

Daily Journal

www.dailyjournal.com

VOL. 128 NO. 170

WEDNESDAY SEPTEMBER 2, 2015

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Release of texts abuse under DVPA

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In the dissolution action *Evilsizor v. Sweeney*, the 1st District Court of Appeal affirmed the trial court's holding that the husband's (John's) action in releasing and threatening to release personal data downloaded from the wife's (Keri's) cellphone constituted "disturbing the peace of the other party" and thus "abuse" warranting a Domestic Violence Protection Act ("DVPA") restraining order. The court also concluded that the order did not violate John's constitutional rights to free speech. *In re Marriage of Evilsizor and Sweeney*, 237 Cal. App. 4th 1423 (2015).

The parties were married in 2010, and Keri gave birth to their daughter in 2012. Keri had two cellphones, one that she used for legal issues, and the other to manage her business. She allowed her son from a prior relationship to use one of her phones to play video games. John testified that he had regular access to both phones, as well as Keri's email account. However, Keri disputed John's statements.

During lengthy and contentious litigation, John attached as exhibits text messages downloaded from Keri's phone to pleadings he filed with the court. In response, Keri filed a request for a restraining order under the DVPA, alleging that John downloaded her text messages to third parties, hacked her Facebook account, changed her passwords, and re-routed her email associated with Facebook to his own account. She alleged that John threatened he would make her texts and emails public as leverage in the divorce case. Keri requested

that the court prohibit John from disseminating her texts and emails and interfering with any of her internet based accounts. She also requested that John be required to return to her all electronically downloaded information he obtained.

At the hearing, Keri testified that it had been "incredibly difficult to deal with" the dissemination of her personal information, stating, "I have sleepless nights. I'm sick to my stomach. My friends are mad at me, embarrassed as if I let him. I didn't know he was even doing any of this. My parents are upset, you know. Why did I marry him? ... It's been incredibly challenging to live with." She "had suffered shock and embarrassment and feared for her safety because of the disclosure." Keri also worried about John's threats to reveal information to the Internal Revenue Service about "things she didn't do."

The trial court specifically clarified that it would not make any decisions regarding whether the text messages were properly acquired, or what effect it could have on the attorney-client privilege. The court then ordered that John be "prohibited from using, delivering, copying, printing or disclosing the messages or content of text messages or e-mail messages or notes, or anything else downloaded from her phone or from what has been called the family computer except as otherwise authorized by the court."

At the time of the DVPA hearing, the former Section 6300 of the DVPA authorized the court "to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved if evidence showed reasonable proof of a past act or acts of abuse." The definition of abuse en-

compasses various types of behavior, including "disturbing the peace of the other party."

The trial court followed the reasoning in the *Nadkarni* case, which stated "the plain meaning of the phrase 'disturbing the peace of the other party' in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party." *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1497 (2009). The phrase includes "destroying the mental or emotional calm [of the other party] by accessing, reading and publicly disclosing her confidential e-mails." In *Nadkarni*, the ex-wife requested a permanent restraining order against her former husband because he accessed her email account and used the emails as exhibits against her in a custody proceeding. That court held that the definition of abuse is not limited to physical injury or assault.

On appeal, John contends that the *Nadkarni* case is different because there were past allegations of physical abuse in that case, whereas Keri made no allegations of physical abuse against John. The Court of Appeal disagreed since prior cases have stated that the court is not confined to a physical abuse requirement under the DVPA. The Court of Appeal pointed out that as recent as September 2014, courts have held that the definition of "abuse" under the DVPA provides numerous variations of behaviors which do not require any physical violence, even though a lack of past physical violence may be considered. See *Eneaji v. Uboe*, 229 Cal. App. 4th 1457 (2014). John also contends that this case is different because the emails in *Nadkarni* were "confidential" whereas here they are not. The Court of Appeal, however, said there is no meaningful distinction between the private details contained in the emails at issue in either case.

John also argued that the restraining order is an improper prior restraint of his rights to free speech under the U.S. and California Constitutions. He contended that the prior restraint improperly prohibits him from making certain communications that fall under his right to freedom of speech under the First Amendment. But the Court of Appeal said "the right to free speech is not absolute," and compared the trial court's finding of abuse in connection with John's behavior to the categories of communications that are not covered by the First Amendment. The Court of Appeal affirmed that the trial court was authorized to conclude that its dissemination was abusive

under the DVPA and not the type of speech afforded protection under the First Amendment.

Article I, Section 2, subdivision (a) of the state Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." The Court of Appeal, citing the state high court case *Balboa Island Village Inn Inc. v. Lemen*, 40 Cal. 4th 1141 (2007), said, "despite the broad language in the California Constitution protecting speech, our Supreme Court has recognized that courts may enjoin speech that has been found at trial to be unlawful." The Court of Appeal then held that the restraining order does not violate the state Constitution "because it was entered only after a contested hearing that resulted in a determination that John's allegedly protected conduct in fact amounted to abuse."

Marriage of Evilsizor and Sweeney expands the definition of what can qualify as abuse under the DVPA, specifically in relation to the use and dissemination of information from internet service providers and social media accounts. Once such information is in the hand of any litigant, the court has the authority, under the DVPA, to enjoin the disclosure or threats of disclosure of the information in order to protect the opposing litigant's peace of mind.

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