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Recent Developments in California Domestic Violence Case Law

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Introduction

When the Family Violence Appellate Project (FVAP) was founded in 2012, there were few published cases in California related to domestic violence (DV). Four years later, there have been more than thirty additional published cases relating to domestic violence. Most of those cases were prosecuted, defended, and/or requested to be published by FVAP, the only organization in California dedicated to appealing cases on behalf of domestic violence survivors and their children.

The significant increase in DV case law through the efforts of FVAP and others highlights the need for all family law practitioners to actively keep abreast of new developments in this area of law. This article discusses some recent developments and trends in California DV case law, with a primary focus on 2015 and the first half of 2016, although it is not intended to be an exhaustive summary of cases during that time.

Three themes emerged in the DV case law over the last year or so. First, the appellate courts continued to elaborate on the standard to renew a domestic violence restraining order (DVRO). Second, several decisions further explained what constitutes "abuse" under the Domestic Violence Prevention Act (DVPA) (Cal. Fam. Code § 6200 *et seq.*), recognizing that "abuse" is much more than physical violence. Third, several cases explored a parent's role in protecting children from abuse by the other parent, including a pair of juvenile dependency cases in which the appellate courts reversed juvenile courts' findings that DV survivors "failed to protect" their children under California Welfare & Institutions Code §§ 300(a) & (b)(1). One particularly

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noteworthy case, *Perez v. Torres-Hernandez,* 1 Cal. App. 5th 389 (2016), touches on all three of these areas.

1. Domestic Violence Restraining Order Renewals

Under Family Code section 6345(a), a petitioner may request a renewal of a DVRO "at any time within three months before the expiration of the orders." The DVRO may be renewed "either for five years or permanently, without a showing of any further abuse since the issuance of the original order." *Id.* In two recent cases brought by FVAP, the First District Court of Appeal overturned trial courts' refusals to renew DVROs and in so doing, recognized the broad protective purpose of the DVPA.

In *Perez*, the appellate court reversed the trial court's denial of the petitioner's requests to renew her DVRO and to modify it to include the parties' children. *Perez*, 1 Cal. App. 5th at 392. The petitioner had sought a three-year DVRO in 2010 to protect herself and the parties' two daughters after enduring a ten-year abusive relationship with the respondent. *Id.* When it granted the DVRO, however, the trial court included only the petitioner as a protected party, granting her sole physical custody with some visitation for the respondent. *Id.* at 392-393. The petitioner alleged that respondent began abusing the children during his visitation, but in 2011 the court denied the petitioner's request to modify the DVRO to include her three children (including one from a prior relationship) as protected parties. *Id.* at 393-394. In addition to allegedly abusing the children, the respondent violated the DVRO by calling and texting the petitioner multiple times, using threatening and harassing language and causing the petitioner enormous fear—such that in 2013 she requested a permanent renewal of the DVRO, again seeking protection for her three children. *Id.* at 394-395. The trial court, however, did not find "enough to extend the DVRO," as it incorrectly believed that a renewal of a DVRO required actual or threatened violence, and that evidence of child abuse was not relevant to petitioner's renewed DVRO. *Id.* at 395.

The appellate court reversed and remanded, holding that for DVRO renewals, "[t]he key consideration for the court is not the type or timing of abuse, but whether the protected party has a *reasonable fear of future abuse*." *Perez*, 1 Cal. App. 5th at 397, italics added. In doing so, it specifically rejected the trial court's determination that the respondent's intent is relevant to whether the conduct was "abuse" for purposes of renewing a DVRO, and held that the respondent's phone calls and text messages to the petitioner both harassed *and* disturbed her peace of mind, providing further guidance to trial courts on what constitutes "abuse" under Family Code § 6320, which specifically includes harassment and disturbing the peace as forms of abuse. *Id.* at 397-400; *see also*, *infra* Part 2.

