

No. D061704

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

LISA KRISTIN FARMER
Plaintiff and Appellant,

v.

FRED S. TOTAH
Defendant and Respondent.

From the Superior Court for San Diego County
The Honorable Edlene C. McKenzie, Commissioner
Case No. DV034328

**APPLICATION FOR PERMISSION TO FILE *AMICUS
CURIAE* BRIEF; PROPOSED BRIEF *AMICUS CURIAE*
OF THE FAMILY VIOLENCE APPELLATE PROJECT
ET AL. IN SUPPORT OF APPELLANT LISA KRISTIN
FARMER**

FAMILY VIOLENCE
APPELLATE PROJECT
Erin C. Smith, SBN 234852
Nancy K.D. Lemon, SBN 95627
2850 Telegraph Ave., Suite 500
Berkeley, California 94705
Telephone: (510) 643-6728
Facsimile: (866) 920-3889

HANSON BRIDGETT LLP
Joseph M. Quinn, SBN 171898
Samantha D. Wolff, SBN 240280
425 Market Street, 26th Floor
San Francisco, California 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
swolff@hansonbridgett.com

Attorneys for Amicus Curiae
FAMILY VIOLENCE APPELLATE PROJECT

TABLE OF CONTENTS

	<u>Page</u>
APPLICATION TO FILE <i>AMICUS CURIAE</i> BRIEF	1
INTERESTS OF <i>AMICI</i>	1
POINTS TO BE ARGUED BY <i>AMICI</i>	9
PROPOSED BRIEF OF <i>AMICI CURIAE</i>	9
INTRODUCTION	9
ARGUMENT	11
I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A DOMESTIC VIOLENCE RESTRAINING ORDER WHEN IT IMPOSED ADDITIONAL REQUIREMENTS NOT CONTEMPLATED BY STATUTE.....	11
A. The DVPA Permits the Issuance of a Restraining Order Upon a Showing of a Past Act of Abuse, as Was Found by the Court Below	12
B. The DVPA Does Not Require That Ms. Farmer Also Show Recent Abuse or a Threat of Future Harm	13
C. The Trial Court Abused its Discretion by Imposing Additional Requirements Not Contemplated by the DVPA	15
II. THE TRIAL COURT'S DECISION TO DENY THE RESTRAINING ORDER BASED ON INSUFFICIENT RISK OF FUTURE ABUSE IGNORES THE CYCLICAL NATURE OF DOMESTIC VIOLENCE AND LEGISLATIVE INTENT TO SAFEGUARD DOMESTIC VIOLENCE VICTIMS	18

III. THE TRIAL COURT FAILED TO CONSIDER THE
IMPACT OF ITS DENIAL OF A RESTRAINING
ORDER ON THE MINOR CHILDREN.....20

CONCLUSION.....23

CERTIFICATE OF COMPLIANCE.....24

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>STATE CASES</u>	
<i>Babalola v. Superior Court</i> (2011) 192 Cal.App.4th 948, 963	18
<i>Gdowski v. Gdowski</i> (2009) 175 Cal.App.4th 128, 137	12, 14
<i>Gonzalez v. Munoz</i> (2007) 156 Cal.App.4th 413	15
<i>Nakamura v. Parker</i> (2007) 156 Cal.App.4th 327, 337	15, 17
<i>People v. Woods</i> (1993) 12 Cal.App.4th 1139, 1154	15
<i>Quintana v. Guijosa</i> (2003) 107 Cal.App.4th 1077	12
<i>Ritchie v. Konrad</i> (2004) 115 Cal.App.4th 1274, 1284	16
<i>Shamblin v. Brattain</i> (1988) 44 Cal.3d 474, 478-479	15
 <u>OUT OF STATE CASES</u>	
<i>Hill v. Inouye</i> (Haw. 1998) 976 P.2d 390	14
 <u>STATUTES</u>	
Hawaii Rev. Stat. § 586-3	14
 <u>STATE STATUTES</u>	
Fam. Code, § 6203	14
Fam. Code, § 6220	12
Fam. Code, § 6300	12, 14
Fam. Code, § 6320	12

OTHER AUTHORITIES

- Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women* (1992) 2 S. Cal. L.Rev. & Women's Stud. 219, 236..... 19
- Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome* (1993) 21 Hofstra L. Rev. 1191, 1208..... 19
- Hannah & Goldstein (2010) *Domestic Violence, Abuse, and Child Custody*, p. 13-10 19, 20
- Holt, et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?* (2003), 24(1) Am. J. of Preventive Med. 16, 18. 16
- Jaffe, et al., *Child Custody and Domestic Violence: A Call for Safety and Accountability* (2002), p. 29 22
- Keilitz, et al., *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1996/1997), State Ct. J. 17, 19..... 16
- Meisner & Korn, *Protecting Children of Domestic Violence Victims with Criminal No-Contact Orders* (April 2011), Strategies: The Prosecutors' Newsletter on Violence Against Women, Issue #4, p. 1 20, 21, 22
- Van Horn & Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions* (Winter 2006), Juvenile and Family Court Journal, p. 52 21
- Wisdom & Maxfield, *An Update on the "Cycle of Violence"* (Feb. 2001), National Institute of Justice Research in Brief, U.S. Department of Justice, p. 1. 21

Pursuant to Rule 8.200(c) of the California Rules of Court, the Family Violence Appellate Project *et al.* respectfully submit this application and proposed *amicus curiae* brief in support of Lisa Kristin Farmer, Appellant.

