FAMILY LAW CASE LAW UPDATE – 2021-2022

SUMMARY OF CASES by Judge JoAnn Johnson

1. ATTORNEY FEES

In re Marriage of Erndt & Terhorst, 59 Cal. App. 5th 898: 271 sanctions & omitted asset

Nancy G. Erndt (wife) and Michael A. Terhorst (husband) entered into a settlement agreement, in the form of a verbal stipulation, regarding the terms of their marital dissolution (the stipulation). The stipulation included an equal division of the community property portion of wife's retirement plan without any mention of the plan's survivor benefits. Thereafter, the parties could not agree as to whether husband had survivor benefits under wife's retirement plan and they asked the court to resolve their dispute; in the alternative, wife asked the court to vacate the stipulation.

The trial court ruled as follows: the survivor benefits were found to be an "omitted asset" (Fam. Code, § 2556) subject to an equal division under section 2610, subdivision (a)(2); wife was not entitled to an order vacating the stipulation; and judgment was to be entered accordingly. The court also awarded husband $800 in attorney fees and $180 in costs in the nature of sanctions under section 271.

On appeal, wife contends the court erred in treating the survivor benefits as an omitted asset as the stipulation provided husband *would not* receive a survivor benefit by virtue of its silence on the topic. Alternatively, she seeks to vacate the stipulation in its entirety based on there being no "meeting of the minds" concerning the division of survivor benefits. We see no merit to wife's contentions and, accordingly, we affirm that portion of the judgment that provides husband is to receive a survivor benefit related to his community property share of the retirement plan. We reverse, in part, that portion of the judgment and order awarding husband the sum of $800 in attorney fees as section 271 does not permit an award of fees to a self-represented party.

➔ Two lessons to be learned from this decision – Silence is not golden; and Section 271 sanctions must be 'tethered" to attorney fees, therefore, a self-represented party – even if an attorney – cannot recover 271 sanctions.

- The testimony of Husband was that no one mentioned the survivor benefits.
- The testimony of Wife is that she didn't say anything because she didn't want Husband to get any part of the survivor benefit. She believed if it wasn't mentioned, his right to the benefit would terminate on the entry of judgment. (Breach of Fiduciary duty?)

Not surprisingly, the court found the survivor benefits to be an omitted asset and awarded Husband his share based on his share of the pension.

Husband asked for $6,100 in attorney fees and $180 in costs plus 271 sanctions. The court granted only the costs and $800 in sanctions based on Wife's conduct.

Wife appeals. She loses on the omitted asset issue but wins on the attorney fee award – even though she didn't raise this issue on appeal.

The CA addresses it as an issue of law on undisputed facts. "We have not found a case that directly addresses whether a self-represented attorney litigant may recover attorney fees in the nature of sanctions under section 271. However, we agree with those courts that have concluded section 271 mandates that sanctions be "tethered" to attorney fees and costs. (*Menezes v. McDaniel* (2019) 44 Cal.App.5th 340; *Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142.) The court says, 271 means what it says, 271 sanctions available under the statute are limited to "attorney fees and costs." The CA reversed, remanded for order for the costs only.

MY COMMENT: I often get requests for sanctions that simply request '$5,000 to deter the other party from sanctionable conduct' without any evidence of what fees have been incurred because of the conduct. 271 fees are for attorney fees and the request must be tethered to fees.

2. SPOUSAL SUPPORT and INCOME DETERMINATION (Three cases)

In re Marriage of Pletcher (2021) 68 Cal. App. 5th 906: **Fluctuating income**

This is an appeal from a family law order setting pendente lite spousal support. Appellant Mitchell Fletcher operates an investment management business. His income fluctuates considerably from year to year depending on the performance of the market. In this scenario, *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075 [23 Cal. Rptr. 3d 273] holds that a court must calculate future income based on a representative sample of past income. Instead of doing that, the trial court here forecasted Mitchell's future income based on the most recent year of historical income, which happened to be Mitchell's best year ever by a wide margin. Given the nature of his income structure, however, it is unlikely that Mitchell will repeat such a year. This is because he has a somewhat unusual setup: for many of his clients, he gets paid based on the increase in value of their portfolios. In order to get paid, therefore, he must exceed the highest value that the asset portfolio has recorded under his management. After such a banner year, he is unlikely to see an equivalent increase in the overall value of the assets he manages. Indeed, in the recent past, Mitchell had made as little as one-third of the amount the court based its calculation on. Accordingly, the court abused its discretion in calculating his prospective income on an unrepresentative sample period.

