June 13, 2022

Senator Thomas J. Umberg
Chair, Senate Judiciary Committee
1021 O Street, Room 3240
Sacramento, CA 95814

Re: AB 2369 (Salas) – Domestic Violence Prevention Act: Attorney's Fees and Costs – Sponsor and Support

Dear Senator Umberg:

On behalf of Family Violence Appellate Project (FVAP), **I write to sponsor and support AB 2369, which will make it easier for survivors of domestic violence to get attorney's fees and costs in domestic violence restraining order (DVRO) cases, and harder for respondents.** AB 2369 will increase meaningful access to legal protection by (1) reducing the chilling effect of current law that prevents some survivors of domestic violence (DV) from seeking protection for fear of being on the hook for thousands of dollars or more in attorney's fees; (2) encouraging attorneys to represent survivors, especially lower income survivors; and (3) discouraging frivolous or abusive requests for protection brought by harmful parties who are not actually survivors. Thus, this bill brings the Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200 et seq.), which governs DVROs, more in-line with other remedial laws that support compelling state interests—here, preventing further abuse and not requiring survivors to fund their own abuse.

FVAP – Who We Are

FVAP is a legal service support center and the only nonprofit organization in California dedicated to representing DV survivors in civil appeals for free. FVAP is devoted to ensuring DV survivors can live in healthy safe environments, free from abuse. This includes a commitment to reducing abusive litigation practices that can harm survivors even after other types of abuse have ceased or diminished, and even after an intimate or close relationship has ended. It also includes a commitment to reduce barriers and disincentives to survivors who are seeking legal protection from abuse. FVAP believes AB 2369 will be a good step forward to reduce the use of DVROs as a tactic of litigation abuse, and to make it easier for actual survivors to get protection.

Background – Financial Abuse, Misguided Courts, and the Need for AB 2369

Financial abuse is prevalent among most abusive relationships. (National Network to End Domestic Violence, *Financial Abuse Fact Sheet*, available at https://nnedv.org/wp-content/uploads/2019/07/Library_EJ_Financial_Abuse_Fact_Sheet.pdf (as of June 13, 2022).) Most survivors of DV have some amount of coerced debt and experience economic loss because of the abuse. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2517 (2019-2020 Reg. Sess., enacted as Stats. 2020, ch. 245, § 1), July 28, 2020; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 975 (2021-2022 Reg. Sess.), April 18, 2022; see also Assem. Bill No. 975 (2021-2022 Reg. Sess.), § 1 [detailing legislative findings of economic abuse, including subd. (d): "Fifty-two percent of domestic violence survivors report experiencing coerced and fraudulent debt of over $10,000 per year."].) These findings have been confirmed by FVAP's 2016 survey of DV service providers (available at https://fvaplaw.org/wp-content/uploads/2017/12/FVAP-2016-Survey-of-CA-Domestic-Violence-Service-Providers-.pdf (as of June 13, 2022)) as well as the California Partnership to End Domestic Violence's 2020 survey of DV survivors (available at https://www.cpedv.org/annual-reports-financials (as of June 13, 2022)).

In part because of this economic abuse, most petitioners (survivors) are not able to pay for an attorney, whereas respondents are more often able to do so. Indeed, about 90% of DVRO litigants are self-represented. (*Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861, fn. 3; see also Stats. 2010, ch. 352 (A.B. 939), § 1, subd. (f) [most family law litigants are self-represented].) DVRO petitioners are "largely unrepresented women and their minor children." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 423.) While DVROs are designed to protect survivors, a survivor's DVRO request can be denied if they cannot advocate for themselves in court or navigate complex rules and laws. **In fact, courts have discretion to deny a DVRO even if they find past abuse has occurred (Fam. Code, § 6300, subd. (a)), so survivors can be ordered to pay for the respondent's attorney's fees even after being abused.** (*Id.*, § 6344, subd. (a).) In addition, even if a survivor can find a way to have an attorney, and then is granted a DVRO, it is less likely that the court will order the respondent pay for the survivor's attorney's fees because, given how the current law is written and interpreted, courts often make it harder for petitioners (survivors) who win to get their attorney's fees, compared to respondents. (See *id.*, § 6344, subds. (a), (b).)