APPLICATION TO FILE *AMICUS CURIAE* BRIEF

The Family Violence Appellate Project and other *amici curiae* respectfully request permission to file an *amicus curiae* brief in support of Appellant Lisa Kristin Farmer on the issues of: (1) the correct legal standard for protective orders under the Domestic Violence Prevention Act, (2) the risk of recurring abuse in domestic violence relationships, particularly at the time of separation of the parties, and (3) the devastating effect of domestic abuse on children. *Amici* are uniquely situated to provide assistance to this Court given the nature of their organizations and the work that they do. As more fully outlined below, *amici* represent the interests of domestic violence survivors in California. *Amici* offer a perspective on the issues presented in this case that has not been fully or adequately briefed by the parties, and which will assist this Court.

INTERESTS OF *AMICI*

Amici are California-based local and state nonprofit organizations. *Amici* collectively work with thousands of domestic violence survivors each year, including survivors who receive temporary restraining orders from trial courts and then seek longer-term protection orders, as well as many survivors who have children. *Amici* are committed to ensuring that domestic violence survivors receive justice in the civil courts in this state. *Amici* have first-hand knowledge of the legal standards applied in Domestic Violence Prevention Act cases, the dynamics of domestic violence, and the dangers to children of being exposed to domestic violence.

Family Violence Appellate Project ("FVAP") is a nonprofit organization founded by members of the University of California, Berkeley School of Law community to ensure, through the appellate legal system, the safety and well-being of domestic violence survivors and their children. While the California Legislature has enacted numerous laws dedicated to preventing domestic violence, too often trial courts err in their application due to an absence of guiding appellate law. The goal of FVAP is to aid in creating a body of precedent that will help protect families across California. To that end, FVAP provides direct appellate representation for survivors of domestic violence in collaboration with pro bono lawyers and offers training to domestic violence attorneys and advocates on issues pertinent to domestic violence appeals. In addition, FVAP monitors California litigation and identifies those cases that have the potential to impact the interests of domestic violence victims and their children statewide. This is one of those cases.

Asian Pacific Islander Legal Outreach ("API Legal Outreach") is a non-profit, community-based, social justice organization founded in 1975. Its mission is to promote holistic, culturally appropriate and linguistically appropriate services for the most marginalized segments of society, particularly in the API community. One of API Legal Outreach's primary project areas is its work with survivors of domestic violence. In addition, its work focuses on violence against women, immigrants and immigrant rights, senior law and elder abuse, persons with disabilities, human trafficking, public benefits and social justice issues. For over 30 years, API Legal Outreach has been providing direct legal representation to survivors of domestic violence. In partnership with sister agencies, it provides comprehensive legal services and complementary social services. Through advocacy it seeks to empower survivors and their children to achieve safety and security in a life free of domestic violence. In its work, API Legal

Outreach sees the tremendous struggles and barriers that survivors encounter in their effort to access and receive effective legal remedies. Survivors need timely, effective and comprehensive legal remedies that reflect an understanding of the dynamics of domestic violence and the ongoing harm it creates in the lives of survivors and their children.

Bay Area Legal Aid is the largest provider of free legal services to low income residents of the San Francisco Bay Area. Domestic violence prevention is one of its principal priorities throughout the seven counties it serves. Bay Area Legal Aid's services are designed to stop the abuse and enable survivors to build safe, stable lives for themselves and their children. Its project offers free legal assistance in obtaining restraining orders, divorces, support orders, safe custody and visitation orders. Over the past forty years, Bay Area Legal Aid and its predecessor organizations have represented tens of thousands of domestic violence survivors. Bay Area Legal Aid also operates or helps supervise restraining order clinics in San Mateo, Contra Costa and San Francisco counties. In 2011 alone, Bay Area Legal Aid helped 7,959 victims of domestic violence and their children to escape the abuse and gain independence, relying on the stay-away injunctions and ancillary orders Bay Area Legal Aid helped obtain.

Interpolating a requirement of "recent" abuse for issuance of a domestic violence restraining order would have a detrimental impact on hundreds of Bay Area Legal Aid's clients and their children every year.

California Partnership to End Domestic Violence ("the Partnership") is the federally-recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the United States and U.S. territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination, and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide

leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. The Partnership believes that by sharing expertise, advocates and legislators can end domestic violence. The Partnership's mission and work are focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. A victim's risk of abuse does not end upon leaving the relationship; rather, women are at an increased risk of harm after separating from an abuser. An important tool for keeping victims safe and preventing future harm is a domestic violence protection order. The judicial system has an essential role to play, and must recognize the need for protection orders to maintain safety.

Community Overcoming Relationship Abuse ("CORA") is a nonprofit organization directed at ending domestic violence in San Mateo County. CORA provides free and confidential services to victims and survivors of domestic/dating violence and abuse. Its services include a 24-hour hotline, support groups, legal services, emergency and transitional housing, and more, in English and Spanish. CORA is a multicultural agency committed to serving victims and survivors of domestic violence and abuse regardless of age, ethnicity, race, financial status, language, sexual orientation, immigration status, class, religion, gender, or mental or physical ability.

