



**Key California Family Law, Juvenile, Criminal,
and US Supreme Court Decisions Involving
Domestic Violence**

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California Partnership to End Domestic Violence Webinar

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What is FVAP?



Family Violence Appellate Project provides free appellate representation to low and moderate-income survivors of domestic violence (DV) throughout California in cases involving restraining orders, child custody, and other DV issues.

What is FVAP?

- A state-bar-recognized Support Center for legal aid providers working on family law cases
- A resource for CA domestic violence agencies
- Screened hundreds of requests for assistance since we started in 2012
- Based in Oakland, serve all of California
- 77% success rate in prosecuting appeals (average: 21%)
- 100% success rate in defending appeals

FVAP's Mission

- California has many well-crafted statutes designed to protect survivors and their children
- However, these laws are under-utilized as there are so few appellate decisions referring to them
- FVAP's mission is to assist and protect individual survivors of DV and their children
- It is also to build a body of published appellate decisions to guide attorneys and judges throughout California

Case Publication Project

- FVAP screens all Ca. family law and juvenile court decisions to identify those that merit publication, then requests publication.
- We also usually request publication of cases we win if court does not indicate it plans to publish decision.
- Our requests are usually granted, though not always.

2016 Published Decisions

- In 2016, FVAP was involved in 6 published CA family law and juvenile law cases, and one US Supreme Court case:
- 3 cases where we represented a party,
- 1 where we participated in an amicus brief,
- And 3 through our case publication project.
- There are also 2 other US Supreme Court cases and 5 other significant CA cases involving DV that FVAP was not involved in – 14 total cases in this training.

Overview of Training

- Tribal Courts And Abusers
- Federal Prohibition on Abusers Possessing Firearms
- Issuing DV Restraining Orders
- Renewing DV Restraining Orders
- Custody Cases Involving DV
- Spousal Support and DV
- Right to Judge Instead of Commissioner
- Juvenile Court Cases Involving DV
- Criminal Cases Involving DV

Tribal Courts and Abusers

- **Questions Presented:**
- May tribal court assert jurisdiction in civil suit over non-tribal corporation whose employee allegedly sexually assaulted minor tribal member, where corporation operated on reservation via contract with tribe?
- Did use of prior tribal court DV convictions where defendant did not have right to counsel violate 6th Amendment, when used to support conviction for being habitual DV offender under federal statute?

Tribal Courts And Abusers

- *Dollar General v Mississippi Band of Choctaw Indians*, 579 US 136 S.Ct. 2159
- Generally, tribes do not have jurisdiction over non-tribal members
- Here, Choctaw tribe entered into contract with Dollar General to operate store on reservation
- Young tribal member allegedly sexually assaulted by store manager, a non-tribal member, during job-training program operated by tribe
- He sued manager and Dollar General in tribal court

Tribal Courts and Abusers, continued

- Dollar General argued tribal court had no jurisdiction over company
- District court upheld tribe's jurisdiction
- 5th circuit affirmed: tribes have inherent sovereignty since prior to existence of US, sovereignty not extinguished by US, can be limited only by Congress
- FVAP signed on to amicus brief by National Indigenous Women's Resource Center

Tribal Courts and Abusers, continued

- Amicus brief:
- National crisis of domestic and sexual violence committed by non-Indians against Indian women
- Need for tribal court jurisdiction over non-Indian perpetrators to sustain tribal self-governance
- Violence against Native women & children perpetrated by non-Indians on tribal lands imperils political integrity, economic security, health & welfare of tribes due to unresolved widespread trauma of survivors

Tribal Courts and Abusers, continued

- Amicus brief, continued:
- Tribal tort law is a critical self-government solution to crisis imposed by unresolved trauma
- US Supreme Court decision: Because court split 4-4, 5th circuit decision stands
- Thus tribes can assert civil jurisdiction over non-tribal members and corporations, at least in 5th circuit

Tribal Courts and Abusers, continued

- *US v Bryant*, US ; 136 S. Ct. 1954; 195 L. Ed. 2d 317; 2016 U.S. LEXIS 3775; 84 U.S.L.W. 4400
- Native American women experience highest rates of DV and sexual assault compared to other groups in US
- They are often repeatedly assaulted or killed by same offender
- So Congress enacted felony offense of DV in Indian country by habitual offender if 2 or more prior DV convictions

