Appeal Nos.: A168514, A169350

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION THREE

C.C.,

Petitioner / Appellant

v.

D.V.,

Respondent / Respondent

On Appeal from the Superior Court of California
County of Marin
The Honorable Sheila S. Lichtblau
Civil Case No. FL 2200215

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF BAY AREA LEGAL AID IN SUPPORT OF APPELLANT C.C.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to Rule 8.200(c) of the California Rules of Court, Bay Area Legal Aid respectfully requests permission to file an *amicus curiae* brief in support of Appellant C.C. on the question of whether a stipulated Domestic Violence Restraining Order After Hearing constitutes a "finding of abuse."

Specifically, this brief asserts: (1) the explicit protective purpose and legislative history of Family Code section 3044 require its application to any domestic violence restraining order, including a stipulated order; and (2) a stipulated domestic violence restraining order implies a finding that an act of abuse has occurred because granting a restraining order without an act of abuse exceeds the court's jurisdiction, violating the Domestic Violence Prevention Act's statutory scheme and offending public policy.

Proposed *amicus* represents the interests of domestic violence survivors in the greater San Francisco Bay Area and offers a perspective on the issues presented in this case that has not been fully briefed by the parties in the opening, responsive, and reply briefs. *Amicus*' long history of representing domestic violence survivors in restraining order, custody, and other family law actions means that *amicus* is uniquely situated to assist this Court in resolving the issues presented.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. (*See* Cal. Rules of Court, rule 8.200(c)(3).)

STATEMENT OF INTEREST OF THE PROPOSED AMICI

Bay Area Legal Aid ("BayLegal") is the largest provider of free civil legal services to low-income residents of the San Francisco Bay Area. Domestic violence prevention is one of its principal priorities throughout the counties it serves. BayLegal's services are designed to stop abuse and enable survivors of domestic violence to build safe, stable lives for themselves and their children. BayLegal offers free legal assistance in obtaining restraining orders, divorces, support orders, safe child custody and visitation orders, and some humanitarian immigration relief. Over the past forty years, BayLegal and its predecessor organizations have represented tens of thousands of domestic violence survivors. BayLegal also operates or supervises restraining order clinics in San Mateo and Contra Costa counties. In 2023 alone, BayLegal handled 736 cases for domestic violence survivors. In addition to these cases, BayLegal provides assistance to hundreds more survivors every year through domestic violence restraining order clinics. BayLegal assists survivors in filing restraining order petitions as well as in providing follow-up legal information and referrals. As such, BayLegal is often in a position to review the decisions of the trial courts in many different cases and hear directly from survivors about how those decisions impact them and their children.

The proper application of California Family Code section 3044 to child custody cases is of paramount importance to survivors of domestic violence. As counsel for hundreds of these

survivors per year, BayLegal is in a unique position to represent the interests of domestic violence survivors and to offer a perspective on the issues presented in this case.

Respectfully submitted,

Dated: July 22, 2024

BAY AREA LEGAL AID

By: */s/ Erin Orum*
Erin Orum

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INTRODUCTION

Every year, California courts issue thousands of Domestic Violence Restraining Orders. While the majority of these are granted after a contested hearing or by default, a significant number are granted by stipulation of the parties. This appeal requires this Court to decide whether, in cases where child custody is at issue, stipulated restraining orders, just like contested or default orders, constitute a finding of domestic violence such that Family Code section 3044 applies.

California Family Code section 3044[1] establishes a rebuttable presumption that awarding custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child. The presumption must be applied without exception in any case where domestic violence has occurred within the last five years. Overcoming the presumption requires a court to consider whether each of the factors specifically enumerated in section 3044(b) weigh for or against an award of custody to the perpetrator of violence. This provision is integral to protecting children from the well-documented harms associated with exposure to domestic violence and reflects a strong public policy and clear legislative intent to prioritize the safety and well-being of children and domestic violence survivors. To enter a domestic violence restraining order (DVRO) without invoking this critical protection would be detrimental to

[1] Undesignated statutory references are to the California Family Code.

children's best interests, endanger survivors of domestic violence, and violate the Legislature's clear intent.

This *amicus curiae* brief is submitted in support of the proposition that section 3044 applies any time a court issues a domestic violence restraining order—regardless of whether by stipulation, default, or after contested hearing—because, by entering the order the court necessarily makes a finding that abuse occurred. Specifically, this brief will address why the explicit protective purpose and legislative history of Family Code section 3044 require its broad application to any domestic violence restraining order, regardless of whether the order is stipulated. The brief also asserts that a stipulated domestic violence restraining order implies a finding that an act of abuse has occurred because granting a restraining order without an act of abuse exceeds the court's jurisdiction, violating the Domestic Violence Prevention Act's (DVPA)[2] statutory scheme and offending public policy.

