

RESOLUTION 0002

RESOLUTION FINDING THAT, AS A RESULT OF THE CONTINUING COVID-19 PANDEMIC STATE OF EMERGENCY DECLARED BY GOVERNOR NEWSOM, MEETING IN PERSON FOR MEETINGS OF THE SAN MATEO DOMESTIC VIOLENCE COUNCIL LEGAL PROCESS COMMITTEE (“Legal Process Committee”) WOULD PRESENT IMMINENT RISKS TO THE HEALTH OR SAFETY OF ATTENDEES

WHEREAS, on March 4, 2020, the Governor proclaimed pursuant to his authority under the California Emergency Services Act, California Government Code section 8625, that a state of emergency exists with regard to a novel coronavirus (a disease now known as COVID-19); and

WHEREAS, on June 4, 2021, the Governor clarified that the “reopening” of California on June 15, 2021 did not include any change to the proclaimed state of emergency or the powers exercised thereunder, and as of the date of this Resolution, neither the Governor nor the Legislature have exercised their respective powers pursuant to California Government Code section 8629 to lift the state of emergency either by proclamation or by concurrent resolution in the state Legislature; and

WHEREAS, on March 17, 2020, Governor Newsom issued Executive Order N-29-20 that suspended the teleconferencing rules set forth in the California Open Meeting law, Government Code section 54950 et seq. (the “Brown Act”), provided certain requirements were met and followed; and

WHEREAS, on September 16, 2021, Governor Newsom signed AB 361 that provides that a legislative body subject to the Brown Act may continue to meet without fully complying with the teleconferencing rules in the Brown Act provided the legislative

body determines that meeting in person would present imminent risks to the health or safety of attendees, and further requires that certain findings be made by the legislative body every thirty (30) days; and,

WHEREAS, on September 28, 2021, in the interest of public health and safety, as affected by the state of emergency caused by the spread of COVID-19, the Board issued a finding that meeting in person would present imminent risks to the health or safety of attendees, and decided to invoke the provisions of AB 361 related to teleconferencing for meetings of the Board; and

WHEREAS, the Board also strongly encouraged other County legislative bodies to make a similar finding and continue meeting remotely through teleconferencing; and

WHEREAS, since Thanksgiving, the statewide seven-day average case rate has increased by 805% and the number of COVID-19 hospitalized patients has increased by 154%; and

WHEREAS, this surge is being driven by the recent emergence of the Omicron variant, which has recently been estimated to account for approximately 70% of cases sequenced nationally; and

WHEREAS, early data suggest that the Omicron variant is more transmissible than the Delta variant; and

WHEREAS, indeed, local rates of transmission of COVID-19 are now in the “high” tier as measured by the Centers for Disease Control; and

WHEREAS, requiring large numbers of individuals to gather, and potentially travel long distances, for in-person public meetings could potentially, and unnecessarily, expose numerous people to COVID-19, further contribute to the ongoing surge in cases caused by the Omicron variant, compound disruptions to our economy, and undermine public health measures during the current State of Emergency; and

WHEREAS, the Legal Process Committee has an important governmental interest in protecting the health, safety and welfare of those who participate in its meetings; and,

WHEREAS, in the interest of public health and safety, as affected by the emergency caused by the spread of COVID-19, the Legal Process Committee deems it necessary to find that meeting in person would present imminent risks to the health or safety of attendees, and thus intends to invoke the provisions of AB 361 related to teleconferencing;

NOW, THEREFORE, IT IS HEREBY DETERMINED AND ORDERED that

1. The recitals set forth above are true and correct.
2. The Legal Process Committee finds that meeting in person would present imminent risks to the health or safety of attendees.
3. Members are directed to return no later than the next meeting after the adoption of this resolution with an item for the Legal Process Committee to consider making the findings required by AB 361 in order to continue meeting under its provisions.

4. Members are directed to take such other necessary or appropriate actions to implement the intent and purposes of this resolution.

* * * * *

APPELLATE CASES INTERPRETING THE DVPA

A. INITIAL JURISDICTION

Hogue v. Hogue (2017) 16 Cal.App.5th 833 (if an out-of-state person commits an act of DV against someone in California – here, threats of suicide via social media or electronic communications – California court has jurisdiction over the abusive out-of-state party to issue a DVRO against them)

B. INITIAL ORDER

M.S v. A.S. 2022 WL 950809 ((1) good cause for inclusion of children as protected parties where the oldest son testified that father enlisted him to stalk mother and surreptitiously gather information on her and father would choke, slap and push the children and mother testified father grabbed child's neck (2) potential jeopardy to the children may be sufficient to include the children at parties but is not a necessary predicate factor; totality of circumstances applies)

In re Marriage of Dorit and Reichental (2021) 73 Cal.App.5th 396 (good cause to include petitioner's girlfriend as protected party where they lived together and respondent's conduct included chasing girlfriend and falsely accusing girlfriend and petitioner as jointly disabling respondent's surveillance system)

J.H. v. G.H. (2021) 63 Cal.App.5th 633 (no error for the trial court not to include the children as protected parties; proper standard is: children may be protected parties if supported by a finding of good cause under the totality of the circumstances)

Noble v. Superior Court (2021) 71 Cal.App.5th 567 ((1) out-of-state DVRO triggers the Fam. Code § 3044 presumption; (2) when allegations of DV are made, the court is required to inform the parties about the presumption prior to mediation [citing Fam. Code § 3044(h)].)

