

No. A155111  
(San Francisco County Super. Ct. No. FDV-17-813669)

**IN THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO**

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JENNIFER KAIN,  
*Appellant,*

v.

SHANE KING,  
*Respondent.*

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Appeal from Judgment of the Superior Court  
for the County of San Francisco  
(Hon. Richard C. Darwin, Presiding)

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**APPLICATION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF;  
[PROPOSED] AMICUS CURIAE BRIEF OF  
LEGAL MOMENTUM IN SUPPORT OF  
APPELLANT JENNIFER KAIN**

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(Cal. R. Ct. 8.220, 8.208)

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None.

Pursuant to California Rule of Court 8.220(c)(3)(A) and (B), Amicus Curiae Legal Momentum certifies that the following party or counsel made a monetary contribution intended to fund the preparation or submission of the brief, and the following entities or persons made a monetary contribution intended to fund the preparation or submission of the brief:

None.

DATED: October 29, 2019.

Respectfully,

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**APPLICATION OF LEGAL MOMENTUM FOR LEAVE  
TO FILE AMICUS CURIAE BRIEF**

Pursuant to California Rule of Court 8.200(c), Legal Momentum respectfully requests leave to file the attached amicus curiae brief in support of Appellant Jennifer Kain.

Legal Momentum is a national non-profit organization dedicated to leading action for the legal rights of women. Founded in 1970 as the NOW Legal Defense and Education Fund, Legal Momentum is the oldest legal advocacy group for women in the United States. Legal Momentum has unique experience regarding the dynamics of domestic violence, the perpetration of domestic violence, and the impacts of domestic violence on victims and their children. As such, Legal Momentum has an interest in ensuring that social science research underlying domestic and sexual violence is given appropriate weight by the courts. Legal Momentum, as a result of its tremendous experience in this area, is uniquely positioned to help inform the Court regarding issues relevant to this appeal including the adverse effects of non-physical acts of domestic abuse.

Legal Momentum is specifically concerned about the Superior Court's decision in this case because it appears to disregard important changes in the Family Code made, in part, to recognize the impact of non-physical abuse. The Superior Court's decision also appears to be based on a misunderstanding of well-established social science concerning domestic and sexual abuse.

DATED: October 29, 2019.

Respectfully,

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## BRIEF OF AMICUS CURIAE

### I.

#### PRELIMINARY STATEMENT

Appellant Jennifer Kain sought a restraining order to ensure that her former boyfriend, Respondent Shane King, could neither approach nor communicate with her except in limited circumstances related to the care of their child. The Superior Court denied her request, and this appeal followed.

As Ms. Kain alleged, Mr. King's interactions with her had been punctuated by violence, beginning with Mr. King raping her on January 1, 2009, which resulted in the conception of their daughter, and continuing with Mr. King forcibly closing the door on her during a custody exchange in 2017, leaving visible bruises on her legs.

But these episodes, while physically violent, were only part of the story. The record reflects that, over the 10 years between the rape and Ms. Kain's decision to seek a restraining order, Mr. King repeatedly and persistently intimidated, threatened, and attempted to control Ms. Kain:

- In July, August or September 2008, early in Mr. King and Ms. Kain's dating relationship, Mr. King shared with Ms. Kain that he had killed someone while boxing. This was surprising and unsettling to Ms. Kain. (1 Reporter's Transcript ("RT") 153-55.) Shortly after that, Mr. King called Ms. Kain to pick him up from the hospital because his head had been "split open . . . split open like you dropped a piece of ripe fruit" due to a boxing injury. (1 RT 154.) Ms. Kain was immediately aware that boxing could cause significant injuries and that Mr. King was capable of inflicting such injury. Ms. Kain stated that this left an impression on her: "knowing that someone can die from getting punched in the head" is "different than if some causal bystander maybe made a fist at you if you

know what that fist can do.” (1 RT 154-55.) Thus, early in their relationship, Ms. Kain was aware of Mr. King’s boxing prowess and the trauma that boxing could inflict.