The legislative history and intent of section 3044 are clear: the statute was enacted to ensure that courts prioritize the safety and welfare of children and survivors of domestic violence when making custody determinations, recognizing the long-term psychological and physical impacts on children who are exposed to such violence. As detailed below, the Legislature has gone to great lengths to direct courts to consider the impacts of domestic

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[2] The California Domestic Violence Prevention Act (DVPA), codified in California Family Code Sections 6200-6219, provides the statutory framework for the issuance of protective orders and other legal measures aimed at preventing domestic violence.

violence on children. In 1999, California enacted section 3044 with the passage of Assembly Bill 840. In so doing, the Legislature cited numerous studies on the harmful effects of domestic violence on children and noted that "Perhaps the most shocking finding of all was by the Department of Youth Services of Boston which reported that children of abused mothers are 6 times more likely to attempt suicide, and 74% more likely to commit crimes against the person. They were also 24 times more likely to have committed sexual assault crimes, and 50% more likely to abuse drugs and/or alcohol." Assem Com. On Judiciary, Analysis of Assem. Bill No. 840 (1999-2000 Reg. Sess.) Apr. 22, 1999 at page 6.

The importance of protecting children from abuse means that section 3044 should be broadly applied to any restraining order, regardless of the manner in which the order was issued. This is consistent with decades of case law finding "The [DVPA] should 'be broadly construed in order to accomplish [its] purpose' of preventing acts of domestic violence." *Vinson v. Kinsey* (2023) 93 Cal.App.5th 1166, 1175 (hereafter *Vinson*) (quoting *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1498 and citing *In re Marriage of F.M. and M.M.* (2021) 65 Cal.App.5th 106, 115).

The presumption in section 3044 serves as a crucial protective measure. It shifts the burden to the perpetrator to prove that granting custody to them would not be detrimental to the child's best interests. This legislative framework underscores the gravity with which the state views domestic violence and its

implications for child custody arrangements. Yet, it is important to note that section 3044 does not terminate parental rights, prevent an abusive parent from spending time with their child, or even prevent an abusive parent from gaining custody. It does not apply indefinitely nor permanently adjudicate custody. Rather, it requires the abusive parent to recognize the harm caused by their behavior and take affirmative steps to demonstrate they are a safe parent before they can be granted custody. Broadly applying section 3044 therefore serves to protect children without foreclosing the rights of abusive parents. This important presumption must be applied any time a domestic violence restraining order is issued, whether by stipulation or otherwise.

Beyond the Legislature's clear intent regarding the broad application of section 3044, issuing a domestic violence restraining order necessarily means an act of domestic violence occurred, because granting a restraining order without an act of abuse would exceed the court's jurisdictional limits. Domestic violence restraining orders are statutory tools designed to protect individuals from abuse and advance the Legislature's goals of family safety. Parties have no automatic entitlement to a restraining order and can only be issued its protections if the statutory requirements are met. In this case, the issuance of a Domestic Violence Restraining Order (DVRO) is statutorily predicated on the occurrence of an act of domestic violence as defined by the DVPA. Its rigid requirements leave little room for discretion in how DVROs must be issued, recorded, and enforced. If a court were to enter a stipulated domestic violence restraining

order without an underlying act of domestic violence, it would run afoul of this statutory scheme and exceed the court's authority.

Issuing a DVRO absent an act of abuse would also offend public policy. The consequences of a DVRO and the public safety interest in enforcing it are supported when the order is predicated on an act of abuse. Moreover, if this Court were to hold that a stipulated restraining order does not constitute a finding of domestic violence pursuant to section 3044, the results would be impractical and untenable. Courts and government agencies rely on restraining orders as proof of abuse and it would be impractical to require them to investigate whether a DVRO was stipulated before such reliance.

Additionally, as detailed below, case law and statutory language make clear that every allegation of abuse in child custody cases requires the court to make a determination as to whether an act of abuse occurred in order to assess whether section 3044 applies. If a stipulated restraining order does not constitute a finding of abuse, courts would be required to nevertheless hold a further hearing in every child custody case to determine whether an act of abuse occurred, thereby triggering section 3044. At best this would result in the unnecessary expenditure of scarce court resources. At worst it could result in a decision that no abuse had in fact occurred and, as a result, the stipulated restraining order issued would be warrantless. This would do nothing to advance the safety of children and families and cannot be what the Legislature intended.

The application of section 3044 to any Domestic Violence Restraining Order is necessary to advance the Legislature's goals, fulfill the statutory scheme, adhere to the court's jurisdictional limits, and advance public policy goals. For the reasons stated herein, the undersigned *amicus* respectfully urges this Court to recognize the applicability of section 3044 to all stipulated domestic violence restraining orders, thereby affirming the Legislature's commitment to the protection of children and families.

ARGUMENT

I. The Explicit Protective Purpose and Legislative History of Family Code Section 3044 Require its Application to any Domestic Violence Restraining Order.

