



California Lawyers Association

*presents*

2023 Family Law Year In Review

1.25 Hours MCLE; Legal Specialization in Family Law

Saturday, September 23, 2023

10:00 AM - 11:15 AM

Speakers:

**Hon. Mark Juhas**

Conference Reference Materials

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# FAMILY LAW UPDATE

JUDGE MARK JUHAS  
SEPTEMBER 23, 2023

CALIFORNIA LAWYERS ASSOCIATION

SAN DIEGO / SEPTEMBER 21- 23

# ANNUAL MEETING

BREAKING BARRIERS

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# DOMESTIC VIOLENCE

# IRMO Destiny and Justin C. (2023) 87 Cal App 5<sup>th</sup> 763

- M files disso petition 2015
- Stip judgment 2019
- M files custody RFO 2021; 6 day trial
- T/C finds both parties committed acts of DV-BUT all DV occurred 5+ years before hearing
- T/C ruled F C 3044 not apply

- F C 3044 presumption arises “[u]pon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years ....”
- DV occurred over 5 years from custody order, 3044 not apply

- F C 3011 court must consider any “history of abuse by one parent or any other person seeking custody.”
- Incidents of domestic violence beyond the five-year period are still relevant evidence in any custody proceeding.
- Only recent incidents give rise to a *presumption* against the award of custody.

# Abdelqader vs. Abraham (2022) 76 Cal App 5<sup>th</sup> 186

- W obtained 2 DVTROs against H
  - Then dropped them and TROs terminated.
- W then obtained a 3<sup>rd</sup> DVTRO.
  - There had been no further acts of DV.
  - She described acts of DV which predated dismissal of earlier DVTROs.

- T/C: DVRO denied
  - Legal custody of Cs to W; previous custody sharing arrangement confirmed with Cs (50/50).
  - T/C finds H committed DV in 2018 triggered FC §3044 presumption.
- DCA:
  - Affirmed denial of DVRO, but ...
  - Remanded for T/C to issue an express statement of reasons that specifically mentions each of the seven section 3044 factors.



- The court must consider all 7 FC 3044 factors.
- If it finds they have been rebutted, it must state its reasons in writing or on the record.
- The doctrine of implied findings does not relieve a court of its obligations under section 3044.

# IRMO D.S. and A.S. (2023) 87 Cal App 5<sup>th</sup> 926

- W files DVRO against H making various claims
- H files response : W “grossly exaggerated” and relied on inadmissible evidence to describe abuse
- Objects to W’s hearsay
- H voluntarily turned in firearms

- At hearing
  - Neither party sworn--T/C not seek testimony
  - No witness list
  - No attempt to introduce live evidence
  - W confirmed her declaration
  - H agrees to voluntarily stay away, follow conduct orders, move out—does not want DV order
  - H wanted to keep firearms, had hunting trips with brothers

- T/C grants DVRO
- FC 6300 the court may issue a DVRO “if an affidavit or testimony and any additional information provided ... shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.”
- F C 6300 Ct can issue DVRO based solely on the affidavit or testimony of the person requesting the order, it may do only “after notice and a hearing.” (FC 6340)
- DVRO hearing subject to F C 217
- DCA reverses— Keeps DVRO in place for 30 days to allow for a hearing

To be sure, there are instances in which a DVRO request is either unchallenged or the declaration in support of the request, if not materially disputed, so clearly describes abuse under the legal standard that a family court may issue a DVRO after a brief hearing that consists of minimal questioning of the petitioner and respondent confirming that the declarations are true. Such a hearing may well comport with due process based on the position of the parties regarding the DVRO request and the nature of the evidence in support of or refuting the restraining order request.

But the conduct of the hearing in this matter was fundamentally unfair. The court did not invite either party to present their version of events and did not question either party or allow an opportunity for cross-examination on the disputed issues. The court thus effectively deprived D.S. of an opportunity to be heard on the material factual dispute and legal issue before the court.

# Salmon v. Salmon (2022) 85 Cal App 5<sup>th</sup> 1047

- H & W filed competing requests for DVROs.
  - 10/19: W files DVRO against H.
    - Alleged H disciplined Cs with a belt and battered W when she intervened.
  - 11/19: H files DVRO against W.
- Matters heard simultaneously.

