

Date of Hearing: July 6, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 320 (Eggman) – As Amended June 14, 2021

As Proposed to be Amended

SENATE VOTE: 39-0

SUBJECT: DOMESTIC VIOLENCE PROTECTIVE ORDERS: POSSESSION OF A FIREARM

KEY ISSUE: IN ORDER TO BETTER EFFECTUATE THE MANDATE IN EXISTING LAW FOR A PARTY WHO IS SUBJECT TO A DOMESTIC VIOLENCE RESTRAINING ORDER TO RELINQUISH ALL FIREARMS AND AMMUNITION THEY OWN OR POSSESS, SHOULD COURT PROCEDURES FOR ISSUING SUCH ORDERS BE CHANGED?

SYNOPSIS

This bill, sponsored by Giffords, seeks to better effectuate the requirement in existing law that a party who is subject to a domestic violence restraining order must relinquish their firearms. It does so by codifying Rule of Court 5.495, relating to firearm relinquishment procedures. That rule suggests that the issuing court, among other things, schedule a review hearing to determine if the restrained party has complied with the court's order to relinquish their firearms and ammunition. This bill would make those procedures mandatory. The bill also clarifies how it interacts with existing provisions of the Family Code. The bill requires a court, in making a child custody determination, to consider whether the party is a restrained person in possession or control of a firearm or ammunition. Finally, the bill in print authorizes a party to appear through technology that enables remote appearances, as determined by the court. This is consistent with the Supreme Court's emergency rule dealing with emergency protective orders, temporary restraining orders, and criminal protective orders that were requested, issued, or set to expire during the state of emergency related to the pandemic. It is also consistent with several bills pending in the Legislature, including SB 538, which the Committee recently approved by a unanimous vote.

The author proposes to amend the bill to allow witnesses, like parties, to appear via remote technology and clarify the language of an existing provision intended to make the provisions of Family Code Section 6389 applicable to cases that are adjudicated under Welfare & Institutions Code Section 213.5. The amendments are incorporated into the summary of the bill and explained in the analysis. The bill is supported by numerous public health, law enforcement, and violence prevention advocates. SEIU California opposes the bill, unless it is amended, because of its remote hearing provisions.

SUMMARY: Changes court procedures for issuing domestic violence restraining orders in order to better effectuate the requirement in existing law that a party subject to such an order must relinquish their firearms and ammunition. Specifically, **this bill:**

- 1) Generally codifies Rule of Court 5.495, described above, in relevant portions of the Family Code. Specifically:

- a) Requires the court, at a noticed hearing relating to a domestic violence protective order in family court or juvenile court, to consider information presented that the restrained person has possession or control of a firearm or ammunition.
 - b) Authorizes the court, upon making this finding, to set a review hearing, as specified, to determine whether the person has possession or control of a firearm or ammunition in violation of the relinquishment requirement. Incorporates the procedures in Rule 5.495 for this process.
 - c) Requires the court, if it determines the restrained person has violated the relinquishment requirement, to consider this determination in deciding custody and visitation orders, as specified.
- 2) Makes changes to enhance communication with law enforcement related to identifying people subject to, or in violation of, the relinquishment requirement. Specifically:
- a) Requires the court, in performing the search to see if the person has a registered firearm, to make a written record as to whether the person has relinquished their firearm and any ammunition, and if evidence has not been provided, to notify law enforcement officials, who must then take all actions necessary to ensure the individual relinquishes the firearm and ammunition.
 - b) Requires the court to notify the parties of how any firearms and ammunition still in the restrained party's possession are to be relinquished and how to submit a receipt to the court.
 - c) Requires a court holding a hearing regarding the firearm and ammunition relinquishment requirement to review the file to determine whether the receipt regarding relinquishment has been filed and to inquire as to whether the person has complied with the requirement.
 - d) Requires violations of the relinquishment requirement to be reported to the prosecuting attorney in the jurisdiction where the order has been issued within two business days of the court hearing unless the restrained party provides a receipt showing compliance at a subsequent hearing or by direct filing with the clerk of the court.
- 3) Specifies that it does not prohibit the court from permitting a party or witness to appear through technology that enables remote appearances, as determined by the court.
- 4) Provides that in a case where a court issues a protective order pursuant to the provisions of the bill, the procedures related to firearms and ammunition possession that are described in existing law shall apply; and that in accordance with those provisions, the court shall make a determination as to whether the restrained person is in possession or control of a firearm or ammunition.
- 5) Clarifies that the criminal penalties for possession of a firearm while being subject to a protective order do not apply if the restrained person is a minor who is a ward of and under the jurisdiction of the juvenile court.