While trial courts have a great deal of discretion in determining what is in the "best interests" of a child when making custody orders, the Legislature has made abundantly clear that courts *must* consider exposure to domestic violence. Family Code section 3011(a)(2), requires courts to consider a parent's history of domestic violence[3] when determining what custody order is in the child's best interest. Further, Family Code section 3020 unequivocally states that children have a right to be free from abuse, that domestic violence is harmful to children, and that protecting children from domestic violence

[3] The individuals listed in section 3011(a)(2)(A)(i)-(iii), against whom abuse by a parent must be considered when determining custody, match those described in family code section 6311, against whom any "abuse" committed is considered "domestic violence." (*See* Fam. Code § 3011(a)(2)(A)(i)-(iii); *cf id.* at § 6211.)

should trump the Legislature's express policy of ensuring frequent and continuing contact with both parents:

> (a) The Legislature finds and declares that it is the public policy of this state to ensure that *the health, safety, and welfare of children shall be the court's primary concern* in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children. *The Legislature further finds and declares that children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child*.
>
> (b) The Legislature finds and declares that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, *except when the contact would not be in the best interests of the child*, as provided in subdivisions (a) and (c) of this section and section 3011.
>
> (c) When the policies set forth in subdivisions (a) and (b) of this section are in conflict, a court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.

(Fam. Code § 3020 (emphasis added).)

Yet, in 1999, the Legislature went even further in directing courts to account for the impact of domestic violence on custody when it passed Assembly Bill 840, codifying Family Code section 3044. Section 3044 goes beyond statements of public policy and

obligatory judicial considerations, and instead establishes a rebuttable presumption against awarding custody to an abusive parent. (Fam. Code § 3044(a).) It states:

> Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against a person [described by section 3011(a)(2)(A)] … there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence.

Ibid.

In codifying section 3044, the Assembly Committee on the Judiciary noted that adding 3044 was necessary because the prior "changes to the Family Code intended to make it more difficult for a batterer to get custody of a child have largely proven to be ineffective." Assembly Committee on Judiciary at 6. The Legislature further proscribed seven specific factors a court must consider before rebutting the presumption and awarding custody to the abusive parent. *See* Fam. Code § 3044(b); *see also Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794, 796 ["The Legislature passed this statute to move courts to give heavier weight to the existence of domestic violence. The statute requires family courts to make specific findings, in writing or on the record, about seven factors…."].

The Legislature's concern about the impacts of domestic violence is well-placed—there is a wealth of social science

research supporting the harmful effects on children of exposure to domestic violence. "Although some children exposed to intimate partner violence (IPV) demonstrate resilience, the population-level health consequences of exposure across the lifespan and the related social and economic costs of such exposure are enormous." Carlson et al., Viewing Children's Exposure to Intimate Partner Violence Through a Developmental, Social-Ecological, and Survivor Lens: The Current State of the Field, Challenges, and Future Directions (2019) 25 Violence Against Women 6, 6. A 2016 review of empirical studies on the effects of domestic violence on children lays out in detail the negative impacts on children in every age group, including on their social and emotional functioning, psychological and behavioral functioning, physiological functioning and physical health problems, and cognitive and intellectual functioning. *See* Howell, et al., Developmental Variations in the Impact of Intimate Partner Violence Exposure During Childhood (2016) Jan 8(1) J. Inj. Violence Res. 43. While the negative impacts in each of these categories are too lengthy to list, perhaps one of the most illustrative is the effect of exposure to domestic violence on the psychological functioning of preschoolers:

> Beyond impairment in children's social and emotional functioning, exposure to IPV has insidious effects on pre-schoolers' psychological and behavioral health. Most recent research on IPV exposure in preschoolers has recognized that posttraumatic stress symptoms and posttraumatic stress disorder (PTSD) are evident, even in this young population. Based on new DSM-5 criteria for PTSD in children ages six and under, it is

> possible that upwards of 50% of preschoolers experience clinically significant symptoms of PTSD following exposure to IPV.

Id. at 46 (citations omitted).

Moreover, this Court has previously recognized the increased risk for child abuse, including instances where "batterers abuse children as a way to inflict pain on the abused spouse." *See Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 402-03 (conc. Opn. Of Streeter, J.) ["The Legislature's sensitivity to this issue is not surprising…given the abundance of social science studies showing a direct correlation between abuse against a parent and abuse against the children of that parent."].

The mandate that courts weigh heavily the impact of domestic violence on children when making custody orders has been reinforced and expanded through additional amendments to the DVPA. In 2020, the Legislature amended Family Code section 6320 to include "coercive control" as an act that may be enjoined by a restraining order,[4] specifically stating "By adding coercive control to the bases for [issuing a restraining order], the bill would, for purposes of a family court determining child custody in those proceedings, create a rebuttable presumption that an award of child custody to a party who has engaged in

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[4] Following the amendments, "coercive control" is now defined as "a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty." (Fam. Code § 6320(c).) It goes on to list various non-violent but nevertheless psychologically, emotionally, or financially coercive behavior that could constitute "coercive control" amounting to acts that may be enjoined. *Id.*

coercive control is detrimental to the best interests of the child." Sen. Bill No. 1141 (2019-2020 Reg. Sess.). These amendments reinforce the Legislature's intent to apply the 3044 presumption any time abuse has occurred—including abuse that is expressly non-physical.

