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THE FURTHER EXPANSION OF -- AND ASSERTION OF "GUARDRAILS" TO – CALIFORNIA'S NOTIONS OF "DOMESTIC VIOLENCE" IN FAMILY LAW

By Gregory W. Herring

Over the past twenty or so years, the Legislature has enacted a "hodgepodge" of confusing and sometimes contradictory provisions, as California Family Law guru, Garrett Dailey, has put it, in its rush to enact one domestic violence ("DV") statute after another.

As of January 1, 2021, *coercive control* is a newly codified form of DV under the Domestic Violence Protection Act ("DVPA") (Fam. Code §6200 *et seq*.). Family Code section 6320 provides for *ex parte* orders enjoining harassment, threats, and violence. Under the statute, "coercive control" is defined as:

> "… a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. Examples of coercive control include, but are not limited to, unreasonably engaging in any of the following:
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> (1) Isolating the other party from friends, relatives, or other sources of support.
> (2) Depriving the other party of basic necessities.
> (3) Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services.
> (4) Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage."

As of the same date, the standard for "disturbing the peace of the other party" sufficient to warrant DV orders is *"conduct that, based on the totality of the circumstances, destroys the mental or emotional calm of the other party."* (Fam. Code §6320 subd. (c).) This grew from 2014's *Burquet v. Brumbaugh* 223 Cal.App.4th 1140, 1146, which rejected arguments that the Penal Code's stricter definition ought to apply.

In making these amendments, the Legislature was concerned about expanding the scope of abusive conduct beyond what was necessary, taking care to "… limit the application … to clearly abusive behaviors." (Senate Judiciary Committee Analysis, cited by *In re Marriage of L.R. and K.A.*, Cal. App., July 27, 2021, D077533 (page citations are not available as of this writing).) The trial courts were left with the hard work of analyzing and applying these arguably amorphous notions, including in the context of complex child custody disputes (under Family Code sections 3020, 3111, and 3044, DV is an express factor in any custody matter).

On July 27, 2021, the Court of Appeal issued its Opinion in *In re Marriage of L.R. and K.A.* The Opinion is now certified for publication. The case involved alleged DV in the context of a high conflict custody proceeding. The Court emphasized that coercive control is to be viewed within "certain parameters," including,

> "… 'a mental state, objective reasonableness, causation, foreseeable harm, actual harm' – [toward] 'provid[ing] strong guardrails to help ensure that the [law] will function as intended and not reach benign conduct that is ordinarily tolerated in relationships or that does not actually distress the person.'"

It explained, "[t]hese 'guardrails' are necessary because [a DV] order implicates fundamental liberty rights, as a violation of its provisions is a crime, … and it is a factor that is weighed in child custody and visitation determinations." The Court continued, "[r]especting these guardrails, courts are concluding that the [DV laws were] not enacted to address all disputes between [former and existing] couples, or to create an alternative forum for resolution of every dispute between such individuals."

Earlier in the case, the San Diego trial court found that the mother involved acted "obsessively" in an incident with the father and their ten-year-old daughter during the mother's scheduled parenting time at a visitation center. The trial court found that the mother was "aggressive and controlling" during the incident, and that she "escalated an already emotionally intense situation, and subjected both the [father] and the child to further distress," and "she manipulated that child's already sensitive emotional state to a degree that was not acceptable." It noted that a responding law enforcement officer testified that it was "one of the worse" DV calls of his 28-year career. The trial court found that the mother "escalated [the situation] beyond control."

Based on those findings, the trial court found that the mother committed DV by disturbing the father's mental peace and calm, including through "controlling and coercive behavior." It therefore issued DV orders against her, protected him and the child.

But the Court reversed, concluding that "[m]other's conduct did not rise to the level of destroying father's mental and emotional calm to constitute abuse with the meaning of the [law]." In short: *The trial court had the authority to handle the matter as a "pure" child custody dispute outside of the DVPA, and should have done so.*

This Opinion immediately set off alarms. Appellate specialists raised concerns that the Court of Appeal appeared to have wrongly asserted its own assessment of the facts over that of the proper factfinder – the trial court.

At the substantive level, the Opinion's logic -- if extrapolated -- could erode hard-fought gains in the eyes of DV prevention professionals (including child development specialists, child advocates, women's advocates, family law attorneys, judicial officers, and many others). *Of course*, trial courts in *any* custody case have the authority to handle custody matters outside of the DVPA. Determinations of DV are always ones of degree. These analyses and applications are well within the normal purview of the trial courts.

As the Legislature continues to find it popular to expand notions of DV, *In re Marriage of L.R. and K.A* may be a harbinger of further "guardrails" from the appellate courts.

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