

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

SB 1265 (Rubio)
Version: April 18, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Domestic violence: child visitation

DIGEST

This bill creates a procedure wherein, if a person who is the subject of a restraining order and also has court-ordered custody or visitation with children is arrested for or charged with a crime involving assaultive conduct or use of a weapon on another person, another party may file a request for order with the court to modify the protective order; upon receipt of the request for order, the court must immediately suspend the subject of the order's in-person contact and set a hearing within 15 days to rule on the request for order.

EXECUTIVE SUMMARY

The state has long sought to balance the rights of parents to care for and raise their children with the interests of the state in protecting children from parents who will cause their children harm. Unfortunately, there are numerous examples of the state failing, such as in a tragic incident earlier this year in Sacramento when a father murdered his three children and a supervisor, then killed himself, during a court-ordered supervised visit. The children's mother had a restraining order against the father, but it did not extend to prohibit contact with the children. Five days before the horrific incident, the father had been arrested for assaulting a police officer.¹

According to the author and supporters of the bill, this pattern – where an abuser escalates their violence, often to the point of murder, following an arrest or other violent act – is all too common. This bill is intended to provide a protective mechanism for children in these situations. Specifically, the bill allows a person who is protected by a protective order to file a request for order when the restrained person, who has court-

¹ See Stanton & Ahumada, *Sacramento church shooter was arrested for assaulting officer 5 days before killing daughters*, Sacramento Bee (Mar. 1, 2022), available at <https://www.sacbee.com/news/local/article258925018.html> (last visited Apr. 22, 2022).

ordered custody or visitation for children, has been arrested for, or charged with, a crime involving assaultive conduct or the use of a weapon on another person. If the request is filed within 45 days of the arrest or charges, the court must automatically suspend the restrained person's custody or visitation rights for 15 days and set a hearing within 15 days to rule on the order. The protected person is excused from serving the request for order on the restrained person, but the court must serve the temporary suspension order along with the notice of the hearing. The protected person may file a response to the request for order in advance of the hearing. If the court, after the hearing, opts to resume in-person custody or visitation for the restrained person, the court must state its reasoning in writing or on the record.

This bill is sponsored by the author and supported by the California Protective Parents Association, Inner Circle, the Legislative Coalition to Prevent Child Abuse, the Los Angeles Police Department, the Peace Officers' Research Association of California, the Sacramento Regional Family Justice Center Foundation, and four individuals. The bill is opposed by the Association of Family and Conciliation Courts.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) States that it is the public policy of this state to ensure that:
 - a) The health, safety, and welfare of children is the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children;
 - b) Children have the right to be safe and free from abuse, because the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child; and
 - c) Children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and parents are encouraged to share the rights and responsibilities of child rearing in order to effect this policy, except when the contact would not be in the best interests of the child, as provided. (Fam. Code, § 3020(a), (b).)
- 2) Provides that, when the policies set forth in 1a) and c) above are in conflict, a court's order regarding physical or legal custody or visitation must be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members. (Fam. Code, § 3020(c).)
- 3) Establishes the DVPA (Fam. Code, div. 10, §§ 6200 et seq.), which sets forth procedural and substantive requirements for the issuance of a protective order to, among other things, enjoin specific acts of abuse or prohibit the abuser from coming within a specified distance of the abused person. (Fam. Code, §§ 6218, 6300 et seq.)

