

DOMESTIC VIOLENCE: COORDINATION OF CRIMINAL AND FAMILY LAW CASES

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Today's Program

1

• **The Three O's**

2

• **EPO's**

Today's Program

3

• **CPO's**

4

• **DVRO's**

1

- **The Three O's**

Emergency Temporary Custody Orders

More restrictive provisions of an EPO trump any less restrictive provisions of a CPO and DVRO

(PC 136.2(c)(1), 136.2(c)(2), 136.2(c)(1))

EPO trumps CPO and DVRO

(PC 136.2(c)(1))

RO's and EPO's

The DVPA authorizes a court to issue protective orders on the application of a party, and emergency protective orders at the request of a law enforcement officer.

(FC 6218, 6320.)

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Emergency Temporary Custody Orders

If jurisdiction is appropriate, the court may:

- enter an emergency temporary custody order (also known as an ex parte temporary custody order),
- set a hearing date within 20 days, and
- order the responding party to appear.

(CRC 5.151, 5.92.)

Needed for Emergency Custody Order

The court may not make an emergency custody order unless there has been a showing of:

- immediate harm to the child or
- immediate risk that the child will be removed from the State of California.

(FC 3064(a), 6323(a); CRC 5.151(d)(5).)

Applicable to interspousal event ONLY

"Immediate harm to the child" includes having a parent who has committed acts of domestic violence...of recent origin or...a part of a...continuing pattern.

Recent or continuing sexual abuse of the child will also show immediate harm.

(FC 3064(b)(2).)

Applicable to interspousal event ONLY

Where a mother left her four-year-old son alone, the mother's failure to provide adequate supervision of a child qualified as "immediate harm" for purposes of issuing a Family Code Section 3064 emergency custody order.

(In re Marriage of Biggums-Slayton (2001) 86 Cal. App. 4th 653, 658.)

Abuse perpetrated against:

DV is abuse perpetrated against:

- Spouse/former spouse
- Co-parent
- Cohabitant/former cohabitant;
- Dating or engagement relationship
- Second degree relative

(FC 6209, 6210, 7600; Oriola v Thaler (2000)
84 Cal. App. 4th 397)

Enjoinable Conduct is Abuse

"Abuse" includes engaging in any behavior that has been or could be enjoined pursuant to Family Code Section 6320.

(FC 6203(d).)

Applicable to interspousal event ONLY

A criminal court may issue any order issued pursuant to Family Code Section 6320 upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.

(PC 136.2(a)(1).)

Applicable to interspousal event ONLY

When sentencing a criminal defendant, the court may also issue an order restraining the defendant from any contact with the victim for up to 10 years.

(PC 136.2(i).)

Applicable to interspousal event ONLY

Although a temporary custody and visitation order requires establishment of a parent and child relationship, generally the court may not make a finding of paternity.

(CRC 5.380.)

Applicable to interspousal event ONLY

Family Code Section 6340 authorizes the extension, for as long as five years, of any orders made at the time of an ex parte protective order request.

(FC 6345, 6340; Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 421-422.)

Applicable to interspousal event ONLY

In general, a minor may appear only by a guardian ad litem. However, special rules govern the ability of minors to seek protective orders pertaining to harassment or domestic violence. A minor 12 years of age or older may appear in court without a guardian.

(CCP 372(a), (b)(1) .)

Applicable to interspousal event ONLY

If a minor (of any age) previously has been declared a dependent child or ward of the juvenile court, the juvenile court with jurisdiction over the minor must hear the minor's application for or opposition to the granting of any of the orders set forth above.

(CCP 374.5.)

Applicable to interspousal event ONLY

No filing fee is required.

(FC 6222.)

Applicable to interspousal event ONLY

A special statute permits a "support person" to accompany a petitioning or responding party to any proceeding to obtain a protective order.

(FC 6303(b).)

Applicable to interspousal event ONLY

When the party who is accompanied by a support person is not represented by an attorney, the support person may sit with the party at the table that is generally reserved for the party and the party's attorney.

