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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of MIGUEL P. and JOSIE MARTINEZ AMEZCUA.	2d Civil No. B277624 (Super. Ct. No. 1314266) (Santa Barbara County)
MIGUEL PEREZ AMEZCUA, Respondent, v. NICOLETTE J. MARTINEZ JONES, Appellant.	

Nicollete J. Martinez Jones (mother) appeals from a 2016 order modifying custody of her son (child), who is now 10 years old.[1] Before the order, mother had sole physical custody of child.

[1] The order is appealable. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377-1378.)

Mother and her former spouse, Miguel Perez Amezcua (father), had joint legal custody. The family court left joint legal custody intact, but awarded father sole physical custody.

Mother contends that the family court abused its discretion (1) by failing to apply the domestic violence presumption of Family Code section 3044,[2] and (2) by modifying physical custody even though father had failed to demonstrate that the modification was warranted by a significant change in circumstances. We granted the application of Family Violence Appellate Project, et al., for permission to file an amici curiae brief in support of mother. We affirm.

Factual and Procedural Background

In November 2006 father was charged with misdemeanor battery upon mother. He pleaded no contest to false imprisonment. (*Id*., § 236.)[3] The battery charge was dismissed. He was placed on formal probation for three years. One of the conditions of probation was that he attend a "52 week batterers program." Father successfully completed the program.

In April 2009 the Santa Barbara County Superior Court (hereafter Court) issued a domestic violence restraining order (DVRO) against father. The protected persons were mother and child. The order expired on December 31, 2009.

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[2] Unless otherwise stated, all statutory references are to the Family Code.

[3] Father described the incident as follows: Mother "was calling his autistic son [a son from father's previous marriage] a retard. [Father] told her he was not a retard and not to call him a retard. She kept repeating it over and over. [Father] . . . lost it and put his hands to her neck and for a very short time was choking her."

In December 2009 the Court dissolved the parties' marriage. It awarded mother sole legal and physical custody of child, then two years old.[4] In February 2013 the Court modified the custody order to grant the parties joint legal custody. At the time of the modification, father lived in Nipomo in San Luis Obispo County and mother lived in Orange County. Mother retained sole physical custody.

In March 2013 the Court issued a DVRO against father. The order expired in August 2013. The sole protected person was mother. Both parties were present at the hearing on mother's request for a DVRO. The request was based on an incident that had occurred on December 25, 2012, when father came to mother's house at about 9:00 a.m. to pick up child. Mother's version of the incident was as follows: She told father that child was not yet ready to go. Father banged on the front door and yelled, "'Give me my son. Give me my son. I want my son now.'" Mother opened the door and said that child needed "a little more time." Mother tried to close the door, but father put his foot in the way so she could not shut it. "He was blocking the door with

[4] "If a parent is awarded 'sole legal custody,' that means the parent 'shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.' [Citation.] If a parent is awarded 'sole physical custody,' that means the child 'shall reside with and be under the supervision' of the custodial parent, 'subject to the power of the court to order visitation' for the noncustodial parent. [Citation.]" (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956.)

his foot." Father grabbed mother's right arm and "shoved" her "with his body" until he was inside the house.[5]

In October 2013 the Orange County Superior Court issued a five-year DVRO against father based upon mother's declaration. The sole protected person was mother. Father did not appear at the hearing on mother's request for a DVRO. Father testified that he had not been served with process and had been unaware of the Orange County proceedings. The Santa Barbara County Court apparently believed father. It found that he had been "deprived of the opportunity to appear."

The record includes mother's August 19, 2013 declaration in support of the Orange County DVRO. The only new incidents occurred on January 15-18, 2013 and June 14, 2013. As to the January 15-18 incidents, mother declared: "On Tuesday, January 15, 2013 [father] harassed me and many individuals in my community. [Father] threaten[ed] to take my son from his

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[5] Father gave a different version of the incident. Father said he was standing outside mother's house waiting for child. Mother came outside and said, "'Why don't you go get in your fucking car?'" Mother went back inside the house. Father knocked on the front door and rang the doorbell. Mother came outside, swore at father, and said that his two other sons from a previous marriage "'are retarded. They're fucking retards.'" (One of the other sons is autistic.) Father pulled the screen door to open it, but mother ran into him and slammed it shut. She then got on the phone and said "'domestic violence, domestic violence.'"

