

## Resolution 12-04-2009

### Elder Abuse: Standing To Seek Protective Order

RESOLVED, that the Conference of the Delegates of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 15657.03 to read as follows:

1 §15657.03.

2 (a) An elder or dependent adult who has suffered abuse as defined in Section  
3 15610.07 or a court-appointed conservator for the elder or dependent adult may seek  
4 protective orders as provided in this section. If there is no conservator, any person  
5 referenced in Probate Code section 1820(a) may seek protective orders as provided in this  
6 section.

7 (b) For the purposes of this section, "protective order" means an order that includes  
8 any of the following restraining orders, whether issued ex parte, after notice and hearing, or  
9 in a judgment:

10 (1) An order enjoining a party from abusing, intimidating, molesting, attacking,  
11 striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning,  
12 including, but not limited to, annoying telephone calls as described in Section 653m of the  
13 Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or  
14 otherwise, or coming within a specified distance of, or disturbing the peace of the petitioner,  
15 and, in the discretion of the court, on a showing of good cause, of other named family or  
16 household members or a conservator, if any, of the petitioner.

17 (2) An order excluding a party from the petitioner's residence or dwelling, except that  
18 this order shall not be issued if legal or equitable title to, or lease of, the residence or  
19 dwelling is in the sole name of the party to be excluded, or is in the name of the party to be  
20 excluded and any other party besides the petitioner.

21 (3) An order enjoining a party from specified behavior that the court determines is  
22 necessary to effectuate orders described in paragraph (1) or (2).

23 (c) An order may be issued under this section, with or without notice, to restrain any  
24 person for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the  
25 satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning  
26 elder or dependent adult.

27 (d)(1) Upon filing a petition for protective orders under this section, the petitioner  
28 may obtain a temporary restraining order in accordance with Section 527 of the Code of Civil  
29 Procedure, except to the extent this section provides a rule that is inconsistent. The temporary  
30 restraining order may include any of the protective orders described in subdivision (b).  
31 However, the court may issue an ex parte order excluding a party from the petitioner's  
32 residence or dwelling only on a showing of all of the following:

33 (A) Facts sufficient for the court to ascertain that the party who will stay in the  
34 dwelling has a right under color of law to possession of the premises.

35 (B) That the party to be excluded has assaulted or threatens to assault the petitioner,  
36 other named family or household member of the petitioner, or conservator of the petitioner.

37 (C) That physical or emotional harm would otherwise result to the petitioner, other  
38 named family or household member of the petitioner, or conservator of the petitioner.

39 (2) If a temporary restraining order is granted without notice, the matter shall be made  
40 returnable on an order requiring cause to be shown why a permanent order should not be  
41 granted, on the earliest day that the business of the court will permit, but not later than 20  
42 days or, if good cause appears to the court, 25 days from the date the temporary restraining  
43 order is granted, unless the order is otherwise modified or terminated by the court.

44 (e) The court may issue, upon notice and a hearing, any of the orders set forth in  
45 subdivision (b). The court may issue, after notice and hearing, an order excluding a person  
46 from a residence or dwelling if the court finds that physical or emotional harm would  
47 otherwise result to the petitioner, other named family or household member of the petitioner,  
48 or conservator of the petitioner.

49 (f) In the discretion of the court, an order issued after notice and a hearing under this  
50 section may have a duration of not more than three years, subject to termination or  
51 modification by further order of the court either on written stipulation filed with the court or  
52 on the motion of a party. These orders may be renewed upon the request of a party, either for  
53 three years or permanently, without a showing of any further abuse since the issuance of the  
54 original order, subject to termination or modification by further order of the court either on  
55 written stipulation filed with the court or on the motion of a party. The failure to state the  
56 expiration date on the face of the form creates an order with a duration of three years from  
57 the date of issuance.

