



## **New Cases in 2021 Affecting Survivors of Domestic Violence**

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**Webinar for the CA Partnership to End Domestic Violence, January 19, 2022**

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## Technical Difficulties

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- Zoom Program Malfunction
  - ▣ Close down the program and log back on

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## Partnership's Land Acknowledgment

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*We acknowledge that we are on the traditional territory and homelands of California Native Peoples. These Nations include over 120 federally recognized tribes and many other non-recognized tribes that are all very culturally diverse. We thank these Nations and we keep them in our hearts and thoughts as we are in this space today, this week, and every day.*

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## Family Violence Appellate Project (FVAP)

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- A non-profit organization dedicated to providing legal representation and support to domestic violence survivors at the appellate court level.
- Partners with pro bono attorneys from private firms to provide free, high-quality legal representation to low- and moderate-income survivors.
- Provides technical assistance to pro bono attorneys, domestic violence advocates on domestic violence issues arising in family law, housing and employment cases.

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## Agenda

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- Restraining Order Cases
- Family Law Cases
- Dependency Cases
- Other

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## List of Cases

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- |                                      |                                  |
|--------------------------------------|----------------------------------|
| □ Marriage of F.M. & M.M.            | □ In re Solomon B.               |
| □ J.H. v. G.H.                       | □ In re Ma V.                    |
| □ Marriage of Reichentel             | □ In re I.R.                     |
| □ K.L. v. R.H.                       | □ In re Cole L.                  |
| □ Ashby v. Ashby                     | □ Elmassian v. Flores            |
| □ Marriage of Brubaker & Strum       | □ People v. Agnelli              |
| □ Marriage of Carlisle               | □ Doe v. Lawndale Elementary     |
| □ Noble v. Sup. Ct. Merced           | □ Hernandez v. Bd of Corrections |
| □ Marriage of Emilie D. v. Carlos C. | □ In re Scarlett V.              |
| □ Marriage of Kahan v. Diamond       |                                  |

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## Restraining Orders

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## Scope of Evidence & Standard of Proof

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- *Marriage of F.M. v. M.M.*, 65 Cal.App.5th 106 (Alameda)
- F.M. filed request alleging M.M. committed various acts of DV
- After TRO in place, M.M. withheld child, pushed her when she came to retrieve her things and threatened to kill her over money
- Court said separation would resolve the problem, that what happened after the TRO was in place was not relevant and that to get a DVRO, F.M. had to prove allegations about what happened with “corroborating” evidence

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## Scope of Evidence & Standard of Proof

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- *Marriage of F.M. v. M.M.*, 65 Cal.App.5th 106 (Alameda)
- Held:
- Must consider evidence of domestic violence that occurred after the filing of the request for an order
- Cannot use the fact of separate residence as a basis for denying the need for a restraining order
- Cannot require “corroboration” or other heightened standard of proof from what is required by law



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## Protected Parties on Restraining Orders

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- *J.H. v. G.H.*, 63 Cal.App.5th 633 (San Francisco), partial publication
- G.H. filed request for DVRO in 2019 based on incidents dating back to 2015, including abuse in front of the children and abuse to the children
- A dependency case had been opened in 2018 and in 2019, parents stipulated to joint legal custody & supervised visitation for J.H.
- Trial Court said there had been a significant period of separation between J.H. and the children, J.H. was not a threat to children’s safety, and reunification was in children’s best interest

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## Protected Parties on Restraining Orders

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- *J.H. v. G.H.* cont.
- Held: Court was not outside bounds of reason when it did not add the children as protected parties to DVRO
- Court has the same discretion to determine if “good cause” exists to add protected parties as it does to issue a restraining order
- Court must consider totality of the circumstances and whether it would jeopardize safety of petitioner or children if denied

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## Private Judging and non-CLETS