- Following a party on December 31, 2008, Mr. King offered Ms. Kain a ride home. He then manipulated Ms. Kain into allowing him into her apartment where he raped her. (1 RT 158–61.)
- Mr. King had been living rent-free in a building Ms. Kain owned but in late 2009 she had asked him to move out so that she could rent the apartment. (1 RT 220.) In response, Mr. King repeatedly requested to move into Ms. Kain’s apartment. Ms. Kain finally acquiesced because she did not have enough money to afford both apartments. (1 RT 146–47, 221; 2 RT 547.)
- During Ms. Kain’s pregnancy, Mr. King insisted that Ms. Kain engage in intercourse with him while attending a family vacation. Ms. Kain repeatedly rejected his demands. Mr. King would frequently become irritated and angry because he was unable to have sex due to lack of a willing partner, and he told Ms. Kain that he was “going to be angry” if he was not able to have sex. (1 RT 223, 250–51.)
- While Respondent lived in Ms. Kain’s home, he would become angry with her if she did not enjoy the dinner he cooked. (2 Appellant’s Appendix (“AA”) 243.)
- After the birth of their daughter, in 2009, Ms. Kain inadvertently missed several doses of her medication and was experiencing symptoms of depression related to the lack of medication. Without Ms. Kain’s consent, Mr. King contacted Ms. Kain’s therapist and raised questions about Ms. Kain’s mental health. Ms. Kain learned of this call only when her therapist

alerted her that Mr. King had made this call. (1 RT 221, 248–49.) Ms. Kain testified, “[H]e took it upon himself to contact my therapist and say I was crazy and I was out of control, and it was very strange. She [Ms. Kain’s therapist] was really worried. She’s, like, ‘That’s really controlling. Why would he do that?’” (1 RT 248.) By calling Ms. Kain’s therapist, Mr. King had inserted himself into the private and confidential relationship between Ms. Kain and her mental health professional, invading her privacy and attempting to exert control over that relationship as well.

- In November 2011, while in Ms. Kain’s home, Mr. King threatened her and then punched the refrigerator directly adjacent to Ms. Kain’s head. Mr. King’s punch was so close to Ms. Kain’s head that she “felt the air of it” and Ms. Kain “just knew that the punch was coming for my head;” she “saw it coming.” (1 RT 145.) The punch landed so hard on the refrigerator that it left an imprint of Mr. King’s knuckles. (1 RT 144–46.)
- In 2014, more than two years after Mr. King had moved out of Ms. Kain’s home, she heard an unknown person enter her home while she was in bed. She then discovered that Mr. King had entered her home. Nervously, Ms. Kain asked him to leave, but he remained in her home for approximately 30 to 40 minutes, going from room to room, apparently searching for something. Ms. Kain placated Mr. King in order “[t]o be safe.” (1 RT 150–51.)
- Several weeks later, Ms. Kain emerged from her shower and was walking to the laundry room to get her clothes when she suddenly encountered Mr. King standing in her home unannounced. Understanda-

bly, she “was terrified” and “didn’t know what was going to happen” due to Mr. King’s unexpected invasion into her home and his threatening behavior and history of violence toward her. (1 RT 148–50.)

- In June 2014, following the incidents where Mr. King entered Ms. Kain’s home without her permission and unannounced, Mr. King told Ms. Kain, without prompting or reason, that he “had a renewed interest in guns and . . . he was getting better and better at his aim.” These comments were “terrifying” to Ms. Kain. (1 RT 152.) Ms. Kain also knew that Mr. King owned a gun. (1 RT 152.) Ms. Kain perceived these comments as veiled threats. Immediately thereafter, Ms. Kain contacted a local family law attorney to consult about seeking a gun restraining order. (1 RT 152.)
- Over the course of their co-parenting relationship, Mr. King had yelled at Ms. Kain for various, unknown reasons and raised his fists at her, in a boxing-type stance, dozens of times. On one of these occasions in 2017, Mr. King had leapt out of his chair into his boxing stance so quickly that the chair had slammed against the floor. Ms. Kain was afraid that he would hit her. (1 RT 154–55.) After issuance of a temporary restraining order (“TRO”) in January 2019, Mr. King violated the TRO on three occasions, including one instance when he was waiting outside of their daughter’s school in close proximity to Ms. Kain. Ms. Kain saw him standing just at the gate entrance to the school, staring at her with his hands in his pockets. (1 RT 175–77, 254.)
- In late 2018 and into early 2019, Ms. Kain requested that all communication between herself and Mr. King be restricted. (1 RT 163.)

