

RESTRAINING ORDER RENAISSANCE
Use of Restraining Orders
More Often and More Effectively
in Elder Abuse Cases

by
Barbara E. Small
and
Steven L. Yarbrough

© September 16, 2009

Prepared for and presented at
the Education Committee Seminar
of the Silicon Valley Bar Association

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

- I. Introduction
- II. Which Act? Purpose and Relief Available.
 - A. Elder Abuse and Dependent Adult Civil Protection Act, Welfare & Institutions Code § 15600 et seq. (“Elder Abuse Act”).
 - B. Domestic Violence Prevention Act, Family Code § 6200 et seq. (“DVPA”)
 - C. Civil Harassment, Code of Civil Procedure § 527.6
- III. Who can apply? Who has standing to request the restraining order?
 - A. Elder Abuse Act
 - B. Domestic Violence Prevention Act
 - C. Civil Harassment
- IV. What showing is required to obtain a temporary order?
 - A. Elder Abuse Act
 - B. Domestic Violence Prevention Act
 - C. Civil Harassment
- V. What is required to make the order permanent?
 - A. Elder Abuse Act
 - B. Domestic Violence Prevention Act
 - C. Civil Harassment
- VI. Case Studies
 - A. The “loving” adopted Son
 - B. The widow and “the friend”
 - C. The college student and “the boyfriend”
 - D. The widow, her care-giver, and the “loving” daughter
 - E. The ill elderly dad and the “trusted” trustee/health care agent
- VII. Closing Comments
 - A. Legislative changes
 - B. Judge Grilli’s comments

I. INTRODUCTION

The backdrop for this topic is the story of the dis-functional family in *A Lion in Winter*, depicted in the 1968 film starring Katharine Hepburn and Peter O'Toole. The film tells the story of the family of King Henry II of England and his wife, Eleanor of Aquitaine. Henry and Eleanor have four sons: Henry, Richard, Geoffrey, and John. Henry senior cannot decide whom to leave his kingdom to. Young Henry has gone to seek alliance with the king of France, Eleanor's ex-husband, in a scheme to overthrow his father, King Henry, and take the kingdom for himself. Richard, Geoffrey and Eleanor align with him, leaving the weak and cowardly son, John, aligned with the king. At a critical point in the film, Eleanor convenes with her sons to discuss the plans. John and young Henry get into an argument about the future of the kingdom. John tells Henry to repeat the words: "John wins and I lose." John replies: "and what if John dies" and pulls a knife on John. John, being rather cowardly exclaims "He's got a knife!" Eleanor retorts back: "We've all got knives! It's 1183 and we're barbarians."

Alas, while the three aligned sons escape to France, Eleanor is taken captive by the king. In today's legal system, if John wished to protect his mother, he might have gone to the local courthouse ahead of the arrival of Eleanor's captors to obtain a restraining order to keep Eleanor's husband and captors at bay. Indeed, it is in the domestic violence setting, under the domestic violence prevention act, that we most often think of restraining orders being used.

However, if Eleanor qualified as an elderly person, (in the actual story, Eleanor was 61, not quite elderly in these days, but certainly elderly for that time period) Eleanor would have the option of turning to the Welfare and Institutions code to obtain a restraining order tailored specifically to protection of elders. Alternatively, Eleanor might turn to the Civil Code to seek a restraining to prevent harassment by King Richard.

Eleanor's son John, being rather cowardly and indecisive, cannot decide what to do. He turns instead to you, his trusted legal adviser, to explain the circumstances under which each of these restraining order statutes would be most effectively used to protect Eleanor.