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- *Marriage of Reichental*, \_\_\_ Cal. App. 5th \_\_\_ (Santa Barbara)
- HELD: Private judge could rule on party’s DVRO request but error of law to issue non-CLETS order
- Husband made DVRO request before private judge, DVRO granted but as non-CLETS
- Wife appealed that DVRO was outside the scope of private judge’s mandate which was just the dissolution, but also if non-CLETS improper than it should be vacated
- DVRO request is encompassed in dissolution so not outside the scope of private judge agreement
- Remedy is to enter proper CLETS order, not to vacate it

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## Mutual Restraining Orders

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- *K.L. v. R.H.*, 70 Cal.App.5th 965 (Orange County)
- K.L. filed for DVRO after incident at exchange where R.H. saw bruising on child and said she would file for DVRO. He got there first.
- K.L. had prior DVRO request against R.H. that was denied
- Trial court found that K.L. had committed numerous acts of domestic violence against R.H. and found R.H. had made a threat and engaged in name-calling over Talking Parents
- Trial court read R.H.'s CLETS report into the record and used it to determine she had committed domestic violence
- Trial court acknowledged 3044 but did not apply it

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## Mutual Restraining Orders

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- *K.L. v. R.H.* cont.
- Held:
- Court failed to consider the required factors necessary to issue mutual restraining orders i.e. if both parties were primary aggressors and neither acted in self-defense
- Court improperly considered R.H.'s past criminal history
- Substantial evidence did not support a DVRO against R.H. but did against K.L.
- Family court must apply 3044 before issuing custody orders when the case returns from dependency court

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## Renewals and Relocation

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- *Ashby v. Ashby*, 68 Cal. App. 5th 491 (Orange)
- Husband appealed renewal of DVRO
- Parties were no longer living in the same state but Husband had visitation and was allowed to see children in Iowa
- Husband had arsenal of guns and argued that he was being unfairly prevented from gun ownership

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## Renewals and Relocation

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- *Ashby*, cont.
- Held:
- Trial court used the right standard to determine renewal of a restraining order
- Survivor proved reasonable apprehension of future abuse even though parties were living in different states where Husband's hostility and anger to Survivor was unchanged

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## Renewals and Excluding Evidence

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- *Marriage of Brubaker and Strum*, \_Cal.App.5th\_ (Los Angeles) [2021 WL 6201726]
- Survivor applied for renewal of DVRO
- Alleged numerous violations of the DVRO and reasonable apprehension of future abuse
- Trial court granted request to exclude allegations of violations because they had been in heard in a 3044 hearing and court there ruled there had been no additional DV
- Trial court focused on whether there had been DV since the original order, ignoring the original abuse that led to the DVRO

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## Renewals and Excluding Evidence

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- *Brubaker* cont.
- Held:
- “Situational abuse” is not an exception to the law that no new abuse need be proven to renew a DVRO
- A court can consider allegations of DVRO violations in determining reasonable apprehension of future abuse for a renewal, even if it was previously heard at a FC 3044 custody hearing which found no violations.
- Court erred by considering only what had happened since DVRO in place and not the original abuse that led to the DVRO

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## DVRO Renewals and Appeals

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- *Marriage of Carlisle*, 60 Cal. App. 5th 244 (El Dorado County)
- Husband is an attorney and was arrested for assaulting the process server of the original DVRO
- Husband attached a GPS tracking device to protected party's vehicle
- Survivor applied for renewal while restrained party was appealing the original order

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## DVRO Renewals and Appeals

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- *Marriage of Carlisle*, cont.
- HELD: DVRO can be renewed even while the original DVRO is being appealed
- DVROs are injunctions which require someone to refrain from a particular act
- Trial courts have the power to extend an injunction while an appeal is in progress to serve ends of justice

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## Other Cases of Note

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- *Williams v. Sup. Ct of Contra Costa*, 71 Cal.App.5th (Contra Costa) – Improper venue for CHRO does **not** make TRO invalid, Protected parties claim of serious emotional distress does not qualify as an injury to person under venue law (CCP 395(a))
- *Goals for Autism v. Rosas*, 65 Cal.App.5th 1041 - Mandatory continuance does not apply after a response is filed in Workplace RO case