EXISTING LAW:

- 1) Establishes the Domestic Violence Protection Act (DVPA) (Family Code Section 6200 *et seq.*), which sets forth procedural and substantive requirements for the issuance of a “protective order,” whether issued ex parte, after notice and hearing, or in a judgment, that enjoins specified acts of abuse, excluding a person from a dwelling, or enjoining other specified behavior. (Family Code Sections 6218, 6300 *et seq.* All further statutory references are to the Family Code, unless otherwise specified.)
- 2) Requires, before a hearing on a protective order, that the court ensure a search of specified records and databases is conducted to determine if the subject of the proposed order, has, among other things, a registered firearm. (Section 6306 (a).)
- 3) Prohibits a person subject to a protective order from owning, possessing, purchasing, or receiving a firearm or ammunition while the order is in effect, a violation of which is a crime. (Section 6389 (a).)
- 4) Makes a violation of the prohibition punishable as either a misdemeanor (owning or possessing a firearm when prohibited from doing so by a restraining order), or a wobbler (purchasing or receiving or attempting to purchase or receive a firearm when prohibited from doing so by a restraining order). (*Ibid.*; See also Penal Code Section 29825.)
- 5) Provides that upon issuance of a restraining order, the court shall order the respondent to relinquish any firearm in the respondent’s immediate possession or control or subject to the respondent’s immediate possession or control. (Section 6389 (c)(1).)
- 6) Authorizes the issuance of a temporary restraining order (Section 240 *et seq.*), which generally requires notice to the respondent unless there is a showing that great or irreparable injury would result to the petitioner before the matter can be heard on notice (Section 241), but expressly authorizes ex parte restraining orders for several purposes under the DVPA. (Section 6320 *et seq.*) Provides that a temporary restraining order generally lasts 21 days, although the court may grant continuances for a reasonable period. (Section 242, 245.) Generally requires that the respondent be personally served with a copy of the petition, the temporary restraining order, if any, and the notice of the hearing on the petition, at least five days before the hearing. (Section 243.)
- 7) Upon issuance of a protective order, requires the court to order the respondent to relinquish any firearm in the respondent’s possession or control. (Section 6389 (c)(1).) After being served with the order, the respondent must surrender the firearm immediately upon request by law enforcement. (Section 6389 (c)(2).) If law enforcement does not make the request directly, the respondent must, within 24 hours of service, relinquish the firearm and, within 48 hours of service, provide documentation to the court. (*Ibid.*)
- 8) Provides that an ex parte restraining order may be extended for up to five years (and subsequently renewed) following a hearing for which notice was provided to the respondent at least five days before the hearing. (Sections 6320.5, 6340, 6345, 6302.)
- 9) Requires a court, when making a protective order where both parties are present, to inform them of the terms of the order, including notice that the respondent is prohibited from

possessing or controlling a firearm or ammunition, and notice of the penalty for violation. (Section 6304.)