T/C. found:

- (1) 10/19 incident: H was primary aggressor.
- (2) 4/19 incident: W was primary aggressor.
- (3) W had previously inflicted injuries to the parties' minor children that would qualify for a presumption under section 3044.
- (4) H was "grossly derelict" in permitting corporal punishment by W against their children; and
- (5) Husband was "grossly negligent" for leaving loaded firearms in the home accessible to Cs.



- H was "the primary aggressor in this case", even though W had also committed acts of abuse in the past.
- DVRO granted against H; Denied against W.
- H argued Fam. Code §6305 does not apply when two competing petitions allege different incidents of DV as the basis for seeking a DVRO.
- H "each petition for protection must be determined on its own merits and independent of the other" regardless of whether the petitions are heard separately or together.

## Salmon v. Salmon

- Competing petitions for DVROs are subject to section 6305, regardless of whether they are heard together or separately.
- Allowing H to wait until W's DVRO was heard and then file to avoid 6305 is contrary to legislative intent.
- If one party seeks a DVRO and there is already one in place...
  - The notice should state the court can modify or terminate the existing DVRO.

If one party seeks a DVRO and there is already one in place...

- The notice should state the court can modify or terminate the existing DVRO.

At the hearing, the T/C can treat them as requests for mutual DVROs and make the required 6305 findings.

- DCA noted conflicting opinions:
  - *Conness v. Satram* (2004) 122 Cal.App.4th 197
    - DVROs entered close in time, on different days, did not fall under 6305 despite resulting in mutual DVROs.
  - *Melissa G. v. Raymond M.* (2018) 27 Cal.App.5th 360
    - “Mutual order” may refer to a single order restraining two opposing parties or two separate orders which accomplish the same result.
- **Melissa G. controls.**
  - FC 6305 applies to all cases in which parties present competing petitions for DVPA restraining orders, regardless of when the petitions are filed or calendared for hearing.

# IRMOR Rivera and Hillard (2023) 89 Cal App 5<sup>th</sup> 964

- T/C issues DVRO against both parties, kicks W out of H's house.
- W trashes house
- H seeks restitution under DVPA

## F C 6342:

- (a) After notice and a hearing, the court may issue any of the following orders:
  - (1) An order that restitution be paid to the petitioner for loss of earnings and out-of-pocket expenses, including, but not limited to, expenses for medical care and temporary housing, incurred as a direct result of the abuse inflicted by the respondent or any actual physical injuries sustained from the abuse.
  - (2) An order that restitution be paid by the petitioner for out-of-pocket expenses incurred by a party as a result of an ex parte order that is found by the court to have been issued on facts shown at a noticed hearing to be insufficient to support the order.
- (b) An order for restitution under this section shall not include damages for pain and suffering.

- T/C broadly construes DVPA to allow compensation for \$387,000 in damage to house, stolen cash, art, other personal possessions
- Trashing of the house was DV in and of itself.

# Willis v. Costa-Willis (2023) 93 Cal App 5<sup>th</sup> 595

- H and W: 3/22 judgment grants joint legal, physical custody, virtually 50/50 time share
- W files DVRO against H, does not seek custodial orders or mention custody in papers
- Does not list C as a protected person
- DVTRO granted; hearing set
- At DVRO hearing, no evidence about custody
- Sua Sponte court grants W sole legal/physical-- not disturb time share



- W appeals– T/C not modify visitation per Family Code 3044
- DCA: reverses
- For 3044 to apply, there must be a custody request or modification of custody order.
- 3044: “Upon a finding by the court that **a party seeking custody** of a child has perpetrated” DV....
- *Nobel vs. Superior Court* (2021) 71 Cal app 5<sup>th</sup> 567—3044 applies in a hearing in which custody orders are sought

# Malinowski v. Martin (2023) 93 Cal App 5<sup>th</sup> 681

- 2018 W files disso
- 9/2021 W filed DVTRO against H- protect self and 2 C's
- 7/2021 C and V order allowed unsupervised visits to H
- 9/2021 DVTRO granted, no contact, no visitation
- Assigned to a different judge (other than disso judge)
- Various continuances, various changes in DVTRO- Hearing set for first available date of 10/22- various review hearings set
- 3/22 review hearing T/C lifts no visitation, reinstates 7/21 visitation order

## Malinowski v. Martin

- W objects as visitation not on calendar and no evidence taken to modify DVTRO
- W appeals
- Affirmed
- CCP 533 governs modification or dissolution of a RO

In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.