Moreover, the Legislature's intent in broadly applying section 3044 is evident in its description of applicable findings of abuse. Section 3044 provides a non-exhaustive list of what can constitute a "finding of abuse" for purposes of triggering the presumption against awarding custody to the abusive parent. Fam. Code § 3044(d)(1) ("the requirement of a finding [of abuse] by the court shall be satisfied by, *among other things, and not limited to*…") (emphasis added). Listed among those examples is "evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty *or no contest*, of [criminal domestic violence]…." *Ibid.* (emphasis added). The reference in 3044 to a plea of no contest is especially noteworthy in that it does not specify that the charge must be a felony. California law prohibits use of a misdemeanor no contest plea as an admission of guilt or as a finding of fault in any civil suit arising from the same facts. (*See* Pen. Code § 1016(3).) Nevertheless, section 3044 specifically permits a misdemeanor no contest plea to constitute a finding of abuse for purposes of establishing custody, evidencing the Legislature's intent to broadly apply the 3044 presumption.[5] It follows, and seems

[5] While the plain language of section 3044 is clear that presumption should be broadly applied, including that the issuance of a restraining order constitutes a finding of domestic

obvious, that issuance of a stipulated Domestic Violence Restraining Order would also constitute a finding of abuse, where a respondent similarly chooses not to contest the allegations made against them and stipulate to a restraining order.

The intent of the legislature is plain: whenever an act of domestic violence has occurred, courts deciding custody matters *must* apply the presumption against awarding custody to the abusive parent. And they must do so by broadly interpreting the DVPA to achieve its protective purpose. *Vinson, supra,* 93 Cal.App.5th at p. 1175 ["The [DVPA] should 'be broadly construed in order to accomplish [its] purpose' of preventing acts of domestic violence." (quoting *In re Marriage of Nadkarni, supra,* 173 Cal.App.4th at p. 1498, and citing *In re Marriage of F.M. and M.M., supra,* 65 Cal.App.5th at p. 115)]; *see also N.T. v. H.T.* (2019) 34 Cal.App.5th 595, 602; *Hatley v. Southard* (2023) 94 Cal.App.5th 579, 589; *In re Marriage of Brubaker & Strum* (2021) 73 Cal.App.5th 525, 535. The plain language of the statute, legislative history, wealth of social science research, and legal

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violence for purposes of section 3044, if the Court finds the language ambiguous, it should look to the statute's purpose, legislative intent, and public policy in interpreting the language. *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126 ["If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy."]; *see also People v. Robles* (2000) 23 Cal.4th 1106, 1111 ["If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs ... . If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent."] (internal citations omitted).

precedent demonstrate that section 3044 must be applied to all domestic violence restraining orders to promote the statute's protective purposes.

II. A Stipulated Domestic Violence Restraining Order Must Necessarily Constitute a Finding of Abuse Consistent with the DVPA's Statutory Scheme and Public Policy.

The Legislature instructs that the 3044 presumption be applied any time domestic violence has occurred. When parties to a restraining order case stipulate to a restraining order's issuance, they necessarily stipulate to the elements required to confer jurisdiction for the order's issuance under the DVPA. One of these elements is the occurrence of an act of abuse. Despite any agreements which may be reached by parties, a court cannot issue an order which exceeds its jurisdiction when, as here, doing so violates the statutory scheme or offends public policy. *See In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 989 ["…[A]ppellate courts have voided acts in excess of jurisdiction when … the act violated a comprehensive statutory scheme or offended public policy."]. To issue a restraining order without a finding of abuse would violate both the plain language of the DVPA's comprehensive statutory scheme and offend public policy.

A. The Statutory Scheme of the Domestic Violence Prevention Act Requires an Act of Abuse as a Prerequisite to Granting a Restraining Order.

1. The DVPA Is Clear on its Face that a Domestic Violence Restraining Order May Only Be Granted When Abuse Has Occurred.

Family Code section 6220 plainly states, "The purpose of [the DVPA] is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." *Ibid.* The DVPA further specifies that a Domestic Violence Restraining Order may be issued only upon "reasonable proof of a past act or acts of abuse." (Fam. Code § 6300.) Prohibited conduct is considered "abuse" for purposes of the DVPA when it is committed by a person against their intimate partner, cohabitant, child, co-parent, or close family relative. (*See* Fam. Code §§ 6205-6210.) Thus, the only requirements outlined in the plain language of the DVPA for entering a restraining order are that the parties have the requisite relationship and that at least one act of abuse has occurred.

