

RESOLUTION 07-01-2013

DIGEST

Criminal Law: Protective Orders in Response to Intimidation of a Witness

Amends Penal Code section 136.2 to broaden the definition of harm for purposes of protective orders arising out of domestic violence to include the presence of children.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 136.2 to broaden the definition of harm for purposes of protective orders arising out of domestic violence to include the presence of children. This resolution should be disapproved because existing law already permits courts to issue protective orders to protect all victims of crimes or witnesses to crimes, regardless of whether they are adults or children, and this resolution does not actually change the law in the manner it purports to do.

Penal Code section 136.2 covers the issuance of criminal protective orders to protect victims and witnesses of crime from harm, intimidation, or dissuasion. Under current law, a court can issue a restraining order to bar a defendant's contact with either a victim or witness to a crime. There is no restriction on the court's ability to bar contact with a victim or witness who is also a child.

Many practitioners agree with the author that the courts do not consistently protect children who are present during domestic violence unless the initial police report identifies such children as victims or witnesses. But the only change that this resolution would bring about is to specify that "harm" has automatically occurred when a child is present during domestic violence. It does not implement any change to the court's ability to protect those children in any substantive way, such as it would if, for example, it specified that the court had the power to bar contact with children who are neither victims nor witnesses. Apparently, by adding the above-described definition of "harm" to the statute the author hopes that the courts will get the message and include those children in protective orders in appropriate circumstances. But this resolution would not require the courts to do so. Furthermore, courts already have broad discretion to issue protective orders for the benefit of children under the Domestic Violence Prevention Act (Fam. Code section 6200 *et seq.*), and children are routinely included in criminal protective orders and CLETs requests. The proponent has not established that this amendment is necessary, and for that reason this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 136.2 as follows:

1 § 136.2

2 For purposes of this section, "harm" includes a child's physical presence, proximity to,
3 and/or location near domestic violence.

4 (a) Except as provided in subdivision (c), upon a good cause belief that harm to, or
5 intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a
6 court with jurisdiction over a criminal matter may issue orders including, but not limited to, the
7 following:

8 (1) An order issued pursuant to Section 6320 of the Family Code.

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

10 (3) An order that a person before the court other than a defendant, including, but not
11 limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not
12 violate any provisions of Section 136.1.

13 (4) An order that a person described in this section shall have no communication
14 whatsoever with a specified witness or a victim, except through an attorney under reasonable
15 restrictions that the court may impose.

16 (5) An order calling for a hearing to determine if an order as described in paragraphs (1)
17 to (4), inclusive, should be issued.

18 (6) (A) An order that a particular law enforcement agency within the jurisdiction of the
19 court provide protection for a victim or a witness, or both, or for immediate family members of a
20 victim or a witness who reside in the same household as the victim or witness or within
21 reasonable proximity of the victim's or witness' household, as determined by the court. The order
22 shall not be made without the consent of the law enforcement agency except for limited and
23 specified periods of time and upon an express finding by the court of a clear and present danger
24 of harm to the victim or witness or immediate family members of the victim or witness.

25 (B) For purposes of this paragraph, "immediate family members" include the spouse,
26 children, or parents of the victim or witness.

27 (7) (A) An order protecting victims Section 6380 of the Family Code. It is the
28 responsibility of the court to transmit the modification, extension, or termination orders made
29 under this paragraph to the same agency that entered the original protective order into the
30 Domestic Violence Restraining Order System.or witnesses of violent crime from all contact by
31 the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence,
32 by the defendant. The court or its designee shall transmit orders made under this paragraph to
33 law enforcement personnel within one business day of the issuance, modification, extension, or
34 termination of the order, pursuant to subdivision (a) of (B) (i) If a court does not issue an order
35 pursuant to subparagraph (A) in a case in which the defendant is charged with a crime of
36 domestic violence as defined in Section 13700, the court on its own motion shall consider issuing
37 a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a
38 victim or witness has occurred or is reasonably likely to occur, that provides as follows:

39 (I) The defendant shall not own, possess, purchase, receive, or attempt to purchase or
40 receive, a firearm while the protective order is in effect.

41 (II) The defendant shall relinquish any firearms that he or she owns or possesses pursuant
42 to Section 527.9 of the Code of Civil Procedure.

43 (ii) Every person who owns, possesses, purchases, or receives, or attempts to purchase or
44 receive, a firearm while this protective order is in effect is punishable pursuant to Section 29825.