In addition, the court built upon prior cases by holding for the first time that child abuse, even if not witnessed by a parent firsthand, is relevant to the DVRO *renewal* standard. *Perez*, 1 Cal. App. 5th at 400 (holding that "the court should [consider] abuse of [the children] in determining whether to renew the order."). Until *Perez*, published cases held only that a parent's *witnessing* child abuse can be "abuse" for purposes of the *initial issuance* of a DVRO (*Gou v. Xiao*, 228 Cal. App. 4th 812, 817-818 (2014), and that renewal of a DVRO does not require actual or threatened physical abuse of the petitioner (*Ritchie v. Konrad,* 115 Cal. App. 4th 1275, 1291-1292 (2004); *Lister v. Bowen,* 215 Cal. App. 4th 319, 332-333 & n. 4 (2013); *Eneaji v. Ubboe,* 229 Cal. App. 4th 1457, 1464 (2014)). *Perez* holds that the alleged child abuse "destroyed Perez's emotional calm and made her fear for her safety and the safety of her children," thus constituting abuse against Ms. Perez herself. *Perez*, 1 Cal. App. 4th at 401. The case provides important new guidance for trial courts because in family law cases involving domestic violence, it is common for parties to be living separately and sharing custody or visitation of children, without any opportunity to witness firsthand the other parent's treatment of the children.

Finally, the court in *Perez* held that the evidence the petitioner presented at the hearing about the respondent's alleged abuse of the children was also relevant to her request to *modify* the DVRO to include the children as protected parties. *Perez*, 1 Cal. App. 5th at 400-401. Although Family Code section 6320 permits courts to issue restraining orders protecting family members of protected parties on "a showing of good cause," *Perez* is the first case to discuss what evidence is relevant to such a request. In his concurring opinion, Justice Streeter, after reviewing "the abundance of social science studies showing a direct correlation between abuse against a parent and abuse against the children of that parent," specifically noted that "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" section 6320. *Id.* at 401-403 (Streeter, J. concurring). Justice Streeter also noted that Family Code § 6340 requires the court to consider whether failure to make requested orders may jeopardize the safety of the petitioner and the children for

whom orders are sought. *Id.* Because requests to include children as protected parties on DVROs are common, the decision in *Perez*, including Justice Streeter's concurring opinion, provides important guidance for trial courts.

In another DVRO renewal case, *Cueto v. Dozier,* 241 Cal. App. 4th 550, 562-563 (2015), the court held that without changed circumstances, it was an abuse of discretion to find no reasonable apprehension of future abuse when the underlying, original DVRO request was based on evidence of a "violent incident" and a long and "troubling history of physical abuse" by the respondent toward the petitioner. In petitioner's underlying request for a DVRO—which was granted for two years—she alleged a recent incident in public where, upon seeing the respondent verbally abuse their son, she tried to take him away, but the respondent punched petitioner and pushed her to the ground and later strangled their son's baseball coach. *Id.* at 553. In addition, the petitioner alleged a history of being punched and assaulted by the respondent over their 11-year relationship and the fact that their son was terrified of his father. *Id.* at 553-554.

Notwithstanding this evidence, the trial court denied her request to renew the restraining order; yet, upon issuing its decision, "the trial court believed there was a need to admonish [the respondent] from the bench that he must continue to stay away and have no contact with [the petitioner]." *Cueto*, 241 Cal. App. 4th at 562. Given the facts underlying the original DVRO, and the trial court's admonition of the respondent, which "bolster[s] [the court's] conclusion" that petitioner had a reasonable fear of future abuse, the appellate court ordered the trial court to renew the DVRO for five years or permanently. *Id.*[2]

Both *Perez* and *Cueto* provide useful guidance to trial courts facing requests to renew DVROs. *Perez* underscores that child abuse, even if not witnessed firsthand, is relevant to both a renewal and any modification of a DVRO, and that the restrained party's intent is not relevant to whether the conduct is abuse under the DVPA. And *Cueto* instructs trial courts to look sufficiently into the history of abuse between the parties, and whether circumstances have changed since granting the initial order, before deciding whether to renew a DVRO.

