



**What Evidence to Extend a Domestic Violence
Restraining Order:
Lessons from *Cueto v. Dozier***

Jennafer Dorfman Wagner, Esq., Director of Programs
Shuray Ghorishi, Staff Attorney

December 17, 2015

California State Bar Webinar

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 500 requests for assistance since we started in 2012
- Based in Oakland, serve all of California
- 88% 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 request publication of our cases if merited and the court does not initially order publication.
- Since beginning in 2012, our work has resulted in **20** key family law and juvenile court cases being published.

DVRO Renewals

Temporary Restraining Orders (21 days)



Long-Term Domestic Violence Restraining Orders (up to 5 years)



Restraining Order Renewals (5 years or permanent)

The Statutory Framework

- Cal. Family Code section 6345(a):

*"In the discretion of the court, the personal conduct, stay-away, and residence exclusion orders contained in a court order issued after notice and a hearing under this article may have a duration of not more than three years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. **These orders may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party.**"*

Ritchie v. Konrad (2004) 10 Cal.App.4th 1275

- Ritchie v Konrad is a 2nd District Court of Appeal decision, outlining the criteria a trial court should apply in deciding whether to renew a DVRO
- Trial court should grant a requested extension unless the request is contested
- If the request is contested, then a trial court should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a **"reasonable apprehension" of future abuse**

Ritchie v. Konrad (Cont.)

- Factors to consider when determining whether the “Reasonable Apprehension” test is satisfied
 - ▣ Trial Court should consider **the evidence and findings** on which the initial order was based
 - But, a party cannot challenge the truth of the evidence and findings underlying the initial DVRO
 - ▣ Trial Court should consider any significant changes in circumstances surrounding the events justifying the initial DVRO
 - ▣ The Trial Court should consider the “burdens” the DVRO imposes on the restrained party if the reasonable apprehension of future abuse does not involve physical abuse (i.e. unwanted telephone calls, letters, email)

Cueto v. Dozier – The Facts

- *In 2012, Ms. Cueto obtained a 2-year Domestic Violence Restraining Order (DVRO) against the father of her son, Mr. Dozier.*
- *Ms. Cueto's DVRO request was precipitated by an attack by Dozier at their 8 year old son's baseball game outlined in her declaration:*
 - ▣ *After the game, Mr. Dozier began yelling at their son who began to cry and shake.*
 - ▣ *When Ms. Cueto attempted to intervene, Mr. Dozier yelled profanities at her, refused to let her walk away, punched at her hitting her nose, grabbed her and threw her to the ground twice.*

Facts (cont'd)

- *Ms. Cueto and her son were able to leave, and when she looked back, she saw Mr. Dozier strangling her son's baseball coach with his hands.*
- *In his Response, Mr. Dozier denied any abuse, stating the argument began when he was speaking to his son who was upset after his game, that Ms. Cueto came up and began yelling and calling him names and pointing her hands in her face. She fell over when he grabbed her hands to block her from jabbing him in the eye.*
- *In Reply, Ms. Cueto submitted a police report in which three witnesses stated to police that Mr. Dozier struck Ms. Cueto and pushed her to the ground, and that after she left Mr. Dozier placed his left hand on the coach's neck for one second while yelling at the coach.*
- *Mr. Dozier was arrested that evening and criminally charged.*

Facts (cont'd)

- In her petition for a restraining order, Ms. Cueto stated that while the parties were in a relationship, Mr. Dozier physically assaulted her on at least 3 occasions. On one occasion, he punched her unconscious.
- Ms. Cueto's petition also alleged that on two occasions after the parties broke up, in August 2010 and 2011, Mr. Dozier became hostile when Ms. Cueto said their son did not want to play football, and he threatened to "kick her ass."

Facts – Renewal Request

- In 2014 Ms. Cueto filed a request to renew her DVRO.
- In her renewal request she relayed her continuing fear, and actions taken to avoid running into Mr. Dozier.
- The request also alleged Mr. Dozier had twice violated the DVRO by driving by her home.
 - ▣ On the first occasion Ms. Cueto stated she looked out at a car playing loud music, which she recognized as one driven by Mr. Dozier, and then the car pulled over and she recognized Mr. Dozier himself.

Facts – Renewal Request

- In her testimony, Ms. Cueto testified to additional acts of physical abuse by Mr. Dozier during their relationship, including sticking a gun in her mouth and threatening to kill her.
- Mr. Dozier testified, denying any history of abuse, stating that if there was a history he was hard pressed to know why the police weren't called.
 - ▣ These are the facts highlighted in the COA opinion, and I think this is really useful because so many abusers rely on a lack of records to try and show there was no abuse when they know very well that lack of records results from the fear and shame they instilled in their victims. Great to have a published opinion that doesn't support abusers' world view.

