FVAP

Family Violence Appellate Project

Recent California Family Law and Juvenile Court Decisions Involving Domestic Violence

Nancy K. D. Lemon, Esq., Legal Director

Assoc. of Certified Family Law Specialists, Walnut Creek, CA

March 8, 2016

What is FVAP?

Family Violence Appellate Project provides free appellate representation to low and moderate-income family law litigants throughout California in cases involving restraining orders, child custody, and other domestic violence (DV) issues.

What is FVAP?

- A state-bar-recognized Support Center for Qualified Legal Services Providers (e.g., Bay Area Legal Aid, Harriett Buhai Center in LA, etc.)
- Screened over 550 requests for assistance since we started in 2012
- Based in Oakland, serve all of California
- 80% success rate in prosecuting appeals (average: 21%)
- 100% success rate in defending appeals

FVAP's Mission

- California has many well-crafted statutes designed to protect survivors and their children
- However, these laws are under-utilized 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 to guide attorneys and judges throughout California

Case Publication Project

- FVAP screens all Ca. family law and juvenile court decisions to identify those that merit publication, then requests publication.
- We also usually request publication of cases we win if court does not indicate it plans to publish decision.
- Our requests are usually granted, though not always.

2015 Published Decisions: California plus US Supreme Court

- In 2015, FVAP got 12 key family law and juvenile court cases published: 3 cases where we represented a party, 1 where we were amicus, 2 where we provided technical assistance, and 6 through our case publication project.
- (Additionally, the US Supreme Court decided a case involving a husband posting threats on Facebook - FVAP was not involved).

Overview of Training

- Issuing DV Restraining Orders Generally
- Issuing Mutual Restraining Orders
- Renewing Restraining Orders
- Attorneys Fees in Restraining Order Cases
- Right to Judge in Restraining Order Cases
- Custody Cases Involving DV
- Dependency Cases Involving DV
- DV Threats via Internet

Issuing Restraining Orders Generally

Issuing DV Restraining Orders: 2014 Cases

- *Nevarez v Tonna* (6th Dist, 2014) 227 CA4th 774
- *Burquet v Brumbaugh* (2nd Dist, 2014) 223 CA4th 1140
- Both involved girlfriend who broke off relationship, boyfriend then refused to leave her alone
- In each case, he texted, emailed, called, came to her workplace and/or residence over months
- In both cases, court issued DVRO, respondent appealed. Affirmed.

Issuing DV Restraining Orders: 2014 Cases, continued

- *Nevarez v Tonna*, continued:
- Prior to TRO, boyfriend grabbed her and bruised her, attempted sexual assault on another occasion
- At DVRO hearing he promised never to contact her again; she agreed that he had not violated TRO
- *Affirmed*: 1. No need to prove fear of future abuse, just past act(s) of abuse (FC 6300)
- 2. Sending large volume of texts, emails, many late at night = harassment, thus abuse under DVPA

Issuing DV Restraining Orders, 2014 Cases, continued

- *Burquet v Brumbaugh*:
- Similar facts, but no more physical abuse after breakup & prior to TRO
- Boyfriend appealed issuance of DVRO
- *Affirmed:* Texting and showing up at residence, causing scene, refusing to leave constitutes "*disturbing the peace*" & thus "abuse" under DVPA, Family Code § 6203(d)

Issuing Restraining Orders, 2014 Cases: Child Abuse + Adult DV

- *Gou v Xiao* (2014) (1st Dist.) 228 Cal.App.4th 812
- Mother witnessed father physically abusing 8 year old son, father bit mother when she tried to stop him
- Father arrested for beating son
- Trial court denied mother's request for DVRO: son had to apply for own RO since he was the victim, or mother had to become son's guardian ad litem
- Mother appealed, FVAP filed amicus brief

Issuing DVROs, 2014 Cases: Child Abuse + Adult DV, continued

- *Gou v. Xiao*, continued:
- ***Reversed:*** parent can seek restraining order based on abuse against child without becoming child's guardian ad litem, under DVPA
- Father's actions placed mother "in *reasonable apprehension of imminent serious bodily injury to self or the child*,
- and *disturbed her peace* by destroying her mental or emotional calm." (FC §§ 6203, 6211, 6320)

Issuing Restraining Orders : 2015 Cases

- **Questions Presented:**

• Is downloading embarrassing information from the partner's cell phone & computer, then disseminating it to partner's family and friends "disturbing the peace" or "harassment" for purposes of the DVPA?

• Is out of state respondent's challenge to court's exercise of jurisdiction over him in DVRO proceeding waived if he does not file a motion to quash service?