The Court stated, "[T]he remarks that are attributed to [mother] are a disgrace, as well as a violation of the court order. But Mr. Amezcua [father], to have a physical episode of any kind on Christmas morning, I'm just appalled that you would do this to your son, both of you."

school on Wednesday, January 16, 2013. On Friday, January 18, 2013, [father] showed up at my son's school and attempted to take my son." (Italics omitted.) As to the June 14, 2013 incident, mother declared: "[Father] showed up at my son's daycare and attempted to abduct my son and get my personal documentation. [Father] stalked the daycare premises [and] demanded to take my son and kept me from safely dropping off and picking up my son. (Police were called)." The only other incidents described in mother's declaration were father's alleged assault on December 25, 2012, and prior incidents that had occurred from 2006 through 2010.

In July 2015 father requested that child custody be modified to give him sole physical custody. The parties would retain joint legal custody. In support of his request, father declared that (1) mother "refuses to allow [child] to have any interaction and contact with [father] when he is in her care"; (2) on two occasions (January 9 and May 29, 2015) mother disrupted child's schooling to impede father's court-ordered visitation; (3) mother refused to allow father's visitation on July 5, 2015; (4) mother "interferes with [father's] custodial time" with child by "constantly attending events" at which father and child are present (father must leave because the Orange County DVRO requires him to stay at least 100 yards away from mother); (5) mother manipulates child with the intent of alienating him from father; and (6) mother falsely reported to the Sheriff and Child Services that father had committed acts of child abuse and neglect. Father asserted: "It is hard to maintain a father-son bond when we can only communicate every two weeks. This is the second year in a row that I was unable to speak with my son on his birthday. The only way [I] can develop a strong, healthy

relationship with my son is to obtain sole physical custody. . . . I have gone months without seeing [child] because of [mother's] constant manipulations of the court system and false allegations."

In March 2016 the Court conducted a two-day trial on father's request for modification of custody. Numerous emails from mother to father manifested mother's extreme hostility toward him.[6] One of father's witnesses was Dr. Kristyn Fowkes-Muto, a licensed psychologist. Without objection, the Court recognized her to be an expert in psychology. She testified as follows: Mother appears to be "limiting the ability for [father] to

[6] For example, in one email mother stated: "'You are to immediately stop hitting, pinching, and smacking our son. Anymore physical or mental abuse will not be tolerated.'" Father denied, hitting, pinching, or smacking child. In another email mother said: "You are abusing our son. Emotional parentification will not be tolerated! Just because Tiffany [father's present wife] abuses her children . . . doesn't make it right that you do the same to our son! [¶] . . . Leave our son out of your unhealthy obsessions! You are married again. Get over it!" "'This issue will be taken to court to discourage you from abusing our son, and to deter you from ongoing emotional parentification.'" In a third email mother asserted, "'I refuse to negotiate with terrorists or be punished for simply acting on our son's best interest, at least by you. You constantly deliberately cause our son to miss out on educational and life-enhancing experiences just because you woke up on the wrong side of the bed.'" In a fourth email mother threatened father with criminal prosecution: "'If, in fact, you are attempting to alienate me from our son, . . . you better be ready with Tiffany's money, because I will not only sue you for monetary damages and attorneys' fees, but you will be facing criminal charges, and I will include her [Tiffany], her business, in the lawsuit.'"

contact his son, to have a healthy relationship with his son." This is called "gatekeeping."[7] "[I]n situations where both parents are reasonably good parents, and one parent is gatekeeping and restricting access to the other parent, then it can really damage that child's self-esteem, emotional, physical, mental well-being . . . because they're deprived [of the] opportunity to be parented by someone who is a good parent."