Family Violence Law Center ("FVLC") has been working to end domestic violence in Alameda County since 1978, when a small group of abuse survivors founded the agency. FVLC operates an integrated service model that includes both protection initiatives for people currently experiencing abuse and prevention initiatives to eliminate future abuse. FVLC provides life-saving services to more than 2,500 survivors and their children annually, helping them achieve safety and independence and supporting them as they heal. FVLC is the only domestic violence agency

in the county that staffs attorneys who provide free legal assistance solely to domestic violence victims. Since its creation in 1978, FVLC's primary purpose has been to provide access to comprehensive legal services that will help domestic violence survivors achieve long-term safety and self-sufficiency. The issues raised in this case will have a tremendous impact on the ability of domestic violence survivors – in Alameda County and across California – to obtain relief under the Domestic Violence Prevention Act and to obtain safe custody orders for their children. Therefore, FVLC has a compelling interest in this case.

Legal Advocates for Children and Youth ("LACY"), a program of the *Law Foundation of Silicon Valley*, advances the legal rights of children and youth by providing legal representation and social work support to children in juvenile dependency, guardianship, education, and family law matters. LACY is unique among child law offices in its sustained focus on reducing dating and domestic violence among teens through education and outreach as well as direct representation of teens in restraining order and child custody matters. LACY also has significant experience and expertise in the areas of child abuse and the effects of domestic violence on children through its work representing children and youth involved in the child welfare system and probate guardianships in Santa Clara County.

Legal Aid of Napa Valley was incorporated in 1967 to provide free legal services to low-income Napa County residents with a variety of legal issues. Legal Aid of Napa Valley is the only legal services provider advising and representing domestic violence survivors and victims in Napa County. Legal Aid of Napa Valley supports the amicus curiae brief. As the only legal services provider in Napa County, the issues in this case will have a tremendous impact on the ability of domestic violence survivors to obtain relief under the Domestic Violence Prevention Act and to obtain safe custody orders for their children.

Legal Aid of Sonoma County ("LASC") was founded in 1958 and incorporated in 1983. The mission of LASC is to help at-risk children and families obtain safety and shelter. One-third of LASC's clients are Spanish-speaking. LASC provides full scope legal services to low-income Sonoma County residents. Services include legal advice, preparation of pleadings and court representation. LASC operates three core programs: SAFE, a domestic violence program, CAP, a Child Abuse Prevention Program, and HOME, a housing program. LASC's SAFE program is the only program in Sonoma County that provides vital domestic violence legal services, including assistance with protective orders and related custody orders. Before SAFE was founded, only a handful of shelter based victims per year had access to a lawyer. SAFE assists over 700 adult victims of domestic violence and 1,200 children annually. The issues at stake in this case are of tremendous importance to the domestic violence clients Legal Aid assists and will greatly impact their ability to obtain safety and ensure the safety of their children under the Domestic Violence Prevention Act. Therefore, LASC has a compelling interest in this case.

Los Angeles Center for Law and Justice's ("LACLJ") mission is to provide legal representation and education to low income families facing the greatest barriers to justice. LACLJ's Family Law Unit has a team of attorneys who focus on supporting victims of domestic violence with divorce, custody and visitation, child and spousal support, establishment of paternity, and restraining orders. Within family law, LACLJ has two specialized programs. Teen/LA assists teens and young parents ages 13-24 with legal issues such as restraining orders, guardianship, emancipation and government benefits. LACLJ is the only organization in Los Angeles providing teen-centered direct legal representation. The program ADVOCATE leverages corporate partnerships in order to match low-income victims of domestic violence with pro bono attorneys for

representation at restraining order hearings. LACLJ prioritizes serving clients who would not be otherwise served because of the complexity of their family law case. LACLJ is committed to ensuring that domestic violence victims have meaningful access to justice in order to increase family stability, decrease homelessness, and promote safe, violence-free homes.

Pro Bono Project Silicon Valley ("Pro Bono Project") has been providing high quality legal services through volunteers to low income residents of Santa Clara County since 1986. The main vision of its creation was to make available opportunities for Santa Clara County attorneys to provide pro bono services to those with the greatest need and to fill the existing gaps in legal services. Since its inception, the Pro Bono Project has taken referrals of cases and clients from other legal providers who cannot provide such services. The Pro Bono Project is often the only legal resource available to those it serves and is the largest provider of family law services in Santa Clara County.

The Pro Bono Project supports and signs this *amicus curiae* brief. As one of a limited number of legal service providers in Santa Clara County, the Pro Bono Project sees self-represented litigants in similar situations. Many times these litigants come to the Pro Bono Project when it is too late to assist them to rectify an error of the court. Having increased clarity regarding issuance or denial of orders of protection is very important for the safety of family members and for the consistent administration of justice in domestic violence matters.