"[I]t seems well settled…that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction…" *In re Marriage of Jackson, supra,* 136 Cal.App.4th at p. 988 (citing *Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 290). Here, the prescribed procedure requires the requisite relationship and an act of abuse. Any issuance of a restraining order without

these two elements would exceed statutory authority and therefore the Court's jurisdiction to issue the order. *See S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1266 [holding that "The trial court's issuance of a restraining order [where there was no abuse] is not authorized under section 6300."]; *see also In re Marriage of F.M. and M.M., supra,* 65 Cal.App.5th at p. 116 ["Judicial discretion to grant or deny an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the 'legal principles governing the subject of [the] action ....'" (citing *Nakamura v. Parke* (2007) 156 Cal.App.4th 327, 337).]

Issuing a restraining order without abuse also does not comport with the DVPA's stated purpose to "prevent acts of domestic violence… and to provide for a separation of the persons involved in the domestic violence." (Fam. Code § 6220.) If no act of abuse has occurred, there can be no reason to "prevent acts of domestic violence" or "separat[e] the persons involved in the domestic violence."

2. The Rigid Terms of the DVPA Mandate that Courts Strictly Adhere to its Statutory Scheme When Issuing Domestic Violence Restraining Orders.

In addition to the prerequisites outlined above, the DVPA specifies several other requirements relating to DVROs and these requirements must be adhered to strictly. Family Code section 6380 requires that all domestic violence restraining orders be entered into the California Law Enforcement Telecommunications

System (CLETS).[6] This ensures that law enforcement officers are aware of orders issued, making them immediately enforceable when violated and thus enhancing their protective nature. Despite this requirement, prior to 2021, *amicus* found it to be a regular practice of trial courts to grant so-called "non-CLETS" orders. These "non-CLETS" orders were domestic violence restraining orders that were issued as either agreements between the parties or by court order, yet were never entered into the CLETS database and were therefore not enforceable by law enforcement.[7] In 2021, the Appellate Court ended this practice, giving weight to section 6380 and instructing that "[t]he obligation to register the order in CLETS [is] mandatory, not discretionary."

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[6] "[A]ll data filed with the court on the required Judicial Council forms with respect to protective orders, including their issuance, modification, extension, or termination, to which this division applies pursuant to Section 6221, shall be transmitted by the court or its designee within one business day to law enforcement personnel by either one of the following methods: (1) Transmitting a physical copy of the order to a local law enforcement agency authorized by the Department of Justice to enter orders into CLETS. (2) With the approval of the Department of Justice, entering the order into CLETS directly." (Fam. Code § 6380(a).)

[7] The only enforcement mechanism available for violations of a non-CLETS order was a civil contempt action. Most legal services organizations do not have the resources to assist with filing contempt motions nor do many court self-help centers. Thus, for many survivors a non-CLETS order was virtually unenforceable. Even if contempt motions were accessible, without entering the restraining order into the CLET system, non-CLETS orders were not enforceable by law enforcement, even when officers were called to the scene of a restraining order violation, leaving survivors in physical danger and without an immediate means of ensuring their safety.

In re Marriage of Reichental (2021) 73 Cal.App.5th 396, 405. Post-*Reichental*, there was a sea change in trial courts' willingness to enter "non-CLETS" orders. In the experience of *amicus*, even in cases where the parties mutually agreed to non-CLETS orders,[8] courts no longer issued them because to do so violated the statutory scheme of the DVPA.

Similarly, the DVPA requires that *any* order issued by a court under the DVPA shall be issued on specific forms approved by the California Department of Justice. (*See* Fam. Code § 6221.) Thus, if a court enters a Domestic Violence Restraining Order—even when that order is pursuant to a stipulation between the parties—that order must be written on the required Judicial Council forms and must be entered into CLETS. The restraining order form – Judicial Council Form DV-130 – has no indication of whether it was entered by stipulation. This means that, on their face, a restraining order issued after an evidentiary hearing or by default and one issued pursuant to a stipulation appear identical, with no real way for any future judge, party, or law enforcement officer to distinguish whether an order was stipulated or not.

In 2014, the Legislature proposed various clarifying amendments to the DVPA in Assembly Bill 2089 and emphasized how the strict requirements furthered the DVPA's purpose:

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[8] Non-CLETS orders were sometimes seen as a last resort for survivors of abuse. When corroborating evidence was lacking or witnesses were not forthcoming, survivors might settle for a non-CLETS order in the hope that at least some form of protection was better than the possibility of none. Respondents were often willing to agree to non-CLETS orders precisely because they carried none of the consequences of a CLETS order.

> (h) Civil protective orders are most effective when they offer comprehensive relief to address the various barriers victims face when safely separating from an abuser, are specific in their terms, and are consistently enforced.
> (i) For these reasons, the effective issuance and enforcement of civil protective orders are of paramount importance in the State of California as a means for promoting safety, reducing violence and abuse, and preventing serious injury and death.