(FC 6303(b), (d).)

Applicable to interspousal event ONLY

Any person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is subject to a protective order as defined by Family Code Section 6218 is guilty of a public offense.

(PC 29825.)

Applicable to interspousal event ONLY

Any person subject to a protective order as defined in Family Code Section 6218 may not own, possess, purchase, or receive a firearm or ammunition while subject to that order. Upon issuance of a protective order, as defined in Section 6218, the court must order the respondent to relinquish any firearm subject to the respondent's immediate possession or control within 24 hours after being served with the order, by either surrendering the firearm in a safe manner to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer.

(FC 6389(a), (c)(1), (c)(2).)

Applicable to interspousal event ONLY

A person ordered to relinquish a firearm must, within 48 hours after being served with the order, file the receipt showing that the firearm was surrendered or sold. In addition, he or she must file a copy of the receipt with the law enforcement agency that served the protective order.

(FC 6389(c)(2).)

Applicable to interspousal event ONLY

A protective order may be granted without notice if a declaration shows reasonable proof of a past act or acts of abuse. No protective order will be granted without notice to the opposite party, however, unless it appears that great or irreparable injury would result before the matter can be heard on notice.

(CCP 2015.5; FC 6300, 241, 6320; Nakamura v. Parker (2007) 156 Cal. App. 4th 327, 338.)

Applicable to interspousal event ONLY

An order denying must include the reasons for denying the petition. An order denying must provide the petitioner the right to a noticed hearing on the earliest date that the business of the court will permit.

(FC 6320(a), (b).)

Applicable to interspousal event ONLY

Before a hearing, the court must ensure that a search is (or has been) conducted.

(FC 6306(a).)

Applicable to interspousal event ONLY

After ruling, the court must advise the parties that they may request the foregoing information on which the court relied.

(FC 6306(c)(1).)

Applicable to interspousal event ONLY

Any information obtained as a result of the search that the court relies on must be maintained in a confidential case file.

(FC 6306(d).)

Applicable to interspousal event ONLY

If there is an outstanding warrant the clerk of the court to immediately notify law enforcement officials.

(FC 6306(e).)

Applicable to interspousal event ONLY

Currently on parole or probation, the clerk of the court must immediately notify the parole or probation officer.

(FC 6306(f).)

Applicable to interspousal event ONLY

A court may issue ex parte any of the following protective orders:

1. Disturbing the peace
2. Exclusive care of any animal
3. Excluding a party from the family dwelling
4. Subject to Family Code Section 3064, an order establishing temporary custody and visitation rights
5. Temporary use, possession and control of the parties' real and personal property

(FC 6320(b), 6321, 6323(a)(2), 6324; In re Marriage of Nadkarni (2009) 173 Cal. App. 4th 1483, 1497-1498.)

Applicable to interspousal event ONLY

An ex parte custody and visitation order may be extended after the trial court considers evidence presented at a noticed hearing, and the resulting order will survive the termination of any protective order.

(FC 6340(a), 6345; Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 421-422.)

Applicable to interspousal event ONLY

Ex parte protective order excluding one party from a residence only if the affidavit shows all of the following:

1. The party who will stay has a right under color of law to possession of the premises
2. The party to be excluded has assaulted or threatens to assault any minor child of the parties or of the other party
3. Physical or emotional harm would otherwise result to the other party, to any minor child of the parties or of the other party.

(FC 6321(b)(1); CCP 2015.5.)

Applicable to interspousal event ONLY

“Color of law” may be based on a lesser showing than a document of title.

Applicable to interspousal event ONLY

Courts have see-sawed. The present trend seems to require a showing of at least the reasonable possibility of physical violence unless an exclusion order is issued.

Applicable to interspousal event ONLY

A mutual restraining order may be issued, only if (a) each party presents written evidence of abuse or domestic violence; and (b) the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense. On and after January 1, 1996, a court no longer has authority to dispense with the requirement of written evidence on the basis of a stipulation of the parties.

