ACFLS
WWW.ACFLS.ORG
FALL 2014, NO. 4
FAMILY LAW SPECIALIST
JOURNAL OF THE CALIFORNIA ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

GUARDING AGAINST FAMILY LAW EXCEPTIONALISM

HON. MARK A. JUHAS
LOS ANGELES COUNTY SUPERIOR COURT JUDGE

In August, 2007, the California Supreme Court handed down the opinion in *Jeffrey Elkins vs. Superior Court.*[1] From a systemic procedural standpoint, the *Elkins* decision made a tremendous change in family law; probably more than any of the Court's other decisions in recent memory. Looking back over the past seven years, some of the change *Elkins* wrought is obvious, some a little more subtle. Divining what will happen on a going-forward basis is downright impossible. John F. Kennedy once said: "Change is the law of life. And those who look only to the past or present are certain to miss the future." The purpose of this article is to highlight the past, but at the same time make sure that we don't miss the opportunities the future holds.

The facts surrounding Jeffrey Elkins's plight in the family law court are quite well known. On the day of his dissolution trial, Mr. Elkins appeared in court, unrepresented. Unfortunately, he failed to comply with his local court's family law rule designed to streamline and simplify the proceedings. The rule required parties in a dissolution trial to present their case in chief by way of written declarations; direct testimony from live witnesses was precluded, save for "unusual circumstances." Further, the parties were required to file pre-trial declarations to establish admissibility for all their exhibits. The trial court justified this rule because it allowed "expeditious resolution of family law cases" and it "reduced adversarial confrontation between estranged spouses." Unable to establish admissibility for all but two of his trial exhibits and with no witnesses, Mr. Elkins essentially capitulated and his wife prevailed at trial.

Mr. Elkins ultimately appealed to the California Supreme Court; then Chief Justice George writing for the majority, stated:

> Although we are sympathetic to the need of trial courts to process the heavy case load of dissolution matters in a timely manner, a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light

Continued on page 4 (Juhas)

WHAT'S INSIDE

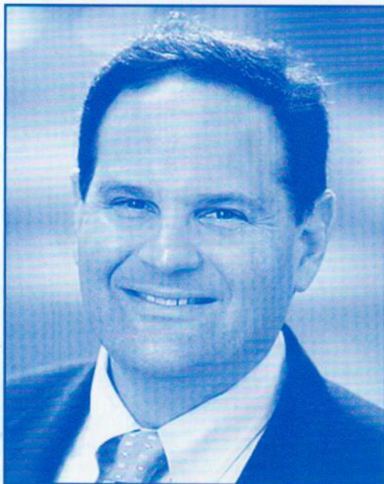
EDITOR'S DESK 2
DEBRA S. FRANK, CFLS
PRESIDENT'S MESSAGE 3
LYNETTE BERG ROBE, CFLS
WHEN FAMILY LAW MEETS CRIMINAL LAW: MASTERING THE INTERPLAY BETWEEN DOMESTIC VIOLENCE LITIGATION AND CRIMINAL PROCEDURE 8
JASON M. SCHWARTZ, CFLS & TRACY C. MILLER, J.D.
DEATH AND DIVORCE: CROSSOVER ISSUES BETWEEN FAMILY LAW AND ESTATE PLANNING 12
CHRISTOPHER M. MOORE, CFLS & SHARON A. BRYAN, CFLS
THE FIVE BEST REASONS YOUR CLIENTS SHOULD CHOOSE A COLLABORATIVE DIVORCE 16
JOHN R. DENNY, CFLS
JUDICIAL OFFICERS LOOK FORWARD TO SPRING SEMINAR 2015 18
JASON M. SCHWARTZ, CFLS & ANNE B. DAVIES, CFLS
ABBREVIATED PARENTING ASSESSMENTS (PART 2): RISKS AND REWARDS 20
RICHARD F. GOULD-SALTMAN, CFLS & ROBERT A. SIMON, PH.D.
HOT OFF THE PRESS, JOURNAL EDITION 28
DAWN GRAY, CFLS
2014 ACFLS BOARD OF DIRECTORS 38
SLATE OF NOMINEES AND BALLOT FOR THE 2015 ACFLS BOARD 39
ACFLS BAY AREA CHAPTER REPORT 40
SHERRY PETERSON, CFLS
ACFLS SACRAMENTO CHAPTER REPORT 41
FREDERICK "RICK" COHEN, CFLS
ACFLS ORANGE COUNTY CHAPTER REPORT 42
JASON M. SCHWARTZ, CFLS
REPORT OF EDUCATION DIRECTOR/ AWARDS COMMITTEE CHAIR 43
JOHN D. HODSON, CFLS
ACFLS CLE ON DVD/CD/MP3 46
YOU LOVED ME AT FIRST: THE DIVORCE LAWYER'S LAMENT . 50
RONALD S. GRANBERG, CFLS
REFLECTIONS ON THE HUMAN SIDE OF FAMILY LAW PRACTICE: COPING WITH HEARTBREAK 51
HEIDI S. TUFFIAS, CFLS

