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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

L.D.,

Plaintiff and Appellant,

v.

V.A.,

Defendant and Respondent.

B270836

(Los Angeles County
Super. Ct. No. TF007845)

APPEAL from orders of the Superior Court of Los Angeles County, Stephen M. Lowry, Commissioner. Affirmed in part; dismissed in part.

L.D., in pro. per., for Plaintiff and Appellant.

V.A., in pro. per., for Defendant and Respondent.

I. INTRODUCTION

Appellant L.D. (Father) appeals from a domestic violence restraining order, a child custody order, a visitation order, and the court's failure to act on a peremptory challenge to a judicial officer. Respondent V.A. (Mother) sought a domestic violence restraining order against Father pursuant to the Domestic Violence Prevention Act (Fam. Code¹, § 6200 et seq.) (DVPA). Mother prevailed at trial and obtained a domestic violence restraining order against Father for one year. Father's biological children were placed in Mother's sole legal and physical custody. Father was also temporarily denied visitation rights. Following the trial and issuance of the order, Father filed a peremptory challenge to the bench officer, pursuant to Code of Civil Procedure section 170.6.

Father contends the trial court erred in granting the restraining order, child custody order, and visitation order. Father further appeals the trial court's failure to act on his peremptory challenge. We affirm the restraining order, and dismiss the appeal as to the child custody order, the visitation order, and the court's purported failure to act on the peremptory challenge.

II. BACKGROUND

On December 18, 2015, Father filed a petition to establish parent relationship. He requested that the court determine he

¹ Further statutory references are to the Family Code unless otherwise indicated.

was the father of A.A., a five-year-old girl, and E.D., a seven-year-old boy. He also requested joint custody and visitation three days a week.

On January 27, 2016, Mother filed a petition for a domestic violence restraining order against Father.² Mother stated the most recent abuse occurred on January 25, 2016: “[Father] keeps calling me and texting me because he found out I’m in a relationship with another man. He keeps calling me a ‘fucking whore[,]’ a ‘bad mother[,]’ a ‘bitch[,]’ [and] ‘he hates me so much.’ [H]e calls me just to insult me and to tell me he[]’s taking my kids away. He cannot control himself nor his anger.”

Mother also asserted that she had recently blocked Father from calling her telephone and that on January 23, 2015, Father kept calling her from different numbers. Father telephoned Mother “just to call [her] a slut and to tell [her] he is going to take [her] kids away.” Mother also expressed fear that he was following her and taking pictures of her.

Finally, Mother asserted that on an unspecified date, Father screamed at her in front of her mother and landlord, and called her “a crazy bitch” because she told him that she would seek child support. Mother accused Father of never returning

² On March 2, 2018, L.D. moved for judicial notice of several documents. We construe the motion as one for augmentation of the record and grant it as to Exhibits 1 (temporary restraining order filed January 27, 2016), 2 (form DV-101, description of abuse), 3 (request for domestic violence restraining order filed January 27, 2016), and 4 (notice of court hearing filed January 27, 2016). Exhibits 1, 2, 3, and 4 were filed with the trial court. The motion is otherwise denied.

their children to her after agreeing to do so. Mother stated Father always screamed at and insulted her in front of their children. Additionally, Mother stated Father was “very aggressive with [her] and wanted [her] to have sex with him because he was giving [her] money for their children.”

A hearing was conducted on February 18, 2016. The trial court asked Mother: “Are the statements that you made in the request for a restraining order concerning the activities involving yourself and [Father] on the 25th of January, and also on the 23rd of January, and also on a date that’s unspecified, are those statements basically true and correct?”³ Mother answered, “Yes.”

Father stated that the petition contained false allegations. The trial court read some of the allegations: “She says that on the 25th you found out that she was in a new relationship and that you started on that date continuously calling her and texting her, in which you call her some fairly filthy things” Mother provided the trial court with her cell phone containing text messages, and upon reviewing the messages, the court found that “at least one of the things she said was true, about you called her, and what you’re doing in terms of trying to check up on her constantly.”⁴

³ The record does not demonstrate either Father or Mother’s statements during the hearing were made under oath. However, as Father did not object, we find this issue waived. (*In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1299.)

⁴ Neither the cell phone nor the text messages are part of the record on appeal.

The trial court read another allegation from the petition: “Well, . . . she says that you . . . , as you have had on other dates, constantly yelled and screamed at her in front of the children. And that when she asked for some money for child support, your response was ‘if you give me some sex; I’ll give you some money’ it will be a quid pro quo. And that you got very, very, angry and aggressive, and abusive”

Father denied demanding sex for money but did not deny calling Mother names. According to Father, Mother “may have a claim for defamation against me for calling her those names” but “in regards to the domestic violence laws . . . Family Code 6200 . . . I’ve never battered [Mother] ever.”

Finally, the court asked Father whether he denied calling Mother from different phone numbers just to call her “a slut” and to say he would take away her children. Father responded, “my only concern is for my children because I don’t know where my children are all the time.” He stated that Mother’s cousin was a registered sex offender.

