

## Between a rock and a hard place

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Here, a Mother obtained a Domestic Violence Restraining Order (DVRO) against Father. The DVRO expired in November 2023 and was based on an incident that took place in October 2022. The parents had a 12-year-old daughter. In October 2022, Father got drunk and beat his current wife - not the daughter's mother - in front of the daughter. Daughter called another relative for help, after which Father slapped her and called her a nasty name. Police arrived, Father was arrested and his wife was taken to the emergency room. The wife obtained a protective order against Father. Mother filed the DVRO request claiming that in addition to the facts surrounding the incident with his wife, Father had verbally abused his daughter on other occasions and had forced the daughter to carry his gun.

In his response to the DVRO, Father argued that he was not currently facing criminal charges related to the incident that took place with his current wife, and that the restraining order obtained by Mother had expired. He argued that the other allegations made by Mother were false and that Mother was lying to obtain full custody of daughter.

At the end of the hearing on Mother's DVRO, the court said that while it was clear that the conduct "distressed" daughter, the other evidence in the case was "he said/she said," and therefore requested to speak to daughter. Father, who was self-represented asked, "Does



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she talk to you publicly or talk to you privately? How does it work? I'm unclear." The court said, "I'll talk to her in my office." The court then held a private interview with daughter in chambers.

Once back on the record, the court said, "I am not going to talk to you about things that I learned from [daughter] except to say that I did hear the recording that happened ... when [Father] and [wife] were having [their] domestic violence issues. It's pretty awful [,] especially for a 12-year-old to listen to." (The record included two short audio recordings.) After argument, the court granted Mother's DVRO, noting to Father, "[Y]ou seem to think everything is just perfect, sir,

believe me[,] things are not perfect from your daughter's stand-point."

The appellate court ruled on several issues. Although the underlying DVRO had expired, Family Code § 3044 still had an impact on Father. This statute provides that when a court has found that a person has perpetrated domestic abuse within the past five years, there is a rebuttable presumption that awarding sole or joint physical custody to that person is not in the child's best interest. Because of the impact of Family Code § 3044, the court found that the appeal was not moot.

The court then turned to Father's arguments that the trial court's interview of the minor child off the

record violated his due process rights as he was unable to respond to the statements made by his daughter.

The court noted that a DVRO may issue after a hearing, wherein the trial court found by a preponderance of the evidence that past acts of domestic abuse had occurred. Due process, the court explained, requires the right to be heard in a meaningful manner, meaning an opportunity to examine evidence and cross examine witnesses.

The court noted that in a contested restraining order hearing, the trial court must protect the fundamental due process rights of represented and self-represented

litigants both seeking and defending against any request for a restraining order. In this case, the court ruled that the trial court's off-the-record interview of the child and the reliance on the evidence gained from that interview in issuing the DVRO violated Father's due process rights.

The phrase "between a rock and a hard place" comes from "The Odyssey," when Odysseus had to choose whether to sail closer to Charybdis—a monster who would suck then violently expel water causing a deadly whirlpool, or Scylla, a terrible six-headed monster that lived in the cliffs and ate those who sailed too close to her. Sailing too close to either Scylla or Charybdis would result in death for Odysseus and his crew. This predicament yielded the phrase "between a rock and a hard place."

In many cases, judges may find themselves in a situation with a choice of the lesser of two challenging situations—between a rock and a hard place. How to handle child testimony in family law cases has long been a perplexing and challenging issue. On one hand, having all relevant evidence in a case presented and considered is a basic tenant of law. On the other, judges have a statutory obligation to protect children from the trauma that can be caused by appearing in court and/or testifying.

There are several different situations in which a child might testify in a family law proceeding. The first is similar to *Cardona*, the case in which the child is a percipient witness to facts or conduct relevant to the proceeding. The second circumstance is pursuant to Family Code § 3042, which provides that

"If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation," the court shall consider the child's preference in making future custody and visitation orders.

The challenge for the judicial officer in these cases is how to balance protecting the due process rights of the litigants and how to protect the child witness from enduring further trauma.

California Rule of Court Rule 5.250 provides guidance for a child's participation and testimony in family court proceedings, including but not limited to cases described in Section 3042. Rule 5.250 describes this balance between process and protection: "[t]he court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to be aware of and to challenge evidence relied on by the court in making custody decisions." Conducting a child interview in chambers requires careful consideration. Research in the field of forensic child interviewing demonstrates that a child's age, primary language, and culture all have an impact on the manner of disclosure. (E.g.: Jennifer Lavoie, Joshua Wyman, Angela M. Crossman, Victoria Talwar, "Meta-analysis of the Effects of Two Interviewing Practices on Children's Disclosures of Sensitive Information: Rapport Practices and Question type." Child Abuse and Neglect Volume 113 (2021).) The way the child is questioned - i.e., leading questions vs. open-ended questions - has an enormous impact on the nature and

quality of the information obtained from a child witness. (E.g.: Brooke B. Feltis, Martine B. Powell, Pamela C. Snow, Carolyn H. Hughes-Scholes, "An Examination of the Association Between Interviewer Question Type and Story-Grammar Detail in Child Witness Interviews About Abuse," Child Abuse & Neglect Volume 34, Issue 6.) The judicial officer should avoid becoming a witness to that officer's own proceeding. By illustration: A child is interviewed without another person present and the child says something different than the child previously said in a report or earlier proceeding, the judge brings this to the attention of the lawyers/parties and the child denies saying anything different from what was previously stated. Such a scenario creates an interviewer-said/child-said situation in which the judge is now the only witness to what the child said or did not say. Game, set, match: Scylla and Charybdis. To protect due process and the record, the judicial officer should ensure the testimony/inter-

view of the child witness is preserved on the record.

Evidence Code § 765 requires the court to protect witnesses from undue harassment and embarrassment. Specifically, with respect to children younger than 14, the court has an obligation to ensure that questions are asked in an age-appropriate manner. Ensuring that a child does not feel responsible for the outcome of a case and asking open-ended questions with an eye toward determining what plan is best for the whole family will help build a record for determining what is in the child's best interest.

Like Odysseus, a judicial officer dealing with the testimony of child witnesses must navigate a difficult strait, for which there is rarely calm or clear water. Unlike the ancient mariner, who faced certain disaster no matter which path he took, the judicial officer can use the statutes and rules of court to find the safest route to a proceeding that protects both due process and the child witness.

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