
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 270 **Hearing Date:** June 20, 2017
Author: Gallagher
Version: March 22, 2017
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: Restraining Orders: Witness

HISTORY

Source: Conference of California Bar Associations

Prior Legislation: AB 1850 (Waldron) Ch. 673, Stats. of 2014
SB 352 (Block) Ch. 279, Stats. of 2015
AB 307 (Campos) Ch. 291, Stats. of 2013
SB 723 (Pavley) Ch. 155, Stats. of 2011
SB 834 (Florez) Ch. 627, Stats. of 2010
AB 289 (Spitzer) Ch. 582, Stats. of 2007

Support: California Police Chiefs Association; 1 individual

Opposition: California Public Defenders Association

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to expand the court's authority to issue a post-conviction restraining order in domestic violence cases to cover a child witness who was not a victim of, but was physically present at the time of, an act of domestic violence.

Existing law authorizes the trial court in a criminal case to issue protective orders when there is a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. (Pen. Code, § 136.2, subd. (a)(1).)

Existing law provides that for purposes of issuing a protective order during a criminal proceeding, 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. (Pen. Code, § 136.2, subd. (a)(2).)

Existing law provides that a person violating a protective order may be punished for any substantive offense described in provisions of law related to intimidation of witnesses or victims, or for contempt of court. (Pen. Code, § 136.2, subd. (b).)

Existing law requires a court, in all cases where the defendant is charged with a crime involving domestic violence, specified sex crimes, or any crime requiring the defendant to register as a sex offender, to consider issuing a protective order on its own motion. All interested parties shall receive a copy of those orders. (Pen. Code, § 136.2, subd. (e)(1).)

Existing law provides that in cases in which a complaint, information, or indictment charging a crime involving domestic violence, specified sex offenses, or any crime that requires the defendant to register as a sex offender, has been issued, except as specified, a restraining order or protective order against the defendant issued by the criminal court in that case has precedence in enforcement over a civil court order against the defendant. (Pen. Code, § 136.2, subd. (e)(2).)

Existing law provides that custody and visitation with respect to the defendant and his or her minor children may be ordered by a family or juvenile court, as specified, but if ordered after a criminal protective order has been issued, the custody and visitation order shall make reference to, and, if there is not an emergency protective order that has precedence in enforcement, or a no-contact order as described in the Family Code, acknowledge the precedence of enforcement of, an appropriate criminal protective order. (Pen. Code, § 136.2, subd. (e)(3).)

Existing law requires the Judicial Council to promulgate a protocol on or before January 1, 2003, for adoption by each local court in substantially similar terms, to provide for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims. The protocol is required to include, but is not be limited to, mechanisms for ensuring appropriate communication and information sharing between criminal, family, and juvenile courts concerning orders and cases that involve the same parties, and is required to permit a family or juvenile court order to coexist with a criminal court protective order subject to the following conditions:

- 1) An order that permits contact between the restrained person and his or her children is required to provide for the safe exchange of the children and is prohibited from containing language either printed or handwritten that violates a “no-contact order” issued by a criminal court.
- 2) Safety of all parties is the courts’ paramount concern. The family or juvenile court is required to specify the time, day, place, and manner of transfer of the child, as provided in Section 3100 of the Family Code. (Pen. Code, § 136.2, subd. (f).)

Existing law requires the court, at the time of sentencing, to consider issuing an order restraining the defendant from any contact with the victim in all cases in which a criminal defendant has been convicted of a crime of domestic violence, as defined in relevant sections of the Penal Code and Family Code, or any crime that requires the defendant to register as a sex offender. The order may be valid for up to 10 years, as determined by the court. (Pen. Code, § 136.2, subd. (i)(1).)

Existing law authorizes, under the Domestic Violence Prevention Act (DVPA), a court to issue and enforce a domestic violence restraining order, including an emergency protective order, a temporary restraining order and a permanent restraining order. (Fam. Code, §§ 6300 *et seq.*)

Existing law provides that certain orders made after a hearing under the DVPA may have a duration of no more than five years, subject to termination or modification. An order may be renewed, upon request of either party, for either five years or permanently, without a showing of any further abuse since issuance of the original order. (Fam. Code, § 6345, subd. (a).)

Existing law provides that a court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, impersonating, as specified, harassing, telephoning, including, but not limited to, making annoying telephone calls as described, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, 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 or household members. (Fam. Code, § 6320.)

Existing law allows the court to issue civil harassment protective orders for up to five years upon a showing of clear and convincing evidence. (Civ. Pro. Code, §§ 527.6.)

Existing law allows the court to issue workplace violence protective orders for up to three years upon a showing of clear and convincing evidence. (Civ. Pro. Code, § 527.8.)

This bill requires the court, at the time of sentencing, to consider issuing an order restraining a criminal defendant who has been convicted of a domestic violence-related offense, from any contact with a minor who was not a victim of, but who was physically present at the time of, an act of domestic violence.

This bill requires that a post-conviction criminal protective order involving specified crimes have precedence in enforcement over a civil court order against the defendant.