F.M. v. M.M. (2021) ((1) Nothing in the plain language of the DVPA restricts courts when ruling on a DVRO request to hearing evidence of abuse that occurred only before the request was filed. (2) Depriving a parent of access to his or her child may qualify as abuse for the issuance of a DVRO [dictum, at fn. 5]. (3) The DVPA does not impose a heightened standard for specificity, nor does it contain a corroboration requirement. (4) Physical separation is not a substitute for the protections of a restraining order.)

McCord v. Smith (2020) 51 Cal.App.5th 358 (Coercive and controlling behavior are domestic violence under California's restraining order laws and the totality of the circumstances needs to be considered when determining whether to issue a DVRO. Seemingly isolated events — like texting a picture of Ms. Smith's professional license — were part of an overall series of actions that were used as a means of exercising control and dominion which threatened her peace of mind and sufficiently justified a restraining order.)

Nicole G. v. Braithwaite (2020) 49 Cal.App.5th 990 (Finding trial court did not err by including temporary property possession and kick-out orders since there was substantial evidence on the record to meet all three requirements of the DVPA re exclusive possession of parties' common dwelling. The fact that P had moved out of the condo and was not living there when trial court made its orders was not

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determinative. That P and D were embroiled in a civil action reg the condo did not preclude the trial court's kick-out and possession orders, effective until the decision in the civil case.)

Jennifer K. v. Shane K. (2020) 47 Cal. App. 5th 558 (trial court did not err in finding that husband's having punched the refrigerator door near wife's head did not constitute domestic violence because he was venting frustration but did not intend to hit wife. Appellate court declined to redetermine the credibility of the witnesses, finding substantial evidence supporting lower court's ruling. Appellate court also rejected wife's argument that remarks by the trial judge regarding the way that rape victims usually behave demonstrated gender bias—finding trial judge made these in the context of a pre-trial determination of admissible evidence).

Curcio v. Pels (2020) 47 Cal.App.5th 1 (The granting of an initial TRO does not create a rebuttable presumption that abuse occurred, and to obtain a DVRO the preponderance of evidence burden has to be met by the Petitioner rather than by the Respondent in defense (i.e. “the proving by a preponderance of the evidence that these allegations are not true.”) Further, ‘Disturbing the Peace’ does not mean any post/expression—here 1 MeToo-like FB post against Petitioner—that annoys or upsets another party. The content, manner, privacy etc. of that expression matters)

Molinero v. Molinero (2019) 33 Cal.App.5th 824 (DVRO's prohibition on husband from posting “anything about the case on Facebook” was overboard and an improper prior restraint on speech, where husband's prior posts expressed despair about the divorce but did not directly disparage wife or openly seek to alienate her from the children.)

Tanguilig v. Valdez (2019) 36 Cal.App.5th 514 ** *Elder Abuse and Dependent Adult Civil Protection Act case*** (CoA defined “good cause” for adding family or household members to protective order: “As a general rule, “good cause” includes reasons that are fair, honest, in good faith, not trivial, arbitrary, capricious, or pretextual, and reasonably related to legitimate needs, goals, and purposes.”)

Lugo v. Corona (2019) 35 Cal.App.5th 865 (2019) (CPOs and DVROs can co-exist and issuing one does not prevent other. DV remedies are in addition to other crim and civil remedies available: all tools by all courts to be used to protect DV vics)

In re: Marriage of Davila (2018) 29. Cal.App.5th 220 ((1) court did not err in considering Petitioner's testimony of details of abuse – that Respondent put his gun to her head numerous times-- to find that abuse occurred, even though the specific allegation was not made in the request; Respondent was sufficiently on notice that Petitioner based her request on the threat of physical violence to Respondent and her children; (2) holding a gun to Petitioner's head and threatening to kill her was domestic violence by way of “reasonable apprehension of serious bodily injury)

In re: Marriage of G (2017) 11 Cal.App.5th 773 (in determining whether someone acts as an abuser, or primary aggressor, common law self-defense principles are implied into the DVPA; acts of legitimate self-defense are not ‘abuse’ under the DVPA)

In re Marriage of Fregoso and Hernandez (2016) 5 Cal.App.5th 698 (affirming grant of restraining order after hearing even where petitioner admitted having consensual sex with respondent during TRO where petitioner testified that the reconciliation was "part of their six-year repeated cycle of violence,

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gifts, forgiveness, sex, and then repeated acts of violence" as the testimony of one witness, including the protected party, can be sufficient evidence)

Phillips v. Campbell (2016) 2 Cal.App.5th 844 (affirming trial court's issuance of DVPA restraining order where text and email message evidence supported court's finding that parties had "frequent intimate associations primarily characterized by the expectation of affection" within the meaning of § 6210)

Rodriguez v. Menjivar (2016) 243 Cal.App.4th 816 (trial court erred in refusing to hear petitioner's evidence regarding mental abuse and finding the physical abuse was too remote in time; mental abuse can support issuing a DVPA order; moreover, a showing of past abuse is sufficient to warrant issuing a DVPA order; petitioner does not have to show a probability of future abuse)

Sabato v. Brooks (2015) 242 Cal.App.4th 715 (affirming a three-year domestic violence restraining order (DVRO) where ex-husband admitted continuing to contact petitioner by text, email, telephone and other means after she told him not to contact her)