Facts such as these—some of which separately may appear to be explainable on other grounds—together form what the academic literature recognizes as a pattern of intimidating behavior, which the perpetrator engages in to dominate the victim and place her in a state of coercive control. The effects of the type of domestic abuse perpetrated by Mr. King are far-reaching and devastating. Decades of widely accepted social science studies—including Legal Momentum’s experience over decades of working with, and advocating for, victims of domestic violence—support these conclusions.

Furthermore, the California Domestic Violence Prevention Act defines abuse broadly to include not only physical violence, but also such acts as “contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party.” (FAM. CODE § 6320(a).) This and other language was added specifically to address instances of non-physical abuse, especially events perpetrated over a period of time, that result in a state of coercive control.

Nevertheless, the Superior Court disregarded these instances of non-physical abuse and based its decision to deny Ms. Kain’s request only on instances of physical violence and violations of the temporary restraining order (“TRO”).

The Superior Court’s disregard of this evidence of non-physical abuse is a reversible error of law. Similarly, the Superior Court’s reliance on misconceived stereotypes about how women subjected to abuse are expected to behave deprived Ms. Kain of a fair trial. Each error mandates reversal.

## II.

### ARGUMENT

#### A. This Court Should Conduct a De Novo Review of the Superior Court’s Denial of the Requested Restraining Order.

Ordinarily, this Court would review the denial of a domestic violence prevention restraining order (“DVRO”) for abuse of discretion. (*Eneaji v. Ubboe*, 229 Cal. App. 4th 1457, 1463 (2014).) However, the Superior Court’s discretion is not unfettered. “[A] discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal.” (*Farmers Ins. Exch. v. Superior Court*, 218 Cal. App. 4th 96, 106 (2013).)

Where, as here, “the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law.” (*Rodriguez v. Menjivar*, 243 Cal. App. 4th 816, 820 (2015).) This question of “whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law requiring *de novo* review.” (*Id.* (citation and internal quotation marks omitted).)

Similarly, where a judge’s exercise of discretion has been infected by gender bias, that decision also will be subject to *de novo* review. (*See, e.g., People v. Freeman*, 47 Cal. 4th 993, 1007 (2010).)

Here, because the Superior Court both erred in its interpretation and application of the Domestic Violence Prevention Act (“DVPA”) and rendered its decision on the basis of preconceptions about Ms. Kain’s gender that evidence bias, this Court should review the Superior Court’s rulings *de novo*.

**B. The Superior Court Erred in Finding that Evidence of Non-Physical Abuse Did Not Constitute Evidence of Domestic Violence.**

The DVPA adopts a broad definition of “abuse” not limited to physical violence or violations of an existing restraining order. Nonetheless, in denying Ms. Kain’s application for a restraining order, the Superior Court focused on incidents of physical violence and alleged TRO violations to the exclusion of the repeated non-physical incidents that constituted a clear pattern of coercive control. In fact, when the Superior Court expressly enumerated “the specific incidents” on which it based its denial, it referenced only two of the multiple incidents of non-physical abuse, and it discounted these because, in the Superior Court’s view, they did not form part of “a pattern of violence.” (2 RT 526-528.) The Superior Court’s failure to consider Ms. Kain’s evidence of non-physical abuse as a basis for a DVPA order is a reversible error of law.

**1. The DVPA Shields Victims from Non-Physical Abuse and Coercive Control.**

The DVPA (Family Code §§ 6200–6460) provides for the issuance of a restraining order to protect victims of domestic violence. Section 6211 defines “domestic violence” as “abuse perpetrated against” certain categories of persons, including “[a] person with whom the respondent has had a child.” (FAM. CODE § 6211(d).)