(FC 6305, 6203, 6211; *Monterroso v. Moran* (2006) 135 Cal. App. 4th 732, 736-737; *Conness v. Satram* (2004) 122 Cal. App. 4th 197, 204.)

Applicable to interspousal event ONLY

A hearing must be held within 21 days of the granting or denial of an ex parte temporary restraining order, or within 25 days if good cause is shown.

(FC 242(a).)

Applicable to interspousal event ONLY

If a hearing is not held within the foregoing time period, the court, nevertheless, is permitted to hear the matter, but the protective order is unenforceable unless reissued under Family Code Section 245. (FC 242(b).)

Applicable to interspousal event ONLY

- At least five days before the hearing, the respondent must be personally served.
- The court, on the petitioner's or its own motion, may shorten the time for service
- The respondent is entitled to one continuance for a reasonable period.

(FC 243(b), (d), (e); Ross v. Figueroa (2006) 139 Cal. App. 4th 856, 861-862.)

Applicable to interspousal event ONLY

Although some law enforcement agencies may be reluctant to enforce the order until proof of service has been received, the preprinted language on the order clarifies that the order is effective when made and is enforceable by any law enforcement agency that has received the order or has verified its existence via the CLETS.

(FC 6381(b).)

Applicable to interspousal event ONLY

Delivery of the protective order to law enforcement agencies is no longer expressly required by statute.

Applicable to interspousal event ONLY

When the law enforcement agency has not received proof of service on a restrained person who was not present at the court hearing, the law enforcement agency is to advise the restrained person of the terms of the order and then enforce it.

(FC 6383(e), (g).)

Applicable to interspousal event ONLY

If the restrained person receives actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement.

(FC 6384, 6380(c).)

Applicable to interspousal event ONLY

If a petitioner protected by a TRO cannot produce an endorsed copy of the order, the officer must immediately contact the Department of Justice Domestic Violence Protective Order Registry to verify the existence of the order. If an order has been issued, but not served, the officer must immediately verbally notify the respondent of the terms of the order and advise the respondent where to go to obtain a copy. (FC 6383(d), (e), 6380.)

Applicable to interspousal event ONLY

Verbal notice is sufficient notice to and service on the respondent.

(FC 6385(a).)

Applicable to interspousal event ONLY

A protective order may be granted if the declaration shows reasonable proof of a past act or acts of abuse.

(FC 6200, 6300; CCP 2015.5; Nakamura v. Parker (2007) 156 Cal. App. 4th 327, 338.)

Applicable to interspousal event ONLY

automatically triggers the Family Code Section 3044 presumption.

(S.M. v. E.P. (2010) 184 Cal. App. 4th 1249, 1267-1268.)

Penal Code § 278.7

The parental kidnapping statute (PC 278.5):
“ . . . does not apply to a person with a right to custody of a child who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes . . . that child . . . ”

and reports the child's address to the district attorney.

Applicable to interspousal event ONLY

The court may issue any of the following orders:

1. Any of the protective orders set forth in Family Code Section 6320
2. Temporary custody or visitation of the child
3. An order that a party pay support of the child provided that the order is without prejudice in the action
4. Respondent pay spousal support if the parties are married to each other and no spousal support order exists
5. Restitution to the petitioner for lost earnings and medical care and temporary housing, incurred as a direct result of the abuse - by the petitioner for out-of-pocket expenses incurred by the responding 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 - by the respondent to any public or private agency providing services to the petitioner
6. Participate in batterer's treatment counsel
7. An order for the payment of the prevailing party's attorney's fees and costs.

(FC 6323(a)(2), 6340(a), 6341(a)-(d), 6342(b), 6343, 6344, 7600, 7611, .)

Applicable to interspousal event ONLY

Excluding a person from a dwelling, but only on a finding that physical or emotional harm would otherwise result to the other party or any minor child of the parties, or of the other party.

(FC 6321, 6340(b).)