In re Marriage of Evilsizor & Sweeney (2015) 237 Cal. App. 4th 1416 (trial court's issuance of a DVPA order prohibiting respondent from disseminating information he downloaded from petitioner's cell phone is affirmed; disturbing petitioner's peace by disseminating private text, email, and social media information can be abuse under the DVPA)

Altafulla v. Ervin (2015) 238 Cal. App. 4th 571 (trial court correctly granted DVPA orders where respondent shared petitioner's private information with her children, coworkers and friends in a manner calculated to cause grave emotional distress)

Nevarez v. Tonna (2014) 227 Cal.App.4th 774 (proof of a past act of abuse is sufficient to warrant issuance of a DVPA restraining order; party requesting order does not have to prove fear of future abuse)

Gou v. Xiao (2014) 228 Cal.App.4th 812 (trial court abused its discretion in denying DVPA restraining order request without an evidentiary hearing where alleged violent acts were physical abuse of the petitioner's minor child in front of petitioner)

Burquet v. Brumbaugh (2014) 223 Cal.App.4th 1140 (non-violent electronic and in person contacts may constitute "disturbing the peace" under FC § 6320, warranting issuance of a DVPA restraining order)

In Re Marriage of Nadkarni (2009) 173 Cal.App.4th 1483 (requisite abuse justifying issuance of a DVPA restraining order does not need to involve physical injury or assault; thus, court erred in denying DVPA restraining order application without an evidentiary hearing)

Nakamura v. Parker (2007) 156 Cal.App.4th 327 (court abused its discretion in summarily denying request for DVPA restraining order without a hearing)

Quintana v. Guijosa (2003) 107 Cal.App.4th 1077 (court abused its discretion in failing to issue DVPA restraining orders based on petitioner's statement that her children were in Mexico)

O'Kane v. Irvine (1996) 47 Cal.App.4th 207 (sub-lessees with no intimate or family relationship who are not a social unit living together are not "cohabitants" within the meaning of FC § 6211 of the DVPA)

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C. “NON-CLETS” ORDERS (NOT PERMITTED)

In re Marriage of Dorit and Reichental (2021) 73 Cal.App.5th 396 (trial court had mandatory not discretionary obligation to register DVRO in CLETS)

D. MUTUAL RESTRAINING ORDERS

K.L. v. R.H. (2021) 70 Cal.App.5th 965 (requests for mutual DVROs require the court to determine the “most significant aggressor” by reweighing the actions of DV against each other)

In re the Marriage of Everard (2020) 47 Cal.App.5th 109 (affirmed trial court’s issuance of reciprocal DVROs, since pursuant to FC section 6305 court found—after a multiday long-cause hearing involving the testimony of the parties and Officer—both parties acted as primary aggressors and that neither party acted primarily in self-defense in multiple DV incidents. “There is a dearth of authority on what constitutes “detailed findings of fact” under subdivision (a)(2) of section 6305, we note in other contexts the concept of detailed findings has been understood to require sufficient factual findings or analysis for a reviewing court to assess the factual or legal basis for the trial court’s decision.”)

Herriott v. Herriott (2019) 33 Cal.App.5th 212 (If one order is an EARO and another is a DVRO, the court is not required to make a “primary aggressor” finding of fact, because not granting mutual DVROs)

Marriage of Ankola (2019) 36 Cal.App.5th 560 (Court improperly issued mutual DVROs when hearing was one where the husband was requesting a RO and was contesting wife’s current RO; statutory interpretation of § 6305, subd. (a)(1) expressly provides that a trial court may issue a mutual ROs only where both parties have submitted RO applications, presenting written evidence of dv)

Melissa G. v. Raymond M. (2018) 27 Cal.App.5th 360 (where a court grants two separate [mutual] restraining orders, the court must make first factual findings required under Fam. Code Section 6305 as to each order, even if the two restraining orders stem from separate incidents and not a single incident)

Marriage of G (2017) 11 Cal.App.5th 773 (in determining whether someone acts as an abuser, or primary aggressor, common law self-defense principles are implied into the DVPA; acts of legitimate self-defense are not ‘abuse’ under the DVPA)

Isidora v. Silvino (2015) 239 Cal. App. 4th 11 (Trial court erred in issuing mutual restraining orders based on respondent’s responsive declaration; court may issue mutual orders only if both parties have filed requests for such relief and given the requisite notice to the other party)

JJ v. MF (2014) 223 Cal.App.4th 968 (“primary aggressor” determination should consider larger context of the parties’ relationship)

Monterroso v. Moran (2006) 135 Cal.App.4th 732 (issuing mutual restraining orders without making the detailed findings required by FC § 3065 was reversible error)

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Conness v. Satram (2004) 122 Cal.App.4th 197 (FC § 6305 restrictions on issuing mutual restraining orders does not apply to situations in which the opposing parties each file separate DVPA applications on different dates)

E. CONTINUANCES

J.M. v. W.T. (2020) 46 Cal.App.5th 1136 (Trial ct. abused discretion by denying requested continuance for a DVPA hearing where petitioner had submitted a DV-115 explaining he had been unable to serve the Respondent and also that he had a spinal surgery scheduled recently, constituting an “unforeseen circumstance.” Unclear to App Ct why trial court had denied request, but the fact that Respondent had not been noticed is not a valid reason under Section 245)

Ross v. Figueroa (2006) 139 Cal.App.4th 856 (law entitles respondent to a continuance where DVPA TRO was issued without notice; therefore, court’s refusal to grant respondent’s requested continuance to allow him to prepare was reversible error)

F. RENEWALS / TERMINATIONS

In re Marriage of Brubaker and Strum (2021) 73 Cal.App.5th 525 ((1) trial court erred in finding that a court determination of no abuse after the DVRO meant the victim was precluded from obtaining a renewal because the standard for renewal is reasonable apprehension; (2) trial court erred in excluding evidence of original abuse in determining request for renewal of DVRO)

Ashby v. Ashby (2021) 68 Cal.App.5th 491 ((1) restrained party’s custodial and financial disputes and “spiteful litigation tactics” against the protected party were relevant to whether restraining order should renew; (2) a restrained party cannot be permitted to challenge the truth of the findings underlying the initial order, because to do so would contradict collateral estoppel principles.)

