

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PATRICK F.,

Appellant and Respondent,

v.

ANDREA M.,

Petitioner and Respondent,

B246661

(Los Angeles County
Super. Ct. No. BF039030)

APPEAL from an order of the Superior Court of Los Angeles County,

Maren E. Nelson, Judge. Dismissed in part and reversed in part.

Daneshrad Law Firm and Joseph Daneshrad for Appellant and Respondent.

Law Office of Cary W. Goldstein, Cary W. Goldstein and Sarah C. Clark for
Petitioner and Respondent.

Patrick F. appeals from the restraining orders entered against him in a child custody proceeding involving his ex-girlfriend, Andrea M., and their three children. Patrick contends that the restraining order issued on September 28, 2012 is void because it relied on inconsistent dates as to the duration of the order, and was based on an order that had been superseded by a prior restraining order. Patrick also challenges the restraining order renewed on December 17, 2012, on the grounds that he was never served with the mandatory Judicial Council forms applicable to a request to renew a restraining order. We dismiss the appeal of the September 28, 2012 restraining order as untimely. We reverse the December 17, 2012 order on the grounds that the trial court abused its discretion in renewing the restraining order when Andrea had not used the mandatory Judicial Council forms or served Patrick with the notice required by the rules of court.

FACTUAL AND PROCEDURAL BACKGROUND

Andrea and Patrick started dating in 1992, and now have three children together. This case initially began when Andrea sought child support from Patrick. As evidenced by the limited record before the court, at some point on or before February 26, 2010, Andrea sought a restraining order against Patrick. On February 26, 2010, the trial court issued a temporary restraining order preventing Patrick from coming within 100 yards of Andrea and their three children.

On June 4, 2010, after hearing evidence from both parties, the trial issued a “permanent” restraining order against Patrick for one year. Prior to the order’s expiration, Andrea filed a request for renewal of the order. The hearing was set for

June 15, 2011. On June 15, 2011, the court continued the hearing to August 8, 2011, and notice of the hearing was mailed to Patrick’s counsel. On August 8, 2011, the trial court granted the request and renewed the restraining order for five years. Patrick and his counsel were not present at the hearing.¹

Four months later, Patrick moved to set aside the restraining order on the grounds that he had not been personally served with notice of the request for renewal. The trial court heard evidence from both parties regarding the circumstances of service, and found that Patrick had, in fact, not been personally served. The court set aside the August 8, 2011 order and set a new hearing on the renewal of the restraining order. On May 24, 2012, after hearing evidence from both parties, the court renewed the restraining order. Patrick was ordered to stay at least 20 yards away from Andrea and their two younger children for a period of five years.

On June 28, 2012, the court modified the order, removing the children from the “stay-away order” and setting forth specific conditions under which Patrick could access the property where Andrea lived. Andrea lived on a ranch where she ran

¹ However, the record establishes that Patrick was present in the courthouse and apparently chose not to attend the hearing. (See April 9, 2012 Reporter’s Transcript [The trial court:] “The hearing occurred on August 8, 2011, and the evidence is unrefuted that the respondent was present in the courthouse when that hearing took place, but did not avail himself of coming into court or having his counsel here”)

a horse-boarding business, and both parties claimed an ownership interest in the property and business. No expiration date was provided on this modified order.²

On July 2, 2012, the court modified the order again, this time including the children in the stay-away order and providing an expiration date of July 9, 2012. The court then extended the restraining order several times. On August 14, 2012, the court issued a restraining order preventing Patrick from coming within 20 yards of Andrea, their two younger children, and the “ranch.” The restraining order was set to expire on December 31, 2012.

Ten days later, Andrea filed a proposed judgment with the trial court addressing the court’s custody award, visitation orders, and the “current Domestic Violence Restraining Order in effect against [Patrick].” Specifically, the proposed judgment provided that the current restraining order “was renewed on May 24, 2012 and expires on May 24, 2017.” The proposed judgment did not address the modifications to the restraining order or the subsequent restraining order issued on August 14, 2012, but attached a copy of the restraining order that was issued on July 2, 2012 and had expired on July 9, 2012.

Patrick filed an objection to the proposed judgment on the sole ground that “the Court never ordered that a Judgment be entered in this case.” On September 28, 2012, the court signed the proposed judgment, and the clerk served notice of entry of judgment on both parties by mail. On October 11, 2012, Patrick moved to set aside the

² Family Code section 6345, subd. (c) provides that “[t]he failure to state the expiration date on the face of the form creates an order with a duration of three years from the date of issuance.”

judgment as void on the grounds that it relied on inconsistent dates as to the duration of the order, and was based on an order that had been superseded by the August 14, 2012 restraining order. The court denied the motion on November 26, 2012. Notice was waived.

