. Section 362.4 is amended to substitute the new reference to the Uniform Parentage Act in the Family Code. The reference to Section 6213 is broader than the former reference. Section 6213 includes an order restraining specific acts, excluding a party from a dwelling, and restraining additional behavior necessary to enforce the first two orders. The former reference did not include the order restraining additional behavior.

Interim Comment. Section 362.4 is amended to correct the cross-references. This is made necessary by the reorganization and consolidation of the Family Code sections dealing with domestic violence.

Welf. & Inst. Code § 18291 (amended). Definitions; Domestic Violence Centers Act

SEC. ____ . Section 18291 of the Welfare and Institutions Code is amended to read:

18291. (a) ~~“Domestic~~ As used in this chapter, domestic violence” means “domestic violence” as defined in Section 6211 of the Family Code, abuse perpetrated by and committed against a family or household member.

~~(b) “Family or household member” means spouse, former spouse, or any other adult person who regularly resides in the household and has sexual relations with another family or household member residing in the household, or who within the last six months regularly resided in the household during which time he or she had sexual relations with another family or household member presently residing in the household.~~

Comment. Section 18291 is amended to substitute a reference to the Family Code provision defining “domestic violence.” The Family Code definition is substantively the same as the

definitions formerly included in this provision, except that the Family Code definition of “domestic violence” applies to children. See Fam. Code § 6211 (“domestic violence” defined) & Comment. The Family Code definition of domestic violence also continues the substance of the omitted definition of “family or household member.” See also Fam. Code §§ 6203 (“abuse” defined), 6209 (“cohabitant” and “former cohabitant” defined).

Appendix

REVISED COMMENTS

Note. The following comments need to be revised in connection with the reorganization and consolidation of the Family Code provisions dealing with domestic violence.

FAMILY CODE

Fam. Code § 3. Construction of provision drawn from uniform act

Comment. Section 3 generalizes former Civil Code Sections 5003, 5150(1)(i), and 5301, Code of Civil Procedure Section 1651, and Evidence Code Section 891. This section expands the uniform construction rule to the Uniform Parentage Act, which formerly lacked a uniform construction provision. Provisions of the Family Code drawn from uniform acts include:

Uniform Premarital Agreement Act (§§ 1600-1617)

Uniform Divorce Recognition Act (§§ 2090-2093)

Uniform Child Custody Jurisdiction Act (§§ 3400-3425)

Uniform Reciprocal Enforcement of Support Act (§§ 4800-4854)

Uniform Act on Blood Tests to Determine Paternity (§§ 7550-7557)

Uniform Parentage Act (§§ ~~7600-7750~~ 7730)

See also Sections 7900-7910 (Interstate Compact on Placement of Children).

The former Uniform Civil Liability for Support Act has not been continued as a uniform act. For the disposition of the former sections, see the Comments to Sections 3550-3551, 3554, 3651, 3900, 3910(a), 4000, 4002, 4005(a), 4300, 4303, 4320, 4400, 4402-4405.

Fam. Code § 211. Judicial Council rules of practice and procedure

Comment. Section 211 continues without change and generalizes former Civil Code Section 4001. The former provision applied only to former Part 5 (commencing with Section 4000) of Division 4 of the Civil Code (the former Family Law Act), whereas Section 211 applies to the entire Family Code.

For other provisions relating to Judicial Council rules, see, e.g., Sections 2021, 2025, 2070, 2321. For provisions relating to Judicial Council forms, see, e.g., Sections 95, 115, 2043, 2062, 2250, 2331, 2401, 2402, 3417, 3634, 3668, 3694, 3772, 4506, 4732, 5295, ~~5512~~ 6221, ~~5520~~ 6228, 7710. For provisions relating to other Judicial Council matters, see, e.g., Sections 1816 (development of training program), 1850-1852 (duties in connection with statewide coordination of family mediation and conciliation services), 2400 (adjustment of dollar amounts to reflect California Consumer Price Index), 2406 (summary dissolution brochure), 3153 (guidelines for determining eligibility for county payment of counsel), 3161 (uniform standards of practice for

mediation), 4005 (development of age increase formula), 4066 (study and report on child support guidelines), 4552 (duties regarding procedure for deposit of money to secure future child support payments, including development of rules and forms).

Fam. Code § 213. Responding party's request for affirmative relief alternative to moving party's requested relief

Comment. Subdivision (a) of Section 213 continues former Civil Code Section 4355.6 without substantive change.

Subdivision (b) is new and has been added to state the application of this section. The application of former Section 4355.6 was unclear, because the section did not include any language specifying the proceedings to which it applied.

See also Section 75 6213 ("domestic violence prevention order" defined).

Fam. Code § 270. Costs and attorney's fees during pendency of proceeding

Comment. Section 270 continues former Civil Code Section 4370(a) without substantive change. The phrase "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" replaces the former reference to "proceeding under this part." The phrase "proceeding under this part" as used in former Civil Code Section 4370(a) referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code).