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

II. Which Act? Purpose and Relief Available:

A. Elder Abuse Act

1. Welfare & Institutions Code § 15657.03 (repealed as of Jan. 1, 2010):
 - (a) **An elder or dependent adult** who has suffered abuse as defined in Section 15610.07 **may seek protective orders** as provided in this section.
 - (b) . . . “protective order” means **an order that includes any of the following** restraining orders, whether issued ex parte, after notice and hearing, or in a judgment:
 - (1) . . . enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning . . . , destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of petitioner.
 - (2) . . . excluding a party from the petitioner’s residence or dwelling, [but not if legal or equitable title, or a lease, is in the name of the party to be excluded], or in the name of such party and any other party besides the petitioner.
 - (3) . . . enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in paragraph (1) or (2).
2. **NOTE:** Section 15657.03 effective as of Jan. 1, 2010 expands the reach of a restraining order **to include “in the discretion of the court on a showing of good cause, . . . other named family or household members or a conservator of the petitioner.”**(15657.03(b)(1).) In addition, this new version allows exclusion from the residence or dwelling where the defendant has assaulted or threatened assault to the petitioner or other named family or household members or the conservator of petitioner. (15657.03(d)(1)(B).)
3. Welfare & Institutions Code § 15610.07: “Abuse of an elder or dependent adult” means either of the following:
 - (a) Physical abuse, neglect financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
 - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
4. Welfare & Institutions Code § 15600: it is the intent of the Legislature in adding Article 8.5 (commencing with Section 15657) is to **enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.**

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

B. Domestic Violence Prevention Act

1. Family Code § 6220: The purposes of this division are **to prevent the recurrence of acts of violence and sexual abuse and to provide for a separation of the persons involved in domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.**

(a) Law Revision Commission comments to Family Code § 6200:
“The orders that may be issued under this division **may be issued in a proceeding brought pursuant to this division.** . . . [and] in a proceeding for dissolution, nullity, or legal separation, an action under the Uniform Parentage Act, and dependency proceedings for a minor.

2. Emergency Protective Orders are available under Family Code § 6240: **A police officer can issue an emergency protective order on the spot at the time of responding to a domestic violence incident.**

C. Civil Harassment Statute

1. Code of Civil Procedure § 527.6: **to Prohibit harassment:**
“. . . 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. The course of conduct must be such as would **cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.**”

2. Provides for issuance of preliminary injunction, temporary restraining order, or both. Specifically does not apply to an order issued under the Family Code. (Code of Civil Procedure § 527.)

3. Workplace Harassment Statute: Targeted to violence in the workplace and not addressed in this paper.

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

III. Who can apply?
(Who has standing to request the restraining order?)

A. Elder Abuse Act:

1. **“An elder or dependent adult who has suffered abuse** as defined in section 15610.07 may seek protective orders as provided in this section”

2. But the following statutory language may allow **an interested person** to apply under Probate Code sec. 48:

Stated intent of the Legislature in adding Article 8.5 (commencing with Section 15657) is to **enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.**

B. Domestic Violence Prevention Act.

1. **“An order under this part may be granted to any person described in Section 6211**, including a minor pursuant to sub-division (b) of section 372 of the Code of Civil Procedure.” (Family Code § 6301(a).)

2. Family Code 6211: **“Domestic Violence”** is abuse perpetrated against any of the following persons:

- (a) A **spouse** or former spouse.
- (b) A **Cohabitant** or former cohabitant, as defined in Section 6209 [a person who regularly resides in, or formerly regularly resided, in a household]
- (c) A **person with whom the respondent is having or has had a dating or engagement relationship.**
- (d) A **person with whom the respondent has had a child, . . .**
- (e) A **child of a party** or a child who is subject to an action under the Uniform Parentage Act . . .
- (f) **Any other person related by consanguinity or affinity within the second degree.**

C. Civil Harassment

1. CCP 527.6: **a person who has suffered harassment** as defined in subdivision (b). . .

CCP 527.6(b): . . . **“harassment”** is unlawful violence, a credible threat of violence or a knowing and willful course of conduct directed at a specific person

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose . . . [and] must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.”

CCP 527.6(b)(1): “Unlawful violence” is any assault or battery, or stalking as prohibited in Section 646.9 of the Penal Code, but shall not include acts of self-defense or defense of others.”

