

# Family Violence Appellate Project

Hello everyone, and welcome to Family Violence Appellate Project's webinar.

Before we get started, a few logistical notes:

- If you have any technical difficulties viewing this recorded webinar, please email us at [training@fvapl.org](mailto:training@fvapl.org).
- If this recorded webinar is not accessible to you, please contact us at [training@fvapl.org](mailto:training@fvapl.org) and we will work with you to provide the material in an accessible format.
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# **Domestic Violence in Dependency Court: What Judges and Attorneys Should Know**

# Introductions

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- Anya Emerson, Esq.

# Juvenile Court Judges' Corner

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- A website begun and maintained by Judge Edwards
  - ▣ Significant Juvenile Cases
  - ▣ Court Improvement
  - ▣ Working in the Community
  - ▣ Juvenile Delinquency
  - ▣ News & Commentary
  - ▣ Publications & Video Blog

[www.judgeleonardedwards.com](http://www.judgeleonardedwards.com)

# What is FVAP?

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Family Violence Appellate Project provides free appellate representation to low- and moderate-income survivors of domestic violence (DV) throughout California in family law and civil matters, and provides free technical assistance to and support for represented parties on appeal, including amicus briefs and publication requests.

# FVAP's Mission

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- California has many well-crafted statutes designed to protect survivors of DV and their children
- However, these laws are underutilized 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 – family law as well as dependency – to guide attorneys and judges throughout California

# What is FVAP?

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- State Bar-recognized Support Center for legal aid providers working on family law cases
- A resource for CA domestic violence agencies
- Provides technical assistance & litigation support in family law and dependency cases
- Screened over 1,200 requests for assistance since we started in 2012
- Based in Oakland, serve all of California
- 71% success rate in prosecuting appeals (statewide average: 20%)
- 100% success rate in defending appeals

# FVAP's Involvement in Dependency Appeals

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- FVAP does not provide direct appellate representation to parents or minors in juvenile dependency appeals, but, where domestic violence is a factor, may offer help to parties or attorneys in the following ways:
  - ▣ Case Publication Project;
  - ▣ Amicus Curiae Briefs;
  - ▣ Technical Assistance; and
  - ▣ Appellate Representation, where a party appeals from a subsequent family law order arising out of or in relation to a juvenile court custody/visitation exit order, or juvenile court restraining order.



# Overview of Training

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- Domestic Violence and Juvenile Dependency
- Best Practices for Juvenile Judges and Attorneys at Critical Stages of the Case
  - ▣ Detention
  - ▣ Restraining Orders
  - ▣ Jurisdiction
  - ▣ Disposition
  - ▣ Placement with Non-Custodial Parent
  - ▣ Custody & Visitation Exit Orders

# What is Domestic Violence?

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- A **pattern** of behavior where someone uses intimidation, threats of or actual...

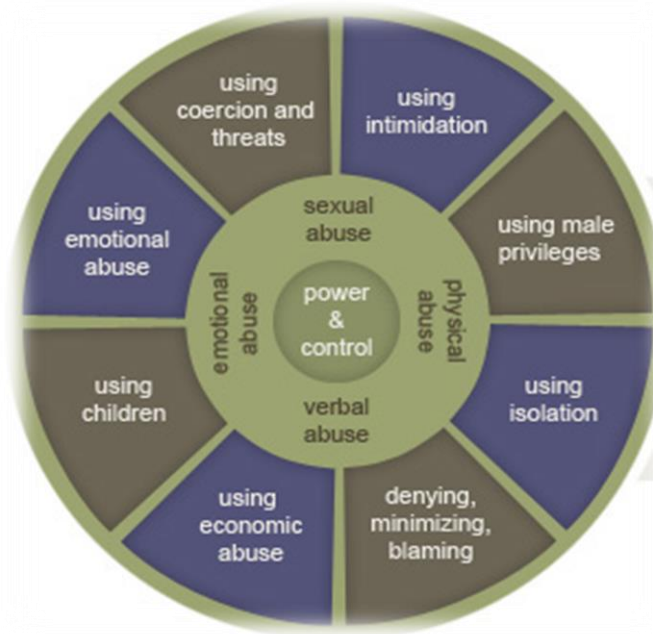
**physical**

**emotional**

**sexual**

...violence in order to maintain power and control over their partner

- **Abuse = Power & Control**



Power & Control Wheel – Source - Domestic Abuse Intervention Program

# The Cycle of Violence

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## **Honeymoon:** Every relationship experiences this phase

- Everything is PERFECT
- Exciting, Butterflies, Romance & Gifts



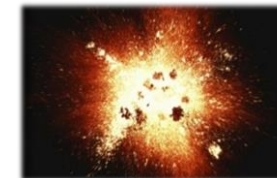
## **Tension:** Like walking on eggshells

- Everyday life stressors (school, family, friends, money) build up
- The abuser does not have healthy ways to handle stress



## **Explosion:** This is where abuse occurs

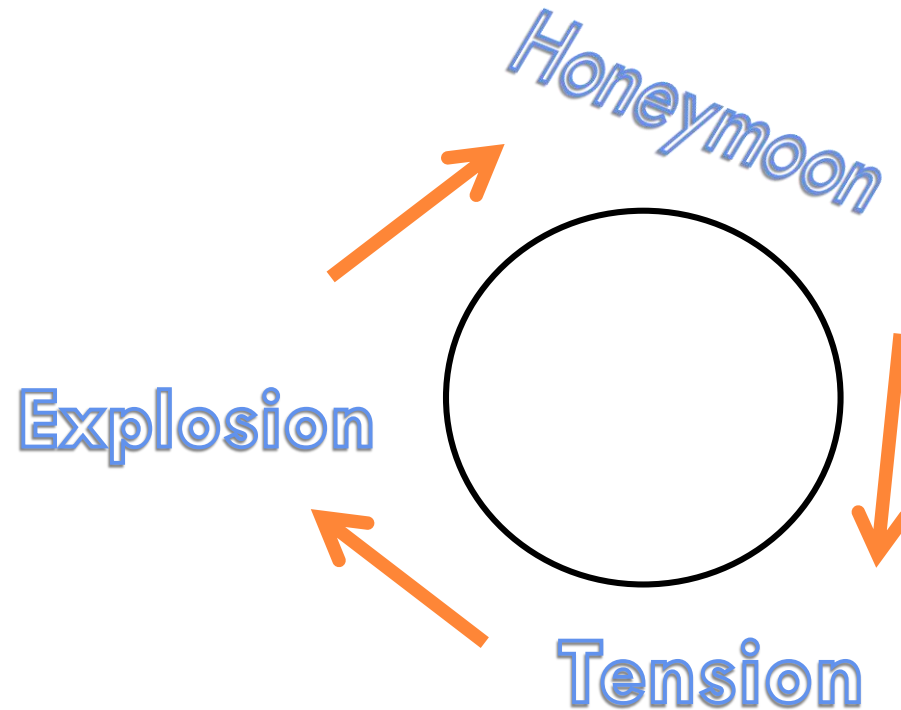
- Trigger can be anything used by the abuser to excuse behavior
- Can be any type of abuse, does not have to be physical



