

Memorandum 92-67

Subject: Study F-1120 - Domestic Violence Prevention Statutes (Comments of Interested Persons and Inclusion of 1992 Legislation)

Attached to this memorandum are comments received from two people regarding the September 1992 tentative recommendation relating to *Reorganization of Domestic Violence Provisions*. Draft legislation incorporating 1992 legislation affecting domestic violence provisions is also included.

COMMENTS OF INTERESTED PERSONS

The Commission received the comments of Alana Bowman, City Attorney, Los Angeles City Attorney's Office. See Exhibit 1. The bulk of Ms. Bowman's comments involve substantive revisions that are not appropriate for inclusion in the 1993 legislation, since they involve potentially controversial policy issues.

The Commission also received the comments of Elizabeth Stoffel, California Alliance Against Domestic Violence. See Exhibit 2. Many points raised by Ms. Stoffel are minor. Of these, the staff agrees that two changes should be made. See draft Sections 6220 and 6273.

Other issues raised in Ms. Stoffel's letter are discussed below.

Adding children to "domestic violence" definition (Section 6211)

A primary goal of the tentative recommendation relating to *Reorganization of Domestic Violence Provisions* is to consolidate and reconcile differences in duplicative provisions of the Family Law Act (FLA), the Domestic Violence Prevention Act (DVPA), and the Uniform Parentage Act (UPA). In relation to the definition of domestic violence, the FLA and the DVPA did not authorize orders to protect children, but the UPA did.

As a policy matter, it is unclear to the staff why the DVPA should authorize orders to protect "an adult person related by consanguinity

or affinity within the second degree," but should not protect a child. Also, as the Commission will recall, people involved with the legislation that removed the reference to children said that the change was inadvertent. See First Supplement to Memorandum 92-56.

Ms. Stoffel feels that adding children would create problems, mainly because the definition of domestic violence in Penal Code Section 13700 does not include children. Penal Code Section 13700 is part of a group of statutes that outline requirements for law enforcement response to domestic violence. The staff did not amend the Penal Code definition, since it appears to apply to criminal violations, as well as to acts prohibited by the DVPA.

The issue is further complicated by 1992 amendments to Penal Code Section 12028.5 which authorizes law enforcement officers to confiscate deadly weapons in situations involving domestic (now family) violence. See draft Penal Code § 12028.5. Before being amended, this section contained a definition of domestic violence that did not include children. The amended section defines "family violence" and includes violence against children.

However, as a practical matter, the proposal to include children in the DVPA's definition of domestic violence is based, in part, on the assumption that eliminating existing authority to issue orders would be controversial, while expanding authority would not. It appears that this assumption is mistaken.

At this point, the staff sees the following options:

Continue problems in existing civil law. The sections could be revised to go back to the existing situation where domestic violence orders can protect children when obtained in a Uniform Parentage Act action, but not when obtained by married persons in a proceeding for dissolution, nullity, or legal separation. This would continue existing law, but is contrary to the goal of consolidating and reconciling the sections. Further, there is no policy reason for this distinction; rather it probably resulted from legislative oversight.

Fix problems in existing civil law, but continue differences between civil and criminal provisions. The DVPA definition including children could be adopted and the Penal Code sections left as they are. This would have the benefit of making the provisions of the DVPA

consistent, since children could be protected by the orders without regard to the type of proceeding in which the orders were issued. As a matter of policy, if children are going to be protected, all children should be protected. The drawback of this option is that it does not resolve the inconsistencies among the provisions of the DVPA and the various definitions in the Penal Code.

Fix both sets of problems. A single set of definitions could be drafted and the Penal Code sections conformed to those. The staff prefers this option, at least as an initial goal. This would be a significant improvement in the law. The civil and criminal provisions would be consistent and future amendments could be directed to a single set of definitions. However, this may involve practical problems, if interested persons cannot agree on whether or not children should be protected. Further, amending the Penal Code sections may cause additional problems.

