Filed 10/31/19 Marriage of Alvizo CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of FRANK and NINA ALVIZO.	B287476
FRANK ALVIZO, Plaintiff and Appellant, v. NINA ALVIZO, Defendant and Respondent.	Los Angeles County Super. Ct. No. BD602649

APPEAL from an order of the Superior Court of Los Angeles County, Lynn H. Scaduto, Judge. Affirmed.

Law Offices of Richard A. Marcus and Richard A. Marcus for Plaintiff and Appellant.

Law Office of Aaron Leetch and Aaron J. Leetch for Defendant and Respondent.

INTRODUCTION

Frank Alvizo appeals from a family court order permanently renewing a Domestic Violence Restraining Order (DVRO) protecting his ex-wife Nina Alvizo. He argues he was denied due process of law because the court would not consider evidence from a custody hearing held several years earlier. But Frank neither requested judicial notice of the documents at issue nor attempted to admit them as exhibits below. Accordingly, we conclude Frank has forfeited the issue, and we affirm.

BACKGROUND

Nina and Frank married in 2003. They have three minor children.

In October 2012, Nina and Frank got into a physical altercation in front of their oldest two children. As a result, Frank moved out of the house, and Nina obtained a criminal protective order against him. In December 2012, Frank and Nina reconciled. They resumed their marital relationship and had a third child the next year.

In May 2014, Frank and Nina got into an argument while driving home from a couples' retreat, and Frank threatened to kill Nina if she took the children away from him.

The couple separated on May 24, 2014, and on May 29, 2014, Nina filed an application for a DVRO.[1] She was granted a temporary DVRO pending a hearing on the matter.

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[1] The record on appeal does not contain any documents or transcripts relating to the DVRO.

On June 2, 2014, Frank filed a petition to dissolve the marriage.[2] On October 21, 2014, after a contested evidentiary hearing before Judge Marc D. Gross, the court issued a three-year DVRO protecting Nina from Frank. The DVRO would expire on October 21, 2017 at 5:00 p.m.

Nina subsequently filed a request to relocate with the children to her home state of Illinois. The court appointed an expert to conduct a child custody evaluation. On June 18, 2015, based on the evaluator's written report and testimony at a contested hearing, Judge Gross concluded Frank had overcome the Family Code section 3044 presumption,[3] and, if Nina moved to Illinois, it would be in the children's best interests to remain with Frank in California.

On August 6, 2015, the court entered a stipulated judgment on the bifurcated issue of custody and visitation, effectively denying Nina's request to relocate with the children. The court found Nina's "motivations for the proposed move [were] mixed. While the court [did] believe there [was] an element of good faith to the move, the court also believe[d] there [was] an element motivating the move of an attempt to avoid father."

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[2] Although Nina was the petitioner in the DVRO matter, which was brought in Los Angeles Superior Court Case No. PQ015565, she was the respondent in the dissolution matter (this case). The DVRO matter was later consolidated into the dissolution matter.

[3] The statute establishes a presumption against granting joint custody to a parent who has perpetuated domestic violence and sets out guidelines for rebutting the presumption. The statute does not establish a presumption for or against joint custody; it merely shifts the burden of persuasion to the perpetrator to show that joint custody would not be detrimental to the child's best interests. (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 334.)

A judgment of dissolution of marriage was entered on October 21, 2016.

On October 20, 2017, Nina filed a timely request to renew the DVRO permanently. Frank was personally served with the renewal request on October 22, 2017.

On November 17, 2017, Judge Lynn H. Scaduto held a three-hour contested hearing on the renewal request. Both Nina and Frank testified. The court heard argument, then granted Nina's request for permanent renewal of the DVRO.

Frank filed a timely notice of appeal. (See *Molinaro v. Molinaro* (2019) 33 Cal.App.5th 824, 831, fn. 6 [issuance of a DVRO is an appealable order under Fam. Code, § 904.1, subd. (a)(6)].)

DISCUSSION

Frank insists he "was deprived of the right to a fair trial when the family law court refused to consider critical evidence consisting of the custody evaluation report and addendum, the evaluator's testimony, and the Court's own files." We disagree.

