CALIFORNIA

Family Law Monthly

January 2019

Volume 2019 • Issue No. 1

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ATTORNEYS

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Presumption of Detriment to Child

Father Who Committed Domestic Violence Rebutted Presumption that Awarding Him Custody Would Be Detrimental to Child

*By Carol Rothstein, Esq.**

In *S.Y. v. Superior Court* (No. D073450; Ct. App., 4th Dist., Div. 1. 11/21/18, mod. 12/19/18) 29 Cal. App. 5th 324, __ Cal. Rptr. 3d __, 2018 Cal. App. LEXIS 1060, the Fourth District Court of Appeal affirmed a trial court's finding that a father who committed domestic violence against the child's mother had rebutted the presumption that awarding him custody would be detrimental to the best interest of the child. Although the trial court erred in considering the father's greater fluency in English as a factor in his favor, the error was harmless because there was substantial evidence supporting the court's conclusion that the father posed no danger to the child.

In the opinion by by Benke, Acting P. J. (Irion, Dato, JJ., concurring) the appeals court rejected the argument that the trial court could not find that the father had rebutted the presumption of detriment because he had not completed either a batterer's treatment program or a parenting class. The court further held that although the trial court was required to state on the record its reasons for finding that the presumption was rebutted, it was not required to make findings concerning all of the Family Code section 3044(b) factors, regardless of their applicability.

Facts and Procedure. S.Y. and Omar were married and had one child, A. In August 2016, Omar pushed and slapped S.Y. several times and choked her, then physically forced S.Y. and A. out of the house. S.Y. and A., who was two years old, went to live with her family. Omar was arrested but the district attorney decided not to file charges.

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Cross-references are made in this publication to CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (7 vols.), CALIFORNIA FAMILY LAW LITIGATION GUIDE (5 vols.), and CALIFORNIA JUVENILE COURTS: PRACTICE AND PROCEDURE (1 vol.) Published by Matthew Bender & Co., Inc.

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S.Y. obtained a temporary restraining order against Omar, and Omar obtained temporary restraining orders against S.Y. and her family. After hearing evidence from both parties, the court denied the mutual requests for permanent restraining orders and dismissed the temporary orders. There was a report to the health and human services agency that Omar had emotionally abused A., but the agency closed the referral after investigation.

Omar filed a petition for dissolution of marriage on October 6, 2016, and requested joint legal and primary physical custody of A. After meeting with the parties, the family court services counselor recommended joint legal and primary physical custody to S.Y., with supervised visitation to Omar. The report recommended that both parties complete a six-week parenting class and a co-parenting class, and that Omar be given unsupervised visitation with A. after he completed the classes and had had three months of consistent visitation with A. Finally, the report recommended that S.Y. get individual counseling.

At a preliminary hearing in April 2017, the court awarded S.Y. physical custody, with five hours of visitation for Omar twice a week, to be supervised by Omar's sister. The court awarded sole legal custody to S.Y. because the parties were not communicating well, but ordered that Omar have full access to A.'s medical records.

Six months later, at trial on custody issues, S.Y. and Omar offered conflicting testimony about what happened in August 2016. S.Y. testified that Omar hit her repeatedly, pulled her hair, strangled her, and

pushed her out of the house with A. Omar testified that S.Y. was the instigator. The trial court accepted S.Y.'s account of Omar's violent behavior.

S.Y. did not let Omar see or contact A. from the time she moved out in August 2016 until February 2017, despite the fact that the temporary restraining order had been dissolved months earlier. S.Y. testified that she did not understand what the court said about custody arrangements at the time the temporary order expired, and the permanent restraining order was denied.

Although S.Y. was A's primary caretaker, Omar took A. to the doctor, because language barriers prevented S.Y. from communicating with health care providers. Omar testified that during visitation, he would take A. to the park and the library and help A. learn English. A. enjoyed spending time with his seven cousins on Omar's side of the family, who spoke English with him. Omar called A. every day, and S.Y. was not concerned with Omar's behavior during visitation.