Eliminate court authority to issue ex parte visitation order (Section 6323)

This section continues the provision in the FLA authorizing issuance of an ex parte visitation order when the parties are married. The DVPA did not provide for ex parte visitation orders. Ms. Stoffel thinks the DVPA rule is better. Based on her experience with domestic violence cases, she believes this keeps the parties apart and reduces the likelihood of further incidents of domestic violence, pending the court hearing. This change would also result in having a single rule, which is preferable. However, eliminating the court's discretion to issue ex parte visitation orders in all cases might be controversial, since there may be other cases where visitation is appropriate.

Substitute "petitioner" for "family or household member" (Section 6342)

As Ms. Stoffel points out, the definition of "family or household member" was amended out of the DVPA in 1990, but the term left in the sections that followed. This is a problem that the staff has struggled with in connection with Sections 6250 (grounds for ex parte emergency protective order) and 6320 (ex parte order enjoining harassment, threats, and violence) as well. It is unclear whether the 1990

legislation left the term in the statutes inadvertently. If so, it is unclear what should be substituted for it. Therefore, in keeping with the general goal of not making substantive changes, the staff continued the existing language. However, the staff would revise Section 6342 to substitute "petitioner" for "family or household member," since in this context "petitioner" is appropriate. The same substitution would not work in Sections 6250 or 6320 and the staff would not revise these.

1992 LEGISLATION AFFECTING DOMESTIC VIOLENCE PROVISIONS

The effect of 1992 legislation on Family Code provisions is covered in other memorandums: Memorandum 92-33 and First Supplement, considered at the September Commission meeting, and Memorandum 92-66, on the agenda for this meeting. The staff is incorporating the 1992 legislation affecting the domestic violence provisions in this memorandum to alert people who do not receive the other memorandums of the effect of 1992 legislation on those provisions.

1992 Cal. Stat. ch. 140. Amendments made by this bill are implemented without substantive change in draft Section 6345. (This amendment was included it in Exhibit 8 to Memorandum 92-33.)

1992 Cal. Stat. ch. 1136. Amendments made by this bill are implemented without substantive change in draft Sections 6222 and 6223.

STAFF RECOMMENDATION

The staff will draft legislation to implement Commission decisions regarding the issues raised in this memorandum and integrate these provisions with those in the tentative recommendation. If the December Commission meeting is canceled, the staff's goal would be to circulate the new draft of the domestic violence provisions to interested persons as a discussion draft and to present a draft recommendation at the January meeting.

Respectfully submitted,

Pamela K. Mishey
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Law Revision Commission
RECEIVED

OCT 13 1992

By: _____

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To: CALIFORNIA LAW	From: ALANA BOWMAN	
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Dept. COMMISSION	Phone: (415) 297-0023	
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Family Code:

Reorganization of Domestic Violence Provisions

September 1992

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN October 15, 1992.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4738

Fam. Code §§ 6200-6303 (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

Fam. Code § 6200 (added). 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).

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.

Fam. Code § 6201 (added). Application of definitions

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

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

Fam. Code § 6203 (added). "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).

Fam. Code § 6205 (added). "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).

Fam. Code § 6209 (added). "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.

Fam. Code § 6211 (added). "Domestic violence"

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

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

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

Comment. Section 6211 continues former Code of Civil Procedure Section 542(b) without substantive change. In subdivision (a), the reference to an ongoing dating or engagement relationship has been added. This conforms this section with a part of Penal Code Section 13700(b), defining "domestic violence" for purposes of setting standards for law enforcement response to domestic violence. The references to a child in subdivisions (a) and (b) have been added.

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); Evid. Code § 1107 (admissibility of expert witness testimony regarding battered women's syndrome).

Fam. Code § 6213 (added). "Domestic violence prevention order"

6213. "Domestic violence prevention order" means an order, issued ex parte, after notice and hearing or in a judgment, as applicable, 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), 6228 (support person for victim of domestic violence), 6385 (notice to Department of Justice), 6386 (appointment of counsel and payment of 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

stips may exist indefinitely - CH 149

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

Fam. Code § 6220 (added). Purposes of division

6220. The purposes of this division are to prevent the recurrence of acts of violence 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. *the safety of the victims of domestic 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).