In Re Marriage of Martindale and Ochoa (2018) 30 Cal.App.5th 54 ((1) no error in denial of renewal request where restricted party intentionally avoided all contact with protected party, and when he was in her vicinity, he left as soon as he was aware.

(2) [Dicta:] collateral estoppel does not mandate a court in a renewal case to give “conclusive” effect of evidence that supported initial DVRO request, because the “issue” decided in an initial DVRO and DVRO renewal are not the same. [dicta, because “in any event, appellant cites nothing in the record showing that the trial court permitted respondent to present evidence challenging the basis for the initial restraining order”])

Rybolt v. Riley (2018) 20 Cal.App.5th 864: (affirming renewal of DVPA restraining order and finding that court did not abuse its discretion in finding that petitioner had a subjective fear of future non-physical abuse or in rejecting respondent’s argument that renewing the restraining order would negatively affect his career).

De la Luz Perez v. Torres-Hernandez (2016) 1 Cal.App.5th 389 (trial court erroneously stated that renewal of DVRO required evidence of additional abuse, trial court failed to consider non-violent restraining order violations as abuse and trial court failed to consider evidence of abuse against the protected party’s children)

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Cueto v. Dozier (2015) 241 Cal. App. 4th 550 (trial court erred in denying application to renew restraining order where respondent had not violated the order; a court shall renew a DVPA restraining orders if it finds by a preponderance of evidence that the protected party has a reasonable apprehension of future abuse even if no actual violation has occurred.)

Eneaji v. Ubboe (2014) 229 Cal.App.4th 1457 (renewal applicant must only show “reasonable apprehension” of future abuse; applicant does not need to show that any abuse occurred during the ROAH period or that she fears future physical abuse; the feared future abuse can be any abuse that could have been enjoined initially)

Lister v. Bowen (2013) 215 Cal.App.4th 319 (nonviolent restraining order violations & abusive litigation practices can provide a basis for a renewal of DVPA restraining order pursuant to FC § 6345)

Avalos v. Perez (2011) 196 Cal.App.4th 773 (court abused its discretion in renewing petitioner’s DVPA Restraining Order After Hearing for less than 5 years; FC § 6345 requires that renewals be for at least 5 years)

Loeffler v. Medina (2009) 174 Cal.App.4th 1495 (standard to be applied in determining whether or not to terminate a DVPA restraining order is that set forth in Code of Civil Procedure § 533 governing the standard for terminating injunctions generally)

Ritchie v. Konrad (2004) 115 Cal.App.4th 1275 (on application for renewal of DVPA restraining order pursuant to FC § 6345, petitioner must show her or she has a “reasonable apprehension” of future abuse)

G. SUPPORT

In re Marriage of Brewster and Clevenger (2020) 45 Cal.App.5th 481 (conclude that to overcome the section 4325 presumption against awarding spousal support to a spouse convicted of dv based on “documented evidence of a convicted spouse's history as a victim of domestic violence,” the convicted spouse must present written evidence in the form of a “writing” within the meaning of Evidence Code section 250 proving by a preponderance their history as a victim of dv in the relationship. Also holds application of 4325 presumption is not limited to incidents of physical violence.)

In Re Marriage of Kumar (2017) 13 Cal.App. 5th1072 (an immigrant spouse has standing to enforce the I-864 affidavit of support in state court; and an immigrant spouse has no duty to seek employment to mitigate damages; this is a contract claim for minimum support, not spousal support as a matter of state law)

Gomez v. Schu (2016) 6 Cal.App.5th 470 (trial court properly denied request for spousal support in light of evidence that party seeking spousal support had committed acts domestic violence and child abuse during the marriage)

In Re Marriage of JO and TB (2014) 223 Cal.App.4th 687 (court may award spousal support pursuant to FC § 6341 before concluding that domestic violence has occurred)

Moore v. Bedard (2013) 213 Cal.App.4th 1206 (court had continuing jurisdiction under FC § 6345 to make child support orders even though protective order was not granted and TRO was dissolved)

In Re Marriage of MacManus (2010) 182 Cal.App.4th 330 (court may consider domestic violence history in reallocating past temporary spousal support)

H. CUSTODY / VISITATION

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Abdelqader v. Abraham (2022) 76 Cal.App.5th 186 (trial court failed to provide necessary statement of reasons that presumption against awarding custody to father, who had committed domestic violence, was rebutted)

Family Code Section 3044 revised effective January 1, 2019:

(1) “abuse” that triggers 3044 presumption includes abuse against person in dating relationship (not just against spouse, other parent, or child).

(2) to overcome the presumption against batterer having sole or joint custody, the court must find all 7 factors, “on balance, support the legislative findings in [Fam. Code Section 3020.]”

(3) If the court determines that the presumption has been overcome, the court must state its reasons on writing or in the record.

