HAS TECHNOLOGY REDEFINED ABUSE UNDER THE DVPA?

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As family law practitioners, we regularly meet with clients and potential clients who need our advice on a wide range of issues. Is it okay if I move out of the house? How much spousal support am I likely to receive? One area that can be particularly challenging to advise clients about is whether they will be successful in seeking restraining orders. The outcome of any contested hearing can be hard to predict due in part to the individual views of the judges who hear them, and the recent revisions to the law on restraining orders make some cases even more unpredictable. An additional concern for victims of domestic violence is the fear that an unsuccessful request for restraining orders could lead to retaliation from their abuser, who now feels empowered by a legal victory and angry about the fact that dirty laundry has been aired in the public court record.

People outside of the practice of family law might not understand why this would be a difficult type of case to predict. They assume that every victim of abuse comes to our office the day after a violent incident occurred, with color photos and a police report. Or that every perpetrator of abuse engages in regular violent outbursts as opposed to more subtle threats and manipulation. And of course, they assume that innocent people are never falsely accused of abusive conduct so that the alleged victim can gain advantages under other Family Code sections.

Abuse can take many forms, and with the guidance of our appellate courts, we now understand that the misuse of e-mail accounts, social media platforms, and other technologies can be sufficient grounds to seek and possibly obtain orders under the Domestic Violence Prevention Act.[1] This trend in broadening the types of conduct that warrant the granting of restraining orders has included revisions to several Family Code sections that had previously been unclear or even inconsistent.

Specifically, prior to an amendment that was passed in 2014, California Family Code section 6220 stated that the purpose of the DVPA was to prevent the recurrence of acts of violence and sexual abuse. Therefore, by the plain language of the former statute, acts of violence or sexual abuse must have occurred in the past in order for a party to seek protection under the DVPA to keep the violence from *recurring*. At least that was the theory many of us put forward when defending requests for restraining orders.

However, a few sections earlier in the same chapter, the term *abuse* was and is defined in part as engaging in any act that could be restrained under section 6320.[2] This includes not only acts of violence, but also harassing conduct and disturbing the peace of the other party.[3] A literal reading of the two code sections means that one party *contacting, either directly or indirectly, by mail or otherwise*, the other party could be sufficient grounds for granting a restraining order. While this would be an absurd interpretation, the fact that the Code sections cannot be taken literally could be used to argue that the Legislature did not intend the litany of acts contained in section 6320 to each constitute abuse, for which protection could be sought by way of domestic violence restraining orders.

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A new definition of *disturbing the peace* under the DVPA came about in 2009, in the case of *In re Marriage of Nadkarni*.[4] In that case, the Court of Appeal reversed the trial court for dismissing the ex-wife's application for restraining orders as facially insufficient, and in doing so, clearly indicated that there do not need to be allegations of physical violence for a restraining order to be made under the DVPA. The *Nadkarni* court relied on the broader language contained in the definition of *abuse* in Family Code section 6320 and found that Mrs. Nadkarni had sufficiently alleged that Mr. Nadkarni had disturbed her peace, as he engaged in conduct which "[destroyed] the mental or emotional calm of his former wife by accessing, reading and publicly disclosing her confidential e-mails."[5]

Advances in technology, including our daily use of e-mail and social media, have continued to push actions under the DVPA in a new direction. Since the decision in *Nadkarni*, the appellate courts have repeatedly affirmed trial courts that have found one party has destroyed the mental or emotional calm of the other, and granted restraining orders under the DVPA. In these cases, the

primary allegations against the restrained parties have involved hacking into social media accounts, posting videos and pictures, and reading, possessing, or disclosing private e-mails of the protected party.

In re Marriage of Evilsizor & Sweeney is one such case.[6] In *Evilsizor*, unlike *Nadkarni*, there was no history of physical violence between the parties. The trial court granted restraining orders under the DVPA based solely upon Mr. Sweeney's downloading and use of a multitude of content taken from Ms. Evilsizor's phone, to which he claimed she had given him access in the past. The content included text messages between Evilsizor and third parties, as well as an electronic diary that she kept on her phone. Sweeney was also alleged to have hacked into her Facebook account and redirected her Facebook e-mail to an account he could access.

The trial court granted Evilsizor's request for restraining orders and the Court of Appeal affirmed, endorsing the trial court's reliance on *Nadkarni* in reaching its decision. A similar result was reached in *Phillips v. Campbell, Jr.*,[7] where restraining orders were granted based, at least in part, on the restrained party posting private information and pictures on Facebook and videos of the protected party on YouTube. He also sent messages to third parties with Ms. Phillips's private information.

These cases represent a trend towards granting domestic violence restraining orders based on conduct that disturbs the peace, as opposed to requiring a showing of acts of violence or credible threats of violence. For the family law practitioner who is attempting to defend against a request for restraining orders, there are only a few published cases in recent years that contain helpful language, and that universe appears to be getting smaller.