Fam. Code § 6221 (added). 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 6229.

(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.

Fam. Code § 6222 (added). Order limiting visitation to situations where third person present

6222. In making an award of temporary custody of a child pursuant to this division, if a domestic violence prevention order has been directed to a parent of the child, the court shall consider whether the best interest of the child requires that the visitation granted to that parent with respect to the child shall be limited to situations in which a third person, specified by the court, is present. A parent may submit to the court the name of a person that the parent considers suitable to be present during visitation. The determination of the best interest of the child pursuant to this section shall include the considerations specified in Section 3022. The court shall also consider in its deliberations the nature of the acts from which the parent was enjoined and the period of time that has elapsed since that order.

Comment. Section 6222 continues former Code of Civil Procedure Section 547.5 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 6213 defines "domestic violence prevention order" to include these orders. See also Sections 3044 (parent convicted under certain Penal Code provisions not allowed unsupervised visitation), 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).

Fam. Code § 6223 (added). 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 evidence of abuse or domestic violence.

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). 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).

Fam. Code § 6224 (added). 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 upon 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).

Fam. Code § 6225 (added). Court to provide 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 ^{personally} 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).

Fam. Code § 6226 (added). 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.

Fam. Code § 6227 (added). Reissuance of restraining order

6227. (a) If the petitioner files an affidavit stating that the respondent could not be served within the time required by statute, the court may reissue an order previously issued and dissolved by the court for failure to serve the respondent.

(b) The reissued order shall state on its face the date of expiration of the order.

(c) No fee may be charged for the reissuance of the order unless the order has been dissolved three times previously.

Comment. Section 6227 continues former Code of Civil Procedure Section 527(b) without substantive change. The reference to "petitioner" has been substituted for the former reference to "applicant." This is not a substantive change.

Fam. Code § 6228 (added). Support person for victim of domestic violence

6228. (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. *Eliminate this*

(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. *Eliminate*

(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. *eliminate*

(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 6228 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 6228(b).

Fam. Code § 6229 (added). Judicial Council forms and instructions

6229. 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 6229 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).

Fam. Code § 6230 (added). Remedies cumulative

6230. The remedies provided in this division are in addition to any other remedies, either civil or criminal, which may be available to the petitioner.

Comment. Section 6230 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

Fam. Code § 6240 (added). 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.

*in both
English and
Spanish*

Fam. Code § 6241 (added). 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

Fam. Code § 6250 (added). Grounds for ex parte emergency protective order

6250. The 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).

Fam. Code § 6251 (added). 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, *and threats*

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).

Fam. Code § 6252 (added). Orders included in emergency protective order

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

- (a) Orders set forth in Sections 6320, 6321, and 6322.
- (b) An order determining the temporary care and control of any minor children 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).

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).

Fam. Code § 6253 (added). 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

Or an indication
that the order is pursuant to
a stipulation order w/o expiration date, under CH 149

adds ->
not here,
under OAH

Also,
the language
of PC §
13710 b

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).

Fam. Code § 6254 (added). 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).

Fam. Code § 6255 (added). 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).

Fam. Code § 6256 (added). 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).

Fam. Code § 6257 (added). 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 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).

*but not when another
EPO is in effect on
the Protected Party
C/n create mutual
R/O*

PART 4. RESTRAINING ORDERS

CHAPTER 1. GENERAL PROVISIONS

Fam. Code § 6300 (added). Issuance on affidavit showing reasonable proof of past act or acts of abuse

6300. A restraining order may be granted pursuant to this division, with or without notice, to restrain any person upon an affidavit which, to the satisfaction of the court, shows reasonable proof of a past act or acts of abuse 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.

Fam. Code § 6301 (added). 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).

Fam. Code § 6302 (added). 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.

Sufficient?
Re: CH 149?