***Jaime G. v. H.L.** (2018) 25 Cal.App.5th 794 (Fam. Code § 3044 presumption against granting custody to the abusive parent cannot be overcome merely by showing the abusive parent is “more suitable,” – instead the court must first make findings about each of the 7 rebuttal factors in writing or on the record).

* *Jaime G.* was expressly codified in Fam. Code Section 3044.

S.Y. v. Superior Court (Omar M.) (2018) 29 Cal.App.5th 324, *opinion overruled* by 2018 A.B. 2044

Rybolt v. Riley (2018) 20 Cal.App.5th 864 ((1) “abuse” can include one parent using a child’s extracurricular activities to harass, intimidate, manipulate, and/or control the other parent; (2) courts should take this into consideration when fashioning safe parenting plans; (3) courts should consider this type of abuse in requests to renew a DVRO; (4) in DVRO renewal requests, courts should consider *actual* “burdens” on the restrained party, not generic or theoretical burdens)

In re: Bruno M. (2018) 28 Cal.App.5th 990 (trial court properly granted a Welf. & Inst. Code § 213.5 restraining order protecting child from father based on father disturbing the child’s peace by physically abusing mother in front of child)

Ellis v. Lyons (2016) 2 Cal.App.5th 404 (trial court’s denial of request to modify custody order reversed where trial court failed to apply § 3044 presumption when an out-of-state court found respondent committed acts of domestic violence against the child within the past 5 years within the meaning of § 3044(d)(2)).

Celia S. v. Hugo H. (2016) 3 Cal.App.5th 655 (reversing award of 50/50 timeshare order as “visitation”; trial court abused its discretion in awarding 50/50 time share where respondent had committed acts of domestic violence implicating § 3044; § 3044 rebuttable presumption remains in effect for 5 years, even if the DVRO has expired and § 3011(e)(1) requires trial court to state, in writing or on the record, the reasons for its determination that a parent has overcome § 3044 presumption)

Noergaard v. Noergaard (2016) 244 Cal.App.4th 76 (in Hague international custody case, trial court erred in failing to hold a full evidentiary hearing before ordering child to be returned to home country where parent alleged that child faced a grave risk of harm due to abuse if returned to the home country)

Christina L. v. Chauncey B. (2014) 229 Cal.App.4th 731 (Trial court erred in modifying sole custody order made in DVPA ROAH to joint custody without addressing FC § 3044 presumption; trial court also should not have modified DVPA ROAH absent a showing of changed of circumstances)

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Keisha W. v. Marvin M. (2014) 229 Cal.App.4th 581 (California had jurisdiction to issue a DVPA restraining order, modifying a Texas child custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) pursuant to FC § 3423, after determining “...that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.”)

In re Marriage of Fajota (2014) 230 Cal.App.4th 1487 (not applying FC § 3044's presumption against awarding custody to a person who has perpetuated domestic violence within the past 5 years was abuse of discretion; court must apply the rebuttable presumption after a finding of domestic violence whether or not a DVRO ROAH was granted)

Keith R v. Superior Court (2009) 174 Cal.App.4th 1047 (custody order made in a DVPA restraining order is not a final judgment but an interim order)

Gonzalez v. Munoz (2007) 156 Cal.App.4th 413 (court's failure to consider DVPA petitioner's request for a custody order was reversible error, notwithstanding lack of paternity determination)

Sabbah v. Sabbah (2007) 151 Cal.App.4th 818 (failure to advise respondent of FC § 3044 presumption before granting DVPA ROAH was not reversible error)

I. Service

Caldwell v. Coppola (1990) 219 Cal.App.3d 859 (person listed as protected party under DVPA restraining order application cannot effect valid personal service on restrained party)

J. Attorney's Fees

Faton v. Ahmedo (2015) 236 Cal.App.4th 1160 (attorney's fees may be properly awarded to prevailing DVPA petitioner after notice and due process, even if petitioner did not request attorney's fees on her initial Request for Order)

K. Commissioners

In re Marriage of Djulus (2017) 10 Cal.App.5th 1042 (mere appearance before a commissioner not sufficient to imply stipulation where in pro per respondent did not show awareness that judicial officer was commissioner and was not offered written stipulation; commissioners are strongly encouraged to obtain a written or oral stipulation on the record)

Elena v. Kroutik (2016) 247 Cal.App.4th 570 (DVPA restraining order issued by commissioner is valid based on respondent's implied consent to a commissioner where respondent failed to prove that he did not orally stipulate and where respondent participated in the hearings where, unlike in **Michaels v. Turk**, no local rule required a stipulation on the record).

Michaels v. Turk (2015) 239 Cal. App. 4th 1411 (DVPA restraining order is void where restrained party's agreement to have her case heard by a commissioner is not “apparent on the record;” parties must agree to have their cases heard by commissioners rather than judges).