Tribal Courts and Abusers, continued

- Indian Civil Rights Act: defendants facing 1 year or less imprisonment do not have right to appointed counsel – i.e., 6th Amendment right to counsel for misdemeanors does not apply in tribal courts
- Bryant had multiple prior DV convictions in tribal court, no appointed counsel as faced jail sentences less than a year
- He had appointed counsel in federal court when convicted of being habitual DV offender

Tribal Courts and Abusers, continued

- 9th circ. reversed use of priors to support his conviction – use would have violated 6th Am if state or federal court
- US Supreme Court: convictions that are valid when entered retain valid status when invoked in subsequent proceeding
- High Court held unanimously: Felony offense of DV in Indian country by habitual offender which included tribal-court convictions as predicate offenses does not violate 6th Amendment's right to counsel
- On remand, 9th circuit affirmed Bryant's conviction

Federal Prohibition on Abusers Possessing Firearms

- **Question Presented:**
- In applying the federal prohibition on convicted batterers possessing firearms under 18 USC 922(g)(9), can the underlying misdemeanor DV conviction be for *reckless* conduct, or does this apply only to conduct that is *knowing* or *intentional*?

Federal Prohibition on Abusers Possessing Firearms

- *Voisine v US*, 579 US , 136 S.Ct. 2272, 2016 WL 3461559
- 2 Maine cases joined, *Voisine* and *Armstrong*
- Each man pled guilty to misdemeanor assault of female partner
- State code section defines assault as “intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact with another person”
- 35 US jurisdictions have similar definition
- Later each man convicted of violating 18 USC 922(g)(9) when law enforcement found they had guns

Federal Prohibition on Abusers Possessing Firearms, continued

- Court of appeal upheld federal convictions, rejecting argument that (g)(9) did not apply because prior convictions could have been based on “reckless” conduct.
- Prior case law held “knowing” or “intentional” acts = “use of force,” triggering gun ban, but left open “reckless” acts.
- Supreme Court in *Voisine*: “Recklessness = conscious disregard of substantial risk that conduct will cause harm to another.” Act must be volitional, not accidental

Federal Prohibition on Abusers Possessing Firearms, continued

- High Court: when (g)(9) enacted, most states defined misdemeanor assault or battery to include *reckless* infliction of bodily harm; Congress must have known this
- Policy reasons: excluding “reckless” acts would mean gun ban does not apply in 35 jurisdictions

Federal Prohibition on Abusers Possessing Firearms, continued

- Holding: Conviction in state court for “reckless” DV, as opposed to “knowing” or “intentional” DV is sufficient to trigger federal prohibition on convicted abusers possessing firearms
- CA Penal Code § 242: “Battery = any willful & unlawful use of force or violence upon person of another.” No mention of “knowing,” “intentional,” or “reckless” conduct.

Issuing Restraining Orders

- **Questions Presented:**
- What is a dating relationship for purposes of the Domestic Violence Prevention Act?
- If a wife testifies she is afraid of the husband due to physical abuse in the past, but they have sex after the TRO is issued, is it an abuse of discretion for the trial court to issue a DV Restraining Order protecting the wife?

Issuing Restraining Orders, continued

- *Phillips v Campbell*, (2nd Dist., 2016) 2 Cal.App.5th 844
- Met through professional cycling, became friends
- Campbell said he wanted to move forward in relationship
- Phillips said she wanted to just be friends
- He texted her many times, posted her personal info and photos on Facebook, posted videos of her on YouTube, and otherwise shared personal information about her.

Issuing Restraining Orders, continued

- In his texts, he called her a “psycho evil witch,” “a compulsive liar,” said she had lied about him and destroyed his life.
- She requested a DV restraining order:
- She had "significant concerns about [her] wellbeing and safety" because appellant had "accused [her] of 'destroying' his life" and "he continues to become more and more angry."

Issuing Restraining Orders, continued

- *Phillips said:*
- Email to Campbell: We built our relationship over many months, ...strengthening our love and respect for each other.
- Also to Campbell: We are not dating.
- To court: We spent time together, dined out, he stayed over at my place, we lay in bed together.
- We kissed and hugged, he sent me nude pictures of himself.

Issuing Restraining Orders, continued

- *Campbell said:*
- To Phillips: “You led me on while dating someone else.”
- To court: Phillips was falling in love with him.
- However, we are just best friends.
- We never went on a date.
- I was a nude model.
- My expression of love is platonic, of caring and concern for my best friend.