San Diego Volunteer Lawyer Program, Inc., ("SDVLP") was established in 1983 as a private, not for profit, charitable law firm that provides pro bono legal assistance to indigent residents of San Diego County. One of SDVLP's priority areas of service is legal assistance to victims of domestic violence. Since 1989, SDVLP has operated legal

clinics in three of the four San Diego County courthouses, where victims of domestic violence are assisted in obtaining domestic violence restraining orders. SDVLP provides legal representation at domestic violence restraining order hearings, as well as representation in family law matters to victims of domestic violence. Over the years, SDVLP has seen an increasing need for guidance from the State's higher courts in the area of domestic violence. Oftentimes, Family Court judges and practitioners are left without clear precedent, which leads to unpredictable, unequal and varied outcomes in the 23 different Family courtrooms in San Diego County. SDVLP joins in support of the instant brief as this issue is of vital importance to the safety and wellbeing of domestic violence victims statewide.

///

///

///

///

///

///

///

///

///

///

///

///

///

POINTS TO BE ARGUED BY *AMICI*

1. The trial court abused its discretion under the Domestic Violence Prevention Act by denying a restraining order based on an absence of evidence indicating recent abuse and threat of future harm, and in doing so, adhered to Code of Civil Procedure requirements instead of the applicable Family Code provisions.
2. The trial court failed to recognize the cyclical nature of domestic violence, and thus the risk of recurrent and escalating abuse, placing Ms. Farmer at risk of future violence and ignoring this Court's decisions requiring liberal interpretation of the DVPA in favor of Ms. Farmer and others seeking protection.
3. The trial court failed to consider the impact of the denial of a restraining order on Ms. Farmer's minor children, placing the children in danger.

PROPOSED BRIEF OF *AMICI CURIAE*

INTRODUCTION

The California Legislature enacted the Domestic Violence Prevention Act ("DVPA") with the express purpose of preventing the recurrence of violence and protecting the safety of domestic violence victims. To that end, the Family Code sets forth protections for victims seeking a domestic violence restraining order. Here, after Ms. Farmer met her burden of proof under the Family Code – as confirmed by the trial court at a hearing on the matter – the court went on to deny her request for a long-term restraining order because Fred Totah, the abuser, did not violate the temporary restraining order. The trial court further reasoned that because the parties were in the process of separating, it appeared to the court that there was a lessened risk of future violence.

The Family Code entertains no requirement that the victim demonstrate either recent abuse or a specific threat of future harm

particularly where, as here, Ms. Farmer proved two incidents of sexual assault. It appears the trial court improperly based its decision on Code of Civil Procedure requirements, which do require civil harassment restraining order applicants to demonstrate a threat of future harm, rather than Family Code provisions relating to the issuance of domestic violence restraining orders. The trial court's imposition of recent abuse/specific future threats requirements sets a dangerous precedent and is contrary to the language and purpose of the DVPA.

The trial court's reasoning in denying the restraining order also indicates a misapprehension of the nature of domestic violence and the legislative intent of the DVPA. The court failed to recognize that the greatest risk of assault or death by an abuser occurs during or immediately following separation. Further, domestic violence is very often cyclical, meaning that physical and emotional abuse is episodic and continual. Separation does not stop the abuse, and instead, frequently causes violence to escalate. It is because of the dangerous nature of domestic violence that the California Legislature and judiciary have encouraged liberal application of the DVPA's provisions in favor of protection. The trial court's failure to understand the basic dynamics of domestic violence and act in a manner consistent with the policy favoring protection placed Ms. Farmer at serious risk of future abuse.

Lastly, in denying the restraining order, the trial court failed to consider the impact of domestic violence on the parties' minor children. Domestic violence has a significant and detrimental impact on children who are subjected to abuse and on those who witness abuse. Evidence presented to the trial court demonstrated that the parties' children witnessed several incidences of violence inflicted by Mr. Totah upon Ms. Farmer, and that the children were exhibiting symptoms consistent with their exposure to violence. The court's failure to consider the detrimental impact of the

violence on the children created an unacceptable risk of serious danger to the children.

For these reasons, *amici curiae* Family Violence Appellate Project *et al.* respectfully request that this Court reverse the decision below denying Ms. Farmer's application for a restraining order, and direct the court to enter a new order granting the restraining order as requested.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A DOMESTIC VIOLENCE RESTRAINING ORDER WHEN IT IMPOSED ADDITIONAL REQUIREMENTS NOT CONTEMPLATED BY STATUTE

Contrary to the DVPA and its intent, after finding that Ms. Farmer had met her burden of proof in proving at least two incidents of sexual abuse within the preceding four months, the trial court denied Ms. Farmer's request for a domestic violence restraining order against her estranged husband, Mr. Totah. (RT 2/21/12 at 3:27-4:1.) The court reasoned that a restraining order was unnecessary because Mr. Totah did not violate the temporary restraining order, which had been in effect for only three months, and because the threat of future harm did not appear to be sufficiently specific. (*Id.* at 4:16-18, 21-27.) In so holding, the trial court confounded Code of Civil Procedure requirements pertaining to civil harassment restraining orders (which do require a specific showing of threat of future harm) with the DVPA (which has no such requirement where past incidents of abuse occurred). The court's imposition of the requirements that Ms. Farmer demonstrate recent abuse and a specific threat of future harm – in addition to showing past incidents of abuse – to receive a restraining order is contrary to the DVPA and, therefore, constitutes an abuse of discretion.