L. Violations

N.T. v. H.T. (2019) 34 Cal.App.5th 595 (A knowing TRO violation cannot be “de minimus” and actions that are obvious breaches of peace (here, forced conversations during visitation) cannot be dismissed as “technical violations”)

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SAN MATEO COUNTY SUPERIOR COURT

DOMESTIC VIOLENCE PREVENTION ACT (DVPA)

BENCH CARD

Purpose of DVPA (1) to prevent DV & (2) to provide sufficient separation period for persons involved in DV to seek a resolution of the causes of violence (*F.C. § 6220*)

(To grant RO, Court need not believe future abuse is possible)

I. Hearing Procedure Checklist

Before Proceeding with Hearing:

- ✓ Verify criminal history search has been completed before hearing (*FC §6306*)

If the results of the search or other evidence reflect that the respondent owns a registered firearm or ammunition, make a written record as to whether the subject has relinquished the firearm or ammunition and provided proof. (*FC § 6306(f)*)

Parties may appear with support persons, who may sit at the litigant's table. (*FC § 6303*)

- ✓ Announce availability of interpreters & ensure interpreters are available if needed (*EC §§ 755, 756*)
- ✓ If respondent has not been timely served AND is not present, TRO may be reissued. (*FC §245*)
- ✓ Check Timely Service: In absence of order shortening time, must be at least 5 days before hearing (*FC §243(b), 6320.5*)
- ✓ Permit Service by Alternate Method: Order if petitioner has made diligent efforts to personally serve & there is reason to believe respondent is evading service; Grant Continuance. (*FC §6340 (a)(2)* now allows service by publication per *CCP § 415.50* or first-class mail or delivery to home or place of employment per *CCP § § 415.20 - 415.40.*)
- ✓ Reissue TRO, in full force and effect, if continuance is granted. Respondent entitled to 1 continuance for a reasonable period, even if was served; either party may request 1 continuance for "good cause"; or court may continue on its own motion. (*FC §245(a), (b)*).
- ✓ Refer parties to FCS for separate child custody recommending counselling, if custody & visitation in dispute. If day-of-court mediation unavailable, set hearing date & either grant ROAH or reissue TRO. Court may make orders including a temporary spousal and/or child support order. Court shall consider whether failure to make support orders jeopardizes petitioner and/or children's safety. (*FC § 6341*)

In-Court Facilitator/ CORA Advocate in courtroom can assist parties in preparing reissuances or orders.

If Proceeding with Hearing:

- ✓ Swear-in parties, ask Petitioner if all statements in the affidavit are true & if they have anything to add. Offer Respondent a chance to comment.
- ✓ Encourage Petitioner to add details or clarify through testimony if application incomplete.

Receive live testimony unless there is good cause or a stipulation by the parties (FC §217)

- ✓ If the restraining order is granted, inform the parties of the terms & the penalties for violating the order, including that respondent is prohibited *from owning*, possessing, purchasing, or receiving (or attempting to purchase or receive) firearms & the penalties for violation. (FC § 6304) and that each violation of the order is a crime punishable by up to 1 year in the county jail, a fine of up to \$1000, or both. Each violation is treated as a separate offense. (FC § 6304, PC § 273.6) *Information provided shall include how any firearms or ammunition still in the restrained party's possession are to be relinquished, according to local procedures, and the process for submitting a receipt to the court showing proof of relinquishment. (FC § 6304)*
- ✓ If the restraining order is denied: state reasons for denial in writing or on the record (FC § 6340)
- ✓ Review petition before ending hearing: ensure all issues have been addressed (e.g. child & spousal support, property retrieval)
- ✓ Ensure ROAH is transmitted to appropriate probation or parole officer, if the record search indicates that respondent is on parole or probation. (FC §6306)

All protective orders subject to transmittal to California Law Enforcement Telecommunications System (**CLETS**) are required to be so transmitted. (FC § 6380(j)(1)), effective 1/1/2020. Parties seeking to have the court enter a stipulated protective order that would not be so transmitted—colloquially a “non-CLETS” restraining order”—goes against the intent of the Legislature.

II. DVPA Substantive Law

Required Relationship (FC §§ 6209, 6210, 6211, 6301) Petitioner must be:

- (a) Respondent's spouse or former spouse (No requirement for dissolution to be filed);
- (b) Respondent's cohabitant or former cohabitant (who "regularly resided in the household");
- (c) a person with whom respondent is having or has had a dating or engagement relationship (same sex or opposite sex) (“dating relationship” is a “frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations”);
- (d) a person with whom respondent has a child;
- (e) a child of a party or a child who is the subject of a Uniform Parentage Action; **OR**
- (f) related to respondent by consanguinity or affinity within the 2nd degree. (parents, grandparents, siblings, children)

Minors 12 and older seeking or opposing a RO may appear without guardian ad litem, guardian, or attorney FC§6301(a), CCP§372(b)(1)). The court may appoint a guardian ad litem, but appointment may not delay the issuance of the protective order. (CCP § 372(b)). A minor under 12 with a guardian ad litem may request or oppose a restraining order with or without counsel. (FC § 6229)

Showing Required (FC §§ 6203, 6300, 6301, 6320)

- **TRO:** Affidavit showing “reasonable proof of a past act or acts of abuse.” (FC § 6300)
 - length of time since most recent abuse is not determinative (FC § 6301)
- **Order After Hearing:** *Preponderance of evidence* (Evidence Code §115)
- **Renewal:** *Preponderance of evidence* that protected party entertains reasonable apprehension of future abuse; requires no showing of further abuse since original DVRO. (*Ritchie v. Konrad* (2004))

“Abuse” is “intentionally or recklessly to cause or attempt to cause bodily injury” OR sexual assault OR to “place a person in reasonable apprehension of imminent serious bodily injury to that person or to another person” OR “**disturbing the peace of the other party**” OR:

- stalking, threatening, credibly impersonating, falsely impersonating, harassing, telephoning, including but not limited to, making annoying telephone calls as described in PC § 653m, destroying personal property (FC 6320(a))

- “Disturbing the peace” means conduct that, based on the totality of the circumstances, destroys the mental or emotional calm of the other party. It also includes, but is not limited to, coercive control, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. (FC 6320(c).)