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## Family Law

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## Notice and Application of 3044

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- *Noble v. Superior Court of Merced*, 71 Cal.App.5th 567
- Survivor had received 10 year restraining order from Utah after she moved there with their children
- Dissolution judgment was reopened in California and survivor and the kids ordered back to CA
- Restrained party had admitted some of the violence in an email and survivor presented evidence of additional acts of domestic violence both before and after the Utah order was in place
- Trial court repeatedly ordered joint legal and physical custody without mentioning or applying Family Code 3044

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## Notice and Application of 3044

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- *Noble*, cont.
- HELD: 3044 applies for out of state DVRO in last five years where acts defined as abuse would be abuse in CA
- Where there are allegations of domestic violence, the trial court has to notify both parties of 3044 and show proof it did
- Where there are allegations of domestic violence the court has to determine if there was abuse before making a child custody order even if some acts were out of state
- Applies even for temporary orders



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## Accountability & Risk of Harm – Hague Case

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- *Marriage of Emilie D.L.M. & Carlos C.*, 64 Cal.App.5th 876 (San Luis Obispo)
- Carlos C. petitioned to have child returned to Chile based on wrongful removal/retention.
- Emilie argued exception of grave risk of physical or psychological harm
- Carlos C. argued exception where parent and state can reduce the harm

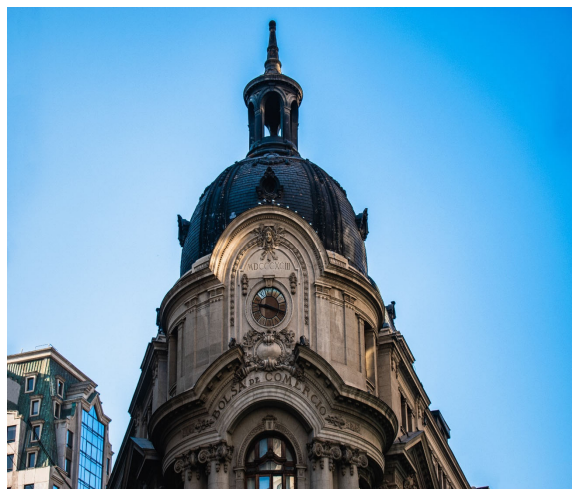
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## Accountability & Risk of Harm – Hague Case

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- *Emilie D.L.M. cont.*
- Held: Risk of grave harm to child cannot be relieved or reduced where parent does not acknowledge their acts and continues to engage in those acts, in this case domestic violence and alcoholism
- Chile's laws punish domestic violence and provide protection orders, it is not enough given Carlos' failure to acknowledge his own actions.



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## Spousal Support Factors & Court Findings

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- *Marriage of Kahan v. Diamond*, \_\_\_ Cal.Rptr.3d \_\_\_ (Los Angeles, 2/5)
- Held: Family Code 4320 does not require the court to identify, put on the record or in writing each factor and how it was weighed, sanctions upheld formal notice not required
- Kahan argued Diamond's actions to modify support were part of a history of litigation abuse. While the trial court did not use the it sanctioned Diamond for his "litigation conduct".
- COA affirmed denial of request to cross-examine Kahan

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## Other Cases of Note

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- *IRMO Erndt & Terhorst*, 59 Cal.App.5th 898, (Solano) - Self Represented Party not entitled to attorney's fees on appeal, even if the party is an attorney
- *IRMO Wozniak*, 59 Cal.App.5th (San Diego) – Rejection of an interspousal transfer deed meant there was no transfer, Restrained party in DVRO later filed deed claiming it was effective