# CYCLE OF VIOLENCE

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Abusing  
someone is  
a **CHOICE**  
about  
Power &  
Control



*Adapted from: Walker, Lenore. The Battered Woman. New York: Harper and Row, 1979*

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# Cycle of Violence - *Fregoso & Hernandez*

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- *IRMO Fregoso v. Hernandez* (4th Dist., 2016) 5 Cal.App.5th 698
  - Husband appealed family court's grant of a DVRO to spouse (DVPA case) -- argued wife's consent to post-TRO sex showed that she was not afraid
  - COA affirmed; what might appear to be behavior by survivor that shows she is not afraid of abuser in fact part of the cycle of violence; thus she could still be afraid
    - Wife testified the parties' post-TRO sex was part of their six-year repeated cycle of violence, gifts, forgiveness, sex, and then repeated acts of violence.
- First case of which we are aware in which the COA discussed cycle of violence.
- *Hernandez v. Ashcroft* (9th Cir. 2003) 345 F.3d 824 – Ninth Circuit extensively discusses cycle of violence in the immigration context

Physical

Emotional

Sexual

Financial

## TYPES OF ABUSE



# PHYSICAL ABUSE

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- ❑ Punching the wall/throwing things
- ❑ Holding someone down
- ❑ Putting someone in a dangerous situation

- ❑ Withholding medication/food
- ❑ Imprisoning/blocking
- ❑ Shoving/pushing/grabbing/slapping/shaking/hitting
- ❑ Strangulation



# EMOTIONAL ABUSE

- Put downs/insults

- Humiliation

- Blaming

- Manipulation

- Isolation

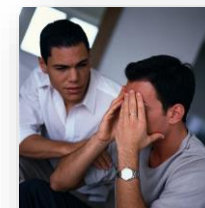
- Crazy-making



- Restricting technological privacy

- Using children to manipulate

- Stalking behavior





# SEXUAL ABUSE

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- Coercion
- Rape
- Criticism
- Cheating



- Forced pregnancy/abortion

- Withholding as punishment



- Contraceptive manipulation
- Unwanted sex acts
- Unwanted pornography
- Demanding/sending sexual pictures

# SPIRITUAL ABUSE

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- Not allowing religious/cultural practices
- Forcing to do things against beliefs
- Not allowing to better self
- Use religion to justify abuse



- Not allowed hobbies
- Unequal household decisions
- Personal beliefs mocked
- No time for self-care

# FINANCIAL ABUSE

- Denying access to money

- Making victim “earn” money

- Getting someone fired and/or evicted



- Allowance

- Stealing

- Ruining credit

- Destroying property

- Excessive spending

- Refusing to work

- Forcing or forbidding work

# LITIGATION & OTHER ABUSE

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## □ Abuse through the court system

- Criminal courts
- Family courts
- Dependency courts
- Delinquency courts
- Child support court
- Immigration court
- Housing court
- Civil lawsuits

## □ Abuse through government agencies & actors

- Police
- Child Welfare
- Housing Authority
- Child Support
- Immigration Enforcement
- IRS

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# DV and Dependency – The Big Picture

# Implications of DV -- Dependency

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- Correlation between domestic violence and child abuse
- Exposure to DV as harm to children
- Batterers: not-so-great parents, like to continue abuse w/ new partner
- Avoiding re-traumatization of children – very important to keep a child together with the protective parent
- DV can impede reunification of survivor & children

# DV and child abuse – highly correlated

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- Research demonstrates a strong link between the perpetration of adult domestic violence and child abuse
  - ▣ Men who abuse their partners are more likely to engage in physical abuse of their children.
  - ▣ In 30-60 percent of families in which either child maltreatment or partner abuse occurs, the other form of violence is also present.
  - ▣ National survey found 50 percent of the men who abused their spouses also abused a child more than twice a year - seven times more than non-violent fathers.

# DV and child abuse, cont.

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- The COA has recognized the correlation between DV and child abuse:
  - [There is an] abundance of social science studies showing a direct correlation between abuse against a parent and abuse against the children of that parent. [M]ost of the studies show that in 30–60 percent of families where either child abuse or spousal abuse exists, both forms of the abuse exist . . . a phenomenon no doubt reflective of the sad reality that some batterers abuse children as a way to inflict pain on the abused spouse.
  - Documented link between the severity of spousal and child abuse -- The more severe the spousal abuse, the more severely the child is likely to be abused.
  - Documented overlap between children witnessing DV and being abused themselves.

(*De la Luz Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, Justice Streeter, concurring.)



# Exposure to DV Harms Children

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- Children are aware of violence in the home
  - ▣ As many as 80 to 90 percent of children in families where domestic violence is present can provide detailed accounts of the violence in their homes.
- Exposure as a child to domestic violence can:
  - ▣ Normalize violence, especially gender-based violence
    - Boys – show dramatically elevated rates of battering their own partners
    - Girls – show increased difficulty in escaping partner abuse as teens/adults
  - ▣ Increase risk for mental health issues related to juvenile delinquency, antisocial behavior, and escalated rates of depression, anxiety, and PTSD.
- Chronic domestic violence exposure in childhood has long-term effects throughout the life span, in part due to effects on child's brain development
  - ▣ The Adverse Childhood Experiences (ACE) Study by the CDC
  - ▣ California Attorney General – video (Handout #1)

# Batterers – not-so-great parents

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- Less likely to
  - show affection to their children
  - be involved with children (sometimes to the point of neglect)
  - allow freedom of expression, creativity, and structure in their children's lives
  - allow normal socialization
- More likely to:
  - use harsh discipline & negative child rearing practices
  - Be controlling and authoritarian
  - Have inappropriate age-based expectations
  - Be angry with their children
  - Require children to abide by strict gender roles
- Poor role models with regard to relationships and conflict resolution
- Likely to commit domestic abuse in new relationships (e.g., w/ new girlfriend)
  - *Note: separation from DV victim does NOT mean batterer will stop pattern of relationship abuse*

# Avoiding re-traumatization of children by removal from protective parent

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- Protective factors that appear to increase a child's resiliency in responding to domestic violence include:
  - ▣ Social competence, intelligence, high self-esteem, outgoing temperament, strong sibling and peer relationships, a supportive relationship with an adult (often the abused parent), opportunities for healing and success, and the existence of assets in the community, incl. social and extended family supports & service providers.
- Removal from a protective parent can traumatize a child already traumatized by exposure to domestic violence
  - ▣ Our dependency system recognizes this – it's “premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also children's and society's best interests.” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 530.)