**a. Family Code Section 6203 Broadly Defines Abuse to Include Non-Physical Acts.**

Section 6203(a)(1) of the DVPA defines “abuse” broadly to include not only acts of physical violence or assault, but also acts of non-physical abuse such as “contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party.” (See FAM. CODE § 6320(a).)

In addition, Section 6203(b), added as part of 2014 amendments to the DVPA, expressly clarifies that “[a]buse is not limited to the actual infliction of physical injury or assault.” As a result, in exercising its discretion to issue an order under the DVPA, a court must consider evidence of non-physical abuse. (*Rodriguez v. Menjivar*, 243 Cal. App. 4th 816, 821 (2015) (holding that the trial court erred when, “in stating its reasons for denying the order, [it] discussed only evidence with respect to physical violence.”).)

**b. The Legislature Amended the DVPA in 2014 to Ensure Protection for Victims of Non-Physical Abuse.**

A synopsis of the proposed amendments adopted in 2014, which was prepared for the Assembly Committee on the Judiciary, explains that the legislature intended the amendments to address the fact that:

Domestic violence is not limited to actual and threatened physical acts of violence, but also includes sexual abuse, stalking, psychological and emotional abuse, financial control, property control, and other behaviors by the abuser that are designed to exert coercive control and power over the victim.

(Assembly Committee on Judiciary, Report on AB 2089, at 2 (Apr. 22, 2014).)

Similarly, an analysis prepared by the Senate Judiciary Committee explains that “‘abuse’ is clearly not limited to the infliction of physical injury or assault, but also includes harassing and other coercive behaviors.” (Senate Judiciary Committee, Report on AB 2089, at 6 (June 10, 2014).) The Committee acknowledged that “[d]omestic violence is a pattern of systematic coercive behavior that is used to gain control and power over another individual.” (*Id.* at 4.)

This legislative history demonstrates that the California Legislature recognized the need to clarify that domestic violence includes non-physical abuse, to ensure more consistent



protection for victims of domestic violence. In recognition of this objective, courts construing the DVPA have interpreted its provisions broadly to protect victims of domestic violence manifested through non-physical abuse. (See, e.g., *N.T. v. H.T.*, 34 Cal. App. 5th 595, 599–601, 603 (2019) (finding respondent’s demands for intimate physical contact and appearance at appellant’s apartment complex to constitute abuse under the DVPA); *In re Marriage of Evilsizor & Sweeney*, 237 Cal. App. 4th 1416, 1425 (2015) (“[T]he DVPA’s definition of abuse is not confined to physical abuse but specifies a multitude of behaviors which do[] not involve any physical injury or assaultive acts.”) (internal quotation marks omitted).)

## **2. The Law Recognizes that Coercive Control Is a Pervasive and Serious Form of Domestic Violence.**

As reflected in the legislative history of the 2014 amendments to the DVPA, episodes of non-physical abuse may constitute a pattern of coercive control or form part of such a pattern. First used by Dr. Evan Stark, a leading scholar on domestic violence, the term “coercive control” refers to a “pattern of domination that includes tactics to isolate, degrade, exploit and control [women] as well as to frighten them or hurt them physically” and “may include but is not limited to physical violence.” (Evan Stark, *Re-Presenting Battered Women: Coercive Control and the Defense of Liberty*, at 3 (2012), [https://www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_10\\_0812.pdf](https://www.stopvaw.org/uploads/evan_stark_article_final_10_0812.pdf); EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (2007).)

As explained by Dr. Stark, prevailing models of domestic violence, such as those based on traditional criminal justice definitions, fail to recognize “the level of fear and entrapment” that a woman may experience as the “cumulative result of all that has come before.” (Evan Stark, *Coercive Control*, *FATALITY REV. BULL.*, at 2 (Spring 2010),

[http://www.ncdsv.org/images/NDVFRI\\_FatalityReviewBulletin\\_Spring2010.pdf](http://www.ncdsv.org/images/NDVFRI_FatalityReviewBulletin_Spring2010.pdf); see also Connie J.A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 556 (2010) (“An increasing body of research suggests that coercive control may be a more accurate measure of conflict, distress, and danger to victims than is the presence of physical abuse.”); Kristy Candela, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 114–15 (2016).)

