THE STATE BAR OF CALIFORNIA

# FAMILY LAW NEWS

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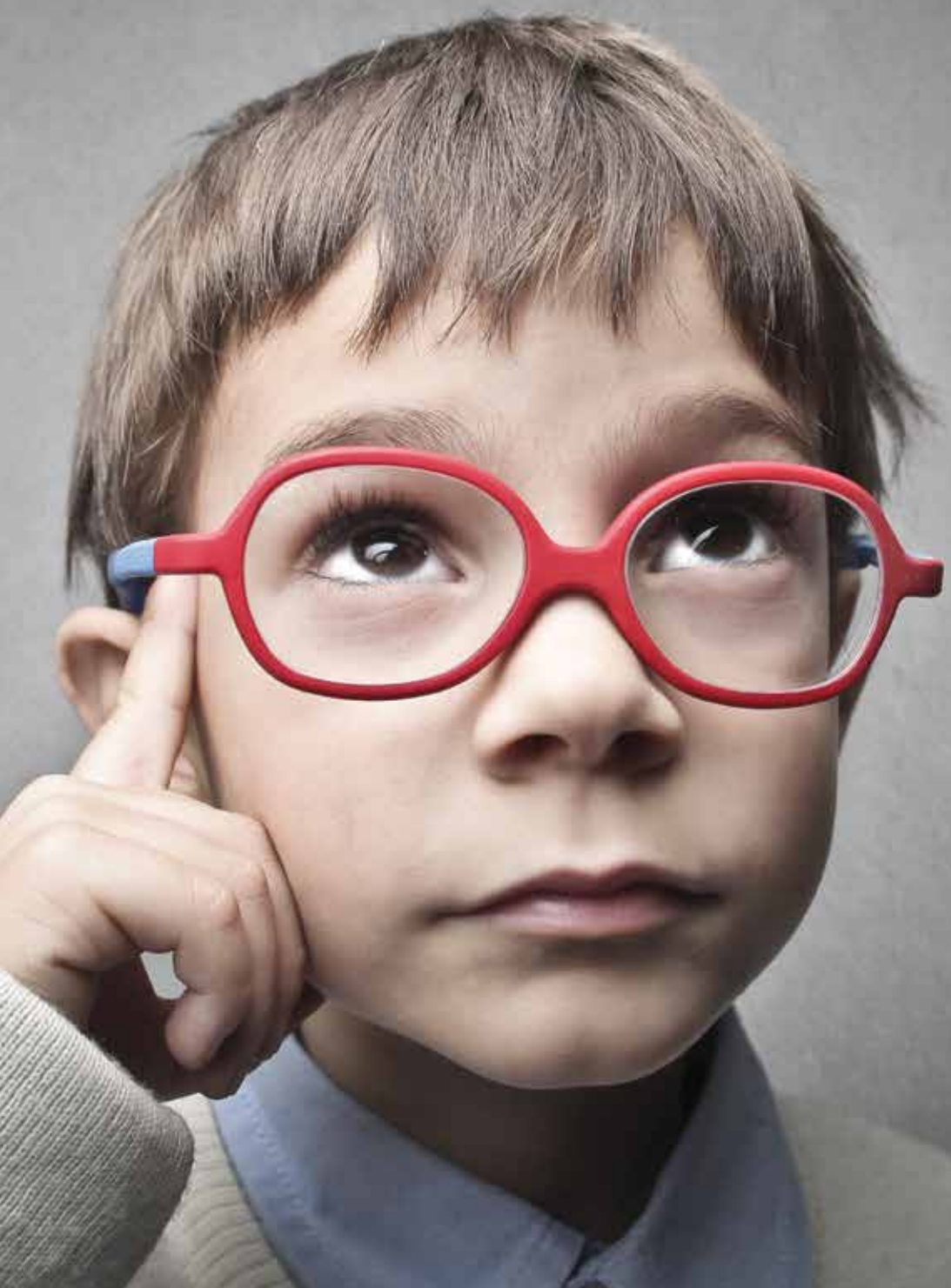

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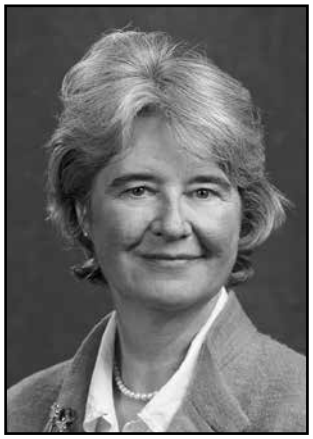
# Recent Developments in Domestic Violence Case Law

Olivia Porter and Nancy Lemon

Olivia Porter is currently in her second semester as a law clerk at Family Violence Appellate Project. She is a 3L student at Golden Gate University, where she has been awarded a Dean's Scholarship. She was previously a social work intern at Primary Children's Medical Center in Salt Lake City, Utah, where she conducted individual and group therapy for children who had been sexually abused, and ran an outreach program focused on relationship skills in high schools in Wendover, Nevada. She holds a B.S.W and M.S.W from Brigham Young University.



