

## Domestic Violence Issues and Dept. 31

9.28.23

**Disclaimer:** Don't speak for any other judicial officers; own observations.

### Orientation

- What is DV
- Dept. 31 v. Dept. 34
- General procedures
- Consequences of TRO or DVRO
- Recurring Issues

### DVPA, FC 6200

FC 6220: **Purpose** of the DVPA is to prevent acts of DV, abuse, and sexual abuse, and to provide for a separation for a period sufficient for parties to seek a resolution of the causes of the violence.

DVPA proceeding requires act of abuse (FC 6203, 6320) against person of certain relationship to perpetrator (FC 6211). **Abuse + Relationship = DV**

**Relationship:** spouse or former spouse; cohabitant or former cohabitant; current or former dating relationship; person with whom perpetrator had child; child of party or UPA proceeding; second degree of consanguinity (parent/adult child; brother/brother; grandparent/grandchild).

Insufficient relationship: former and new BF or GF; co-workers; neighbors; uncle/nephew. Civil Harassment or Workplace Violence proceeding in D34.

### Abuse, FC 6203.

(a) For purposes of this act, "abuse" means any of the following:

- (1) To intentionally or recklessly cause or attempt to cause bodily injury.
- (2) Sexual assault.
- (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
- (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.

(b) **Abuse is not limited to the actual infliction of physical injury or assault.**

## FC 6320.

- (a) The court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in Section 528.5 of the Penal Code, falsely personating as described in Section 529 of the Penal Code, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or **disturbing the peace of the other party**, and, in the discretion of the court, on a showing of good cause, of other named family or household members.
- (b) ....
- (c) As used in this subdivision (a), **“disturbing the peace of the other party”** refers to conduct that, based on the **totality of the circumstances, destroys the mental or emotional calm of the other party**. ....This conduct includes, but is not limited to, **coercive control**, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty. Examples of coercive control include, but are not limited to, unreasonably engaging in any of the following:
- (1) Isolating the other party ...
  - (2) Depriving the other party of basic necessities
  - (3) Controlling, regulating, or monitoring the other party’s movements, communications, daily behavior, finances, economic resources, or access to services.
  - (4) Compelling the other party by force, threat of force, or intimidation.... to engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage.
  - (5) Engaging in reproductive coercion...

### NATURE AND CONTEXT OF THE “BAD” BEHAVIOR

Relationships are hard. Even in the best relationships there will be serious disputes and discord. Separation, divorce, and custody disputes often times ramp up bad behavior in people not normally disposed to such behavior.

Things to look for:

- Power, control, intimidation v. venting, badgering, argument
- Act of physical violence v. non-violent behavior
- Stalking, threats, taking cell phone, bullying
- Constant and unwanted texts, calls

- One dominant aggressor with history of abusive behavior
- Planned or reactive behavior, mutual behavior, and if reactive behavior was the reaction a result of history of abuse.
- Frequency of abusive behavior
- How recent is the behavior
- Behavior escalating
- Coercive conduct?

DV 100 checklist, page 3

“We do not interpret *Nadkarni* and its progeny to hold a restraining order may issue based on any act that upsets the petitioning party. The DVPA was not enacted to address all disputes between former couples, or to create an alternative forum for resolution of every dispute between such individuals.” *Curcio v. Pels* (2020) 47 Cal. App. 5<sup>th</sup> 1

*IRMO Nardkarni* (2009) 173 CA4th 483

*Altafulla v. Ervin* (2015) 238 CA4th 571

*IRMO Evilsizor & Sweeney* (2015) 237 CA4th 1416

*Burquet v. Brumbaugh* (2014) 223 CA4th 1140

*Jennifer K. v Shane K.* (2020) 47 CA5th 558

### **TRO PROCEDURE**

Forms:

DV-100 Petition

DV-105 Request c/c orders

DV 110 TRO

DV 140 c/c orders

DV 109 Notice of Hearing

Court must rule on request same or next day (FC 6326); set hearing within 21-25 days (FC 6320.5)

Standard of proof: “Reasonable proof” of past act or acts of abuse.

