Extending The Impact Of Domestic Violence Protective Orders

By Lynette Berg Robe, C.F.L.S. and Melvyn Jay Ross, C.F.L.S.

Ms. Robe is a Certified Family Law Specialist in solo practice in Studio City, dealing with all family law matters, including domestic partnerships, mediation and collaborative law. She is a member of the Executive Committee of Family Law Section of the Los Angeles County Bar Association and is co-chair of its Legislation Committee.

Mr. Ross is a 1964 graduate of UCLA School of Law and is a Certified Family Law Specialist (1980) in private practice with offices in Beverly Hills, California. He is a Fellow of the American Academy of Matrimonial Lawyers, a member of the Executive Committee of the Family Law Section (FLEXCOM) of the State Bar of California and a member of the Executive Committees of the Los Angeles County Bar Association and Beverly Hills Bar Association, Family Law Sections.

In 2005, Domestic Violence continued to be a fruitful area for legislative action.

This past year, Assembly Member Rebecca Cohn (D-Saratoga) introduced a package of three bills to improve what she viewed as "deficiencies" in the State's domestic violence prevention laws:

- **Assembly Bill No. 99 (2005-2006 Reg. Sess.)** amended Family Code section 6345 subdivision (a) and (c) and Family Code section 6361.
- **Assembly Bill No. 118 (2005-2006 Reg. Sess.)** amended Family Code section 3100 and *Penal Code* section 136.2.
- **Assembly Bills No. 99 and 118 (2005-2006 Reg. Sess.)** passed both houses and were signed into law by the governor, effective January 1, 2006.
- **Assembly Bill No. 104 (2005-2006 Reg. Sess.)** amended Family Code section 6347 was introduced to provide that the early dismissal of a protective order, even by stipulation, required an order by the *original* issuing judicial officer.
- **Assembly Bill No. 104 (2005-2006 Reg. Sess.)** failed passage in the Senate Judiciary Committee.

Assembly Bill 99

Under Assembly Bill No. 99 (amending Fam. Code, § 6361, subd. (b)), commencing January 1, 2006, Domestic Violence Protective Orders issued in hearings brought under the Domestic Violence Protection Act and in Family Law proceedings can extend for a maximum duration of five years rather than the current maximum of three years.

Interestingly, if on the face of the order no termination date for personal conduct, stay away, and residence exclusion orders is stated, then the default still will be the old three-year duration period. So, while the court has the discretion to make the order last up to five years, the court retains discretion to make the order for a shorter period of time, or, if the court is silent as to duration, the issued protective order will extend for a three-year period.

Assembly Bill No. 99's amendment to Family Code section 6345 subdivision (a) and (c) provide for an extension of the protective orders after five years for an additional five-year period, or permanently, without a showing of further abuse since the date of the initial order, subject to termination or modification on motion of one party or further order of court.

Amending Family Code section 6361 subdivision (b), Assembly Bill No. 99 also provides that the date of expiration of the protective orders, in addition to being stated on the face of the judgment, shall also state that the protective orders shall expire not more than five years from the date the judgment is entered.

Assembly Bill No. 99 was not without controversy. As originally introduced, Assembly Bill No. 99 would have made the initial term for a protective order 10

years instead of three years. Assembly Member Cohn and the proponents of the bill cited studies that nearly half of the victims who obtained protective orders were re-abused within two years and that six percent of defendants in domestic violence cases were convicted of having violated the order. Proponents thus contended that extending the initial duration of these protective orders would save victims from the painful ordeal of having to return to court every three years to renew their orders. Proponents of the bill also argued that Assembly Bill No. 99 constituted a "cost saver" because victims would not be coming back to court every three years.

Advocates for domestic violence victims further argued that even though the physical abuse may have stopped during the three years, the litigation was often prolonged, going on for years, with the abusive party re-victimizing the protected party by forcing the protected party to go through the emotional gauntlet of contested hearings to renew their protective orders.