///

///

A. The DVPA Permits the Issuance of a Restraining Order Upon a Showing of a Past Act of Abuse, as Was Found by the Court Below

The DVPA was enacted with the express purpose of preventing recurrent acts of violence and sexual abuse. (Fam. Code, § 6220.) To that end, the DVPA provides for the issuance of a restraining order to enjoin contact, harassment, threats, and violence. (Fam. Code, § 6320.) Such an order may issue "if an affidavit . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (Fam. Code, § 6300, emphasis added.) Proof of a past act of abuse alone is sufficient for purposes of issuance of a domestic violence restraining order. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137 [Fourth District Court of Appeal]; *Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077; see also Fam. Code, § 6300.)

In support of her request for a restraining order, Ms. Farmer submitted an affidavit describing in great detail several incidences of abusive behavior by Mr. Totah. (AA, Tab #5.) At the hearing on Ms. Farmer's request for a domestic violence restraining order, after four days of testimony and argument, the trial court found that Mr. Totah had committed two acts of sexual assault within the meaning of Family Code section 6203. (RT 2/21/12 at 3:25-27.) The court held, "[s]o on those two [acts] alone, the court sustains and finds Ms. Farmer has met her burden of proof by a preponderance of the evidence." (RT 2/21/12 at 3:27-4:1.) On that basis alone, the DVPA permits the issuance of a restraining order, and indeed, the trial court should have issued such an order protecting the Appellant from further abuse.

///

///

///

B. The DVPA Does Not Require That Ms. Farmer Also Show Recent Abuse or a Threat of Future Harm

After making explicit findings of prior sexual assaults, however, the trial court went on to impose additional requirements not contemplated by the DVPA. The court stated:

The next part of this is a little more difficult because the court has to, under Family Code 6220, look at the purpose of the Domestic Violence Prevention Act. And the purpose of this Division is to prevent the recurrence of acts of violence and sexual abuse and provide for a separation of the persons involved in the domestic violence for a period such to enable these persons to seek a resolution of the causes of their violence.

In this particular case, the last alleged instance occurred in November. . . . But I think that *sufficient time has elapsed* that the parties are no longer living together, their business ties are finished, and it appears they have negotiated some sort of settlement, *although I don't know about that*. . . . I don't know that this court really needs to continue the restraining order in this case. *I find that it has met its purpose, but the court is specifically making a finding of domestic violence.*

(RT 2/21/12 at 4:2-11; 4:21-5:1, emphases added.) Thus, despite making a finding of domestic violence and acknowledging that the court was unsure of the status of the parties' settlement (and thus, need for future interactions), the court denied the restraining order because Mr. Totah had not abused Ms. Farmer recently and Ms. Farmer did not make an additional showing of a specific future threat of violence. The trial court's order is contrary to the DVPA.

Family Code section 6300 provides that a restraining order may issue upon a showing of "a past act or acts of abuse," and does not require these past acts of abuse to have occurred recently. *Amici* are aware of no published California authority on this point, but in an analogous proceeding

in Hawaii, the Hawaii Supreme Court reversed a trial court's denial of a restraining order where that court improperly required the plaintiff to show recent abuse. (*Hill v. Inouye* (Haw. 1998) 976 P.2d 390.) The *Hill* Court noted that the Hawaii statute in question provides that an order for protection may issue where a petition alleges "a past act or acts of abuse," and does not require a showing of recent acts. (*Id.* at p. 397.) The DVPA includes language identical to that of the Hawaii Revised Statutes; notably, neither statute contains language requiring recent abusive acts. (See Cal. Fam. Code, § 6300; Hawaii Rev. Stat. § 586-3.)

The DVPA also does not mandate restraining order applicants to demonstrate a specific threat of future harm. The Family Code defines "abuse" in a number of ways, including behavior consisting of sexual assault, intentionally or recklessly inflicted bodily injury, *or* reasonable apprehension of imminent serious bodily injury. (Fam. Code, §§ 6203 & 6320.) The Family Code does not require restraining order applicants to demonstrate multiple forms of abuse or reasonable apprehension of imminent serious bodily injury, which is only one form of behavior recognized as "abuse." Indeed, as this Court has stated, "Family Code section 6300 . . . require[s] a showing of past abuse, not a threat of future harm." (*Gdowski, supra*, 175 Cal.App.4th, at p. 137.)

It appears the trial court incorrectly relied on Code of Civil Procedure standards in requiring Ms. Farmer to demonstrate a specific threat of future harm. That is appropriate in cases of civil harassment, where all civil harassment restraining order applicants must demonstrate the threat of future harm, but not in cases of domestic violence. This Court has acknowledged the distinction, noting that "[t]he DVPA . . . therefore permit[s] issuance of protective orders on a different, broader basis than permitted under [the] Code of Civil Procedure." (*Gdowski, supra*, at pp.

136-137.) It is with this "broad" framework in mind that trial courts must consider domestic violence restraining order petitions.

By requiring Ms. Farmer to prove recent abuse and a threat of future harm, in addition to establishing prior incidents of sexual assault, the trial court exceeded the bounds of the framework established by the DVPA and read additional requirements into the Act. As explained next, this constituted an abuse of discretion and reversible error.