Applicable to interspousal event ONLY

Batterer's program provided in Penal Code
Section 1203.097.

(FC 6343(a).)

Applicable to interspousal event ONLY

The court may grant a mutual order only if (a) both parties personally appear and each party presents written evidence of abuse or domestic violence, and (b) the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.

(FC 2047(b), 6305; *Conness v. Satram* (2004) 122 Cal. App. 4th 197, 204.)

Applicable to interspousal event ONLY

The court's protective order must state that the respondent is prohibited from owning, possessing, purchasing, receiving, attempting to purchase, or attempting to receive a firearm.

(FC 6304; PC 29825.)

Applicable to interspousal event ONLY

The matter must be set for mediation even if paternity of a child is at issue, mediation must not be denied to the parties.

(FC 3170, 3172, 6323, 6340.)

Applicable to interspousal event ONLY

If a protective order has been directed to a parent, the court must consider whether visitation by that parent shall be supervised, suspended, or denied.

(FC 6320, 6340.)

Applicable to interspousal event ONLY

The visitation order must specify the time, day, plan, and manner of transfer of the child.

(FC 3100(c), (d).)

Applicable to interspousal event ONLY

- Personal conduct, stay-away, and residence exclusion orders may not exceed five years in duration.
- These orders may be renewed, on the request of a party, either for five years or permanently, without a showing of any further abuse.
- The request for renewal may be brought at any time within the three months before the expiration of the orders.

(FC 6345; Avalos v. Perez (2011) 196 Cal. App. 4th 773.)

Applicable to interspousal event ONLY

- If the restrained party appears and challenges the requested extension, the court must determine whether the protected party's expressed fear of future abuse is genuine and reasonable.
- The court must find evidence that there is some reasonable risk that such abuse will occur sometime in the future if the protective order is not renewed.
- But the court should not permit the restrained party to challenge the truth of the evidence and findings underlying the initial order.

(Ritchie v. Konrad (2004) 115 Cal. App. 4th 1275, 1282-1285.)

Applicable to interspousal event ONLY

The duration of orders for custody, visitation, support, and disposition of property is governed by the law relating to those specific subjects.

(FC 6345(b).)

Applicable to interspousal event ONLY

The failure to state the expiration date creates an order with a duration of three years from the date of issuance.

(FC 6345(c).)

Applicable to interspousal event ONLY

- § 96.07 Ex Parte Emergency Protective Orders Requested by Peace Officers
- Family Code Section 6240 et seq.

Applicable to interspousal event ONLY

A designated judicial officer may orally issue emergency protective orders against domestic violence at the request of certain law enforcement officers.

(FC 6240(a), 6241, 6250.)

Applicable to interspousal event ONLY

If a responding law enforcement officer believes that there may be grounds for issuance of an emergency protective order, the officer must inform the person for whom the order may be sought that the person may request the officer to request an emergency protective order. If the officer believes that the person requesting an emergency protective order is in immediate and present danger, the officer must request the order.

(FC 6241, 6275(b).)

Applicable to interspousal event ONLY

An emergency protective order may consist of any of the protective orders set forth in Family Code Section 6218.

(FC 6252(a), 6320, 6322.)

Applicable to interspousal event ONLY

An emergency protective order may be issued only if the judicial officer specifically finds that (a) reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists, or that a child is in immediate and present danger of abuse or abduction, and (b) an emergency protective order is necessary .
(FC 6251.)

Applicable to interspousal event ONLY

The law enforcement officer must reduce it to writing and sign it.

(FC 6270.)

Applicable to interspousal event ONLY

- The emergency protective order must be served on the restrained party by the law enforcement officer who requested it.
- A copy must be given to the protected party and another filed with the court as soon as practicable after issuance.

(FC 6271(a)-(c).)

Applicable to interspousal event ONLY

An emergency protective order expires at the earlier of: (1) the close of judicial business on the fifth court day following the day of its issuance, or (2) the seventh calendar day following the day of its issuance.

(FC 6256.)