COMMENTS

1. Need for This Bill

According to the author:

Under current law, 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.” This does not include witnesses, who are in most cases minors, and who may not have been the actual physical recipient of domestic violence; 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 cannot 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, 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 still suffers harm. Numerous studies show that child witnesses of domestic violence typically do worse in school, suffer more frequent health complaints, are more prone to anxiety, depression, and PTSD, and are more frequently victims of rape and/or sexual misconduct. 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.

This bill would include witnesses within the coverage of post-conviction domestic violence restraining orders; and would 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.

2. Protective Orders Generally

As a general matter, a court can issue a protective order in any criminal proceeding pursuant to Penal Code section 136.2 where it finds good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. Protective orders issued under this statute are valid only during the pendency of the criminal proceedings. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382.)

When criminal proceedings have concluded, the court has the authority to issue protective orders as a condition of probation in cases where probation was granted. In some cases in which probation has not been granted, the court also has the authority to issue post-conviction protective orders. The court is authorized to issue no-contact orders for up to 10 years when a defendant has been convicted of willful infliction of corporal injury to a spouse, former spouse, cohabitant, former cohabitant, or the mother or father of the defendant's child. The court can also issue no-contact orders lasting up to 10 years in cases involving a domestic violence-related offense, rape, spousal rape, statutory rape, or any crime requiring sex offender registration. (Pen. Code, § 136.2, subd. (i)(1).) The same is true of stalking cases. (Pen. Code, §646.9, subd. (k)). Similarly, in cases involving a criminal conviction or juvenile adjudication for a sex offense in which the victim was a minor, the court may issue an order “that would prohibit ... harassing, intimidating, or threatening the victim or the victim’s family members or spouse.” (Pen. Code, § 1201.3, subd. (a).) Lastly, the court has authority to issue no-contact orders lasting up to 10 years in cases involving the abuse of an elder or dependent adult. (Pen. Code, § 368, subd. (l).)

3. Criminal Contempt

Disobedience of a court order may be punished as criminal contempt. The crime of contempt is a general intent crime. It is proven by showing that the defendant intended to commit the prohibited act, without any additional showing that he or she intended “to do some further act or achieve some additional consequence.” (*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.) Nevertheless, a violation must also be willful, which in the case of a court order encompasses both intent to disobey the order, and disregard of the duty to obey the order. (*In re Karpf* (1970) 10 Cal.App.3d 355, 372.)

Criminal contempt under Penal Code section 166 is a misdemeanor, and so proceedings under the statute are conducted like any other misdemeanor offense. (*In re McKinney* (1968) 70 Cal.2d 8, 10; *In re Kreitman* (1995) 40 Cal.App.4th 750, 755.) Therefore, the criminal contempt power is vested in the prosecution; the trial court has no power to institute criminal contempt proceedings under the Penal Code. (*In re McKinney*, supra, 70 Cal.2d at p. 13.) A defendant charged with the crime of contempt “is entitled to the full panoply of substantive and due process rights.” (*People v. Kalnoki* (1992) 7 Cal.App.4t Supp. 8, 11.) Therefore, the defendant has the right to a jury trial, regardless of the sentence imposed. (*People v. Earley* (2004) 122 Cal.App.4th 542, 550.)

5. Proposed Amendments

The bill as currently drafted does not allow a court to modify a no-contact order or to authorize a family or juvenile court to issue an order regarding visitation where good cause has been shown.

The author intends to amend the bill to allow a criminal trial court judge to include in a post-conviction order, at the time of sentencing or subsequently upon a showing of good cause, an order authorizing a family or juvenile court to make an order establishing visitation with a defendant’s minor child who is a witness to an act of domestic violence. The amendment requires that notice of the hearing in the criminal court be provided to the protected party, the prosecuting attorney, and the protected minor via his or her primary legal custodian other than the defendant-parent. The amendment cross-references subdivisions of Penal Code section 136.2 that address custody and visitation standards and protocols.

The author also intends to move the provision pertaining to the precedence in enforcement of a post-conviction restraining order over a civil court order against the defendant to its own paragraph.

6. Argument in Support

The California Police Chiefs Association supports this bill stating:

AB 270 protects minor witnesses of domestic violence by including them within the coverage of post-conviction domestic violence restraining orders.

Currently, a minor who is present during the act(s) of domestic violence cannot be included in a post-conviction protective order unless the minor was also physically abused, or is likely to be abused.

AB 270 is a good sense measure that will ensure that vulnerable witnesses receive the protection that they need.

7. Argument in Opposition

The California Public Defenders Association opposes this bill stating:

Although the law will give the court discretion in deciding whether to impose such an order, the law has the potential to become routine “on demand.” Such an order also has the potential for further disruption to parent-child relationships in an already stressful situation. These pro forma orders could also be misused by

parties seeking to “jockey” for an advantage in custody matters and as retaliation. Moreover, this new provision simply is not necessary because existing law already provides the court with discretion to issue a restraining order in the event a parent or guardian seeks a restraining order on behalf of a child that has been victimized or in the case of any threatened violence. This bill is redundant, overreaching and unnecessary.

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