

**RESOLUTION 01-06-2016 (As Amended)**

**DIGEST**

Domestic Violence: Extend Post-Conviction Restraining Order Protection to Witness

Amends Penal Code section 136.2 to allow witnesses to domestic violence to be protected by a post-conviction restraining order.

**TEXT OF RESOLUTION**

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

§136.2

- 1           (a) (1) Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or  
2 witness has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal  
3 matter may issue orders, including, but not limited to, the following:
- 4           (A) An order issued pursuant to Section 6320 of the Family Code.
  - 5           (B) An order that a defendant shall not violate any provision of Section 136.1.
  - 6           (C) An order that a person before the court other than a defendant, including, but not  
7 limited to, a subpoenaed witness or other person entering the courtroom of the court, shall not  
8 violate any provisions of Section 136.1.
  - 9           (D) An order that a person described in this section shall have no communication  
10 whatsoever with a specified witness or a victim, except through an attorney under reasonable  
11 restrictions that the court may impose.
  - 12           (E) An order calling for a hearing to determine if an order as described in subparagraphs  
13 (A) to (D), inclusive, should be issued.
  - 14           (F) (i) An order that a particular law enforcement agency within the jurisdiction of the  
15 court provide protection for a victim or a witness, or both, or for immediate family members of a  
16 victim or a witness who reside in the same household as the victim or witness or within  
17 reasonable proximity of the victim's or witness' household, as determined by the court. The order  
18 shall not be made without the consent of the law enforcement agency except for limited and  
19 specified periods of time and upon an express finding by the court of a clear and present danger  
20 of harm to the victim or witness or immediate family members of the victim or witness.
  - 21           (ii) For purposes of this paragraph, "immediate family members" include the spouse,  
22 children, or parents of the victim or witness.
  - 23           (G) (i) An order protecting a victim or witness of violent crime from all contact by the  
24 defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by  
25 the defendant. The court or its designee shall transmit orders made under this paragraph to law  
26 enforcement personnel within one business day of the issuance, modification, extension, or  
27 termination of the order, pursuant to subdivision (a) of 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.
  - 31           (ii) (I) If a court does not issue an order pursuant to clause (i) in a case in which the  
32 defendant is charged with a crime involving domestic violence as defined in Section 13700 or in  
33 Section 6211 of the Family Code, the court on its own motion shall consider issuing a protective

34 order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness  
35 has occurred or is reasonably likely to occur, that provides as follows:

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

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

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

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

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

58 (2) For purposes of this subdivision, a minor who was not a victim of, but who was  
59 physically present at the time of, an act of domestic violence, is a witness and is deemed to have  
60 suffered harm within the meaning of paragraph (1).

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

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

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

76 (ii) The emergency protective order restrains the individual who is the restrained person  
77 in the other restraining or protective order specified in clause (i).

78 (iii) The provisions of the emergency protective order are more restrictive in relation to  
79 the restrained person than are the provisions of the other restraining or protective order specified  
80 in clause (i).

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

85 (2) Except as described in paragraph (1), a no-contact order, as described in Section 6320  
86 of the Family Code, shall have precedence in enforcement over any other restraining or  
87 protective order.

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

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

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

97 (e) (1) In all cases in which the defendant is charged with a crime involving domestic  
98 violence, as defined in Section 13700 or in Section 6211 of the Family Code, or a violation of  
99 Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to  
100 subdivision (c) of Section 290, the court shall consider issuing the above-described orders on its  
101 own motion. All interested parties shall receive a copy of those orders. In order to facilitate this,  
102 the court's records of all criminal cases involving domestic violence or a violation of Section  
103 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c)  
104 of Section 290, shall be marked to clearly alert the court to this issue.

105 (2) In those cases in which a complaint, information, or indictment charging a crime  
106 involving domestic violence, as defined in Section 13700 or in Section 6211 of the Family Code,  
107 or a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register  
108 pursuant to subdivision (c) of Section 290, has been issued, except as described in subdivision  
109 (c), a restraining order or protective order against the defendant issued by the criminal court in  
110 that case has precedence in enforcement over a civil court order against the defendant.

111 (3) Custody and visitation with respect to the defendant and his or her minor children  
112 may be ordered by a family or juvenile court consistent with the protocol established pursuant to  
113 subdivision (f), but if ordered after a criminal protective order has been issued pursuant to this  
114 section, the custody and visitation order shall make reference to, and, if there is not an  
115 emergency protective order that has precedence in enforcement pursuant to paragraph (1) of  
116 subdivision (c), or a no-contact order, as described in Section 6320 of the Family Code,  
117 acknowledge the precedence of enforcement of, an appropriate criminal protective order. On or  
118 before July 1, 2014, the Judicial Council shall modify the criminal and civil court forms  
119 consistent with this subdivision.

120 (f) On or before January 1, 2003, the Judicial Council shall promulgate a protocol, for  
121 adoption by each local court in substantially similar terms, to provide for the timely coordination  
122 of all orders against the same defendant and in favor of the same named victim or victims. The  
123 protocol shall include, but shall not be limited to, mechanisms for ensuring appropriate

124 communication and information sharing between criminal, family, and juvenile courts  
125 concerning orders and cases that involve the same parties, and shall permit a family or juvenile  
126 court order to coexist with a criminal court protective order subject to the following conditions:

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

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

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

135 (h) (1) In any case in which a complaint, information, or indictment charging a crime  
136 involving domestic violence, as defined in Section 13700 or in Section 6211 of the Family Code,  
137 has been filed, the court may consider, in determining whether good cause exists to issue an  
138 order under subparagraph (A) of paragraph (1) of subdivision (a), the underlying nature of the  
139 offense charged, and the information provided to the court pursuant to Section 273.75.