• Is it an abuse of discretion for a court to deny a DVRO based on length of time since last abuse?

Issuing Restraining Orders: 2015 Cases, continued

- *Evilsizor v Sweeney* (1st Dist., 2015) 237 Cal.App.4th 1416
- Husband downloaded 11-12 gigabytes of data from wife's cell phones, hacked into her Facebook account, made exhibits in custody battle; disclosed extremely sensitive info about wife to her father
- Wife testified this caused her shock, embarrassment, fear for her safety, her friends & family were upset
- Court granted 5 year DVRO, prohibited husband from further distributing the info without court permission; husband appealed

Issuing Restraining Orders: 2015 Cases, continued

- *Evilsizor v Sweeney*, continued:

• Held: husband's acts = disturbing wife's peace under DVPA, Family Code § 6320(a); thus order did not violate his 1st Am rights

• Irrelevant whether husband obtained the information illegally, the abuse was the dissemination of it

• Constitutional protection does not apply to speech found to be abusive after a contested hearing

• Court also noted that DVPA does not require physical abuse

Issuing Restraining Orders: 2015 Cases, continued

- *Altafulla v. Ervin* (4th Dist, 2015) 238 Cal.App.4th 571
- When male cohabitant discovered partner was having affair, he sent surveillance report with photos to her friends, relatives, co-workers
- He told her daughters their mother did "blow jobs" on her lover & they could get STDs from her towels; he angrily tried to take children's beds apart
- One daughter was so upset she checked into psychiatric facility; they would not let her go home until he left
- Ex-girlfriend sought 3-year DVRO against ex-boyfriend

Issuing Restraining Orders: 2015 Cases, continued

- *Altafulla v Ervin*, continued
- Ex-boyfriend alleged that ex-girlfriend's having an affair, getting a yeast infection, and filing for a well-supported DVRO against him was abuse or harassment; he requested DVRO against her
- Ex-boyfriend had threatened to shoot his ex-wife and her children; he testified at DVRO hearing that this was not a "death threat"

Issuing Restraining Orders: 2015 Cases, continued

- *Altafulla v. Ervin*, continued:
- Ex-girlfriend changed request to 5 year order at hearing
- Court issued 5-year DVRO protecting her and children
- Issuance of DVRO upheld on appeal
- Held: Ex-boyfriend's actions were alarming, annoying, harassing, intended to cause substantial emotional distress and did cause this to ex-girlfriend and children; this is harassment under DVPA, Family Code § 6320
- Factual accuracy of his statements did not keep them from being abusive

Issuing Restraining Orders: 2015 Cases, continued

- *Altafulla v Ervin*, continued:
- Issuance of DVRO against ex-boyfriend did not violate his 1st Amendment right to free speech or 2nd Amendment right to bear arms
- Ex-girlfriend's actions did not amount to abuse or harassment against ex-boyfriend, so his request for DVRO denied

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks* (3rd Dist, 2015) 242 Cal.App.4th 715
- Wife alleged threats and intimidation by husband before & during marriage
- After separation husband continued to harass and frighten her for months via texts: e.g., "Nothing will ever separate us, we are always going to be together"
- Ex-husband bought ammunition for his gun for the first time, which made ex-wife afraid

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- After ex wife wrote to ex husband asking him to stop contacting her and her family, he stopped
- But 4 months later he started harassing her weekly via texts, gifts, & emails, using other's phones to get around her blocking his number, and guessing her new email address
- Ex-husband started to blame ex-wife, his anger was escalating
- Ex-wife feared for her life & lives of her family

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- Ex wife obtained TRO, had ex husband served in TX, where he had temporarily relocated
- A few minutes before DVRO hearing in CA, ex husband faxed opposition documents to court administrator
- He also mailed documents to ex wife but they did not arrive before the hearing
- Unclear if court ever saw ex husband's documents; never file-stamped by clerk

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- In documents, ex husband claimed he sent "non-threatening messages" for 6 months in attempt to reconcile but stopped when El Dorado Sheriff called him 1 week before ex wife filed for TRO
- He also challenged jurisdiction of El Dorado court since he had never lived there and was now in Texas
- Ex wife testified ex husband hacked into her email account, stole her house key, sent letter and unwanted gifts, tracked down her church & contacted pastor, trying to get ex wife to reconcile with him

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- Ex husband's roommates confirmed much of this
- After he was served with TRO, ex husband urged a friend to get ex wife to withdraw her request for DVRO
- Ex wife testified that he was "hunting her down"
- Court issued 3 year DVRO
- Ex husband appealed: no personal jurisdiction since he was living in TX when served with TRO, no basis for DVRO, and court did not consider his documents