Among supporters of Assembly Bill No. 99 were: California District Attorneys Association; California Alliance Against Domestic Violence; Contra Costa County Child Abuse Prevention Council; Lambda Letters Project; American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME); California Commission on the Status of Women; and Lt. Governor Cruz Bustamante.

During debate in the Assembly Judiciary Committee, the author agreed to amend the bill down to five-year duration, rather than the initial request for 10 years. It was pointed out during the debate that civil harassment restraining orders and protective orders for workplace violence, which have only a three-year duration, have a higher standard of proof, "clear and convincing," rather than the lesser "preponderance" standard of proof for domestic violence restraining orders. Also, stalking protective orders, which may be issued for up to 10 years, require that the defendant actually be convicted of stalking.

Historically, previous legislative sessions had defeated several prior attempts to increase the duration of the domestic violence protective orders to 10 years or to make them permanent with the initial order.

In light of these comparisons, Assembly Member Cohn agreed to change her bill to increase the duration only to the five years, rather than the 10 years that she had wanted.

The opponents of Assembly Bill No. 99, including the California Public Defenders Association and the Family Law section of the State Bar, both opposed extending the DVPOs to five years, arguing that it would harm families and put unnecessary burdens on the restrained party. The primary concern of the Family Law section of the State Bar was that these protective orders are increasingly being used in family law cases to help one side jockey for an advantage in child custody and/or property litigation and in cases involving the right to receive spousal support. They argued that extending the duration of the orders could severely impact or prejudice ongoing custody and visitation of children of the parties. Also, they pointed out, the initial temporary protective orders (pending a full, noticed hearing) restricting personal conduct, stay-away orders, and residence exclusion, are almost routinely issued by the court in family law proceedings even when there is relatively meager evidence and usually without notice to the restrained person.

Later, at the noticed hearing, in order to obtain the same domestic violence protective order relating to personal conduct, stay-away orders, or a residence exclusion order, the petitioner is supposed to make a showing of "reasonable proof" of past acts of abuse and the likelihood of continuing abusive conduct on the respondent's part. Assembly Bill No. 99's opponents argued, however, that such protective orders are readily ordered, frequently without actual proof, such that extending the duration would overly penalize and prejudice parties who were not guilty of the allegations.

Often, the opponents argued, the protective order hearing may be at the beginning of a family law case before the respondent has retained counsel and the typical respondent rarely has the skill to prove himself or herself not guilty of the allegations. The court has already issued a temporary restraining order based on an ex parte hearing without notice or argument from the respondent, and such prior issuance creates a presumption of guilt too difficult to

overcome.

The Family Law section of the State Bar further argued that at the noticed hearing on protective orders, Respondents are frequently asked by judicial officers if they "have any problem staying away" from the other party. If (as is typically the case) the Respondent answers "no," the permanent order is generally issued. And, because the statute (Fam. Code § 6345) mentions "three years" as the maximum duration for such orders, trial court's too often issue three-year protective orders, which then become renewable with no additional proof of a recurrence of abuse for another three years or even permanently, upon the request of a party.

It should be noted that with CLETS (California Law Enforcement Telecommunications System) orders, these Domestic Violence Protective Orders are entered into the California law enforcement computer system, which can be accessed from all over the state, and are also entered into the Federal Registry (the "Family Violence Indicator") where the accused's identification is put into data banks without a mechanism for removal even if the order is later canceled. Further, there is an automatic firearm restriction imposed by federal law and, therefore, the state judge has no discretion but to order firearm restrictions if the protective order is granted.

The Family Law section of the State Bar was additionally concerned that the extension of the protective orders could continue to hurt the family by limiting visitation or requiring monitored visitation, or could result in the permanent eviction of a party from his or her home shared with the protected party, and severely impact on the protected person's employment opportunities, all frequently based on mere allegations from the initial hearing.

While clearly these protective orders are necessary in egregious cases of abuse, it is troubling that they appear to be sought more and more frequently for retaliation and litigation purposes rather than from the true need to be protected from a genuine abusive batterer.