On redirect examination, Fowkes-Muto was questioned about a child custody evaluation report prepared in September 2012 by Dr. Deborah Moffett, a licensed clinical psychologist. Fowkes-Muto testified that she had read the report, which "corroborated the opinion [she] had already formed" about mother's gatekeeping. In the report Moffett opined: "A major issue in this custody conflict is the restrictive gatekeeping practiced by [mother]. She has been unwilling to facilitate the court ordered visitation plan for a variety of unfounded issues. Her restrictive gatekeeping has been a consistent pattern." "[I]f [child's] mother did not practice restrictive gatekeeping, then a recommendation could be made for her to continue to be the custodial parent. However, because she has intentionally interfered with the relationships between [child] and his father[,] making this recommendation does not provide [child] with consistent and unobstructed access to his father. Although [child] is a well adjusted child and his mother's obstructing a positive relationship with his father has not had a significant

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[7] See *James U. v. Catalina V.* (N.Y. App. Div. 2017) 151 A.D.3d 1285, 1288 ["the evaluating psychologist expressed concerns regarding the mother's tendency towards 'gatekeeping,' i.e., using her status as the custodial parent to keep the children away from the father"].)

impact on him, when he does reach a cognitive level where alienation can occur, he may develop problems as a result of his mother's unwillingness to foster a healthy relationship between [child] and his father." When Moffett prepared her report, child was five years old. When Fowkes-Muto testified in March 2016, child was eight years old and was going to turn nine the following month.

Trial Court Rulings

At the conclusion of the trial, the Court found: Father "is the recipient of an unending stream of controlling decisions [by mother], allegations that prove to be unfounded, and unreasonable demands on his schedule with the result that he doesn't get all of the time that he should have, and is unable to build a good relationship with his son. [¶] . . . [I]t hasn't developed into the relationship of trust and confidence that seems warranted to me in the circumstances, and it's because of the activities which I think are legitimately described as gatekeeping engaged in by [mother]." By "gatekeeping," the court was referring to "effort after effort [by mother] to raise issues that minimize father's time [with child]." Mother "has been tremendously resistant to efforts by [father] to co-parent." Mother's "efforts at recrimination and harassment, as evidenced in the e-mails, has continued unabated."

The Court noted that father has "visibly grown and calmed over the years that I have seen him." On the other hand, the Court could not "fault [mother] for her concerns in the matter because there is a real history [of domestic violence] here, and it represents a trauma in her life. But those events are fading far into the past, and really don't much concern the period of the child's life."

The Court did not believe "there is a present need for a restraining order [against father]." The Court continued: "I'm in no position to tell the Orange County court that it can't impose one, and I would never attempt to do so. [¶] But I did read the document [mother's declaration] that was presented to the Orange County court as part of the previous court proceedings, and I thought it a very unfair presentation of the facts as it gave no sense of the chronology. [¶] It gave me the impression . . . that all these things were of recent vintage, as opposed to ancient history. [¶] It did not fairly present [father's] side of any of those controversies."

As to the "change in circumstances" required for an order modifying custody, the Court found that "the child has grown in years and has had longer experience with [father]. Many of the issues that had been of concern have been addressed. [¶] We have seen a pattern [by mother] of not being willing to abide by the orders of the [C]ourt, a very frustrating level of micromanagement, and I think the only way that we're going to see the child maintain and develop a relationship with both parents, which is for his mental health here, is to have a change in custody." The Court believed that father had been "unfairly treated in [mother's] unilateral decisions not to comply with the [visitation] schedule imposed by the [C]ourt in the absence of agreement [by the parties]."

The Court found that child would suffer detriment if custody were not modified: "[I]t is detrimental to [child] to remain in a position of high conflict and circumstances in which he is not encouraged to have as important of a relationship with his father as he does with his mother."