Nancy Lemon is a founder and Legal Director of Family Violence Appellate Project. She is the author of Domestic Violence Law, the premiere textbook on the subject, and has been teaching the Domestic Violence Seminar at UC Berkeley Law - the first law school class of its kind - since 1988, where she also directs the Domestic Violence Practicum. Among her recent honors are the American Bar Association Commission on Domestic & Sexual Violence's Corbitt award (2013); the California Women's Law Center Pursuit of Justice Award (2014), and the Lifetime Achievement Award from the California Partnership to End Domestic Violence (2009). Nancy holds a B.A. degree in Women's Studies from the University of California, Santa Cruz, and earned a J.D. degree from UC Berkeley School of Law.

In February 2012, two Berkeley Law students listened intently to a young woman who had survived years of physical and sexual abuse at the hands of her father. He obtained custody despite having severely physically abused the woman's mother. Nancy Lemon, a long-time Lecturer in Domestic Violence Law at Berkeley, and author of the first legal textbook on the topic, commented to her students that while California has strong laws protecting victims of domestic violence, in order for them to be enforced, someone should be appealing cases where battered women lost custody to abusers, putting the children in danger of abuse. Her comments weren't mere speculation. Lemon had authored an article showing that in states where family law appeals are brought, trial courts are more likely to follow domestic violence laws. (Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective are They?*, 28 Wm. Mitchell L. Rev. 601 (2001).)

Law students Sonya Passi and Alexandrea Scott determined to do just that. They worked with Lemon and Erin Smith, a former student of Lemon's who was invited to be Executive Director, to launch a new non-profit agency, Family Violence Appellate Project (FVAP). At the time, you could count the number of California's published domestic violence related cases on just one hand. Fast forward *just three years* and there have been an additional eleven published family law cases in California relating to domestic violence. Each case provides welcome guidance to trial courts as to how to interpret and apply the laws enacted to protect victims of abuse and their children. Ten of those cases were prosecuted, defended, briefed, and/or requested to be published by FVAP.

FVAP is the only organization in California dedicated to appealing cases on behalf of domestic violence survivors and their children. Its mission is to ensure the safety and well-being of California domestic violence survivors and their children by helping them obtain effective appellate representation. FVAP works in a variety of ways to meet this goal.

True to its roots, FVAP boasts a rigorous year-round next generation development program that currently has four law student interns, from across the Bay Area and as far away as Michigan, helping to screen cases. After determining that cases have merit, FVAP co-counsels

with pro bono attorneys from the private sector to assist in representing domestic violence survivors and filing *amicus curiae* briefs in cases of statewide importance for survivors of domestic violence. Additionally, FVAP continually monitors unpublished domestic violence-related appellate case law in an effort to identify cases that would advance the interests of domestic violence survivors statewide and requests publication of these cases.

Since its inception, FVAP has experienced tremendous success in building a body of precedent that is helpful to survivors of domestic violence and their children. As of February 2015, FVAP has screened more than 330 cases, prosecuted thirteen appeals, defended eight appeals, submitted nine *amicus curiae* briefs, and has succeeded in obtaining publication of ten California Appellate decisions.

Three areas in particular in which FVAP has made significant in-roads include restraining order renewals, the meaning of "disturbing the peace" under California Family Code section 6320's definition of abuse, part of the Domestic Violence Prevention Act (DVPA), and the application of California Family Code section 3044's rebuttable presumption in child custody determinations.

## Restraining Order Renewals

Under California law, a domestic violence restraining order (DVRO) "may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order…" (Cal. Fam. Code § 6345 (a).) In a 2004 case of first impression, *Ritchie v. Konrad,* 115 Cal. App. 4th 1275 (2004), the court took up the question of what should be considered in deciding whether to renew a DVRO.

The *Ritchie* court distinguished between a non-contested and contested DVRO renewal request and held that, where the renewal request is contested by the restrained party in order to grant the renewal, the trial court must find the protected party entertains a reasonable apprehension of future abuse. (*Id*. at 1284.) This means the evidence must show it is more probable than not that there is a sufficient risk of future abuse. (*Id*. at 1290.)