Section 272 requires that the award of attorney's fees and costs under Section 270 be just and reasonable under relevant circumstances of the parties. See *In re Marriage of Hublou*, 231 Cal. App. 3d 956, 282 Cal. Rptr. 695 (1991).

Special provisions may govern attorney's fees and costs in particular circumstances. See, e.g., Sections 916 (attorney's fees in enforcing right to reimbursement after division of community property), 1101(g) (breach of fiduciary duty), 2255 (attorney's fees and costs in proceeding for judgment of nullity of marriage), 2334 (order for attorney's fees during period of continuance for reconciliation), 3027 (attorney's fees in proceeding to recover monetary sanction for false accusation of child abuse or neglect), 3028 (attorney's fees in proceeding to recover compensation for failure to assume caretaker responsibility or for thwarting other parent's visitation or custody rights), 3113, 3150-3153, 3174 (appointment of counsel to represent child in custody or visitation proceeding), 3407 (attorney's fees where custody or visitation proceeding commenced in clearly inappropriate forum), 3408 (attorney's fees where jurisdiction declined by reason of conduct), 3416 (attorney's fees for enforcement of sister state custody order), 3652 (attorney's fees in proceeding to modify or terminate child support order), 4002 (attorney's fees for county enforcement of child support), 4303 (attorney's fees for county enforcement of spousal support), 4403 (attorney's fees for county enforcement of parent's right to support), 4803 (limitation on recovery of attorney's fees in proceeding under Uniform Reciprocal Enforcement of Support Act), 5283(d) (earnings assignment order), 5755, ~~5805~~ 6386 (attorney's fees in proceeding under Domestic Violence Prevention Act), 6602 (contract for attorney's fees for services in litigation for minor), 7640 (counsel fees and costs under Uniform Parentage Act), 7827, 7860-7864, 7895 (appointment of counsel in proceeding to declare child free from parental custody and control), 8800 (independent adoption).

Fam. Code § 754. Limitation on disposition of separate property residence if notice of pendency of proceeding recorded

Comment. Section 754 continues former Civil Code Section 5102(b) without substantive change. See also Section 700 (real property includes leasehold interests in real property).

Section 754 provides a means of restraining transfer or encumbrance of a separate property dwelling for a three-month period during the pendency of separation, annulment, or dissolution

proceedings. The restraint applies to voluntary dispositions of the dwelling, as well as involuntary dispositions, such as pursuant to a writ of execution. As to the authority of the court to restrain transfer during pendency of these proceedings, see ~~Section~~ Sections 2035 and 2040. See also Section 2030 (temporary restraining order in summons). A community property dwelling may not be transferred or encumbered without joinder or consent of both spouses. See Sections 1100(c) (disposition or encumbrance of personal property family dwelling), 1102 (lease, transfer, or encumbrance of real property).

For background on former Civil Code Section 5102, see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2630 (1980).

Fam. Code § 1816. Continuing instruction programs

Comment. Section 1816 continues former Code of Civil Procedure Section 1745.5 without substantive change. See also Sections ~~55~~ 6203 ("abuse" defined), ~~70~~ 6211 ("domestic violence" defined).

Fam. Code § 1830. Jurisdiction of family conciliation court

Comment. Section 1830 restates former Code of Civil Procedure Section 1760 without substantive change. The reference to legal separation has been added to conform with other sections. See, e.g., Sections 1831, 1840, 1841. See also Sections ~~70 ("domestic violence" defined)~~, 1842 (conciliation court may accept other cases where no minor children involved), 3155-3183 (mediation of visitation or custody issues), 3190-3192 (counseling of parents and child), 6211 ("domestic violence" defined).

Fam. Code § 1833. Contents of petition

Comment. Section 1833 continues former Code of Civil Procedure Section 1763 without substantive change. See also Section ~~70~~ 6211 ("domestic violence" defined).

Fam. Code § 2335. Evidence of specific acts of misconduct

Comment. The introductory part and subdivision (a) of Section 2335 continue former Civil Code Section 4509 without substantive change. The phrase "under this part," meaning under the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code), has been omitted as surplus.

Subdivision (b) is a new provision that recognizes that evidence of specific acts of misconduct is admissible in proceedings to obtain or retain in effect a domestic violence prevention order. See, e.g., Section 6223 (presentation of evidence of abuse or domestic violence required for mutual restraining order).

See also Sections ~~75 ("domestic violence prevention order" defined)~~, 3022 (history of abuse of child or other parent must be considered in determining best interest of child for purposes of custody), 6213 ("domestic violence prevention order" defined).

Fam. Code § 3064. Limitation on ex parte order granting or modifying custody order

Comment. Section 3064 continues the last two sentences of former Civil Code Section 4600.1(e) without substantive change. Unlike the former section, this section does not contain a reference to the section defining "domestic violence." This is not a substantive change. See Section ~~70~~ 6211 ("domestic violence" defined).