- 4) Provides for the issuance of DVPA ex parte orders and orders issued after a noticed hearing at which the alleged abuser may appear. (Fam. Code, §§ 6320-6327, 6340-6347.)
- 5) Requires a court, prior to the issuance or denial of a protective order under the DVPA, to ensure that a search has been conducted of specified records and databases to determine if the subject of the proposed order:
 - a) Has a prior criminal conviction for a violent or serious felony, as defined;
 - b) Has a misdemeanor conviction involving domestic violence, weapons, or other violence;
 - c) Has an outstanding warrant;
 - d) Is currently on parole or probation;
 - e) Has a registered firearm; or
 - f) Has a prior restraining order or a violation of a prior restraining order. (Fam. Code, § 6306(a).)
- 6) Requires the court, prior to deciding whether to issue an order or when determining appropriate temporary custody or visitation orders, to consider the following information obtained pursuant to the search 4): the subject's conviction for a violent or serious felony; the subject's conviction for a misdemeanor involving domestic violence, weapons, or other violence; the subject's outstanding warrants; the subject's parole or probation status; prior restraining orders of the subject; and the subject's violation of a prior restraining order. The court may not consider information relating to a crime that did not result in a conviction. (Fam. Code, § 6306(b).)
- 7) Provides that the information obtained from the search in 3) must be maintained in a confidential case file and shall not become part of the public file in the proceeding, subject to the following:
 - a) The parties may request the information on which the court relied; the court must admonish the party seeking the proposed order that it is unlawful to willfully release the information except as authorized by law.
 - b) The parties, upon receipt of the information, may release it to their counsel, court personnel, and court-appointed mediators for the purpose of seeking judicial review or for specified dependency proceedings.
 - c) The contents may be released to specified court-appointed persons for other proceedings, including a court-appointed mediator or child custody evaluator. (Fam. Code, § 6306(c), (d).)
- 8) Requires, if the search in 3) shows that an outstanding warrant exists against the subject of a protective order, to notify appropriate law enforcement of the issuance and contents of the protective order and any other appropriate information, and for law enforcement to take actions necessary to execute any outstanding warrants with

respect to the restrained person as appropriate and as soon as practicable. (Fam. Code, § 6306(e).)

- 9) Requires, if the search in 3) shows that the subject of a protective order owns a registered firearm, or if the court receives other evidence that the subject is in possession of a firearm or ammunition, the court to make a written record of whether the subject has relinquished the firearm/ammunition and provided proof thereof. If the subject has not provided evidence of compliance, the court shall notify law enforcement of the issuance and contents of the protective order and any information about the firearm/ammunition, and law enforcement must take all actions necessary to obtain any firearms or ammunition owned, possessed, or controlled by the restrained person and to address any violation of the order with respect to firearms/ammunition as appropriate and as soon as practicable. (Fam. Code, § 6306(f).)
- 10) Requires, if the search in 3) shows that the subject of a protective order is currently on parole or probation, the court to immediately notify the appropriate parole or probation officer of the issuance and contents of the protective order, and that officer shall take all actions necessary to revoke parole or probation, or any other actions, as appropriate and as soon as practicable. (Fam. Code, § 6306(g).)
- 11) Provides that the search in 3) does not require a court to delay the granting of an application for an order that may otherwise be granted without the information resulting from the search. If the court finds that the evidence is sufficient to issue the order without a search, the court must issue the protective order and then ensure that the search is conducted prior to the hearing. (Fam. Code, § 6306(h).)
- 12) Requires a party seeking an emergency restraining order other than an emergency protective order under the DVPA to provide a declaration regarding notice that includes one of the following statements:
 - a) The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether any opposition is expected and that, within the applicable time, the applicant informed the opposing party where and when the application would be made.
 - b) That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party.
 - c) That, for reasons specified, the applicant should not be required to inform the opposing party. (Cal. Rules of Court. r. 5.151(e).)

This bill:

- 1) Modifies the scope of the search that must be conducted prior to a hearing on a domestic violence protective order, to specify that the search look for all convictions

involving domestic violence, weapons, and other violence, not just misdemeanor convictions.

- 2) Provides that, if a person who is already restrained pursuant to a domestic violence protective order or other protective order and who has court-authorized custody or visitation with children, and the court has received a request for an order from a party to the restraining order, or a minor's counsel if minor's counsel has been appointed, stating that the restrained person has been arrested for or charged with a crime involving assaultive conduct or use of a weapon upon another person, the court must:
 - a) Suspend the restrained party's in-person contact with the children;
 - b) Conduct a hearing on the request for order within 15 days of receipt of the request; and
 - c) Serve notice of the hearing on the request for order to the party whose custody or visitation has been suspended.
- 3) Provides that the restrained party may provide a response prior to the hearing.
- 4) Provides that the party filing a request for an order pursuant to 2) is automatically exempt from serving the restrained party with the request for order, pursuant to California Rule of Court 5.151(e).
- 5) Requires a court to ensure that a criminal background check is conducted prior to the hearing in 2(b) and provide the results of the search, to the extent permitted by existing law, to the parties prior to the hearing. The search must be conducted of all records and databases readily available and reasonably accessible to the court, but a record or database need not be searched if the information available there can be obtained as a result of a search conducted in another record or database.
- 6) Requires the court to exercise due diligence regarding all information relevant to child safety knowing that the database information in 5) may be incomplete.
- 7) Provides that if, following the hearing in 2)(b), the court reinstates in-person custody or visitation, the court shall state its reasons in writing or on the record.
- 8) Clarifies the provision relating to the court's treatment of information obtained during a search, to account for the new obligations set forth in this bill.