CCP 527.6(b)(2): “Credible threat of violence” is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.”

CCP 527.6(b)(3): “Course of Conduct” is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of “course of conduct.”

II. Showing necessary to obtain a Restraining Order.

A. Elder Abuse Prevention Act

1. W&I C. 15657.03 (c): **an affidavit showing**, to the satisfaction of the court, **reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult.**

W&I C. 15657.03 (d): the court may issue an ex parte order excluding a party from the petitioner’s residence or dwelling only on a showing of all of the following: (A) facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises. (B) that the party to be excluded has assaulted or threatens to assault the petitioner. (C) That physical or emotional harm would otherwise result to the petitioner

2. In order to grant a temporary restraining order, Section 15657.03 does not require findings to be made by clear and convincing evidence, therefore, a **preponderance of evidence is sufficient.** (Evid. C. 115) *Bookout v. Nielsen*

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

(2007) 155 Cal.App.4th 1131, 1138.

3. Requires **only a showing of past abuse** to grant a temporary restraining order. *Gdowski v. Gdowski* (2009) 174 Cal.App.4th 128, 135.

B. Domestic Violence Prevention Act

1. Fam.C. 6300: An order may be issued under this part, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit or, if necessary, an affidavit and any additional information provided to the court pursuant to Section 6306, shows, to the satisfaction of the court, **reasonable proof of a past act or acts of abuse**.

2. Requires only a showing of past abuse. *Gdowski v. Gdowski* (2009) 174 Cal.App.4th 128, 135.

C. Civil Harassment

1. CCP 527.6(c): . . . a temporary restraining order may be issued with or without notice upon an affidavit that, to the satisfaction of the court, shows **reasonable proof of harassment** of the plaintiff by the defendant, **and that great or irreparable harm would result to the plaintiff**. In the discretion of the court and **upon a showing of good cause**, a temporary restraining order or injunction, issued under this section **may include other named family or household members who reside with the plaintiff**.

2. **Requires a showing of threat of continuing or ongoing harm.** *Gdowski v. Gdowski* (2009) 174 Cal.App.4th 128, 135, citing *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332-33 (“ . . .it must appear with reasonable certainty that the wrongful acts will be continued or repeated.”)

3. **Note:** As a result of a rape case in which a civil harassment restraining order was denied because the court found the facts (one act) did not meet the criteria of a showing of threat of continuing or ongoing harm, the legislature is amending the criteria to allow a civil harassment restraining order to be issued upon a showing of a single act of violence.

III. What is the evidentiary requirement to sustain a Restraining Order.

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

A. Elder Abuse Act

1. No standard is specified. One court has held, therefore, that the petitioner need only show a **preponderance of evidence** for orders to issue under this section. *Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1137.

2. Counsel's aggressive conduct in questioning the witness cannot serve as grounds for issuance of or sustaining a R.O. under the Elder Abuse Prevention Act. *Gdowski v. Gdowski* (2009) 174 Cal.App.4th 128, 139 ("statements and arguments by counsel are not evidence")

B. DVPA: Fam. C. § 6320 requires a showing of **good cause**

1. See, *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, *Marriage of Nadkarni* (2009) 2009 Cal.App. LEXIS 775

C. Civil Harassment

1. CCP 657.6(d): ". . . If the judge finds by **clear and convincing** evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. . ." *Russell v. Douvan* (2003) 112 Cal.App.4th 399, 401 ("Clear and convincing evidence' requires a finding of high probability." citing *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

2. Not available to obtain a final resolution of disputed rights, such as the right to an easement over a driveway for purpose of parking there. *Byers v. Cathcart*, (1997) 57 Cal.App.4th 805.

3. Does not give the court authority to evict someone from his/her dwelling. *Marquez-Luque v. Marquez* (1987) 192 Cal.App.3d 1513, 1518.

4. Attorney's fees are available to the prevailing party. *Adler v. Vaicius*, 21 Cal.App.4th 1770, *Krug v. Maschmeier* (2009) 2009 Cal.App. LEXIS 432.