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- DVRO affirmed.
- 1) Ex husband's failure to properly move to quash service waived challenge to personal jurisdiction over him
- 2) Ex husband's opposition papers were not filed in compliance with local court rules prohibiting fax filing in DVPA cases
- 3) His actions met definition of abuse in DVPA: harassing, contacting by mail or otherwise, and disturbing the peace (FC § 6320(a))

Issuing Restraining Orders: 2015 Cases, continued

- *Sabato v Brooks*, continued:
- Harmless error even if court failed to consider opposition papers, since ex husband admitted continuing to contact ex wife after she asked him to stop
- And he admitted this went on for months until Sheriff called him
- "Even if the allegations of threats and/or violence were not considered, these unilateral, unwanted and harassing contacts supported the issuance of the DVRO."

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar* (2d Dist) – (2015 WL 9654036, __ Cal.App.4th ___)
- Boyfriend called teen girlfriend multiple times a day, controlling, isolating, taking her phone, accusing her of cheating on him
- Kept her under surveillance via forcing her to keep her cell phone connected to him all the time, threats to hit her if she did not comply
- Intimidation, threats to beat and kill her, have her arrested

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- Physical violence including during pregnancy: kicked, slapped, pulled hair, punched her, left bruises
- She left him, dropped out of college and social media, changed her phone number, went to counseling
- Last physical abuse: 5-6 months before TRO issued
- Threats via social media: 3 months before TRO issued
- Pre term birth, perhaps based on stress from abuse

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- Trial court found substantial evidence of physical violence, but denied DVRO:
- 1. DVPA does not protect petitioners from mental abuse & controlling behavior, only physical abuse
- 2. Petitioner waited too long to file for TRO and it was not sufficiently likely the abuse would be repeated as boyfriend had moved out of area

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- Ca Family Code § 6301, effective 1/15 (after trial court issued decision in *Rodriguez*):
- "(c) The length of time since the most recent act of abuse is not, by itself, determinative.
- The court shall consider the totality of the circumstances in determining whether a petition for relief will be granted or denied."

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- Counsel: "You're making a determination that there was domestic violence in the past and that that is not sufficient to order a restraining order going forward?"
- Court: "That's right."
- Court: last physical abuse was too remote, and boyfriend moved away, though conceded parties might have contact because of their child

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- Reversed and remanded with instructions to enter DVRO
- 1. Significant acts of emotional abuse = disturbing the peace under DVPA
- 2. Court found past acts of physical abuse; DVPA requires only "a past act of abuse"; boyfriend had *not* moved out of area; legal error to require showing of probability of future abuse

Issuing Restraining Orders: 2015 Cases, continued

- *Rodriguez v Menjivar, continued*
- "… the fact that six months had passed, during almost half of which respondent was subject to a protective order, does not justify dissolving that order and failing to issue a new order."

Issuing Restraining Orders: Mutual Orders - 2014 Cases

- *J.J. v. M.F.* (2014) (2nd Dist) 223 Cal.App.4th 968
- History of serious physical abuse by father: strangling several times, pushing mother out of car and through glass door which cut her, threats
- Mother obtained DVRO, kept address secret, child exchanged at other relatives' residences
- Father dissolved DVRO without notice to mother
- Father didn't bring child's 1 warm jacket, child sick, winter, mother called father several times to ask him to bring jacket

Issuing Restraining Orders: Mutual Orders - 2014 Cases, continued

- *J.J. v. M.F., continued:*
- Altercation when father and his wife came with jacket, father tried to take child from mother's arms, mother pushed him away, child screaming, crying
- Father grabbed mother by neck, strangling her, his wife punched mother, hit her in face with shoe
- Police called, mother filed for new DVRO with supervised visits, no contact between parents

Issuing Restraining Orders: Mutual Orders - 2014 Cases, continued

- *J.J. v. M.F., continued:*
- At hearing, father did not request DVRO
- Court issued mutual DVRO sua sponte, finding father "choked" mother but this was mutual combat, mother's calls were harassment, she pushed father before he strangled her
- Mother appealed, FVAP filed amicus brief

Issuing Restraining Orders: Mutual Orders - 2014 Cases, continued

- *J.J. v. M.F., continued:*
- Reversed order directed toward mother
- FC § 6305: court must find both parties acted primarily as aggressors, not in self defense
- Finding that mother was primary aggressor not supported by evidence, this was self-defense
- Extreme violence in past by father toward mother very relevant to primary aggressor determination

Issuing Restraining Orders: Mutual Orders - 2014 Cases, continued

- *J.J. v. M.F., continued:*
- Mother's calls to father re jacket were not harassing but made in good faith, as child needed it right away, was ill, and had only one warm jacket
- Father never alleged that he felt threatened or abused by mother, did not request DVRO
- Abuse of discretion to order mutual order in this situation

Issuing Restraining Orders: Mutual Orders – 2015 Cases

- **Questions Presented:**
- May the trial court issue mutual DV restraining orders where one party files a response to a DVRO request, but does not explicitly request his or her own DVRO and properly serve the other party with an application?
- Does a party's guilty plea to DV obviate need for trial court to determine whether either party was a dominant or primary aggressor for DVRO?