# DV Can Impede Victim's Reunification

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- Continuing domestic abuse, or ongoing effects on victim from past domestic abuse, can hinder a victim's reunification efforts
  - ▣ Abuse has a broad range of effects on the reunification process
    - Batterer can prevent victim from accessing services
    - Batterer may sabotage victim's efforts
  - ▣ Abuse may have other ill effects on victim & her overall well-being
    - Substance abuse
    - Post-traumatic stress disorder
    - Homelessness
    - Lack of employment
    - Loss of family & other support systems due to social isolation

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# Systemic Challenges – The Big Picture

# Juvenile Court & CPS Responsibilities -- DV Survivors

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- Can be challenging to help DV survivors
  - ▣ Survivors may suffer from multiple, overlapping challenges
    - lack of housing, drug use, poverty, etc.
  - ▣ Parents may not want “help”
    - Afraid children will be taken away
    - May not want to acknowledge underlying problems
    - May not want to interact with government agencies, court system, etc.
  - ▣ DV survivors may actively refuse help -- out of fear
  - ▣ Children may not verify survivor’s story, may protect batterer – either out of fear, or manipulation by batterer (See *In re C.Q. (2013) 219 Cal.App.4th 355* [teenage daughters freely admitted they preferred abuser, who bought them whatever they wanted].)

# Systemic Challenges in Helping DV Survivors

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## □ Funding issues

- E.g. – provision of safe housing
- DCSF typically does not direct fund housing for parents; there may be no shelter beds available; parent may have “used up” all time shelter allows

## □ Implicit bias & stereotypes

- New research indicates that *everyone* is subject to implicit biases
  - <https://implicit.harvard.edu/implicit/>
- A family’s involvement in the dependency system may depend on judgment of police officers, doctors, social workers, and mandated reporters -- when is a child at risk?
- The lifetime rate of maltreatment investigations — which covers a time span from birth to age 18 — varies widely by race. This rate is highest — at 53% — for African-American children. It drops to 32% for Hispanic children; 28% for white children; 23% for Native American children; and to just 10% for Asian and Pacific Islanders.

# Survivor's Fears – Sometimes Valid

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- *In re Jonathan B.* (2d Dist, 2015) 235 Cal.App.4th 115
  - Mom immediately reported abuse to police, yet dependency court sustained failure-to-protect jurisdiction
  - COA reversed, warning against penalizing mothers for reporting abuse – “this is the kind of response that should be encouraged.”
- Why does this happen?
  - Misunderstanding dynamics of domestic violence
  - Misunderstanding reasons survivors take certain actions
  - Survivors refusing to work with system & authority figures out of fear & distrust
  - Application of an educated, middle class, non-DV survivor lens
- FVAP successfully requested publication of this case



# Litigation Abuse by Batterers

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## Litigation Abuse & Abuse via Government Agencies & Actors

### -- Does Occur within Dependency System

- Perpetrators very good at using & manipulating “system” against survivors
  - Examples
    - Did batterer instigate dependency?
    - Is batterer actively sabotaging survivor’s efforts towards reunification?
  - Why?
    - Common characteristics of batterers
- Dependency judges, attorneys, and social workers *must be aware*

