

***the trial court found that the wife had not shown a reasonable apprehension of further abuse.***

**Procedural Posture.** The Sonoma County Superior Court denied a former wife's request, under Family Code section 6345, for permanent renewal of a three-year domestic violence prevention restraining order against her former husband.

**Overview.** The court affirmed the trial court's order and remanded the matter for further proceedings. The husband was not collaterally estopped from denying the facts underlying the original three-year domestic violence restraining order when the wife sought to make the order permanent, because the issue decided in the prior proceeding was whether the wife established a basis for issuance of a restraining order, not whether all the incidents to which she testified were true. The trial court properly denied the renewal request based on additional evidence showing the husband's intentional avoidance of unintended contact. Watch for a full discussion of this case in next month's issue.

**References:** CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., § 96.06[9] (renewal of domestic violence restraining order). This summary was derived from the California Official Reports Summary [see 2018 Cal. App. LEXIS 1149].

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## Restraining Orders

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### Wife's General Allegations of Threats in Application for DVRO Were Sufficient to Put Husband on Notice that Wife Would Testify About Specific Threats

*In re Marriage of Davila & Davila Mejia*  
(No. B279874; Ct. App., 2d Dist., Div. 7. 10/23/18, mod. 11/19/18)

\_\_\_ Cal. App. 5th \_\_\_, \_\_\_ Cal. Rptr. 3d \_\_\_, 2018 Cal. App. LEXIS 1079

By Feuer, J. (Zelon, Acting P. J., Segal, J., concurring)

***In a proceeding under the Domestic Violence Prevention Act (DVPA) [Fam. Code § 6200 et seq.], the trial court did not err in considering Wife's testimony concerning Husband's specific***

***threats of violence, when the request for a domestic violence restraining order (DVRO) alleged generally that Husband threatened to harm her and she feared for her physical safety. Wife's request was sufficient to place Husband on notice that Wife would testify about Husband's specific threats of violence, including the fact that he held a gun to her head on several occasions. Husband had a meaningful opportunity to respond to Wife's specific allegations at the hearing and to request a continuance if he needed additional time to respond.***

**Facts and Procedure.** In July 2016, Wife filed a petition for dissolution of marriage. In November 2016, she filed a request for a DVRO, in which she alleged that Husband had a history of verbally and emotionally abusing her three children, that he had been physically abusive toward her son, and that he had "threatened to physically harm" her. In her supporting declaration, Wife stated that on the evening of November 2, her daughter called the police after Husband jumped over the gate, tried to enter the house, and threatened to hurt the children if they did not let him in. Wife also stated that Husband had been physically, emotionally and verbally abusive to her children, including calling her daughter names and insulting her appearance.

The court issued a temporary DVRO, ordering Husband to stay away from Wife and the children. At the hearing on a permanent DVRO, the court asked Wife whether Husband had perpetrated domestic violence against her. Wife responded that Husband had held a gun to her head two or three times and said, "I will kill you." When the court asked Wife if she had previously told anyone that she was afraid of Husband, she stated that she hadn't done so because she thought the divorce would be amicable and she didn't want to subject the children to additional court proceedings.

Husband denied holding a gun to Wife's head and pointed out that Wife had not mentioned any alleged violence during the dissolution proceeding. Husband testified that Wife began harassing him after she served him with divorce papers, because she wanted him to leave the house. Husband testified that Wife had a history of lying, including an open case alleging welfare fraud. He also claimed that Wife had made similar allegations of abuse against her former husband in her prior divorce proceedings.

When the court found that Wife was credible and that she had satisfied her burden of establishing that abuse had taken place, Husband repeated that Wife had a history of lying and stated that he had a “hearing with [Wife’s] name notifying the issuance of the welfare fraud.” The trial court stated that it was not taking allegations of welfare fraud into account in making its decision. The court noted that Wife’s request for a DVRO stated that Husband had threatened to physically harm her and that, when asked by the court, Wife recounted that Husband had held a gun to her head three times. The court issued a protective order to remain in place for two years. Husband appealed.

**Court Did Not Err in Considering Testimony that Husband Held Gun to Wife’s Head.** On appeal, Husband contended that the trial court erred by considering Wife’s testimony that he held a gun to her head, when Wife failed to make this allegation in her request for a DVRO. The appeals court disagreed, stating that Husband forfeited this contention because he failed to cite any authority for his contention that testimony at a DVRO hearing is limited to the specific allegations in the party’s application and because he failed to object to the trial court’s consideration of Wife’s testimony concerning the gun.

The court further reasoned that even if Husband had not forfeited this argument, the trial court did not err in considering Wife’s testimony about the gun. Although she did not mention the gun in her request for a DVRO, her statement that Husband “threaten[ed] to physically harm” her and that she feared for her own safety and that of her children was sufficient to place Husband on notice that she based her request for a DVRO on the threat of physical violence. Moreover, Husband had an opportunity to respond to Wife’s testimony at the hearing, where he testified that she was lying about the gun.