Issuing Restraining Orders: Mutual Orders – 2015 Cases

- *Isidora M. v Silvino M.* (2015) 239 Cal.App.4th 11
- Volatile marriage
- Wife arrested twice for DV against husband, criminal protective order issued through 7/16
- Wife requested DVRO based on death threats by husband
- Husband objected in writing, but didn't request DVRO
- 5 year mutual DVRO issued *sua sponte* by court

Issuing Restraining Orders: Mutual Orders – 2015 Cases

- *Isidora M. v Silvino M.*, continued:
- Holding: reversed order against wife.
- Trial courts may issue mutual DVRO's only if both parties filed requests & served each other on time
- Due Process issue: notice to opposing party
- Family Code section 6305 mandates court determine whether each party acted primarily as aggressor or in self-defense; court did not do this
- Guilty plea, while admissible, is not conclusive evidence that that party acted primarily as aggressor

Issuing Restraining Orders: Mutual Orders – 2015 Cases

- *Isidora M. v Silvino M.*, continued:
- Family Code § 6305 amended by AB 536, effective 1/1/16
- "… each party [must] present[] written evidence of abuse or DV … using mandatory Judicial Council RO application form …
- [doing this in] responsive pleading does not satisfy obligation to present written evidence of abuse or DV."

Renewal of Restraining Orders – 2014 Cases

- *Eneaji v Ubboe* (2014) (2nd Dist) 229 Cal.App.4th 1457
- Extreme violence during marriage including strangling, severe beatings, threats to kill
- Wife obtained divorce and 3 year DVRO
- Husband violated it 2x, approaching her in public
- Court refused to renew DVRO: violations not violent, wife had not shown reasonable apprehension of future *physical* abuse

Renewal of Restraining Orders – 2014 Cases, continued

- *Eneaji v Ubboe*, continued:
- Appellate court reversed and remanded:
- 1. Not necessary to show any violations to obtain renewal, per Family Code § 6345(a)
- 2. Also, not necessary to show apprehension of future *physical* abuse, but of *any* abuse, per Family Code §§ 6203, 6320, 6345, *Ritchie v Konrad*, (2004)115 Cal.App.4th 1275

Renewing Restraining Orders – 2015 Cases

- **Question Presented:**
- Where there is a long history of serious physical abuse by a father toward a mother, is it abuse of discretion for the trial court to refuse to renew a DVRO if the mother testifies that she is still in great fear, there is no evidence that the father has acknowledged the abuse or gone to court ordered anger management classes or otherwise moved on, and the court admonishes the father not to contact the mother?

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier* (1st Dist) 241 Cal.App.4th 550
- Father knocked mother out, repeatedly threatened to "kick her stupid ass," stuck gun in her mouth and threatened to kill her, 8-9 such incidents over years
- Parties had 8 year old son; after parents separated, father assaulted mother after son's baseball game in front of son, then "choked" the coach

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier* (continued):
- Father arrested for battery on mother but released
- Mother and son afraid father would kill them
- Father acquitted of assaulting mother when she did not appear to testify, due to 30 min. notice from DA
- 2 year DVRO issued
- Court ordered 16 weeks anger management
- Mother and son had nightmares, mother thought she saw father drive down their street a few times

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued:
- At renewal hearing, father denied abusing mother or violating order
- Stated he did not remember being ordered to complete anger management program
- FCS report said son was afraid of father
- Trial court admonished father not to contact mother in future

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued:
- Renewal denied: no reasonable apprehension of future abuse
- Mother appealed
- Appellate court reviewed standard for renewal:
- Family Code § 6345, *Ritchie v Konrad*, *Lister v Bowen*, *Eneaji v Ubboe*

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued
- Held - No legal error:
- Trial court appropriately applied "reasonable woman in same circumstances" standard
- Trial court did not require mother to prove father violated DVRO
- Trial court did not improperly limit definition of abuse under DVPA to only "physical or mental abuse"