The court in *Ritchie* also laid out a variety of factors to consider when deciding whether there is "reasonable apprehension" of future abuse, including the evidence and findings on which the initial order was based and whether there have been any significant changes since the initial issuance. (*Id*. at 1290-92.) The burden on the restrained party may or may not be relevant, but the court was clear it can never justify a denial of renewal where there is reasonable apprehension of physical abuse. (*Ibid*.)[1]

Although the *Ritchie* decision comprehensively laid out the parameters of DVRO renewal, subsequent trial court decisions suggest that the additional discussion surrounding how to adequately consider the burden on the restrained party created confusion about what the protected party needed to show in order to obtain a renewed protective order. Through FVAP's efforts, two additional appellate court cases have been published that provide guidance to trial courts on this issue: *Lister v. Bowen,* 215 Cal. App. 4th 319 (2013) (appeal of restraining order renewal defended by Bay Area Legal Aid who, along with many leading domestic violence agencies, joined FVAP's request for publication) and *Eneaji v. Ubboe,* 229 Cal. App. 4th 1457 (2014) (appeal prosecuted and request for publication made by FVAP, Asian Americans Advancing Justice – LA, and Wilson Sonsini).

In 2013, FVAP undertook direct representation of Pamela Ubboe in an appeal of the trial court's denial of her request for renewal of a three year DVRO against her ex-husband. (*Eneaji v. Ubboe* 229 Cal. App. 4th 1457 (2014).) The trial court had denied her request, finding she had no reasonable apprehension of future *physical* abuse. (*Id*. at 1462.) The court also denied her request because no new episodes of *physical* abuse occurred between the time of the first issuance and the request for renewal. (*Ibid*.)

The appellate court reversed and remanded, pointing out the plain language of the statute does not require additional acts of abuse between the issuance of the first order and the renewal in order to grant the renewal request. (*Id*. at 1464.) To hold otherwise, the court reasoned, would require the requesting party to show the order failed, which would make the renewal of that ineffectual order useless. (*Ibid*.) To the contrary, the court said, quoting *Ritchie*, "Indeed the fact a protective order has proved effective is a good reason for seeking its renewal." (*Ibid*.)

Additionally, the court clarified that "there is no requirement that the party requesting a renewal have a fear of *physical* abuse." (*Id*. at 1464, emphasis in the original.) Rather, the requesting party needs to show a reasonable apprehension of *any* kind of abuse enjoined

under Family Code § 6320, which specifically includes many types of abuse. (*Ibid*.) The *Eneaji* decision serves as an exclamation point on the *Ritchie* case, reiterating with emphasis the standard for renewal first outlined in *Ritchie*.

Likewise, *Lister v. Bowen,* 215 Cal. App. 4th 319 (2013), provides important clarification and guidance to trial courts, specifically as to how courts should weigh violations of restraining orders when faced with a renewal request. In *Lister*, the restrained party sought to overturn the trial court's grant of a DVRO renewal based on the contention that all abuse was in the "remote past" and that any violation of the current restraining order was "a de minimis and technical violation if at all." (*Id*. at 335.) Lister countered that the renewal was justified by Bowen's violation of the DVRO in coming to her workplace and his litigation abuse. (*Id*. at 332.) The appellate court agreed with her, stating, "…*any* violation of a restraining order is very serious, and gives very significant support for renewal..." (*Id*. at 335, emphasis added). By giving such serious weight to even non-violent violations of a DVRO, and upholding for the first time the trial court's consideration of a party's litigation tactics, the court drew a strong boundary of safety around domestic violence survivors. The publication of this decision helps hold restrained parties accountable for all of their behaviors in relationship to the protected party, not just violent behaviors.

## "Disturbing the Peace" under section 6320

When statutes include vague terms, appellate interpretation is often necessary to provide further definition and explain the scope of such language. Publication of appellate decisions that provide this definition and scope are vital to giving full effect to the statutory language, which is one reason FVAP continually monitors recent unpublished appellate decisions. One such decision for which FVAP sought and was granted publication is *Burquet v. Brumbaugh,* 223 Cal. App. 4th 1140 (2014). *Burquet* is only the second case interpreting the phrase "disturbing the peace," as mentioned in the enjoined list of behaviors the DVPA considers to be abuse. (The first was *IRMO Nadkarni,* 173 Cal. App. 4th 1483 (2009).)