C. The Trial Court Abused its Discretion by Imposing Additional Requirements Not Contemplated by the DVPA

Trial court judges do not have unfettered discretion to grant or deny a petition for a domestic violence restraining order. (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 337.) Rather, a trial court abuses its discretion where its decision "exceeds the bounds of reason." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420 [quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479].) If, however, at least two reasonable inferences can be drawn from the facts, then the appellate court should not substitute its judgment. (*Shamblin, supra*, at pp. 478-79; *People v. Woods* (1993) 12 Cal.App.4th 1139, 1154.)

Here, after finding that Mr. Totah sexually assaulted Ms. Farmer on two occasions, the trial court denied the restraining order because Ms. Farmer had not fulfilled two conditions that are *not* set forth in the DVPA. The court indicated it would reconsider its denial if violence occurs in the future:

[I]f there are any other instances which occur that would suggest that [] Mr. Totah is not complying with court orders regarding child custody and visitation, the court would look very seriously at whether or not it should entertain, if there is another request for [a] domestic violence restraining order, but in this particular case the purpose has been met.

(RT 2/21/12 at p. 5:2-8.) The trial court's imposition of additional requirements and suggestion that only noncompliance with a court order could trigger imposition of a restraining order contradicts the DVPA and constitutes an abuse of discretion.

Compliance with temporary court orders is not a basis for denying a long-term protective order under the DVPA. Any such requirement would be dangerous and illogical because court orders are issued precisely because the court wants them to be followed. This Court has held as much, stating, "[i]t would be anomalous to require the protected party to prove further abuse occurred in order to justify renewal of that original order . . . the fact [that] a protective order has proved effective *is a good reason for seeking its renewal.*" (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1274, 1284, emphasis added.) Here, the fact that the temporary order succeeded in halting the abuse weighs *in favor* of issuing a longer-term protective order, not against it.

Further, research has shown that court orders are extremely effective tools in halting abuse. In one study, nearly sixty-five percent of persons who obtained a restraining order reported no further abuse six months after getting their final order of protection. (Keilitz, et al., *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1996/1997), State Ct. J. 17, 19.) Women who obtain and maintain protective orders have been found to be "significantly less likely" than women without protective orders to be contacted, threatened, or abused by the perpetrator, and these decreases in risk become more pronounced over time. (Holt, et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?* (2003), 24(1) Am. J. of Preventive Med. 16, 18.) The same holds true for women with long-term protective orders compared to women with temporary orders. Indeed, sixty-five percent of women with permanent protective orders experience a "substantial and

significant decrease in risk of most abuse outcomes; these decreases were larger than those . . . observed for all women with [temporary protective orders]." (*Id.* at 19.) The fact that a temporary order worked, therefore, is not and should not be grounds for removing court-ordered protection for survivors of domestic violence.

Further, the trial court's decision contradicts this Court's jurisprudence that encourages liberal application of the DVPA's protections. (See *Nakamura, supra*, 156 Cal.App.4th at 334 [the DVPA confers "a discretion designed to be exercised liberally, at least more liberally than a trial court's discretion to restrain civil harassment generally"].) Rather than err on the side of protection, the trial court denied the restraining order in large part because Ms. Farmer did not make the showing anticipated by the Code of Civil Procedure. The DVPA, however, is different, and does not require a specific threat of future harm. *Nakamura* acknowledged the distinction and encouraged trial courts to adopt a less-strenuous approach to the imposition of restraining orders under the DVPA than the Code of Civil Procedure. (*Ibid.*)

Finally, the basis for the court's determination that there was no need for future protection in this case was unsupported by substantial evidence. In discussing the likelihood of future harm during the hearing on the matter, the trial court acknowledged its ignorance of the likelihood of the parties' future interactions. The court was unsure of the status of parties' settlement negotiations and dissolution proceedings. (See RT 2.27.12 at 4:2-11: "[I]t appears [the parties] have negotiated some sort of settlement agreement, *although I don't know about that . . .*" [emphasis added].) The court also failed to consider that the parties are the parents of two young children and will certainly interact many times in the future regarding their upbringing. The parties' almost certain likelihood of future interaction poses a

significant risk of future violence and should have been considered by the trial court.

In light of the above, it was untenable for the court to deny Ms. Farmer the protections of a restraining order where she had proven two prior incidents of sexual assault and met her burden under the DVPA. The court's imposition of additional requirements and reliance on uncertain assumptions is unsupported by the law, contradicts the stated purpose of the DVPA to prevent recurrent acts of violence, and constitutes an abuse of discretion. No other reasonable inference can be drawn, and the trial court's decision should be reversed.

II. THE TRIAL COURT'S DECISION TO DENY THE RESTRAINING ORDER BASED ON INSUFFICIENT RISK OF FUTURE ABUSE IGNORES THE CYCLICAL NATURE OF DOMESTIC VIOLENCE AND LEGISLATIVE INTENT TO SAFEGUARD DOMESTIC VIOLENCE VICTIMS

The Legislature has consistently expressed its intent that courts must use all tools at their disposal to safeguard against domestic violence. (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 963.) One reason the Legislature encourages courts' liberal construction of the DVPA in favor of protection from abuse is the perniciousness of domestic violence. Here, the court's suggestion that Ms. Farmer was not in need of protection because continued violence was unlikely given the parties' separation ignores the reality of domestic violence and the legislative intent.