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued
- However, *abuse of discretion not to renew DVRO* in this case:
- 1. Facts supporting original order can be sufficient in themselves for renewal – here, history of serious physical abuse
- 2. Lack of violations proved order was effective

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued:
- 3. No showing of change of circumstances since DVRO issued: father failed to attend anger management classes ordered by family court as condition of visitation with son, parties still in contact as co-parents
- 4. Court admonishing father not to contact mother indicated it believed she was still in danger

Renewal of Restraining Orders – 2015 Cases, continued

- *Cueto v Dozier*, continued:
- Mother demonstrated reasonable apprehension of future abuse
- Reversed and remanded for trial court to determine whether to issue renewed DVRO for 5 years or permanently
- See also *Minkey v MacIntyre* (1st Dist, 2015, unpublished)(similar facts and holding)

Attorneys Fees in Restraining Order Cases – 2015 Cases

- **Questions presented:**

- Does petitioner for DVRO have to request attorney's fees in initial application for TRO?
- Does petitioner have to request attorney's fees on official Judicial Council form?

Attorneys Fees in Restraining Order Cases – 2015 Cases, continued

- *Faton v Ahmedo* (4th Dist.) 236 Cal.App.4th 1160
- DV survivor initially self-represented, so did not request attorney's fees in her DVRO petition
- When opposing party hired a lawyer, survivor did as well
- Survivor obtained DVRO, then asked for attorney's fees as prevailing party

Attorneys Fees in Restraining Order Cases – 2015 Cases, continued

- *Faton v Ahmedo*, continued:
- Opposing party said attorney's fees had to be requested in initial DVRO petition
- *Held*: Attorney's fees can be granted after "notice and a hearing," even though not requested on standard Judicial Council DV forms, and they don't have to be requested in initial DVRO petition. Fam. Code 6344.

Right to Judge in Restraining Order Cases – 2015 Cases

- **Question Presented:**

- Is a DVRO void if there is no evidence in the record that a self-represented party was given notice of the right to a judge rather than a commissioner?

Right to Judge in Restraining Order Cases – 2015 Cases, continued

- *Michaels v Turk* (4th Dist.) 239 Cal.App.4th 1411
- Parties lived together 5 years, child born in 2012
- Litigating for 10 years over custody and child support
- Mutual RO's prohibiting contact between parties and father's wife, federal RO prohibiting father from contacting son, mother had sole custody
- After federal order over, father sought change to sole custody; 6 day trial; denied

Right to Judge in Restraining Order Cases – 2015 Cases, continued

- *Michaels v Turk*, continued
- Custody change denied in part due to father's 3 prior felony convictions, and his child abuse & neglect
- In 2012, self-represented father lost appeal regarding his request to modify child support, having failed to follow through at trial court (unpublished)

Right to Judge in Restraining Order Cases – 2015 Cases, continued

- *Michaels v Turk*, continued:
- Mother posted negative comments on father's business website, InvestorsHub, saying he was a dope, deadbeat dad, practically lives in the courtroom, convicted criminal and liar, loser, etc.
- Father requested DVRO
- Mother represented self at hearing

Right to Judge in Restraining Order Cases – 2015 Cases, continued

- *Michaels v Turk*, continued:
- Commissioner found harassment, entered 3 year DVRO ordering mother to stay away from father and prohibiting her from posting negative and harassing comments about father

- Appellate court voided DVRO

Right to Judge in Restraining Order Cases – 2015 Cases, continued

- *Michaels v Turk*, continued:
- No evidence in record that mother expressly or impliedly consented to commissioner hearing DVRO matter
- Violation of CA Constitution & CA appellate cases
- Local rule states self represented parties must be informed of right to judge and asked on record if they stipulate to commissioner

Child Custody Involving DV – 2014 Cases

- *Christina L. v Chauncey B.* (2014) (1st Dist) 229 Cal.App.4th 731
- *Fajota v Fajota* (2014) (4th Dist) 230 Cal.App.4th 1487
- Similar facts: evidence of extensive physical abuse by father toward mother presented at trial
- In spite of this, court awarded joint physical and legal custody to Chauncey B. and joint legal custody to Mr. Fajota
- Reversed - failure to comply with FC § 3044.