Facts – Renewal Request

- Mr. Dozier stated he had been acquitted of the criminal charges stemming from the April 2012 attack. He testified this was because Ms. Cueto failed to appear and cited that as evidence that she was not really afraid of him.
- Mr. Dozier denied driving by Ms. Cueto's house, and submitted a letter from his girlfriend stating the car belonged to her but had no radio system, and had been impounded for unpaid tickets at the time of the second alleged violation.

Facts – Renewal Request

- Family Court Services interviewed the parties' son, and filed a report.
 - ▣ Their son implied the April 2012 incident began when Mr. Dozier got angry at him for not defending himself when a teammate threw a glove at him, and his mother told his father to stop.
 - ▣ Their son reported his father was calling him disparaging names.
 - ▣ Their son reported being afraid of his father because of how aggressive his father was with his mother and his coach.
 - ▣ The report showed that Mr. Dozier had previously been ordered to attend an anger management program, but had not.

Procedural History

- *The initial DVRO petition was made in April 2012.*
- *Mr. Dozier filed a Response on May 15, 2012.*
- *The hearing on Ms Cueto's request for a long-term was held on July 13, 2012 and resulted in a 2 year DVRO.*
- *Mr. Dozier did not appear at that hearing, he later stated he was mistaken about the time.*

Procedural History (cont'd)

- On April 23, 2014 Ms. Cueto filed a request to renew the DVRO permanently.
- The court held two hearings on the renewal request: June 25, 2014 continued to July 9, 2014.
- The trial court denied the renewal request.
- In denying the request, the court admonished Mr. Dozier that if he contacted Ms. Cueto in any way it would strongly consider issuing another restraining order.

Procedural History(cont'd)

The trial court issued a written Statement of Decision, based on a request from Ms. Cueto's trial counsel, denying the renewal "for the following reasons:

- (1) no testimony could be provided to the court that respondent was the person who drove by the petitioner's home twice in the last two years in a white Lexus,
- (2) no testimony was provided to the court of any violations of the restraining order,
- (3) petitioner did not show a reasonable apprehension of [sic] fear, for physical or mental abuse,
- (4) [b]ased on the testimony and documents presented, and the facts showed that at two times within the last two years a white Lexus vehicle drove down petitioner's street, never being able to identify respondent as the person involved, the Court rules that there is insufficient evidence at this time to renew the restraining order."

Procedural History (cont'd)

- The trial court agreed to stay the DVRO termination pending appeal.
 - Try this if you can!

Procedural History (Cont'd)

- The Appeal alleged first and foremost that the trial court had committed reversible legal error by:
 - 1) requiring violations of the DVRO to support renewal;
 - 2) Failing to evaluate the reasonableness of Ms. Cueto's fears from the perspective of a reasonable woman in her circumstances;
 - 3) Limiting the definition of abuse to physical or mental abuse.

Procedural History (Cont'd)

- The Appeal argued that the trial court had also abused its discretion by failing to issue a renewal based on the record before it.
- This argument focused on:
 - ▣ The long history of violent abuse;
 - ▣ The absence of any chance in circumstances;
 - ▣ Any burdens on Mr. Dozier were irrelevant because Ms. Cueto reasonably feared future *physical* abuse;
 - ▣ Thus all the *Ritchie* factors overwhelmingly favor renewal.

How FVAP became involved

- Ms. Cueto was represented at trial by attorneys from Cooley, LLP who had taken the case pro bono on referral from the San Mateo County DV Collaborative, made up of San Mateo Legal Aid, Bay Area Legal Aid and CORA (Communities Overcoming Relationship Abuse).
- The Consortium advised trial counsel FVAP was available to provide technical assistance between the June and July hearings

How FVAP became involved (cont'd)

- We provided technical assistance to trial counsel regarding requesting a statement of decision.
- We provided technical assistance to trial counsel relating to available post-trial relief.
- We worked with trial counsel to assess the merits of an appeal.
- We came on as co-counsel, helped to develop and execute an appellate briefing strategy, and helped prepare co-counsel for oral argument.

How FVAP became involved (cont'd)

- After the Court of Appeal issued its opinion, FVAP assessed the case for publication and made a successful publication request.

The Holding: No Legal Error

- The appellate court did not find that there was legal error:
 - ▣ Trial Court did apply the “reasonable person in the same circumstances” test when assessing whether Cueto’s fear of future abuse was reasonable.
 - ▣ Cueto raised allegations of violations of the restraining order, and the court properly addressed this evidence in determining whether her fear was reasonable, this was not requiring additional acts of abuse in order to renew.

The Holding (Cont'd)

- Court's reference to "physical or mental abuse" was not a legal error, it was just the trial court's shorthand for the lengthy definition of abuse in the DVPA.
 - *No relevant evidence of abusive acts were excluded.*
 - *Absent any evidence to the contrary, we presume that the trial court applied the correct legal standard. (Armando D. v. Superior Court (1999) 71 Cal.App.4th 1011, 1025).*

The Holding: Abuse of Discretion

The trial court abused its discretion in finding Cueto had not demonstrated (by a preponderance of the evidence) a reasonable apprehension of future abuse.