Applicable to interspousal event ONLY

An emergency protective order may consist of any of the orders authorized in Welfare and Institutions Code Section 213.5. It may require placement of the temporary care and control of the endangered child and any other minor children in the family or household with the child's parent or legal guardian who is not restrained.

(FC 6252(c).)

Applicable to interspousal event ONLY

An emergency order for an endangered child expires at the earlier of (1) the close of judicial business on the fifth court day following the day of its issuance, or (2) the seventh calendar day following the day of its issuance.

(FC 6256.)

Applicable to interspousal event ONLY

An order under the DVPA must contain a notice in substantially the following form:

"This order is effective when made. The law enforcement agency shall enforce it immediately on receipt. It is enforceable anywhere in California by any law enforcement agency that has received the order or is shown a copy of the order."

(FC 6224.)

Applicable to interspousal event ONLY

This notice requirement has not been amended to reflect new law, which provides that a law enforcement agency may also enforce an order under the DPVPA when an officer has verified the existence and contents of an order through the Department of Justice Domestic Violence Restraining Order System.

(FC 6381(b), (c), 6380(a).)

2

- **Criminal Law
Precedent**

Applicable to interspousal event ONLY

Domestic Violence Restraining Order
System available to court clerks and law
enforcement personnel, through CLETS
(FC 6380(b), 6385.)

Presumption Against Custody to D.V. Perpetrators

- Family Code § 3044:
- (a) upon a finding that a party seeking custody has perpetrated d.v. against other party, child or child's siblings within past 5 years – there is a presumption against sole or joint, physical or legal custody.
- (c) perpetrated “domestic violence” = intentionally or recklessly caused/attempted bodily injury or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

Presumption Against Custody (cont.)

- The issuance of a domestic violence restraining order = finding for purposes of Family Code § 3044. *S.M. v. E.P.*, 184 Cal.App.4th 1249, 1267 (2010)
- A conviction of domestic violence against the other party in the last 5 years also satisfies the finding – Fam. Code § 3044(d)(1)
 - Fam. Code § 6306 requires court in all restraining order cases to search for criminal convictions for serious or violent felonies or d.v./violent misdemeanors/restraining order violations and parties may request the results of the search
- Even if no restraining order has been requested, survivor can still ask court to make a finding if the other parent has perpetrated domestic violence

What if survivor wants to leave the state to get safe?

- If there are no court orders in place & no action has been filed in CA, no CA law prevents a parent from taking the children out of state, as long as they are not concealing the child
 - However, parent may need to come back to CA to litigate custody if CA was the home state
- UCCJEA- Uniform Child Custody Jurisdiction & Enforcement Act governs where a custody case gets filed – Family Code § 3400 et seq.
- Jurisdiction is in the “home state,” usually where child has been living for past 6 months
- A court can decline custody jurisdiction if there has been domestic violence

If they file for custody in CA, can't leave state without court order

- Family Code § 3063: any ex parte order for custody must include an order preventing the parent receiving custody from removing the child from the state pending notice and hearing
- Don't file a restraining order here if your client needs to leave the state immediately and has kids with abuser
 - May be jurisdictional issue about whether new state will issue a restraining order for abuse that occurred in another state
 - No case law in CA on whether court can issue restraining order for acts of domestic violence that occurred in another state – many courts here willing to issue orders

If survivor needs to go into hiding – warn about parental kidnapping (Penal Code 278; 278.5)

- Hiding child from other parent, whether or not there is a court order in place is a crime, and whether or not they leave the state (unless the order is a no custody and no visitation order).
- Good cause exception for abuse to child or parent (Penal Code § 278.7).
 - Must file good cause report with District Attorney: Child Abduction Unit in county from which you flee (have at least 10 days)
 - Must file for custody (have at least 30 days)

Crafting Safe Custody and Visitation Orders

- Right to separate mediation – Fam. Code § 3181 (a) and separate meeting with custody evaluator – Fam. Code § 3113
- Family Code §§ 3031(b), 6323(c) requires any custody/visitation order made when a restraining order is in place must specify: **time, day, place and manner of transfer** of child, and **must not disclose location of any confidential location** where a party is staying
- Family Code § 3031(c) also requires court to consider whether supervised or no visitation is appropriate in cases where restraining order has been issued
- Discuss with clients safety issues around particular visitation proposals
 - i.e.: If opposing party's family member is to supervise exchange, will they hold him/her accountable?
 - Consider police station as visitation exchange site if not using professional supervised exchange site
 - Is Skype communication safe if abuser is technologically savvy?