In *Burquet*, the appellate court affirmed the grant of a DVRO to a woman who requested the order after her ex-boyfriend ignored her repeated requests to leave her alone upon ending their relationship. (*Id*. at 1147.) The petitioner reported her ex-boyfriend continually whenever he contacted her by phone, email, and text messages using inappropriate and sexually suggestive language. (*Id*. at 1142-43.) She also reported her ex-boyfriend came to her home uninvited and unannounced. (*Ibid*.) When she asked him to leave, he began to yell at her and pace back and forth in a frightening manner. He left before police arrived. (*Ibid*.)

In its decision, the Court reiterated the reasoning and holding of *Nadkarni* citing, "the plain meaning of the phrase 'disturbing the peace of the other party' may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*Id*. at 1146.) Thus, section 6320 provides that "the requisite abuse need not be actual … physical injury or assault." (*Id*. at 1145.)

*Burquet*, however, stands apart from *Nadkarni* as it broadened the scope of the behaviors included in the definition of the phrase 'disturbing the peace.' The difference between the facts in *Nadkarni* and *Burquet* provides a crucial touchstone for trial courts. *Nadkarni* involved a husband who hacked his wife's email account, and threatened to publish emails, causing her to fear for her personal and business interests, while *Burquet* involved unwanted electronic and in-person communications, actions more akin to stalking behaviors. (*In Re Marriage of Nadkarni* at 1489-90.) *Burquet*, therefore, directly addresses behaviors more commonly found in domestic violence cases, ensuring the law will protect not only the physical safety of the victim, but the victim's mental and emotional calm as well.

The definition of "disturbing the peace" under section 6320 was further explicated in *Gou v. Xiao,* 228 Cal. App. 4th 812 (2014), a case appealed by Bay Area Legal Aid, in which FVAP acted as *amicus curiae*. In *Gou*, the trial court denied a wife's request for a DVRO against her husband to protect both herself and her son from ongoing physical abuse of the child. (*Id*. at 816-17.) The trial court found the abuse between the child and the husband was "relatively straightforward," however this abuse was insufficient to support a finding that the *wife* was a victim of domestic violence within the meaning of the DVPA. (*Id*. at 816.) The appellate court reversed, holding the wife's

> "personal knowledge describing past acts perpetrated by [the husband] against the child… would support a finding that [the husband's] past behavior was abusive as it had placed [the wife]

> in reasonable apprehension of imminent serious bodily injury to herself or the child, and disturbed [her] peace by causing the destruction of her mental or emotional calm." (*Id*. at 818.)

In other words, under the DVPA, abuse of a child can constitute abuse of the parent requesting a restraining order because it places the parent in reasonable apprehension of imminent serious bodily injury to the child and disturbs the parent's peace. Taken together, *Nadkarni*, *Burquet*, and *Gou* help to ensure safety for victims from a wide variety of forms of abuse, whether physical or otherwise.

## Rebuttable Presumption under Section 3044

A third area in which FVAP is working hard to educate judges, lawyers, and families involved in custody issues is the law requiring that once a court has made a finding of domestic violence by a party seeking custody "…there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to [that] person… is detrimental to the best interest of the child … This presumption may only be rebutted by a preponderance of the evidence." (Cal. Fam. Code § 3044.)

FVAP believes that the presumption against awarding any custody to an abuser has been overlooked or under-utilized by trial courts, for a variety of reasons. FVAP's approach to ensuring section 3044 is applied has been two-fold. FVAP has created a training specifically explaining the domestic violence laws that protect survivors and their children and the neuroscience and social science behind them. The training is designed to assist judges, court staff, and attorneys to understand the policy behind section 3044 and other statutes, and to assist domestic violence advocates and attorneys to better lay a record in court. The training has been given free of charge throughout the state. Second, FVAP has actively participated as counsel or *amicus curiae* in cases challenging trial court's application of section 3044, and FVAP has requested publication of those cases that focus on section 3044.

One common misconception surrounding section 3044 is that the trial court has discretion to choose whether to apply the presumption against giving any joint or sole custody to an abuser. (*See*, *e.g. SM v. EP,* 184 Cal. App. 4th 1249 (2010) (holding the trial court abused its discretion by failing to apply the presumption in determining custody despite having issued a DVRO against the father "[b]ecause a DVPA restraining order must be based on a finding that the party being restrained committed one or more acts of domestic abuse, a finding of domestic abuse sufficient to support a DVPA restraining order necessarily triggers the presumption in section 3044.")).