# Best Practices for Juvenile Judges and Attorneys at Critical Stages of the Case

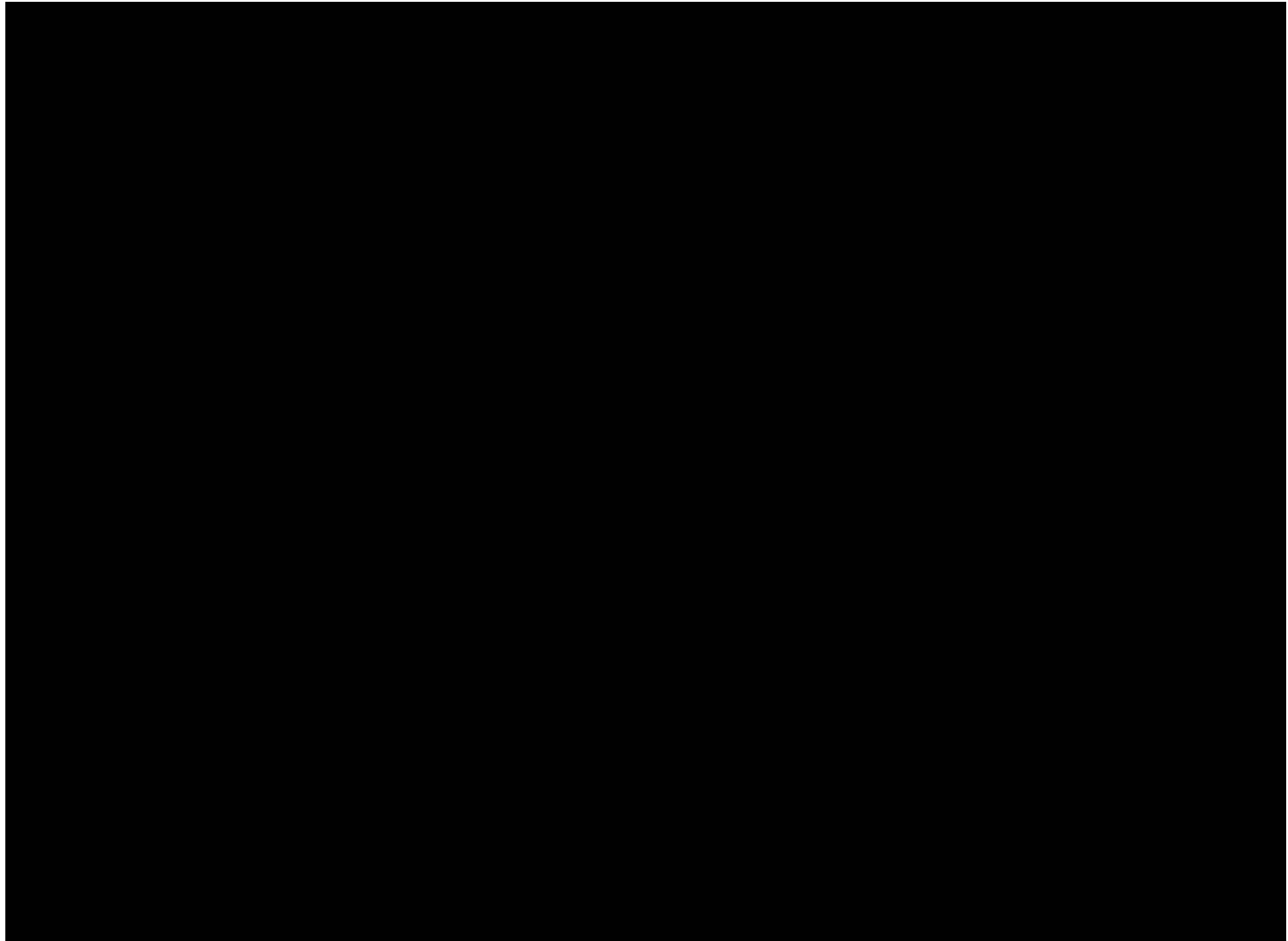
# Initial/Detention Hearing

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Video:

Juvenile Dependency Hearing Video Simulation #1:  
Reasonable Efforts to Prevent Removal

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# Initial/Detention hearing, cont.

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- Actions by DCSF Social Worker – Pre-Detention
  - Before taking a child into temporary custody WIC 306 requires that a DCSF social worker **MUST** consider whether the child can remain safely in the home:
    - Are there any reasonable services available to the worker that would eliminate need for removal?
    - Can a non-offending caretaker provide for and protect the child if abuser moves out?
- Judge *should* enquire into these actions at the initial/detention hearing (WIC 319)

# Initial/Detention hearing, cont.

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- At an initial hearing the court must ask questions & hear evidence
- At a detention hearing court must hear DCSF SW's report on case, including the available services and the referral methods to those services that could facilitate the return of the child to the custody of the child's parents

# Initial/Detention hearing, cont.

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- What questions should an enquiring magistrate make?
  - Handout #4 – *DV and Reasonable Efforts at the Detention Hearing* (Edwards)
  - Handout #5 – *Should Judges Ask Questions? The Enquiring Magistrate* (Edwards)
  
- Why so important to ask questions?
  - WIC 319(d)(1) provides that this determination – as to whether reasonable efforts were made – *must* be made on the record, and must reference the evidence on which it is based, and whether any available services would prevent detention; otherwise child may not be detained.
  
- Discussion: Handout #6

# Best Practices – Initial/Detention Hearing

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## Best Practices for Attorneys & Minor's Counsel

- Contest detention!
  - ▣ Cross-examine SW on reasonable efforts -- insist DCSF carry burden of proof
  - ▣ Be prepared to explain survivor's actions
    - Why did she take certain actions or not take certain actions?
    - Has she been protecting the children in her own way/to the best of her ability?
    - Failure to separate from abuser may be a *protective* action -- *separation is the most dangerous time for DV victims*
- Advocate that children remain with protective parent/abuser move out!
- Request a TRO on behalf of parent/minor!
- File a writ!



# Best Practices, cont. – Initial/Detention hearing

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## Best practices for judges:

- Ask questions of DCSF
  - ▣ Juvenile court has an obligation to provide careful oversight of agency actions
- Juvenile court has the obligation not to detain children unnecessarily
- Consider issuing a TRO, whether upon request *or sua sponte*
  - ▣ Note: Unlike a family judge, a juvenile judge does have the ability to issue restraining orders on its own motion (WIC 304)
  - ▣ Studies show that ROs are effective
- Make detailed findings based on the record (if none, likely appeal)
- Don't be afraid of making a no-reasonable-efforts finding

# Juvenile Court Restraining Orders – WIC 213.5

# Juvenile Court Restraining Orders – WIC 213.5

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- WIC 213.5 allows for ex parte restraining orders to protect the child or any other child in the household
  - ▣ Such orders may enjoin abusive behavior against the child or other children
  - ▣ Such orders may exclude any person from the dwelling of the person who has care, custody, and control of the child.
  - ▣ Juvenile court has exclusive jurisdiction to issue these orders relating to the child
- May also protect any parent, legal guardian, or current caretaker of the child, regardless of whether the child resides with that person
- Such orders may include pets
- New FVAP cases: *Garcia v. Escobar* & *Priscila N. v. Leonardo G.* (see below)

# Caselaw – WIC 213.5 Restraining Orders

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- “[E]vidence that the restrained person has previously molested, attacked, struck, sexually assaulted, stalked, or battered the child is certainly sufficient. However, the statute does not state that such evidence is necessary.” It is sufficient if “failure to make [the order] may jeopardize the safety of the petitioner....” *In re B.S.* (2009) 172 Cal.App.4th 183
- Where children witnessed abuse, but father stopped when children stepped in front of mother, COA found no substantial evidence that failure to include the children as protected persons under the restraining would jeopardize their safety. *In re C.Q.* (2013) 219 Cal.App.4th 355

# Caselaw, cont.

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- Where the dependency itself was focused primarily on other issues, including the mother's drug use and false allegations of sexual abuse; and the father's request for a restraining order to protect the minor was based on the mother's attempts to contact the minor's school, COA reversed restraining order. *In re N.L.* (2d Dist, 2015) 236 Cal.App.4th 1460
  - no evidence that daughter's safety might be in jeopardy w/o restraining order;
  - no evidence that mother had engaged in any violent or dangerous conduct or threats to daughter;
  - mother's interaction with daughter during monitored visitation was favorable and that daughter enjoyed spending time with mother.

# New Case!

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- *Priscila N. v. Leonardo G.* (2DCA, Dec. 1, 2017, No. B279584) \_\_\_ Cal.App.5th \_\_\_, 2017 WL 5951573 – *Appeal brought by FVAP*
  - ▣ Because WIC 213.5 was amended in 2012 to add a cross-reference to the Domestic Violence Prevention Act (“DVPA”), “the Legislature signaled its intent that the two statutes work in concert to protect domestic violence victims. . . . [and] **so that the juvenile court could issue Domestic Violence Restraining Orders under the same standards provided for in the DVPA**”
- Upshot: juvenile courts may issue DVPA restraining orders– New unpublished case from 3DCA: *In re O.M.* (3DCA, 12/6/2017, No. C081450) [juvenile court extended & reissued, for 5 years, a TRO issued originally by a family court]

# Best Practices – Restraining Orders

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## Best Practices for Attorneys:

- At first interview, discuss DV with the client, even if not apparent; client may need to be educated as to DV
  - ▣ *Caution: Client may NOT disclose DV at first interview; may not be ready yet to do so*
- At first interview, discuss advisability of a restraining order
  - ▣ Move-out? Pets Included? Other Children? Workplace/school protected?
- At first interview, discuss safety planning
- Become familiar with the DVPA as well as WIC 213.5
- Ask the juvenile court judge to issue the RO – don't just send client to family court w/o a lawyer to an unfamiliar judge!
- Call Family Violence Appellate Project for technical assistance!
- File a notice of appeal!

