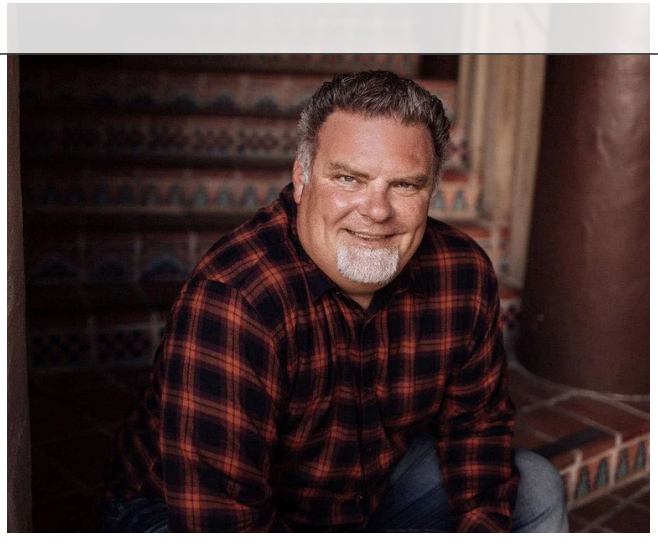

M. Jude Egan.

COMMENTARY

The Death of the Non-CLETS Domestic Violence Restraining Order. Finally.

Family Law specialist M. Jude Egan urges custody and visitation lawyers and legal aid clinics who represent survivors of abuse to consider deeply the implications of treating DVROs as distinct matters or included matters in dissolution cases on custody, visitation, and support issues particularly.

January 13, 2022 at 02:37 PM

12 minute read

Family Law

By M. Jude Egan

I do not like publicizing my appellate court losses. I like to win as much as any lawyer. However, I make an exception in the newly published case of *Marriage of Reichental* 2d Civil No. B307255, which presents us with a definitive published decision on an important area of law for family law practitioners across the state (even if it was not the ultimate outcome we sought).

Those of us who have been practicing family law for longer than the past couple of years have grown accustomed to “non-CLETS” Domestic Violence Restraining Orders (DVRO). A “non-CLETS” order is enforceable via contempt rather than through law enforcement. The difference for non-family lawyers is that violation of a CLETS, or California Law Enforcement Telecommunications System, order leads to immediate arrest by law enforcement and violation of a non-CLETS leads (potentially) to a citation for contempt.

The “non-CLETS” order was a contrived middle ground between a full CLETS order and no restraining orders, letting a party know that the court was serious about stopping abuse without going so far as to issue a CLETS order. “Non-CLETS” orders have often been conceived as “mutual stay away” orders.

The legislature added Family Code 6380 in 2020, requiring all DVROs to be reported to the CLETS system, to stop the practice of issuing non-CLETS orders. Lawmakers added Family Code 6305 in 2016, requiring mutual DVROs to only be issued after evidence of abuse by each party, to stop the practice of issuing mutual Domestic Violence Restraining Orders based on one party’s application for a DVRO. However, each of these code sections is relatively new, and because there is a long history of both non-CLETS and mutual “stay away” orders, the practice of issuing these types of orders continues.

CLETS DVROs come with a number of long-term implications for the restrained party. Typically, the restrained party loses their Second Amendment rights and risks losing licensure status and employment with the state of California. Law enforcement and military personnel, as well as guards at places like Diablo Canyon—of whom I have represented a number—who are required to carry firearms in their positions, lose their jobs. Firefighters and state employees also have their employment terminated. Those of us who rely on statewide licensure typically see licenses suspended or denied.

survivor is the lower earning spouse who is also likely to have more custody of any minor children after issuance of a DVRO—there is thought to be a "double punishment" to the survivor, who endures abuse and loses income. In fact, this has long been thought to be one of the reasons survivors do not like to testify against their abusers in criminal DV trials.

In the *Reichental* case, the Judge Pro Tem issued a "non-CLETS" DVRO after an eight-day trial. Wife appealed on a number of grounds, including jurisdictional grounds. One of the questions on appeal was whether a "non-CLETS" order could issue after the passage of Family Code 6380.

On appeal, we argued that there are only two types of orders: a CLETS DVRO and no DVRO, and that there cannot be a middle ground after passage of Family Code 6380. In our case the Pro Tem had found that there were no grounds for a CLETS order, so we argued that the non-CLETS order should be vacated. The appellate court agreed with us that the court can only issue a CLETS order or no order at all. To my client's dismay the appellate court then remanded to the Judge Pro Tem to reissue the order as a CLETS order. (I'll explain later why I believe this decision was not appropriate.)