In addition to managing investments, Mitchell and Jill A. Pletcher started a theater company. In calculating Mitchell's income, the court did not consider any losses from the theater company on the ground that the theater was not "related to" the investment business. We agree with Mitchell that the court employed the wrong legal standard in conducting that analysis. The error, however, was harmless because Mitchell did not identify any prospective theater expenses that would impact his income going forward. Nevertheless, because this issue may recur in this case, we set forth the proper legal standard below.

Brief facts: Thirty-five year marriage. Parties ran an investment firm. H's base salary was $250,000 but received bonuses based on the increase in the value of the assets he managed. His income since 2014 was as follows: 2014: $1.13 million; 2015: $540,000; 2016: $490,000; 2017: $505,000; 2018: $1,097,000; 2019: $1.59 million. Issue is what income to use for temporary spousal support

H's expert went back 10 years to 2008 and determined his income to be $58K per month. $696K per year. Trial court rejected this approach finding it to be "an obvious and unpersuasive attempt to lower the income available for support by going far enough back in time to bring in the period of the great recession that began around 2008."

H's expert then offered a second approach which was to deduct $770K over the last three years for losses on a theater project H had started. The Trial Court rejected this also as the theater business was not related to the investment firm.

Wife's expert offered to use the last 12 months income of $132,500 per month with which the court agreed as set spousal support at $31,700 monthly.

At the time of the hearing, H did not suggest using an Ostler / Smith approach. Filed motion to reconsider which was denied. Nothing new or different - he could have requested O/S at hearing.

Husband appeals and CA reverses and remands. While usually the last 12 months income is indicative of prospective income with most people, it may not be when a party has an income that fluctuates significantly from year to year. The court discusses IRMO Riddle (2005) 125 CA 4th 1075.

Remands to recalculate support considering one of two options:

Utilize a representative period of time that takes into account his fluctuating income. [The court noted that the T/ct was given 2 unreliable positions from the experts. The court does not have to accept either and most makes is own determination of the appropriate income]

Use the Ostler / Smith method. [The CA seems to suggest this is preferable in this situation]

On the issue of the theater losses, the CA found that if the court erred in failing to include the losses, it was harmless error because the expenditures were one-time expenditures and since SS is prospective, these expenditures were irrelevant to determining SS. However, the court went into some discussion about Blazer, Sorge, DeLuca, regarding deducting reasonable business expenditures from business income.

<u>In re Marriage of Maher & Strawn</u> (2021) 63 Cal. App. 5th 356: Payment of college expenses for adult child

David Maher appeals from a judgment of dissolution of his marriage with Laurie Strawn. He primarily contends there is insufficient evidence to impute income to him and to step down the spousal support he is receiving.

In determining Laurie's ability to pay David support, the court took into account numerous circumstances, including that Laurie was spending about $3,000 per month for their adult son's college expenses. The interesting question this case poses is whether the court may properly consider that expense in determining her ability to pay spousal support. There is conflicting authority on the issue. (Compare *In re Marriage of Paul* (1985) 173 Cal.App.3d 913 [219 Cal. Rptr. 318] (*Paul*) with *In re Marriage of Serna* (2000) 85 Cal.App.4th 482 [102 Cal. Rptr. 2d 188] (*Serna*).)

The trial court determined that the better reasoned cases—not the least of which is the Supreme Court's decision in *In re Marriage of Epstein* (1979) 24 Cal.3d 76 [154 Cal. Rptr. 413, 592 P.2d 1165] (*Epstein*)—indicate that the court has discretion to consider an adult child's college expenses like any other expenditure of discretionary income. The ultimate question in determining ability to pay is whether the expense is reasonable and will result in a just and equitable award of spousal support.