# Best Practices for Attorneys, cont.

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## □ Best Practices for Attorneys

- ▣ If your client does NOT want a RO, explore reasons why
  - Does CI deny DV totally (may need DV counseling)?
  - Does CI not understand effect of DV on kids (may need parenting education)?
  - Is CL too afraid? (Do safety planning, obtain confidential housing, educate client on ROs, dependency proceedings, need to ensure children's safety before return)?
- ▣ Many times DCSF/court will not be willing to return children without a RO
  - have a frank discussion with survivor about the need for a RO



# Best Practices, cont. – Restraining Orders

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- Best Practices for Judges
  - ▣ Judges CAN issue ROs under 213.5 *sua sponte* (WIC 304, 362.4)
  - ▣ Judges CAN issue ROs for a parent (not only for children)
  - ▣ Judges CAN include children (or other household members) as protected parties on ROs
  - ▣ Judges CAN extend a RO past 3 years (extension or modification allowed)
  - ▣ Judges CAN re-issue or extend a RO at the time dependency is terminated & juvenile court custody “exit” orders issued.
    - Required as part of the reasonable efforts analysis
  - ▣ Judges CAN include pets on ROs – may be very imp't to kids

# Best Practices, cont. – Restraining Orders

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- Judges should avoid:
  - ▣ Sending DV survivor parent to family court to get a DVRO
  - ▣ Issuing mutual restraining orders
    - Mutual ROs disfavored
    - Pattern & practice of DV -- usually is a dominant aggressor, it's NOT truly mutual
      - Mutual orders, if any, should follow the DVPA statute (Fam. Code 6305), plus due process & notice reqs. of Isidora M. v. Silvino M. (2015) 239 Cal.App.4th 11
  - ▣ Non-CLETS orders & bench admonishments disfavored
    - IRMO Minkey (Cal. Ct. App., Dec. 15, 2015, No. A143625) 2015 WL 8811829

# Jurisdiction

# Jurisdiction

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- A child exposed to domestic violence may come within the dependency court's jurisdiction under one or more subdivisions of WIC 300, depending on the facts of the individual case.
  - ▣ 300(a) – serious physical harm inflicted nonaccidentally
  - ▣ 300(b) – general neglect: substantial risk of serious physical harm or illness
  - ▣ 300(c) – serious emotional damage, mostly evident in older children
  
- Most “failure to protect” cases come under WIC 300(b)

# Section 300(a) jurisdiction

- Children can be found to come within WIC 300(a) based on exposure to domestic violence, although 300(a) jurisdiction generally requires physical violence in the presence of the child, even if child not harmed:
  - *In re Giovanni F.* (4<sup>th</sup> Dist., 2010) 184 Cal.App.4th 594
    - COA affirmed 300(a) jurisdiction, where father had an extensive history of physical violence with the mother and others; e.g., with the child in the car, father drove with one hand on the steering wheel while attempting to hit and choke mother; infant minor not physically harmed.
  - *In re M.M.* (4<sup>th</sup> Dist., 2015) 240 Cal.App.4th 703
    - Father abused mother in front of toddler son (“choking”, hitting, throwing, & pinning her); mother hit father with piano stool, kicked him, shredded his shirt, while father holding son
    - COA affirmed – rejected argument that 300(a) jurisdiction was error b/c violence not directed at child. 300(a) appropriate b/c child was in father’s arms, plus father’s DV history.

# Section 300(a) and (b) -- jurisdiction

- Compare *Giovani F. and M.M.* with *In re Daisy H.* (2011) 192 Cal.App.4th 713
  - ▣ father made derogatory remarks to the children about their mother. Minors were healthy, not suffering any physical harm, denied witnessing DV or fear of father. Noted that no evidence of ongoing DV, parents were now separated.
- COA reversed in *Daisy H.*
  - ▣ Subdivision (a) finding not supported -- no evidence of intentional physical harm or risk of intentional physical harm. Physical harm required.
  - ▣ Subdivision (b) finding -- dependency jurisdiction is not invoked by “emotional harm.”

# Section 300(b) – DV in home & “failure to protect”

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- *In re Heather A.* (1996) 52 Cal.App.4th 183
  - Petition sustained -- father’s domestic violence against the stepmother, at least one incident in presence of children
  - 300b juris may be appropriate in cases in which the child has suffered no direct physical harm but there is a pattern of domestic violence that has put the child at risk of harm.
  - COA: “Obviously the children were put in a position of physical danger from this violence, since, for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg, or by [the abused parent] falling against them . . . [D]omestic violence in the same household where children are living is neglect; it is a failure to protect [children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. “

# Section 300(b) – Plenty of Cases since *Heather A.*

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- *In re T.V.* (2013) 217 Cal.App.4th 126
  - Exposing children to recurring domestic violence may be sufficient to establish 300(b) jurisdiction
  - Even where minor not physically harmed, the cycle of violence between the parents constituted a failure to protect her “from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.”
- *In re E.B.* (2010) 184 Cal.App.4th 568
  - COA: father’s DV placed the children at risk; mother’s remaining in an abusive relationship and her record of returning to the father, who physically and emotionally abused her and the children, supported the juvenile court’s finding that the mother’s conduct also endangered the children.
  - “Both common sense and expert opinion indicate spousal abuse is detrimental to children.”



# Affirmances not guaranteed: 300(b) reversals

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- But DV in home by itself may NOT support 300(b)
- In re Alysha S. (1996) 51 Cal.App.4th 393 [petition insufficient in that it did not allege that the violence was perceived by or affected the child]
- In re Jonathan B. (2d Dist, 2015) 235 Cal.App.4th 115
  - ▣ Parties had 3 children together; Father punched mother in face once in 2009. Parties separate in 2013, little contact, get along well, but in 2014 incident during visitation exchange
  - ▣ Mother immediately drove to police station, obtained report and EPO
  - ▣ COA: reversed finding of failure to protect jurisdiction -- Not foreseeable that father would again assault mother in front of children after 5 years of no violence
- See also: In re M.W. (2d Dist., 2015) 238 Cal.App.4th 1444 (supp. juris)

# “Failure to Protect” -- Problematic

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## DV Community views “failure-to-protect” allegations as problematic – Why?