On December 13, 2012, Andrea moved ex parte for an order shortening time to renew the restraining order that was set to expire on December 31, 2012. Andrea provided notice to Patrick's counsel two days prior to the ex parte appearance, however, neither Patrick nor his counsel attended the hearing. The court granted the application and set a hearing on the renewal request for December 17, 2012.³ Later that day, Andrea e-mailed Patrick's counsel with notice of the ruling scheduling the hearing. On December 17, 2012, the court renewed the restraining order until December 31, 2017. Patrick and his counsel did not appear. On January 23, 2013, Patrick appealed.

CONTENTIONS

Patrick contends that (1) the restraining order incorporated into the September 28, 2012 judgment is void because it relied on inconsistent dates as to the duration of the order, and was based on an order that had been superseded by the August 14, 2012 restraining order; and (2) the trial court erred in renewing the

³ Andrea requested shortened time on the grounds that the underlying restraining order was about to expire. We note that the Judicial Council has addressed this concern by providing in mandatory form DV-710 that the restraining order sought to be renewed remains in place until the hearing is held on the renewal request. Accordingly, that a restraining order is about to expire is not a valid reason for shortening time on a hearing for a renewal request.

restraining order on December 17, 2012 because Patrick had not been served with the mandatory Judicial Council forms applicable to that request.⁴

DISCUSSION

1. The September 28, 2012 Judgment

The appeal of the September 28, 2012 judgment is untimely. Patrick moved to set aside this judgment on October 11, 2012. The trial court denied the motion on November 26, 2012. He then appealed the denial of the motion on January 23, 2013.

Pursuant to California Rules of Court, Rule 8.108, service and filing of a motion to vacate a judgment within the normal appeal deadline extends the time for a party to appeal the judgment until the earliest of the following dates: (a) 30 days after the superior court clerk or a party serves an order denying the motion or notice of entry of

⁴ In addition, Patrick contends that the restraining order issued on August 8, 2011 should be set aside because he was not personally served with notice of that hearing. This issue is moot given that the trial court already set aside that restraining order. We also decline to address Patrick's contention that the court abused its discretion in awarding discovery sanctions after the restraining order was issued. An appealable postjudgment order must "affect" or "relate" to the judgment either "by enforcing it or staying its execution." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652.) Here, from the limited record on appeal, it appears that the discovery dispute addressed child support obligations, not the enforcement of the restraining order. Furthermore, Patrick has not provided a reporter's transcript of the proceeding, therefore, we must assume the court did not abuse its discretion. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 [it is the appellant's burden to provide an adequate record on appeal, and to the extent the record is inadequate, we make all reasonable inferences in favor of the judgment.])

that order; (b) 90 days after the motion was filed; or (c) 180 days after entry of judgment.⁵ (Cal. Rules of Court, Rule 8.108, subd. (c).)

Here, neither the clerk nor a party served notice of the order denying the motion, therefore, the first time limit did not apply. The earliest of the later two time limits expired on January 9, 2013 — 90 days after the motion was filed. As Patrick did not appeal this order until January 23, 2013, his appeal was untimely.⁶

2. *The December 17, 2012 Renewal of the Restraining Order*⁷

Patrick contends that he was denied due process because he was never served with the mandatory Judicial Council forms applicable to a request to renew a restraining order. Andrea does not dispute that she did not serve Patrick with these forms, but contends that Patrick was afforded due process because (1) his counsel was provided with telephonic notice of the ex parte hearing seeking to shorten time on the renewal hearing, and (2) his counsel was e-mailed notice of the trial court's ruling scheduling the hearing.

⁵ Rule 8.108 also only operates “to extend the time to appeal otherwise prescribed in rule 8.104(a); it does not shorten the time to appeal.” Here, the time to appeal the September 28, 2012 judgment under rule 8.104(a) expired on November 27, 2012 – 60 days after the clerk served notice of entry of judgment on Patrick. (Cal. Rules of Court, Rule 8.104, subd. (a).) Under these circumstances, applying rule 8.108 properly extended the time for Patrick to appeal.

⁶ However, Patrick may still, at any time, move to modify or terminate this restraining order. (Family Code, § 6345, subdivision (a).)

⁷ Even though we dismiss Patrick's challenge to the September 28, 2012 restraining order, we do not find that his other appeal is moot. The terms of the September 28, 2012 restraining order are different from those of the restraining order renewed on December 17, 2012.

We review the court’s issuance of a restraining order under the Domestic Violence Prevention Act (DVPA) (Family Code § 6200 et seq.)⁸ for abuse of discretion. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264.) “However, ‘[j]udicial discretion to grant or deny an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the “ ‘legal principles governing the subject of [the] action ’ ” ’ [Citations.]” (*Id.* at pp. 1264-1265.)

