

# Recurring Questions Under the Domestic Violence Prevention Act

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**Section 22 on Family Law Form DV-130 provides that the court has discretion to order that a party attend a fifty-two-week batterer program approved by the probation department. When is that appropriate and how should the party attend a batterer intervention program?**

Once the court decides to order a party to attend a batterer program, its discretion is prescribed by Family Code section 6342, which provides that the court may order the restrained person to participate in a “batterer’s program” approved by the probation department as provided in Penal Code section 1203.097. The Penal Code imposes stringent requirements for batterer programs that include the size of groups, the content of curricula and a requirement that completion requires weekly attendance for a period of one year unless there is good cause for missing no more than three individual sessions.<sup>1</sup> It has been noted that attendance policies of counties vary greatly and some appear to be more lenient than state law.<sup>2</sup>

The general consensus within the mental health community is that longer periods of treatment are necessary to address the goals of changing beliefs, teaching empathy and anger management skills, and non-violent communication.<sup>3</sup> The length of time in a program depends on the needs of each individual and their childhood and trauma histories. Substance abusers share many characteristics with domestic violence abusers and substance abuse is often a component of domestic



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abuse. However, one year would usually be considered a beginning in a substance abuse recovery process.<sup>4</sup> There may well be individuals who do not require a fifty-two-week program, but such a determination would be difficult without a detailed needs assessment with input from a domestic violence expert. In Ms. LaViolette’s experience, batterers need more than fifty-two weeks to see transformative change.

At the end of fifty-two weeks, unless there has been an egregious violation, the court will generally release the individual from any additional treatment. If the individual

is the subject of a criminal court order, there is a three-year period of probation. We have, on occasion, had an individual violate probation during the probationary period and be sent back to group for up to another year.

**In a recent case, the batterer's counsel proposed that his client attend an anger management program. What is the difference between an anger management program and a batterer intervention program approved by the probation department?**

The state standards for domestic violence abuser programs do not apply to anger management programs.<sup>5</sup> There are defined training, supervision, and continuing education requirements for group facilitators in batterers' programs. They must also be monitored by the Probation Department. Anger management is only one of the topics covered in batterers' intervention programs. Those programs cover a far wider range of issues and may use a wider range of techniques such as didactic education, group participatory exercises, structured feedback, self-evaluation, role-playing, skills training, homework, positive reinforcement, and cognitive behavioral techniques. For example, abusive individuals must examine "gender roles, socialization, the nature of violence, the dynamics of power and control, and the effects of abuse on children and others." There are no state requirements or standards for anger management programs or for the individuals who facilitate them.

**Are batterer intervention programs group-based or individualized? What is recommended?**

Anger management classes can be done individually or in group. Batterer intervention programs are always group-focused. Individual counselors tend to be more easily "conned" by clients. Groups that promote social accountability in a non-judgmental setting guided by one or two facilitators are generally believed to lead to better outcomes. Group participants develop a deeper understanding of their behaviors when other group members share their experiences and behaviors and they have a sense of not being alone in their predicament. Group is beneficial because members and the facilitator can confront entrenched beliefs that are often characterized by denial, minimization and blame.

**What if the batterer claims that they cannot attend regular weekly sessions due to work or travel?**

As discussed, state law requires a minimum fifty-two-week period and has a limit of three excused

absences. Most programs work with perpetrators who travel for their jobs or have fluctuating shifts by extending their time in group. Court orders often provide that an offender has a maximum period of time to complete the program. Some programs allow group participants to attend make-up groups or more than one group in a week. Facilitators will write progress reports explaining why the participant has attendance problems. In Ms. LaViolette's program, Alternatives To Violence, clients provide work schedule verification to their group facilitators if they are going to miss group for an extended period of time.

**Often batterers at a hearing try to impugn the victim's credibility because he or she did not call the police or run away after an abusive incident. The common refrain is "why would she stay with me if I was abusive?" If the victim stays with the abuser, does this mean that there was no abuse? Does it mean that the victim is not afraid of their abuser?**

Most domestic abusers either blame the victim or argue that the victim is lying or exaggerating. There are studies that opine that most victims will deny, minimize or recant in both family law and criminal cases.<sup>6</sup> Victims typically stay in abusive relationships for a period of time before they eventually leave. In the California study cited above, a third of victims still lived with their batterer even after a criminal domestic violence conviction.<sup>7</sup> However, in Ms. LaViolette's experience, most eventually leave.