- If DV present, a failure to protect allegation automatically added for the survivor-parent, which *may or may not* be borne out by the actual facts
  - ▣ Common sense may not support “failure to protect” – *Jonathan B., M.W.*
  - ▣ See *In re Jennifer P. (1985) 174 Cal. App. 3d 322* [failure to protect not sustained for 300(d) count; where mom had taken all appropriate protective actions]
- DV survivor parent may have been protecting children, to the best of ability
- DV survivor’s protective attempts may have been actively sabotaged by batterer
- Survivor’s attempts to protect children *after* dependency petition filed are ignored, rather than encouraged (going into shelter; obtaining restraining order; filing for divorce)
- Finally – *survivor may have believed, accurately, that staying with the abuser was safer than leaving...* separation is the most dangerous time for DV victims.

# “Engaging in DV” – Similar

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- Often petitions will allege both parents are “engaging in DV” -- again, very problematic
  - Puts equal responsibility for DV on batterer and survivor
  - Fails to hold batterer accountable for his actions
- “failure to protect” & “engaging in DV” language carry heavy moral opprobrium
  - Such language may cause survivors to distrust the system
  - Such language disparages survivors’ recognized attempts to protect children
- BUT In re R.T. (2017) 3 Cal.5th 622 -- Cal. Sup. Court held that section 300(b)(1) jurisdiction authorizes dependency jurisdiction without a finding that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child.
  - Justice Liu, conc. opn: “But it must be acknowledged that simply being found “inadequate” as a parent, even when the parent is not at fault, can carry a painful stigma.”

# Best Practices – Judges & 300(b) cases

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- Require accuracy & accountability in petition language
  - Court should require and sustain explicit factual language that assesses each parent’s responsibility for the abuse that placed the children at risk.
    - Clarify parents’ respective responsibility, so appropriate protections & services provided
    - Too general language -- “kids exposed to DV” may be challenged on demurrer/appeal
      - DCSF allegations must contain a concise statement of supporting facts – e.g. “on a specific date, the father slapped and punched mother while she was holding the infant child.”
    - Court should be prepared to conform the petition to the proof
- Avoid “failure to protect” & “parents are engaging in DV”, if at all possible
  - Focus on impact of DV on children, rather than the conduct of the parents.
- Strike failure-to-protect counts if not supported by evidence at time of jurisdiction

# Best Practices -- Attorneys

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- Object to general language & allegations (“engaging in”)
  - File demurrers based on too-general language
  - Actively contest failure to protect allegations
    - Present evidence on all protective actions DV survivor took, including non-traditional methods
    - Present evidence on all the protective steps DV survivor has taken since dependency began
      - Attorneys may need to actively assist clients in obtaining ROs, referring them to divorce attorneys, housing resources, etc.
    - Convince court to strike or not sustain failure to protect count – DV survivor could then be considered “non-offending”
    - If the evidence shows that the father was the primary aggressor, consider making a motion to amend the petition to proof
- Contest risk of physical harm/injury for 300(a) & (b) allegations – emotional harm not sufficient

# Disposition

# Disposition

WIC 361(c)(1) requires clear and convincing evidence “of a substantial danger to the children's physical health, safety, protection, or physical or emotional well-being” AND “there are no reasonable means by which the minor’s physical health can be protected” without removal.

- “no reasonable means” language here is key
  - ▣ DCFS required to submit a social study which “must include . . . a discussion of the reasonable efforts made to prevent or eliminate removal[.]” (CRC 5.690.)
    - This social study report is critical -- this is the evidence on which to base a determination of reasonable efforts, AND specific required findings.

# “Reasonable Means”

- “Reasonable means” must include consideration of:
  - ▣ Removing an offending parent from the home.
  - ▣ Allowing a nonoffending parent to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.
- Oral or written findings of reasonable means required
  - ▣ 361 (d): “The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home . . . The court shall state the facts on which the decision to remove the minor is based.”



# Key questions at disposition

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- Is the evidence clear and convincing?
- Is there substantial danger to the children's well-being?
- What are "reasonable means/efforts," in a DV context?
- Did DCSF establish that it had made these reasonable efforts?
- Which parent(s) to remove from?
  
- Handout #2, *Reasonable Efforts in Child Abuse & Neglect* (NCJFJ)
- Handout #7, *Reasonable Efforts to Prevent Removal* (Edwards)

# Exposure to DV – Grounds for Removal

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- Exposure to DV may constitute substantial danger to child's emotional well-being, even if no physical danger:
  - ▣ *In re J.S.* (2014) 228 Cal.App.4th 1483
    - Fourth District affirmed – DV cause to remove the children from both parents.
    - Holding: Ongoing domestic violence, committed by both parents, in the presence of the children, from 2008 through 2012, is substantial evidence of a substantial danger to the children's emotional well-being, if not their physical well-being.
    - Note: *In re J.S.* distinguished *In re Basilio T.* (1992) 4 Cal.App.4th 155, -- Since *Basilio T.*, law has changed significantly – then, removal only allowed if substantial danger to the physical health; now, removal allowed if danger to emotional well-being. (§ 361(c)(1).)

# Reasonable Means – *In re Ashley F*

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- Reasonable means--must be found by clear & convincing evidence (supported by substantial evidence, on appeal), detailed in findings
- *In re Ashley F.* (2014) 225 Cal.App.4th 803
  - ▣ COA reversed because DCSF report included no discussion of reasonable efforts, no other discussion in record; used perfunctory language that “[r]easonable efforts were made to prevent or to eliminate the need for removal of the [children] from [their] home”, without supporting evidence
    - Report did not describe what “reasonable means” DCSF had considered & rejected
  - ▣ COA reversal also noted that court’s failure to state facts on which removal was based violated 361(d) – it just repeated the statutory language

# Reasonable means, cont.

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- Ashley F., cont.
  - Reasonable means removing offending parent from home
  - If court is concerned that if removal does not occur, custodial parent will allow other parent access to children, reasonable means can include variety of services: e.g., parenting classes, unannounced visits by DCFS, public health nursing services, in-home counseling
  - Social worker must continue to provide reasonable efforts up to the disposition hearing (or 60 days); if parent is doing well and has addressed her problems, return to the parent should occur.