Although the trial court construed the matter as close, it nonetheless found that the restraining order should issue. The court ordered Father to stay 100 yards away from Mother and the two children, subject to any court-ordered visitation. It also ordered Father not to contact, harass, threaten, attack, stalk, or obtain the locations of Mother and the children, again subject to court-ordered visitation. The restraining order expired on February 18, 2017. The trial court also issued a child custody and visitation order. Mother was awarded sole legal and physical custody of A.A. and E.D. Father was denied visitation rights

until the next court hearing.⁵ At the end of the hearing, Father filed a peremptory challenge of the bench officer pursuant to Code of Civil Procedure section 170.6. Father also filed a notice of appeal.

III. DISCUSSION

A. *Appealability and Standard of Review*

A domestic violence restraining order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6). (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 332.) The restraining order here has expired. The appeal, however, is not moot. The finding of domestic violence triggered a rebuttable presumption that award of custody to Father is detrimental to the best interest of the children, and this presumption remains in effect for five years. (§ 3044, subd. (a); *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665-666.)

“A grant or denial of injunctive relief is generally reviewed for abuse of discretion. [Citation.] This standard applies to a grant or denial of a protective order under the DVPA. [Citation.]” (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420; accord, *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264.) We review the trial

⁵ The record indicates that the next hearing occurred on June 8, 2016. At this hearing, Father received visitation rights with A.A. and E.D. on alternate Saturdays from 8:00 a.m. to 5:00 p.m.

court's factual findings for substantial evidence. (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1505.)

B. *Father Fails to Show Violation of His Due Process Rights*

Father contends the court violated his due process rights by asking questions of the parties and failing to permit Father to cross-examine Mother. We disagree. Due process requires that a litigant be provided notice and an opportunity to be heard. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) There is no question that Father received notice of the hearing and was given ample opportunity to be heard. Moreover, a trial court may, consistent with due process, question witnesses during a hearing pursuant to the Family Code. (§ 217; Cal. Rules of Court, rule 5.113(g); see *People v. Carlucci* (1979) 23 Cal.3d 249, 256 [no *per se* denial of due process where a trial court calls and questions witnesses].) Finally, Father at no point during the hearing requested to examine Mother. Father therefore has waived any argument regarding his cross-examination rights on appeal. (*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 745.) Accordingly, we find no due process violation.

C. *Father Fails to Show Trial Court Erred by Finding He Committed Domestic Violence*

Father contends the trial court erred by granting Mother's petition for a domestic violence restraining order. We disagree and find substantial evidence supports the trial court's findings. "Domestic violence" is abuse perpetrated against, among others, a former cohabitant, or a person with whom the party has had a

child. (§ 6211.) It is undisputed that Father and Mother formerly lived together and have children together.

Pursuant to section 6203, “abuse” includes “engag[ing] in any behavior that has been or could be enjoined pursuant to [s]ection 6320.” Section 6320 does not limit abuse to the actual infliction of physical injury or assault. (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1496.) “To the contrary, section 6320 lists several types of nonviolent conduct that may constitute abuse within the meaning of the DVPA,” including two types of conduct relevant here. (*Ibid.*) First, section 6320 provides that “making annoying telephone calls as described in [s]ection 653m of the Penal Code,” may constitute abuse. (§ 6320, subd. (a).)⁶ Second, section 6320 provides that “disturbing the peace of the other party” may constitute abuse. (*Ibid.*; *In re Marriage of Nadkarni, supra*, 173 Cal.App.4th at pp. 1496-1498; *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146.)

“The trial court sits as trier of fact and it is called upon to determine that a witness is to be believed or not believed. This is the nature of fact finding.” (*In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1099.) Substantial evidence supports the trial court’s finding that Father abused Mother within the meaning of section 6320, by repeatedly telephoning her from different numbers in order to call her “a slut” and threaten to take away the children, and by shouting at and insulting her with profane language in front of her mother, landlord, and the

⁶ Penal Code section 653m, subdivision (a) makes it unlawful for any person, who, with intent to annoy or harass, makes repeated telephone calls or contact, to another person.

children. The trial court did not abuse its discretion by issuing the domestic violence restraining order.

D. *The Custody and Visitation Orders and Failure to Act on Peremptory Challenge Are Not Reviewable*

Father also seeks appellate review of the child custody and visitation orders issued concurrently with the February 18, 2016 restraining order. Here, both the child custody and visitation orders were deemed temporary by the trial court. The trial court indicated it may revisit those orders when the parents appeared again for a subsequent hearing to determine Father's paternity action. Specifically, the trial court stated: "It is the court's expectation that when the parties return . . . , that it is very possible that these orders will be changed. These orders are temporary orders. All orders concerning custody, visitation, and child support are temporary orders; that means they exist until they get changed, if they get changed." Indeed, the court later modified those orders. The child custody and visitation orders issued February 18, 2016 were temporary and are therefore not directly appealable. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1496, fn. 5; *Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1089-1090.)

Nor is the trial court's purported failure to act on Father's filing of a peremptory challenge reviewable on appeal. Father filed the peremptory challenge, after the bench officer issued the domestic violence protective order. The record does not indicate whether the court acted on the petition. In any event, "[t]he determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of

mandate” (Code Civ. Proc., § 170.3, subd. (d); *People v. Webb* (1993) 6 Cal.4th 494, 522-523.)

IV. DISPOSITION

The domestic violence restraining order is affirmed. The appeal from the child custody and visitation orders and the peremptory challenge is dismissed. Respondent V.A. is entitled to recover her appellate costs from appellant L.D.

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KIM, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.