Assem. Bill No. 2089 (2013-2014 Reg. Sess.) §1 (h) & (i). These strict requirements—that restraining orders be issued on Judicial Council forms and entered into CLETS—establish a statutory scheme to create clear, protective, and readily enforceable orders and are consistent with the statute's protective goals.

Because strict adherence to the DVPA's statutory requirements is necessary to effectuate the statute's purpose, and any DVRO issued must comport with all statutory requirements, parties cannot stipulate around such requirements. Parties cannot, therefore, stipulate to a non-CLETS restraining order. (Fam. Code § 6380.) Similarly, parties cannot stipulate to a restraining order but deny that they have the requisite relationship.[9] (Fam. Code §§ 6205-6210.) Nor can parties

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[9] Other types of restraining orders are available to parties who don't meet the requisite relationship requirements. If platonic neighbors in a dispute agreed to a restraining order, for example, the trial court could issue a Civil Harassment Restraining Order, but not a Domestic Violence Restraining Order. (*See* Code Civ. Proc. § 527.6 & § 527.9.) Similarly, if an elder sought a restraining order against their caregiver who was not their close relative, the court could issue a restraining order under the Welfare and Institutions Code, but not a Domestic Violence Restraining Order. *See* Cal. Wel. & Inst. Code § 15657.03.

stipulate to a DVRO but deny that the requisite act of abuse occurred. (Fam. Code § 6300.) Given the plain language of the DVPA and its rigid requirements, it would violate the statutory scheme of the DVPA for a court to grant an order without an act of abuse because such an order would exceed its jurisdiction. Put another way, a stipulated DVRO must be presumed to comport with the statute's requirement, and therefore such a DVRO implies a finding of abuse which triggers 3044's application.

B. Public Policy Requires that a Domestic Violence Restraining Order Only Be Granted When Abuse Has Occurred.

In addition to the statutory scheme of the DVPA, public policy necessitates that an act of abuse occur before a domestic violence restraining order is granted due to the significant consequences of such orders. To presume otherwise undermines the credibility and protective purpose of the DVPA, violates the Legislature's intent, and offends public policy, thereby exceeding the court's jurisdiction.

1. It Would Offend Public Policy to Issue a DVRO without an Underlying Act of Abuse Given a DVRO's Significant Consequences.

A DVRO has significant consequences. It restricts a respondents' civil rights, including forced relinquishment of firearms, potential criminal prosecution for violations, and restricting their free movement. It also informs important

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Domestic Violence Restraining Orders are reserved for people in a dating relationship, who have children together, parent-child relationship, or other close relative. (Fam. Code §§ 6205-6210.)

decisions by employers, government agencies, and judges. It is of paramount public importance that these consequences actually serve the statute's protective purpose and be rooted in an act of abuse.

When a respondent stipulates to a CLETS domestic violence restraining order, they effectively choose not to contest the allegations brought against them by the petitioner, and accept the order's consequences. There must be a basis for issuing a restraining order before these measures are imposed to uphold the integrity of the DVPA. One example of the immediate and significant consequences of a DVRO is the mandatory relinquishment of firearms by the restrained party. "Upon issuance of a protective order, as defined in Section 6218, the court shall order the respondent to relinquish any firearm in the respondent's immediate possession or control or subject to the respondent's immediate possession or control." (Fam. Code § 6389(c)(1).) The only, very limited exception to this requirement is that a "court may, as part of the relinquishment order, grant an exemption…for a particular firearm … if the respondent can show that a particular firearm … is necessary as a condition of continued employment and that the current employer is unable to reassign the respondent to another position where a firearm … is unnecessary." (Fam. Code § 6389(h).) There is notably no exception based on agreement of the parties, or any other finding of the court.

The purpose of the firearm relinquishment is to protect domestic violence survivors and the public from the very real risk

of gun violence. It is such a crucial protective measure that it permits infringing upon respondents' Second Amendment rights. However, under section 6389, it would clearly violate public policy to infringe upon these rights if a respondent had not committed an act of abuse. (*See United States v. Rahimi* (2024) 144 S.Ct. 1889, 1901-02.) ("While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, we note that [the federal law prohibiting individuals subject to restraining orders from possessing firearms] applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another.") (citations omitted). To read section 6389 as compatible with public policy and the Constitution of the United States, it must be inferred that the issuance of a restraining order inherently means abuse has occurred.

The same logic holds for the other restrictions imposed on respondents in a DVRO—imposing such restrictions where no abuse has occurred would be unjustified because it would not advance the statute's protective purposes. *See, e.g.*, *Alves v. Justice Court of Chico Judicial Dist., Butte County* (1957) 148 Cal.App.2d 419, 425 (striking down law prohibiting loitering by minors because "it cannot be said that [the law] has any real or substantial relationship to the primary purpose of the statute [and] therefore constitutes an unlawful invasion of personal rights and liberties, and for that reason is unconstitutional."); *Ex parte Miller* (1912) 162 Cal. 687, 693-94 ("[Individual liberty]

cannot be taken away or impaired at the mere will of the Legislature, nor at all, unless the public welfare demands it.").