The appeals court contrasted the facts of the case with those in *In re Jonathan V.* (2018) 19 Cal. App. 5th 236. In *Jonathan V.*, the prosecutor requested a restraining order at a pretrial conference in a delinquency case. Minor’s counsel objected based on the lack of notice and a hearing and requested a continuance to prepare. The court denied counsel’s request and issued a two-year restraining order against the

minor. The case was reversed on appeal, because the minor did not receive written notice, a description of the evidence to be used against him, or a meaningful opportunity to be heard and to present evidence. Unlike the minor in *Jonathan V.*, Husband received notice of Wife’s general allegations of threatened physical abuse and a meaningful opportunity to present evidence in opposition to Wife’s request. In addition, Husband did not object to Wife’s testimony, nor did he request a continuance to prepare a response to her testimony.

**Court Properly Refused to Consider Husband’s Impeachment Evidence.** At the hearing, after the court found Wife’s testimony to be credible and decided to issue the DVRO, Husband testified that Wife had a history of giving false testimony, which Wife denied. On appeal, Husband stated that the trial court abused its discretion by failing to consider evidence of welfare fraud to impeach Wife’s credibility. The appeals court found that Husband failed to meet his burden of showing that the trial court abused its discretion, because there was no record of the document Husband sought to present to the court.

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### **Commentary**

#### **Dawn Gray**

The issue in this case is primarily one of due process. In her petition for the DVRO, Wife alleged that Husband had “threatened to physically harm her,” and that she feared for her safety. Her allegations were apparently no more specific than that. At the hearing, she testified that Husband had held a gun to her head on several occasions, allegations that Husband denied. The court found Wife credible, that she had met her burden of proof and issued the order.

On appeal, Husband argued two separate things: (1) that “the trial court erred by considering Davila’s testimony that Mejia held a gun to her head even though she did not make that specific allegation in her request for a DVRO” and (2) that he was not given notice that she contended that he had held a gun to her head as a basis for a DVRO and was thus deprived of due process when the court used her testimony to that effect as a basis for its issuance. It appears to me as if the court confused these two

issues. As to the first, the Second District held that Husband cited no authority “for his contention that testimony at the DVRO hearing is limited to the specific allegations in the party’s application” – which were only that Husband had “threatened to physically harm her” – and that Husband had therefore forfeited the issue. It did not rule on it, which means that this case is not authority for the assertion that a party’s testimony at a hearing on a petition for a restraining order is limited to the allegations made in the petition.

As to the second issue, the panel said that even if Husband hadn’t forfeited his argument that the testimony exceeded the scope of the allegations Wife had made, the trial court did not abuse its discretion in considering Davila’s testimony that Mejia held a gun to her head. Although Davila did not state in her request for a DVRO specifically that Mejia held a gun to her head, she stated that Mejia “has threaten[ed] to physically harm me,” and requested the trial court “grant me these orders because I fear for my safety and the safety of my children.” By these statements, Davila placed Mejia on notice that she based her request for a DVRO on the threat of physical violence Mejia posed both to her and her children. Further, Mejia had an opportunity to respond to Davila’s testimony, and at the hearing testified that her testimony as to the gun was false.

Unlike the minor in *Jonathan V.*, Mejia received notice of Davila’s general allegations of threatened physical abuse and had a meaningful opportunity to present evidence in opposition to the request at a hearing. Further, in contrast to *Jonathan V.*, Mejia neither objected to the testimony nor requested a continuance to respond to Davila’s testimony [*see* Fam. Code § 245(a) [respondent entitled to one continuance “as a matter of course” to respond to petition for DVRO], (b) [hearing on request for DVRO may be continued for good cause upon request by either party]).

This is the holding that has generated much criticism of this case. It is multi-layered. First, the court held that a general statement in a petition for a DVRO that the party against whom the order is sought threatened the petitioner with physical harm and that she fears for her safety and that of her children is sufficient to satisfy due process concerns, regardless of the incidents or threats to which she later testifies.

However, “[t]he essence of procedural due process is notice and an opportunity to respond. (*Cleveland Bd. of Educ. v. Loudermill, supra*, 470 U.S. 532, 546, 105 S. Ct. 1487.) ‘The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending “hearing.”’ (*Memphis Light, Gas and Water Division v. Craft* (1978) 436 U.S. 1, 14, 98 S. Ct. 1554, 56 L. Ed. 2d 30, fn. omitted.)” [*Gilbert v. City of Sunnyvale* (2005) 130 Cal. App. 4th 1264, 1279, 31 Cal. Rptr. 3d 297]. How could Husband have prepared to meet Wife’s allegations of Husband’s gun threats at the hearing if Wife never alleged any specific threats to which he could respond?