Although for various reasons I am not a fan of the court's overall opinion in *Marriage of Reichental*, the Family Code 6380 holding is important for Domestic Violence jurisprudence across the state. Despite many judges having ceased using non-CLETS orders, there are still many judges who continue to use them as a way to quickly resolve difficult cases that would otherwise take up a large chunk of trial time in already overloaded family courts. Non-CLETS orders are dangerous for many women (and some men) who are foreclosed from using law enforcement to enforce orders of protection when they need help immediately. The legislature recognized this exact issue with the passage of Family Code 6380.

Conversely, I also believe that a non-CLETS Restraining Order is an impermissible restraint on the freedom of the person against whom it is issued. It is a restraining order without a finding of domestic violence. Our argument on appeal was largely that a non-CLETS DVRO is a restraint even without a finding of a need for restraint and that a court must protect the protectable party, while also protecting the rights and liberties of the restrained party.

The only way to properly do that is to determine that a case rises to the level of a DVRO and refer it to the CLETS system, or to decide that a DVRO is not appropriate and is not an issue at all. It MUST either be one or the other to protect both the protected party and the rights and liberties of the restrained party. In the case of a non-CLETS order, neither the party needing protection gets protected, nor are the liberties of the restrained person protected.

I have been a practicing family lawyer since 2009, and I have probably participated in 40-50 non-CLETS DVRO stipulations for my clients over the years. I have seen a number of judicial officers make a non-CLETS order without a hearing or taking any evidence. I had one client murdered by the person who would have been the restrained party, and several other clients who experienced continued harassment and threats of violence even after the issuance of non-CLETS orders and were forced to file contempt paperwork to enforce non-CLETS orders (a process that sometimes takes months and rarely results in any actual punishment). I have also seen CLETS orders lead to immediate help and protection for the abuse survivor.

The courts and state legislature have been, appropriately, expanding the concept of violence to "disturbing the peace" and "coercive control" during the last five to seven years. See, e.g., *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497; *McCord v. Smith* (2020) 50 Cal.App.5th 358; Family Code 6320. This expansion of the understanding of the pernicious effects of coercive control—through access to money and necessities, isolation, surveillance, hacking into

etc.—are all worthwhile and positive developments in the law. But the availability of the "non-CLETS" order was always a deterrent to enforcement.

Marriage of Reichental is important for what it says about Family Code 6380's requirement that orders of protection issued under the DVPA must be transmitted to the CLETS system. This puts a trial judge in the position of taking evidence and ruling whether to issue a DVRO (and transmit to CLETS) or not to issue one at all. It not only permits, but demands that courts hear evidence regarding domestic abuse when requested. In so doing, it furthers family law due process— orders issued after a full hearing on the merits

However, there are two other areas about which I firmly disagree with the appellate court's ruling in *Reichental*. First, Family Code 6211 tells us who is protectable under the DVPA—new paramours are not protectable parties. See also *Hauck v. Riehl*, 224 Cal.App.4th 695 (Cal. Ct. App. 2014) as well as *People v. Selga* (2008) 162 Cal.App.4th 113, 119. *Reichental* expands coverage under the DVPA to "household" members by focusing on the language in Family Code 6320(a): "... in the discretion of the court, on a showing of good cause, of other named family or household members," rather than the language in Family Code 6211, which defines the domestic abuse as abuse between spouses, former spouses, cohabitants or former cohabitants, the children of spouses or cohabitants, and "any other person related by consanguinity or affinity within the second degree." The consanguinity and affinity relationships are family relationships—related by blood or marriage.

Reichental reads 6320 ("other household members") as trumping 6211 (relationship of consanguinity or affinity within the second degree), thereby expanding the DVPA to include new paramours. This was relevant to *Reichental*, because some of the bad acts occurred wife and new girlfriend when husband was not present.

In fact, we argued (and the appellate decision confirms) that the issuance of the non-CLETS DVRO was based on acts that occurred between wife and new girlfriend about which new girlfriend was permitted to testify at the DVRO trial. If the new girlfriend's testimony had been excluded (she already has a clear remedy, which is to seek a civil harassment restraining order), then the "bad acts" are very minor and were several years old.

The DVPA is a relational law. The Family Court asserts jurisdiction based on the relationships between the parties—it is a type of civil harassment restraining order, but has lower evidentiary thresholds. The idea is that partner abuse is pernicious, in part, because of the relationship of trust and confidence (or love). To permit new spouses to be protected from previous spouses extends the law beyond its jurisdictional bounds. How does the Family Court assert jurisdiction over a new girlfriend purely because she lives with the ex-husband?