- In so holding, the trial court relied largely on the lack of any violation of the restraining order.
 - ▣ That the initial restraining order proved effective is a good reason to seek renewal (citing Ritchie).

Abuse of Discretion (cont'd)

Each of the Ritchie factors support renewal:

1. The facts underlying the initial DVRO
(as per *Ritchie*, these will often be enough *in themselves* to support renewal):

- The initial RO followed a violent incident in 2012.
- There was evidence of a troubling history of physical abuse, including being punched in 2002, and threatened on two occasions in 2010 and 2011.

Abuse of Discretion (cont'd)

2. No Changed Circumstances:

- Nothing in the record suggests Dozier “had moved on” with his life so far that the opportunity and likelihood of abuse has diminished.
- ▣ To the contrary, Dozier failed to attend court-ordered anger management that was part of custody order.

Abuse of Discretion (cont'd)

- “we are troubled by the comments the trial court made to Dozier at the conclusion of the hearing *denying*” the renewal “to the effect that Dozier did not have ‘free reign to contact’ Cueto or to ‘drive by her house, or anything of that sort;’ and that he did not have ‘free license to contact her in any way.’ These comments suggest the trial court believed there was a need to admonish Dozier . . . he must continue to stay away . . . but without giving Cueto the legal protection of a restraining order.”
- The comments “bolster our conclusion that Cueto had demonstrated a reasonable apprehension of future abuse.”

How it Builds on Ritchie

- In *Ritchie*, the 2nd District Court of Appeal outlined the standard for renewal and the factors a trial court should consider when determining whether a protected party has a “reasonable apprehension” of future abuse
- *Cueto* helps illuminate the evidence necessary to establish “reasonable apprehension”
 - ▣ What evidence and/or findings supporting an initial order show that the order should be extended into the indefinite future
 - ▣ No change in circumstances supports renewal

Distinguishing *Lister v. Bowen*

- 1st District Court of Appeal decision
- Appellate panel: Justice Lambden, Kline and Richman
- Facts: Lister filed a request to renew her three-year DVRO, which was based on a finding that Bowen was stalking her, including suddenly appearing at her workplace. The Trial Court granted her renewal and Bowen appealed
- Holding: The Trial Court did **NOT** abuse its discretion to conclude that Lister's evidence indicated that it was more probable than not that her apprehension of future abuse was genuine and reasonable

Distinguishing *Lister* (cont'd)

- Lister's evidence submitted in support of her renewal request
 - ▣ Recent violation of the DVRO where Bowen went to her workplace
 - The trial court's great emphasis on Bowen's knowing violation does not exceed the bounds of reason. "Any violation of a restraining order is very serious, and gives very significant support for renewal of a restraining order."

- It was reasonable to conclude that the violation of going to Lister's workplace would make her feel apprehensive about her safety, given the facts underlying the issuance of the initial RO (i.e. stalking, particularly showing up to her workplace).
- Evidence that she stayed away from her workplace after she discovered he was there and that she was "very distressed, crying, unable to focus on her...caseload, in fear" after she returned to work, amply supported the trial court's conclusion that she had a genuine and reasonable apprehension of future abuse.

Distinguishing *Lister* (cont'd)

- ❑ Testimony that Bowen came within a couple blocks of Lister's house in 2008 and 2009
- ❑ Testimony that he sent mail to her employer
- ❑ Testimony that he mailed her the motion for reconsideration, despite the fact that he was represented by counsel
- ❑ Testimony that he had inappropriate involvement with her family
- ❑ Testimony of litigation abuse (i.e. he continuously filed paperwork with the court since she filed for the initial restraining order that caused her to miss work)

Distinguishing *Lister* (cont'd)

LISTER	CUETO
Affirmed the TC's issuance of a DVRO renewal based on the abuse of discretion standard	Reversed the TC's denial of a DVRO renewal based on the abuse of discretion standard
Abuse underlying the initial DVRO was stalking	Abuse underlying the DVRO was physical abuse, with a particularly violent incident
Appellate Court supported the DVRO renewal, in part, based on the TC's finding that the restrained party <i>had violated</i> the DVRO	Appellate court noted that it is an abuse of discretion to determine that the protected party's reasonable apprehension of future abuse was unreasonable based in large part on the fact that the restraining order had NOT been violated



Questions?

Thank You!

- Jennafer Wagner, Esq., Director of Programs
 - jwagner@fvapl.org
- Shuray Ghorishi, Esq., Staff Attorney
 - shuray@fvapl.org

1814 Franklin St. Suite 805

Oakland, CA 94612

(510) 858-7358 (tel)

(866) 920-3889 (fax)

www.fvapl.org