- 10) Establishes, in the Rules of Court, processes for a family court to determine whether a restrained party has a firearm in their control, and, if a protective order has been issued, to determine if the restrained party has properly disposed of the firearm. (Cal. Rules of Court 5.495.)
- 11) Requires, when relevant information is presented to the court at any noticed hearing that the person has a firearm, that the court consider that information to determine whether, by a preponderance of the evidence, the person subject to the protective order is violating the requirements established under 3), above. (*Id.* at (c).)
- 12) Authorizes the court to make this determination at a noticed hearing when a protective order is issued, at a subsequent review hearing, or at any subsequent family law hearing while the order remains in effect. (*Id.* at (d)(2).) A review hearing must be set within 10 days after the noticed hearing at which the information was presented. (*Id.* at (e)(2).) If the restrained person is not present when the court sets the review hearing, the protected person must provide notice of the review hearing to the restrained person at least two court days before the review hearing, by personal service, or by mail to the restrained person's known address. (*Id.*)
- 13) Authorizes the court to extend the date of the review hearing for a reasonable period or remove it from the calendar. (*Id.* at (e)(3).)
- 14) Requires the court to order the restrained person to appear at the review hearing, but permits the court to conduct the review hearing in their absence. (*Id.* at (e)(4), (5).) Provides that a party may appear telephonically. (*Id.* at (e)(6).)
- 15) Requires the court, if it determines the restrained person has violated the relinquishment requirement, to consider this determination in deciding custody and visitation orders, as specified. (*Id.* at (f).)
- 16) Provides that a relinquishment violation may be considered in an order for monetary sanctions or to show cause for contempt, as specified. (*Id.* at (g).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill, sponsored by Giffords, seeks to better effectuate the requirement in existing law that a party who is subject to a domestic violence restraining order must relinquish their firearms. It does so by codifying Rule of Court 5.495, relating to firearm relinquishment procedures. That rule suggests that the issuing court, among other things, schedule a review hearing to determine if the restrained party has complied with the court's order to relinquish their firearms and ammunition. This bill would make those procedures mandatory. According to the author:

In civil domestic violence restraining order cases the burden is too often on the victim to know about the rule of court process and to request that the court conduct a hearing to ensure the restrained person is no longer armed. Making sure courts, litigants, and attorneys know

how important it is to address the firearms prohibition at the earliest point possible will protect victims of domestic violence, their families and communities, and law enforcement.

SB 320 would codify Rule of Court 5.495, ensuring that existing requirements and procedures are more accessible to key stakeholders responsible for hearing domestic violence cases. It will also amend additional family code sections to ensure communication between the courts and law enforcement has occurred when a prohibited person is in violation of firearm relinquishment requirements.

Background – DVROs and GVROs. The Domestic Violence Prevention Act (DVPA, or Act) seeks to prevent acts of domestic violence, abuse, and sexual abuse, and to provide for a separation of persons involved in domestic violence for a period sufficient to create safety. The Act enables a party to seek a “protective order,” also known as a restraining order, which may be issued to protect a petitioner who presents “reasonable proof of a past act or acts of abuse.” (Family Code Sections 6300, 6218.)

Petitioners who need immediate protection may seek a temporary restraining order or TRO, which becomes effective upon receiving a judge’s signature and being served on the respondent. TROs may be issued “ex parte” (Latin for “by or for one party”)—that is, without formal notice to, or the presence of, the respondent. (Family Code Section 241.) Speed is by necessity an issue in obtaining the TRO, so processes that make it quicker and easier to file for, and receive, the TRO are important. Because a restrained party may not have had the opportunity to defend their interests, TROs are of necessity short in duration. If a noticed hearing is not held within 21 days (or 25 if the court finds good cause), the TRO is no longer enforceable, unless a court grants a continuance. (Family Code Sections 242, 245.) After a duly noticed hearing, however, the court is authorized to extend the original TRO into a “permanent” protective order (also known as orders after hearing) that may last up to five years. (Family Code Sections 6345, 6302.)

California’s GVRO laws, modeled after domestic violence restraining order laws, went into effect on January 1, 2016. A GVRO prohibits the restrained person from purchasing or possessing firearms or ammunition and authorizes law enforcement to remove any firearms or ammunition already in the individual’s possession.

Shortcoming of current law, rules, and procedure to facilitate the relinquishment of firearms.