The court also held that even if that general allegation was insufficient, Husband “had an opportunity to respond to Davila’s testimony, and at the hearing testified that her testimony as to the gun was false.” In other words, due process concerns were satisfied because Husband showed up at the hearing and heard the specific allegations Wife was making against him. However, it then held that Husband waived the right to object to the lack of due process by failing to object to the testimony on issues beyond the general allegations in the petition or to request a continuance to prepare a response. So, the court held that Husband was provided with sufficient notice of the allegation of gun threats by Wife’s testimony at the hearing, but then waived his right to object to any *prior* lack of notice or opportunity to be heard by testifying that it did not happen and/or by not demanding a continuance. It would appear that the only thing that a responding party who is only on notice of general allegations can do when the petitioner offers testimony of specific incidents of abuse is immediately request a continuance, without testifying in response to the allegations.

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### **Commentary**

#### **Stacy Phillips**

*In Re Marriage of Davila & Davila Mejia* discusses the strategic decision faced by any petitioner seeking a domestic violence restraining order (DVRO) – specifically, how detailed should a petitioner make their initial DVRO application? Should the petitioner lay out all the facts and provide a roadmap for the respondent or, should the petitioner

proceed with general allegations and lay a possible trap for trial by ambush?

Wife, the petitioner in *In Re Marriage of Davila & Davila Mejia*, based her DVRO application on general allegations of domestic violence perpetrated by Husband. Wife alleged: “[Mejia] has threaten[ed] to physically harm me. I fear for the safety of my children because [Mejia] has threaten[ed] to take the children to Mexico.” Wife expanded her story in her application by describing an incident where Husband jumped over the gate and banged on the family home’s doors and windows. Whatever Wife said in her initial application was sufficiently detailed to have the court grant the TRO without Wife having given notice.

At trial, Wife testified in far more gruesome detail regarding husband’s domestic violence, including testimony that husband had held a gun to her head and threatened to kill her. At trial, Husband denied Wife’s allegations of abuse. The trial court found Wife’s testimony credible and that she had established by a preponderance of the evidence that Husband had perpetrated domestic violence against her.

The primary issue on appeal was whether the trial court committed reversible error by considering Wife’s testimony that Husband had placed a gun to her head. According to Husband, because Wife failed to include specific allegations regarding this conduct in her DVRO application, Wife should have been precluded from offering such testimony at trial. The Court of Appeal disagreed.

In rejecting Husband’s argument on appeal, the Court of Appeal first noted that Husband failed to object to Wife’s testimony regarding his use of a gun and failed to request a continuance to prepare a response. The Court of Appeal went on to hold that, even if Husband had not forfeited these objections, as long as Wife’s DVRO application provided Husband notice of Wife’s “general allegations of threatened physical abuse” and Husband had a meaningful opportunity to present evidence in opposition to the request, Husband’s due process rights were protected and no basis for appeal existed. Based upon Wife’s general allegations, it is difficult to see how: (i) Husband was put on notice of Wife’s allegations of abuse, and (ii) he could meaningfully cull evidence in opposition to Wife’s unspecified claims. There is a big leap from “[Husband] threatened to harm me” to “Husband put a gun to my head and

threatened to kill me.” Understanding that the Court of Appeal will take a lenient stance on the notice requirements of DVRO applications, it is incumbent on practitioners to probe general allegations and, in response to such general DVRO applications, propound the discovery necessary to reveal the facts that the Petitioner will rely upon at trial. While doing so may delay a client’s right to a speedy trial, the benefit to proceeding to trial with eyes wide open and fully prepared for the good, bad, and ugly will pay dividends in the end. One can only imagine how *In Re Marriage of Davila & Davila Mejia* may have turned out if Wife had been deposed prior to trial and her claim of Husband’s alleged abuse had been timely investigated and addressed. On the other hand, for those representing the victims of domestic violence, *In Re Marriage of Davila & Davila Mejia*, highlights the strategic benefit to including in DVRO applications only enough detail to meet notice requirements and holding close to the vest as many cards as possible until trial.

**References:** CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §96.06 (DVRO issued after notice and hearing).

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## JUVENILE COURTS

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### Habeas Corpus

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#### Briefly Noted

*In re Cody R.*

(Nos. D073527, D074328; Ct. App., 4th Dist., Div. 1. 12/17/18)

\_\_ Cal. App. 5th \_\_, \_\_ Cal. Rptr. 3d \_\_, 2018 Cal. App. LEXIS 1168

By Dato, J. (Irion, Acting P. J., Guerrero, J., concurring)

***The Court of Appeal held that habeas corpus in dependency proceedings is limited to claims of wrongful withholding of custody of the child, including lack of jurisdiction, and claims of ineffective assistance of counsel. The court disapproved the use of a petition for writ of habeas corpus in dependency cases to challenge a dependent child’s placement.***