## Malinowski v. Martin

- DVPA does not require compliance with CCP 533
- F C 245 governs x-parte DVTROs: (c) in granting a continuance, the court may modify or terminate a temporary restraining order”
- T/C has discretion to modify DVTRO pending a hearing
- What about *Loeffler*?
  - Mo to terminate not modify
  - Factual dispute
- Malinowski
  - No factual dispute
  - T/C also already modified custody order

- Yost?
  - CCP 533 applies to RO's "obtained under the usual procedures"
- DVPA provides expedited and simplified procedures for victims of violence, abuse and harassment.
- While CCP 533 not apply, due process may require a court to take evidence at a noticed hearing to dispute factual issues
  - Not here, no factual issues in dispute- all agree  
7/2021 order existed

# Vinson v. Kinsey (7/27/2023)

- 4/2022 W files DVPA- 3/2022 most recent abuse
  - Both parties in a car
  - H threatened to beat her face in
  - H threaten to kill her
- 6/2020 incident
  - Punched her face
  - Pushed her to the floor
- H sent texts admitting to the violence
- T/C grants DVTRO

- At hearing T/C focused on March incident:
  - “let me understand this, he threatened to kill you multiple times, but you let him in your car?”
  - Waited till after daughter’s birthday party to file DVTRO
- DVRO denied
  - W doesn’t act like a victim of violence
  - Un-defined “credibility issues”
- W appeals

- T/C took view DVRO only available if W fear bodily injury
- T/C felt fact that W in car with H undermined her credibility
  - Imposed on W a “singular view of how an abused woman should act”
  - Refers to in re I.B. (2020) 53 Cal App 5<sup>th</sup> 133
- Court can consider timing of filing DVTRO request
  - “Length of time since the most recent act of abuse is not, of itself determinative”
- T/C must consider totality of circumstances, failure to do so is an abuse of discretion.



# Michael M. v. Robin J (2023) 92 Cal App 5<sup>th</sup> 170

- 9/2018 W gets a DVRO
- 9/2019 H threatens W with a knife, pushes her, in presence of their 1 year old child
- Parties file several x-parties fighting over custody
- 9/17/2021 W files renewal
  - H constantly texts her
  - Found her safe at home address
  - H hit daughter
  - H \$8K in C/S arrears
- T/C denies renewal
- Reversed

- Renewal does not require showing of further abuse
- Standard is reasonable apprehension of future abuse-not necessarily physical abuse
- W not required to show recent abuse or a violation
- T/C must consider underlying evidence and findings giving rise to initial DVRO
- Any violation of a DVRO is serious and gives “very significant support” for renewal
- Court has no discretion to treat a violation of the DVRO as “not really” a violation

- Retaliatory motive
  - Renewals have a set time they must be filed
  - Mere existence of a retaliatory motive is insufficient to deny

# Procedure

# Slaieh V. Superior Court (2022) 77 Cal App 5<sup>th</sup> 266

- Proposition 9 (Marcy's law), the Victims' Bill of Rights Act of 2008:
  - Permits victims to refuse being interviewed or deposed by the defendant.
- Does it apply in civil DV cases?
- Resp seeks Pet depo, T/C bars

- Protects W from being deposed or interviewed by H in the pending *criminal case*.
- It does not protect her from being deposed by him in their divorce action.
  - Both parties are entitled to discovery on disputed issues that fall outside the realm of criminal justice, e.g.,
    - matters of community property, child and spousal support, custody, and visitation.