Fam. Code § 3100. Visitation rights generally

Comment. Subdivision (a) of Section 3100 continues former Civil Code Section 4601 without substantive change.

Subdivision (b) continues former Civil Code Section 4601.5 without substantive change. The phrase “domestic violence prevention order” has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders.

See also Sections 3022 (factors to be considered in determining best interest of child), 3044 (parent convicted under certain Penal Code provisions not allowed unsupervised visitation with child), 3131 (action by district attorney where child taken or detained in violation of visitation order); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal). ~~For comparable provisions, see Sections 5513 (Domestic Violence Prevention Act), 7604(b) (Uniform Parentage Act).~~

Fam. Code § 3101. Visitation rights of stepparent or grandparent in dissolution, nullity, or legal separation proceeding

Comment. Subdivision (a) of Section 3101 restates former Civil Code Section 4351.5(a)-(b) without substantive change. The “notwithstanding” clauses of the former subdivisions have been omitted as surplus. The reference to former Civil Code Section 4601 has been omitted as surplus. References to the “superior” court have been omitted as surplus. See Section 200 (jurisdiction in superior court).

Subdivision (b) continues former Civil Code Section 4351.5(k) without substantive change.

Subdivision (c) continues former Civil Code Section 4351.5(j) without substantive change.

Subdivision (d) continues former Civil Code Section 4351.5(l) without substantive change. The phrase “domestic violence prevention order” has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders.

See also Section 3022 (factors to be considered in determining best interest of child); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Fam. Code § 3111. Separate meetings where history of domestic violence or domestic violence prevention order

Comment. Section 3111 continues the second paragraph of former Civil Code Section 4602 without substantive change. The phrase “domestic violence prevention order” has been substituted for the references to orders under specific former sections in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders.

Fam. Code § 3176. Separate mediation permitted where history of domestic violence

Comment. Section 3176 continues the last sentence of former Civil Code Section 4607(d) without substantive change. Unlike the former section, this section does not contain a reference to the section defining “domestic violence.” This is not a substantive change. See Section 70 6211 (“domestic violence” defined).

Fam. Code § 3177. Separate mediation where domestic violence prevention order

Comment. Section 3177 continues former Civil Code Section 4607.2 without substantive change. The “notwithstanding” clause in the former section has been omitted as surplus. Unlike the former section, this section does not contain a reference to the section defining “domestic

violence.” This is not a substantive change. See Section 70 6211 (“domestic violence” defined). The phrase “domestic violence prevention order” has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders.

Fam. Code § 3192. Separate counseling where protective order against domestic violence

Comment. Section 3192 continues former Civil Code Section 4608.1(b) without substantive change. Unlike the former section, this section does not contain a reference to the section defining “domestic violence.” This is not a substantive change. See Section 70 6211 (“domestic violence” defined). The phrase “domestic violence prevention order” has been substituted for the references to orders under specific former sections in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders.

Fam. Code § 3600. Order for support during pendency of proceeding

Comment. Section 3600 continues the first sentence of former Civil Code Section 4357(a) without substantive change. The language describing the support proceedings to which this section applies is drawn from the first sentence of former Civil Code Section 4700(a)(1), with the addition of language to make clear that this section applies to a child for whom support is authorized under Section 3901. This is not intended as a substantive change. The word “support” has been substituted for “support and maintenance” with reference to support of a husband or wife, since “maintenance” is surplus. The word “support” has been substituted for “support and education” with reference to support of a child. This is not a substantive change. See Section 150 (when used with reference to minor child, “support” includes education). A reference to “child” has been substituted for “children.” This is not a substantive change. See Section 10 (singular includes plural). A reference to the “superior” court has been omitted as surplus. See Section 200 (jurisdiction in superior court).

See also Sections ~~240-245 (ex parte support orders)~~, 273 (attorney’s fees for enforcement of support order), 2254 (order for support of putative spouse), 3017 (support order required where parent receiving public assistance).

Fam. Code § 7604. Pendente lite relief of custody or grant of visitation rights

Comment. Section 7604 continues former Civil Code Section 7004.5 without substantive change. There is no comparable provision in the Uniform Parentage Act (1973).

In subdivision (a), a reference to Part 2 (commencing with Section 3020) of Division 8 has been substituted for narrower references to former Civil Code Sections 4600 and 4601. This is not intended as a substantive change.

In subdivision (b), the phrase “domestic violence prevention order” has been substituted for the references to orders under specific former sections in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section 75 6213 defines “domestic violence prevention order” to include these orders. For provisions in this code that are comparable to subdivision (b), see Sections 3100(b) (visitation rights generally), 5513 (Domestic Violence Prevention Act).

See also Sections ~~75 (“domestic violence prevention order” defined)~~, 200 (jurisdiction in superior court), 3044 (parent convicted under certain Penal Code provisions not to be allowed unsupervised visitation with child), 3131 (action by district attorney where child taken or detained in violation of visitation order), 3155-3183 (mediation of custody or visitation issues), 6213

("domestic violence prevention order" defined); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).