Omar had completed his co-parenting class and was half way through his parenting classes. S.Y. was studying English at school but was unable to take a parenting class because she could not find one that was taught in Chaldean, her native tongue. S.Y. had not taken a co-parenting class because she could not find one that took Medi-Cal and was unable to find individual counseling.

The trial court found that Omar had committed domestic violence against S.Y. in August 2016 and applied the section 3044 presumption that awarding custody to Omar would be detrimental to A.'s best interest. However, the court found that Omar had rebutted the presumption. It found that Omar was not a risk to A., that he was attentive to A. and understood his development, that A. enjoyed his visits with Omar, and that Omar was more fluent in English than S.Y. It further found that S.Y. had withheld access to A. and that she had no concerns about Omar taking A. to the doctor. The court concluded that joint custody was appropriate because it was in A.'s best interest to have both parents involved in educational and medical decisions, both families were very involved in A.'s life, and an award of sole legal custody to S.Y. would cause more family battles. The court awarded four days a week of physical custody to S.Y. and three days a week to Omar.

S.Y. filed a petition for writ of mandate and/or prohibition, seeking an immediate stay and vacation of the preliminary order. The appeals court denied the petition and the request for stay. After review by the Supreme Court, the appeals court vacated its denial and ordered Omar to show cause why S.Y.'s petition should not be granted. In the meantime, S.Y. filed an appeal from the trial court's order and written findings. The appeals court granted S.Y.'s request that the appeal and writ be considered together.

Presumption of Detriment to Best Interest of Child. Family Code section 3044 creates a rebuttable

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presumption that awarding sole or joint physical or legal custody to a parent who has perpetrated violence against the other parent within the past five years is detrimental to the best interest of the child. When the presumption is applied, the perpetrator must show by a preponderance of evidence that giving him sole or joint custody would not be detrimental to the child. In making this determination, the paramount factor is the child's health, safety and welfare. "The determination of custody is not to reward or punish the parents for their past conduct, but to determine what is currently in the best interest of the child."

Statutory Preference for Frequent and Continuing Contact with Both Parents. The trial court stated that the fact that S.Y. had withheld A. from Omar for several months supported its finding that the presumption of detriment had been rebutted. According to S.Y., this showed that the court had impermissibly taken into consideration the statutory preference for frequent and continuing contact with both parents [*see* Fam. Code § 3044(b)(1)]. The appeals court disagreed, reasoning that the trial court did not mention the preference as a basis for finding that Omar had rebutted the presumption of detriment. S.Y.'s withholding of A. was a relevant consideration, because her actions reflected her lack of understanding of common parenting best practices and her inability to understand court orders. Section 3044(b)(1) did not prevent the court from considering "evidence about the nature of Father's relationship with [A.]," as well as A's "needs for more than marginalized parental relationships" [*quoting* Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1056].

Court Erred in Considering Omar's Greater Fluency in English. The trial court abused its discretion when it considered Omar's greater fluency in English, and the possible advantage it would provide for navigating the educational and medical system, as one of the factors rebutting the presumption of detriment. This was error, as S.Y.'s lack of fluency in English was not a factor relating to A's safety or the impact of domestic violence on A.

A court may not consider a parent's fluency in English in determining the child's best interest, unless the lack of fluency results in specific harm to the child. As an example, the court explained that a parent's lack of fluency could be a factor if the parent repeatedly made mistakes in administering medicine to the child because of the parent's inability to read labels. However, there was no finding in this case that S.Y.'s lack of fluency resulted in harm to the child.

However, the appeals court rejected the argument that the court's consideration of S.Y.'s language was motivated by discriminatory intent against Mother based on her nationality, because both parents were natives of Middle Eastern countries. The judge did not mention the parents' immigration status, and her comments about language were limited to communications with education and health care providers. Although the judge's consideration of language fluency was improper because it was not relevant to the best interest of A., it was harmless error. Substantial evidence supported the trial court's finding that there was no risk to A's safety in Omar's custody.