Existing law requires, before a hearing on a protective order, that the court ensure a search of specified records and databases is conducted to determine if the subject of the proposed order, has, among other things, a registered firearm. (Section 6306 (a).) While this requirement has been in place since 1993, it is not always implemented as envisioned by the Legislature. For example, a court is not required to request firearms ownership information from the California Department of Justice (DOJ) and is only required to search all records and databases “readily available and reasonably accessible to the court,” including several state, federal, and local databases, but not databases of firearms ownership. (See *Ibid.*)

In 2008, Judicial Council issued a report recommending guidelines for improving the administration of justice in domestic violence cases. On the issue of firearms relinquishment, the report stated that while California and federal law bars persons subject to restraining orders from possessing or purchasing firearms or ammunition, a court’s order to relinquish firearms are not self-implementing. The restrained party is responsible for surrendering any firearms to law enforcement or selling them to a licensed gun dealer but some gun owners are extremely reluctant to comply. (*Recommended Guidelines and Practices for Improving the Administration*

of Justice in Domestic Violence Cases: Final Report of the Domestic Violence Practice and Procedure Task Force (Jan. 2008) Administrative Office of the Courts, p. 21.)

According to the report:

Ultimately, public safety is best served when law enforcement and the entire justice system take immediate action to remove firearms, whether registered or not, from the hands of a person who is statutorily barred from possessing them. The courts have a necessary and important role in achieving this goal, but because they are not investigative or enforcement agencies, the courts must rely on justice system entities to provide necessary information and to enforce compliance with firearm relinquishment orders. (*Ibid.*)

In 2014, the Judicial Council adopted Rule of Court 5.495 related to firearm relinquishment procedures when a civil domestic violence restraining order has been issued. These rules of court were created in order to address a procedural gap in existing statutes that prohibit a restrained person from owning, possessing, or controlling a firearm for the duration of the restraining order but do not provide for a procedure for the court to determine whether its order to relinquish firearms has been complied with. Specifically, the rules:

- Require the court to consider relevant information, when presented at a noticed hearing, to determine whether the person subject to a civil domestic violence order has a prohibited firearm;
- Provide procedures regarding the court's determination of whether the firearm has been relinquished;
- Provide that the court may make its determination at the time the domestic violence restraining order is issued or at a subsequent noticed hearing while the order remains in effect;
- Specify that documentation of the court's determination be provided to the parties;
- Specify remedies to be applied if the court determines that a restrained person has failed to relinquish a prohibited firearm; and,
- For cases in which the court defers consideration of the matter to a review hearing, specifies the timing of the hearing, specified notice requirements if the restrained person was not present when the court set the review hearing, specifies who must be present at the hearing and provides that a party may appear by telephone.

COVID-Related Emergency Rules of Court. The COVID-19 pandemic reduced court operations and made court intervention more difficult, despite the increased need for access to the courts during the pandemic. Recognizing the critical nature of some domestic situations and the temporary nature of existing family law orders, the Judicial Council issued emergency rules to protect family law litigants, facilitate the electronic filing of protective orders, and allow court hearings to be conducted in a remote manner.

One of the key family law emergency orders issued by the Judicial Council extends the time period for existing domestic violence and other protective orders; requires that courts provide a

means of filing ex parte requests for protective orders even during court shutdowns, whether by physical location, drop box, or electronic means; and deems service on the respondent to be complete if the respondent appears at the hearing in which the court grants the restraining order. (Cal. Rules of Court, Emergency Rule 8 (April 6, 2020).) These protective orders can include establishing a temporary custody and visitation order, or temporarily changing an existing custody and visitation order. (See Family Code Section 6323.) Thus, emergency domestic violence protective orders, including related child custody orders, have been available throughout the pandemic for the protection of families and children.