On April 12, 2016, the Court ordered that the parties shall have joint legal custody and, through the end of the 2015-2016 school year, mother shall have "primary physical custody." The matter was continued to August 2, 2016 "for a hearing to review custody and visitation." But in July 2016 the Court awarded primary physical custody to father beginning retroactively on June 12, 2016.

On August 2, 2016, both parties testified and their counsel presented argument. The Court said it would "first put focus on the interests of [child]." The Court noted that it had earlier made "its determination that there were changed circumstances that would justify a change in custody, based upon a very long-running pattern of gatekeeping, and attempts at alienation, and very hostile behavior." The Court "reaffirm[ed] its decision to change the custody." It ordered that, after August 13, 2016, child "will remain in father's home in preparation for the start of the school year." A signed order to this effect was filed on October 5, 2016.

Mother requested a statement of decision as to "[t]he Court's findings and orders as to the requisite change in circumstances required to change physical custody of the minor child." In response to the request, the Court observed that its reasons had been "expressed on the record" at a hearing conducted on April 12, 2016, and "no request for a statement of decision was made at that time." The court noted that at the April 12 hearing it had expressed "its concerns for the ongoing frustration of the father's visitation efforts, continued micromanagement of scheduling, gatekeeping efforts, and the long record of hostile exchanges all of which finally made clear that without a change of custody there would never be an

opportunity for [child] to develop a genuine bond with both parents, to his ultimate detriment."

Changed Circumstance Rule

The California Supreme Court has "articulated a variation on the best interest standard, known as the changed circumstance rule, that the trial court must apply when a parent seeks modification of a final judicial custody determination. [Citations.] Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest. [Citation.]" (*In re Marriage of Brown & Yana*, *supra*, 37 Cal.4th at p. 956.)

Domestic Violence Presumption (Section 3044)

A court's application of the changed circumstance rule may be subject to a presumption triggered by section 3044. Mother contends that the presumption was triggered but the Court failed to apply it.

"[S]ection 3044 establishes a rebuttable presumption that awarding physical or legal custody to a parent who has committed domestic violence is detrimental to a child's best interest . . . ." (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661.) Section 3044, subdivision (a) provides: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child . . . *within the previous five years*, there is a rebuttable 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, pursuant to Section 3011. This presumption may

only be rebutted by a preponderance of the evidence." (Italics added.) Because of the five-year limitation, the presumption could be triggered here only by the perpetration of domestic violence in March 2011 or thereafter. The court trial on custody was conducted in March 2016.

"The section 3044 presumption is rebuttable and "'may be overcome by a preponderance of the evidence showing that it is in the child's best interest to grant joint or sole custody to the offending parent.'" [Citations.] The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence. [Citation.]" (*Celia S. v. Hugo H.*, *supra*, 3 Cal.App.5th at p. 662.) "Once the presumption has been rebutted . . . , the case becomes like any other in determining what custody arrangement is in the best interests of the child." (*Jason P. v. Danielle S.* (2017) 9 Cal.App.5th 1000, 1033.)

"If a domestic violence restraining order has been issued, then it is clear that there has been a finding of domestic violence sufficient to trigger the presumption of section 3044." (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1500, fn. 10; see *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736 ["'Because a [DVRO] must be based on a finding that the party being restrained committed one or more acts of domestic abuse, a finding of domestic abuse sufficient to support a [DVRO] necessarily triggers the presumption in section 3044'"].) Here, the presumption was triggered by the March 2013 Santa Barbara County DVRO and the October 2013 Orange County DVRO.

Section 3044, subdivision (b) provides that, if the presumption is triggered, the court "shall consider all of the following factors" in determining whether the presumption has

been overcome: "(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part. [¶] (2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code. [¶] (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate. [¶] (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate. [¶] (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole. [¶] (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions. [¶] (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence."