CHAPTER 2. EX PARTE ORDERS

Fam. Code § 6320 (added). Enjoining harassment, threats, and violence

6320. On application by a party, the court may issue an ex parte order enjoining another party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, 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.

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).

Fam. Code § 6321 (added). Exclusion from dwelling

6321. On application by a party, 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.

Stalking

*Why only married?
What of marvin situations?*

Fam. Code § 6325 (added). Restraints on community, quasi-community, and separate property and determination of payment of debts

6325. On application by a married person, the court may issue the following ex parte 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.

Comment. Section 6325 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 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.

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

Fam. Code § 6340 (added). Orders that may be issued ex parte

6340. After notice and 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.

(c) An order determining the right of a party to visit the minor child on the conditions the court determines.

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). 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:

(i) 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

(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. See also Section 6203 ("abuse" defined).

Fam. Code § 6343 (added). Participation in counseling

separate
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.

eliminate
(b) Where there has been a history of domestic violence between the parties and an order described in Section 6320 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 an order described in Section 6320 has been substituted for the former reference to "protective" order. This is not a substantive change. See also Section 6211 ("domestic violence" defined).

Fam. Code § 6344 (added). 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).

see CH 149
Fam. Code § 6345 (added). Duration of restraining order granted after notice and hearing

6345. 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.

Comment. Section 6345 continues former Code of Civil Procedure Section 548 and the third sentence of former Civil Code Section 7020(b) without substantive change. 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."

CHAPTER 4. ORDERS INCLUDED IN JUDGMENT

Fam. Code § 6360 (added). 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).

Fam. Code § 6361 (added). 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).

or if by stipulation of parties

PART 5. REGISTRATION AND ENFORCEMENT OF ORDERS

Fam. Code § 6380 (added). 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 granted 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).

Fam. Code § 6381 (added). 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 certified copy of the order.

put this sentence first
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.

Fam. Code § 6382 (added). 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).

Fam. Code § 6383 (added). Service of restraining order by law enforcement officer

shall see P.C. § 13710(c)
 6383. (a) A domestic violence prevention order issued pursuant to this division may, upon request of the petitioner, be served upon 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 shall be 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).

Fam. Code § 6384 (added). 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."

*eliminate - notifies
Δ of victim's
location*

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.

Fam. Code § 6385 (added). Notice to Department of Justice

6385. (a) Except as provided in subdivision (b), upon 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.

"you w/ the action"

(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 shall be no civil liability on the part of, and no cause of action shall arise 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

California Alliance Against Domestic Violence

Advocating on Behalf of Battered Women and Their Children

Mid-Peninsula Support Network
200 Blossom Lane, 3rd Floor
Mountain View, CA. 94041

October 14, 1992

Law Revision Commission
RECEIVED

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

OCT 15 1992

File: _____
Key: _____

Re: #F-1001, Tentative Recommendation
Family Code: Reorganization of Domestic Violence Provisions

To Whom it May Concern:

Until recently, Nancy Lemon has been submitting comments to you on behalf of the California Alliance Against Domestic Violence. She has asked me to review the work you have been doing in your efforts to reorganize current law into a Family Code. What follows are my comments on the proposed reorganization of the domestic violence provisions in the new Family Code.

I. REORGANIZATION OF THE SUBSTANTIVE PROVISIONS.

Overall, the concept of consolidating the substantive provisions for domestic violence restraining orders into one comprehensive division seems a very useful one. Not only will it be easier for practitioners to use and understand, it will also be easier for legislators to amend more consistently.

Specifically, the tentative recommendation calls for the new Family Code to contain one division entitled the Domestic Violence Prevention Act (Fam. Code Sections 6200 et seq.). The restraining order provisions currently found in the other divisions would be repealed. Instead these divisions would contain new provisions which specifically refer back to the Family Code's new Domestic Violence Prevention Act.

A. Comments on the new Domestic Violence Prevention Act

Family Code Section 6211 "Domestic violence"

This section adds child abuse to the definition of "domestic violence," even though current CCP Section 542(b)(1) does not. Penal Code Section 13700 et seq. also excludes child abuse from the definition of domestic violence.