The main argument to the contrary is that supporting an adult child reduces the supporting spouse's available funds to pay spousal support. The supported spouse, so the argument goes, is in effect being compelled to pay adult child support, which the law prohibits. (*Serna, supra*, 85 Cal.App.4th at p. 488.)

We acknowledge, of course, that David cannot be *required* to support his adult child. Family Code section 3901, subdivision (a) prohibits that. But the question here—whether Laurie's *choice* to spend her discretionary income on their adult child's educational expenses may be considered on equal footing with her other expenses—is distinctly different. As explained, both *Epstein* and section 4320 compel the conclusion that a trial court may appropriately consider a supporting spouse's payment of adult children's college expenses in determining ability to pay spousal support.

In a nutshell, Wife, the supporting party is paying for the adult child's education. The trial court considers these expenses in calculating SS. H appeals, "you are making me support an adult child". CA affirms and discusses the 2 cases on this issue: Paul and Serna. Cites are in the summary. Paul considered the expenditures in increasing SS. Serna takes the opposite approach – adult child support.

CA affirms – the court may consider the supporting spouse's payment of adult children's college expenses in determining the ability to pay SS.

MY COMMENT: But, before you run out and waive this case saying the court must consider the cost of the child's education, the CA explained that this is just one of the 4320 factors i.e. expenses, the ultimate question is whether the amount is reasonable under the circumstances. Court enumerated ten factors to consider.

"In evaluating a supporting spouse's payment of adult children's college expenses under section 4320, the ultimate question is whether the amount is reasonable under the circumstances. In making that determination, the court should consider all relevant factors, including but not limited to: (1) whether the supported spouse, if still living with the child, would have contributed toward the educational costs; (2) the effect of the background, values and goals of the parents on the reasonableness of the child's expectation of higher education; (3) the amount expended; (4) the supporting spouse's ability to pay that cost; (5) the parents' respective financial resources; (6) the commitment to and aptitude of the child for the education; (7) the adult child's financial resources; (8) the child's ability to earn income during the school year or on vacation; (9) the availability of financial aid including reasonable amount of loans; and (10) the relationship of the education to the adult child's long-range career goals as affected by the family circumstances and values during the marriage."

In re Marriage of Kahan & Diamond (2021) 72 Cal. App. 5th 595: 4320 factors to consider.

Scott Diamond (H) appeals from the trial court's order denying his request to terminate or modify the spousal support he pays to Tal Kahan Diamond (W). Husband contends the trial court (1) failed to consider required criteria under Family Code section 4320, (2) erroneously excluded live testimony at the hearing on his motion, and (3) abused its discretion in issuing attorney fee sanctions against him. We affirm.

H filed to modify SS which the court denied. H appealed asserting the court was required to consider all the 4320 factors; erred in not allowing him to cross-examine Wife; and erred in ruling on sanctions as he did not have sufficient notice.

CA affirmed, T/ct is not required to make specific findings on each and every 4320 factor, so long as it considers all of them. Although the better practice might be to do so.

As to the 217 evidentiary hearing, the issues H wanted to cross examine on were not substantive therefore the court was correct in finding good cause to not allow live testimony.

Wife had requested sanctions in her responsive declaration to H's motion which gave H sufficient notice. (See *Perow v. Uz*elac 31 Cal.App5th 984)

3. PROPERTY and PMA:

In re Marriage of Kelpe, (2021) 64 Cal.App.5th 103: character of benefit receive post-sep.

The trial court ruled that a lump-sum payment respondent received from a retirement plan (known as a Top-Hat plan) upon leaving his employment with an accounting firm after a marital dissolution was respondent's separate property. The trial court rejected the argument that respondent's right to receive the benefit accrued during the marriage by virtue of the years of service needed to qualify for the payout, even though he was not a partner and therefore not eligible for the benefit during the marriage.

The Court of Appeal affirmed the trial court's order characterizing the payment as respondent's separate property. The court concluded the payment was not an enhanced community benefit derived from the retirement benefits respondent accrued during the marriage. Rather, the payment was an additional benefit respondent acquired when he became a partner in the firm, which occurred after the parties' date of separation. As a distinct and separate benefit available only to partners, the Top-Hat plan was in addition to and not derivative of the retirement benefits available to respondent while a nonpartner employee. The plan may have enhanced respondent's overall retirement portfolio, but it was a stand-alone contractual benefit.