Mother Has Not Shown that the Court Failed to Apply the Presumption of Section 3044

If the presumption of section 3044 is triggered, the failure to apply it is an abuse of discretion. (*In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at pp. 1499-1500.) Father does not dispute that the section 3044 presumption was triggered. Although the Court did not mention section 3044, father argues,

"Based on the courts [*sic*] thorough reasoning it is clear the court, at a minimum, implicitly applied the presumption and determined it was rebutted."

The record does not show that the Court complied with section 3044, subdivision (f), which provides as it pertains to the 2016 order: "In any custody . . . proceeding in which a party has alleged that the other party has perpetrated domestic violence . . . , the court *shall inform the parties of the existence of this section* . . . ." (Italics added.) But mother does not claim that the Court failed to comply with subdivision (f). She states, "[B]ecause there is no indication in the record one way or the other about whether notice [pursuant to subdivision (f)] was given, [mother's] argument here is based solely on the court's failure to *apply* the presumption."

"Our starting point is the presumption that duty was regularly performed. (Evid. Code, § 664.) . . . [Therefore,] the presumption is that the [Court] knew and properly applied the law [i.e., the section 3044 presumption]. It is an appellant's burden to overcome the regularity presumption by an affirmative showing." (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1152; see also *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 ["scores of appellate decisions, relying on this provision [Evid. Code, § 664], have held that 'in the absence of any contrary evidence, we are entitled to presume that the trial court . . . properly followed established law' "]; *In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 653-654 ["'[w]e must presume that the court knew and applied the correct statutory and case law' and applied them to the facts in this case"].) Mother has failed to carry her burden of overcoming the presumption that the Court properly applied the presumption of section 3044.

During appellate oral argument, mother's counsel conceded that the Court was aware of section 3044. Mother has failed to carry her burden of overcoming the presumption that it properly applied section 3044.

Mother argues: "The trial court's failure to consider the factors outlined in section 3044 was a *per se* abuse of discretion that requires reversal." Amici curiae request that we make "clear that application of Section 3044 requires explicit consideration of the Section 3044 rebuttal factors." But the statute does not say that each relevant factor must be expressly considered on the record. "We decline to add such a requirement to the statute. [Citation.]" (*Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1140.) "[A]lthough section 3044, subdivision (b) requires the court to *consider* the factors it lists, it does not require the court to find they all have been satisfied in order to find the presumption rebutted. The court simply must find, by a preponderance of the evidence, that awarding custody to the domestic violence perpetrator would not be detrimental to the child's best interests." (*Jason P. v. Danielle S.*, *supra*, 9 Cal.App.5th at p. 1032, fn. 23.)

Here the Court found, by a preponderance of the evidence, not only that awarding sole physical custody to father would not be detrimental to child's interests, but also that child would suffer detriment without a change of physical custody: "[I]t is detrimental to [child] to remain in a position of high conflict and circumstances in which he is not encouraged to have as important of a relationship with his father as he does with his mother." "[W]ithout a change of custody there would never be an opportunity for [child] to develop a genuine bond with both parents, to his ultimate detriment." "[T]he only way that we're

going to see the child maintain and develop a relationship with both parents, which is for his mental health here, is to have a change in custody."

It is understandable why the Court did not expressly consider the second through seventh factors listed in section 3044, subdivision (b). The Court could reasonably have determined that these factors were inapplicable. Mother cites no evidence that father's completion of "a parenting class" would be "appropriate." (*Id*., subd. (b)(4).) The Court found that he is "an excellent father." He was not on probation or parole. (*Id*., subd. (b)(5).) Mother testified that he had previously participated "in a 52-week batterers' intervention program." (*Id*., subd. (b)(2).) Father had completed the program.[8] The Court's comments make clear that it did not believe father needed to complete another batterer's treatment program. The Court found that father's prior domestic violence "events are fading far into the past," that he has "grown and calmed over the years," and that there is no "present need" for a DVRO.