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## Dependency

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## DV and Detriment

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- *In re Solomon B.*, 71 Cal.App.5th 69, (Los Angeles)
- HELD: Having to leave the children behind when fleeing an abusive partner does not itself mean placement with the survivor is a detriment to the child
- Survivor reasonably believed that partner would not abuse the children; kept in regular contact with children; returned as soon as it became clear there was a problem with other parent
- Lack of physical contact during COVID pandemic was understandable not inappropriate

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## DV Survivor and Removal of Child

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- *In re Ma V.*, 64 Cal.App.5<sup>th</sup> 11 (Orange County)
- Mother was survivor of domestic violence committed by child's father
- Mother ended relationship with Father and he had left the family home and that had not changed 10 months later at the court hearing
- Trial court acknowledged domestic violence was old situation but said it was still currently relevant
- Trial court said Mother did not show sufficient proof that she could understand and avoid further abusive relationships.

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## DV Survivor and Removal of Child

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- *In re Ma V.*, cont.
- HELD: Facts did not support by clear and convincing evidence removal of children
- Trial court erred by focusing on parent's history as a victim of domestic violence
- Trial court blamed parent for Dept being unable to interview her VA service providers, though parent had signed a release months earlier
- Case plan was not court ordered and lack of completion unclear

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## DV Survivor and Removal of Child

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- *In re Ma V.*, cont.
- In discussing perceptions of credibility, court notes “[w]e expect such victims to be “sweet, kind, demure, blameless, frightened, and helpless and not a “not a multi-faceted woman who may or may not experience fear or anger “
- “These are the preconceptions that judges and jurors bring with them into the courtroom when they assess the veracity of a victim-witness's story.”
- “We encourage continued diligence and education to guard against such preconceptions.”

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## DV Survivor and Removal of Child

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- *In re Ma V.*, cont.
- “[T]rend of what looks like mothers being punished as victims of domestic violence, it seems as if once a woman is battered, she will forever be faced with losing her children. This is not the legal test.
- “When evaluating the complexity of domestic violence relationships, not every case will be the same. Unlike drug and alcohol addiction, there are no Alcoholics Anonymous (AA) meeting cards, coins, or clean tests to measure success [as a victim of domestic abuse].” (I.B., supra, 53 Cal.App.5th at p. 156, 266 Cal.Rptr.3d 814.)”

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## Abuse and Removal of a Child

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- *In re I.R.*, 61 Cal.App.5th 510 (Los Angeles)
- Parents alleged to have 1-2 incidents of domestic violence
- Father threw a baby shoe at the mother during an argument in front of the child
- Mother alleged Father had slapped her 8 months before this incident
- Parents did not live together

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## Abuse and Removal of a Child

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- *In re I.R.*, 61 Cal.App.5th 510 (Los Angeles)
- HELD: Evidence did not support removal of child from parent even after domestic violence
- Evidence did not show that domestic violence between parents was likely to continue if child was in parent's care
- Parents did not live together and after DCFS prevented parent from visiting the son at the other parent's house he stayed away
- No basis for the argument that "they can't really stay away from each other"

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## Failure to Protect & Risk of Harm

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- *In re Cole L.*, 70 Cal.App.5th 591 (Los Angeles, 2/7)
- Police called to home “observed evidence of a DV altercation” Both parents were screaming and both had scratches. Police thought children were under influence. Tests showed no evidence of substances. Police called DCFS and case opened
- Court declared children dependents based on a “long history of these persons having some domestic violence issues”

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## Failure to Protect & Risk of Harm

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- *Cole L.* cont.
- Held: DV between parents alone did not support finding based on nonaccidental harm
- Substantial evidence did not support children were at
  - ▣ Substantial risk of serious physical harm due to failure to protect
  - ▣ Substantial risk of deliberate infliction of serious physical harm
- The failure to protect a child from unintended consequences of intentional behavior is different from the deliberate (non-accidental) infliction of injuries.