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

V. CASE STUDIES

1. The Loving Adopted Son: Facts: Elderly mother has an adopted son heroin addict who takes cash from his mother's purse and has his mother sign blank checks so he can cash them to support his addiction. Mother does not lack capacity but cannot resist his influence and is emotionally abused by son to get money.
 - A. Issues: emotional abuse, undue influence, financial abuse
 - B. Solution: Conservatorship and Restraining order
 - C. Other options/issues:

2. The Widow and "the friend." Facts: Elderly widow does not lack capacity, but is subject to undue influence and has conservator of her estate and person(private fiduciary). Widow has a "friend" who has known widow for some years. This "friend" first was hired to provide assistance with daily needs for widow and her husband. After husband dies and widow is conserved, "friend" continues on to take care of widow. "Friend" starts interfering with widows caregivers, rescheduling doctor appointments so that "friend" can take widow, took widow to the doctor and claimed she wasn't being cared for, refused to communicate with conservator or trustee, and had widow dismiss the caregivers when "friend" stayed at widow's condo. Widow demands conservator and trustee pay "friend" for the "services." At one point, widow phones son (the trustee) and leaves message asking for a monthly allowance from the trust, money to pay "friend" for the past two years, and questioning the conservatorship. At the end of the phone call widow is heard saying "How is that?" and a voice in the background believed to be "friend" says "perfect."
 - A. Issues: Conservatee wanted to associate with her "friend." Pr.C. 2113 requires conservator to abide by the conservatee's wishes except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate.
 1. "Friend's" interference with conservator's authority.
 2. "Friend's" efforts to get money from the trust through the conservatee.
 - B. Solution: Restraining Order under the Elder Abuse Act

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases**
September 16, 2009

- C. Other issues: This “friend” secreted herself from anyone who had contact with widow. “Friend” was never personally served, but was in contact with the court investigator, who informed her of the date and time of the hearing and invited her to appear or attend by phone. Based on these facts, judge found good cause to hold “friend” had been served. After granting the restraining order for the maximum period, “friend” again could not be personally served but contacts with conservatee diminished substantially and conservator and trustee were able to regain control of care for widow.
3. The college student and the “boyfriend.” Facts: Young student meets former Navy guy who volunteers to help move her furniture into apartment on first day of college. After helping, young man thinks he’s owed something and starts emailing and texting dozens of times each day – plus more than 600 telephone calls. At one point he corners the girl in her car and screams at her.
- A. Issues: Harassment, violence by one in a “relationship”
- B. Solution: Domestic Violence Retraining Order.
- C. Other issues/options: Since man was in military, TRO has negative affect on service and weapons. Resulted in early settlement and long-term stay away order.
4. The widow, the caretaker, and the “loving” daughter. Facts: Elder mom was wheelchair-bound and lived in her family home with her 24/7 care-giver, with whom she had a close and trusted relationship. “Loving” daughter harbored much animosity toward care-giver, care-giver blew the whistle on daughter’s (and her brother’s) abuse of mom. Whenever daughter visited mom, she behaved abusively toward care-giver, swearing at her, calling her names, yelling at her and pushing her. At one point, daughter became violent with care-giver, punching her hard in the chest and slamming her against the wall. Care-giver suffered injury, went for medical attention and filed a police report. Conservator wanted a restraining order to keep “loving” daughter away from mom’s care-giver.
- A. Issues: Standing to apply, abuse directed toward care-giver, not mom.
- B. Solution: Allege a nexus between daughter’s behavior toward the care-giver and emotional and/or physical ill effects suffered by the elder. Conservator of the person has standing to apply.
- C. Other options: Care-giver could seek civil harassment restraining order, but the threshold burden for obtaining the restraining order is greater than for a restraining order under the Elder Abuse Act.