Brief facts: Husband is a non-partner employee in a law firm throughout the marriage. Two years after separation he becomes an equity partner after paying $150,000 with post-separation funds. As a partner, Husband was eligible to participate in certain deferred compensation plans not available to employees. The one at issue is called the Top-Hat plan. Within the next three years he suffers a heart attack and is requested to withdraw as a partner. He is then paid out a lump sum benefit under the Top Hat plan that is calculated based on twenty years of service (13 of which were during the marriage)

The Trial Court found the Top Hat benefits to be H's SP because he was not eligible for the Top Hat plan until he was a partner, which occurred after separation. The court rejected the argument that H had an expectation of advancement to partner during the marriage.

The CA affirmed: The trial court correctly concluded that even where a benefit is dependent in part on total years of service accrued during marriage, if the contractual right to the benefit is not acquired until after separation, the benefit is separate property. The time rule is not used to characterize the benefit, but to apportion it. If the right accrued post-sep it is the sep property of the employee spouse, even if it is calculated on years of service during marriage.

MY COMMENT: Good discussion of *Lehman, Gowan, Frahm,* and *Gram*. If you have a scenario in which a spouse receives some form of compensation from an employer post-separation (other than the known retirement benefit) take a look at this case. The determining factor will be when the contractual right to the benefit is acquired even if that benefit is calculated by the number of years of service which might include years during the marriage.

<u>In re Marriage of Ramsey & Holmes (2021) 67 Cal. App. 5th 1043:</u> Both parties have duty to provide court with information to determine value of CP asset.

Steven Holmes appeals from a judgment in a marital dissolution action. Holmes raises a single issue. He challenges the family court's determination of the community property interest in the family home. Although he concedes that community funds were used during the marriage to make the mortgage payments on the house, which he bought using his separate property before marriage, he asserts the court erred by using an incorrect number in its calculation of the community property share in the house. The reason for the court's error? Holmes's now-former wife, Nakiya Ramsey (who filed the petition for dissolution), failed to submit sufficient evidence to allow the court to determine the correct number, and Holmes, while recognizing at trial the absence of that critical evidence, declined to submit it, believing it was Ramsey's burden to do so.

"We hold that where it is undisputed that there is a community property interest in real property, it is the obligation of *both* spouses to ensure that the family court has the information necessary to determine that interest, no matter which spouse brought the dissolution action. If the spouses fail to do so, the family court must direct them to furnish the missing information, reopening the case if necessary. Because the determination of the community property interest in the property at issue in this case was based upon incomplete information, we reverse the judgment and remand with directions to the family court to hold a limited retrial to determine the amount of community funds used to reduce the mortgage principal and to recalculate the community property interest."

Brief facts: It's undisputed that the house is H's SP and that the mortgage was paid during the marriage with community funds. Issue is the Moore / Marsden calculation of the community interest. At trial, Wife's counsel failed to provide sufficient evidence for the court to calculate the interests. Husband's counsel asserted it was her burden to do so and if she didn't provide the court with sufficient evidence, the court would have to find the house was H's S/P. The court allowed Wife to reopen but she still didn't provide sufficient evidence to determine what part of the monthly mortgage payment was attributable to principal, interest, insurance, etc.

Husband didn't provide any evidence regarding the house in his case in chief.

The court then calculated the community interest by utilizing the entire mortgage payment of $3,200 and Husband filed an objection to the court's tentative decision providing the missing information. But the trial court overruled the objection stating that H had provided no explanation for why he did not provide the evidence at trial. The court went with the evidence it had at the conclusion of trial.

H appeals and the CA reverses and remands. The material fact at issue in this case was whether there was a community property interest in the house. H conceded this fact. Since it was thus established that a community property interest existed, the family court was obligated to determine the value of that interest and divide it equally. Both spouses had an equal interest in ensuring that the court had sufficient information with which to fulfill its judicial responsibility. In fact, as the mortgagor, H was in the best position to provide the evidence needed to establish the reduction in principle.