The Law Revision Commission's explanation for inclusion cites current Civ. Code Section 7020, but this is not a provision which specifically defines domestic violence.

One of the main reasons I question the inclusion of child abuse in the definition of domestic violence stems from the further inconsistency this would cause between the new Family Code and the provisions of the Penal Code which outline law enforcement response to domestic violence.

Family Code Section 6220. Purposes of division

I think it would be better for this section to continue the provision in current CCP section 540 which contains the phrase "acts of violence and sexual abuse" instead of "acts of violence." This is more consistent with the language in the 1990 amendments.

Family Code Section 6222. Order limiting visitation to situations where third person present

Again, I think it would be better to continue the provision in CCP Section 547.5 which contains the words "any visitation" instead of "the visitation." "Any visitation" better conveys that the court might determine that no visitation is in the best interests of the child.

Family Code Section 6225. Court to provide information to parties concerning terms and effect of order

This proposed section continues CCP Section 550(f) which outlines what information the court is required to give the litigants when both parties are present in court.

It might also be useful to incorporate Penal Code Section 13711 into this section (or at least somewhere in the General Provisions sections). Penal Code Section 13711 outlines what information must be included in a pamphlet the county clerk is supposed to provide at the time a restraining order is applied for or issued.

Family Code 6254. Availability of emergency protective order

Use of the word "left" in this proposed section seems preferable to "vacated" in current CCP Section 546(b) and (c). It better conveys the meaning that the departure can be temporary.

Family Code Section 6273. Officer to carry copies of order

I think it would be better to continue using the phrase "while on duty" which has been omitted from this proposed section. This phrase is included in CCP Section 546(b) and (c) and it better describes the extent of the officer's duty.

Family Code Section 6300. Issuance on affidavit showing reasonable proof of past act or acts of abuse.

This proposed section uses the word "ensuring" and the current CCP Section 545 uses the word "assuring." Is the use of "ensuring" purposeful or a typographical error?

Family Code 6323. Determining temporary custody and visitation

As stated in the comment concerning this section, there is an inconsistency between CC Section 4359(a)(4) and CCP Section 546(a). The Family Law Act authorizes the court to grant custody and visitation orders pending the hearing and the Domestic Violence Prevention Act only authorizes the court to grant custody orders.

The Law Revision Commission has resolved the inconsistency by authorizing the court to grant visitation orders where the parties are married. I would argue that the new provision should retain the approach taken by the Domestic Violence Prevention Act with respect to all parties, whether they are married or not.

This approach would further the purposes of the division by keeping the parties apart and reducing the likelihood of further incidents of domestic violence until they get to court where a visitation schedule, if appropriate, can be devised.

Family Code Section 6340. Orders that may be issued ex parte
Shouldn't this section be entitled "Orders that may be issued
after notice and hearing"?

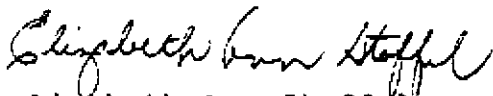
Family Code Section 6342. Payment of restitution for loss of
earnings and out-of-pocket expenses

I think it would be better if the phrase "family or household
member" was replaced by the word "petitioner." This would be more
consistent with the approach taken by the Uniform Parentage Act
(Civ. Code Section 7020(b) which uses the word "plaintiff."

Also, "family or household member" was deleted in the 1990
amendments to the CCP Section 542 definitions. Retention of this
phrase in the restitution section was clearly an oversight.

I hope these comments are somewhat helpful. I've concentrated
primarily on the new Domestic Violence Prevention Act. I've skimmed
through the "Conforming Revisions" section starting on p. 39 of the
Tentative Recommendation. I haven't studied them well enough to
comment on them in detail, but I am very pleased to see that CCP
Section 527.6(f) provides a support person for a party seeking an
injunction prohibiting harassment.