Restrictions on Mutual Restraining Orders

- Fam. Code § 6305: restricts court from issuing mutual RO's unless –
 - Both parties appear
 - Both present written evidence of abuse
 - Court makes detailed findings of fact that both parties acted primarily as aggressors and neither party acted primarily in self defense
- *Monterroso v. Moran*, 135 Cal.App.4th 732 (2006): “an improvidently issued mutual restraining order may adversely impact victims of domestic violence and continue their victimization” 135 Cal.App.4th at 738.
- See Penal Code §§ 836(c)(3) & 13701(b) for definition of primary aggressor

Penal Code §§ 836 (c)(3) & 13701(b)

- Penal Code § 836(c)(3) requires police responding to a situation where there are mutual restraining orders to determine primary aggressor:
 - The primary aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the primary aggressor, an officer 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.
- Penal Code § 13701(b) requires all law enforcement agencies to develop policies and standards for responding to all domestic violence calls
 - Defines “dominant aggressor” identically as in §836(c)(3)

CLETS v. Non-CLETS Orders

- No such creature in law as a non-CLETS order
- Family Code § 6221(c) requires all orders issued under the Domestic Violence Prevention Act to be on Judicial Council forms
- *Akilov v. Rosenblum*, 2012 Cal. App. Unpub. LEXIS 5837 (Cal. App. 1st Dist. Aug. 8, 2012) court found no authority for the issuance of a non-CLETS stay away order
- If parties stipulate to non-CLETS, may be argument that this is permissible
- Need to really review pros/cons with client

Economic support is key to safety

- Fam. Code § 6341(a),(c): Court can order child and spousal support in restraining order actions even if no underlying dissolution/paternity case
 - Court must consider whether failure to order spousal or child support will jeopardize safety of abused party

Domestic Violence & Spousal Support

- Family Code § 4320(i): history of d.v. is mandatory factor in spousal support determination
 - Abuser may have caused partner to lose her job
 - Prevented her from entering work force or getting more education
 - Psychological damage from abuse may have long term affect on abused partner's ability to work
- Domestic violence is the only listed factor that courts can also consider when issuing temporary spousal support – Family code § 3600

D.V. and Spousal Support – cont.

- Family Code § 4325 – presumption against temporary or permanent spousal support to spouse who has been convicted of domestic violence against the other spouse in five years prior to filing of disso. or any time thereafter - *In re Marriage of Cauley*, 138 Cal.App.4th 1100, 1106 (2006) (even when there is a prior settlement agreement with non-modifiable support provision)
- Family Code § 4324 – spouse who is convicted of attempting to or solicit murder or other spouse is prohibited from receiving spousal support or any insurance benefits from injured spouse
- Family Code §4324.5 – spouse who is convicted of a violent sexual felony against the other spouse - no spousal support to perpetrator

Domestic Violence & Property

- Domestic violence is not a reason for unequal distribution of property with one exception:
 - Family Code § 4324.5(a)(4): a criminal conviction for a violent sexual felony perpetrated by one spouse against the other spouse within 5 years
 - injured spouse gets 100% of community property pension/retirement benefits
- Abused spouse may want to file a tort suit against abusive spouse if that spouse has sufficient resources and there is significant history of abuse
 - 3 year statute of limitations from last act of domestic violence or from discovery that injury or illness resulted from domestic violence – Code of Civ. Proc. § 340.15.