140 (2) In any case in which a complaint, information, or indictment charging a violation of  
141 Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to  
142 subdivision (c) of Section 290, has been filed, the court may consider, in determining whether  
143 good cause exists to issue an order under paragraph (1) of subdivision (a), the underlying nature  
144 of the offense charged, the defendant's relationship to the victim, the likelihood of continuing  
145 harm to the victim, any current restraining order or protective order issued by any civil or  
146 criminal court involving the defendant, and the defendant's criminal history, including, but not  
147 limited to, prior convictions for a violation of Section 261, 261.5, or 262, a crime that requires  
148 the defendant to register pursuant to subdivision (c) of Section 290, any other forms of violence,  
149 or any weapons offenses.

150 (i)(1) In all cases in which a criminal defendant has been convicted of a crime involving  
151 domestic violence as defined in Section 13700 or in Section 6211 of the Family Code, a violation  
152 of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to  
153 subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an  
154 order restraining the defendant from any contact with the victim. A minor who was not a victim  
155 of but who was physically present at the time of an act of domestic violence is a witness. Any  
156 order related to a minor witness is subject to and shall be modified by any subsequent  
157 dependency court orders regarding contact or visitation. The order may be valid for up to 10  
158 years, as determined by the court. This protective order may be issued by the court regardless of  
159 whether the defendant is sentenced to the state prison or a county jail or subject to mandatory  
160 supervision, or whether imposition of sentence is suspended and the defendant is placed on  
161 probation. It is the intent of the Legislature in enacting this subdivision that the duration of any  
162 restraining order issued by the court be based upon the seriousness of the facts before the court,  
163 the probability of future violations, and the safety of the victim and his or her immediate family.

164 (2) An order under this subdivision may include provisions for electronic monitoring if  
165 the local government, upon receiving the concurrence of the county sheriff or the chief probation  
166 officer with jurisdiction, adopts a policy authorizing electronic monitoring of defendants and  
167 specifies the agency with jurisdiction for this purpose. If the court determines that the defendant  
168 has the ability to pay for the monitoring program, the court shall order the defendant to pay for  
169 the monitoring. If the court determines that the defendant does not have the ability to pay for the

170 electronic monitoring, the court may order the electronic monitoring to be paid for by the local  
171 government that adopted the policy authorizing electronic monitoring. The duration of the  
172 electronic monitoring shall not exceed one year from the date the order is issued.

173 (j) For purposes of this section, “local government” means the county that has jurisdiction  
174 over the protective order.

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

**PROPOSERS:** Joseph A. Goldstein, Lisa Berger, Michael Fern, Vicky Barker, Jodi Taksar, Charles H. Goldstein, Jonathan A. Goldstein, Daryl Miller, Erin Noonan, Cathleen Yonahara

## **STATEMENT OF REASONS**

The Problem: Under the statute’s current language, if a defendant is convicted of a crime involving domestic violence, the Court can only issue a post conviction restraining order restraining the convicted defendant from any contact with the “victim”. Currently, the definition of the term “victim” in the post conviction context ignores witnesses, who are in most cases minors, and who may not have been the actual physical recipient of domestic violence [since the minors’ parent was the actual physical recipient]; but were still physically present at the time of the act(s) of domestic violence; witnessed the act(s) of domestic violence; and suffered actual harm as a result of witnessing the act(s) of domestic violence against his or her parent. Currently, a minor who is present during the act(s) of domestic violence can *not* be included in a post conviction protective order unless the minor was also physically abused or is likely to be abused, or if there is good cause to believe that the convicted defendant will attempt to punish the child for testifying. However, if the convicted defendant has not physically abused the minor in the past, or if the minor did not testify against the defendant (e.g., too young, too traumatized, testimony not needed), the minor who witnessed these acts is still in imminent physical danger, and the Court is powerless to issue a post conviction protective order covering this individual. A minor who is physically present during an act(s) of domestic violence suffers harm. Although the harm may not be immediately visible, like the bruises and broken bones suffered by a victim of physical violence, it is no less real. Numerous studies show that child witnesses of domestic violence typically do worse in school than their peers, suffer more frequent health complaints, are more prone to anxiety, depression, and PTSD, are more frequently victims of rape and/or sexual misconduct, and suffer other ills. These symptoms do not appear immediately, nor in all child witnesses. But they are very real, and militate strongly in favor of changing the law to permit the inclusion of these children in post conviction protective orders.

The Solution: Would add specific language to subdivision (i)(1) of Section 136.2 which would include witnesses within the coverage of post conviction domestic violence restraining orders; and would also amend the subdivision to state that a minor who was not a victim of, but who was physically present at the time of, an act of domestic violence, is a witness and is deemed to have suffered harm.

## **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

**CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

**AUTHOR AND/OR PERMANENT CONTACT:** Joseph A. Goldstein, The Goldstein Law Firm, 8912 Burton Way, Beverly Hills, California 90211; (310) 553-4746; fax (310) 282-8070; [josephgoldsteinesq@gmail.com](mailto:josephgoldsteinesq@gmail.com)

**RESPONSIBLE FLOOR DELEGATE:** Joseph A. Goldstein

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**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 136.2 to allow witnesses to domestic violence to be protected by a post-conviction restraining order. This resolution should be approved in principle because it furthers a significant state interest in extending protection to minors and witnesses of violent crimes.

CCBA sponsored previous legislation to amend Penal Code section 136.2, which was enacted into law in 2014 to extend protection to witnesses and minors during the pendency of the criminal action. This resolution further extends this protection to witnesses and minors post-conviction and, as such, is a logical extension of existing law. A domestic violence protection order is generally intended to protect the victim and the victim’s immediate family members from the abuser.