The Court knew that father "is restrained by a protective order" in the Orange County case. (§ 3044, subd. (b)(6).) Mother cites no evidence that father has "not complied with its terms and conditions" or "has committed any further acts of domestic violence" since the issuance of the Orange County DVRO. (§ 3044, subds. (b)(6)-(7).) In her reply brief, mother states that

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[8] In her reply brief mother asserts that the "only evidence that [father] completed a batterer's program is that [mother] said he did." But one of the conditions of father's probation for the false imprisonment conviction was that he attend a "52 week batterers program." Father testified that he had completed "all of [the] terms and conditions associated with [his] probation."

father abused her "as recently as 2013." The Orange County DVRO was issued in October 2013.

Mother asserts that father "had at least the potential for (if not problem with) drug and alcohol abuse (see CT 169, 244, 550; Mot. To Augment, appen. A, at p. 11 . . . .)" Mother's citations to the record do not support a finding that "alcohol or drug abuse counseling" would be "appropriate." (§ 3044, subd. (b)(3).) Page 169 of the Clerk's Transcript is part of Dr. Moffett's child custody evaluation report prepared in September 2012. At page 169 Moffett states, "[Father's test] scores reveal a vulnerability to use alcohol to relieve his emotional distress." Moffett does not say that father has succumbed to that vulnerability. Page 244 of the Clerk's transcript is part of an attachment to Moffett's report in which father said that, when he was 18 years old, he had drunk alcohol and smoked marijuana at a party. (When the report was prepared in 2012, father was 37 years old.) Father asserted: "I haven't used an illegal drug in at least 15 years. I don't have the urge to or want to." Page 550 of the Clerk's Transcript is part of a declaration by Blyth Butler-Lopez filed on March 17, 2016. She declared, "[Father] had some very questionable friends during the time that I knew him [i.e., 1995-1996, 2002-2003]. The friends were dealing and using illegal street drugs, and having parties that, I myself did not feel comfortable attending." Butler-Lopez did not say that father had dealt or used drugs. Finally, the cited Appendix A of the motion to augment is mother's declaration in support of the Orange County DVRO. Mother declared, "[Father] has a history of drug and alcohol abuse, . . . driving under the influence, possession of illegal drugs." But mother cited no facts to support this conclusion.

The only relevant section 3044 factor is the first: whether giving sole physical custody to father "is in the best interest of the child." (*Id.*, subd. (b)(1).) The Court considered this factor. It concluded, with detailed supporting reasons, that the change in physical custody is in child's best interest because of mother's continuing efforts to sabotage the father-child relationship and the resulting detrimental effect upon child.

Amici curiae contend that, in determining whether the section 3044 presumption has been rebutted, a court lacks authority to consider nonstatutory factors irrelevant to domestic violence such as the custodial parent's gatekeeping and attempts to alienate the child from the noncustodial parent. We disagree. Section 3044, subdivision (b) provides that the court "shall consider all of the . . . factors" set forth in that subdivision. It does not prohibit the court from considering other factors that the court deems relevant. "The minor child's best interests must remain at the forefront of the family court's considerations on custody in determining whether the section 3044 presumption has been rebutted." (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1056.) "[S]ection 3044 places no limitation on the evidence the family law court may consider concerning Minor's best interests . . . ." (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 419.)

The Court could reasonably conclude that mother's gatekeeping and attempts at alienation were relevant factors in determining whether granting sole physical custody to father would be in child's best interest. Father's expert in psychology, Dr. Fowkes-Muto, opined that gatekeeping "can really damage [the] child's self-esteem, emotional, physical, mental

well-being . . . because they're deprived [of the] opportunity to be parented by someone who is a good parent." (See Pruett et. al., *The Hand That Rocks the Cradle: Maternal Gatekeeping After Divorce* (2007) 27 Pace L.Rev. 709, 716, fns. omitted ["The father-child relationship is salient because of the consistent finding that children with active, involved fathers fare better emotionally, behaviorally, and cognitively and because of the father-child relationship's vulnerability to attenuation and loss after divorce. Given this importance and vulnerability of the father-child relationship after divorce, maternal gatekeeping poses a potentially powerful obstacle to its sustenance"].)