Domestic violence is often a recurring pattern of behavior. Known as the "cycle of violence," abusive relationships often follow a similar pattern consisting of "a tension building phase, followed by acute battering of the victim, and finally by a contrite phase where the batterer's use of promises and gifts increases the battered woman's hope that violence has occurred for the last time." (*Hernandez v. Ashcroft* (9th Cir. 2004) 345 F.3d 824, 836 [quoting Dutton, *Understanding Women's Responses to*

Domestic Violence: A Redefinition of Battered Woman Syndrome (1993) 21 Hofstra L. Rev. 1191, 1208 (hereafter *Understanding Responses*)). The "cycle of violence" is a widely acknowledged model that is extensively used in the field of domestic violence because of its accuracy. (See *ibid.*)

Abuse typically "pervades the entire relationship" and "does not occur as a series of discrete events." (*Id.* at pp. 836-837, internal citations omitted.) While physical abuse may occur infrequently, when combined with psychological abuse, the entire cycle of physical and psychological abuse "can be viewed as a single and continuing entity." (*Id.* at p. 837, internal citations omitted.) This cycle of physical and psychological abuse repeats, with the level of abuse increasing over time. (See *ibid.*, citing Ganley, *Understanding Domestic Violence* (1996) Improving the Health Care Response to Domestic Violence, p. 18 [domestic violence is a pattern of behavior; "the perpetrator will escalate [his behavior] and use whichever tactic, including force, is necessary to get what he wants"].)

Further – and crucially in this case – the risk of violence significantly increases when a victim separates from the abuser. In fact, "research [] shows that women are often at the highest risk of severe abuse or death when they attempt to leave their abusers." (*Hernandez, supra*, 345 F.3d at p. 837 [citing *Understanding Responses, supra*, 21 Hofstra L. Rev. at p. 1212].) Women are far more likely to be killed by their husbands when they are separated than when they are living together. (Hannah & Goldstein (2010) *Domestic Violence, Abuse, and Child Custody*, p. 13-10, internal citation omitted (hereafter *Domestic Violence*).) And one study has shown that 80% of victims were divorced or in the process of divorcing their abusers when they were battered. (Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women* (1992) 2 S. Cal. L.Rev. & Women's Stud. 219, 236.)

Unfortunately, the court below adhered to a common misconception that domestic violence will end when a couple divorces or separates. (*Domestic Violence, supra*, at p. 13-10.) Indeed, the court specifically stated that it appeared a restraining order was unnecessary because "the parties are no longer living together, their business ties are finished, and it appears they have negotiated some sort of settlement." (RT 2/21/12 at 4:2-11.) However, as indicated above, this is exactly when a protective order is most needed and when the victim is at the greatest risk of assault. The trial court's failure to understand the nature of domestic violence relationships was implicit in its ruling and consequently, exposed Ms. Farmer to an even greater risk of violence. Its finding that a restraining order was unnecessary because of the parties' separation was not supported by substantial evidence and should be reversed.

III. THE TRIAL COURT FAILED TO CONSIDER THE IMPACT OF ITS DENIAL OF A RESTRAINING ORDER ON THE MINOR CHILDREN

Another reason the DVPA is construed in favor of protection from abuse is the dire consequences of abuse on the next generation. Like their abused parent, children often face an increased risk of danger following their parents' separation. (*Domestic Violence, supra*, at p. 13-11.) Batterers often feel as though they are losing control over their victims, and therefore look for other means of maintaining control, including by abusing and manipulating their children. (*Ibid.*) Children who live in homes where domestic violence occurs are aware of the violence 80 to 90% of the time. (Meisner & Korn, *Protecting Children of Domestic Violence Victims with Criminal No-Contact Orders* (April 2011), Strategies: The Prosecutors' Newsletter on Violence Against Women, Issue #4, p. 1 (hereafter *Protecting Children*)). Children may be abused when they intervene to protect a parent from abuse, or when their proximity to the abuse results in

their injury. (*Id.* at pp. 2-3.) Injuries often occur when the victim is holding the child. (*Id.* at p. 3.)

The effects of domestic violence on children are staggering. Domestic violence can interrupt a child's brain development, cause emotional and behavioral problems, and can even cause increased risk of health problems such as insomnia, headaches, stomachaches, diarrhea, asthma, and peptic ulcers. (*Protecting Children, supra*, at p. 4; see also Van Horn & Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions* (Winter 2006), *Juvenile and Family Court Journal*, p. 52 ["[C]hildren exposed to high levels of domestic violence had IQs that were eight points lower than those of non-exposed children."] (hereafter *Children Exposed to Violence*.) Children who are exposed to domestic violence are more likely to resort to violence when confronted with a problem and have difficulty forming peer relationships. (*Protecting Children, supra*, at p. 4.) The U.S. Department of Justice has found that the abuse and neglect of children increases their odds of future delinquency and adult criminality by twenty-nine percent. (Wisdom & Maxfield, *An Update on the "Cycle of Violence"* (Feb. 2001), National Institute of Justice Research in Brief, U.S. Department of Justice, p. 1.) Child victims of domestic abuse, not surprisingly, display higher rates of post-traumatic stress disorder symptoms and can experience nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development. (*Protecting Children, supra*, at p. 4; see also *Children Exposed to Violence, supra*, at p. 52.) Importantly, these effects are visible not only in children who are directly abused, but also in children who observe abuse between their parents. (*Protecting Children, supra*, at p. 1.) Further, children under age five who witness violence between their parents are disproportionately impacted. (*Children Exposed to Violence, supra*, at p. 53.)