Pursuant to the DVPA, a trial court may issue a restraining order to prevent a recurrence of domestic violence and to provide for a separation of the persons involved. (§ 6220.) Under section 6345, the trial court may renew a restraining order “upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order” (§ 6345, subd. (a).) The renewal request may be brought any time within three months before expiration of the underlying restraining order. (§ 6345, subd. (a).)

The Judicial Council has adopted mandatory form DV-710 (Notice of Hearing to Renew Restraining Order) for use in a renewal hearing, and it provides that the protected party must ensure, prior to the hearing, that the restrained party is personally served with that form as well as form DV-700 (the Request to Renew Restraining Order), a blank copy of form DV-720 (Response to Request to Renew Restraining Order), and a copy of the current restraining order the moving party seeks to renew. After the restrained party has been served with these forms, the party seeking renewal of

⁸ All further statutory references are to the Family Code, unless otherwise stated.

the restraining order must file form DV-200 (Proof of Personal Service) with the court clerk. (See Judicial Council Form DV-710.)

Government Code section 68511 provides that “[t]he Judicial Council may prescribe by rule the form and content of forms used in the courts of this state. When any such form has been so prescribed by the Judicial Council, no court may use a different form which has as its aim the same function as that for which the Judicial Council’s prescribed form is designed.” Likewise, the California Rules of Court provide that mandatory judicial forms “*must* be used by all parties,” while optional forms “*may* be used by parties.” (Cal. Rules of Court, Rules 1.31(a), 1.35(a), italics added.) Judicial Council forms are adopted as rules of court for use in any proceeding under the Family Code. (Cal. Rules of Court, Rule 5.7(a).)

Here, instead of filing form DV-200 indicating that Patrick had been served with all of the mandatory forms specified above, Andrea filed form POS-050 (Proof of Electronic Service) with the trial court indicating only that she had served Patrick with the trial court’s ruling shortening time on the hearing. The trial court had no discretion to go beyond the mandatory forms—which constituted rules of court—and to grant a renewal of the restraining order based on a proof of service indicating that Patrick had only been given notice of the date and time of the hearing. (See, e.g., *County of Lake v. Palla* (2001) 94 Cal.App.4th 418, 427.)

Furthermore, we conclude that Patrick was prejudiced by Andrea’s failure to comply with the procedures established by the applicable mandatory forms because he was not afforded due process. “ ‘[D]ue process is flexible and calls for such procedural

protections as the particular situation demands.’ [Citation.]” (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) “ ‘The fundamental requisite of due process of law is the opportunity to be heard.’ [Citation.] And the ‘right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest’ (citation) . . . ” (*Greene v. Lindsey* (1982) 456 U.S. 444, 450.)

Restraining orders under the DVPA “are broader than civil harassment orders, and do not require as high a burden of proof.” (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055.) Under the DVPA, a respondent may be enjoined from harassing or contacting the protected parties and also excluded from “the family dwelling.” (§§ 6218, subd. (b), 6321, subd. (a), 6340, subd. (a).) Furthermore, a broad restraining order prohibiting the respondent from possessing firearms automatically takes effect when the a DVPA restraining order is issued. (§ 6389, subd. (a).) The violation of a domestic violence restraining order may expose the respondent to criminal penalties and compensatory “restitution” orders. (Penal Code, § 273.6; § 6342, subd. (a).)

We conclude that, under all the circumstances, Patrick was deprived of his due process right to notice and a reasonable opportunity to object to Andrea’s request for renewal of the restraining order. The restraining order Andrea sought to renew prevented Patrick from, *inter alia*, coming within 20 yards of his two younger children except as specified in the court’s visitation order, and within 20 yards of the ranch in which Patrick claimed an ownership interest. Under section 6345, the trial court could

renew that restraining order for a period of five years or permanently. (§ 6345, subd. (a).) Accordingly, the request to renew the restraining order presented the possibility of a significant incursion on Patrick’s liberty. Although Patrick may have been apprised of the hearing date through the notice e-mailed to his counsel, he was never served with a copy of the request for renewal explaining the basis for the renewal request. This did not give Patrick an adequate opportunity to prepare his objections to the request for renewal, therefore, his right to due process was violated. Accordingly, because we find an abuse of discretion and prejudice, we reverse the December 17, 2012 restraining order.⁹

⁹ Patrick also argues that the renewed restraining order “had no basis” because Andrea did not introduce any evidence showing an “objective ‘reasonable apprehension’ of future abuse.” We need not reach this argument as the appeal is resolved on other grounds. However, we note that, when a restrained party does not contest a request for renewal of a restraining order, a party protected by a restraining order is “entitled to a renewal of the protective order merely upon request In that instance, both the protected party and the court are entitled to assume the restrained party has a good reason for not objecting. . . .” (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1284.)

DISPOSITION

The appeal of the September 28, 2012 judgment is dismissed. The restraining order issued on December 17, 2012 is reversed. Each party shall bear its own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.