

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1143 (Berman)
Version: June 14, 2021
Hearing Date: June 22, 2021
Fiscal: No
Urgency: No
JT

SUBJECT

Civil procedure: restraining orders

DIGEST

This bill enables a court, in a hearing on a petition for a civil harassment restraining order, to authorize alternative means of service in certain circumstances.

EXECUTIVE SUMMARY

A person who is harassed can seek a temporary restraining order and then file for a hearing in which the court may grant a permanent restraining order. Before the hearing for a permanent order, however, the person seeking the restraining order must ensure that the alleged harasser is served with a copy of the petition, the temporary restraining order, and notice of hearing. This ensures the subject of the petition is apprised of the allegations and able to prepare for the hearing. Delivery of the papers must be performed by way of personal service, which means that the person must be located and physically given a copy of the papers. But in some instances personal service is not feasible, either because the restrained party's whereabouts are unknown or the party is being evasive. Such was the case in a recent appellate decision, *Searles v. Archangel* (2021) 60 Cal.App.5th 43, in which the petitioner was denied a permanent protective order against an unhoused harasser who could not be tracked down.

This bill would instead provide that if the court determines at the hearing that, after diligent effort, the petitioner has been unable to accomplish personal service, and that there is reason to believe that the respondent is evading service or cannot be located, then the court may specify another method of service that is reasonably calculated to give actual notice to the respondent and may prescribe the manner in which proof of service is made. The bill is author-sponsored. There is no support or opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that if at the time of a hearing with respect to a domestic violence restraining order, the court determines that, after diligent effort, the petitioner has been unable to accomplish personal service, and that there is reason to believe that the restrained party is evading service, the court may permit an alternative method of service designed to give reasonable notice of the action to the respondent, as specified. (Fam. Code § 6340(a)(2).)
- 2) Provides that where no provision is made for the service of summons, the court in which a civil action is pending may direct that summons be served in a manner which is reasonably calculated to give actual notice to the party to be served and that proof of such service be made as prescribed by the court. (Code of Civ. Proc. § 413.30.)¹
- 3) Defines “harassment” as unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. (§ 527.6(a)(3).)
- 4) Provides that a temporary restraining order may be issued, with or without notice, on the basis of a declaration that, to the satisfaction of the court, shows reasonable proof that (1) the respondent is harassing the petitioner, and (2) great or irreparable harm would result to the petitioner if the harassment is not restrained. (§ 527.6(d).) The request must be issued on the same day it is submitted to the court, unless it is filed too late in the day, in which case the order must be granted or denied the next day of judicial business. (§ 527.6(e).) The order lasts up to 21 days, unless extended by the court to 25 days. (§ 527.6(g).)
- 5) Following that period, a noticed hearing must be held. If the court finds clear and convincing evidence that unlawful harassment exists, the court must issue an order prohibiting the harassment. (§ 527.6(i).) The order may last up to five years, and may be renewed. (§ 527.6(j).)
- 6) Requires, at least five days before the hearing, that the respondent be personally served with a copy of the petition, the temporary restraining order, and notice of hearing of the petition. (§ 527.6(m).)

This bill would provide that if the court determines at the hearing that, after diligent effort, the petitioner has been unable to accomplish personal service, and that there is

¹ All further section references are to the Code of Civil Procedure unless otherwise specified.

reason to believe that the respondent is evading service or cannot be located, then the court may specify another method of service that is reasonably calculated to give actual notice to the respondent and may prescribe the manner in which proof of service is made.

COMMENTS

1. Author's statement

The author writes:

No victim of harassment should be denied a protection order simply because their perpetrator cannot be found. This is especially true given the ability to provide notice via other means, if only allowed. Unfortunately, and to the harm of victims, existing law expressly provides that perpetrators be personally served with a copy of the petition for a protective order, temporary restraining order, if any, and notice of hearing of the petition – without exception.