It may helpful to spell out **exactly *how* the current language in Family Code section 6344 creates this imbalance in favor of respondents, to the detriment of survivors-petitioners.** The statute has two subdivisions, (a) and (b). (*Bennett v. Rivers* (Oct. 6, 2021 B301211) WL 4583844 [nonpub. opn.] at pp. *5-8 [discussing the differences between subds. (a) and (b) of Fam. Code, § 6344].) Subdivision (b) was added in 2005. (Stats. 2004, ch. 472 (AB 2148), § 6.) The first subdivision (a) gives the court discretion after notice and a hearing to award either petitioner or respondent attorney's fees and costs if they prove they are a prevailing party. The second subdivision (b) mandates the court award the prevailing *petitioner* attorney's fees and costs if certain conditions are met. Thus, the law as currently written is supposed to give the court discretion to award attorney's fees to the prevailing party in any case, without a favor for one side or the other (Fam. Code, § 6344, subd. (a)), and, separately, the law is supposed to give an additional mandate in favor of petitioners in a limited number of cases (*id.*, § 6344, subd. (b)). **Although distinct in intent, language, and origin, many courts have collapsed the two subdivisions (a) and (b) of Family Code section 6344 together, making it harder for petitioners to get attorney's fees than respondents.**

For these misguided courts, a respondent may get attorney's fees if they prove **two things**: (1) they are "prevailing" (Fam. Code, § 6344, subd. (a)); and (2) the petitioner "has or is reasonably likely to have the ability to pay" (*id.*, § 270).

Yet, for a petitioner to get attorney's fees in these misguided courts, they must prove **four things**: (1) they are "prevailing" (Fam. Code, § 6344, subd. (a)); (2) the respondent "has or is reasonably likely to have the ability to pay" (*id.*, § 270); (3) the petitioner "cannot afford to pay for [their] attorney's fees and costs" (*id.*, § 6344, subd. (b)); and (4) both "parties' respective abilities to pay," including "any factors affecting the parties' respective abilities to pay," make the award "appropriate" under the circumstances (*ibid.*).

As a result, many attorneys are reluctant to take survivors' cases, and many survivors are discouraged from even filing their request in the first place: if they lose, they could be ordered to pay thousands or more for the respondent's attorney's fees, and if they win, the court could deny them attorney's fees for almost any reason, as the matter is discretionary. This was not how attorney's fees were supposed to work pursuant to the DVPA, but given how the language is worded and interpreted by courts across the state, as explained, there is a conspicuous need to update the language to better reflect the Legislature's purpose in **promoting survivors seeking restraining orders and discouraging frivolous requests**

filed by retaliatory opposing parties. (See *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1509 ["We note that the availability of a fee award under [Family Code] section 6344, subdivision (a) serves to dissuade a restrained party from continuing his or her harassing behavior by filing unwarranted applications to terminate the restraining order."]; see also *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 38 ["[F]amily law courts are authorized to impose attorney fee awards as sanctions against persons who frivolously or maliciously and without probable cause request DVPA restraining orders."], citations omitted.)

AB 2369 – How It Will Help Survivors and Deter Abusers

AB 2369 would help to promote these legislative policies that are not currently being realized; and would reduce the chilling effect under the current law, which has led to survivors having to pay the other side's fees, even if the court finds abuse has occurred, just because the survivor could not overcome some evidentiary or procedural barriers to fully present their case.

As an example of how the current law could play out against survivors, say a survivor is of moderate income and can afford to pay for their own attorney—not all that common, but it happens—or, perhaps more commonly, say a survivor is of low or no income and they somehow are able to scrounge up enough to pay for an attorney. If they win and get a restraining order, under Family Code section 6344 as currently written, as explained above, the court could still refuse to give them attorney's fees simply because the statute gives them that discretion, for almost any reason. And, in fact, as explained above, some courts interpret the statute to mean the court should always consider the survivor's needs and ability to pay, and will deny them attorney's fees on that basis, even if they win.

With the current law, then, the court could say, for instance, that the survivor could afford to pay for their attorney on their own, because they had in fact already retained the attorney. **In these situations, survivors essentially must fund their own abuse. If passed, AB 2369 would change the outcome.** In this kind of scenario, AB 2369 would require the court to order the respondent to pay for the survivor's attorney's fees, after taking into consideration the respondent's ability to pay.

Thus AB 2369 would instead require the court, after issuing a DVRO, to order a restrained party to pay the prevailing petitioner's attorney's fees and costs, after determining ability to pay. This bill would also allow the court to order a protected party to pay the prevailing respondent's attorney's fees and costs, after

determining ability to pay, only if the respondent can prove by a preponderance of the evidence that the petition or request is frivolous or solely intended to abuse, intimidate, or cause unnecessary delay.