Mother argues that, by relying on her gatekeeping, the Court violated section 3044, subdivision (b)(1) insofar as it provides that "the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part." But the Court's finding that mother was sabotaging father's efforts to develop a relationship with child does not mean that it applied the statutory preference for frequent and continuing contact with both parents or with the noncustodial parent. Mother has not cited any portion of the record of the 2016 custody proceedings where the Court or counsel mentioned the statutory preference. The preference did not prevent the Court from considering child's need for a meaningful relationship with father. (See *Keith R. v. Superior Court*, *supra*, 174 Cal.App.4th at p. 1056 ["while Father may have lost his ability to cite [the statutory preference in attempting to overcome the section 3044 presumption], Daughter

certainly did not lose her right to have a meaningful relationship with both parents"].)

Mother claims that her "alleged 'gatekeeping' behavior . . . is not supported by the record" and that father failed to carry his burden of showing "*by a preponderance of the evidence* that living with him would not be detrimental to [child's] best interests." Mother forfeited the claim because she failed to set forth a fair statement of the evidence presented at the two-day court trial with supporting citations to the record and meaningful analysis. "'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent. [Citation.] Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it '"are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived." [Citations.]' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; see also *Foreman & Clark Corp. v. Fallon*, *supra*, at p. 881; *Binning v. Binning* (1962) 210 Cal.App.2d 693, 694; *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 847, fn. 2 ["The argument is forfeited because it is unsupported by citations to the record and meaningful analysis"].)

In any event, father's trial testimony provides substantial evidence of mother's gatekeeping. This evidence is supported by the expert opinions of Drs. Fowkes-Muto and Moffett.

The Court Did Not Abuse Its Discretion in Applying the Changed Circumstance Rule

The trial court ruled that the required change of circumstances had occurred. The standard of review is abuse of discretion. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 731.) "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion . . . .'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "[E]rror must be affirmatively shown." (*Id*. at p. 564.)

Mother argues, "None of the reasons the court cited . . . can satisfy [father's] weighty burden of showing a substantial change in circumstances warranting a modification to custody." The argument lacks merit. The court found that the changed circumstances included mother's gatekeeping, frustration of father's visitation rights, lack of willingness to abide by the court's orders on visitation, and attempts to alienate child from father. Mother's sabotage of father's visitation rights was an important factor in determining whether custody should be modified. "The deliberate sabotage of visitation rights not only furnishes ground for modification, it is a significant factor bearing on the fitness of the custodial parent. [Citation.]" (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 652; see also *Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 907 ["It is certainly true that one of the key factors the court should address as grounds for modifying custody is the custodial parent's deliberate efforts to impair the children's frequent and continuing contacts with the noncustodial parent"]; *In re Marriage of Wood* (1983)141 Cal.App.3d 671, 682 ["Frustration of visitation rights by the

custodial parent is a proper ground for transfer of custody to the formerly noncustodial parent"].)

Mother contends that her gatekeeping, alienation of child from father, and frustration of father's visitation rights were not changed but ongoing circumstances that existed when the Court considered custody at a hearing in December 2012. But the Court impliedly concluded, and the evidence supports, that there was a significant change of circumstances because mother's conduct had significantly worsened. Father testified: "This last summer [summer of 2015] I was supposed to have [child] for four weeks, I only got two. I have been down to the school [in Orange County] to pick [child] up, and she has taken him out of school. Or she will put him in school and take him out early, . . . and I'm not able to pick him up." "[I]f I was to go down there [to Orange County], I don't know if I would . . . be able to pick him up, or if she would make him available." In August 2015 father was entitled to visitation, but mother "just said she wasn't going to provide it. She wasn't going to do it." Mother refused to provide visitation on July 5, 2015. In an email to father, mother said without further explanation, "'In minor child's best interest, we will not be exchanging [child] today.'" Between visits with child, father has no "communication with him. It is not like I can call him on the phone and talk to him." During one visitation period, father and his family went to see child play in a soccer game in Santa Maria in Santa Barbara County. Mother, who was living in Orange County, appeared at the game. Pursuant to the Orange County DVRO, father was required to stay at least 100 yards away from her. Father called the Sheriff's Office and was told, "You need to leave." Father and his family - his wife,

children, and in-laws - had to "get up and leave, and take [child] out of the game."

