



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

MUTUAL RESTRAINING ORDERS

LEGISLATIVE PROPOSAL (FL-2015-07)

TO: Office of Governmental Affairs

FROM: Minouche Kandel, Chair of Affirmative Legislation
Alexandra O'Neill, Vice-Chair of Affirmative Legislation

DATE: April 16, 2014

RE: Proposal to Amend Family Code Section 6305 (Mutual Restraining Orders)

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: April 12, 2014
Approval vote: 13-0-0

Section Chair of Affirmative Legislation: Minouche Kandel (415) 572-6482 (cell) (415) 252-3203 (work) minouche.kandel@sfgov.org	Section Member Fariba Soroosh (408) 882-2922 fsoroosh@scscourt.org
---	---

SUMMARY OF PROPOSAL

This proposal would ensure that when the court is determining whether to issue mutual domestic violence restraining orders pursuant to the requirements of Family Code Section 6305, the written evidence of abuse required by Section 6305 is in the form of a request for Domestic Violence Prevention Act (DVPA) orders, not in the form of an Answer to a request for DVPA orders.

ISSUES AND PURPOSE

Under existing law, the court may not issue mutual DVPA orders unless (a) both parties personally appear and each party presents written evidence of abuse or domestic violence, and (b) the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense. The existing language of

Section 6305 - requiring only “written evidence of abuse or domestic violence” - lacks clarity. The concern is that, as written, “written evidence of abuse or domestic violence” can be supplied to the court in either a Request for Order (Judicial Council Form DV-100) or an Answer (Judicial Council Form DV-120). This creates a situation where a court may issue mutual orders on the basis of the written evidence of abuse or domestic violence contained in one party’s Request and in the other party’s Answer. This raises potential fairness and due process problems, because the party for whom the order was issued on the basis of an Answer did not have proper notice that the issuance of mutual orders was before the court.

Section 6305 may also result in orders that are not accorded full faith and credit under federal law. Specifically:

- Pursuant to 18 USC section 2265(c) if a court issues a protective order against a person who has filed a petition for a protective order, that order is not entitled to full faith and credit unless there was a “cross or counter petition, complaint, or other written pleading was filed seeking such a protection order.” This strongly suggests that issuing a mutual order on the basis of one Petition and one Answer would result in an order that is not accorded full faith and credit.
- 18 USC section 2266(5)(A) clearly defines protection orders as those issued “in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.” This list does not include Answers or Responses seeking a protection order as affirmative relief, as an answer or response would not qualify as a “complaint, petition, or motion”; and
- 18 USC section 2265(b) specifies that a protection order will not be accorded full faith and credit unless (1) the issuing court had jurisdiction and (2) *reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process*. This provision clearly states that due process is required for any restraining order (mutual or not) to be accorded full faith and credit.

This proposal would clarify that the written evidence of abuse or domestic violence necessary for the issuance of mutual DVPA orders is an application for relief on Judicial Council Form DV-100, and that both parties must submit their written requests for relief in the form of an application. This proposal would amend Family Code Section 6305 and specify that each party’s written evidence of abuse or domestic violence must be contained in a written application for relief using Judicial Council Form DV-100.

HISTORY

We are unaware of any similar prior proposals.

IMPACT ON PENDING LITIGATION

None.

LIKELY SUPPORT AND OPPOSITION

It is likely that the California Partnership to End Domestic Violence and other anti-domestic violence organizations will support this proposal. We are not aware of any opposition to this proposal.

FISCAL IMPACT

There does not appear to be any direct fiscal impact, although there may be some costs associated with the proposed statutory requirement that the Judicial Council amend the current Response to Request for Domestic Violence Restraining Order.

GERMANENESS

This proposal is germane to family law, as it will clarify the proper process to follow when both parties in a family law case are seeking domestic violence restraining orders.

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.

TEXT OF PROPOSAL*

SECTION 1. Section 6305 of the Family Code is amended to read:

(a) The court shall not issue a mutual order enjoining the parties from specific acts of abuse described in Section 6320 unless both of the following apply:

(1) Both parties personally appear and each party presents written evidence of abuse or domestic violence. For purposes of this paragraph, each party's written evidence of abuse or domestic violence must be contained in an application for relief using mandatory Judicial Council restraining order application forms. Requests for relief that are contained in mandatory Judicial Council restraining order response forms are not sufficient to satisfy the requirement of written evidence of abuse. The Judicial Council shall amend the current Response to Request for Domestic Violence Restraining Order to inform a party that they may not use this form to request a domestic violence restraining order against the other party.

(2) The court makes detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.

* AB 2089 (Stats. 2014, ch. 635) amends Family Code Section 6305, effective January 1, 2015. These proposed statutory amendments are made to Section 6305, as amended by AB 2089.

(b) For purposes of subdivision (a), in determining if both parties acted primarily as aggressors, the court shall consider the provisions concerning dominant aggressors set forth in paragraph (3) of subdivision (c) of Section 836 of the Penal Code.