1. Non-Physical Abuse under the DVPA

In addition to helping domestic violence survivors obtain DVRO renewals, FVAP has done substantial work clarifying the definition of "abuse" under the DVPA. Under the DVPA, a trial court may issue an order "to restrain any person for the purpose" of "prevent[ing] acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved" if the evidence provided shows "reasonable proof of a past act or acts of abuse." Cal. Fam. Code §§ 6220, 6300. Included in the definition of "abuse" are acts that "could be enjoined pursuant to section 6320." Cal. Fam. Code § 6203 (a)(4) & (b). Section 6320(a), in turn, allows a court to enjoin a person from "harassing, telephoning, including, but not limited to, making annoying telephone calls as described in section 653m of the Penal Code, 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."

In addition to the fact that this definition includes many types of non-physical conduct, as of January 1, 2015, the DVPA now specifically states that "[a]buse is not limited to the actual infliction of physical injury or assault." Cal. Fam. Code § 6203(b), as amended by Stats. 2014, ch. 635, §2[3]; *see also Rodriguez v. Menjivar,* 243 Cal. App. 4th 816, 822, n. 3 (2015) ("[T]he amendment was reflective of existing case law,[4] as described in the text, and clarified, but did not change, the applicable standard.").

Four cases published in 2015 provide further guidance to trial courts on the definition and scope of "abuse" when issuing a DVRO. In *Rodriguez*, at 822, the appellate court clarified that significant acts of emotional abuse constituted "disturbing the peace," and thus "abuse," under the DVPA. In that case, the petitioner's boyfriend harassed and controlled her in many ways. He called her multiple times a day, accused her of cheating on him, forced her to keep her cell phone connected to him all the time so he could keep her under surveillance, and threatened to hit her if she did not obey him. *Id.* at 818. The respondent also kicked, slapped, and punched petitioner, pulled her hair, and left bruises on her during her pregnancy with his child. *Id.* at 819. The last physical abuse happened five to six months before the Temporary Restraining Order (TRO) was issued, and the last threat was made via social media three months before the TRO was issued. *Id*. Despite these serious acts of abuse, the trial court believed that a DVRO could be issued only for petitioners who have suffered *recent* and *physical* abuse, not mental abuse. *Id.* at 820. It denied the DVRO, finding that the petitioner had waited too long since the last act of physical abuse. *Id.* at 824.

The appellate court reversed and remanded, finding that the trial court erred as a matter of law because mental abuse and controlling and coercive behavior *are* within the definition of "abuse" under the DVPA. *Rodriguez*, 243 Cal.

App. 4th at 824. Moreover, held the panel, the trial court made a legal error in finding that the petitioner had waited too long to seek the court's protection. "The fact that there had been a six month hiatus in violence in this case does not support the court's erroneous imposition of a requirement of a showing of likelihood of future abuse. The DVPA expressly allows renewal of a protective order without a showing of any further abuse beyond that on which the original order was based." *Id.* at 823; *see also id.* at 823-824 ("[T]he fact that six months had passed, during almost half of which respondent was subject to a protective order, does not justify dissolving that order and failing to issue a new order.").

In *Sabato v. Brooks,* 242 Cal. App. 4th 715, 719 (2015)**,** the court of appeal ruled that unwanted and harassing contacts are sufficient to issue a DVRO even without allegations of threats or violence. In *Sabato*, the petitioner's ex-husband harassed her on a weekly basis, trying to get her to reconcile with him. He sent unwanted texts, gifts, and emails; hacked into her email account; and even tracked down her new church and pastor, asking the pastor to convince Ms. Sabato to reconcile with the him. *Id.* The trial court issued a three-year DVRO, and when the respondent appealed, the appellate court affirmed, holding that "harassing[,] . . . making annoying telephone calls," and "contacting, either directly or indirectly, by mail or otherwise," are within the DVPA's definition of "abuse." *Id.* at 723; *see also* Cal. Fam. Code§ 6320(a).