AB 2369 – Bringing the DVPA In-Line with Other Remedial Statutes

In this way, this bill mirrors similar remedial statutes like the Fair Employment and Housing Act (FEHA; Gov. Code, § 12965, subd. (b)), and the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (c)(1)). (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["There is no doubt that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions [like FEHA], and without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible."]; *Patterson v. Superior Court* (2010) 70 Cal.App.5th 473, 487 ["[T]he Legislature's intent [was] to encourage employees to vigorously enforce the state's antidiscrimination law: In amending California's employment antidiscrimination law to authorize discretionary awards of attorney fees and costs, our Legislature, like Congress before it, sough to encourage persons injured by discrimination to seek judicial relief."]; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 627, fn. 19 ["The dual purpose of this mandatory attorney fee award is to discourage meritless lawsuits and to provide financial relief to the victim of a SLAPP lawsuit by imposing the litigation cost on the party seeking to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The purpose of section 425.16 is clearly to give relief, including financial relief in the form of attorney's fees and costs, to persons who have been victimized by meritless, retaliatory SLAPP lawsuits because of their participation in matters of public significance."]; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 486 ["The fee-shifting provision also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement."].)

Like those statutes, AB 2369 bill will remove the chilling effect in current Family Code section 6344 for survivors in seeking protection, because they can know it will be harder for the respondent to be awarded attorney's fees. (See Rowe, *If We Don't Get Civil Gideon: Trying to Make the Best of the Civil-Justice Market* (2010) 37 Fordham Urb. L.J. 347 [Generic "loser pays" attorney's fees statute deters good faith claims of parties with modest means; making smaller claims viable through fee shifting arrangements is one way to narrow the gap of unmet legal needs].)

And like those statutes, **AB 2369 will encourage more survivors to bring forth more meritorious cases**, with representation, without worrying they may have to pay for their own or the respondent's attorney's fees for the act of making the request; and encourages more attorneys to take low-income survivors' cases. (See Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors* (2013) 36 Harvard J.L. & Gender 224, 246 ["Modern policymakers have provided incentives for private attorneys general in these widespread contexts because of the distinct advantages of private enforcement. A frequently cited advantage of private enforcement is cost efficiency: 'giving private parties a financial interest in enforcing public law is an efficient way to promote the public interest.' Fee-shifting provisions allow the cost of enforcing civil statutes to be borne by defendants (through judgment or settlement) or, of course, unsuccessful plaintiffs."].)

Plus, **AB 2369 will discourage frivolous or abusive requests** from harmful parties who are not actually survivors but are just trying to use the DVRO process solely to further harass the other party or unnecessarily delay case, thus saving time, money, and trauma from survivors and, to some extent, the court system and broader public itself. (See Sabbeth, *What's Money Got to Do With It?: Public Interest Lawyering and Profit* (2014) 91 Denver Univ. L.Rev. 441, 492 ["If we keep in mind that fee-shifting statutes are designed for more than the individual litigants and are aimed at the broader public interest, it is harder to paint the lawyers as greedy for seeking financial compensation, and harder to shrug off the aggregate public impact of refusing to provide this support. The view of public interest lawyering as a charitable endeavor may be clouding the judges' thinking. Moreover, the widespread acceptance of that view obscures the reality that fee-limiting decisions are, intentionally or not, defunding public interest lawyering and 'taking out the adversary' of corporate and government power."].)

AB 2369 – Serving and Bolstering the Purpose of the DVPA

These changes will thusly better serve the broad protective purpose of the DVPA. (See generally *Hogue v. Hogue* (2017) 16 Cal.App.5th 833, 839 ["The very existence of the [DVPA] bespeaks California's concern with an exceptional type of conduct that it subjects to special regulation."]; *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334 [DVPA is to be broadly construed and applied to achieve its remedial purpose of protecting survivors and preventing abuse]; *Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863 ["The [DVPA's] protective purpose is broad both in its stated intent and its breadth of persons protected."].)

As a result, AB 2369 vindicates every person's "right to be safe and free from violence and abuse in [their] home and intimate relationships" (Stats. 2014, ch. 635, § 1, subd. (a)), and promotes the Legislature's goals of preventing abuse and not requiring survivors to fund their own abuse. (See generally Fam. Code, § 6220.)

For these reasons, FVAP is pleased to sponsor and support AB 2369, and respectfully requests your "Aye" vote and strong support. I am happy to discuss further as needed, and am available at (510) 858-7358 or chernandez@fvaplaw.org. Thank you.

Sincerely,

Family Violence Appellate Project

Cory Hernandez

Cory Hernandez, Staff Attorney

cc:
Assemblymember Salas (author; Michael Dyar., staff)