Because coercive control is defined as an ongoing, persistent pattern of acts of control and intimidation, these acts must be analyzed collectively and in the context of “all that has come before,” rather than as isolated events. Where a trier of fact examines a single event of intimidation, out of context of the pattern of abusive acts, he or she may fail to understand the cumulative abusive effect of that series of acts.

Indeed, it is the cumulative effect of the abuse that frequently leads the woman who is abused to experience a heightened level of fear or apprehension in reaction to otherwise seemingly mundane events. And this can result in a court wrongfully determining that the woman is exaggerating or being manipulative. (See, e.g., Margaret B. Drew, *Collaboration and Coercion*, 24 HASTINGS WOMEN’S L.J. 79, 87 (2013) (“The lack of accountability for coercive behavior that resulted in great harm to the family undermines the target’s ability to achieve safety.”).)

Dr. Stark’s observations on coercive control are not only widely cited in academic work on domestic violence, but have also informed decisions of this Court—as well as the U.S. Court of Appeals for the Ninth Circuit—which recognize coercive control as a model for analyzing allegations of domestic abuse, manifested in non-physical abusive acts. (See, e.g., *United States v. Haischer*, 780 F.3d 1277, 1282–83 (9th Cir. 2015);

*Hernandez v. Ashcroft*, 345 F.3d 824, 836–37 (9th Cir. 2003); *Pugliese v. Superior Court*, 146 Cal. App. 4th 1444, 1452 (2007).)

For example, in *Pugliese v. Superior Court*, the Court of Appeal, Second Appellate District, found that “[m]ost domestic violence victims are subjected to ‘an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.’” (146 Cal. App. 4th 1444, 1452 (2007) (quoting Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985 (1995) (emphasis in original).)

In addition, the Court of Appeal has held that ongoing intimidation and control can be perpetrated by purely psychological and emotional abuse. (*Id.*; see also *Eneaji v. Ubboe*, 229 Cal. App. 4th 1457, 1464 (2014) (finding abuse includes a “multitude of behaviors which does not involve any physical injury or assaultive acts”); *Conness v. Satram*, 122 Cal. App. 4th 197, 201–02 (2004) (finding that the requisite abuse for issuance of a protective order can be threatening or harassing non-physical behavior); *N.T. v. H.T.*, 34 Cal. App. 5th 595, 597 (2019) (“abuse . . . is not limited to acts inflicting physical injury”); *In re Marriage of Evilsizor & Sweeney*, 237 Cal. App. 4th 1416, 1425–26 (2015) (holding that issuance of a protective order does not require a finding of physical abuse); *In re Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1496 (2009) (providing examples of non-physical abuse, and citing Family Code Section 6320, which provides that contacting the other party “either directly or indirectly, by mail or otherwise” may constitute abuse).) In *Burquet v. Brumbaugh*, a case with very similar facts to those in this case, the Court of Appeal found substantial evidence to support issuance of a DVPA restraining order where there was no evidence of physical abuse, but the

Court found that the restrained party disturbed the peace of his ex-girlfriend by e-mailing her, sending her text messages, and showing up unannounced at her home. (223 Cal. App. 4th 1140, 1142–43, 1146 (2014).)

**3. The Superior Court Erred by Disregarding Evidence of Non-Physical Abuse in its Denial of the DVRO.**

The Superior Court’s failure to consider the evidence of non-physical abuse adduced by Ms. Kain is inconsistent with the applicable legal standard under the DVPA.

After the close of the six-day trial, the trial judge announced his desire to “tell [the parties] on the record so [they would] understand why [he was] denying [the restraining order].” (2 RT 526.) He made clear that he was “going to talk about the specific incidents” underlying his decision. (*Id.*) Those incidents included Ms. Kain’s allegations that Mr. King had slammed a door on Ms. Kain, punched a refrigerator near Ms. Kain’s head (although the Court noted that “he [Mr. King] regretted it,” which is entirely irrelevant), raped Ms. Kain, violated the TRO, and became agitated because Ms. Kain brought her boyfriend on a pre-school camping trip. (2 RT 256–57). Having enumerated these events as the basis for his decision, the Superior Court summarily declared that he did not “find any other evidence in the record of an incident of domestic violence or abuse as that term is used in the Domestic Violence Prevention Act.” (2 RT 529.)