Issuing Restraining Orders, continued

Ca Family Code § 6211:

- “Domestic violence” is abuse perpetrated against any of the following persons: ...
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- **Ca Family Code § 6210:**
- ‘Dating relationship’ means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.

Issuing Restraining Orders, continued

- Is this “abuse”?
- If so, is this a dating relationship?
- Should the court grant Phillips’ request for a DV Restraining Order under the DV Prevention Act?

- Show of hands: yes or no?

Issuing Restraining Orders, continued

- Trial court found this was a dating relationship: parties had “frequent intimate associations primarily characterized by the expectation of affection” despite the fact that both of them said they were not “dating.”
- Trial court found he had disturbed her peace.
- Issued 5 year DVRO.
- Campbell appealed, argued DVRO not appropriate because not dating,
- And his actions protected under 1st Amendment.

Issuing Restraining Orders, continued

- Appellate court upheld issuance of DVRO:
- Dating relationship was a factual issue that the Trial Court decides, based on all of the evidence
- Trial court's finding that this was a dating relationship was based on substantial evidence
- 1st Amendment violation waived, not raised at trial court & Campbell's speech was abusive, so not protected.

Issuing Restraining Orders, continued

- This case is particularly important because modern relationships in the 21st century often do not fit within traditional definitions of “dating,”
- And survivors of domestic abuse may not define their relationships in traditional terms.

Issuing Restraining Orders, continued

- *Fregoso v Hernandez* (4th Dist, 2016) 5 Cal.App.5th 698
- Married 5 years, young daughter
- Husband (Fregoso) filed for divorce and sole custody, alleged wife violent to him
- Wife (Hernandez) requested TRO, alleged husband violent to her and daughter, she was afraid of him
- At hearing, husband denied abusing wife or daughter

Issuing Restraining Orders, continued

- Wife testified that husband recently grabbed her arm, bruising it; threw her on daughter's bed so hard it broke; squeezed her face into mattress so she could not breathe
- Wife said husband threatened her re his godfather, a drug trafficker
- And that he hit daughter with belt repeatedly
- Wife said she did not call police because afraid of husband

Issuing Restraining Orders, continued

- Wife conceded they had sex after TRO issued, explained this was part of pattern in relationship: husband violent, then sought forgiveness with gifts, then they would have sex
- Husband said wife lying, trying to gain advantage in custody and angry that he filed for divorce
- Court granted 1 year DVRO
- Appellate court affirmed – substantial evidence supported issuance of DVRO

Issuing Restraining Orders, continued

- Husband argued on appeal that consensual sex obviously showed wife did not fear him nor did she need protection from him
- Appellate court disagreed, cited wife's testimony re physical abuse he inflicted on her and child
- “[Wife] also testified that the parties’ post-TRO sex was part of their 6 year repeated cycle of violence, gifts, forgiveness, sex, and then repeated acts of violence.”

Issuing Restraining Orders, continued

- FVAP successfully sought publication
- First case of which we are aware in which a CA appellate court discussed cycle of violence
- Court explains that what might appear to be behavior by survivor of abuse that shows she is not afraid of abuser in fact is part of this cycle and thus she could still be afraid

Renewing Restraining Orders



Renewing Restraining Orders

- **Questions Presented:**
- Is father's alleged abuse of parties' children relevant to mother's request to renew DVRO?
- Is it reversible error for trial court to refuse to include children as protected parties in DVRO?
- In order to renew DVRO, does petitioner have to prove restrained party violated it?
- In order to renew DVRO, does petitioner have to prove physical abuse while order was in effect?

Renewing Restraining Orders, continued

- *De la Luz Perez v Torres-Hernandez* (1st Dist, 2016)
- 1 Cal.App.5th 389
- Perez (mother) and Torres-Hernandez (father) in relationship since 2000
- Mother already had son, she & father had 2 girls
- 2010: Mother filed for DVRO, claimed many instances of physical & emotional abuse by father: threats to kill her, take children, calling hundreds of times a day, breaking into her home in middle of night, hitting her many times, calling her names

Renewing Restraining Orders, continued

- Mother asked that DVRO keep father away from girls
- Court granted 3 year DVRO
- Ordered sole physical custody to mother, visitation with father
- Father ordered not to harass, molest, etc. mother
- No stay-away order or no-contact order from mother or children