THIS PAPER CONTAINS 30% POST-CONSUMER WASTE

When Family Law Meets Criminal Law: Mastering The Interplay Between Domestic Violence Litigation and Criminal Procedure

Jason M. Schwartz, CFLS
ACFLS Associate Chapter Director 3
Orange County
jschwartz@sgsblaw.com

Tracy C. Miller, J.D.
Founder, Domestic Violence Legal Center
Former Prosecutor
tracymiller@dvlegalcenter.com



Jason M. Schwartz is a Partner in the law firm Stegmeier, Gelbart, Schwartz & Benavente, LLP, in Newport Beach. He is a member of the ACFLS Board of Directors and serves on the ACFLS Family Law Specialist Editorial Board, the Membership Benefits Committee, the Legislative Advisory Committee and is the Associate Chapter Director for the Orange County Chapter of ACFLS. He has been a Certified Family Law Specialist since 2007.

Tracy C. Miller is a former prosecutor and Founder of Domestic Violence Legal Center® handling Criminal and Restraining Order Matters. As a former Deputy District Attorney she handled many criminal cases, most being domestic violence as the majority of her tenure was spent in the Domestic Violence Vertical Unit. Tracy provides continuing education credits for lawyers and is published concerning topics of domestic violence, criminal matters, and restraining orders. Tracy utilizes her criminal law experience and cross-over approach concerning the Penal and Family Codes described in this article to gain successful case results. Tracy also serves as an adjunct law professor teaching Criminal Pre-Trial Litigation.

Every so often, we family law attorneys receive messages such as this on our morning voice mail from other attorneys: "(My client) Harry just got arrested for domestic violence and his family is asking what (I) will be doing for him to get him out of jail?!?" Instinctively, we tell them that we are not criminal defense attorneys and refer them to someone who can help Harry. This advice seems straightforward enough to "handle" Harry's current issue. However, as his family law attorney, your involvement throughout Harry's plight should not be underestimated.

This article will provide a fact pattern familiar to many of you, along with suggested legal strategies useful for litigation stages stemming from the incident that led to Harry's arrest.

We know your practice is most likely limited to family law. Nonetheless, it is critical that you are "in sync" concerning basic criminal procedure issues and how they may affect your client's case.

The hypothetical scenario for this article is not unusual: The authors represent Harry, who has been married to Wanda for seventeen years. Harry is arrested and charged with inflicting corporal punishment on a spouse (a felony) in violation of PC §273.5(a). Prior to Harry's arrest, the parties argued over an intimate text message exchange of Wanda's with an unknown male that Harry found on Wanda's telephone. After Harry screams obscenities at Wanda (with the children (ages 15 and 12) in hearing distance), Wanda retreats to the master bedroom.

Harry alleges that when Wanda (who was unaware that he was following her into the bedroom) attempted to slam the bedroom door shut, he grabbed the door to prevent it from hitting him, stumbled forward because of the force of the door, the door struck Wanda who flew backwards, and the back of Wanda's head was bruised from her fall.

Wanda alleges that she attempted to "normally close the door" as Harry slammed her with it causing her to fly to the ground and bruise the back of her head. The children could hear Harry screaming but do not know what caused Wanda's fall.

Twenty-four hours lapse before Harry can post his bail for his release from jail. Upon his release, Harry is served with an Emergency Protective Order ("EPO"), a Notice to Appear in criminal court in six days (when the EPO expires), and a family court Temporary Restraining Order ("TRO") – with a residence exclusion order and a no-contact order with Wanda and the children. A hearing date concerning Wanda's request for a "permanent" family law restraining order against Harry is set for three weeks out. Harry is also noticed by Wanda to appear at his deposition in two weeks, and is ordered to report to a family court investigator to participate in an Emergency Investigation.