Recently, in *Searles v. Archangel*, a court of appeal had no choice but to affirm the superior court's ruling that a woman's petition for a protective order could not be granted because she was unsuccessful in her numerous attempts to personally serve her stalker. AB 1143 would authorize the court to order alternate means of service, thereby removing unnecessary barriers for victims of harassment to seek protection.

2. Personal service and civil harassment restraining order petitions

Existing law enables a person who has suffered harassment to seek a temporary restraining order (TRO) without notice to, or the presence of, the harasser. (§ 527.6(a).) After notice and a hearing, the court may then issue a protective order that prohibits harassment for a duration of up to five years (often referred to as a permanent order). (*Id.*, (j)(1).) The hearing must be held within 21 days, or, if good cause is shown, 25 days of the issuance of the TRO, although the court may grant continuances for good cause. (*Id.*, (p)(1).) Section 527.6(m) requires, at least five days before the hearing, that the respondent be personally served with a copy of the petition, the TRO, and notice of hearing of the petition.²

“Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.” (*Murphy Bros. v.*

² See Cal. Rules of Court, rule 3.1160(c). (“The request for a protective order, notice of hearing, and any temporary restraining order, must be personally served on the respondent at least five days before the hearing, unless the court for good cause orders a shorter time. Service must be made in the manner provided by law for personal service of summons in civil actions.”)

Michetti Pipe Stringing (1999) 526 U.S. 344, 350.) “The essence of procedural due process is notice and an opportunity to respond. [Citation.] The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’” (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 183–184; *see also In re Jonathan V.* (2018) 19 Cal.App.5th 236, 242.)

However, if the respondent cannot be located, a rigid requirement that a party receive personal service impedes justice and, in the case of restraining order petitions, personal safety. While existing law authorizes alternative means of service in various contexts,³ provisions governing restraining orders for harassment and domestic violence were initially crafted to require actual notice.⁴ Recognizing the injustice this may work when an abuser is being evasive, the Legislature recently changed the service requirement in the Family Code provisions governing domestic violence restraining orders to allow for alternative means of service if the petitioner has made diligent efforts and there is reason to believe the person is being evasive. (Fam. Code § 6340(a)(2); AB 2694 [Rubio, Ch. 219, Stats. 2018].)

A recent case decided by the Fifth District Court of Appeal illustrates the need for a similar reform to section 527.6. In *Searles v. Archangel* (2021) 60 Cal.App.5th 43, the plaintiff petitioned for a restraining order, alleging that the defendant had threatened violence and was stalking her. The court issued a TRO against the defendant. (*Id.* at 46.) However, over the course of the next six months the plaintiff was repeatedly forced to ask for continuances of the hearing to make the TRO permanent because she was unable to accomplish service, as he was homeless, had no known mailing address, and was being evasive. (*Id.* at 46-47.)

Frustrated, the plaintiff moved to waive traditional service and requested authorization to serve the defendant by social media on which he followed her. (*Id.* at 47.) She referenced out-of-state cases in which service and summons via email or social media were permitted, including a New York case where a family law court authorized service and summons in a divorce action through a direct message to the defendant’s Facebook account, based on a state statute allowing a court to authorize an alternative method of service, if a sufficient showing is made that personal service and traditional substitute service would be impractical, and the method proposed is reasonably calculated to provide the defendant with actual notice. (*Id.*, discussing *Baidoo v. Blood-Dzrako* (N.Y.Sup.Ct. 2015) 48 Misc.3d 309.) The plaintiff in *Searles* argued that section 413.30

³ California law allows for five basic methods of service: (1) personal delivery to the party (§ 415.10); (2) delivery to someone else at the party’s usual residence or place of business with mailing after (known as “substitute service”) (§ 415.20); (3) service by mail with acknowledgment of receipt (§ 415.30); (4) service on persons outside the state by certified or registered mail with a return receipt requested, (§ 415.40); and (5) service by publication (§ 415.50).

⁴ For further discussion in the context of domestic violence restraining orders, see Prof. Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases* (Mar. 2019) 94 Wash. L. Rev. 333.