Renewing Restraining Orders, continued

- 2011: Mother sought to modify DVRO to protect all 3 children
- During visits father physically abused them with hands, shoes, belt, and left bruises and welts
- Father arrested for abusing younger daughter
- Mother testified at hearing that father had not hit children before DVRO issued
- Court suspended visits with younger daughter, ordered visits with older daughter supervised
- Court ordered father not to contact mother

Renewing Restraining Orders, continued

- Mother testified that she had a lot of fear of father, fear that he would physically abuse children again; he violated DVRO many times, no consequences; she felt helpless
- Court stated that any alleged child abuse by father not relevant to renewal
- Court refused to renew DVRO: abuse against children irrelevant to mother's fear, harassing calls & texts to mother were not "abuse"

Renewing Restraining Orders, continued

- Court stated: Abuse must be “violence or the infliction of violence on an individual.”
- Therefore, insufficient evidence of reasonable belief of continued abuse to support another DVRO
- Appellate court reversed:
- Section 6320 defines abuse to include harassing, telephoning, disturbing the peace of other party
- Section 6345 allows renewal without a showing of any further abuse since issuance of original order

Renewing Restraining Orders, continued

- Alleged abuse of children by father relevant to renewal and to whether they should be included in DVRO
- § 6203 includes fear of “injury”... “to another” - evidence that father struck daughter relevant to show he disturbed peace of mother
- Renewal of DVRO does not require proof of abuse during time period since order issued
- Father’s continued calls, texts relevant to show reasonable apprehension of future abuse

Renewing Restraining Orders, continued

- Concurring opinion included studies about overlap between DV and child maltreatment by Edleson; Meisner & Korn; and Hart & Klein
- “...to evaluate both of Ms. De La Luz Perez's requests for relief—for renewal and for modification—it is important to recognize that the interests of the children are, as a practical matter, bound up with the interests of their mother under the relevant statutory standard.”

Child Custody Cases Involving DV

- Background: Christina L. v Chauncey B. (2014) 229 Cal.App.4th 73 and
- Fajota v Fajota (2014) 230 Cal.App.4th 1487
- Similar facts: evidence of extensive physical abuse by father toward mother presented at trial
- In spite of this, court awarded joint physical and legal custody to Chauncey B. and joint legal custody to Mr. Fajota
- Reversed - failure to comply with FC § 3044: no custody allowed unless presumption is rebutted.

Child Custody Cases, continued

- **Questions Presented, continued:**
- Where a DVRO has been granted, then the court awards sole custody to the protected party, and 50/50 timeshare, calling this “visitation,” is this reversible error?
- Where another state has issued a DVRO, and the CA court awards custody to the restrained party based on preference for frequent and continuing contact with each parent, is this reversible error?

Child Custody Cases, continued

- **Questions Presented, continued:**
- In a child custody proceeding where there is no court reporter and the allegedly abused mother is not represented, so does not request a Statement of Decision, then the trial court changes custody from mother to father, may the appellate court imply that the trial court made all the necessary findings to support its decision?

Child Custody Cases, continued

- *Celia S v Hugo H* (4th Dist, 2016) 3 Cal.App.5th 655
- Parties had long relationship, not married, 2 children
- Several acts of DV by father toward mother
- 2014: parties separated and stipulated to 50/50 timeshare, alternate weeks, court entered stipulation as order
- Jan 2015: mother invited father to have dinner with her and children, he assaulted her in front of them
- Police arrested father after son said he saw assault

Child Custody Cases, continued

- Mother filed for DVRO, requested sole custody
- Father testified that he did not hit mother
- Social worker testified that children saw DV in past
- Father presented no evidence that custody of 2 children to him was in children's best interest
- Trial court found father committed DV against mother so Family Code § 3044 applied
- Issued one year DVRO: father must stay away from mother and children except during visitation

Child Custody Cases, continued

- Mother awarded sole legal and physical custody
- Father awarded “visitation,” 50/50 timeshare (a week at a time), continuing existing arrangement except father can’t pick up children at mother’s place
- Father must complete one year batterer’s program, then court will hold review hearing re custody

Child Custody Cases, continued

- Appellate court reversed and remanded:
- § 3020 prioritizes children's health, safety, and welfare over frequent and continuing contact with each parent after separation
- § 3044 establishes a mandatory presumption against any type of custody to parent who has perpetrated DV in last 5 years
- § 3011(e) requires courts to state reason for awarding any type of custody to parent who has perpetrated DV, in writing or on record