What should the trial court have done? Since there was clearly an issue that the court had to resolve and the evidence had not been presented, the court should have required the parties to furnish the additional evidence.

Knapp v. Ginsberg (2021) 67 Cal. App. 5th 504: PMA – cannot ratify a void PMA by subsequent conduct

Summary judgment was improperly entered in favor of an attorney in his former client's legal malpractice action arising from the preparation and execution of a premarital agreement (PMA) between the client and her late husband where there was a triable issue of material fact as to the threshold issue of whether the husband satisfied the requirements of Fam. Code, § 1615, when he executed the PMA because the evidence did not establish that he was represented by counsel, and where the trial court erred in ruling that he ratified the PMA via amendments he made to his estate plan during the marriage because a PMA that was involuntarily executed was void, not voidable, and thus could not be ratified as a matter of law.

This is a malpractice case arising from the preparation of a pre-marital agreement. Attorney moves for summary judgment contending the PMA was ratified by H's subsequent conduct. T/Ct agrees and summary judgment is granted in favor of the attorney and W (client) appeals.

Two important facts: 1) H was not represented by counsel when the PMA was executed although the PMA stated that H had been represented by and consulted with independent counsel but no attorney signed or was named and H had not executed a waiver. 2) Husband makes several amendments to his trust and estate plan which all acknowledge the PMA and ratifies it.

Husband dies and his children contest the PMA (which benefited W re: house). Wife settles for less favorable terms and then sues her attorney.

The real issue is – if H did not satisfy the requirements for a valid PMA at the time of execution, is it void or voidable? If void, it cannot be ratified.

The CA resolves this question: "A premarital agreement that is not enforceable under section 1615 is void, not voidable, and accordingly cannot be ratified."

"The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. The advisement to seek independent legal counsel shall be made at least seven calendar days before the final agreement is signed." (FC 1615)

4. RESTRAINING ORDERS: 8 CASES

In re Marriage of Carlisle (2021) 60 Cal. App. 5th 244 DV Renewal while appeal pending

Plaintiff filed a request for a domestic violence restraining order (DVRO) against defendant, her then-husband. The trial court granted a two-year DVRO. While defendant's appeal from the DVRO remained pending, a little more than a month before the original DVRO was set to expire, plaintiff filed a request to renew the DVRO on a permanent basis. After a hearing, the trial court granted plaintiff's request, renewing the DVRO for five years.

The Court of Appeal affirmed the order. Contrary to defendant's contention, the trial court did not lack jurisdiction to renew the DVRO. The trial court had the authority to renew the DVRO pending disposition of the appeal from the granting of the original DVRO if doing so would serve the ends of justice. The trial court, having determined that plaintiff satisfied her burden in seeking renewal of the DVRO necessarily concluded that renewing the DVRO would serve the ends of justice. Defendant's assertion that a prior trial court order, which was not appealed, had a preclusive effect, barring renewal of the DVRO, suffered from numerous flaws. One of those flaws was that defendant did not establish the existence of the order in question. It also was not clear that the order, if it did exist, would have been an appealable order. In addition, the issue as to whether a DVRO, the issuance of which is being appealed, may be modified does not present the same question as whether that DVRO may be renewed, a question the court answered affirmatively.

Searles v. Archangel (2021) 60 Cal. App. 5th 43: Civil harassment RO service issue.

The trial court dismissed plaintiff's petition for a civil harassment restraining order when she was unable to personally serve defendant with a copy of the petition and notice of hearing as required by Code Civ. Proc., § 527.6, subd. (m).

The Court of Appeal affirmed the order dismissing the petition. The trial court properly concluded it was obligated to follow Code Civ. Proc., § 527.6's express requirement for personal service. The Legislature has expressly mandated that the respondent in a proceeding for a civil harassment restraining order be provided notice of the hearing, together with a copy of the petition and any temporary restraining order, only through personal service. Even though plaintiff's petition was ultimately dismissed, her rights were fully protected. The trial court rescheduled the hearing on plaintiff's request for a permanent restraining order multiple times. In addition, when the trial court dismissed the petition, it did so without prejudice.

