

## **RESOLUTION 10-01-2008**

### **DIGEST**

#### Domestic Violence: Service of Domestic Violence Restraining Order

Amends Family Code section 6384 to allow judicial discretion to issue restraining orders when service is being evaded.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

#### **DISAPPROVE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Family Code section 6384 to allow judicial discretion to issue restraining orders when service is being evaded. This resolution should be disapproved because courts currently have the discretion to assist persons seeking protection when the person named in a restraining order is intentionally avoiding service.

This resolution seeks to address service of process problems that recur in Family Law Domestic Violence Prevention Act (“DVPA”) cases where the restrained party successfully avoids service of the Temporary Restraining Order and Order to Show Cause, resulting in the order being reissued time and time again until the party upon whom it is to be served is indeed personally served. Substituted service of the DVPA order is not acceptable because of the contempt provisions of the order. (Code Civ. Proc., § 1015.)

While service of process problems within the family courts can present a real challenge, due process rights of individuals outweigh them. As this resolution would effectively enable a restraining order to be issued against an individual who might not have not been served with notice – and not because of an intentional effort to evade service – it also fails to assure that due process rights are protected. Because constitutional due process rights are an overriding interest, this resolution should be disapproved.

### **SECTION/COMMITTEE REPORTS**

#### **FAMILY LAW SECTION**

#### **DISAPPROVE**

The Family Law Section Executive Committee disapproves this resolution as it appears to be a circumvention of due process requirements requiring personal service of notice of the existence and substance of a DVPA order. Current law requires that a person named in a DVPA order must be served as precondition for the issuance of a temporary or emergency order of protection. Once an emergency or temporary order is issued and the person to be restrained is personally served but does not appear, then a permanent restraining order identical to the temporary order may be served by first class mail at the most current address for the person to be restrained available to

the Court. This resolution, an effort to eliminate the personal jurisdictional requirement, creates a significant departure from constitutional due process. An order entered without personal service jurisdiction over a party sought to be restrained is void as a matter of law. There should not be any departure from the long-standing legal precedent. Proper service is and should continue to be a requirement for the Court's exercise of personal jurisdiction irrespective of the difficulties that may be posed for the party seeking protection. The history of the DVPA's intent to prevent reoccurring events by a spouse or household member is substantial; however, a DVPA order made without granting the party who is sought be restrained an opportunity to be heard may significantly impact that party's custody, ability to retain firearms, and opportunities for employment in the security field or other fields of endeavor.

**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 Board of Governors 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 services.**

#### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 6384 to read as follows:

1 § 6384

2 (a) If a person named in an order issued under this part after a hearing has not been  
3 served personally with the order but has received actual notice of the existence and  
4 substance of the order through personal appearance in court to hear the terms of the order  
5 from the court, no additional proof of service is required for enforcement of the order.

6 If a person named in a temporary restraining order or emergency protective order is  
7 personally served with the order and notice of hearing with respect to a restraining order or  
8 protective order based thereon, but the person does not appear at the hearing either in  
9 person or by counsel, and the terms and conditions of the restraining order or protective  
10 order are identical to the temporary restraining or emergency protective order, except for  
11 the duration of the order, the restraining order or protective order may be served on the  
12 person by first-class mail sent to that person at the most current address for the person  
13 available to the court.

14 (b) The judicial forms for orders issued under this part shall contain a statement in  
15 substantially the following form:

16 "NO ADDITIONAL PROOF OF SERVICE IS REQUIRED IF THE FACE OF  
17 THIS FORM INDICATES THAT BOTH PARTIES WERE PERSONALLY PRESENT  
18 AT THE HEARING WHERE THE ORDER WAS ISSUED."

19 "IF YOU HAVE BEEN PERSONALLY SERVED WITH A TEMPORARY  
20 RESTRAINING ORDER OR EMERGENCY PROTECTIVE ORDER AND NOTICE OF  
21 HEARING, BUT YOU DO NOT APPEAR AT THE HEARING EITHER IN PERSON

22 OR BY COUNSEL, AND A RESTRAINING ORDER OR PROTECTIVE ORDER IS  
23 ISSUED AT THE HEARING WHICH DOES NOT DIFFER FROM THE PRIOR  
24 TEMPORARY RESTRAINING ORDER OR EMERGENCY PROTECTIVE ORDER, A  
25 COPY OF THE ORDER WILL BE SERVED UPON YOU BY MAIL AT THE  
26 FOLLOWING ADDRESS \_\_\_\_\_. IF THAT ADDRESS IS NOT CORRECT OR YOU  
27 WISH TO VERIFY THAT THE TEMPORARY OR EMERGENCY ORDER WAS  
28 MADE PERMANENT WITHOUT SUBSTANTIVE CHANGE, CALL THE CLERK OF  
29 THE COURT AT \_\_\_\_\_."

30 (c) If a person named in an order issued under this part after a hearing has not been  
31 served personally with the order, but a court finds by clear and convincing evidence that  
32 the person named is avoiding personal service an appropriate substitute manner for service  
33 may be permitted. If a restraining order is granted by the court, the named person may not  
34 be held in violation of a criminal penalty, but such an order shall be recorded in accord  
35 with Family Code § 6380 and served on the person by first-class mail sent to that person at  
36 the most current address for the person available to the court. If subsequently the named  
37 person is able to be personally served, a hearing on the merits may be permitted at the  
38 discretion of the court.

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

**PROPONENT:** Bar Association of San Francisco

**STATEMENT OF REASONS:**

Existing Law: The existing law provides that a person named in an action need not be personally served so long as they are present when an order is made. Alternatively, if the named person was personally served with notice, but were not present at a hearing, service of an order may be made by registered mail.

This Resolution: Seeks to modify Family Code § 6384 to allow the court some discretion in cases where a person is seeking protection, but the person named in a restraining order is avoiding service.

The Problem: In the worst domestic violence cases, the perpetrator of domestic violence may avoid being personally served with a restraining order. This proposed change will give the court some discretion and the ability to create orders. While for reasons of due process a person could not be punished criminally without personal service, an order could be recorded in CLETs to assist the police department in protecting the battered person.

**IMPACT STATEMENT:**

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

**AUTHOR AND/OR PERMANENT CONTACT:** M. Tilden Moschetti, 633 Battery St, Ste 640, San Francisco, CA 94111 ph: (415) 399-0970, fax: (415) 399-0980, [tilden@moschettilaw.com](mailto:tilden@moschettilaw.com)