# A.F. v. Jeffrey F. (2023) 90 Cal App 5<sup>th</sup> 671

- M and D in a disso case
- 12 yr. old brings DVRO against F on her own behalf
  - F C 6229 and CCP section 374, permit minors under 12 to appear and request restraining orders without having an attorney present
- T/C appoints minor's counsel to represent "best interest of minor" in disso case because of DVRO filing
- Minor hires own counsel in DVRO matter
- T/C "interviews" minor, fired minor's selected atty
- Appointed atty in DV matter "as part of her duties as minor's counsel"

- Error to appoint minor's counsel
  - Minor's counsel is for custody/visitation
  - NOT civil DVRO action
  - F C 3150
  - F C 3152
  - CRC 5.420 and 5.242



“A neutral minor’s counsel in a dissolution plays an entirely different role than counsel hired in a civil matter. In family court, counsel for a minor has a statutorily-imposed duty to present to the court recommendations based on what the attorney believes is in the best interests of the child in addition to the child’s wishes. [Citations.] In a civil matter, attorneys representing minors—or any other party who has a GAL—are bound by Business and Professions Code section 6068 and the State Bar Rules of Professional Conduct and have an obligation to zealously represent their clients’ interest within the bounds of the law.”

- OK for T/C to void K btwn A.F. and her atty
- To enter a contract with counsel, A.F. must first be capable of contracting. (CC 1550)
- A person who lacks capacity to make decisions must appear by a guardian, conservator, or GAL. (CCP 372);
- F C 6229 and CCP 374 require the presence of a guardian ad litem.

- Minors generally lack capacity to sue on their own.
- T/C can evaluate A.F.'s competency and capacity to independently select counsel.
- A.F. not have capacity to contract because “she did not understand why she was hiring him or the terms of his engagement”.

- A.F.'s counsel D.Q.'d by wrong standard
  - CRC 5.420 and 5.424 don't apply here
- T/C 'interviewed' A.F. re atty-
  - Inappropriate w/o notice to her
  - Not prejudicial to minor

# STATUTORY CHANGES

# FC 271

- Effective 1/1/2024
- (b) An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice **by the requesting party or the court** to the party against whom the sanction is **proposed** and opportunity for that party to be heard **is provided by the court.**

## DVRO renewal Fam. Code §63454 (a)

- “... These orders may be renewed, upon the request of a party, either for five or more years, or permanently, at the discretion of the court, without a showing of further abuse since the issuance of the original order.
- Renewals and subsequent renewals shall be subject to termination, modification, or subsequent renewal by further order of the court either on written stipulation filed with the court or on the motion of a party....”

## **Fam. Code §6323.5 [Calley's Law]**

Authorizes a court to include in an ex parte order a provision restraining a party from accessing records and information pertaining to the health care, education, daycare, recreational activities, or employment of a minor child of the parties.



## Family Code §6308

- [Remote appearances at DV hearing]: May include a support person.

## Family Code §6344

- Prevailing Petitioner SHALL be awarded A/F.
- Prevailing Resp. MAY be awarded A/F, if (after hearing):
  - If Resp. shows:
    - Frivolous or
    - Solely intended to abuse, intimidate, or cause unnecessary delay, and
    - Pet. has ability to pay.

# Fam. Code §4058 (b)(2)

When considering a parent's earning capacity for c/s, court shall consider parent's specific circumstances:

- assets,
- residence,
- employment and earnings history,
- job skills,
- educational attainment,
- literacy,
- age,
- health,
- criminal record and other employment barriers,
- record of seeking work,
- local job market,
- availability of employers willing to hire the parent,
- prevailing earnings levels in the local community,
- other relevant background factors.

# Potpourri

# Braugh v. Dow (2023) 93 Cal. App 5<sup>th</sup> 76

- Plaintiff served complaint on defendant
- Plaintiff gets default judgment
- 21 months later, defendant files set aside motion (granted)
- CCP 473(d)- T/C *may* set aside void judgment within 6 months
- 6 month time limit does not apply if judgment void on its face
- Void on its face if clearly void from court record without extrinsic evidence

# Shapell SoCal Rental Properties v. Chico's FAS (2022) 85 Cal.App.5th 198

- *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127 held an attorney has an ethical obligation to warn opposing counsel that he or she is about to take a default.
- Here, P requested and obtained a default and default judgment against D in direct violation of the ethical and statutory obligations confirmed in *LaSalle*.
- P never communicated intent to take default.
- P effected service of the complaint, the request for entry of default, and default judgment in a way intentionally and precisely calculated to create a strong possibility of a default.