In *Altafulla v. Ervin,* 238 Cal. App. 4th 571, 578 (2015), the respondent told the petitioner's daughters traumatizing things about their mother, leading the trial court to issue a five-year DVRO protecting the petitioner and her children. *Id.* at 576-577. When the respondent challenged this DVRO on appeal, the appellate court affirmed and held that his behavior was "alarming, annoying[,] and harassing," causing the petitioner and her children substantial emotional distress such that he "disturbed their peace" under the DVPA.[5] *Id.* at 574. The appellate court held that trial courts shall not consider whether the content of the respondent's abusive statements is true, but rather whether the dissemination of those statements have disturbed the petitioner's mental peace sufficiently to issue a DVRO. In doing so, the court made it clear that the First Amendment is not a viable defense for perpetrating emotional abuse under the DVPA, as protecting survivors of domestic violence is a compelling governmental interest. *Id.* at 581-582.

Similarly, in *In re Marriage of Evilsizor & Sweeney,* 237 Cal. App. 4th 1416, 1426-1427 (2015), the court held that physical abuse was not required under the DVPA, and that disseminating embarrassing information downloaded from the partner's cell phone and computer constituted "disturbing the peace." The respondent asserted that the data were acquired legally, and that his First Amendment right to free speech should be protected. *Id.* at 1427. The court refused both defenses. "Regardless whether the data was acquired legally, the trial court was authorized to conclude that its dissemination as we have described was abusive under the DVPA and not the type of speech afforded protection under the First Amendment." *Id.* at 1428.

In sum, *Rodriguez*, *Sabato*, *Altafulla*, and *Evilsizor* clarified and elaborated upon the definition of "abuse" under the DVPA, which includes not only physical violence, but also emotional, mental, and other non-physical forms of abuse. *Altafulla* and *Evilsizor* further ensured that the First Amendment may not shield abusive conduct in domestic violence cases.

2. A Parent's Role in Protecting Children from Abuse

As discussed above, *Perez* established that child abuse by a parent is itself abuse against the other parent, and that evidence of child abuse should be considered by trial courts when non-abusive parents seek protection for children or themselves. *Perez*, 1 Cal. App. 5th at 398, 400-401. The concurring opinion described the social science explaining the strong correlation between child abuse and intimate partner abuse, demonstrating that trial courts should take seriously a parent's request to protect children from abuse in a DVPA action. *Id.* at 402-403 (Streeter, J. concuring); *see also Gou*, 228 Cal. App. 4th at 817-818 (parent can obtain a DVRO protecting a child from abuse by the other parent).

In addition to this important concept in DVPA actions, FVAP sought and obtained publication in two recent dependency cases from the Second Appellate District in which the juvenile courts had initially found the DV survivors "failed to protect" their children. Under Welfare & Institutions Code § 300(a), the dependency court may assert jurisdiction over a child when that "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." Under the same section, subdivision (b)(1), the court may have jurisdiction over a child when that "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness,

as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child."

In *In re Jonathan B.,* 235 Cal. App. 4th 115, 117 (2015), after arguing in the car with their child present, father threw mother's belongings at her and into the street, and "punched her in the face and slapped her." Then, mother "drove straight to the police station" and obtained an emergency protective order; but notwithstanding mother's actions, the "Department of Children and Family Services filed a petition alleging that the children were endangered under section 300, subdivisions (a) and (b)(1)." *Id.* The juvenile court sustained the petition, finding that the mother had "'fail[ed] to protect the children 'by allowing . . . father to frequent the children's home and have unlimited access to the children.'" *Id*. at 117-118.