[NOTE: As of 1-1-2022, CCP 527.6 amended to allow for alternate method of service in CH cases.]

<u>Ashby v. Ashby (2021) 68 Cal. App. 5th 491:</u> Renewal does not require any violation of the RO or further acts of abuse.

The trial court granted a request to renew a domestic violence restraining order (Fam. Code, § 6345, subd. (a)). The Court of Appeal affirmed, finding no abuse of discretion because the record showed that the trial court did not fail or refuse to weigh relevant evidence, but rather specified that it considered the previous factual findings as well as current events, ultimately determining that the current circumstances evidence did not eliminate the need for the order. A substantial evidence challenge was forfeited because the restrained party failed to set forth all of the relevant and material evidence supporting the trial court's decision, instead attempting to refute the factual basis for the original order by maintaining that the supporting allegations were trivial; moreover, compliance with the order was not shown and could not preclude a finding that the protected party had reasonable apprehension of further abuse.

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. So there should be no misunderstanding, this does not mean the court must find it is more likely than not future abuse will occur if the protective order is not renewed. It only means the evidence demonstrates it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable.

In assessing the reasonable apprehension, the court can consider the facts surrounding the underlying RO but must weigh all the relevant evidence.

<u>In re Marriage of F.M. & M.M. (2021) 65 Cal. App. 5th 106:</u> Court can consider post-DVTRO filing conduct when deciding to grant RO.

The trial court denied a mother's application for a domestic violence restraining order against the father of her six children (Domestic Violence Prevention Act; Fam. Code, § 6200 et seq.). The Court of Appeal reversed the trial court's order and remanded the matter for a new hearing. The application was sufficient because it documented specific acts of domestic violence and described the father‘s ongoing abusive behavior, including that he had threatened the mother's life if she called the police, called her names in front of the children, beat her, and took her phone away. It was prejudicial error not to consider evidence of postfiling abuse. The denial could not be based on the fact that the parents no longer lived together because they still had to coparent the children. Even with separate residences, continuing interaction had resulted in ongoing conflict.

The court said the parties definitely needed to stay away from each other, stated that didn't mean they needed RO. Apparently the court believed that the fact they no longer lived together meant they didn't need the RO. Further, the court refused to consider any evidence of what had occurred after the RO was issued, including Father's arrest for violation of the RO. - Not surprisingly, the CA reversed and remanded for new hearing.

<u>In re Marriage of L.R. & K.A. (2021) 66 Cal. App. 5th 1130</u>: What constitutes destroying the other party's mental and emotional calm?

A father filed a request for a domestic violence restraining order (DVRO) seeking protection from his child's mother for himself and the child after an incident involving a two-hour urgent care visit for the sick child ended with the mother, who did not have physical custody, taking the child home in violation of a child custody and visitation order. The trial court found that the mother was obsessive, aggressive, manipulative, and controlling of the father during the incident and that her conduct disturbed his peace. The trial court issued a three-year DVRO against the mother for the father's protection and included the child as a protected party.

The Court of Appeal reversed, concluding the mother's conduct—although demonstrating poor coparenting—did not rise to the level of destroying the father's mental and emotional calm to constitute abuse within the meaning of the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.). The mother's aggressive and controlling or manipulative conduct was in her demands that the father take the child to urgent care, in her failure to make reasonable and good faith efforts to put the child in the father's car, and in her failure to lessen an emotionally intense situation all during a single two-hour incident that ended with her taking the child home in violation of the custody order. Her conduct simply did not fall within the ambit of Fam. Code, § 6320, subd. (c), such as unreasonably isolating the other party, depriving them of basic necessities, controlling or monitoring their movements, or compelling them by force or intimidation to engage in conduct that they had a right to abstain from or to abstain from conduct that they had a right to engage in. In issuing the DVRO, the trial court went over the guardrails put in place by the Legislature to ensure the DVPA reached only clearly abusive behaviors.

This is the rare case of a court being reversed for issuing a DVRO. The issue in this case is the definition of 'disturbing the peace' of the other party.