Another emergency rule deals with emergency protective orders, temporary restraining orders, and criminal protective orders that were requested, issued, or set to expire during the state of emergency related to the pandemic. (<https://www.courts.ca.gov/documents/appendix-i.pdf>) The rule, which applies to DVROs as well as GVROs, provides as follows: “Any temporary restraining order or gun violence emergency protective order issued or set to expire during the state of emergency related to the COVID-19 pandemic must remain in effect for a period of time that the court determines is sufficient to allow for a hearing on the long-term order to occur, for up to 90 days.” (*Ibid.*) The rule further provides: “Upon the filing of a request to renew a restraining order after hearing that is set to expire during the state of emergency related to the COVID-19 pandemic, the current restraining order after hearing must remain in effect until a hearing on the renewal can occur, for up to 90 days from the date of expiration.” (*Ibid.*) The rule additionally requires that courts provide a means of filing ex parte requests for temporary restraining orders and requests to renew restraining orders, and specifies that this may be done by providing a physical location, drop box, or through electronic means, if feasible. (*Ibid.*)

Other relevant emergency rules authorized the following: (1) courts to require that judicial proceedings and court operations be conducted remotely, including by video, audio, and telephonic means; (2) the electronic and authentication of documentary evidence; (3) e-filing and e-service; (4) the use of remote interpreting; and (5) the use of remote reporting and electronic recording to make the official record of an action or proceeding. (Cal. Rules of Court, Emergency Rule 3(a)(3) (April 6, 2020).) However, as documented in the Committee’s joint informational hearing with the Senate Judiciary Committee in February of 2021, these rules have been implemented unevenly across the state and will sunset 90 days after the state of emergency is lifted. (See Joint Informational Hearing of Assembly and Senate Committees on Judiciary, “COVID and the Courts: Assessing the Impact on Access to Justice, Identifying Best Practices, and Plotting the Path Forward” (Feb. 23, 2021), available at: https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/Background%20paper_022321.pdf.)

This bill. The bill makes a number of changes to existing law related to protective orders and firearms (and ammunition) possession.

Mandatory court procedures to ensure firearms and ammunition are relinquished. According to the author and sponsor of this bill, Rule of Court 5.495 is not mandatory and thus implementation of the rule and its procedures has been inconsistent among counties in the state. The inconsistency in implementation is especially concerning in the civil law context because the only person with the ability to address the issue of the restrained party being in possession of firearms and ammunition as close to the time of prohibition as possible is the judge hearing the case. Unlike in the criminal context, there is no outside law enforcement, probation officer, or

prosecutor present in the courtroom to address compliance or violations with the firearms relinquishment process.

This bill codifies Rule of Court 5.495 in the Family Code and makes compliance mandatory so that standards and procedures for ensuring the relinquishment of a firearm and ammunition following the issuance of a civil restraining order would consistently apply throughout the state. It also requires, in order to fill the gaps in court communication with justice partners identified by the 2008 Judicial Council report, the court to notify law enforcement officials and the county prosecutor's office when there has been a violation of a firearm relinquishment order related to a civil domestic violence restraining order.

Interaction between the Family Code and Welfare & Institutions Code provisions regarding protective orders and possession of firearms and ammunition. The bill in print seeks to clarify how existing provisions of the Family Code, specifically Section 6389, that address possession of a firearm or ammunition by persons who are subject to a protective order interact with cases adjudicated under Welfare & Institutions Code Section 213.5. However, due to a drafting error, this provision is unclear. The author's proposed amendments revise the language of this provision to make it clear that the procedures set forth in Family Code Section 6389 apply to these cases. The amendments, on Page 11 at lines 11-16, will read as follows:

(g) (1) ~~When~~ **In a case where** a court issues a protective order pursuant to subdivision (a), (b), (c), or (d), **Section 6389 of the Family Code shall apply. In accordance with that section,** the court shall make a determination as to whether the restrained person is in possession or control of a firearm or ammunition, as provided in Section 6322.5 of the Family Code, ~~and the firearms provision in Section 6389 of the Family Code shall apply.~~