Examples of coercive control: (FC 6320(c).)

- Isolating the other party from friends, relatives, or other sources of support.
- Depriving the other party of basic necessities.
- Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services.
- Compelling the other party to act or not act by force, threat of force, or intimidation, including using immigration status
- reproductive coercion

Petitioner Address Not Required (FC § 6225):

RO enforceable *without* stating the petitioner's address, place of residence, school, employment, childcare, or child's school.

- Child custody & visitation orders must be designed to prevent disclosure of petitioner's location, if confidential. (FC § 6323)

Written evidence in a responsive declaration is not sufficient; court may only grant DVPA restraining orders to a person who files an application for such orders on the **mandatory judicial council forms.**

Mutual Orders (FC §§ 6305, 7720) May NOT be issued *unless*: both parties personally appear AND Present WRITTEN evidence of abuse AND Court makes detailed findings that both acted primarily as aggressors & neither acted primarily in self-defense.

Form & Duration of Orders (FC §§ 6221, 6345)

- Orders pursuant to this division shall be issued on forms adopted by the Judicial Council & approved by the DoJ. (FC 6221.) However, not being issued on JC forms does not make a court order, in and of itself, unenforceable. (FC §6221)
- No contact, stay-away, & residence exclusion orders may last up to FIVE(5) YRS & can then be

renewed either for another 5 years or Permanently, without a showing of further abuse. (FC § 6345)

- The duration of all other orders, including but not limited to child custody, visitation, support, and disposition of property, is governed by the law related to those subjects. (FC§ 6345)
- Custody, visitation, & support orders issued after notice & a hearing survive the termination of a restraining order. (FC §6340)

Priority of Enforcement *Penal Code §§ 136.2(c) and (e)*

1. Emergency Protective Order (EPO), if more restrictive and if same parties
2. Any no contact provision in any restraining order, whether criminal or civil
3. A criminal protective order (CPO)

Violations A knowing TRO violation cannot be “de minimus”; actions that are breaches of peace cannot be dismissed as “technical violations” (*N.T. v. H.T.*, 2019)

Scope and Types of Orders Permitted

Orders that may be granted ex parte:

- **Orders prohibiting conduct & stay away orders** Court may prohibit the restrained party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in PC § 528.5, falsely personating as described in PC§ 529, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in PC § 653m, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party. (FC §§ 6320, 6340)
- **Conduct & stay away orders as to family or household members** the above orders may also cover family & household members, upon a showing of good cause (FC § 6320(a))
- **Orders re animals** owned, possessed, leased, kept or held by the parties or their minor children -The court may grant petitioner care & control of animals & issue stay away orders re animals (FC § 6320(b))
- **Residence Exclusion Orders** - Court may exclude a party from the family dwelling, the dwelling of the other party, the parties' common dwelling, or the dwelling of the person who has care, custody, and control of a child to be protected, where necessary to prevent domestic violence regardless of which party holds legal or equitable title or is the lessee of the dwelling. Must find (1) that the party who will stay in the dwelling has a right under color of law to the premises, (2) that the party to be excluded has assaulted or threatens to assault the other party or any other person under her care, custody and control or any minor child of the parties or the other party, (3) that physical or emotional harm would otherwise result to the party, any person under his/her care, custody and control, or any minor child of the parties or the other party. (FC §§ 6321, 6340)
- **Orders Enjoining Other Specified Behavior** - as needed to effectuate court's orders. (FC §§

6322, 6340)

- **Orders Permitting Protected Party to Record Restraining Order Violations** - Court may order that a protected party is permitted to record prohibited communications by the restrained party. (*PC § 633.6*)
- **Orders Prohibiting Disclosure of Addresses**- Court may prohibit disclosure of addresses or other identifying information of protected party, child, parent, guardian, or child's caretaker (*FC § 6322.5*) & shall prohibit the restrained party from taking any action to obtain the address or location of a protected party or a protected party's family members, caretakers, or guardian, unless there is good cause not to make that order (*FC § 6322.7*)
- **Child Custody & Visitation Orders** - Court may issue custody and visitation orders, whether or not another family law action has been filed. See Custody & Visitation, below.
- **Parentage by stipulation, subject to set-aside** (*FC §6323(b)(2)*)
- **Orders Regarding Real or Personal Property, Insurance, & Marital Restraining Orders** - Court can determine the use, possession, & control of real or personal property, the payment of liens and encumbrances coming due while the order is in effect & can issue standard marital restraining orders. (*FC §§ 6324, 2045, 6325, 6340*). Court may restrain parties from cashing, borrowing against, cancelling, transferring disposing of or changing the beneficiaries of any insurance or other coverage held for the benefit of the parties or children from whom support may be ordered or both. (*FC § 6325.5*)