The former spouse and the new spouse have no relationship, no privity, nothing that would establish that the Family Court has jurisdiction to speak the law over the relationship between people who are strangers to each other. The Family Court's jurisdiction comes from the intimate relationship between people (spouses, lovers, dating partners and the children of those relationships and, perhaps, the parents of the people in those relationships). The expansion of the rule to "household members" is an expansion beyond the scope of the DVPA. No one says they are not entitled to protection; they should just not be entitled to protection under the DVPA.

Second, I also disagree with the *Reichental* holding that a Petition for a DVRO is akin to a "Request for Order" or "pre-trial motion" and is therefore included in a dissolution action. A number of cases have held that DVRO petitions are separate and distinct causes of action from dissolution actions, which is appropriate for a number of reasons, the most important of which is that when parties sign a Pro Tem Agreement based on a Petition for Dissolution, they do not have notice that there will be a Petition for DVRO filed later. Since a Pro Tem Agreement is a contract between the court and the

More importantly, however, the *Reichental* court said that a DVRO may be a part of a dissolution action and also may not be a part of a dissolution action.

That's an unsatisfying answer to the question of whether the Pro Tem had jurisdiction over the DVRO trial over wife's clear objection. By reducing the status of a DVRO petition to a "pre-trial motion" or "request for order," it also minimizes the importance of a DVRO in any given case. That a DVRO petition can be brought in a dissolution action or separately from a dissolution action (or when there was not marital relationship at all) is an indication of the importance of the petition—it is a "separate cause of action" (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 335) that has its own record, is immediately appealable and proceeds to its own judgment. The *Reichental* court states that a DVRO may be included in a judgment of dissolution, but this is not entirely accurate; a DVRO may issue after a dissolution trial, but the transmittal to the CLETS system always comes with orders issued on separate DVRO forms.

Although this was a loss for my client, as a matter of law the case is an important addition to California domestic violence jurisprudence. The death of the non-CLETS order is important for the protection of survivors of domestic violence. The change to include household members, including new paramours, will create a shockwave in domestic violence issues that will probably be resolved by the California Supreme Court or by the legislature because a conflict of authorities on the issue has been formed, at the least between Family Code 6211, *Hauck v. Riehl*, supra and *People v. Selga*, supra on the one hand and *Reichental* and Family Code 6320 on the other.

Whether a DVRO is an ancillary matter or not is still unknown since the *Reichental* court says it may or may not be a part of the underlying dissolution action. I would urge custody and visitation lawyers and legal aid clinics who represent survivors of abuse to consider deeply the implications of treating DVROs as distinct matters or included matters in dissolution cases on custody, visitation, and support issues particularly. In my view, treating them as included matters in the dissolution hearing may be cause for concern—particularly for legal aid lawyers who represent survivors of domestic abuse at low or no costs, but do not represent parties in the underlying dissolution action.

M. Jude Egan *is a certified Family Law Specialist in California and certified by the State Bar of California, Board of Legal Specialization. He has published internationally in peer reviewed legal, trade and academic journals. He has taught disaster law, business law and federal and state entitlements at the Louisiana State University, E.J. Ourso College of Business. His website is JudeEgan.com.*

7 minute read

By ALM Staff

6 minute read

January 04, 2022

The New Professionalism Created by the Pandemic

By Shari L. Klevens and Alanna Clair

6 minute read

TRENDING STORIES

Banking Clients No Longer 'Jewel in the Crown' For Law Firms, Partners Say

INTERNATIONAL EDITION

Law Firms Love to Talk About Culture. But Can They Define It?

THE AMERICAN LAWYER

Brooklyn US Attorney Names Leadership Staff, Brings Hawaii Prosecutor Back to NYC

NEW YORK LAW JOURNAL

Law Firms' Emerging Weapon in Talent Wars: The Moneyball Strategy

THE AMERICAN LAWYER

You've Been Thinking About The Big Four All Wrong

INTERNATIONAL EDITION

LAW.COM PRO

Our 2022 Watch List: Law.com Pro's Global Team Highlights Key Trends to Keep an Eye on This Year

Dishing on Diversity: A Candid Discussion on DE&I in Law Firms

2022: The Trends to Watch in the New Year

FEATURED FIRMS

Law Offices of Gary Martin Hays & Associates P.C.
(470) 294-1674

Law Offices of Mark E. Salomone
(857) 444-6468

Smith & Hassler
(713) 739-1250