Mother claims that the Court abused its discretion because father "failed to demonstrate . . . a detriment to [child] if modification [of custody] was not made." But father was not required to demonstrate such a "detriment" under the changed circumstance rule. He was required to "demonstrate[] 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's *best interest*. [Citation.]" (*In re Marriage of Brown & Yana*, *supra*, 37 Cal.4th at p. 956, italics added; see also *Burchard v. Garay* (1986) 42 Cal.3d 531, 535 ["The changed-circumstance rule . . . provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court . . . should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest"].)[9] Mother has not shown that the court exceeded the bounds of reason in concluding that a change of physical custody was in child's best interest because it would enable him to develop a beneficial relationship with father as well as mother.

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[9] A showing of detriment to the child is required in a "move-away" case where the custodial parent seeks to relocate. "'In a "move-away" case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer *detriment* rendering it '"essential or expedient for the welfare of the child that there be a change."'" [Citation.]" (*In re Marriage of Brown & Yana*, *supra*, 37 Cal.4th at p. 960, italics added.)

Even if a showing of detriment were required, mother has not shown that the court abused its discretion in finding that "it is detrimental to [child] to remain in a position of high conflict and circumstances in which he is not encouraged to have as important of a relationship with his father as he does with his mother," or in finding that, "without a change of custody there would never be an opportunity for [child] to develop a genuine bond with both parents, to his ultimate detriment."

Mother alleges that, in violation of section 3011, subdivision (b), the Court "indisputably failed" to take into account father's "history of domestic violence . . . when performing the best interests analysis." But as we have previously discussed, the Court expressly considered father's history of domestic violence.

Request for Change of Venue to Orange County

Mother requests that we change the venue from Santa Barbara County to Orange County. In her opening brief, mother relies on Code of Civil Procedure section 170.1, subdivision (c), which authorizes an appellate court to "consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (*Ibid.*) Mother complains "that the trial court currently assigned to this matter may not be impartial going forward" and that traveling from her home in Orange County to Santa Barbara County "imposes a substantial financial and emotional burden" on her.

In her reply brief, mother acknowledges that Code of Civil Procedure section 170.1, subdivision (c) does not authorize a change of venue. She argues that a change of venue should be ordered pursuant Code of Civil Procedure section 397,

subdivision (c), which provides, "The court may, on motion, change the place of trial in the following cases: . . . [¶] (c) When the convenience of witnesses and the ends of justice would be promoted by the change." Mother forfeited this argument because she failed to raise it in her opening brief. (*Holmes v. Petrovich Development Co.* (2011) 191 Cal.App.4th 1047, 1074.)

Moreover, mother is requesting a change of venue in the wrong court. The request should be made in the trial court. "A motion for the change of venue based upon the convenience of witnesses is addressed to the sound discretion of the trial court, and an order denying the change can only be reversed for an abuse of discretion. [Citations.]" (*Ayres v. Wright* (1928) 205 Cal. 201; see also *Pacific Coast Title Ins. Co. v. Land Title Ins. Co.* (1950) 97 Cal.App.2d 829, 832; *People v. Brite* (1937) 9 Cal.2d 666, 690 ["The granting or refusing of a motion for a change of place of trial is essentially a matter which rests in the sound discretion of the trial court, who ordinarily is . . . better able to pass understandingly on the motion than an appellate court would be"].)

In any event, a change of venue is unwarranted. There is no reason to question the trial judge's impartiality. It is readily apparent that the request for a change of venue is, in reality, a disguised attempt to obtain a new trial judge.

Disposition

The order modifying custody is affirmed. Father shall recover his costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

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