To Testify or Not to Testify

The Fifth Amendment of the U.S. Constitution provides that no person shall be compelled to be a witness against himself. However, a defendant cannot testify on his own behalf and also claim the right to be free from cross-examination. (*Brown v. United States* (1958) 365 U.S. 148.) A defendant may exercise his or her right against self-incrimination if the potential testimony furnishes a "link in the chain" of evidence which could be used to prosecute him. (*People v. Lawrence* (1958) 168 Cal.App.2d 510.) Thus, the testimony does not have to be an admission to the crime, but merely establish information that can be used to prosecute the person.

The privilege against self-incrimination extends to litigants in California through Evidence Code §940. Once a litigant exercises his right against self-incrimination, no presumption can arise from its exercise and the judicial officer cannot draw any inferences as to the credibility of the witness, pursuant to Evidence Code section 913. If a person exercises his or her privilege against self-incrimination, he (upon objection to the exercise of the privilege) has the burden to show that the proffered evidence might tend to incriminate him. EC §404. The court, not the litigant, then has the burden of determining whether the exercise of the privilege is well-founded and whether it may be invoked. (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299.)

Harry has several upcoming proceedings where people will be seeking statements from him and the impact of his potential statements is far-reaching. Should Harry testify and/or speak during each of these stages, selected stages, or none at all? Harry's testimony can potentially exonerate him of all charges and allegations, leading to liberal custodial time with his children, or he can make potentially incriminating statements that can lead to the issuance of a "permanent" restraining order, felony conviction, jail time and/or severe restraints on his contact with his children.

Decisions of when and to whom Harry should speak highlight the most common overlap between domestic violence litigation and criminal procedure. These are also the decisions that Harry's criminal defense attorney and family law attorney should make in unison. The attorneys should advise Harry regarding the benefits and burdens of testifying at each stage.

Harry cannot use his right against self-incrimination as both a sword and a shield. If he exercises his right against self-incrimination at his deposition, then, upon proper objection, he will be precluded from testifying on these issues at trial. This, of course, would result in the court only hearing Wanda's version of the incident. The implications of such one-sided testimony are indeed perilous.

"The privilege against self-incrimination is analogous to the physician-patient privilege.... The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause humiliation. **He cannot have his cake and eat it too.**" (emphasis added) (*Newson v. City of Oakland* (1974) 37 Cal.App.3d 1050.)

As a practical pointer, Harry is only precluded from answering those questions for which he invoked his right against self-incrimination at the deposition. Therefore, it is crucial for Wanda's attorney to ask the proper questions at the deposition, and assure that Harry exercises his right against self-incrimination for each question, rather than simply stating a blanket invocation of his privilege. In viewing the issue from the opposite side, Harry may testify at his deposition and still exercise his right against self-incrimination at the time of hearing if he chooses to do so. The deposition testimony may be used against him at the hearing, but he cannot be compelled to testify at the hearing just because he testified at his deposition.

As for Harry's appointment with the court-appointed investigator (or other Evidence Code section 730 evaluator) and his Responsive Declaration, there are some subtle considerations in advising Harry. Anything that Harry states to a court investigator or in his

Continued on page 10 (Schwartz & Miller)

SCHWARTZ & MILLER

Continued from page 9

Responsive Declaration (as well as his deposition testimony cited above) can be used against him as exceptions to hearsay, pursuant to Evidence Code section 1220 (admission of a party), Evidence Code section 1230 (declarations against interest – Harry is "unavailable" as a witness if he exercises his privilege), and potentially Evidence Code section 1291 (former testimony offered against party to former proceeding). Accordingly, Harry's Responsive Declaration should be drafted with a final review by his criminal counsel. Such careful attention is warranted because any statements made in the response and/or to the investigator can and likely will be used against him.

As for the Responsive Declaration, it is advisable that Harry generally deny the domestic violence allegations that are in fact false and as to others expose credibility issues and interpose defenses. For example, it is common for a petitioner (Wanda) to skew and/or omit facts and Harry can point out in a general manner that this is occurring. With a carefully drafted declaration, it will appear that Harry is stating that there are possible factual and/or legal defenses to Wanda's claims without providing specific details concerning the incident itself. Harry may also state in the Declaration that he reserves the right to supplement his response via further declarations and/or testimony regarding the allegations at the hearing.

