Appeal No. 54321

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
TENTH APPELLATE DISTRICT

Mary Smith,
Petitioner and Appellant,

vs.

John Smith,
Respondent.

APPEAL FROM THE ORDER OF THE
SUPERIOR COURT, COUNTY OF REDWOOD
THE HONORABLE JOAN BLACK, JUDGE
TRIAL COURT NO. 12345

APPELLANT'S OPENING BRIEF

Attorneys for Appellant

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INTRODUCTION

Appellant Mary Smith recently lost her home, custody of her young son, and part of her livelihood just because she found herself in the interspousal discord that often occurs on the demise of a marriage. Mary has never caused any bodily injury to her husband, John Smith. She has never threatened him or put him in fear of being assaulted. She has never battered or harassed him. Rather, as is the case when most marriages fall apart, Mary and John were at odds and not agreeing on most issues. There was friction and disharmony in their broken home. But there was no domestic violence.

California law nowhere says that a wife (or husband) can be locked out of her home, denied physical custody of her child, and have her movements curtailed simply for being part of a broken marriage. Otherwise, there would be stay-away orders, residence-exclusion orders, and presumptions against custody in nearly every dissolution action brought before the California courts. This is hardly what the Legislature intended.

Mary Smith was subjected to a grievous injustice here. She was stripped of her home, her son, and part of her livelihood. The trial court abused its discretion, and its order should be reversed.

STATEMENT OF THE CASE

1. Nature of the action and relief sought

Mary and John Smith each filed OSCs re child support, child custody, etc. John also filed a Domestic Violence Prevention Application. After a hearing, the court entered a restraining order requiring Mary to move immediately from the family home and awarded custody to John with weekend visitation for Mary. Mary appeals from that order.

2. Factual and procedural history

Mary Smith and John Smith were married on February 1, 1990. Appendix (Appx.) at 1. Their son, Joe, was born on December 1, 1991. *Ibid.* In April 1996, the parties physically separated, although they continued to reside in the same home. Appx. at 12, 45. John moved into his son's room and eventually to the in-laws' quarters at the residence. Appx. at 17, 18.

Two months later, Mary filed a Petition for Legal Separation. Appx. at 1. Three months after that, she filed an Order to Show Cause Re: Child Support, Child Custody, Visitation, Attorney's Fees and Costs. Appx. at 5. In the declaration attached to the Order to Show Cause, Mary recounted some instances of John's aggressive behavior. Appx. at 7. She did not request temporary orders ex parte, and a hearing date was set. Appx. at 5. Although Mary's counsel contacted John directly, she heard nothing from him regarding Mary's OSC for nearly ten weeks. Reporter's Transcript (RT) at 2:11-16.

In late 1997, John served on Mary his Responsive Declaration to her Order to Show Cause re: Child Custody, etc. Appx. at 8. He also served his own OSC Re: Child Support, Child Custody, Spousal Support, Visitation and Attorney's Fees (Appx. at 9), as well as an ex parte Application and Declaration for an Order Preventing Domestic Violence. Appx. at 25, 26. Most of the conduct set out in John's ex parte Application had existed for some time and none of it required urgent remedying. Appx. at 16-19. Mary filed a Responsive Declaration to the OSC re: Child Custody, Child Support, etc. (Appx. at 40) and the Domestic Violence Prevention Application. Appx. at 45.

Shortly before the date set for hearing, John went in ex parte on his domestic violence prevention application, requesting a personal-conduct restraining order, a residence-exclusion order, and a stay-away order. Appx. at 25 and 26. The trial court issued a temporary restraining order on that same day—unbeknownst to either

party—and set a hearing date on the Domestic Violence Restraining Order on a date following the hearing date on the OSC. Appx. at 50.

When the parties appeared for hearing on Mary's OSC, they learned for the first time that the trial court had already signed John's temporary restraining orders and residence-exclusion order. RT at 3:3-24 and 4:5-10. The court then reread the pleadings and concluded,

> I find there is domestic violence and/or restrainable conduct. It does not mean it actually happened, but it means there was sufficient evidence that a temporary restraining order would issue and one has been issued.
>
> RT 4:5-10.

When Mary's counsel attempted to argue the propriety of issuing the temporary restraining order, the court interrupted, stating,

> Nothing you say is going to make me change my mind about the temporary restraining order. So are you asking for a hearing today on the restraining order and is each party waiving notice, or are we going to have it on August 13th, which is when it is set for?
>
> RT at 6:8-14.

The parties stipulated to proceed on the restraining-order issue directly, rather than wait. RT at 6:17-20. They were sworn as witnesses and testified. RT at 6:21-27.

