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Is this a domestic violence case?

By Lisa H. Meyer and Eric W. Meyer

Episodes of the television series "Nip/Tuck," a show about Miami plastic surgeons, opened with the same question posed to potential clients: "Tell me what you don't like about yourself." This is essential information when conducting elective, cosmetic surgery. When a potential client walks into the offices of a family law attorney seeking counsel regarding custody issues, a similar, yet very different question may not be explicitly asked, but is often the implicit driving force of the case: "Tell me what you don't like about your spouse."

The Family Code is replete with references to the "the best interests of the child," the primary consideration for the court in a custody proceeding. Family Code Section 3011 sets forth "any history of abuse," in addition to "the health, safety, and welfare of the child" (among other factors) when determining the best interests of the child. The scrutiny involving the behavior of parents towards each other is greatest in a case involving a party seeking domestic violence restraining orders (DVROs) against the other parent.

Family Code Section 3044 has been in effect since Jan. 1, 2000, when the California Legislature sought to create a rebuttable presumption that a perpetrator of domestic violence against the other party or the child(ren) of the parties shall not be awarded sole or joint physical or legal custody of the subject child of a proceeding.

In high-conflict custody litigation, this statute has led many litigants to request DVROs from the family court. A finding of domestic violence leads to a significant advantage in a custody case because of Section 3044, which can be used as a tactic potentially leading to unjust results not in the best interests of the child. In several situations, the conduct of a parent falls clearly within the behavior described within Family Code Section 6320, which most notably includes the ability of a court to issue orders enjoining a party from, "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering … harassing … or disturbing the peace of the other party."

In other situations, an attorney may be regaled with tales of a horrific human being, which led to the potential client's visit to the conference room. Often, uncertainty arises if the conduct described is *abuse* as defined in Section 6320, or merely discord in a volatile relationship. Counseling a client to pursue DVROs should not be advice extended without serious consideration about how that pursuit will impact the overall dissolution or paternity case, the ability of the parties to co-parent, and the financial resources necessary for litigation.

If a potential client, or the child of a potential client, faces imminent risk of serious physical harm, the pursuit of DVROs is an obvious recommendation. However, when the calculus is whether the client's peace is disturbed, a nuanced analysis is required.

Strong lawyering not only involves assessing success at trial, but also requires mapping out expectations of the likely impact of a DVRO request, which often sets the tone for a litigious case and creates a potentially irreparable co-parenting situation. Ultimately, I inquire if there is any way to find peace that does not involve a draconian restraining order.

If the answer is *yes*, I can work with the client to find out-of-court solutions, such as reaching a stipulation to communicate via apps like Our Family Wizard and setting limits on the content, tone and frequency of messages. While courts are barred from approving stipulations for NONCLETS restraining orders, parties can, for example, stipulate to a party submitting to alcohol/drug testing (when substance abuse is a factor in a party's troublesome conduct). As another example, parties can stipulate to a party voluntarily participating in anger management counseling or having temporary monitored visitation with the child.

If the answer is *no*, at least the client is making an informed decision.

A major difference between general custody litigation and custody litigation paired with a request for DVROs is that the hearing on the request for DVROs must occur within 25 days of the issuance of temporary restraining orders, unless waived by the restrained party. This time restraint does not permit parties to ease into a case; rather, it requires frantic preparation to identify, interview and coordinate witnesses, construct witness outlines, prepare the client for direct examination, and to prepare for issues relating to both a restraining order and custody litigation, which otherwise would not have occurred for months if not years. A party may be out of financial resources and exhausted by extensive litigation at the onset of a case.

Each case is unique and the intentionally broad statutes cited above may lead to two experienced, reasonable and intelligent judges issuing very different orders based on the same fact pattern. There is no black-letter law or sure-fire way to distinguish between poor judgment, marital discord, and situational conduct versus abusive conduct. Custody and domestic violence litigation goes to the most intimate spaces of a home, and open and honest communication with a potential client is the only way to unlock the closest possible version of the "truth," although there is rarely one truth in the breakdown of a relationship. When receiving one version of a story, an attorney may find a very credible different version of events through the course of discovery or at trial.

In cases of coercive control, emotional harassment, profanity-laced email tirades, or even an isolated, but heated confrontation during the final days of a relationship, carefully consider the context of the event(s), the whole and heart of the relationship, how separation may dissipate tensions, what relief can be obtained, and how to obtain that relief. Sometimes that involves requesting DVROs; other times, the best resolution may be outside the courtroom.

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