58 (g) Upon the filing of a petition for protective orders under this section, the  
59 respondent shall be personally served with a copy of the petition, notice of the hearing or  
60 order to show cause, temporary restraining order, if any, and any affidavits in support of the  
61 petition. Service shall be made at least five days before the hearing. The court may, on  
62 motion of the petitioner or on its own motion, shorten the time for service on the respondent.

63 (h) The court may, upon the filing of an affidavit by the applicant that the respondent  
64 could not be served within the time required by statute, reissue an order previously issued  
65 and dissolved by the court for failure to serve the respondent. The reissued order shall be  
66 made returnable on the earliest day that the business of the court will permit, but not later  
67 than 20 days or, if good cause appears to the court, 25 days from the date of reissuance. The  
68 reissued order shall state on its face the date of expiration of the order.

69 (i)(1) If a person named in an order issued under this section, after a hearing, has not  
70 been served personally with the order but has received actual notice of the existence and  
71 substance of the order through personal appearance in court to hear the terms of the order  
72 from the court, no additional proof of service is required for enforcement of the order.

73 (2) If the person named in a temporary restraining order is personally served with the  
74 order and notice of hearing with respect to a restraining order or protective order based  
75 thereon, but the person does not appear at the hearing, either personally or by counsel, and  
76 the terms and conditions of the restraining order or protective order are identical to the  
77 temporary restraining order, except for the duration of the order, then the restraining order or  
78 protective order may be served on the person by first-class mail sent to that person at the  
79 most current address for the person available to the court.

80 (3) The judicial form for orders issued pursuant to this subdivision shall contain a  
81 statement in substantially the following form: "NO ADDITIONAL PROOF OF SERVICE IS

82 REQUIRED IF THE FACE OF THIS FORM INDICATES THAT BOTH PARTIES WERE  
83 PERSONALLY PRESENT AT THE HEARING WHERE THE ORDER WAS ISSUED. IF  
84 YOU HAVE BEEN PERSONALLY SERVED WITH A TEMPORARY RESTRAINING  
85 ORDER OR EMERGENCY PROTECTIVE ORDER AND NOTICE OF HEARING, BUT  
86 YOU DO NOT APPEAR AT THE HEARING EITHER IN PERSON OR BY COUNSEL,  
87 AND A RESTRAINING ORDER OR PROTECTIVE ORDER IS ISSUED AT THE  
88 HEARING THAT DOES NOT DIFFER FROM THE PRIOR TEMPORARY  
89 RESTRAINING ORDER OR EMERGENCY PROTECTIVE ORDER, A COPY OF THE  
90 ORDER WILL BE SERVED UPON YOU BY MAIL AT THE FOLLOWING ADDRESS  
91 \_\_\_\_\_. IF THAT ADDRESS IS NOT CORRECT OR YOU WISH TO VERIFY THAT THE  
92 TEMPORARY OR EMERGENCY ORDER WAS MADE PERMANENT WITHOUT  
93 SUBSTANTIVE CHANGE, CALL THE CLERK OF THE COURT AT \_\_\_\_\_.”

94 (j)(1) The court shall order the petitioner or the attorney for the petitioner to deliver,  
95 or the clerk of the court to mail, a copy of an order issued under this section, or a reissuance,  
96 extension, modification, or termination of the order, and any subsequent proof of service, by  
97 the close of the business day on which the order, reissuance, extension, modification, or  
98 termination was made, to each local law enforcement agency designated by the petitioner or  
99 the attorney for the petitioner having jurisdiction over the residence of the petitioner, and to  
100 any additional law enforcement agencies within the court's discretion as are requested by the  
101 petitioner. Each appropriate law enforcement agency shall make available information as to  
102 the existence and current status of these orders to law enforcement officers responding to the  
103 scene of reported abuse.

104 (2) An order issued under this section shall, on request of the petitioner, be served on  
105 the respondent, whether or not the respondent has been taken into custody, by any law  
106 enforcement officer who is present at the scene of reported abuse involving the parties to the  
107 proceeding. The petitioner shall provide the officer with an endorsed copy of the order and a  
108 proof of service, which the officer shall complete and send to the issuing court.