John testified as to three incidents that he contended constituted domestic violence. First, he contended that Mary had wedged a piece of wood underneath their front door one night so that he could not open it. RT at 8:24-10:16. Only when he pushed hard on it did it open. RT 63:28. Mary said that she had wedged the piece of wood under the door so that she would hear what time John came home that night. RT 63:24-64:28. John also contended that Mary had let the air out of one of his car's tires on a day when he had an important meeting, which made him late.

Next, John contended that Mary bought a voice-activated tape-recording

device to record his telephone and other conversations, and that she did so record him more than once. RT 15:18-17:7. Mary said that she had bought the recording device, but that it was for work purposes and that John knew about it. RT 41:8-19; 52:11-56:7.

An offer of proof was made through counsel that Mary worked as a word processor out of a home office in the family residence. RT 43:26-44:3. Her computer and supplies were located and used in that office. RT 43:26-44:3. Mary testified that, if she were not able to work out of the home, her earnings would be greatly decreased. RT 62:12-19.

Near the end of the hearing, the court reporter had to leave, so the parties agreed that the court's findings could be entered in a minute order by the court clerk, in lieu of being recorded by the court reporter. Appx. at 53. The Minute Order states that the court found that Mary had committed domestic violence against John. *Ibid*. The court specifically found that Mary's admission—that she placed a wedge in the door—by itself constituted restrainable conduct. *Ibid*. The court issued a three-year restraining order, including a personal-conduct order, a stay-away order and a residence-exclusion order. The court also made a specific factual finding under Family Code § 3044, and awarded John temporary custody, with visitation to Mary. *Ibid*. The parties agreed to keep the OSC re: custody, etc. on calendar as scheduled. Appx. at 54.

After the hearing on the OSC, the court entered a Restraining Order after Hearing under the Domestic Violence Prevention Act (DVPA) related to the earlier hearing. Appx. at 55. The Restraining Order essentially recited the conclusions set forth in the court's Minute Order. Appx. at 55-58. The court ordered Mary to move immediately from the family residence, and to stay at least 300 yards away from John, his place of work, and his residence. Appx. at 55. The court also awarded custody to John and weekend visitation to Mary. Appx. at 58.

On December 1, 1997, Mary filed her notice of appeal from the order.

3. Issue on Appeal

The facts here show a badly broken marriage. Each party describes the other's behavior in terms of active dislike. The trial court found John more credible, ordered Mary to move immediately, and deprived her of her son's custody. Did the trial court abuse its discretion in finding that Mary's conduct—it noted, in particular, putting a wedge in a door to make it difficult to open—warranted restraint under the Domestic Violence Prevention Act?

STATEMENT OF APPEALABILITY

Under Code of Civil Procedure § 904.1 and Family Code § 2025,[1] the domestic violence prevention order is directly appealable as a collateral final order, since it finally determined the parties' rights in relation to the restraining-order matter, leaving no further judicial acts to be done. As a party to the action who has been aggrieved by the order, Mary has standing to bring this appeal.

STANDARD OF REVIEW

A trial court's decision to grant or deny preliminary injunctions and restraining orders is reviewed for abuse of discretion. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109; *14859 Moorpark Homeowner's Association v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402. The generally accepted test of abuse of discretion is whether or not the trial court exceeded all bounds of reason, all of the circumstances being considered. *Marriage of Connolly* (1979) 23 Cal.3d 590, 598. Although trial courts have considerable leeway, their exercise of discretion is not unfettered.

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[1]All statutory references are to the Family Code unless otherwise noted.

Baggett v. Gates (1987) 32 Cal.3d 128, 142. The trial court's decision is entitled to deference on appeal only when it is based on a reasoned judgment and complies with the legal policies and principles appropriate to the particular matter at issue. *Bullis v. Security Pacific Nat'l Bank* (1978) 21 Cal.3d 801, 815. That is, the trial court's discretion must be guided by fixed legal principles, and must be exercised in conformity with the spirit of the law and in a manner that serves rather than impedes or defeats the ends of substantial justice. *Marriage of Varner* (1997) 55 Cal.App.4th 128, 138. Discretion is also abused if the trial court applies the wrong legal standard in its decision. *Marriage of Kerry* (1984) 158 Cal.App.3d 456, 464. Thus the trial court's order will be overturned if, considering all of the evidence most favorably in support of its order, no judge could reasonably make the order. *Marriage of Hubner* (2001) 94 Cal.App.4th 175, 184.