There are many reasons for staying in abusive relationships. One of the most significant is a victim's hope that their partner will change. Muldary coined the phrase "learned hopefulness" to explain a victim's ongoing belief that the abuser will change their behavior.<sup>8</sup> In 1979, Lenore E. Walker interviewed 1,500 women who were victims of domestic violence and found a similar pattern of abuse, for which she coined the phrase "cycle of abuse" or "cycle of violence."<sup>9</sup> The cycle has three distinct phases: (1) Tension Building; (2) Acute Incident; and (3) Loving Respite or Honeymoon Phase. A relationship starts in the honeymoon phase. Over time, tension builds. When the abuser feels that the victim is sufficiently "hooked" into the relationship, the tension leads to an incident of verbal and/or psychological and/or physical abuse. Following the incident of abuse, the perpetrator feels remorseful (at least for a period of time) and tries to "hook" the victim back into the relationship. This is the "honeymoon" phase of peace, or at least relative peace. According to the theory, the violence



will increase in intensity and frequency over time and eventually the honeymoon phase will disappear.<sup>10</sup>

The cycle of violence theory is one reason that victims stay with abusers. A clash of values is another, as well as empathy and love for their partners, financial dependence, immigration status, shame and a myriad of other issues. Staying in an abusive relationship does not mean that the victim is not afraid or that the abuse will not re-occur. This theory can affect the burden of proof in domestic violence cases in a number of ways.<sup>11</sup> The abuser often makes two similar but distinct arguments based on the victim staying in the abusive relationship. The first impugns the credibility of the victim. The argument is that staying in the relationship or acts or omissions by the victim such as not calling the police, fleeing or having make-up sex is evidence that the victim is lying, meaning that the abuse never happened. They claim that the victim is making it up to secure some advantage in the litigation. The second is that such behavior shows that the victim is not afraid of the abuser and therefore does not need a restraining order. Both arguments are based on a flawed understanding of the dynamics of domestic violence and the legal framework.

It is very important to ask the right question regarding the victim of abuse's state of mind. Victims of abuse might say that they are not afraid of their perpetrators, although they live in a constant state of "chronic apprehension." A question asking how the victim feels when their partner gets upset, sounds or looks angry will usually elicit a response of fear and apprehension.

The "cycle of violence" theory was recently illustrated in *Fregoso v. Hernandez*, 5 Cal. App. 5th 698 (2016). After Wife was granted a TRO, she invited Husband to a birthday party where they had consensual sex. She never called the police after acts of abuse. She testified that acts of abuse were always followed by gifts and sex. Her husband argued that her behavior showed that she was not afraid of him. The Fourth District found this argument unavailing because Wife had proved acts of past abuse and "the parties' post-TRO sex was part of their six-year repeated cycle of violence, gifts, forgiveness, sex, and then repeated acts of violence."

The second argument misrepresents the requirements of the Domestic Violence Prevention Act ("DVPA"). The purpose of the DVPA is "to prevent acts of domestic violence, 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."<sup>12</sup> The DVPA permits a court, upon a showing of "reasonable proof of a past act or acts of abuse,"<sup>13</sup> to issue a protective order restraining any person from contact with another, for the purpose of preventing a recurrence of domestic violence.<sup>14</sup> The court has the discretion to decide whether a fear of further abuse, depending on the circumstances, should be taken into account in determining whether a restraining order is necessary under Family Code section 6220, because it may be probative as to whether an order is necessary "to prevent acts of domestic violence, abuse." However, nothing in the DVPA actually requires a finding in all cases that the victim have a reasonable apprehension of future harm before a restraining order will be issued. The focus of domestic violence legislation has been the public policy goal of preventing future acts of domestic violence.<sup>15</sup>

Restraining orders have been shown to be effective in preventing further violence. Studies show that the risk of violence between intimate partners increases when they are separating or separated.<sup>16</sup> Therefore, the focus should not be on the victim's subjective state of mind. Objective factors such as the severity of the abuse and the pattern of abuse that is supported with admissible evidence should carry more weight. Studies show that victims of domestic violence, particularly where it rises to the level of PTSD, suffer a host of psychological, biological, neurological, behavioral, and physiological alterations.<sup>17</sup> Victims of domestic violence often suffer from a form of "cognitive dissonance."<sup>18</sup>

However, the victim's state of mind may be relevant to whether there was a past act of abuse. "Abuse" may include, among other things, placing "a person in reasonable apprehension of imminent serious bodily injury to that person or another."<sup>19</sup> Disturbing the peace has also been construed broadly to include "conduct in destroying . . . mental or emotional calm."<sup>20</sup> Counsel for alleged abusers should therefore be careful in addressing the victim's subjective state of mind and apparent lack of fear as the basis for denying a restraining order.