- P's trial counsel had an ethical and statutory duty to advise D's counsel of the intent to seek entry of default and default judgment.

Counsel should act with “dignity, courtesy, and integrity.”

# Guardianship of A.H. (2022) 83 Cal App 5<sup>th</sup> 155

- Dueling grandparents were ordered to exchange witness lists pretrial.
- Order stated anyone not on list would be precluded from testifying.
  - Including the parties.
- Maternal GM (MGM) failed to exchange a witness list.
  - Atty.'s *mia culpa* stated MGM was the only witness, and counsel mistakenly believed the pretrial order did not require her to list party witnesses.

## Guardianship of A.H.

- Trial ct. dismissed MGM's petition and granted PGM's petition.  
This was a terminating sanction
- Nothing wrong with ordering parties to exchange witness lists.
  - Promotes a fair trial.
  - Avoids surprises.
- There must be teeth to these rules.
  - That includes the exclusion of evidence...



- Unless they prevent a *full and fair opportunity* to present all competent, relevant, and material evidence.
  - Here, MGM had adequate notice of requirement.
    - She did not have an absolute right to present evidence.
- But
- The trial court's exclusion of evidence must not be arbitrary.

- MGM was her only witness.
- Excluding her was a terminating sanction.
- This was arbitrary for 5 reasons:
  - 1) MGM's atty. was at fault.
  - 2) MGM's atty.'s conduct not severe or extreme.
  - 3) The prejudice to PGM was negligible.
  - 4) Lesser sanctions were adequate to vindicate the trial ct.'s authority.
  - 5) Trial ct.'s form order did not allow for any lesser sanctions.
    - In other words, it would not exercise any discretion.
    - The power to dismiss is discretionary.

# IRMO Lauralin Cohen and Richard Cohen (2023) 89 Cal App 5<sup>th</sup> 574

- F in arrears on child and spousal support
- M seeks to dismiss modification RFO on disentitlement
- T/CT dismisses and conditions future RFO filings on F's compliance with support orders
- F in arrears in the past, evidence supports that F not pay unless forced to by contempt, or he bring an RFO to reduce. OK to dismiss
- Cannot blanket prevent future filings – disentitlement is based on equities in each case, cannot be applied lightly.

# D.H. v. B.G. (2023) 87 Cal App 5<sup>th</sup> 586

- When are you a full time high school student?
- C lives with M, F not see C for several years
- C over 18, F claims not a full time student, M says she is
- F wants to stop support at 18<sup>th</sup> birthday FC3901 (by operation of law), and get refund for overpayment
- M argue no retroactive modification F- argue already stopped
- M: Full time student, “demonstrably engaged towards timely graduation”
- DCA: Education Code 48200: designated by length of the school day... not in school all day, not full time.

- Generally, burden of proof on person making request
- Here burden appropriately on M
  1. Knowledge of facts
  2. Availability of evidence
  3. Most desirable result due to public policy
  4. Probability of the existence or nonexistence of the fact

# Brubaker v. Strum (2023) 87 Cal App 5<sup>th</sup> 497

- H owed W c/s, s/s, plus *Ostler-Smith* payments.
- Income withholding order (IWO) was in effect.
- H moved from job to job in the tech sector.--IWO followed.
- W requested an order to "set child support arrears."
- H responded since IWO was in effect, W's remedy was to contact H's employers.
  - Threatened CCP§128.5 sanctions.

- W did not w/draw request.
- T/ct. denied motion.
  - Awarded 128.5 sanctions against W and W's Atty.
- Where employer is subject to IWO, Fam. Code §5241 protects obligors from being held in contempt or subject to criminal prosecution...
  - But does not preclude obligee from seeking arrearages from obligor.