Child Custody Cases, continued

- Here, father did not even attempt to rebut presumption in § 3044
- Trial court may not circumvent Family Code § 3044 by characterizing its order as visitation when it was really joint physical custody
- Nature of any order is based on its legal effect, not the label the court attaches
- § 3031 and 3100 govern visitation in DV cases: on remand, court shall consider ordering supervised visits, or suspending or denying visitation

Child Custody Cases, continued

- *Ellis v Lyons* (2nd Dist, 2016) 2 Cal.App.5th 404
- 2002: Father filed paternity action
- 2009: Parents stipulated to joint custody of 1 year old daughter, who lived mostly with mother in MA, visited father in CA
- 2014: Physical altercation between father and his brother-in-law in front of daughter, who called 911. Father told 911 no need to come, threatened to slap daughter, but did not hit or slap her.
- Daughter told mother she was “really scared.”

Child Custody Cases, continued

- Mother applied for TRO in CA but when told she had to give notice to father, did not proceed, felt this would endanger daughter
- She got TRO in MA, where she lived, based on altercation; father's attorney present; father not allowed to contact daughter
- Daughter shaking and crying during testimony about fear of father
- Mother asked CA court to modify to sole legal and physical custody to her, supervised visits with father in MA

Child Custody Cases, continued

- After hearing, CA court said MA order was improperly issued
- Denied request to change custody
- Did not believe daughter feared father or was in danger
- Stressed need for frequent and continuing contact with father, citing § 3040
- Made no reference to § 3044 or rebuttal factors even though mother's attorney raised this

Child Custody Cases, continued

Reversed on appeal:

- MA DVRO against father gave rise to FC § 3044 presumption that custody to him would be detrimental to daughter's best interest
- Immaterial that daughter not injured, she was in reasonable apprehension of imminent serious bodily injury
- Relying *at all* on preference for frequent and continuing contact with noncustodial parent to rebut 3044 “*infects*” custody decision with reversible error even when trial court also relied on other factors to rebut presumption

Child Custody Cases, continued

- A.G. v C.S. (3rd Dist., 2016) 246 Cal.App.4th 1269
- Father filed petition for sole legal and physical custody of parties' 3 boys
- Mother filed request for DVRO, denied: no abuse
- Court adopted prior agreement between parties giving sole custody to father, mother to see boys on weekends
- Mother not represented, father had attorney
- Mother appealed

Child Custody Cases, continued

- No court reporter at either DVRO hearing or custody trial
- Therefore, parties had to create settled statement for appeal
- This is authorized by CA Rules of Court in lieu of reporter's transcript
- Neither party requested a Statement of Decision (SOD)

Child Custody Cases, continued

- Appellate court held:
- 1. Use of settled statement in lieu of reporter's transcript does not negate doctrine of implied findings where parties waived SOD
- Comment: If SOD is given in child custody action, provides Court of Appeal with trial court's reasoning on disputed issues and is touchstone to determine whether or not trial court's decision is supported by facts and law

Child Custody Cases, continued

- Generally, under *doctrine of implied findings*, when parties waive SOD expressly or by not requesting one on time, appellate courts must presume trial court made all factual findings necessary to support judgment for which there is substantial evidence
- CS argued that settled statement showed trial court's errors, so doctrine of implied findings did not apply

Child Custody Cases, continued

- Appellate court disagreed:
- “The settled statement used by the parties does not contain an express statement by the trial court that it complied with the procedures required for adopting a statement of decision and that the settled statement serves as the court's statement of decision.”
- Thus, doctrine of implied findings applied

Child Custody Cases, continued

- Holding, continued:
- 2. Under doctrine of implied findings, evidence supported implied finding that court properly considered father's documented history of DUI's when making child custody determination (FC 3011 requires court to consider parties' substance abuse);
- 3. Settled statement adequately set forth trial court's reasons for granting father sole custody of children in light of allegations of father's alcohol abuse (FC 3011(e));

Child Custody Cases, continued

- Holding, continued:
- 4. Trial court adequately considered nature and amount of contact the children had with both parents when awarding custody of children to father.
- (Trial Court found that mother had history of “running away” with the children to her family and to shelters, and not telling father where they were, which it held against her.)