# Removing Offending Parent from Home

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- *In re Michael S.* (2d Dist., 2016) 3 Cal.App.5th 977
  - ▣ Alleged sex abuse by father of Michael's half-sister; mother also reports physical abuse; Mother took Michael with her to shelter, got EPO
  - ▣ 300 petition sustained; TRO issued; Michael released to mother
  - ▣ Michael then removed from father, 3 year DVRO against father: supervised visits
- COA affirmed – WIC § 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

# Disposition – Best Practices

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## □ Best Practices for Judges

- Carefully determine who is/was “custodial” or a “noncustodial” parent --  
*In re Anthony Q.* (2016) 5 Cal.App.5th 336
- First try to remove child from abusive parent only, keep with protective parent
  - Reduces trauma to children
  - May need to occur in conjunction with issuance of TRO
- Hold agency to burden of proof re reasonable means and efforts
- Should make detailed findings about DCSF reasonable efforts & means:
  - Without judicial oversight & detailed findings supported by evidence, reasonable efforts test can “become merely a hollow formula designed to achieve the result the agency seeks.”  
*(In re Ashley F.)*

# Reunification Services

# Reunification Services – Best Practices

72

- Best practices for reunification services for perpetrators
  - ▣ Professionally supervised visitation (or therapeutic visitation)
    - NOT relative supervised visitation
    - NOT agreed-upon monitor supervised visitation
    - If professionally supervised visitation is not possible, at the very least have professionally supervised visitation exchanges with reports written
  - ▣ 52-week batterers intervention program
    - Anger management, mental health, therapy, etc., are NOT substitutes for BIP
  - ▣ Parenting education with a focus on how DV impacts children



# Best Practices, cont.

73

- Accountability is key!
  - ▣ Handout #3 -- *NCJFC Checklist for Perpetrator Accountability*
    - “Review and tailor service plans to hold perpetrators accountable in ways that promote safety and compliance with orders”
      - Insist on accountability from perpetrators
      - Perpetrators often will try to set their own rules or believe rules do not apply to them
    - Focus should be on perpetrator’s abusive behavior, not survivor’s actions
    - Batterers may try to exert power & control over service providers, esp. women

# Reunification Services – Best Practices

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- Best practices -- reunification services for survivors
  - ▣ Parenting education -- focus on how DV impacts children
  - ▣ DV counseling, individual or group
  - ▣ Housing assistance
  - ▣ Employment preservation: Order service providers to accommodate a survivor's work schedule
  - ▣ Do *not* order co-parenting classes, co-counseling or joint-counseling, or “anger management” for both parents
  - ▣ Service plan should avoid provisions or directives that only the perpetrator can be responsible for or held accountable for
- Service providers, attorneys, & courts should be aware that batterers often sabotage victim's reunification efforts – advance planning req'd

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# Placement with Non-Custodial Parent

# Placement with Non-Custodial Parent (WIC 361.2)

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- The court shall place the child with the parent *unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. . .*
- If child placed with non-custodial parent per 361.2 , court may:
  - ▣ Dismiss dependency w/ custody to non-custodial parent & exit orders; or
  - ▣ Grant physical custody to non-custodial parent but require home visit within three months; or
  - ▣ Grant physical custody to non-custodial parent with reunification services and/or other services & hold subsequent review hearings to determine which parent, if either, shall have custody of the child.

# Placement, cont.

77

- Relevant caselaw on detriment – not much
  - Children’s wishes not controlling -- *In re C.M. (2014) 232 Cal.App.4th 1394*
    - 14-year-old strongly objected to being placed with her father and gave substantial reasons
    - COA found her reasons were inadequate and placed her with her father.
  - Only case denying placement:
    - *In re Luke M. (2003) 107 Cal.App.4th 1412*
      - COA denied non-custodial father custody, because of need to maintain in-state siblings relationships, where father was out-of-state
  - Need more caselaw here!
  
- Handout #8 – *Placement with a Non-Custodial Parent* (Edwards)

# Best Practices – WIC 361.2

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## □ Best Practices for Attorneys

- Raise client's concerns regarding the previously non-custodial parent
  - Present concrete evidence – not wild allegations
  - May require research, investigation in other parent's background
- Contest the placement!
- Appeal!

## □ Best Practices for Judges

- Sufficient inquiry is necessary (e.g., if child being removed from custodial mother for substance abuse, and to be placed with non-custodial father, but mother says wait, dad's an abuser!)
- Enquiring magistrate should make enquiries – if substantial allegations raised
- Continue dependency for a period of time, do not immediately terminate
- WIC 361.2 requires findings to be made in writing or on the record

# Juvenile “Exit” Orders

# Juvenile Court Custody Orders – “Exit” Orders

80

- “Juvenile court custody orders,” informally known as “exit orders” may be issued pursuant to WIC 361.2(b)(1) or 362.4, then filed in a new or previously pending family court action
  - ▣ In making exit orders, the juvenile court must look at the best interests of the child based on the particular facts of the case. (*In re John W.* (1996) 41 Cal.App.4th 961.)
  - ▣ Juvenile court must issue exit orders; cannot punt issue to family court (*In re Armando L* (5th Dist., 2016) 1 Cal.App.5th 606.)
- Handout #9 – *How to Tackle the Problems Involved when a Case Moves from Juvenile to Family Court* (Edwards)



# Broad Authority to Issue Appropriate Orders

- Juvenile court has broad authority to issue appropriate orders
  - ▣ Exit orders can condition parental access to the child in ways unavailable to the family court, to prevent re-abuse of child, such as on a parent's future conduct (*In re Chantal S.* (1996) 13 Cal.4th 196 [WIC 362(d) authorizes a juvenile court to make collateral orders reasonably related to custody and visitation].)
- However, a juvenile court cannot usurp a family court's later authority
  - ▣ Juvenile court cannot prohibit modification of exit orders for a period of time (*In re John W.* (1996) 41 Cal.App.4th 961.)
  - ▣ Juvenile court cannot condition the *family court's* modification of an exit order upon the completion of counseling and other programs (*In re Cole Y.* (2015) 233 Cal.App.4th 1444.)