Notably absent from the Superior Court’s enumerated list are the multiple instances of non-physical abuse identified by Ms. Kain in her submissions to the court and testimony at trial. As described above, these instances include Mr. King’s repeated requests for sexual intercourse while Ms. Kain was pregnant; Mr. King’s call to Ms. Kain’s therapist to complain about Ms. Kain’s mental state; and Mr. King’s entry into Ms. Kain’s home—twice—without her consent. Also absent

from the Superior Court’s enumerated list is Mr. King’s informing Ms. Kain (1) at the outset of their relationship that he had killed a man while boxing; and (2) for no apparent reason that he owns a gun and “was getting better and better at his aim,” after twice having entered her home unannounced and without consent. (1 RT 152.) Mr. King’s pattern of conduct—physical and non-physical—constitutes an exercise of coercive control over Ms. Kain and falls within the broad definition of abuse under the DVPA. (See EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007); Evan Stark, *Re-Presenting Woman Battering*, *supra*, 58 ALB. L. REV. 973 (describing coercive control).)

Given that the DVPA expressly defines “abuse” to include such non-physical acts, the Superior Court’s failure to consider evidence of these events of non-physical abuse and coercive control as “evidence of domestic violence or abuse” under the DVPA reveals that it failed to apply the correct legal standard. (FAM. CODE § 6203(b); 2 RT 529.) This is reversible error.

Further, the Record makes clear that the Superior Court’s disregard of these issues was not a mere oversight but part of its deep misunderstanding of the law. From the first day until the final day of the trial, the judge distinguished the allegations of physical abuse as “serious,” a characterization he did not apply to the allegations of non-physical abuse raised by Ms. Kain. (See, e.g., 1 RT 7 (“Ms. Kain has made very serious allegations about threats to kill, physical hits, slaps, and rape.”); 2 RT 527 (“The rape, that’s obviously a very serious allegation.”).)

Similarly, the Superior Court repeatedly emphasized the centrality of “violence” to its analysis, characterizing only acts of physical abuse as domestic violence. (See, e.g., 2 RT 526–27 (“A deliberate slamming of the door on someone entering your house is a *very violent* act . . . .”) (emphasis added); 2 RT 528 (“I find no . . . *pattern of violence* that would support the issu-

ance of a domestic violence restraining order”) (emphasis added); *see also* 2 RT 527 (“There was no evidence that . . . Mr. King communicated anything that was implied that the punch was a threat or an *effort to hurt* [Ms. Kain].”) (emphasis added).)

The Superior Court’s dismissive approach to the evidence of non-physical abuse is further illustrated in its discussion of the single instance of non-physical abuse the judge appears to have considered in issuing his decision: Mr. King’s controlling behavior toward Ms. Kain on a pre-school camping trip. The Superior Court’s analysis of this incident addressed only the question of whether Ms. Kain’s *boyfriend* felt intimidated on that trip. (2 RT 528.) Having decided the boyfriend did not feel intimidated, the Superior Court dismissed the camping trip as a “non-issue,” although the boyfriend left the trip early because he knew that Mr. King was not comfortable with him being present, without addressing the possible impact on Ms. Kain—the victim herself. (*Id.*) The Superior Court’s minimization of this episode, together with its failure to evaluate evidence of multiple other allegations of non-physical abuse, and to place them in context, represents a failure to properly exercise the discretion granted under the DVPA.

The Superior Court’s evaluation of the camping trip allegations in isolation from the series of events of non-physical abuse alleged by Ms. Kain is particularly problematic as it is inconsistent with research on coercive control and the Legislature’s intent to protect victims from that form of domestic violence. To properly assess allegations of non-physical abuse, the court must engage in an “examination of the dynamic of coercive control over time,” including a pattern of control over even the “minute facets of everyday life.” (STARK, *Re-Presenting Women Battering*, *supra*, 58 ALB. L. REV. at 1024.) The Superior Court cannot isolate each instance of non-physical abuse, but rather must analyze the events together.