Batterer's Treatment Program and Parenting Class. In determining whether the presumption of detriment has been rebutted, the trial court must consider whether the perpetrator has successfully completed a batterer's treatment program and a parenting class, if the court determines that a parenting class is necessary. Here, the trial court was concerned about Omar's violence against S.Y. and ordered him to complete 12 weeks of a domestic violence treatment program. It did not, however, condition custody on the completion of such a program.

Omar did not physically abuse either S.Y. or A. after August 2016. The visitation reports showed that Omar parented A. appropriately, correcting him without abuse and caring for his developmental needs. The court found that a batterer's treatment program and parenting classes would be appropriate for Omar, but not critically needed for Omar to rebut the presumption that his custody would be detrimental to A's best interest.

The appeals court rejected the arguments of S.Y. and amicus curiae California Women's Law Center (CWL) that section 3044(b) requires the court to find that the perpetrator has completed a batterer's treatment program and parenting classes before it may find that the presumption of detriment has been rebutted. Section 3044(b) requires the trial court to "consider" a list of factors, including completion of a batterer's program and parenting class, but completion of those programs is not mandatory to rebut the presumption of detriment.

S.Y. also asserted that Omar was required to complete a 52-week batterer's treatment program, rather than the 12 weeks ordered by the court. Section 3044(b) requires a "treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code." A treatment program meets these criteria if it is open only to a person with a written referral from the court or probation department that states the minimum number of sessions required. A 52-week program is required only for defendants on probation for a domestic violence crime. In this case, the court ordered Omar to complete 12 sessions of a batterer's treatment program. Because Omar was not on criminal probation, there was no requirement that he attend a year's worth of sessions.

Consideration of Additional Acts of Domestic Violence by Omar. A trial court must consider whether the perpetrator of domestic violence has committed any further acts of domestic violence [former section 3044(b)(7), now codified as section 3044(b)(2)(F) (effective January 1, 2019)]. The trial court found that Omar had perpetrated domestic violence against S.Y. on August 29, 2016 but made no other findings of domestic violence.

S.Y. contended that Omar continued to harass or threaten her, citing an incident in which Omar allegedly threatened to sue S.Y. for enrolling A. in preschool. According to S.Y.'s attorney, Omar used the court order as a "weapon" to control S.Y. While the trial court "chastised the parties for their continued lack of cooperation," it did not find that Omar had perpetrated additional domestic violence. Moreover, the threats and harassment alleged by S.Y. did not occur in A.'s presence and did not put his health, safety or welfare at risk.

Trial Court's Order Was Adequate Because It Stated the Reasons Supporting Its Decision. S.Y. criticized the trial court's decision because the court did not state its reasons concerning each statutory factor on the record.

When a court considers domestic violence in a child custody case and awards joint or sole custody to the offending parent, it must state the reasons for its ruling in writing or on the record [Fam. Code section 3011(e)(1)], to allow for meaningful review on appeal. However, the plain language of sections 3011 and 3044 "do not require a step-by-step discussion of each of the statutory factors," regardless of their applicability. The appeals court disagreed with *Jaime G. v. H.L.* (2018) 25 Cal. App. 5th 794, to the extent it holds that the trial court must specifically mention each of the factors listed in section 3044(b).

Commentary

Stacy D. Phillips and Erica Swensson

Three blindfolded men are led to an elephant. Each inspects the elephant by touch and tries to describe in turn what he perceives. The man holding the elephant's trunk describes a snake. The man with the tail describes a rope. The third, holding the elephant's ear declares he is holding the edge of a fan. Unsurprisingly, each man's description does not adequately encompass the creature he in front of him. To see the whole, you must take a step back to see everything.

Father in *S.Y. v. Superior Court* is like that elephant—not described by a single element of his case. The trial court's finding that Father had superior language skills alone did not dictate the outcome on appeal, nor was Father's act of domestic violence a bar to future custody of the child. It was instead the aggregate of both parties' conduct—which included Father's rehabilitation and Mother's withholding of the child—which led the trial court to order joint legal custody and grant each parent significant periods of custodial time with the child.

S.Y. provides an excellent primer (and collection of cases) for understanding the Family Code section 3044 presumption that "an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child."