109 (3) Upon receiving information at the scene of an incident of abuse that a protective  
110 order has been issued under this section, or that a person who has been taken into custody is  
111 the respondent to that order, if the protected person cannot produce an endorsed copy of the  
112 order, a law enforcement officer shall immediately attempt to verify the existence of the  
113 order.

114 (4) If the law enforcement officer determines that a protective order has been issued,  
115 but not served, the officer shall immediately notify the respondent of the terms of the order  
116 and where a written copy of the order can be obtained, and the officer shall at that time also  
117 enforce the order. The law enforcement officer's verbal notice of the terms of the order shall  
118 constitute service of the order and is sufficient notice for the purposes of this section and for  
119 the purposes of Section 273.6 of the Penal Code.

120 (k) Nothing in this section shall preclude either party from representation by private  
121 counsel or from appearing on the party's own behalf.

122 (l) There is no filing fee for a petition, response, or paper seeking the reissuance,  
123 modification, or enforcement of a protective order filed in a proceeding brought pursuant to  
124 this section.

125 (m) Pursuant to paragraph (4) of subdivision (b) of Section 6103.2 of the Government  
126 Code, a petitioner shall not be required to pay a fee for law enforcement to serve an order  
127 issued under this chapter.

128 (n) The prevailing party in any action brought under this section may be awarded  
129 court costs and attorney's fees, if any.

130 (o)(1) An order issued pursuant to this section shall prohibit the person subject to it  
131 from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a  
132 firearm.

133 (2) Paragraph (1) shall not apply to a case consisting solely of financial abuse  
134 unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.

135 (3) The court shall order a person subject to a protective order issued under this  
136 section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of  
137 the Code of Civil Procedure.

138 (4) Every person who owns, possesses, purchases, or receives, or attempts to purchase  
139 or receive a firearm while the protective order is in effect is punishable pursuant to  
140 subdivision (g) of Section 12021 of the Penal Code.

141 (p) Any willful disobedience of any temporary restraining order or restraining order  
142 after hearing granted under this section is punishable pursuant to Section 273.6 of the Penal  
143 Code.

144 (q) This section does not apply to any action or proceeding covered by Title 1.6C  
145 (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code, by Chapter 3  
146 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, or by  
147 Division 10 (commencing with Section 6200) of the Family Code. Nothing in this section  
148 shall preclude a petitioner's right to use other existing civil remedies.

149 (r) The Judicial Council shall promulgate forms and instructions therefor, rules for  
150 service of process, scheduling of hearings, and any other matters required by this section.  
151 The petition and response forms shall be simple and concise.

152 (s) This section shall become operative on January 1, 2010.

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

**PROPONENT:** San Diego County Bar Association

**STATEMENT OF REASONS:**

Existing law: The existing statute, which will be renewed in 2010, provides for the issuance of a protective order against an abuser in cases of physical, financial or emotional elder abuse of an elder (over age 65) or a dependent adult.

This Resolution: The proposed amendment confers standing to seek a protective order on an elder or dependant adult's court-appointed conservator, a spouse, registered domestic partner or child of the elder or dependant adult, or a trustee of the elder or dependant adult's trust which is providing the elder with income or principal. Often, the elder or dependant adult has a trust but can no longer act as trustee and has designated a successor trustee to manage his or her trust.

This would allow a person who has an interest in protecting the elder from physical, financial or emotional abuse to seek a protective order on behalf of the elder or dependant adult.

The Problem: The statute only authorizes the elder or dependent adult to seek the protective order. Many elders or dependent adults do not have the mental capacity to hire an attorney or to commence legal action without assistance, or may be afraid to do so because they have been a victim of emotional abuse.

**IMPACT STATEMENT:**

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

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