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## Other Dependency Cases of Note

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- *In re S.G.*, 71 Cal.App.5th 654 (Los Angeles), (dissenting opn.)  
Appeal of restraining order denial is not moot where after obtaining a DV TRO, DCFS opened a case and Parent did not appeal the termination of dependency jurisdiction. Need for protection does not end with dependency case

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## Other

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## DV as a Defense Against Eviction

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- *Elmassian v. Flores*, 69 Cal.App.5th Supp. 1 (Los Angeles)
- Survivor had a DVRO and move out order against ex-partner.
- Survivor had a new partner who became abusive
- Landlord tried to evict after 3-day notice. Claimed nuisance and listed incidents involving the ex-partner, incidents with the boyfriend and other claims
- Survivor was not allowed defend against the eviction by showing the incidents were domestic violence as allowed under CCP 1161.3

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## DV as a Defense Against Eviction

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- *Elmassian cont.*
- Held: Domestic violence as a defense against eviction based on nuisance can be raised even where there are other grounds for eviction in the complaint
- A police report counts as documentation to support a defense of domestic violence even if it which contains only the statements of the survivor, does not include information about the other person, and covers only one of the incidents listed in the complaint.
- Substantial evidence supported tenant's affirmative defense of domestic violence committed by tenant's ex-boyfriend

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## Electronic Tracking and Co-Ownership

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- *People v. Agnelli*, 68 Cal.App.5th Supp. 1 (Orange)
- Agnelli and Survivor co-owned vehicle, disputes as to payments. They have a child together.
- Survivor went to a resort with son and Agnelli showed up. She found the tracking device underneath the car
- Held: Law that makes it a crime to use an electronic-tracking device to determine location of a person of a without consent of the owner of the vehicle person a crime was unconstitutional as vague in this case where both parties were co-registered owners of the vehicle

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## Reporting Under CANRA

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- *Doe v. Lawndale Elementary*, \_\_\_ Cal.Rptr.3d\_\_\_ (Los Angeles)
- Doe sued school district for negligence and breach of duty to report child abuse after she was abused by a music teacher
- Alleged that school should have known what was going on but no testimony that teachers or school employees were aware or present or that they were not credible
- Trial court granted order in favor of school without a trial saying school did not violate mandatory duty to report child abuse



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## Reporting Under CANRA

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- *Doe v. Lawndale Elementary* cont.
- Held: Upheld trial court ruling of no evidence of reasonable suspicion requiring reporting
- Reasonable suspicion is based on facts actually known to the mandated reporter, though professionals have a duty to evaluate facts in light of their training
- CANRA not intended to criminalize a failure to take reasonable steps to discover information

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## Federal Firearms Law & DV Against Partner

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- *Hernandez v. Dept of Corrections*, 60 Cal.App.5th 873 (San Bernadino)
- HELD: Job termination upheld because girlfriend was still “similarly situated as a spouse” for purposes of the federal law prohibiting firearms where there is a conviction for DV even without sharing a residence
- Hernandez pled no-contest to misdemeanor DV against girlfriend who did not live with him
- Spending 4-5 nights a week with partner even if not living together is enough where a live in partner would automatically qualify without additional facts

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## Special Immigrant Juvenile Status

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- *In re Scarlett V.*, 72 Cal.App.5th 495 (Los Angeles)
- Held: Trial court erred in saying decision on SIJ status is discretionary; Evidence required the court to enter the SIJ finding
- Child brought by her parents from Honduras. Later was removed from home and declared a dependent based on Father's domestic violence against Mother
- Child was released to Mother and filed for SIJ status as a dependent of the court arguing reunification with Father not possible and not in best interest to return to Honduras

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## Other Cases of Note

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- *Doe v. Damron*, 70 Cal.App.5th 684, (Napa) – Non-CA resident survivor of DV can sue Non-CA resident who committed DV in the state under CA DV Tort law
- *Curtis v. Superior Court*, 62 Cal.App.5th (Los Angeles) Identity of non-testifying expert is not attorney work product absent foundational showing, expert obtained from a confidential lawyers' association listserv

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# Questions?

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# Thank You!

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