Yet, despite the *S.M. v E.P.* ruling, not all trial courts are applying section 3044 as the legislature intended. To date, FVAP has successfully appealed two cases where the trial courts failed to apply section 3044. These cases came out of the 1st and 4th Districts, respectively. In *Christina L. v. Chauncey B.,* 229 Cal. App. 4th 731(2014), which FVAP co-counseled with Dentons US, the trial court granted the father's request to modify custody from sole custody to the mother to joint legal custody and 50/50 shared physical custody. (*Id*. at 735.) The trial court did so, without applying the section 3044 presumption, even though the father was restrained by a DVRO. (*Ibid*.) The trial court found that the mother had not adduced sufficient evidence of abuse such that it had to make a decision based on section 3044. (*Ibid*.) In reversing, the appellate court held that a restraining order is a prior finding which necessarily invokes section 3044, and a trial court may not, pursuant to section 3011, subdivision (b), require any additional corroboration of abuse before applying the section 3044 presumption. (*Id*. at 736-37.)

In sum, the protected party is not required to show the restrained party is a detriment to the children, rather, because of section 3044's presumption against awarding custody to a person who has committed domestic violence, the restrained party is required to show that time with him or her is not a detriment to the children.

A second appellate case applying section 3044 prosecuted by FVAP, co-counseling with Reed Smith and San Diego Volunteer Lawyer Program, was handed down in 2014. In *Fajota v. Fajota,* 230 Cal. App. 4th 1487 (2014), the mother made two separate requests for a DVRO against the father, her ex-husband, who had severely abused her. In the first hearing, the court made a finding that the father had committed domestic violence against the mother, but denied her request for a DVRO and failed to apply section 3044's presumption at all. (*Id*. at 1491.) In the second hearing, the court granted the DVRO request and considered section 3044's presumption. However, the court failed to apply it correctly. (*Id*. at 1500.) Instead of requiring the father to rebut the presumption *prior* to being granted any form of custody as the statute calls for, the trial court suggested

to the father that he would be able to overcome the presumption in the future by attending a high-conflict parenting program. (*Id.* at 1496.)

The appellate court reiterated *SM v. EP*'s admonition that "a court may not 'call into play' the presumption contained in section 3044 only when the court believes it is appropriate." (*Id*. at 1498.) This important decision makes clear that where there is a finding of domestic violence, regardless of whether a DVRO is also issued, the court is mandated to apply section 3044's presumption against awarding custody to the restrained party. (*Id*. at 1499-1500.) In other words, once a court has made an explicit finding of domestic violence *or* issued a DVRO (which is always based on a finding of domestic violence), the presumption against custody applies and the restrained party *cannot* be awarded sole or joint physical or legal custody *unless* he or she can overcome the presumption by a preponderance of the evidence. Section 3044, subdivision (b) lists seven factors the court must consider in determining whether the presumption has been overcome.

Further, the court's holding in *Fajota*, *supra*, 230 Cal. App. 4th 1487, highlights the vital point that the restrained party is required to rebut the presumption *before* being granted sole or joint legal or physical custody and not the other way around.

## Conclusion

While FVAP has made great strides in working toward its mission to ensure the safety and well-being of California survivors of domestic violence and their children, its work continues. As news of the organization spreads, more victims of abuse turn to FVAP for appellate representation. Additionally, as a State Bar-funded support center, FVAP provides training and case-specific technical assistance to qualified legal services providers with a focus on laying a record for appeal, and ensuring application of the laws that enable domestic violence survivors and their children to obtain safe outcomes. This assistance and training by FVAP is increasingly sought from attorneys and litigants around the state. There is every indication that FVAP's great success so far will continue in years to come.

## Endnotes

1 To date, there are no published appellate court decisions holding a restraining order was improperly renewed or properly denied. However, the same factors a trial court may consider in determining whether the petitioner has demonstrated the requisite reasonable apprehension of future abuse should be analyzed whether arguing for or against a renewal. *Ritchie*, at 1290-94. As regards to the facts underlying the initial DVRO, the *Ritchie* court posited that there could be a difference in a case with a half-dozen violent acts and a psychological evaluation showing sociopathy and a case with a single threat issued in the course of an angry divorce. *Id*. at 1290. Discussing significant changes in the circumstances surrounding the events justifying the initial restraining order, the *Ritchie* court suggested the proper inquiry would be whether the parties had moved on with their lives so far that the opportunity and likelihood of future abuse has diminished to the degree they no longer support a renewal of the order. *Id*. at 1291. Finally, the *Ritchie* court thought it would be appropriate to weigh any burdens the protective order imposes on the restrained party against the seriousness and degree of risk of future abuse cautioning, however, that the physical security of the protected party trumps all burdens. *Id*. at 1291-2; *see, e.g. Loeffler v. Medina,* 174 Cal. App. 4th 1495, 1507–08 (2009) (the restrained party's alleged burdens—such as a purported inability to get a construction job—did not justify termination of a protective order because he had "been able to work in his field, despite the order.")

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