Child Custody Involving DV – 2014 Cases

- *Christina L. v Chauncey B:*
- Court granted 3 year DVRO protecting mother, father had one monthly 2 hour supervised visit
- Later: mother awarded sole physical and legal custody, criminal protective order in effect, another DVRO granted for 2 years due to stalking at work
- Father had very little contact with children for 5 years
- He requested termination of DVRO and sole custody
- Court granted joint physical and legal custody, equal timeshare

Child Custody Involving DV – 2014 Cases

- *Christina L. v Chauncey B., continued:*
- Reversed and remanded
- 1. Trial court ignored FC § 3044 presumption, triggered by DVRO
- 2. Trial court did not require father to show changed circumstances since original order

Child Custody Involving DV – 2014 Cases

- *Fajota v Fajota:*
- Father abused mother and children, CPS involved
- Father admitted physical abuse of mother, for which he was arrested, to FCS and at trial
- FCS recommended joint legal custody
- Court gave father copy of FC § 3044, found abuse occurred, but denied DVRO: "He's not going to hit you in the head to get your attention any more."
- Court awarded joint legal custody, sole physical custody to mother; mother appealed joint legal custody order

Child Custody Involving DV – 2014 Cases

- *Fajota v Fajota, continued:*
- Ongoing abuse by father, mother obtained divorce and 1 year DVRO
- Court continued joint legal custody order
- Reversed and remanded: 3 different trial court judges abused their discretion when awarding joint legal custody and continuing this order, after finding that father had abused mother
- Trial court ignored FC § 3044, which is mandatory

Interstate Custody Issues – 2014 Cases

- *Keisha W v Marvin M* – (2014) (1st Dist) 229 Cal.App.4th 581
- Abused mother fled to CA from TX with son, lived here > 6 months, CA court modified TX joint custody order to sole custody to mother, granted DVRO to mother
- Father took child to NV, refused to return him, appealed CA order as invalid due to mother's unjustifiable conduct, denied perpetrating DV
- **Affirmed.** CA properly asserted jurisdiction. Mother's conduct OK because of DV + neither parent lived in TX

Spousal Support – 2014 Cases

- *In re Marriage of JQ & TB* (2014) (4th Dist) 223 Cal.App.4th 687
- Immigrant battered wife spoke no English, requested DVRO and temporary spousal support while DV criminal charges against husband pending
- Court denied both requests, no authority to issue spousal support before DV finding made
- **Reversed:** spousal support order can be awarded in DVRO action before finding of DV has been made

Child Custody – 2015 Cases

- **Question Presented:**

- In a proceeding under the Hague Convention on International Aspects of Child Abduction, may the trial court hold a summary hearing on the issue of grave risk if a child is returned to the home country, or is it required to hold a full evidentiary hearing?

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard* (4th Dist, petition for publication granted 1/15/16)
- US citizen woman married Danish man in US, had 2 daughters, moved to Germany for 1 year for man's job training, planned to return to US
- He lost job, moved family to Denmark without mother's consent
- Mother later argued father's moving children to Denmark = abduction under Hague Convention but Danish courts would not recognize this

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- In Denmark, father tried to cut mother out of girls' lives, filed false police reports against her, tried to get her deported to US
- Father very violent to mother and girls, threatened to kill mother, sexually assaulted her, she was hospitalized, stayed in DV shelter more than once
- Indications that he was sexually abusing girls

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- Mother had visitation in Denmark but ordered to turn girls over to father
- Girls told Danish authorities father hit them; witnesses documented black eyes, bruises on several occasions; this continued 4 years
- Danish court gave father custody in spite of this
- Older daughter ran away from father multiple times
- Mother's mother brought older daughter to US, mother followed

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- Father petitioned for girl's return under Hague Convention on International Aspects of Child Abduction
- Father obtained arrest warrant for mother in Denmark for abducting older daughter
- Father given temporary custody of girl in CA; she vomited on police when they removed her from mother
- CA trial court admitted evidence that Danish court gave father custody, refused to admit mother's evidence of grave risk to children or Danish orders giving her temporary custody

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- Court met with older girl in chambers, no one else present, record sealed
- Court averred that girl stated she did not fear father and did not recall running away from him
- Court denied mother's request for child custody evaluation, including investigating why girl apparently recanted
- Court refused to admit father's email containing death threat against mother and younger girl, sent after Danish custody order made

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- Court ordered older girl returned to father in Denmark
- Court stated that Denmark is a civilized country, fully capable of making decision in best interest of children, even though mother might not like the decision or the Danish court might not find her side to be true

Child Custody Involving DV – 2015 Cases, continued

- *Noergaard v Noergaard, continued*
- Appellate court issued lengthy opinion detailing evidence of serious physical abuse against mother, girls
- Stated that father's argument that his alleged death threat was harmless error was "preposterous," as threat "automatically constitutes grave risk of harm" prohibiting the child's return
- Remanded for new trial – "a full and fair hearing" on the issue of grave risk, in which mother would be allowed to present all relevant evidence; she averred Danish courts never allowed her to present this either

Dependency Cases Involving DV – 2015 Cases

- **Questions Presented:**
- If an abused mother has been peacefully separated from the father for years, then he assaults her in front of the children, after which she immediately seeks help from police, has she failed to protect the children from the father?
- If an abused mother does not know of the father's criminal history and she and the children have almost no contact with him after she leaves him, has she failed to protect them from him?