The Second District addressed a related question in *Rodriguez v. Menjivar*, 243 Cal. App. 816 (2015), holding that "(n)o showing of probability of future abuse is required to issue a DVPA restraining order" (*Id.*, at 823)

when the trial court refused to issue a DVRO because the last act of physical abuse occurred more than six months before the hearing. In *Rodriguez*, the trial court clearly gave temporal proximity undue weight in light of the significant physical, emotional and mental abuse perpetrated against mother and daughter over a period of time. While the court of appeal cited one sentence in *Nakamura v. Parker*, 156 Cal.App.4th 327, (2007) “A trial court is vested with discretion to issue a protective order under the DVPA simply on the basis of an affidavit showing past abuse” (*Nakamura, supra*, 156 Cal. App. 4th at p.334.),” the next sentence in *Nakamura* concluded that “(s)pecifically, it ‘may’ issue an order ‘with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.’”<sup>21</sup> While the probability of future abuse may not be a requirement for a DVRO, it is surely relevant to the statutory question of whether a DVRO is necessary to prevent a recurrence of domestic violence and ensure a period of separation. The better argument is that the weight given to this factor may be less where the abuse is severe and sustained.

### Should children be covered by a restraining order even if they were not subjected to abuse?

There are an abundance of social science studies on the correlation between intimate partner violence and child abuse.<sup>22</sup> Children can be exposed to domestic abuse if they observe a violent act, overhear an abusive exchange, or see the results of an assault (bruises, crying, broken objects).<sup>23</sup> Children exposed to domestic violence can exhibit: (a) behavioral problems (aggression, hyperactivity, substance abuse, promiscuity); (b) mental health problems (anxiety, anger, depression); (c) health problems (headaches, rashes, stomach headaches); (d) learning problems (absenteeism, school failures); and (e) social problems (poor social skills, difficulty in forming relationships, dating violence).<sup>24</sup>

A number of elements affect exposed children, including: (a) the nature and amount of the abuse witnessed; (b) the target of the abuse; (c) severity and frequency of parental violence; (d) degree of responsibility that the child assumes for the abuse and its outcome; (e) age and gender of the child; and (f) mediating factors such as familial, interpersonal and community resources and suitability and presence of interventions.<sup>25</sup> A number

of recent decisions have addressed this relationship. Under the DVPA, the abuse is not limited to the protected party seeking the order. Abuse includes placing a “person in reasonable apprehension of imminent serious bodily injury to that person *or another*.”<sup>26</sup> In *Gou v. Xiao*, 228 Cal. App. 4th, 812, 818 (2014), the First District held that a mother’s witnessing abuse of the children was grounds for a DVRO protecting the mother. In *Perez v Hernandez*, 1 Cal. App. 5th 389, 401 (2016) the First District remanded the case back to the trial court to consider whether the DVRO should be renewed as to mother and also modified to include the children where father had abused the children. Mother had not witnessed the acts of abuse, but she had seen the bruises and been told by the children, and “the abuse destroyed Perez’s emotional calm and made her fear for her safety and the safety of her children.”<sup>27</sup> Justice Streeter’s concurring opinion contains an insightful review of social science studies showing a direct correlation between partner and child abuse.<sup>28</sup>

### Conclusion

Despite developments in domestic violence case law over the past few years, and in particular, the types of behavior that qualify as “abuse,” the decisions emphasize that the primary requirement is whether a restraining order is necessary to protect the applicant and his or her children under Family Code section 6220. As with “best interests” custody determinations, the legislature has empowered the courts with wide discretion to make this determination. The appellate decisions illustrate the risks of elevating any one factor that a court might reasonably take into account in deciding whether a restraining order is necessary, such as the probability of future abuse, the time that has elapsed since the last act of abuse or the victim’s state of mind, into a bright-line requirement for a finding of abuse.

Further, social science studies, including research into the “cycle of violence,” reveal that some factors, such as whether victim stayed with their abuser, may be highly misleading to the question of whether abuse happened and a restraining order is justified. Once there has been a finding of abuse, we hope that the parties and their lawyers will be mindful of the legislative framework for batterer’s intervention programs that are specifically designed to treat and lead to recovery for domestic violence abusers, along the lines of substance abuse recovery models.