“This history helps the court understand how events that might seem relatively trivial to an outsider . . . take on momentous importance.” (*Id.*)

Here, the camping trip was one of multiple instances in a years’ long series of events of non-physical abuse. Mr. King laid years of groundwork for implementing control over Jennifer, beginning with statements that would cause her to fear him—*i.e.*, his boxing prowess, his ability to kill someone with his bare hands, his access to firearms—and continuing with acts both of subtle coercive control and of overt physical violence. The pattern of intimidation and control illustrated by Ms. Kain’s evidence is precisely the pattern that academics—and the California Legislature and Courts—have identified as evidence of abuse and coercive control. But the Superior Court failed to evaluate the cumulative effect of these events of emotional and psychological abuse over time.

Because the Court failed to consider or evaluate the evidence of the instances of non-physical abuse and their cumulative effect on Ms. Kain in determining whether to grant or deny DVRO, the Superior Court’s decision should be set aside.

**C. The Decision of the Superior Court Was Infected by Gender Bias and Must Be Set Aside.**

“[A] judge should not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon sex.” (*Catchpole v. Brannon*, 36 Cal. App. 4th 237, 247 (1995) (quoting Code of Judicial Conduct, Canon 3), *disapproved of on other grounds by People v. Freeman*, 47 Cal. 4th 993 (2010).) Accordingly, “where it is ‘reasonably clear that [the trial judge] entertained preconceptions about the parties because of their gender . . . [which make] it impossible for [a party] to receive a fair trial’ the decision of the trial court should be reversed. (*Catchpole*, 36 Cal. App. 4th at 245, 249 (reversing decision below where

“the court’s comments reflect a predetermined disposition to rule against appellant based on her status as a woman.”.)

Here, the Superior Court explicitly based its ruling on its own preconception of how it believed a woman should behave following a rape or violent attack—the central and initiating form of physical violence in Mr. King’s pattern of coercive control. In the words of the Superior Court:

What I see and the evidence based on that that was presented, seven years of conduct that is more consistent with two parents cooperatively and collaboratively working together to co-parent in the best interest of the child. I did not see evidence that was *consistent with what I would expect following a forcible rape*.

(2 RT 527–28 (emphasis added).) Similarly, in assessing Ms. Kain’s allegation that Mr. King repeatedly slammed a door on her legs, the Superior Court assessed Ms. Kain’s credibility against the judge’s own subjective standard, declaring that her conduct “after that event”—being civil to Mr. King’s sister and returning to Mr. King’s home—“was not consistent with someone who was violently attacked and injured.” (2 RT 527.)

From the Superior Court’s ruling, it is apparent that the judge considered Ms. Kain’s allegations that Mr. King raped her to be not credible because of her decisions to (1) give birth to and keep her daughter following the alleged rape, (2) maintain a relationship with her daughter’s father, and (3) attempt to cooperatively co-parent with Mr. King. But the fact that Ms. Kain’s actions defied the Judge’s unfounded expectations should never have been permitted to influence his determination of her credibility.

Importantly, the Superior Court’s reasoning was founded on misconceived stereotypes about how women who are raped are expected to act. “[I]n non-stranger cases post-assault contact between the victim and offender is not unusual.” (National Judicial Education Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*, at 8 (2017), file:///C:/Users/bjg6946/Downloads/Judges



%20Tell%20Final%202017.pdf.) Victims who maintain contact with their abuser may be seeking a way to normalize and make sense of the assault, to not “rock the boat,” and to not disrupt their social and family circle, on which they rely for emotional and often financial support.

In addition, California’s public policy favors co-parenting, regardless of the circumstances of the conception and status of the parents’ relationship. “The Legislature finds and declares that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents . . . .” (FAM. CODE § 3020(b).) Ms. Kain made clear that she maintained a relationship with Mr. King for the benefit of their daughter, in order to provide their daughter with a family structure. (1 RT 166, 242–43.)