Moreover, various entities—including courts, government agencies, and employers— rely on the existence of a restraining order to make important decisions. For example, USCIS officers perform "criminal and national security background checks to protect national security and public safety, as well as to ensure that the person is eligible for the benefit sought," which includes a search to determine whether a restraining order exists. *See* USCIS Policy Manual, Volume 1, Chapter 1. Given the goal is to ensure national security and public safety, it is of chief public importance that these background checks reflect accurate information and do not exclude potentially qualified people from benefits.

Additionally, courts across different venues, jurisdictions, and even countries rely on the existence of restraining orders as proof of domestic violence. In *Noble v. Superior Court*, a California court considered whether a restraining order issued in Utah constituted a finding of domestic violence for purposes of section 3044. *Noble v. Superior Court* (2021) 71 Cal.App.5th 567 (hereinafter *Noble).* Although "the record does not reveal the details of the incident on which the Utah court based its issuance of the protective order," the Appellate Court found that the Utah order, which "was issued under that state's Cohabitant Abuse Act, which allows '[a]ny cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of abuse or domestic violence,' to 'seek a protective

order,'" constituted a finding of domestic violence and triggered the 3044 presumption. *Id.* at 581. The Court's interpretation would not make sense if a finding of domestic violence were not implied by virtue of a DVRO's issuance.

As noted above, a DVRO does not specify on its face whether it resulted from a stipulation, contested hearing, or default. Nor is this information found in the CLETS database. It would be impractical at best to suggest that orders appearing identical on their face should be applied differently, but that would be the result if this Court were to hold that a stipulated DVRO does not constitute an abuse finding. Imagine a scenario in which pro per litigants stipulate to a restraining order, and years later the case is transferred out of county or to a new judge who is asked to make custody orders. That judge would have to comb back through the record to determine whether that DVRO was entered by stipulation and, if so, whether the record indicates an act of abuse was stipulated or found to occur. This is illogical and impractical. Public policy demands that courts be able to rely on the existence of a DVRO as proof of abuse without conducting an unnecessary and burdensome inquiry into the DVRO's origin.

2. It Would Offend Public Policy to Issue a DVRO Without an Underlying Act of Abuse Because It Would Waste Judicial Resources and Cause Unnecessary Trauma and Expense to Litigants.

Should this Court hold that a stipulated Domestic Violence Restraining Order does not amount to a finding of domestic violence for the purposes of applying section 3044, the result

would lead down a non-sensical path, wasting judicial resources and forcing parties to litigate the very thing they sought to resolve by stipulation. Such a ruling would mean that, where parties to a restraining order stipulate to its entry but a finding of domestic violence is not made, the trial court would then still be obligated to hold a separate hearing on whether an act of abuse occurred to determine whether the 3044 presumption applies. This is because both the plain language of section 3044 and case law require it. Section 3044 itself states:

> In an evidentiary hearing or trial in which custody orders are sought and where there has been an allegation of domestic violence, the court *shall* make a determination as to whether this section applies prior to issuing a custody order, unless the court finds that a continuance is necessary to determine whether this section applies, in which case the court may issue a temporary custody order for a reasonable period of time, provided the order complies with Sections 3011 and 3020.

(Fam. Code § 3044(g) (emphasis added).) The Court in *Noble* reiterated this:

> [I]f an allegation [of domestic violence] is made, the court first must determine if the [3044] presumption might apply before making a custody award. If courts do not, upon receiving an allegation of domestic violence, even have to consider whether the Section 3044 presumption applied, the goal of that section—to protect children from the known harm of exposure to domestic violence—would be substantially undermined.

Noble, supra, 71 Cal.App.5th at p. 580.

Thus, one way or another, the Court *must* determine whether an act of abuse occurred and therefore whether the presumption applies before issuing custody orders. As with the other strict requirements of the DVPA, parties cannot stipulate that the 3044 presumption does not apply. Parents have no right to stipulate to divest the court of its jurisdiction to make custody orders or to direct the court to make orders without applying the statute's required considerations, such as the 3044 presumption. "The children are not parties to the action for divorce, and the jurisdiction which the statute confers on the court, to be exercised, from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties made pending the divorce litigation which the decree follows, or by the action of the court in originally approving and adopting it." (*In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1026-27 (citing *Black v. Black* (1906) 149 Cal. 224, 226) [parties' stipulation that the court could not modify custody order in the future was void because it violated public policy].) The trial court, therefore, would have no choice but to hold a separate hearing on whether an act of abuse occurred.

If, after a hearing on whether the abuse occurred, the court determines that abuse did *not* occur, the court would then be in the position of having issued a Domestic Violence Restraining Order, entered it into CLETS, and imposed the weighty restrictions and consequences of that order on the Respondent, when the Court now knows that order to be baseless. Knowingly

allowing a warrantless restraining order to stand undermines the integrity of the DVPA and of the trial court's authority generally and likely violates the personal liberty rights of respondents as articulated above.