Harry will receive his chance to tell his side of the story at the hearing. There is nothing to gain by providing a detailed response to the domestic violence allegations, other than potential fodder for cross-examination if his hearing testimony is not consistent with his Responsive Declaration. Of course, if custody is at issue, Harry can and should respond to any issues regarding custody (as long as his responses do not tend to incriminate him) specifically upon the consent of his criminal defense attorney.

Interestingly, there is no right for Harry to automatically continue the deposition, and/or the family law hearing until the resolution of the criminal case. The family court is vested with its discretion in determining how long, if at all, these proceedings may be delayed. (*People v. Coleman* (1975) Cal.3d 867.) Among the factors that the family court will most likely consider upon Harry's potential request to delay discovery or the hearing are as follows:

(1) The interest of Wanda proceeding expeditiously with this litigation;
(2) The burden that any aspect of the proceedings places on Harry;
(3) The convenience of the court in management of its cases and the efficient use of judicial resources;
(4) The interests of persons not parties to the family law litigation; and
(5) The public interest in the pending civil and criminal litigation. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876.)

The ultimate decision on whether Harry will testify in his defense at the restraining order hearing arrives when Wanda has rested her case. At that point, Harry's attorneys should move for the court to dismiss Wanda's case pursuant to Code of Civil Procedure section 631.8. If the court denies this request, it provides a strong inference that Harry needs to testify because Wanda has likely met her burden. Therefore, Harry's testimony becomes a necessity. If the court dismisses Wanda's request for a "permanent" restraining order, Harry, of course, would not need to testify. Therefore, the Code of Civil Procedure section 631.8 request is imperative.

Burden of Proof

The usual school of thought is that if a litigant such as Wanda cannot meet her burden of proof in family court (mere preponderance of the evidence), the criminal charges should be dropped because the burden of proof is even greater in criminal court.

Two considerations rebut this common point of view. Practically speaking, a skilled deputy district attorney who prosecutes domestic violence cases daily may be more capable of convincing a jury that domestic violence occurred than an attorney who rarely handles domestic violence prosecutions in family court. The district attorney may be better able to erase technicalities or evidentiary problems that the lesser-experienced attorney could not. The denial of the "permanent" restraining order in family court does not automatically mean Harry will not be prosecuted or convicted in criminal court.

Next, despite the greater burden of proof in the criminal case, the "permanent" restraining order may actually be more difficult to obtain for Wanda because Harry may assert an "affirmative defense" under Family Code section 6220. Harry may successfully argue that the door incident was "situational" domestic violence that will not likely reoccur given that the parties have not had prior incidents of domestic violence, and are now living apart. However, there is no such affirmative defense available to overcome PC §273.5(a). If all of the elements of the domestic violence charge are proven, Harry would be convicted of this felony despite the denial of the family court restraining order request.

Thinking Prospectively – Use of Mitigation

As soon as you discover your client is arrested or accused of domestic violence, a customized "mitigation" list should be provided comprised of items in support of your client's criminal defense and in response to the opposing party's allegations in family law court. The question is how does a family law attorney make such a list at the outset without detailed information, such as witness statements, to assess the legal and defensive issues? When a client is released from custody, it is rare that either attorney would have the police reports, including detailed witness and factual information. Following Harry's arrest he must wait six days until his Arraignment, when his criminal attorney will have access to these reports.

However, waiting until just before the final hearing to determine Harry's defense may eliminate his chance of seeing the children until after the final hearing. Harry wants to see his children and he expects that he will be granted visitation with his children at the initial family law hearing. Harry needs to know this is not guaranteed

and until the restraining order hearing is completed he may not have any visitation with his children, unless the court can be persuaded to issue interim visitation orders, or if Wanda agrees.

Therefore, we would never prepare a closing argument at the last minute. Early case preparation to explore potential domestic-violence related "roadblocks," including bars to visitation, is essential.

At the initial restraining order hearing date, Harry will either proceed with the hearing or request a continuance in order to better prepare his case. A predictable item is Harry's statutory right to a continuance of the restraining order hearing under Family Code section 243(d). However, the court has no obligation to amend a "no visitation" TRO. You must present persuasive reasons to the court and/or Wanda as to why Harry should be granted time with the children pending the next court date.