Child Custody Cases, continued

- Holding, continued:
- 5. Trial court could rely in part on its own observation that mother “acted in very abnormal manner and may be depressed” when awarding custody of children to father; and
- 6. Mother not entitled to mid-trial continuance in order to obtain counsel

Child Custody Cases, continued

- Note: opposing counsel's hearsay objections to CS's evidence of DV sustained. CS did not know exceptions to hearsay rule, realized needed attorney, asked for continuance to obtain one. Denied.
- Decision also raises issue of unrepresented party being overwhelmed by opposing counsel, & whether there should be right to appointed counsel when parent may be deprived of custody, just as parents facing termination of parental rights have right to appointed counsel in juvenile court.

Spousal Support and DV

- **Question Presented:**
- Is it an abuse of discretion for a court to deny a wife spousal support after she pled no contest to 7 counts of unlawful sex with a minor who was a friend of her son's, as well as giving her children great quantities of alcohol, showing them pornographic movies, and forcibly cutting off her daughter's long hair to punish her?

Spousal Support and DV

- *In re Marriage of Schu* (2nd Dist., 2016) 6 Cal.App.5th 470
- Long term marriage, husband worked, wife raised 3 children, upper middle class lifestyle
- Wife gave children and their friends a lot of alcohol, showed pornographic movies to them
- Wife had sex with son's friend frequently starting when he was 12, continued 7 years even though victim tried to end it, wife threatened to tell his friends and family and insisted they continue

Spousal Support and DV, continued

- Wife forced son to hold his sister down while wife cut off daughter's long hair to punish her for not helping wife obtain social media passwords to see if victim's sister had found out about molestation
- Daughter started cutting self, wife would not let her see counselor, said they would remove her from home
- When molestation came to light, wife pled no contest to unlawful sex with minor, sentenced to 6 years, served 3
- Victim sued wife and husband for sexual battery, sexual assault, intentional infliction of emotional distress, settled out of court

Spousal Support and DV, continued

- Wife got close to \$1 million in divorce, sought \$7900/month spousal support, court denied this
- Appellate court upheld denial
- Family Code § 4320: spousal support discretionary, must consider domestic violence
- § 6320 defines domestic violence to include disturbing the peace of other party
- Wife disturbed husband's & children's peace by subjecting them to emotional abuse for years, some physical abuse: forcibly cutting off daughter's hair, providing a lot of alcohol to children

Spousal Support and DV, continued

- 4320(n) requires court to consider “any other factors the court determines are just and reasonable”
- This was independent ground for denying support
- Children felt humiliated and betrayed by wife’s arrest and conviction
- Harm caused to victim and his family cannot be calculated
- Wife had sufficient assets to be all right

Right to Judge Instead of Commissioner

- **Question Presented:**
- Must someone restrained by a DV restraining order affirmatively prove he did not orally stipulate to have the matter heard by a commissioner instead of a judge, if he contends the order is void because the matter was heard by a commissioner without the proper consent?

Right to Judge , continued

- Background: *Michaels v Turk* (4th Dist., 2015) 239 Cal.App.4th 1411, held DVRO against mother void absent evidence in record that she expressly or impliedly consented to having commissioner preside over DVRO hearing
- No indication in record that mother saw stipulation signs in or outside courtroom, and local rule in Riverside County required that self represented parties “be asked on the record if they so stipulate.”

Right to Judge, continued

- *Elena S v Kroutik* (4th Dist., 2016) 247 Cal.App.4th 570
- Kroutik sexually assaulted fiancée, Elena, threatened to report her to ICE and to tell her abusive ex-husband where she lived
- Elena obtained DVRO after 3 hour hearing, much testimony, many exhibits, court reporter present
- Kroutik appealed, arguing he did not stipulate to commissioner instead of judge
- He did not provide a reporter's transcript or settled statement to appellate court

Right to Judge, continued

- Appellate court upheld DVRO
- Appellate court presumes trial court acted correctly
- Respondent has burden to show he did not stipulate to commissioner, orally or in writing
- Transcript or settled statement might have shown that he objected to commissioner
- He impliedly consented to commissioner by participating in hearing

Right to Judge, continued

- Appellate court distinguished *Michaels v Turk* (same District Court of Appeal):
- In *Michaels*, a sign in courtroom stated failure to object to commissioner = consent.
- No evidence in *Michaels* that mother actually saw the sign.
- In *Michaels*, local rule in Riverside County required that a pro per litigant's stipulation to commissioner be made on the record, but in *Elena S*, San Diego, there was no such local rule.
- Also in *Elena S*, “tantamount stipulation” doctrine applies (silence = implied consent); *Michaels* court not asked to address this.