Requirement to consider in child custody cases a party's failure to relinquish firearms and ammunition. The bill requires a court, in making a child custody determination, to consider whether the party is a restrained person in possession or control of a firearm or ammunition. "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; see Sections 3011, 3020, 3040 & 3041.) That scheme "allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child." (Section 3040 (c).) When determining the best interest of a child, a court may consider any relevant factors, and must consider the following: the health, safety, and welfare of the child; any history of abuse by the party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent. (Sections 3011, 3020.) Custody and visitation orders are reviewed under the deferential "abuse of discretion" standard, under which reversal is warranted only "if there is no reasonable basis upon which the trial court could conclude that its decision advanced the best interests of the child." (*Ed H. v. Ashley C.* (2017) 14 Cal.App.5th 899, 904.) Under Rule of Court 5.495 (f)(1), a court must specifically consider whether a restrained party violated the requirement under Section 6389 that they relinquish their firearm. The bill would codify this requirement.

Remote appearance of parties and witnesses. Finally, the bill in print authorizes **a party** to appear through technology that enables remote appearances, as determined by the court. This is consistent with the Supreme Court's emergency rule dealing with emergency protective orders, temporary restraining orders, and criminal protective orders that were requested, issued, or set to expire during the state of emergency related to the pandemic. It is also consistent with several

bills pending in the Legislature, including SB 538, which the Committee recently approved by a unanimous vote. SB 538 would allow parties *and witnesses* to appear remotely at a hearing on a petition for a gun violence restraining order or a domestic violence restraining order. The author proposes to amend the bill to allow witnesses, like parties, to appear remotely at hearings.

SEIU California objects to the bill's remote hearing provision, arguing that court reporters struggled during the pandemic with being able to accurately create records of remote testimony. Given that there is no requirement in the law for a court reporter to produce a record of most civil proceedings, including hearings on petitions for DVROs and GVROs, it appears that SEIU California's concerns are less about the hearings at issue in this bill than about other hearings where court reporters are required to create a record of the proceedings. Those concerns certainly may be well-founded, but they are not necessarily at issue in this particular bill.

ARGUMENTS IN SUPPORT: The sponsor, Giffords, writes in support of the bill that it is particularly important for civil courts to schedule relinquishment hearings because they generally have fewer law enforcement tools than criminal courts have:

Civil domestic violence restraining order cases almost always involve self-represented parties. As a result, those seeking protection rely heavily on the courts to ensure that orders are effective and provide the remedies that have been enacted in California, including ensuring that firearms are in fact relinquished and prohibitions around future purchases are put into place. This bill would encourage courts to utilize straightforward, existing mechanisms to reduce the risk of firearm violence and ensure compliance with the law and court orders.

ARGUMENTS IN OPPOSITION: SEIU California writes that it opposes the bill, unless amended, because its language authorizes the appearance of parties at remote hearings:

Unfortunately, our experience with remote proceedings and appearances during the pandemic has proven that with existing technology, our court reporters ability to do their very jobs is all but impossible. Many gun violence protective order proceedings are held in conjunction with other court proceedings; which means that although the bill limits remote appearances of parties only to proceedings concerning violations of PC 6389, it is entirely possible that other appearances might be undertaken by the courts. This is particularly problematic where such proceedings are in relation to felony matters, where the sanctity of the official verbatim record is of utmost importance.

REGISTERED SUPPORT / OPPOSITION:

Support

Giffords (sponsor)
 American Academy of Pediatrics, California
 Brady Campaign California
 California District Attorneys Association
 California Partnership to End Domestic Violence
 Family Violence Appellate Project
 Little Hoover Commission
 Los Angeles County Bar Association - Family Law Section
 National Association of Social Workers, California Chapter

Never Again CA
Prosecutors Alliance of California
Tides Advocacy
Violence Prevention Coalition of Orange County
Weave
Women Against Gun Violence

Opposition

SEIU California (unless amended)

Analysis Prepared by: Alison Merrilees / JUD. / (916) 319-2334