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases
September 16, 2009**

5. The ill elderly dad and the “trusted” trustee/health care agent. Facts: Emergency conservatorship. Elderly alcoholic widowed dad, lived in his home in Mt. View. He owned a second home in Aptos, that the “trusted” trustee/health care agent daughter (who was unemployed) lived in. Dad was hospitalized, then discharged to Manor Care for rehab. “Trusted” trustee/health care agent took dad out of rehab against doctor’s orders and took him to his house in Aptos, claiming to be caring for him at home. In fact, “trusted” trustee/health care agent was neglecting dad’s care, over-medicating him, and had called in hospice. Fearing for dad’s safety, daughter #2 and her husband (a paramedic) went to visit dad and found him in a near comatose state from lack of proper nutrition and over-medication. He was rushed to the hospital in Santa Cruz in a life-threatening condition.
 - A. Issue: The emergency conservatorship is in Santa Clara county where dad lives but conservator daughter wants to restrain sister from visiting dad in Santa Clara county or in the hospital in Santa Cruz county.
 - B. Solution: The court added to the order appointing daughter #2 temporary conservator, the authority for conservator to restrict visitation to dad.
 - C. Other issues/option: When daughter #2 and husband went to visit dad, they requested a civil standby. Daughter #2 might have been able to request that the officers who did the civil standby issue an emergency protective order under the Domestic Violence Prevention Act.
- VI. CLOSING COMMENTS: Steve and I met with Judge Grilli to obtain her perspective on the use of restraining orders. Following are highlights from that meeting.
- A. Legislative developments:
 1. At the state level: the use of the judicial counsel forms for the various restraining order statutes is currently under review by the legislature for the purpose of making the forms more consistent and clarifying the various acts.
 2. A clean-up bill addressing the restraining order acts will be presented in the next legislative cycle. Attorney’s with suggestions on how to improve the restraining order statutes or process may forward their comments directly to Judge Grilli.or to Patrick McDonald.
 3. The Silicon Valley Bar Association may want to consider submitting a proposal for making the restraining order process more user friendly, for example, a Uniform Restraining Order Act, with a single set of forms, which consolidates the statutory requirements in a single act, eliminating duplication, allowing for

**RESTRAINING ORDER RENAISSANCE:
Use of Restraining Orders More Often and
More Effectively in Elder Abuse Cases
September 16, 2009**

greater consistency in use of the statute, while maintaining the differences deemed appropriate for the three major purposes currently covered by the statutes: Elder and Dependent Adult Abuse, Domestic Violence Prevention, and to address Harassment in the civil context as well as the workplace.

B. Attorney's Use of Restraining Orders as a Provisional Remedy:

1. Restraining orders under the Elder Abuse statute are underutilized! This is the only statute that allows a restraining order for financial abuse. Whenever an attorney prepares an elder abuse complaint, her/she should consider whether a restraining order can/should be applied for as well to freeze a bank account. Too often other relief is too late and the money is gone.

Cautionary note: where relief is sought in the form of freezing a bank account and suspending a trustee, relief can be had on freezing the bank account without notice under the statutes, but a request to suspend the trustee requires notice.

2. Judge Grilli invites attorneys to use restraining order statutes more often as a provision remedy in your matters. For example: as a companion to petitions for conservatorships where there is physical abuse happening; in instances of isolation to keep the isolators away from the isolated elder; where proposals of marriage are being used as a tool for elder abuse; as well as the more obvious abuse by caretakers, siblings, and in instances of stealing, physical or emotional abuse.

3. Attorneys too often rely on restraining orders under the criminal statutes, but they are only effective as long as someone is on probation. Get a companion civil restraining order - it can last longer!

4. The challenge in obtaining a restraining order in financial abuse cases is: does the person who is being abused really want the restraining order. If there is not a conservator appointed, this may be an appropriate situation for an agent or other interested party under Probate Code § 48 to make the application on behalf of the abused elder.

5. Understand the impact of a restraining order - if an order is issued, one phone call (or other prohibited act) can send the restrained person to jail, and it will show up on that person's record.