COMMENTS

1. Author's comment

According to the author:

This bill will further protect victims and children by allowing for a pause in visitation if there were recent signs of an escalation in violent behavior by the abusive parent that resulted in an arrest, charge or use of a weapon on another person. We must take the necessary steps to ensure children, victims and families are protected when we identify high-risk circumstances and an escalation of violent behavior.

Children continue to be victims of severe domestic violence cases that have ultimately led to murder by an abusive parent. Many people are aware of the tragedy that took place in February of this year in Sacramento County, where a father that had a domestic violence restraining order in place, ended up murdering his three little girls. In family court cases that involve domestic violence, children have almost double the risk for child abuse. The legal system failed this mother and her three children. We must do a better job to protect victims and their children from violent abusers.

Furthermore, we have seen 832 child homicides reported in the media involving families that were divorcing. In some cases, the family courts received evidence of a history of abuse, but missed opportunities to prevent child deaths. The Center for Judicial Excellence, a non-profit group advocating for child safety has documented over 800 cases reported in the media since 2008 in the United States where children have been killed by a parent when the family was facing divorce or separation.

2. This bill creates a procedure to implement an automatic custody suspension when a person already restrained by a protective order is arrested or charged with certain offenses

As the author notes, the most dangerous time for an abused partner and the children of an abuser is when the partner ends the relationship.² There is also a pattern of abusers engaging in increasingly violent acts before turning to murder – warning signs that the

² E.g., Kasperkevic, *Private Violence: up to 75% of abused women who are murdered are killed after they leave their partners*, *The Guardian* (Oct. 20, 2014), <https://www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice> (last visited Apr. 20, 2022).

judicial system often fails to heed.³ This bill is intended to provide victims with a tool to protect their children when there have been dangerous signs of escalation.

The procedure created by this bill applies to persons already restrained by a protective order and who have court-ordered visitation or custody with children.⁴ If the restrained parent is arrested for or charged with a crime involving assaultive contact or the use of a weapon on another person, the protected party may, within 45 days of the arrest or charges, file a request for an order with the court setting forth the facts of the arrest or charges. Upon receipt of the request for order, the court must suspend the restrained parent's right to custody or visitation for 15 days and set a hearing; the bill does not specify what exactly the request for order or hearing will consider, but it is presumably to consider modifying the protective order and/or order granting the restrained parent custody or visitation. The court has no discretion over whether to implement the 15-day custody suspension, nor does it appear that the court is required to first verify whether the arrest actually took place or the charges were actually made.

Out of concern for the danger that may arise when a restrained parent is served with the request for order contemplated by this bill, the bill allows the protected party seeking the order to not serve the restrained party with the request for order. Accordingly, the restrained person will not learn that the protected party is seeking to suspend custody or visitation until after the fact, when the restrained person is served with notice of the order implementing the 15-day suspension and setting the hearing to consider the request for order. The bill permits the restrained person to file a response in advance of the hearing. If the court decides, after the hearing, to reinstate in-person custody or visitation, the court must state its reasons in writing or on the record.

Proponents of the bill argue that this automatic suspension is necessary to protect children when they are most at risk from a violent parent. They state that, in many cases, requests to modify an order are set too far in the future to effectively prevent contact with a restrained parent when the parent is most violent, i.e., immediately after an act of violence. They argue that the mandatory pause imposed by this bill will interrupt the cycle of abuse when violence is escalating and protect children until the court can hear the matter in a hearing.

The Association of Family and Conciliation Courts, writing in opposition, raises due process concerns discussed in Part 3, and also argues that the 15-day hearing window established by the bill is unrealistic in light of the courts' current caseloads. The Judicial Council of California (Judicial Council), which has not taken a position on the bill, has expressed similar concerns. Judicial Council also questions whether the bill

³ See, e.g., Kitagaki & Ahumada, *Sacramento-area shooting exposes basic failure to protect victims of domestic violence*, Sacramento Bee (Mar. 1, 2022), available at <https://www.sacbee.com/article258929453.html> (last visited Apr. 20, 2022).