The opinion adds two important factors to the interpretation of Family Code section 3044: (i) the superior English language skills of one parent is not a permissible factor in considering the best interest of a child, and (ii) a court need not consider all seven factors in Family Code § 3044(b) when determining whether a parent has overcome the presumption that custody with that parent is detrimental to the child, so long as there is sufficient evidence under the other factors.

S.Y. is also a powerful example of what can be accomplished with diligent and well-planned

rehabilitation of a client who previously perpetrated domestic violence. A finding that a parent has perpetrated domestic violence against the other is not a *de facto* conclusion that that parent can never have custody. In *S.Y.* the appellate court points out that "[t]he legal presumption is not, as [Mother] asserts, 'that a parent who has committed an act of domestic violence *should not be awarded* sole or joint legal or physical custody of a child.' [Father's] burden was only *to persuade* the court his custody would *not be detrimental* to [the child's] best interest. . . .The determination of custody is not to reward or punish the parents for their past conduct, but to determine what is currently in the best interest of the child" [emphasis in original, citations omitted]. That presumption can be overcome by a preponderance of the evidence [Family Code § 3044(a)].

Father was able to overcome the presumption of detriment by presenting evidence of (i) his positive relationship with the child, (ii) his efforts to rehabilitate himself through parenting classes, and (iii) his representation that he would not smoke in front of the child.

It is said that a person's grit is determined by how they respond to a bad situation. In this case, the facts that occurred *after* the incident of domestic violence were at the center of the Court's analysis. This is important because it shows that, as practitioners, we can be instrumental in shaping the outcome after an incident of domestic violence. Perpetrators of domestic violence should not underestimate the power of a well-timed *mea culpa* and rehabilitation. Nor can the other parent use the incident to withhold custody of the child from the perpetrating parent.

As practitioners, we have an opportunity to rehabilitate our clients after incidents of domestic violence and to impress upon the client that a positive relationship with his or her child is the most important aspect of a custody determination. We can recommend parenting classes and therapy. We can give him or her tools to improve the client's relationship with the child. We can give that parent motivation and inspiration to focus on the best interest of the child, rather than the altercation with the other parent. In this case, good advocacy also means improving the situation for all of the parties involved.

When representing a parent who has been accused of domestic violence, we need to talk about the elephant in the room. Domestic violence is always serious and can be difficult to discuss openly and honestly with clients. However, it is important that we approach the issue and put a rehabilitation plan into action early if we hope to influence the outcome of the client's custody case.

Commentary

Vanessa Kirker Wright

This case, like *Melissa G. v. Raymond M.* (2018) 27 Cal. App. 5th 360, causes me to breathe a sigh of relief. The court is finally curbing the gung-ho expansion of punishments associated with any domestic violence. Relationship violence is a terrible thing and it must be eliminated. But it is not, and cannot be, the sole consideration in a child custody dispute or when setting spousal support. Violence is not simple, it is not a black and white analysis with a "good gal" and a "bad guy" each and every time. It is nuanced and deadly and the analysis must be given the attention it deserves by the courts, the litigants and the public policy advocates. We now have a few cases that breathe sense into the child custody analysis — but the criminal process is still destroying the unwary. Public defenders and criminal defense attorneys are still pleading their clients "down" to something less than a felony, but that does not clear them of the presumptions that arise when there is any sort of threat, annoyance, etc.

For example, I know of a case where the parties were married for 35 years. Husband was a terrible human being; he regularly hit Wife and he oppressed her financially and verbally. In addition, he cheated on her. One day she walked into the house and found him with another woman in the marital bed. She picked up a bottle (his empty) and threw it at him, which resulted in a large cut over his eye. He immediately called the police and she was arrested and the court issued an emergency protective order against her. She had never even had a parking ticket and was so terrified that on her way to jail she became incontinent. She was embarrassed and humiliated and incarcerated for weeks because she had no way to post bail. She agreed to the first offer that came from the District Attorney and pleaded to "disturbing the peace." Then Husband filed for divorce and — guess what? He raised the presumption against