Here, evidence presented to the trial court indicated that the parties' children, ages six and four, suffered as a result of their father's abuse of their mother. (AA, Tab 2, p. 0062.) The children, who witnessed several incidences of domestic violence between their parents, suffered from nightmares, headaches, and stomachaches. (RT 12/15/11, at 32:7-14.) The six-year-old began wetting the bed and the four-year-old began wetting himself. (*Ibid.*) Tellingly, the six-year-old wrote several notes to her father, asking him not to "yell so much." (RT 1/20/12, at 221:11-25.)

Despite significant evidence of the detrimental impact Mr. Totah's abuse of Ms. Farmer was having on their children, the court failed to consider the children when denying the restraining order. That the court had previously issued orders relating to child custody and visitation is irrelevant; here, the children, much like Ms. Farmer, need protection from exposure to violence. Orders relating to custody and visitation do not prevent the children from witnessing their father inflict further violence on their mother where no restraining order is in effect.

Moreover, and as noted above, violence does not end at separation. Rather, "physical abuse, stalking, and harassment continue at significant rates post-separation." (Jaffe, et al., *Child Custody and Domestic Violence: A Call for Safety and Accountability* (2002), p. 29 (hereafter *Child Custody*)). This escalation of violence is true not only for the parent-spouse, but for the children as well. (*Protecting Children, supra*, at p. 5.) Where children are involved, "[v]isitation can be used by batterers as an opportunity to further abuse their former spouse." (*Child Custody, supra*, at p. 29.) The trial court's failure to appreciate the realities of domestic violence left not only Ms. Farmer vulnerable to future abuse, but the children as well. *Amici* request that this Court reverse the decision, as it imposes unacceptable risks of harm on the parties' children.

///

CONCLUSION

Consistent with the purpose of the Domestic Violence Prevention Act to prevent the recurrence of abuse and to ensure the protection of domestic violence survivors and their children, *amici curiae* the Family Violence Appellate Project *et al.* respectfully request that this Court reverse the trial court's order denying Ms. Farmer's application for a restraining order and direct the court to enter a new order granting the restraining order as requested.

DATED: October 16, 2012

Respectfully submitted,

FAMILY VIOLENCE APPELLATE
PROJECT

By: *Erin Smith by Samantha Wolff*
ERIN C. SMITH
NANCY K.D. LEMON

DATED: October 16, 2012

HANSON BRIDGETT LLP

By: *Samantha Wolff*
JOSEPH M. QUINN
SAMANTHA D. WOLFF

Attorneys for *Amicus Curiae*
FAMILY VIOLENCE APPELLATE
PROJECT

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies pursuant to Rule 8.204(c)(1) of the California Rules of Court that the enclosed brief is produced using 13-point Roman type and contains 4,329 words. Counsel used Microsoft Word in preparing the brief, and relies on that program's computer word count.

DATED: October 16, 2012

HANSON BRIDGETT LLP

By: 

JOSEPH M. QUINN
SAMANTHA D. WOLFF
Attorneys for *Amicus Curiae*
FAMILY VIOLENCE APPELLATE
PROJECT

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, 26th Floor, San Francisco, CA 94105.

On October 15, 2012, I served true copies of the following document(s) described as **APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF; PROPOSED BRIEF *AMICUS CURIAE* OF THE FAMILY VIOLENCE APPELLATE PROJECT *ET AL.* IN SUPPORT OF APPELLANT LISA KRISTIN FARMER** on the interested parties in this action as follows:

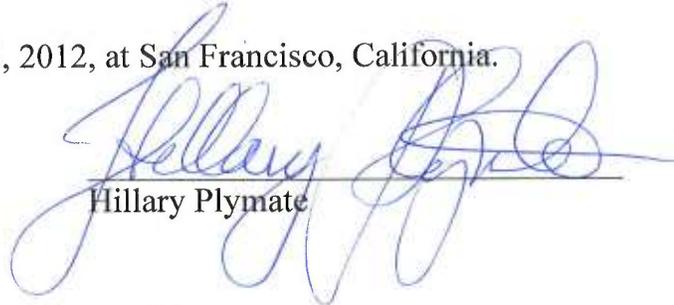
Clerk of San Diego Superior Court Marge Bradley Building 1409 Fourth A venue San Diego, CA 921 01 Attention: Comm. Edlene C. McKenzie	Via Regular Mail
Supreme Court of California 350 McAllister St. San Francisco, CA 94102	Via Electronic Document Submission (Fourth Appellate District) Only
Garrett Clark Dailey, Esq. 2915 McClure St Oakland, California 94609	Via Regular Mail
Stephen N. Falletta, Esq. Falletta & Klein 1520 Sixth A venue San Diego, California 92101	Via Regular Mail
The Law Offices of James A. Hennenhofer Garrett C. Dailey 2915 McClure Street Oakland, CA 94609	Via Regular Mail
Stephen Temko Attorney at Law 1620 Fifth Avenue, Suite 800 San Diego, CA 92101	Via Regular Mail

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed

the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Hanson Bridgett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 15, 2012, at San Francisco, California.



Hillary Plymate