Effective January 1, 2021, section 6320 was amended by Senate Bill No. 1141 (2019–2020 Reg. Sess.) (Senate Bill 1141) to add subdivision (c), which defines "'disturbing the peace of the other party'" as "conduct that, based on the totality of the circumstances, *destroys* the mental or emotional calm of the other party." (§ 6320, subd. (c); Stats. 2020, ch. 248, § 2, italics added.) The "conduct may be committed directly or indirectly, including through the use of a third party, and by any method or through any means including, but not limited to, telephone, online accounts, text messages, internet-connected devices, or other electronic technologies." (§ 6320, subd. (c).)

The statute also defines coercive control "a *pattern of behavior* that in purpose or effect *unreasonably interferes with a person's free will and personal liberty*." (§ 6320, subd. (c), italics added.)

The key words / phrases are *Destroys* the mental or emotional calm and a Pattern of *Behavior*…. The purpose of these limiting terms is to put in place strong guardrails to ensure the statute will function as intended and not curtail benign conduct that is tolerated in relationships and does not actually distress a person.

K.L. v. R.H. (2021) 70 Cal. App. 5th 965: Mutual restraining orders.

After their domestic relationship ended, the father and the mother of a young child filed requests for Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6300 et seq.) orders against each other. After an evidentiary hearing, the trial court found that both had acted as a primary aggressor against the other, and that neither had acted in self-defense. The court therefore issued mutual orders against both parties, and also issued orders granting joint physical and legal custody of the child to both parties.

The Court of Appeal reversed the restraining order against the mother, affirmed the restraining order against the father, and reversed the custody orders. The court held that the trial court erred by issuing mutual restraining orders without considering the mandatory factors of Pen. Code, § 836, subd. (c)(3). Specifically, the trial court failed to consider the intent of the DVPA and other laws protecting victims of domestic violence from continuing abuse, whether either party made the threats to the other creating fear of physical injury, and the history of domestic violence between the father and the mother, which showed more than two years of substantiated physical, emotional, and sexual abuse of the mother by the father. Substantial evidence supported the restraining order against the father (Fam. Code, §§ 6300, 6320), but did not support the restraining order against the mother. The father admitted at the hearing that the mother had never placed him in reasonable apprehension of imminent serious bodily injury to himself or anyone else. The acts committed by the father against the mother were significantly more violent than the acts committed against the father by the mother. The trial court therefore erred in finding that the mother was a primary aggressor who did not act in self-defense. As a result, its order granting joint physical and legal custody to the father and the mother could not stand. Moreover, until a dependency proceeding involving the child was resolved, the trial court could not make any orders regarding child custody.

Penal Code section 836, subdivision (c)(3), provides as follows: "The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, [the court] shall consider (A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defense." (Pen. Code, § 836, subd. (c)(3).)**8**

As a result, in deciding whether mutual restraining orders should issue, the trial court must consider the parties' respective alleged acts of domestic violence in concert, and not separately, as the court did here.

"It is essential in a case such as this that the court rigorously evaluate the evidence to ensure that the moving party has, in fact, been victimized. This is so, particularly, where, as here, the trial court is aware that the acts *committed* by the moving party … are significantly more violent than the acts *alleged* by the moving party." (*Conness v. Satram* (2004) 122 Cal.App.4th 197, 205 [18 Cal. Rptr. 3d 577].) The acts committed by K.L. against R.H. were significantly more violent than the acts committed against K.L. by R.H. The trial court failed to evaluate the evidence before it in light of the Penal Code section 836, subdivision (c)(3) factors, and therefore erred in finding that R.H. was an aggressor who did not act in self-defense. The mutual restraining order therefore cannot stand.

Noble v. Superior Court (2021) 71 Cal. App. 5th 567: FC 3044 Notice required.

The family court set aside a default it entered in a marital dissolution action and ordered the parties, who had two minor children, to attend custody mediation. Although the family court was made aware during the proceedings that the mother had obtained a domestic violence restraining order from a Utah court against the father, it adopted the mediator's recommendation and awarded joint legal and physical custody of the children to the father without mentioning Fam. Code, § 3044.