ARGUMENT

1. The trial court abused its discretion in issuing the stay-away order.

In 1993, the DVPA consolidated several bodies of law that were duplicated elsewhere in California law. Its purpose was to "prevent the recurrence of acts of violence and sexual abuse . . . ." Fam. Code § 6220. The code defines "domestic violence" as abuse perpetrated against certain categories of persons. Fam. Code § 6211. "Abuse" is defined as: (a) intentionally or recklessly causing or attempting to cause bodily injury; (b) sexual assault; (c) placing a person in reasonable apprehension of imminent serious bodily injury; or (d) engaging in any conduct prohibited under § 6320. § 6203. Section 6320 includes such conduct as molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, or telephoning the other party. Under § 6300, an order may be issued 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 court's

satisfaction, reasonable proof of a past act or acts of abuse. Lastly, § 3044 provides that, on a finding by the court that a party seeking custody of his child perpetrated domestic violence against the other party or the child within the last five years, there is a rebuttable presumption that an award of sole or joint custody of a child to that person is not in the child's best interests.

A. The trial court applied the wrong legal standard.

No officially reported cases have yet interpreted the foregoing sections (or their predecessor sections) and no cases have defined with any kind of precision exactly which types of conduct constitute domestic violence. But the appellate court need only look at the statute's plain language, and compare it to the facts and evidence presented in this case, to see that the conduct complained of simply does not rise to the level of abuse or violence the recurrence of which would have to be prevented. The trial court must have applied the wrong legal standard in arriving at its conclusion. Indeed, there is evidence in the record that the trial court was mistaken as to the applicable legal standard. It stated that, "I find there is domestic violence and/or restrainable conduct." But the statutory scheme requires a finding of domestic violence, not a finding of domestic violence *or restrainable conduct.* The code defines "domestic violence" as abuse perpetrated on certain categories of persons. § 6211. "Abuse" is then defined as specific types of conduct. § 6203. A restraining order cannot issue unless the court finds past acts of "abuse." § 6300.

What constitutes abuse is specifically defined by statute. Nowhere does § 6203 indicate that the list defining abuse is not exhaustive. There is no "including, but not limited to. . . ." provision. There is no catch-all provision that says, "or any other type of conduct that the court finds is restrainable." Yet, here, the trial court seems to have applied exactly this type of catch-all provision, because none of the conduct complained of fits within the definition of "abuse," and the court expressly

stated that there was evidence of domestic violence *and/or* restrainable conduct. Thus the trial court appears to have applied an incorrect legal standard.

B. The trial court's decision is not supported by the facts.

The trial court's decision can be reversed if there is no reasonable factual basis for the decision. Here, John presented no reasonable proof of past acts of "abuse," as that term is defined by statute. Rather, the evidence presented regarding Mary's conduct demonstrates that, even if truthfully described, it does not meet the statutory definition of "abuse" in §§ 6203 or 6320. What Mary did do was allow herself to become wrapped up in the emotional turmoil that accompanies most disintegrating marriages. Even if everything in John's declaration were true (and of course, Mary contends that it is not), that declaration demonstrates great pain and heartache on both sides. It relates, perhaps, some poor decisions on Mary's part, and some instances where she may have let her pain and heartache get the best of her, saying things better left unsaid. *But it does not show that John was a victim of domestic violence at her hands.* John's declaration nowhere shows that Mary intentionally or recklessly attempted to cause him bodily injury. His declaration nowhere shows that Mary at any time placed him in reasonable apprehension of serious bodily injury. John does claim that Mary asked him for sex, even demanded it, on two occasions in the past year. "Sexual assault" is not defined in the Penal Code, but "sexual battery" is defined as touching an intimate part of another person while that person is unlawfully restrained by the accused, where the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse. "Sexual Assault," although not specifically defined, is the subject of Title IX of the Penal Code entitled "Title IX of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals." Title IX includes such crimes as rape and spousal rape. "Spousal rape" is defined by Penal Code § 262 as

sexual intercourse that is accomplished against the person's will by means of force, violence, duress, menace, or fear of immediate bodily injury, or where the person is unconscious or incoherent. That is hardly what happened here. Mary asked for sex, or perhaps even "demanded" sex with her husband, but she did not pursue it further.

John's declaration does not show that Mary molested, attacked, struck, stalked, threatened, battered, or harassed him. He claims that he saw Mary's car at his office on one occasion, but he did not see Mary in it. He may have been attempting to claim that Mary was stalking him. Penal Code § 646.9 defines "stalking" as willfully, maliciously, and repeatedly following or harassing another person *and* making a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family. As the facts show, that is hardly what happened here. John listed one incident where he saw Mary's car but did not see her. There is no evidence of repeated following or harassing, and there certainly is no evidence that any following, if it did occur, was coupled with a credible threat with the intent to place John in reasonable fear for his safety or that of his immediate family.