Right to Judge, continued

- **Takeaways/Best Practices:**
- Inform self represented litigants of right to refuse commissioner in favor of judge
- Encourage them to inquire about local commissioners and judges so can make informed decision
- Work to adopt Riverside type language in local rules of court so any consent to have case heard by commissioner is explicit and on the record, or in writing and clearly explained to litigants

Juvenile Court Cases Involving DV

- **Questions Presented:**
- In proceeding where juvenile court states it will order custody of abused child to father with only visitation for mother, does she have right to contested hearing, and to present evidence re exit orders?
- May juvenile court remove custody of abused child from abusive father and keep custody with abused mother?

Juvenile Court Cases, continued

- *In re Armando L* (5th Dist., 2016) 1 Cal.App.5th 606
- Mother had sole custody, left father before due to DV
- Mother left son with father because she could not handle his behavior, son had ADHD
- Mother unaware father using meth
- Father bruised son's face, school reported this
- County filed petition under Welfare & Institutions Code § 300 alleging mother failed to contact authorities or immediately take son to doctor

Juvenile Court Cases, continued

- DCFS recommended son stay with mother, she was to receive family maintenance services
- Father to have reunification services
- Juvenile court first gave custody to mother, then changed this to group home when son acted out at school and with siblings
- Juvenile court changed custody to father to protect siblings, child did OK there

Juvenile Court Cases, continued

- At 18 month hearing, DCFS recommended termination of dependency, physical custody to father, joint legal custody, visitation for mother
- Mother objected, requested contested hearing
- Juvenile court denied request, mother had no standing, family court would issue exit orders regarding custody

Juvenile Court Cases, continued

- Appellate court reversed:
- Mother had right to contested hearing in juvenile court to challenge dismissal of dependency and present evidence re exit orders
- Also error for juvenile court to “punt” the case to family court instead of issuing exit orders
- Minor may be entitled to more services via juvenile court even after it terminates jurisdiction

Juvenile Court Cases, continued

- *In re Michael S* (2nd Dist., 9/30/16) Cal.App.5th (2016 CalApp LEXIS 815)
- Father allegedly sexually abused half sister of Michael S, daughter of Michael's mother
- During investigation, mother stated father physically abused her at least three times
- Mother took Michael with her to shelter, got EPO
- DCFS filed petition under Welfare & Institutions Code § 300, juvenile court sustained it, extended TRO to hearing, released Michael to mother

Juvenile Court Cases, continued

- Later juvenile court ordered Michael removed from father, 3 year DVRO against father: supervised visits, no contact with mother and her other children
- Appellate court affirmed
- Welfare & Institutions Code § 361(c), requiring court to consider removing offending parent from home as alternative to removing child from parent, does not preclude doing both in regard to father, while keeping child with mother

Criminal Court Cases Involving DV

- **Question Presented:**
- May a husband be convicted of robbery for temporarily taking his wife's cell phone in the middle of assaulting her, even if the cell phone belonged to both of them?

Criminal Cases Involving DV, continued

- People v Aguilera (2nd Dist., 2016) 244 Cal.App.4th 489
- Husband abused wife, who obtained DVRO
- A few days later they went to a party
- Husband upset about DVRO, they argued, he ran after wife when she ran to their car
- Husband strangled wife, demanded she give him her phone, she locked herself into car and turned it on

Criminal Cases Involving DV, continued

- He broke driver's side window, turned car off, tried to pull wife out through broken window, cutting her
- Husband took wife's purse, another man pulled husband from car
- Husband took phone and wallet from her purse, left, arrested, charged with battery and robbery
- At trial wife recanted her original statement to police, DA used statement to impeach her
- DA brought in history of husband strangling wife and taking her phone, also abusing ex girlfriend

Criminal Cases Involving DV, continued

- DA argued taking phone = DV because done to keep wife from calling police
- Husband convicted of misdemeanor DV, robbery
- Appellate court upheld conviction
- Even if wife's phone was community property, taking it = robbery (theft by force or fear)
- If intent to deprive temporarily but for unreasonable period of time so as to deprive other person of major portion of its value or enjoyment, it is robbery

Criminal Cases Involving DV, continued

- Court rejects argument that this is only a “domestic and not a criminal” matter – policy grounds
- Quotes DA’s argument to jury: Calling 911 for help during violent assault is probably “the most important call you could make.”
- Whether phone was separate or community property was irrelevant. Point is intent of defendant in taking phone.

Questions?

Thank You!

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