## Endnotes

- 1 CAL. PEN. CODE § 1203.097(a)(6) & (c).
- 2 “Batterer Intervention Programs in California” (2005), Administrative Office of the Courts, <http://www.courts.ca.gov/documents/batterer-report.pdf>
- 3 Discussions with other program providers such as Kendall Evans, Dean Eddy, Gail Billingsbeck, Edward Gondolf, “Batterer Intervention Systems” (2002), and Alyce LaViolette, Ch. “Batterers’ Intervention: A View From the Trenches” in *Mandatory Court Review and Batterer Program Compliance* (2000), Geffner & Rosenbaum, *Domestic Violence Offenders: Current Interventions, Research, and Implications for Policies and Standards* (2001).
- 4 Recovering addicts and alcoholics do not say they are “cured.” They say they are in “recovery.”
- 5 CAL. PEN. CODE § 1203.097(a)(6) & (c).
- 6 Cited in *People v. Brown*, 33 Cal. 4th, 982 (2004) in support of this proposition: *Developments in the Law; see AMERICAN PSYCHOLOGICAL ASSN., VIOLENCE AND THE FAMILY*, p. 5 (1997); Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem. Forging the Solutions*, 60 WASH. L.REV. at 306-307 (1985), Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 68 (1998); Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L.REV. 553 (1991).
- 7 Batterer Intervention Programs in California (2005) Administrative Office of the Courts. <http://www.courts.ca.gov/documents/batterer-report.pdf>
- 8 A. LaViolette & Barnett, *It Could Happen to Anyone: Why Battered Women Stay* (3d ed., 2014).
- 9 Walker, *The Battered Woman* (1979)
- 10 The Supreme Court has allowed expert evidence on the “cycle of violence” in the criminal prosecution of domestic violence. *People v. Brown*, 33 Cal. 4th, 982 (2004)
- 11 *Hernandez v. Ashcroft*, 345 F.3d 824,836 (9th Cir. 2004) citing Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).
- 12 CAL. FAM. CODE § 6220.
- 13 CAL. FAM. CODE § 6300.
- 14 *Id.*
- 15 Domestic violence is a serious economic, criminal justice and public health issue. According to a national survey, approximately 1.5 million women and 834,732 men are physically assaulted or raped by their intimate partner every year in the United States, with 41.5% of women injured during their most recent assault, compared to 19.9% of men (Tjaden & Thoennes, 2000). In 2005, data collected by the FBI revealed that 1181 females and 329 males were murdered by an intimate partner (Fox & Zawitz, 2007). The annual cost of medical care, mental health services, and lost employment productivity due to intimate partner violence (IPV) has been estimated at more than \$8.3 billion (Max, Rice, Finkelstein, Bardwell, & Leadbetter, 2004; National Center for Injury Prevention and Control, 2003). IPV-related criminal justice service use is also significant, including police and investigative costs, prosecutors, courts, legal fees (public defenders), and incarcerations (Miller, Cohen, & Wiersema, 1996), though nationally representative cost estimates are not available (National Center for Injury Prevention and Control, 2003).
- 16 Dutton, *Trauma, Violence and Abuse*, (2009).
- 17 *Id.*
- 18 Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).
- 19 CAL. FAM. CODE § 6203 (a)(1) & (3).
- 20 *In Re Marriage of Nadkarni*, 173 Cal.App.4th 1483 (2009). *Rodriguez v. Menjivar*, 243 Cal.App.4th, 816 (2014) (applying *Nadkarni’s* holding that mental abuse and controlling behavior may be “abuse.”) An objective fear of future abuse may also be relevant in applications for renewal. *Ritchie v. Konrad*, 115 Cal.App.4th 1272, 1288 (2004).
- 21 CAL. FAM. CODE § 6300; *Nakamura*, at 334.
- 22 Graham-Bermann & Howell (2010), *Impact of Women Abuse on Children’s Social Development*; UNICEF, *Behind Closed Doors: The Impact of Domestic Violence on Children* (2006); Edieson (1999).
- 23 LaViolette & Barnett, *It Could Happen to Anyone: Why Battered Women Stay* (2014) p.34.
- 24 Finkelhor, Turner, Ormrod & Hamby & Kracke (2009), *Children’s Exposure to Violence*.
- 25 Finkelhor, Turner, Ormrod (2010).
- 26 CAL. FAM. CODE § 6203(a)(2).
- 27 *Id.* at 401.
- 28 *Id.* at 403.

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