⁴ The person could be a parent, guardian, or other family member, which this analysis refers to collectively as "parent."

contemplates the courts conducting any sort of verification of the arrest or charges, and if so, notes that many courts do not have access to the databases necessary to do so. Judicial Council also wishes to continue working with the author to clarify key terms and definitions.

3. Concerns, considerations, and potential amendments

“[T]he interest of parents in the care, custody, and control of their children...is perhaps the oldest of the fundamental liberty interests recognized” by the United States Supreme Court.⁵ This right is not absolute, however – the state’s interest in ensuring the health and safety of the state’s children can outweigh the parent’s interest when the parent has been persistently unfit.⁶ Any procedure for depriving a parent of their interest in raising their child must satisfy the Due Process Clause of the Fourteenth Amendment.⁷

This bill creates an automatic suspension of custody by means of a clerical act. The bar for the automatic suspension is low: the person seeking the order need allege only that the other party is (1) already restrained by a protective order, (2) has court-ordered custody or visitation rights to the children, and (3) has been arrested for or charged with undefined crimes involving “assaultive conduct” or the use of a weapon on another person. Upon receipt of such a filing, the court *must* suspend any court-ordered custody or visitation for 15 days, at which point the court must hold a hearing on the requested order (which, presumably, could be to modify the restraining order or the custody/visitation order). Additionally, the party seeking the order need not provide notice of the request for order to the restrained party; instead, the court is required to serve the restrained party with the order suspending custody at the same time it serves notice of the hearing.

The Association of Family and Conciliation Courts, writing in opposition, points out that, while the suspension of custody or visitation is brief, this bill provides no process for the parent who is losing their right to see their children. The bill does not even provide notice to the parent that the other parent has requested a suspension – the first notice the parent will receive is the suspension order. The bill also removes any potential for judicial discretion in the automatic suspension.

Additionally, because the bill allows the suspension of custody or visitation on the basis of an arrest or criminal charges, it seems likely that the bill will result in the suspension of custody when the parent did not actually engage in any violent contact. Moreover, as Judicial Council points out, some abusers obtain protective orders against their victims

⁵ *Troxel v. Granville* (2000) 530 U.S. 57, 65.

⁶ See Fam. Code, § 3020; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 257.

⁷ *Santosky v. Kramer* (1982) 455 U.S. 745, 753.

as a means of perpetuating the abuse,⁸ so this bill would appear to give those abusers a powerful tool with which to continue terrifying and harassing their victims. Overall, although the state undeniably has an interest in protecting children from the threat of violence, this bill appears unlikely to satisfy Due Process concerns because of its total lack of process and the broad scope of parents whose rights may be affected.

To address these concerns, the Committee and the author may wish to amend the bill to create an expedited ex parte process in lieu of an automatic suspension. The bill could be amended to guarantee a same-day hearing for a petition filed before 10:00 a.m., or next-day for a petition filed after 10:00 p.m., when a person files an ex parte request to modify a protective order due to the restrained person's recent arrest or charges for specified crimes. The revised language could read as follows, subject to any technical changes Legislative Counsel may make:

Amendment

Family Code section 6306(b)(2)(A):

If a person who is restrained pursuant to a Domestic Violence Protection Act order or other protective order has court-authorized in-person custody or visitation with children and the court has received an ex parte request for an order to modify the protective order from a party to the restraining order, or a minor's counsel if minor's counsel has been appointed, stating that the restrained person has been arrested for or charged with a crime involving assaultive conduct, or use of a weapon upon another person, within the 45-day period prior to the court's receipt of the request to modify the protective order, the court shall hear the ex parte request on the same day it was filed, if the request was filed before 10:00 am, or on the next day if it was filed after 10:00 am. At the ex parte hearing, the court may suspend the restrained person's in-person contact with the children until it holds a noticed hearing on the request to modify the protective order, which must be conducted within 15 days. The court must serve a copy of the order and the notice of the hearing to the party whose custody or visitation has been suspended. The party may file a response prior to the hearing. Filing an ex parte request for an order under this subparagraph automatically exempts the applicant from the requirement to give advance notice to the opposing party as specified in paragraph (2) of subdivision (e) of Rule 5.151 of the California Rules of Court. The applicant is also exempt from any fee for any filings related to a petition filed pursuant to this subparagraph.

⁸ E.g., Miller & Smolter, *Paper Abuse: Documenting New Abuse Tactics*, Family & Intimate Partner Quarterly (June/July 2012), at p. 32.