Sincerely yours,



Elizabeth Ann Stoffel
Attorney at Law
Co-Chair, Family Law Committee

cc: Nancy Lemon, CAADV

RECOMMENDED LEGISLATION

Outline

Staff Note: These sections will be integrated into the proposed legislation in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions, before circulating the discussion draft version of the provisions.

CIVIL CODE

- § 4359 (repealed). Ex parte protective orders; delivery to local law enforcement agency; enforcement; violations; penalty
- § 7020 (repealed). Ex parte protective orders; delivery to local law enforcement agency; enforcement; violations; penalty

CODE OF CIVIL PROCEDURE

- § 545.5 (repealed). Conditions of issuance of mutual restraining order
- § 547.7 (repealed). Custody and visitation orders should not be inconsistent with restraining or protective orders
- § 548 (repealed). Duration of domestic violence restraining order

FAMILY CODE

- § 6220 (added). Purposes of division
- § 6222 (added). Matters to be considered when custody or visitation order issued pursuant to Domestic Violence Prevention Act
- § 6223 (added). Conditions for issuance of mutual restraining order
- § 6273 (added). Officer to carry copies of order
- § 6342 (added). Payment of restitution for loss of earnings and out-of-pocket expenses
- § 6345 (added). Duration of restraining order granted after notice and hearing

PENAL CODE

- § 12028.5 (amended). Temporary custody of deadly weapon in situations involving domestic violence

CIVIL CODE

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. 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. 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. § 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. 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. Section 547.7 [as added by 1992 Cal. Stat. ch. 1136, § 6] is continued in Family Code Section 6222 without substantive change.

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. 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.

FAMILY CODE

Fam. Code § 6220 (added). 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).

Staff Note. This version of Section 6220 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. The phrase "and sexual abuse" is added, restoring the language of former Code of Civil Procedure Section 540.

Fam. Code § 6222 (added). Matters to be considered when custody or visitation order issued pursuant to Domestic Violence Prevention Act

6222. A temporary custody or visitation order made pursuant to this division is subject to the following provisions of Part 2 of Division 8:

- (a) Chapter 1 (commencing with Section 3020).
- (b) Chapter 2 (commencing with Section 3040).
- (c) Chapter 3 (commencing with Section 3060).
- (d) Section 3100.

Comment. Section 6222 continues former Code of Civil Procedure Sections 547.5 and 547.7 without substantive change and adds references to provisions in Division 8 that are applicable to temporary custody and visitation. This provides a complete set of rules for determining temporary 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).

Staff Note. This version of Section 6222 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. The section is rewritten to substitute broader references to applicable sections in the custody division.

Fam. Code § 6223 (added). 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).

Staff Note. This version of Section 6223 supersedes the version in the September 1992 tentative recommendation relating to Reorganization of the Domestic Violence Provisions. The section is amended to reflect changes made by 1992 Cal. Stat. ch. 1136 §§ 1, 4, 5.

Fam. Code § 6273 (added). 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).

Staff Note. 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.

Fam. Code § 6342 (added). 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 upon facts shown at a noticed hearing to be insufficient to support the order.

(c) An order requiring that the respondent shall pay 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." This is not intended as a substantive change. See also Section 6203 ("abuse" defined).

Staff Note. 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.

Fam. Code § 6345 (added). 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 arising under this code with a permanent duration.

Comment. Section 6345 continues former Code of Civil Procedure Section 548 and the third sentence of former Civil Code Section 7020(b) without substantive change. In subdivision (c), the reference to this code replaces the narrower reference to 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. 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."

Staff Note. 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.

PENAL CODE

Penal Code § 12028.5 (amended). Temporary custody of deadly weapon in situations involving domestic violence

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~~) Part 3 (commencing with Section 7600) of Division 12 of the Family Code.

(4) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(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 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 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 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)(3) of Section 12028.5 [as amended by 1992 Cal. Stat. ch. 1136, § 8] is amended to substitute the new reference to the Uniform Parentage Act in the Family Code.