However, the appellate court held the evidence insufficient as to these findings. *Jonathan B.*, 235 Cal. App. 4th at 119. Regarding whether "the children were at 'substantial *risk*' of 'suffering serious physical harm' inflicted nonaccidentally by mother (§ 300, subd. (a), italics added)," the court noted that "the only other time father had assaulted mother was five years prior when they were living together," and so her inability "to foresee that father would punch and slap her at that time was not unreasonable." *Id.* at 119-120. Regarding whether mother had "fail[ed] . . . to protect the children" under section 300, subdivision (b)(1), the court held that "mother took the proper actions immediately after father attacked her" and that the previous "incident of domestic violence[, which] occurred five years before . . . was too distant in time to show that mother would . . . choose not to address an assault by father." *Id.* at 120. Had the court ruled otherwise and found that mother failed to protect her children, it "would, in effect, penalize her for having brought the incident to the authorities' attention when, in fact, this is the kind of response that should be encouraged." *Id.* at 121.

Furthermore, in *In re M.W.*, 238 Cal. App. 4th 1444, 1447 (2015) (*M.W.*), the Department of Children and Family Services (DCFS) petitioned for jurisdiction of the children under section 300, subdivision (b), initially because of mother's "history of substance abuse and alcohol abuse and emotional problems"—which mother did not appeal or contest. Then, after locating the children's presumed father, DCFS amended the petition to allege that mother failed to protect her children because she "failed to press charges [and] declined a restraining order" from a 2007 DV incident, and "that mother 'knew or should have known about the father's criminal conduct and yet allowed the father access to the children.'" *Id.* at 1450.

Regarding mother's "failure to obtain a protective order in response to the 2007 incident," when father slapped mother on the face once, the court of appeal reversed, noting that there was "no substantial evidence connecting the single domestic violence incident in 2007 or mother's response to that incident to a risk of current harm to the children." *M.W.*, 238 Cal. App. 4th at 1454-1455. Plus, the court noted that no "authority requiring a parent to obtain a restraining order in response to a single act of domestic violence." *Id.* at 1456. As to the notion that mother should have known about father's criminal history, the appellate court found that it was not reasonable to hold mother responsible for not being aware of father's criminal history, some of which had taken place before they met and some after they separated. *Id.*

These cases provide useful guidance to trial courts to provide effective protection for children based on the current risks to children, and to give appropriate credence to, and not unduly penalize, parents' efforts to protect their children from abuse.

Conclusion

The California domestic violence case law that FVAP and others have developed over the past few years is remarkable. We hope that it will provide guidance to trial courts deciding these cases and that it will help effectuate the legislature's intent to protect adults and children from abuse and end domestic violence in our state.

Endnotes

1 The authors would like to acknowledge and thank the many individuals who have made the rapid development of DV case law over the last few years possible, in particular, the dedicated staff at Family Violence Appellate Project, the legal aid organizations who work tirelessly in trial courts day in and day out, and the volunteer pro bono attorneys who help make our work possible.

2 Similar to *Cueto*, the petitioner in *In re Marriage of Jesica & Harry Minkey*, 2015 Cal. App. LEXIS 9002, at *1-*6 (Cal. Ct. App. 1st Dist. 2015) (unpublished), recounted a long history of physical and other abuse in her petition for a DVRO. Although the trial court initially granted the petitioner's DVRO, when she requested a five-year renewal the trial court declined to renew the DVRO: "Despite findings acknowledging Minkey's continuing abusive behavior, the court elected only to warn Minkey of the consequences of future violations." (*Id.* at *25.)

3 FVAP testified in support of this legislation and helped craft its language.

4 The case law at the time included *Burquet v. Brumbaugh,* 223 Cal. App. 4th 1140 (2014) and *Gou v. Xiao,* 228 Cal. App. 4th 812 (2014).

5 The case to first interpret "disturbing the peace" under the DVPA was *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483 (2009).