To do so, referencing Family Code section 3044(b)(1)-(7)(e) and Penal Code section 1203.097(a)(6)(7)(8)(10)(11)(12) will provide Harry's case exposure and "to do list." By a parallel read, you will see these Codes serve similar legislative purposes because they are both governed by the Domestic Violence Prevention Act and the relationship between the parties arising out of Family Code section 6211. Further, these Sections often represent the "worst-case" scenario in a low-level/first offense type of domestic violence case. The criminal defense attorney will use much, if not all, of the "mitigation" information that arises from Harry's family law to-do list in order to attempt to persuade the District Attorney's Office not to file charges. Or, if criminal charges are filed, the information will be used to request leniency concerning the issue of a Criminal Protective Order at the arraignment phase. All Criminal Protective Orders "trump" family court orders and coordination with criminal counsel is a must to avoid potential additional criminal charges for Harry's violation of a criminal or family law restraining order. When Harry grumbles about engaging in his exhaustive "mitigation list" (e.g., individual counseling, volunteer anger management, parenting courses, Alcoholic Anonymous meetings, etc.), explain to him that by following your customized mitigation plan, Harry will show the criminal and family courts his good-faith effort to move forward constructively to safely co-parent with Wanda. By utilizing a swift and precise mitigation plan, Harry will significantly increase his chances of seeing his children sooner. His actions will also potentially provide that the criminal case will be resolved favorably at a much quicker rate than usual. Harry's work will also strengthen your Family Code section 6220 defensive tactic.

Other Practical Pointers

Consult with defense counsel prior to Harry's criminal plea. It may seem to the criminal defense attorney that Harry is getting off easy by pleading guilty to a misdemeanor count of disturbing the peace, instead of the felony charge. However, under Family Code section 6320, "disturbing the peace" is an action that may be used as a basis for issuance of a "permanent" restraining order in family court. Thus, even a low-level criminal plea could establish Wanda's prima facie case under Family Code section 6320 for the issuance of the restraining order as well as trigger the presumptions under Family Code section 3044. Family law attorneys should always request that they be permitted to review their client's criminal plea agreement prior to its entry.

- Look for any inconsistent statements made by Wanda. Wanda is likely to give many statements during the proceedings. If these statements are not consistent, they could impact her credibility. For instance, statements listed in the EPO, police reports, her family law declarations (related to domestic violence and Requests For Order), statements to court investigators, child custody evaluators, and deposition testimony should provide instances of inconsistent statements to be used both at depositions and at hearing or trial. Expose any inconsistencies by clear charting or Power Point presentation at trial/hearing.
- Deposition of the alleged victim. The right to take an alleged victim's deposition is not automatic upon the filing of the request for a "permanent" restraining order. The accused should file a Dissolution of Marriage case to assure a deposition. Clients like Harry may not want to take the drastic step of filing for divorce. However, given that Wanda has filed a request for a restraining order, Harry needs to know that irreconcilable differences have likely arisen leading to the irremediable breakdown of his marriage.
- "Voir Dire" the alleged victim. If the parties agree to dismiss the request for family law restraining orders, it is preferable that the alleged victim is questioned on the record to assure that she is knowingly and intelligently waiving her right to pursue the orders. Many judicial officers take it upon themselves to conduct this questioning based upon local rules concerning free and voluntary dismissal/withdrawal of domestic violence restraining orders by alleged victims.

Conclusion

The overlap issues we have explored are only the most common. Start building your client's case plan early and use the statutory and case law we have provided in this article as a guide. Coordinated case plans for family law and criminal defense for all of the proceedings are ideal and critical. In family court, once a "no visitation" ex-parte TRO is issued, there is no telling how long that will actually last nor whether this order may be modified without a full evidentiary hearing. In criminal court, once a "no contact" CPO is issued there is no assurance when that will be modified to allow for expanded contact with the opposing party and/or the children. These initial stages contain moments and orders that simply cannot be reversed.

Take a moment to read the case and statutory law referenced. The next time YOU get a call that your client has "just been arrested for domestic violence" feel confident that you have the basic tools to give your client's case a head start with the most rigorous defense possible. ■