Decision based upon affidavit or testimony (FC 6300) and court review of result of Criminal History Search (FC 6306)

Can not deny for lack of notice alone (FC 6300(b))

If deny, must state reasons and offer to set for hearing.

## Gun Protocol

Prohibited from possession firearms/ammo; advise restrained party

Declaration of no firearms/ammo

DV-800-Surrender to law enforcement or licensed gun dealer

Dispute: Advise law enforcement and DA

5<sup>th</sup> amendment

## DVRO Hearing

### Continuance

Responding one matter of right; petitioner showing of good cause

Pending criminal case; *Pacers, Inc. v. Superior Court* (1984) 162 CA 3<sup>rd</sup> 686

### Evidence of acts not in petition or that occurred post-petition

*IRMO Davila and Mejia* (2018) 29 CA5th 220; *IRMO F.M. & M.M.* (2021) 65 CA5th 106

### Discovery

No reported case authorizing discovery in DV proceeding; no discovery in CH cases

Senate Bill 741-no discovery in DV proceeding without ordered by court on showing of good cause

### Affidavits and testimony/Right to be heard

*IRMO D.S. & A.S.* (2023) 87 Cath 926

### Standard of Proof: Preponderance of evidence

Duration: FC 6345 – up to 5 years; 3 years by default

## CONSEQUENCES OF TRO OR DVRO

“We note a domestic violence restraining order is no ordinary injunction. Its violation is punishable as a misdemeanor. (Pen. Code, §§ 166, subd. (c)(3)(A), 273.6.) Arrest is mandatory where an officer has probable cause to believe the order has been violated. (Pen. Code, § 836, subd. (c)(1).) Moreover, “[t]here often will be some social stigma attached while a person is subject to a protective order. Existing employers may frown on an employee who is subject to such an order and prospective employers almost surely will. Thus[,] the restrained party may lose

out on a promotion or a job.” (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1291 [10 Cal. Rptr. 3d 387].)” *Curcio v. Pels* (2020) 47 Cal. App. 5<sup>th</sup> 1; footnote 6.

Firearm Prohibition-FC 6389

Predicate to PC 166/273.6 prosecution

Immigration: Issuance of TRO or DVRO doesn’t have consequence, but violation of order could have consequences.

Child Custody: FC 3044, 3011, 3020

Spousal Support

FC 4320(i)-- shall consider

FC 4320(m)—reference to 4324.5 and 4325

FC 4324—attempted murder; no spousal support to perp

FC 4324.5—DV felony within 5 years; no spousal support to perp

FC 4325—DV misd. within 5 years; rebuttable presumption against s/s to perp

Retirement/Pension Benefits

See FC 4324.5

Date of Separation/ FC 70

See FC 4324.5

Attorney’s Fees

FC 6344-shall order to prevailing petition, subject to ability to pay

-to prevailing resp. only if DV request was frivolous, abusive, intimidate, delay

Restitution-FC 6342

Job Loss

Disadvantage in out of court custody confrontations

## RECURRING ISSUES

Attorney's Fees-See above

Renewal of DVRO-FC 6345- 5 years minimum or permanent

Showing Required-"more probable than not that there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable". *Richie v. Konrad* (2004) 115 CA4th 1275

Issue preclusion: *IRMO Brubaker & Strum* (2021) 73 CA5th 525; *Martindale & Ochoa* (2018) 30 CA5th 54

Mutual Restraining Orders-Determine dominant aggressor

*Salmon v. Salmon* (2022) 85 CA5th 1047

*K.L. v. R.H.* (2021) 70 CA5th 965

Non-Clets Orders- *IRMO Reichental* (2021) 73 CA 5<sup>th</sup> 396