(which, like this bill, authorizes alternative forms of service that are reasonably calculated to give actual notice to the party to be served) enables courts to resort to alternatives to personal service in the context of civil harassment restraining order petitions. (*Id.* at 48.) However, the superior court ruled that section 527.6's express requirement for personal service precluded alternatives. (*Id.* at 48-49.)

The Court of Appeal upheld the lower court ruling but acknowledged the "practical merit" of the plaintiff's request. (*Id.* at 45-46.) The court discussed unpublished United States District Court opinions that have construed section 413.30 as authorizing alternative methods of service of a summons, specifically by email, when traditional methods have proved ineffective.⁵ However, the court concluded that because other provisions of code expressly invoke the court's authority to authorize service by alternative means under section 413.30, "[t]he Legislature's decision not to include a comparable provision for alternate forms of service in section 527.6 precludes our rewriting the statute to allow service other than by personal delivery." (*Id.* at 55.) As a result, the plaintiff was unable to obtain a restraining order.

The court stated: "We encourage the Legislature and the Judicial Council, which have already authorized extensive use of electronic service of notice ... to consider developing pilot programs to test the efficacy of utilizing new technologies as an approved method of service of process." (*Id.* at 51.)

3. Authorizes alternative means of service in civil harassment restraining order proceedings when personal service cannot reasonably be accomplished

To prevent such unjust outcome such as that in *Searles*, this bill, drawing on related statutes described above, would provide that if the court determines at the hearing on a civil harassment restraining order petition that, after diligent effort, the petitioner has been unable to accomplish personal service, and that there is reason to believe that the respondent is evading service or cannot be located, then the court may specify another method of service that is reasonably calculated to give actual notice to the respondent and may prescribe the manner in which proof of service is made.

Although the bill does not expressly address electronic service, given the arguments in *Searles* and the fact that section 413.30, which the bill closely resembles, has been interpreted to authorize service by email in some circumstances, the bill appears to open that door for electronic service in the context of civil harassment restraining orders. In these narrow circumstances, this is arguably appropriate. There are of course due process concerns; the respondent does not get to consent and will be unlikely to be unrepresented. On the other hand, the petitioner may be in serious danger; their

⁵ "Courts have also construed § 413.30 as authorizing service by email where email service 'is reasonably calculated to give actual notice to the party to be served,' particularly where there is evidence that the defendant is evading service. [Citations.]" (*Cal. Serv. Empl. Health & Welfare Trust Fund v. Greenbox Servs. LLC* (N.D.Cal. May 17, 2021, No. 21-cv-02237-LB) 2021 U.S. Dist. LEXIS 93477, at *2-3.)

inability to obtain protection when personal service cannot reasonably be accomplished is itself a due process problem.⁶ Depending on the respondent's circumstances, traditional alternative means of service, such as service by mail or general publication, may be much less likely to result in actual notice than service by email or social media. Under this bill, only after the court is satisfied that genuine efforts have been made to accomplish personal service and that ongoing efforts are essentially futile, can the court resort to alternatives, which must be reasonably calculated to provide actual notice based on the specific circumstances of the case at hand.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SB 666 (Umberg, 2021) would, on and after July 1, 2023, require a court to electronically serve court-issued documents on any party or other person who has provided express consent or has been ordered to accept electronic service. The bill is on the Senate inactive file.

Prior Legislation: *See* Comment 2.

PRIOR VOTES:

Assembly Floor (Ayes 77, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)

⁶ In the realm of domestic violence restraining orders, Professor Jane Stoeber argues: "Significantly, the petitioner also has a constitutionally protected interest in a hearing on the merits of his or her claim 'at a meaningful time and in a meaningful manner,' and court rules must allow access to such a hearing. Respondents simply do not have a due process right to evade service or avoid litigation, and if procedural rules are so stringent as to prevent petitioners from achieving service, petitioners are denied the right of access to the courts." (*Access to Safety and Justice: Service of Process in Domestic Violence Cases*, *supra*, fn. 4 at 344-345 [footnotes omitted].)