The Superior Court’s finding that Mr. King did not rape Ms. Kain based on the evidence that Mr. King and Ms. Kain were cooperatively co-parenting their daughter is grounded in the judge’s misconception about rape victims, which is emblematic of gender bias. Furthermore, contrary to the State’s public policy of encouraging co-parenting, the Superior Court’s finding will discourage women from making the wholly legitimate decision to co-parent with the fathers, even if the father raped them. This is not a proper exercise of the Superior Court’s discretion, and because this bias infected the Superior Court’s decision-making process, its decision must be set aside.

The Superior Court also erred in holding that, because Ms. Kain did not report the rape soon after the assault, there must not have been a rape. This is a common misconception that also supports reversal.

The Court asserted that “a long, long, long delay between these alleged events [including the rape] and comments to third parties about them” is probative of whether that event happened. (1 RT 100.) Essentially, the Court states that it is less likely that an assault actually occurred if a “long, long,

long” time passes between the assault event and the victim’s report of the event. Additionally, the Superior Court stated, “[p]art of the conduct you would expect of someone who is sexually assaulted is to tell someone . . . [a]nd the absence of statements like that tend to prove against the existence of that event.” (1 RT 23.)

This misconception has been shown to be overwhelmingly inaccurate in many cases. It is yet another instance of the Judge inserting his expectations into the decision. “*It is common for victims of sexual assault to wait some time before telling someone.* . . . The reasons for this are numerous: victims may want to deny the fact that someone they trusted could do this to them; they may want to just put it behind them; they may believe the myth that they caused the assault by their behavior; or they may fear how other people will react to the truth.” (Cal. Dep’t of Justice, California Megan’s Law Website, *Myths and Facts About Sexual Assault* (last accessed Oct. 23, 2019),

[https://www.meganslaw.ca.gov/mobile/Education\\_MythsAndFacts.aspx](https://www.meganslaw.ca.gov/mobile/Education_MythsAndFacts.aspx) (emphasis added).) “[T]he fact that reporting was delayed should never raise concerns about truthfulness because delayed reporting is normal.” (Kelsie Plesac, *Remedying Cursory Police Investigation of Sexual Assault and the False Reporting Charges That Result*, 53 VAL. U.L. REV. 509, 521 (2019).) “Very few victims report the sexual assault to the police, but if they do, it is often after a delay of days, weeks, months, or **even years.**” (Kimberly A. Lonsway & Joanne Archambault, *Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?*, End Violence Against Women International, at 9 (2019) (emphasis added).)

In addition, the California Supreme Court has held that certain evidence is admissible to rebut suggestions that the conduct of the victim following the sexual assault—such as a

delay in reporting it—is inconsistent with her claim of having been raped. (*People v. Bledsoe*, 36 Cal. 3d 236, 247–48 (1984).)

It is not justifiable for the Superior Court to have discounted Ms. Kain’s allegations of abuse due to a misalignment with the Judge’s unfounded and unrealistic “expectation” that a woman who is raped will always and promptly report that abuse. The Superior Court’s determination that Ms. Kain was not raped, based on the Judge’s expectations, wrongfully eroded Ms. Kain’s credibility and impacted the Judge’s decision-making in denying the DVRO. As a result, this Court should reverse.

### **CONCLUSION**

Mr. King’s pattern of abusive behavior leading to coercive control over Ms. Kain is apparent simply from the chronology. Among other evidence, at the outset of their dating relationship, Mr. King told Ms. Kain he had killed a man while boxing, and over an almost 10-year period he made fists at her when angry, dozens of times, and once punched her refrigerator, in extremely close proximity to her head, so hard it left the impression of his fist in the door. More recently, he told her he owns a gun and is improving his aim. He twice entered her home, without notice or permission, and surprised her when she was in bed or getting out of the shower. The Superior Court’s denial of the restraining order without crediting evidence of non-physical abuse is an error of law that mandates reversal of its decision.

In addition, the Superior Court’s bias as to expectations for how victims of rape should behave infected the Superior Court’s decision-making process, rendering it impossible for Ms. Kain to receive a fair trial.

The Superior Court’s denial of the DVRO must be set aside.

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Respectfully,

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