The Court of Appeal granted the mother's petition for writ of mandate. The court held that the facts of the case required the family court to inform the parties of Fam. Code, § 3044, or provide them with a copy of the statute when it ordered them to custody mediation. The family court was aware of the Utah protective order against the father, as well as the evidence of domestic violence the mother submitted with her responsive pleading to the father's motion to set aside the default. The family court, however, after setting aside the default, ordered the parties to attend custody mediation without mentioning § 3044. The family court thus clearly erred when it failed to comply with the notice requirements. The family court also abused its discretion in granting the father joint legal and physical custody without applying the § 3044 rebuttable presumption that it would be detrimental to the children's best interests to award joint legal and physical custody. All of the statutory requirements were satisfied. The Utah court expressly found the father immediately threatened the mother's physical safety. In addition, the finding was based on events occurring within the five-year time frame preceding the family court's ruling on the parties' requests to modify custody. Accordingly, there was no reasonable basis for the family court's failure to apply the § 3044 presumption when it addressed custody and revised the prior custody orders.

Once acts of domestic violence has been established, the court must consider FC §3044. Protected party has burden to establish, then burden shifts to restrained party to rebut.

IRMO Reichental (2021) 73 Cal.App.5th 396: No Non-CLETS restraining orders.

A wife filed a petition for the dissolution of her 39-year marriage to her husband. The parties stipulated to the appointment of a retired judge as temporary judge to hear and determine the matter until its final determination. At the husband's request and after an eight-day evidentiary hearing, the temporary judge entered a non-CLETS (California Law Enforcement Telecommunications System) domestic violence restraining order (DVRO) prohibiting the wife from entering the property where the husband was residing with his girlfriend, harassing or surveilling either of them, communicating with them, or coming within 50 yards of them. (Superior Court of Santa Barbara County, Melinda A. Johnson, Temporary Judge.*)

The Court of Appeal remanded the matter to the temporary judge with instructions to enter a modified order in compliance with Fam. Code, § 6380. In all other respects, the order was affirmed. The temporary judge did not exceed the scope of her appointment when she heard and decided the husband's request for a DVRO. The parties' stipulation, which authorizing the temporary judge to hear and determine pretrial motions, applied to the husband's request for a DVRO. However, the temporary judge erred as a matter of law when she specified that the DVRO was a non-CLETS order. The temporary judge found that the wife committed acts of abuse within the meaning of Fam. Code, § 6320. Section 6380 required the DVRO be reported to the Department of Justice and entered in CLETS. The obligation to register the order in CLETS was mandatory, not discretionary.

SUMMARY OF NEW STATUTES AND RULES:

SB 654 Amends Section 3011 and 3042

3011 new language: The court must state reasons as to why granting sole or joint custody or unsupervised visitation to a parent when allegations of domestic violence have been made against that parent.

3042: A child shall not be permitted to testify in court in the presence of the parents unless the court finds that it is in the child's best interest to do so and the court makes findings on the record.

NOTE: I suggest that remote appearance of the child by Zoom would be acceptable if the child cannot see the parents on the Zoom video.

AB 1143 amends CCP 527.6

The court may allow Civil Harassment Restraining Orders to be served by alternative methods.

SB 320 Amends 3044, 6304, 6306, 6323, 6389 and adds 6322.5

Very comprehensive bill regarding firearms relinquishment, compliance hearings, notification to law enforcement and the district attorney for non-compliance.

CCP 367.75 and CRC 3.672: Remote appearances

Party may appear remotely after giving notice [RA 010 Mandatory form] Notice to be given at least 2 court days before the proceeding for non-evidentiary proceedings and 15 court days for evidentiary hearings and trials.

Other party may object to remote appearances at evidentiary hearings and trials [RA 015 Mandatory form] Objection to be filed at least 5 court days before the proceeding.

Court makes orders [RA 020 optional form or other order]

The court may require in-person appearances on a case-by-case basis.

During a proceeding, the court may determine that an in-person appearance is necessary and may continue the matter and require appearance.

The court may prescribe other methods for giving notice but must be in compliance with CCP 367.75. The court may implement a local rule without the 45-day comment period or the January 1 or July 1 commencement date.

EMERGENCY RULE allowing DVRO cases to be delayed up to 90 days has been lifted.