4. Arguments in support

According to the Sacramento Regional Family Justice Center Foundation, writing in support:

Prior family violence is the number one risk factor in cases where parents kill their families. Seventy percent of men who murder their families have a history of intimate partner violence.

Under SB 1265 (Rubio), if a person already restrained due to violence has in-person contact with children and has been arrested or charged within the last 45 days with an assault, or assault with a weapon, a parent may file to halt in-person contact with children. A hearing must be conducted within 15 days, and a criminal background check must be done.

Currently, under existing law, a parent who fears their children may be injured or killed by a violent parent may file with the court to plead for protection. However, in many cases, judges set a hearing date but leave existing orders in place, and children are required to continue in-person contact, which is unconscionable. The children are not given a choice!

SB 1265 (Rubio) will interrupt this cycle of violence.

5. Arguments in opposition

The Association of Family Conciliation Courts writes in opposition:

The first major obstacle [to this bill] is the attempt to limit, if not fully eliminate, the target parent's due process rights to access their children by providing no notice of the attempt to suspend all in-person contact. The second serious obstacle for us is the attempt to eliminate the court's discretion in such circumstances. This is only exacerbated by the fact that such unnoticed and mandatory action is to occur based solely on the allegation that one of the triggering actions has occurred before such action has been properly verified or documented.

In addition, the inclusion of an instruction to "set a hearing date" once the order to suspend occurs is meaningless in this impacted court environment. Parties now routinely wait 3-6 months in some counties for such an initial hearing. During that period the targeted parent and child would be denied any meaningful contact (in-person, even supervised) to maintain the parent-child relationship. Presuming electronic means of contact is questionable in that many low-income parents may not have the technological means to do this; it requires

a lot of cooperation from the parent who just surreptitiously cut off all meaningful contact and there is no discretion allowed to even order such contact.

SUPPORT

California Protective Parents Association

Inner Circle

Legislative Coalition to Prevent Child Abuse

Los Angeles Police Department

Peace Officers' Research Association of California

Sacramento Regional Family Justice Center Foundation

Three individuals

OPPOSITION

Association of Family and Conciliation Courts

RELATED LEGISLATION

Pending Legislation: SB 935 (Min, 2022) clarifies a court may renew a DVPA protective order multiple times, subject to termination, modification, or subsequent renewal, as specified. SB 935 is pending before the Assembly.

Prior Legislation:

SB 654 (Min, Ch. 768, Stats. 2021) required a court that grants unsupervised visitation to parents with histories of abuse, neglect, or substance abuse to state its reasons for doing so in writing or on the record, and provides that if a child addresses a court regarding custody or visitation, they generally must be permitted to do so without the parties being present.

SB 538 (Rubio, Ch. 686, Stats. 2021) among other things, required, by July 1, 2023, a court or court facility that receives petitions for domestic violence restraining orders or gun violence restraining orders to permit those petitions to be filed electronically; and permitted parties and witnesses to appear remotely at a hearing on a petition for a gun violence restraining order or domestic violence restraining order.

SB 329 (Eggman, Ch. 685, Stats. 2021) codified existing Rules of Court related to the relinquishment of a firearm by a person subject to a civil domestic violence restraining order and requires the courts to notify law enforcement and the county prosecutor's office when there has been a violation of a firearm relinquishment order.

AB 887 (Levine, Ch. 681, Stats. 2021) provided that domestic violence restraining orders or temporary restraining orders may be submitted electronically, as specified, and

authorized the petitioner to elect to receive documents by regular mail or through the court.

AB 1796 (Levine, 2020) would have required courts to provide a drop box, during and after business hours, for the filing of petitions for domestic violence restraining orders. AB 1796 died on the Senate floor.

AB 2694 (Rubio, Ch. 219, Stats. 2018) provided that a request for an ex parte DVPA restraining order may not be denied solely because the respondent was not provided with notice, and provided methods for alternative service if it appears that a respondent is attempting to evade service.

AB 2089 (Quirk, Ch. 635, Stats. 2014) clarified that the abuse necessary for a DVPA protective order need not be limited to the actual infliction of physical injury itself, and that the length of time since the most recent act of abuse must be considered in the totality of the circumstances in determining whether to grant such an order.

AB 176 (Campos, Ch. 176, Stats. 2013) modified the law governing the order of precedence for enforcing protective and restraining orders between the same parties, so that a no-contact order, if any, takes precedence.