Moreover, the trial court's minute order setting forth its findings of fact seems to indicate that it did not even base its ruling on the various conduct alleged in John's declaration, and instead may have based its entire decision on only one fact. The trial court stated that Mary's one act of placing a wedge in the door of the home constituted domestic violence and "[was] by itself restrainable conduct." One single act of putting a wedge in a door warranting a finding of domestic violence cannot possibly be what the legislature intended when it enacted the DVPA to prevent "recurring acts of violence and sexual abuse." This is particularly true where a finding of domestic abuse automatically creates a presumption that it is not in the child's best interest for the restrained person to have custody of her child. The legislature certainly must have intended more egregious and violent conduct before a

court could presume that a parent should not have custody of his or her child.

Whether the trial court based its decision on all the allegations in John's pleadings, or just on the wedge-in-the-door allegation, there simply was no reasonable proof of past acts of "abuse," as that term is defined. Thus the court's finding of domestic violence was entirely unsupported by the evidence presented.

2. The trial court abused its discretion in issuing the residence-exclusion order.

Under § 6321, the court may issue an ex parte order excluding a party from the family dwelling *only* on a showing of *all* of the following: (1) facts sufficient to ascertain that the party who will stay in the dwelling has the right under color of title; (2) that the party to be excluded has assaulted or threatens to assault the other party or any other person under the other party's care, custody, and control or any minor child of the parties or of the other party; and (3) that physical or emotional harm would otherwise result to the other party or any other person under the other party's care, custody, and control, or to any child of the parties or of the other party. Under § 6340, the court may issue an order described in § 6321 after notice and a hearing only if the court finds that physical or emotional harm would otherwise result to the other party or any other person under the other party's care, custody and control, or to any child of the parties or of the other party.

The Rutter Group CALIFORNIA PRACTICE GUIDE ON FAMILY LAW notes that,

> [a]s a practical matter, judges rarely grant ex parte dwelling exclusion orders, except in the most *extreme* cases of very recent assaultive or threatening conduct demonstrated on competent, fact-specific declarations (times, dates, places and exact injuries suffered, etc.).
>
> CAL. PRACTICE GUIDE, FAMILY LAW, Rutter Group, § 5:77, at 5-28.

CALIFORNIA FAMILY LAW PRACTICE similarly notes that

> [m]any judges are reluctant to grant ex parte kick-out orders, and they will generally ignore allegations of emotional harm that are not supported by specific evidence of recent physical violence that has resulted in injury.
>
> CAL. FAMILY LAW PRACTICE, 2001, K-12, § K.2.00.5.

A. The trial court applied the wrong legal standard.

In order to issue an ex parte residence-exclusion order, the court must find that the party to be excluded has assaulted or threatens to assault the other party and that physical or emotional harm would otherwise result to that party. Similarly, a residence-exclusion order after hearing can only be issued on a finding that physical or emotional harm would otherwise result to the other party or anyone under her care. The trial court appears not to have even considered this legal standard in issuing the kick-out order. It seems to have simply issued that order as part and parcel of the other orders. But residence-exclusion orders are much more extreme and punitive than simple personal-conduct orders or stay-away orders, which is why additional legal requirements must be met before they are issued. The trial court did not consider the applicable legal standard. Its factual findings do not even mention "emotional harm" or "physical harm" or any other factual basis supporting the residence-exclusion order. The trial court's abuse of discretion in completely overlooking the applicable legal standard is reversible error.

B. The trial court's decision is not supported by the facts.

Even if the trial court were somehow considering the applicable legal standard, the evidence presented simply does not support its decision to evict Mary from her home. Here, there was absolutely no evidence of assaultive behavior toward or injury to John that would support the ex parte residence-exclusion order. The three main

incidents complained of were not violent or assaultive acts in any way. The other conduct set forth in John's declaration was not violent or assaultive in any way. Such conduct is typical in the demise of a once-loving relationship.

Moreover, no evidence was presented regarding physical or emotional harm that would support the residence-exclusion order after hearing. Indeed, John never states or testifies that he or others in his care will suffer physical or emotional harm if Mary were to remain in the family dwelling. Thus the trial court's decision is unsupported by the evidence and cannot have had a reasonable basis.

CONCLUSION

The trial court abused its discretion in making a finding of domestic violence and issuing the stay-away order, the residence-exclusion order, and awarding custody to John Smith. Its restraining orders and consequent custody award completely ignored the plain statutory language. Moreover, even if the trial court did use the correct legal standard, its orders are not supported by the facts and evidence. The trial court's abuses of discretion cost Mary Smith her home and her son, and impaired her livelihood. The trial court's order should be reversed.

Dated: Respectfully submitted,

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Attorneys for Appellant