45 (C) An order issued, modified, extended, or terminated by a court pursuant to this
46 paragraph shall be issued on forms adopted by the Judicial Council of California and that have
47 been approved by the Department of Justice pursuant to subdivision (i) of Section 6380 of the
48 Family Code. However, the fact that an order issued by a court pursuant to this section was not
49 issued on forms adopted by the Judicial Council and approved by the Department of Justice shall
50 not, in and of itself, make the order unenforceable.

51 (D) A protective order under this paragraph may require the defendant to be placed on
52 electronic monitoring if the local government, with the concurrence of the county sheriff or the
53 chief probation officer with jurisdiction, adopts a policy to authorize electronic monitoring of
54 defendants and specifies the agency with jurisdiction for this purpose. If the court determines
55 that the defendant has the ability to pay for the monitoring program, the court shall order the
56 defendant to pay for the monitoring. If the court determines that the defendant does not have the
57 ability to pay for the electronic monitoring, the court may order electronic monitoring to be paid
58 for by the local government that adopted the policy to authorize electronic monitoring. The
59 duration of electronic monitoring shall not exceed one year from the date the order is issued. At
60 no time shall the electronic monitoring be in place if the protective order is not in place.

61 (b) A person violating an order made pursuant to paragraphs (1) to (7), inclusive, of
62 subdivision (a) may be punished for any substantive offense described in Section 136.1, or for a
63 contempt of the court making the order. A finding of contempt shall not be a bar to prosecution
64 for a violation of Section 136.1. However, a person so held in contempt shall be entitled to credit
65 for punishment imposed therein against a sentence imposed upon conviction of an offense
66 described in Section 136.1. A conviction or acquittal for a substantive offense under Section
67 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act.

68 (c) (1) Notwithstanding subdivisions (a) and (e), an emergency protective order issued
69 pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10 of the Family
70 Code or Section 646.91 of the Penal Code shall have precedence in enforcement over any other
71 restraining or protective order, provided the emergency protective order meets all of the
72 following requirements:

73 (A) The emergency protective order is issued to protect one or more individuals who are
74 already protected persons under another restraining or protective order.

75 (B) The emergency protective order restrains the individual who is the restrained person
76 in the other restraining or protective order specified in subparagraph (A).

77 (C) The provisions of the emergency protective order are more restrictive in relation to
78 the restrained person than are the provisions of the other restraining or protective order specified
79 in subparagraph (A).

80 (2) An emergency protective order that meets the requirements of paragraph (1) shall
81 have precedence in enforcement over the provisions of any other restraining or protective order
82 only with respect to those provisions of the emergency protective order that are more restrictive
83 in relation to the restrained person.

84 (d) (1) A person subject to a protective order issued under this section shall not own,
85 possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order
86 is in effect.

87 (2) The court shall order a person subject to a protective order issued under this section to
88 relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of
89 Civil Procedure.

90 (3) A person who owns, possesses, purchases or receives, or attempts to purchase or
91 receive a firearm while the protective order is in effect is punishable pursuant to Section 29825.

92 (e) (1) In all cases where the defendant is charged with a crime of domestic violence, as
93 defined in Section 13700, the court shall consider issuing the above-described orders on its own
94 motion. All interested parties shall receive a copy of those orders. In order to facilitate this, the
95 court's records of all criminal cases involving domestic violence shall be marked to clearly alert
96 the court to this issue.

97 (2) In those cases in which a complaint, information, or indictment charging a crime of
98 domestic violence, as defined in Section 13700, has been issued, a restraining order or protective
99 order against the defendant issued by the criminal court in that case has precedence in
100 enforcement over a civil court order against the defendant, unless a court issues an emergency
101 protective order pursuant to Chapter 2 (commencing with Section 6250) of Part 3 of Division 10
102 of the Family Code or Section 646.91 of the Penal Code, in which case the emergency protective
103 order shall have precedence in enforcement over any other restraining or protective order,
104 provided the emergency protective order meets the following requirements:

105 (A) The emergency protective order is issued to protect one or more individuals who are
106 already protected persons under another restraining or protective order.

107 (B) The emergency protective order restrains the individual who is the restrained person
108 in the other restraining or protective order specified in subparagraph (A).

109 (C) The provisions of the emergency protective order are more restrictive in relation to
110 the restrained person than are the provisions of the other restraining or protective order specified
111 in subparagraph (A).