In *S.M. v. E.P.*, the Court of Appeal reversed the trial court's granting of restraining orders under the DVPA.[8] In that case, the incident for which protective orders were sought was an argument that occurred in the middle of the night, during which S.M. badgered E.P. and pulled the covers off of her while she was in bed. E.P. alleged that S.M. had threatened to kill her, but the trial court did not find that a threat had been made, instead finding that he made a "very negative comment."[9]

The trial court in *S.M.* issued restraining orders under the DVPA, but also indicated that they did not intend for those orders to invoke the custody presumption in Family Code section 3044. The Court of Appeal essentially found that the trial court was confused about its authority to control the impact of an order under the DVPA, as the Code does not contemplate different types of restraining orders, with some affecting custody and others not affecting custody.

For the family law attorney defending a histrionic, argumentative client, *S.M.* offered solid support for the concept that badgering your significant other and saying very negative things during an argument is not enough to warrant the granting of orders under the DVPA. However, with the newer appellate decisions consistently finding that orders can be granted for conduct that *destroys the mental or emotional calm* of the other party, it is likely that arguments relying on the holding in *S.M. v. E.P.* will not have the impact that the defending party once hoped.

In fact, in the *Evilsizor* case, Mr. Sweeney raised *S.M. v. E.P.* in support of his argument that orders should not have been made against him under the DVPA. The *Evilsizor* court distinguished *S.M.* by indicating that the trial court in *Evilsizor* found that Mr. Sweeney's conduct fell within the DVPA, but that the *S.M.* court did not make a clear finding of abuse.[10] This analysis appears to be a convenient way to avoid the real issue: the *S.M.* court found that the defending party had badgered the alleged victim, but did not find that this badgering had disturbed her peace or destroyed her mental calm.

Trial courts and appellate courts are taking an aggressive stance in favor of granting restraining orders based upon misuse of e-mail and social media accounts, which begs the question whether comparable conduct would have the same result if not executed through technology. If Mr. Sweeney had gone through a physical file of handwritten letters that he found in his estranged wife's bedroom and attempted to use the information in those letters against her, would the court have restrained him based on that conduct? If Mr. Campbell had telephoned third parties and shared personal information with them about Ms. Phillips instead of private messaging them, would the court have considered that an unfortunate consequence of unrequited love, as opposed to conduct warranting restraining orders? Is more intense protection needed against possible stalking and harassment via technology because technology makes this bad conduct easier to execute? Does the availability of a thousand pieces of information and delivery platforms that reach millions of people necessitate a shorter leash on ex-boyfriends who demonstrate a propensity to misuse these channels against their former girlfriends?

On the other hand, how much is this trend in appellate cases influencing our daily practice in the trial courts? Our judicial officers who have been on the bench for a few years used to consider and rule on these applications with the directive of preventing the recurrence of violence, and many of them appear reluctant, or even unwilling, to grant orders under the DVPA without actual violence or a credible threat of violence.

When your next potential client sits across from you during the consultation and tells you that their wife hacked into their Facebook account and made a copy of all the contents of their laptop, which included their cell phone data, how confident will you be in recommending that they seek a restraining order? Many clients will tell you that they don't want to seek restraining orders if they aren't going to win because they don't want to incur the cost unnecessarily or to empower the other party to continue their bad conduct. It will remain challenging to say with any confidence that the judge who is about to hear their case won't require abusive conduct beyond harassment in order to obtain protective orders.

1 The Domestic Violence Prevention Act (or DVPA) is codified at California Family Code sections 6200–6409.

2 California Family Code section 6203 defines "Abuse" as follows:

(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.

3 California Family Code section 6320(a) provides:

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.

4 93 Cal. Rptr. 3d 723 (2009).

5 *Id.* at 734.

6 *In re Marriage of Evilsizor & Sweeney*, 89 Cal. Rptr. 3d 1 (2015).

7 206 Cal. Rptr. 3d 492 (2016).

8 *S.M. v. E.P.*, 109 Cal. Rptr. 3d 792 (2010).

9 *Id.* at 802.

10 *Evilsizor*, 89 Cal. Rptr. 3d at 9.

UPCOMING CHAPTER PROGRAMS

Bay Area

March 7, 2017

R. Ann Fallon, CFLS, and John Madden

The Perils of PERS

April 12, 2017

Lorie Nachlis, CFLS, and Robert Kaufman, PhD

Special Needs Children in Divorce

Sacramento Chapter:

February 28, 2017

Steven R. Burlingham, CFLS, Gary, Till & Burlingham

Primer on Stepparent Adoptions

March 28, 2017

David L. Black, COA, ABV, CFF, ASA

Unusual Forms of Compensation and Income Available for Support

April 25, 2017

Steve Baron, MA, MFT

Secondary Trauma and Self-Care for the Family Law Attorney

Orange County

2017 Speaker's Series: "An Open House at 2640 Family Court: How to properly present your neighbors, the Epsteins, Watts, Moores, Marsdens, Brancos, Griniuses, Haineses, Delaneys, and Dukes at Trial"

April 17, 2017

Preparing and Presenting Credits and Reimbursements Issues, Determining Lender's Intent, Understanding the Accounting of the Right to Reimbursement Pursuant to Moore/Marsden and Beyond (Branco, and Grinius)

June 26, 2017

Calculating and Litigating Tracing Issues

September 18, 2017

A Dispute in Value - Proper Analysis, Examination, and Cross-Examination of Real Estate Appraisers and Analysis of the Valuation Report and Fair Market Rental Analysis

November 13, 2017

Presumptions and Fiduciary Duties