1. Legal Principles

A court may take judicial notice of the records of any court of this state—including materials contained in its own files. (Evid. Code,[4] § 452, subd. (d)(1).) The court must judicially notice such records *if* "a party requests it" *and* the requesting party "furnishes the court with sufficient information to enable it to take judicial notice of the matter." (§ 453.) But the rules of

[4] All undesignated statutory references are to the Evidence Code. All undesignated rule references are to the California Rules of Court.

evidence are not self-executing; the court is not required to take judicial notice absent a request. (*People v. Amaya* (2015) 239 Cal.App.4th 379, 386.)

Rule 5.115 requires any party requesting judicial notice in a family law proceeding to "provide the court and each party with a copy of the material [he wants the court to judicially notice]. If the material is part of a file in the court in which the matter is being heard, the party must specify in writing the part of the court file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing." The rule affords the court time to comply with section 453, which requires it to give the "adverse party sufficient notice of the request … to enable such adverse party to prepare to meet the request." (§ 453, subd. (a).)

2. Frank did not seek admission of the documents.

Despite his claims to the contrary, Frank not only failed to comply with rule 5.115 in this case but also failed to even ask the court to judicially notice the reports and transcripts he now claims were critical to the court's decision on the renewal request.

To be sure, counsel sometimes obliquely alluded to such a wish. For example, shortly after Nina began testifying, Frank's attorney interjected, "This was actually testimony that was rejected by Judge Gross." Once counsel explained the move-away hearing, the court asked, "Are you suggesting that I have to reread the entire transcript of the last hearing?" Counsel answered, "No. What I would like to be able to do, though, is to

get the relevant portions of that transcript because this is, like, a second adjudication of something that's already happened."[5]

After Nina's attorney objected that he had not received notice of such a request and disputed Frank's characterization of Judge Gross's rulings, the court asked Frank's lawyer, "What is it you're asking the court to do, [counsel]?" But counsel still did not request judicial notice. Instead, counsel replied, "I'm just objecting because this is now—there's already been findings made by the court, this court, regarding the testimony that [Nina] is providing that has been rejected by the court."

Other times, counsel barely mentioned the assertedly-critical evidence. For example, Frank claims on appeal that he "specifically requested that the Court review the custody evaluator's report and her testimony because Nina was attempting to re-litigate a number of issues that had already been determined adversely to her by Judge Gross." But Frank provides no record cite to support this claim, and our review of the reporter's transcript has not revealed any. To the contrary, the transcript reveals Frank was primarily concerned with Judge Gross's findings; he referred to the custody evaluator—and her report—only in passing.[6]

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[5] Several of counsel's remarks, including this one, could be construed as requests to continue the hearing to permit him to obtain the records and *then* request judicial notice of them. But Frank insists that the "issue before this Court is ***not*** whether the family law court abused its discretion in failing to grant a request for a continuance … ." (Emphasis original.) We therefore do not address that issue.

[6] Counsel brought the evaluator up twice during a lengthy exchange about the move-away hearing. First, counsel said, "The point here is that [Nina] decided that she was going to go to Illinois with the children, and, as a result of that, she went and filed for a Domestic

Nor did Frank attempt to bring the materials before the court by entering them into evidence. For example, Frank claims that "[d]uring the proceedings, Judge Scaduto declined to consider the findings made by Judge Gross"[7] that Nina's "motivations for the proposed move were mixed." Unlike the other documents at issue here, however, the court *had* the judgment in which that finding appears; Frank had marked it as an exhibit and attached it to his opposition papers. Yet counsel never attempted to move that exhibit into evidence.

Fundamentally, Frank argues in this appeal that during a three-hour hearing in which he testified at length, he was denied due process of law because the court failed to consider evidence he did not present. We conclude he has forfeited that claim by failing to meet any of the requirements for such a request. (§ 453; rule 5.115; see *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 519–521 [court did not abuse its discretion by denying a request for judicial notice where requesting party did not meet statutory requirements].)

Violence Restraining Order and made up the fact that my client had threatened to kill her. And if you look at the evaluator's report, which we're going to have to get for you, as well, the issue regarding [Nina's] veracity came into play regarding the incidents alleged, which Judge Gross then considered in the move-away case regarding these parties when he determined that my client had met his burden under [Family Code section] 3044, and if [Nina] was going to move away, it was in the best interest of the children to be placed with my client." Later, counsel said, "And then subsequent to that, there was a custody evaluation where [Nina's] veracity with regard to the restraining orders came to the attention of the court, again, by way of the evaluator."

[7] The cited pages of the reporter's transcript do not support this claim.

DISPOSITION

The order granting a permanent restraining order is affirmed. Respondent Nina Alvizo shall recover her costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.