112 (3) Custody and visitation with respect to the defendant and his or her minor children
113 may be ordered by a family or juvenile court consistent with the protocol established pursuant to
114 subdivision (f), but if ordered after a criminal protective order has been issued pursuant to this
115 section, the custody and visitation order shall make reference to, and acknowledge the
116 precedence of enforcement of, an appropriate criminal protective order. On or before July 1,
117 2006, the Judicial Council shall modify the criminal and civil court forms consistent with this
118 subdivision.

119 (f) On or before January 1, 2003, the Judicial Council shall promulgate a protocol, for
120 adoption by each local court in substantially similar terms, to provide for the timely coordination
121 of all orders against the same defendant and in favor of the same named victim or victims. The
122 protocol shall include, but shall not be limited to, mechanisms for assuring appropriate
123 communication and information sharing between criminal, family, and juvenile courts
124 concerning orders and cases that involve the same parties, and shall permit a family or juvenile
125 court order to coexist with a criminal court protective order subject to the following conditions:

126 (1) An order that permits contact between the restrained person and his or her children
127 shall provide for the safe exchange of the children and shall not contain language either printed
128 or handwritten that violates a "no contact order" issued by a criminal court.

129 (2) Safety of all parties shall be the courts' paramount concern. The family or juvenile
130 court shall specify the time, day, place, and manner of transfer of the child, as provided in
131 Section 3100 of the Family Code.

132 (g) On or before January 1, 2003, the Judicial Council shall modify the criminal and civil
133 court protective order forms consistent with this section.

134 (h) In any case in which a complaint, information, or indictment charging a crime of
135 domestic violence, as defined in Section 13700, has been filed, the court may consider, in

136 determining whether good cause exists to issue an order under paragraph (1) of subdivision (a),
137 the underlying nature of the offense charged, and the information provided to the court pursuant
138 to Section 273.75.

139 (i) (1) In all cases in which a criminal defendant has been convicted of a crime of
140 domestic violence as defined in Section 13700, the court, at the time of sentencing, shall consider
141 issuing an order restraining the defendant from any contact with the victim. The order may be
142 valid for up to 10 years, as determined by the court. This protective order may be issued by the
143 court regardless of whether the defendant is sentenced to the state prison or a county jail, or
144 whether imposition of sentence is suspended and the defendant is placed on probation. It is the
145 intent of the Legislature in enacting this subdivision that the duration of any restraining order
146 issued by the court be based upon the seriousness of the facts before the court, the probability of
147 future violations, and the safety of the victim and his or her immediate family.

148 (2) An order under this subdivision may include provisions for electronic monitoring if
149 the local government, upon receiving the concurrence of the county sheriff or the chief probation
150 officer with jurisdiction, adopts a policy authorizing electronic monitoring of defendants and
151 specifies the agency with jurisdiction for this purpose. If the court determines that the defendant
152 has the ability to pay for the monitoring program, the court shall order the defendant to pay for
153 the monitoring. If the court determines that the defendant does not have the ability to pay for the
154 electronic monitoring, the court may order the electronic monitoring to be paid for by the local
155 government that adopted the policy authorizing electronic monitoring. The duration of the
156 electronic monitoring shall not exceed one year from the date the order is issued.

157 (j) For purposes of this section, "local government" means the county that has jurisdiction
158 over the protective order.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Currently, if a defendant is charged with domestic violence and a child is present during the crime, but not listed as a victim, the court will not issue a protective order for the child unless there is a showing of good cause that the defendant will attempt to dissuade the child from testifying. If the child is used against the parent victim to threaten or intimidate them, the statute does not recognize that as "harm" either to the child or to the process.

This Solution: This resolution would make clear that the court should be considering the collateral consequences of Domestic violence as harm that should be protected under Penal Code section 136.2. These orders are typically made at arraignment and can be modified if information becomes available that warrants a change in the order.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

This proposed resolution does not affect other laws or statues other than to clarify the scope of authority that the Court in criminal proceedings can have in protecting children.

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RESPONSIBLE FLOOR DELEGATE: Teresa Sullivan

COUNTER-ARGUMENT(S) TO RESOLUTION 07-01-2013

ARGUMENT IN SUPPORT BY FAMILY LAW SECTION OF THE STATE BAR OF CALIFORNIA

Approve in principle.

Rationale: Although this resolution is focused on criminal restraining orders and an amendment to Penal Code Section 136.2, the Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) notes the occasional overlap of criminal restraining orders with family law restraining orders. FLEXCOM further recognizes the potential negative and serious impact upon children of being nearby or witnessing domestic violence perpetrated upon a parent that may itself warrant the inclusion of the children in any protective orders made.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.