Dependency Cases Involving DV – 2015 Cases, continued

- **Questions presented**, continued:
- In a DV case where child's home residence is a foreign country but the court of that country is not willing to discuss jurisdiction with a US court, may the US court exercise temporary or permanent jurisdiction under the UCCJEA?
- If a child is present during a DV incident between its parents, can this be a basis for juvenile court asserting jurisdiction over the child?

Dependency Cases Involving DV – 2015 Cases, continued

- *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
- In 2013, mother and father separated, had contact only when exchanging children, got along well
- In 2014 during exchange, father drinking at party, asked for ride to his home, mother agreed
- Father jealous, called mother names, pinched her, grabbed sunglasses off her face & broke them

Dependency Cases Involving DV – 2015 Cases, continued

- *In re Jonathan B.*, continued:
- When she stopped car, father threw mother's things into street, punched her in face, slapped her
- Children witnessed all this, crying and upset
- Mother immediately drove to police station, obtained report and Emergency Protective Order
- DCFS filed § 300 petition alleging mother failed to protect children by allowing father to frequent children's home and have unlimited access to them
- Father pled no contest at juvenile court hearing

Dependency Cases Involving DV – 2015 Cases, continued

- *In re Jonathan B.*, continued:
- Over mother's objection, juvenile court sustained petition that mother intentionally hurt & neglected children, & they were at "substantial risk" of suffering serious physical harm
- Appellate court reversed due to lack of substantial evidence that mother failed to protect children
- Not foreseeable that father would again assault mother in front of children after 5 years of no violence
- Courts should not penalize mothers for reporting abuse – "this is the kind of response that should be encouraged."

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M.W. v. K. G.* (2nd Dist., 2015) 238 Cal.App.4th 1444
- 2007: mother called police after father slapped her in face in front of infant, cooperated with them but declined EPO; father arrested but not prosecuted
- 2008: Mother left father due to DV, no further incidents of violence
- Little contact with father for years, his whereabouts unknown by mother
- 2013: Mother drank & took drugs, DUI with children in car, she called 911, went into treatment program

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M.W.*, continued:
- DCFS filed petition alleging children at risk of physical and emotional harm
- Mother pled no contest, trial court sustained petition, placed children with maternal grandmother
- DCFS found father in jail awaiting trial for sexually assaulting stranger in 2009 at gun point (arrested in 2013), & found he was a felon and registered sex offender from juvenile offense in 1987

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M.W.,* continued:
- DCFS filed 2nd petition: father's criminal conduct endangered children, mother failed to protect them from sexual abuse, she did not "press charges" for DV 7 years earlier or accept Emergency Protective Order
- Trial court sustained petition and ordered children removed from mother

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. W.,* continued:
- Appellate court reversed:
- 1. Evidence insufficient to support finding that prior DV placed children at risk of current physical harm
- Older child said never saw anyone hit mother, younger child not born at time of earlier DV
- No contact between children and father since 2013
- Father in jail awaiting trial on felony

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M.W.*, continued:
- Other bases for reversal:
- 2. Mother's failure to obtain EPO in prior DV incident did not place children at current risk of physical harm
- 3. Evidence insufficient to show mother knew or should have known of father's prior criminal conduct

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M.W.,* continued:
- Trial court erroneously assumed that people accepting EPOs are provided with restrained person's criminal record, which would have shown father's criminal history as sex offender
- Even if mother had obtained EPO in 2007, this would not have informed her of father's alleged crime 2 years later in 2009
- Obtaining an EPO is "an advisable but not mandatory course of action"

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.* (4th Dist., 2015) 240 Cal.App.4th 703
- Father in Navy in San Diego abused mother in front of 18 month old son ("choking", hitting, throwing, & pinning her); mother hit father with piano stool, kicked him, shredded his shirt; father holding son during part of this
- Mother contacted Naval command, who issued Military Protective Order (MPO) removing father from home pending investigation
- Parents requested that MPO be rescinded, claiming violence would not happen again

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Neither parent expressed empathy for son or seemed to understand the danger they put him in
- Nor could they provide description of skills they had developed since incident to prevent future violence
- Father angrily blamed mother for involving his command
- Both parents minimized and denied prior incidents where father abused mother, including during the pregnancy with MM – mother fell to the floor