****Orders that are permitted only after notice & hearing:***

- **Child Support & Spousal Orders*** - If the parties do not already have a spousal or child support order, the court may make spousal support orders, if the parties are married, and child support orders, if the parties are married or respondent is the presumed father under *FC § 7611* of a child in petitioner's custody, whether or not a Uniform Parentage Act case has been filed. (*FC § 6341*). These orders shall be without prejudice to a subsequent family law case. In deciding support orders, the court shall consider whether failure to make support orders will jeopardize the safety of petitioner & minor children including safety concerns related to financial needs. (*FC § 6341*)
- **Restitution***- Court may order respondent to pay petitioner restitution for expenses incurred as a result of abuse & to reimburse public & private agencies for services provided to petitioner. If the *ex parte* order was issued without a sufficient factual basis, the court may order petitioner to pay for expenses incurred due to the issuance of the order. The court shall not order pain & suffering damages. (*FC § 6342*)
- **Counseling Orders*** - Court may require the restrained party to participate in batterer's program approved by the probation department & shall develop a referral list. (*FC § 6343, CRC 982(a)*). These orders shall require the restrained party to register by a set deadline or if no deadline is set, within 30 days of the order, and to sign a release with the program allowing the program to provide proof of enrollment, attendance records, and completion or termination information to the court, the protected party and the protected party's attorney

and provide the program name, address and telephone number to the court. (FC 6343(b)) The referral list shall be developed in consultation with local domestic violence shelters and agencies and provided to each applicant for an order under this section. (FC 6343(c)).

- **Attorneys Fees & Costs*** may be awarded to the prevailing party. (FC § 6344) In any case in which the petitioner is the prevailing party and cannot afford to pay attorney's fees and costs, the court shall order respondent to pay, if appropriate in light of the parties' respective ability to pay. (FC § 6344)
- **Firearm Relinquishment*** - Unless the court finds one of the statutory exceptions applies, the court shall order respondent to relinquish any firearms or ammunition in his/her immediate possession and control, within 24 hours of service and provide proof of relinquishment within 48 hours of service). (FC § 6389)
- **Cell phone transfer orders*** - The court may make separate cell phone transfer orders to ensure that the requesting party and any minor children in his or her care are able to maintain existing cell phone accounts. These separate orders shall direct the cell phone provider to transfer the phone accounts to the requesting party. (FC 6347)
- **Order to not post photos, videos etc. to internet***: does not violate free speech (*Phillips v. Campbell*, 2016)

III. Child Custody & Visitation

- **Custody & visitation only to parents** – DVPA allows the court to grant custody & visitation only to a person who has established a parent-child relationship by giving birth or otherwise as set forth in FC § 6323 or by filing a Uniform Parentage Act case. (FC § 6346). If the party seeking the restraining order has established a parent-child relationship and the other party has not, the court may order sole custody to the protected party and no visitation to the restrained party pending establishment of a parent-child relationship. (FC §3064(2)(a))
- **Domestic violence is detrimental to children** - “The legislature . . . finds and declares that **children have a right to be safe and free from abuse**, and that the perpetration of . . . domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child.” (FC § 3020)
- **History of domestic violence must be considered in custody decisions** - In making custody orders, court must consider any history of abuse against the other parent, any related child or child with whom s/he has had a caretaking relationship, or a parent, current spouse, cohabitant or fiancé or dating partner of the person seeking custody. (FC §3011(a)(2)(A)). If the court gives sole or joint custody or unsupervised visitation to a parent about whom there are allegations of domestic violence, the court must state reasons in writing or on the record. (FC §3011(a)(2)(B).)
- **Statutory Presumption against awarding joint or sole legal or physical custody to domestic violence perpetrators** - If court finds, by the preponderance of the evidence, that the party seeking custody has perpetrated DV against the other party seeking custody, or against the child or siblings, or against a person with whom the person seeking custody has a dating or engagement relationship, within the previous five (5) years, there is a rebuttable

presumption that an award of sole or joint physical or legal custody to the perpetrator is detrimental to the best interests of the child. (FC § 3044)

- The presumption may be rebutted by a preponderance of evidence that award is in the best interests of the child. The court must first make detailed *findings about each of the 7 factors* listed in § 3044, *in writing or on the record.*
- If court finds both parents have perpetrated DV within last 5 years, section does not apply.
- **Specific Child Exchanges Required** - Custody & visitation orders shall "specify the time, day, place, and manner of transfer of the child ...to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members" & must be "designed to prevent disclosure of shelter or other confidential location" of protected person. (FC §§6323(c), 3011(e)(1))
- **Court Must Consider Granting Supervised or Suspended Visits** - The Court shall consider whether the child's best interest requires that any custody or visitation be supervised or whether custody or visitation shall be suspended or denied. (FC §§ 6323(d), 3031, 3100))
- **Court Must Consider Firearms Determination Prior To Making Visitation Orders** - When determining whether visitation should be suspended, denied, or supervised, the Court must consider a determination made that the party is a restrained person in unlawfully in possession or control of a firearm (FC § 6323(c))
- **Court should not consider relocation from the family because of domestic violence** - Unless a statutory exception applies, the court may NOT consider a party's absence or relocation from the family as a factor in determining custody or visitation if the party is absent because of actual or threatened domestic or family violence by the other party. (FC § 3046)
- **In appropriate cases, court should make Child Abduction Prevention orders** - If court becomes aware of facts suggesting a child is at risk of abduction, the court shall, either on its own motion or at the request of a party, determine whether measures are needed to prevent the abduction of the child by one parent. Domestic violence is one of many factors to be considered; FC 3048 lists possible orders. (FC §3048)
- **In appropriate cases, court may order Drug Testing** - Court may order parties seeking child custody/visitation to undergo testing for illegal use of controlled substances/alcohol, where a preponderance of evidence shows habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol. Must order least intrusive method of testing & adhere to procedural protections set forth in FC 3041.5.