# “Exit” Order Best Practices -- Judges

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- Do issue sole custody to the protective parent
- Do require supervised visitation for batterer parent
  - ▣ Difficult decision – use of professionally supervised monitor or agreed-upon monitor?
    - Pros & Cons
- Do provide specifics as to:
  - ▣ How will parents communicate? FamilyWizard, etc.
  - ▣ Place of visitation exchange important – where? Who arranges transport?
- Do put in place child abduction orders, if needed

# Best Practices, cont.

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- Do consider exercising discretion to issue collateral orders reasonably related to custody and visitation, per *Chantal S.* and WIC 362(d)
  - ▣ Collateral orders may be especially important in domestic violence situations to prevent re-abuse of child or DV survivor
  - ▣ Collateral orders could include participation in parenting classes, counseling, domestic violence intervention programs, no violations of a restraining order, etc.
- Do consider issuing on your own motion a restraining order, or extending a restraining order on motion by a party

# Best Practices, cont.

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- Do provide detailed findings, and incorporate them into the exit orders
  - ▣ Detailed findings are important to show on what basis you are granting the parent(s) custody & visitation
  - ▣ Exit orders themselves are not confidential and will be filed in the family court case; everything else in the juvenile court case file will be confidential and accessible only via an approved WIC 827/JV-570 motion
- Do freely grant WIC 827/JV-570 motions, later brought by family court litigant or attorneys seeking to use dependency case file in a family court action

# “Exit” Order “Don’ts”

- In a domestic violence case, **don’t** issue joint custody orders, whether physical or legal:
  - ▣ Violence may continue or even escalate after custody & visitation orders issued
    - Studies show that when non-abusive parents (primarily women) asserted the need to protect their children from the custody of domestic abusers, “there were consistent findings that violence often continued or even escalated” *after* custody or visitation orders were issued.
  - ▣ An order of joint custody necessarily requires a survivor of abuse to interact with her abuser, providing increased opportunities for further abuse.

# “Exit” Order “Don’ts”

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- In a domestic violence case, **don’t** issue pro forma or general custody orders:
  - ▣ Typical language is far too general: "Legal and physical custody to mother with reasonable rights of visitation to father."
    - Leads to unnecessary family court litigation
      - families will be back in family court almost immediately over enforcement issues, holiday schedules and travel, what constitutes a substantial change in circumstances.
      - And remember – batterers have the upper hand in family court litigation
    - Leads to new dependencies
      - If the exit orders set the family up for continued conflict, they’ll be back in your court!

# Best Practices - Attorneys

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- Discuss exit orders in detail with survivor, take sufficient time to do so
- Insist that custody & visitation orders are sufficiently specific as to avoid immediate family court enforcement litigation
  - In an appropriate case, seek mediation as to exit order specifics
- Do not agree to or accept joint custody orders
- No visitation for abusers or limited prof. supervised visits
- Ask for collateral orders to issue
- Ask that basis for custody/visitation orders be included in exit orders
- Minor's counsel -- take an active role, exit orders protect child until majority
- File a Notice of Appeal!





# When the Family Court Assumes Jurisdiction Over a Family After Dependency Terminated

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## A family coming out of dependency may quickly end up back in Family Court

- Especially true for families with domestic violence!
  - Litigation abuse by batterers – often repeated, prolonged, and/or frivolous motions
    - But litigation abuse may be as simple as filing a motion – victim now afraid, must miss work, school, find childcare, pay for an attorney, answer to a judge, and confront batterer in court
  - Batterers affirmatively file to get back into court, court a means of power & control
  - Batterers “litigation shop” – if they don’t get what they want in juvenile court, will try again in family court, with an unfamiliar judge

## Actions by a Family Court can help the family stay safe, OR can further endanger the children/protective parent

- ... which in turn could lead the state to assume jurisdiction over family, again

# Family Court Modification of Juvenile Exit Orders

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- Juvenile court custody and visitation “exit” orders are final judgments
  - ▣ Family court judges may not understand the authority or permanence of juvenile court orders, but they are permanent custody orders (302(d))
- Family Courts may not modify juvenile court exit orders lightly
  - ▣ A parent must first show a significant change in circumstance since the juvenile court’s issuance of the exit order to change *any* part of an exit order, whether custody or visitation (WIC 302(d); Rule 5.700; *Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150; *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96.)

# Juvenile Restraining Orders as Exit Orders

- Juvenile Restraining Orders -- Become Part of Juvenile Exit Orders
  - WIC 362.4 provides that when a juvenile court terminates its jurisdiction over a dependent minor, the juvenile court on its own motion, may issue a protective order as provided for in Section 213.5 or as defined in Section 6218 of the Family Code, and an order determining the custody of, or visitation with, the child.
  - Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court.

# Family Court Renewal/Dissolution of Juvenile Restraining Orders

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- FVAP is currently co-counseling three cases on these issues
- Issues presented:
  - ▣ Does a Family Court have jurisdiction to renew a restraining order originally issued by the juvenile court, in order to protect a DV survivor and her children?
  - ▣ May the Family Court, *sua sponte* and without notice, dissolve a restraining order issued by the juvenile court on behalf of dependent children against their father?

# New Caselaw!

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- *Garcia v. Escobar* (2DCA, Nov. 15, 2017, No. B279530) \_\_ Cal.App.5th \_\_, 2017 WL 5477343
  - ▣ Reversed & remanded: The family court had jurisdiction to renew a restraining order issued by the juvenile court, because Family Code section 6345—which governs the renewal of a domestic violence restraining order—applies to the renewal of a domestic violence restraining order issued by a juvenile court.
- *Priscila N. v. Leonardo G.* (2DCA, Dec. 1, 2017, No. B279584) \_\_ Cal.App.5th \_\_, 2017 WL 5951573
  - ▣ Reversed & remanded: Agreeing with *Garcia v. Escobar*, but extending its holding by finding that the language of the Family Code and the Welfare and Institutions Code work together and should be applied broadly to effect the Legislature’s intent to provide the best protection for survivors of domestic violence.
- *Jessica V. v. Douglas M.*, No. C083120 (3d Dist.)
  - ▣ *No decision issued yet – still pending*

# Best Practices for Family Court Judges

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## □ First question to ask –

Does the family have a juvenile court history?

- ▣ If so, can the juvenile court file be obtained in a timely manner?
- ▣ If so, can the juvenile court judge be (re)assigned to hear the family court matter?
  - See e.g., Handout #10, Superior Court, Santa Clara County, Family Rule 7
- ▣ If so, should the DCSF social worker who handled the dependency be called to testify in family court?
- ▣ If so, it is necessary or advisable to appoint minor's counsel?

# Best Practices for Family Court Attorneys

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- Obtain the juvenile court case file
  - ▣ Such files are confidential – family court attorneys usually must request access via the JV-570 process first (WIC 827)
- Request judicial notice of findings and orders of juvenile case
- Subpoena the DCSF records
- Call the DCSF social worker as a witness
- Argue the WIC 302/rule 5.700 standard for modification: parent requesting change *must* establish a change of circumstance to modify any part of juvenile exit orders
- Call Family Violence Appellate Project for technical assistance!

# Reference Materials – See Handout

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- Multimedia
- Legal Resources
- Articles
- Relevant Dependency Cases
- Relevant Family Law Cases



# Questions?

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## □ Family Violence Appellate Project

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