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Juvenile court ordered child to stay with mother, supervised visits with father, reunification plan, restraining order against father
- Mother said they needed help before father returned home, but recanted her initial reports of history of DV by father
- Both parents continued to deny effect on child of witnessing DV, claimed child thought they were "playing"

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Mother Japanese; child born there: dual citizen of US and Japan
- Family first resided in Japan, in US less than 6 months, Japan = "home state" of child
- Parents intended to stay in US, no prior custody proceedings in Japan
- Juvenile court asserted emergency jurisdiction under UCCJEA (foreign country = another US state)

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- US court attempted to discuss jurisdiction with court in Japan by phone, email and letter
- Japanese court said not appropriate to discuss this by phone, email or letter, must use diplomatic services

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Mother went to court-ordered DV counseling, denied past DV by father, said any past DV was mutual, wanted to keep family intact
- Evidence of prior DV between parents presented to juvenile court
- Court asserted permanent jurisdiction, removed child from father while reunification services continued
- Mother appealed assertion of jurisdiction on several grounds

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Affirmed: 1. CA properly asserted subject matter jurisdiction over child where Japan declined to exercise jurisdiction, child and parents had significant connection with CA, & substantial evidence re child is in CA (Family Code § 3421)
- 2. Where other jurisdiction does not expressly decline to assert jurisdiction but declines to discuss it, CA may assert jurisdiction over child as it is the more appropriate forum (Id.)

Dependency Cases Involving DV – 2015 Cases, continued

- *In re M. M.*, continued:
- Mother also argued jurisdiction based on DV = error because violence not directed at child
- Appellate court held there was ample evidence showing substantial risk of serious physical harm to child inflicted non-accidentally by mother and/or father, since child was in father's arms during part of last incident, and due to history of DV by father toward mother

DV Threats via Internet – 2015 Cases

- **Question Presented:**
- In a federal prosecution where a husband posted lyrics about killing his wife, co-workers, law enforcement, and a kindergarten class on Facebook but claimed they were not intended as threats, does the prosecution have to prove intent to threaten or is the standard whether a reasonable person would interpret the postings as threats?

DV Threats via Internet – 2015 Cases, continued

- *Elonis v U. S.* (US Supreme Court, 2015) 135 S.Ct. 2001
- After wife left him and took children, husband posted self-styled rap lyrics on Facebook under pseudonym
- His postings included violent words and images re wanting to kill his wife, his co-workers, and a kindergarten class in" the most heinous school shooting ever imagined"
- His postings said these were fictitious, not intended to depict real people, therapeutic, and he was exercising 1st Amendment rights

DV Threats via Internet – 2015 Cases, continued

- *Elonis v U. S.,* continued:
- Wife obtained DVRO
- Husband posted that a DVRO cannot stop a bullet, threatened to blow up state and federal law enforcement
- Boss fired husband for threatening co-workers and told FBI, who investigated husband's Facebook postings
- After FBI came to his house, husband posted threat to kill female agent with suicide bomb

DV Threats via Internet – 2015 Cases, continued

- *Elonis v. U. S.,* continued:
- US Attorney prosecuted husband for transmitting threats to injure someone in interstate commerce
- At trial, husband claimed 1st Am supported his posting and he did not intend it as a threat, also said he was emulating Eminem, who had similar lyrics re his ex-wife
- Jury instructed to use reasonable person standard
- Husband convicted of criminal threats
- 3rd Circuit affirmed; all but 2 circuits use this standard

DV Threats via Internet – 2015 Cases, continued

- *Elonis v U. S.*, continued:
- **Reversed.** In prosecution for threatening communications, prosecutor must prove defendant intended to threaten victim or knew communications would be viewed as threats.
- Standard is not how a reasonable person would interpret communications – this is a tort standard.
- Criminal statutes are generally interpreted to contain *mens rea* requirement.
- Court did not consider 1st Amendment issues.

Questions?

Thank You!

- Erin Smith, Esq., Executive Director
  - esmith@fvaplaw.org
- Nancy K.D. Lemon, Esq., Legal Director
  - nlemon@fvaplaw.org
- Jennafer Wagner, Esq., Director of Programs
  - jwagner@fvaplaw.org
- Shuray Ghorishi, Esq., Staff Attorney
  - shuray@fvaplaw.org

1814 Franklin St. Suite 805

Oakland, CA 94612

(510) 858-7358 (tel)

(866) 920-3889 (fax)

www.fvaplaw.org