During the hearings on Assembly Bill No. 99, in connection with the matter of renewal of the protective orders after the initial three-year, or, now five-year, period, the question arose regarding whether or not additional proof of abuse was required.

In practice under current law, the protective orders may be renewed for three years, or extended permanently, without any further evidentiary showing of abuse in uncontested proceedings. In a case of first impression, *Ritchie v. Konrad* (2004) 115 Cal. App.4th 1275 (trial court, Judge Richard E. Denner, Los Angeles), the Second District Court of Appeal held that the trial court should grant a requested extension either for three years or permanently upon the request of the plaintiff/petitioner, unless the request is contested.

In the event that the extension is contested, the trial court then must determine whether or not the protected party has a "reasonable apprehension" of future abusive conduct in order to renew and extend the restraining orders. The Court of Appeal did opine that if the restrained party does contest the renewal, the trial court must make an inquiry beyond whether the protected party requested the renewal and therefore has a desire for the continuance of the protective order.

The *Ritchie* panel ruled that for a renewal of an order, a protected party need not make a showing of immediate and present danger of future acts of abuse. The trial court must find, however, by a preponderance of the evidence, that "the probability of future abuse is sufficient such that a "reasonable" woman or man in the same circumstances would have a "reasonable apprehension" such abuse will occur unless the court issues the protective order."

The trial court should look at the past, look at what has changed in the lives of the parties, whether they have "moved on" and what has stayed the same, and then relate those facts to the consideration of whether to renew the orders, make them permanent, or terminate them. The trial court should weigh the burdens on the restrained party, such as the impact on employment or visitation with the children, against the benefits to the protected party. In the case where there is reasonable apprehension of physical abuse in the future, there the appellate panel concluded that the balance should be on the side of the protected party.

The *Ritchie* case will continue to govern hearings on the renewal of protective orders, only now the

renewal period will be for another five years unless the protected party requests permanent restraining orders.

Assembly Bill 118

Amending Family Code section 3100 and Penal Code section 136.2., Assembly Bill No. 118 (2005-2006 Reg. Sess.), which also goes into effect on January 1, 2006, was supported by the Family Law section of the State Bar, among others.

Assembly Member Cohn's stated purpose for Assembly Bill No. 118 was to "ensure the safety of children, by closing a loophole in the law." In instances where a criminal protective order has been issued, this amendment adds the following language to section 3100, subdivision(c):

> If a criminal protective order has been issued pursuant to Section 163.2 of the Penal Code, the visitation order shall make reference to, and acknowledge the precedence of enforcement of, any appropriate criminal protective order.

Current law, California Rules of Court, rule 5.500, requires the Judicial Council to promulgate a "protocol" to be adopted by all local courts, for the timely coordination of all orders against the same defendant and in favor of the same victim or victims. The protocol has been in place since 2003 and specifies mechanisms for coordinating communication and information between criminal, family, and juvenile court cases involving the same parties. Los Angeles County has adopted Local Rule 2.6, effective July 1, 2005, dictating how these communications will take place in Los Angeles County, and a local form, "Notice of Other Cases Involving Minor Children," is being devised.

Assembly Bill No. 118 adds another layer by requiring that when custody and visitation orders are entered by family law or juvenile court judges, after a criminal protective order involving the same parties has been issued, the order specifically reference the criminal protective order in any subsequent custody and visitation order.

Additionally, under current law, a criminal protective order always has precedence over a family law order, so it may not always be possible for parties or law enforcement to determine if a family law order is inconsistent with the criminal protective order and, thus, not enforceable. Assembly Bill No. 118, by requiring that any subsequent custody order reference the criminal protective order, should help parties and law enforcement when faced with multiple orders potentially better understand which orders are enforceable. It allows those protective and other orders to coexist, but under specified conditions.

This past 2005 legislative year confirmed once again that our California Legislature views domestic violence with utmost seriousness—and that even a single act of domestic violence will have profound long term repercussions.■

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