The only other option is for this Court to find that stipulated restraining orders are not permitted. But this interpretation does not promote the statute's protective purposes or the Legislature's intent, and would force parties and trial courts into unnecessary litigation.

Family courts are already over-burdened. *See* Trust and Confidence in the California Courts (2006).[10] Restraining order cases are required to receive preferential calendaring, which increases the burden of these cases on the trial courts. (*See* Fam. Code § 244.) Allowing stipulated restraining orders promotes judicial economy by significantly reducing the time and resources courts must allocate to resolving contentious domestic violence cases. When parties agree to a stipulated restraining order, it eliminates the need for a full evidentiary hearing, which can be lengthy and resource-intensive, involving witness testimonies, evidentiary presentations, and judicial deliberation. With the Court obligated to provide court reporters in all domestic violence cases, lengthy hearings can mean significant expenses for the Court. *See Jameson v. Desta* (2018) 5 Cal.5th 594, 611, 623 (holding that the court must provide court reporters free of charge to indigent litigants and noting that the cost of court

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[10] Available at https://www.courts.ca.gov/documents/PTC_phase_II_web.pdf.

reporters is significant). The streamlined process of stipulated restraining orders not only accelerates the resolution of individual cases but also alleviates court congestion, enabling the judiciary to allocate its limited resources more effectively across a broader spectrum of cases.

Stipulated restraining orders also benefit the parties. Stipulated orders result in higher compliance rates and reduce future litigation. *See, e.g.*, *Warren et al.,* Cal. Prac. Guide Alt. Disp. Res., (The Rutter Group 2023) ¶ 3:512 ("people are more likely to comply with agreements in which they have participated…"). For Petitioners, a stipulated order means they receive the protection they need without having to endure the trauma of reliving their abuse through their testimony in court. *See*, *e.g.*, Katirai, Retraumatized in Court (2020) 62 Ariz. L.Rev. 81, 85-86. They can also avoid airing their private, most traumatic experiences in open court, and negate the need to drag friends and family members into court to testify on their behalf, including their children if they are of sufficient age. *See, e.g.*, Administrative Office of the Courts, Trust and Confidence in the California Courts (Dec. 2006) page 18 ("The public nature of court proceedings adds another complication to the court experience. After listening to the 'dirty laundry' of other people's domestic battles, some people report leaving court feeling very troubled and upset. Others favor private proceedings when it comes to dealing with family or juvenile proceedings, saying they are embarrassed or uncomfortable discussing their personal business in open court.").

Respondents also benefit from a stipulated order in a number of ways. Those facing criminal charges for the same events at issue in the restraining order case can protect their Fifth Amendment right against self-incrimination and can also avoid having the testimony of witnesses and experts become a part of the record and used against them in their criminal case. Respondents may also benefit by negotiating a shorter duration of the restraining order. (Fam. Code § 6345(a) (providing that a restraining order may be issued for a duration of up to five years).) Moreover, while a respondent—by virtue of the stipulation— necessarily concedes that an act of abuse took place, specific factual findings about which acts and their frequency and severity are not made. This may benefit a respondent should a petitioner later seek a renewal of the restraining order, because which specific acts formed the basis for the restraining order are not identified. *See* Fam. Code § 6345; *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1285 ["A renewal of a full order of protection can be based upon the fact that the circumstances which formed the basis for the initial order continue to exist."]. Finally, both parties may benefit from a stipulation by reducing the expense of attorney fees and trial costs.

The Legislature could not have intended that parties be prohibited from stipulating to restraining orders where, based on the petitioner's sworn affidavit and the respondent's stipulation, there exists "reasonable proof of a past act … of abuse." (Fam. Code § 6300(a).) Nor could the Legislature have intended that the court and parties waste their resources litigating whether an

act of abuse has occurred after the parties already stipulated to a restraining order. This would be a non-sensical and harmful interpretation of the DVPA, that would contradict the DVPA's plain language, violate its explicit intent and purpose, and offend public policy considerations.

CONCLUSION

For the reasons stated above, this Court should hold that a stipulated Domestic Violence Restraining Order necessarily implies a finding of an act of abuse that triggers the presumption against awarding custody to the abusive parent pursuant to Family Code section 3044.

Respectfully submitted,

Dated: July 22, 2024

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,535 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: July 22, 2024

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PROOF OF SERVICE

The undersigned declares as follows:

I am a citizen of the United States and employed in San Francisco County, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1735 Telegraph Avenue, Oakland, California 94612. On the date set forth below, I served a copy of the following document:

> **Application For Leave To File Amicus Curiae Brief And [Proposed] Amicus Curiae Brief Of Bay Area Legal Aid In Support Of Appellant C.C.**

on all counsel of record via the Court's electronic filing system, TrueFiling, https://tf3.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 22, 2024.

/s/ Erin Orum
Erin Orum