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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

JESSICA TELLO, Petitioner and Appellant, v. DARRYL JONES, Respondent.	B282259 (Los Angeles County Super. Ct. No. SQ007724)

APPEAL from an order of the Superior Court of Los Angeles County, Matthew C. St. George, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Reversed in part, affirmed in part.

Tanya Asim Cooper for Appellant.

No appearance for Respondent.

INTRODUCTION

Petitioner Jessica Tello sought a domestic violence restraining order (DVRO) against respondent Darryl Jones pursuant to the Domestic Violence Prevention Act, Family Code section 6200, et seq. (DVPA).[1] In a separate paternity action, respondent sought custody of petitioner's minor child, K., alleging that he was K.'s father.[2] After a hearing at which both parties presented evidence, the court denied petitioner's request for a DVRO, ordered respondent to have visitation with K., and found that respondent was K.'s presumed father. Petitioner appealed.

We affirm in part and reverse in part. The trial court did not abuse its discretion by denying the request for DVRO. However, because the court stated throughout the hearing that it would not be determining respondent's paternity, yet made a paternity finding at the end of the hearing, that portion of the court's order was erroneous and is reversed. In addition, because respondent did not request visitation before the hearing and no relevant evidence was presented at the hearing relating to visitation, the court erred in ordering visitation and that portion of the order also is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner and respondent had what petitioner characterized as "a brief dating relationship." Petitioner gave birth to K. in December 2016.

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[1] All further statutory references are to the Family Code unless otherwise indicated.

[2] We refer to the minor by first initial and witnesses by first names to protect the parties' privacy. (See Cal. Rules of Court, rule 8.90(b)(1), (11).)

A. Request for domestic violence restraining order

On January 10, 2017, petitioner filed a request for temporary restraining order under the DVPA. She requested protection from respondent for both herself and K. The request noted that respondent had filed a paternity case concerning K. in 2016.

In a declaration attached to the request, petitioner said that respondent "claims to be the father of my child," but "I do not know whether Respondent is the father or not. Respondent is not on the child's birth certificate and he has not signed a voluntary declaration of paternity." Petitioner stated that she was afraid for her safety, and asked for a five-year restraining order. She said that respondent "has been increasingly physically, verbally, and emotionally abusive." She described several incidents in her declaration. For example, in April 2016, she told respondent that he was not the father of the child she was carrying, and he pleaded with her to abort the fetus. Respondent got angry with petitioner, and "grabbed me by the neck and pushed me onto the floor. He took my backpack, which contained my money, identification, and wallet, and ran off with it. When Respondent saw that I was getting up, he ran back and pushed me back down." Petitioner said she was eventually able to get up and run away.

Petitioner said that respondent went to the hospital shortly after petitioner gave birth to K. in December 2016. Respondent was "pacing around the room" and "made me feel very uncomfortable." Respondent saw K.'s birth certificate near his belongings, and picked it up. When petitioner asked for it,

respondent said it was his: "He grabbed my wrists and told me, The paper is mine. Don't make things difficult."

Petitioner also stated in her declaration that on Christmas respondent went to the apartment petitioner shared with her mother, sister, and K., and "began screaming and yelling to see" K. Respondent "pushed my mother out of the way while he headed down the hall" and took K. from his crib. Petitioner stated, "[Respondent] might have been under the influence of drugs or alcohol because his eyes were bloodshot and had a weird crazy stare." After a few minutes, respondent "shoved my son back into my arms and stormed out of the apartment, slamming doors on the way out."

Petitioner said that on January 5, 2017, respondent again went to her apartment, but she did not let him in. Respondent "began throwing rocks at the windows and pounding on doors, yelling to see my child." Petitioner told respondent she was going to call the police, but she did not because she did not have a phone. Respondent called the police; when they arrived they spoke to both respondent and petitioner, and told respondent to leave. In her declaration, petitioner requested that the court award her sole legal and physical custody of K.

The court granted petitioner's request for a temporary restraining order the same day she filed the request. The court set a hearing date of January 31, 2017.

B. Respondent's response to petitioner's request

Respondent filed a response to petitioner's request on January 18, 2017. Respondent said he agreed to stay away from petitioner and her mother, "however I would like to get access to my son [K.]." Respondent submitted a written statement saying

that when petitioner told him she was pregnant, "I was concerned because I knew she was on drugs." Respondent "wondered if the baby was mine or not, but I had a feeling that it was." As the pregnancy progressed, petitioner "continued to engage in criminal behaviors and use illegal substances." Petitioner was arrested in June 2016, and respondent said he visited her at a hospital and in jail.

Petitioner returned home in July 2016, while respondent was house-sitting for petitioner's mother, Maria, who was in Mexico. Petitioner began using drugs again, and as a result, respondent felt that he "could no longer associate with her." They got into "a verbal argument about her wellbeing and the child's development during the pregnancy." They began communicating only by email, and petitioner's "behavior and the nature of her emails made me concerned that she was still using heroin." After a period of no contact, petitioner and respondent reestablished email contact and respondent "felt that we had an agreement to co-parent without the intervention of the courts."

Respondent said petitioner called him when she went into labor, and he visited her and K. in the hospital. Respondent took a paternity test to confirm that he was K.'s father, and he "chose not to" sign K.'s birth certificate "until I received the results of the paternity test." Respondent stated that the paternity test results were attached, but they are not included in the appellate record.

Respondent said that after K. was released from the hospital, Maria "began to make it slightly difficult for me to visit and interact with [K.]." When respondent visited on Christmas, "[t]he visit was going well until [Maria] began sharing that she was uncomfortable with when I was coming by to visit my son."

Maria said that respondent could only see K. once a week, and K. would not be permitted to go to respondent's home. When respondent spoke with petitioner about this, they were "unable to come to an agreement about a revised visitation plan, and a verbal argument ensued with her yelling at me." Respondent said he had been holding K. at the time, and he gave K. to petitioner and left.

Respondent stated that he received the paternity test results confirming that he was K.'s father, and therefore initiated a paternity proceeding on December 29, 2016. He said he went to petitioner's residence on January 5, 2017, and petitioner did not open the door when he knocked, "even though I could tell she was in the residence." Respondent stated, "I then proceeded to try to get [petitioner's] attention by throwing pebbles at the window to the residence." Petitioner opened the window and yelled for respondent to stop, and respondent "immediately called" the police because petitioner's "outburst . . . was consistent with behavior she exhibits when under the influence." Respondent said he also contacted the Los Angeles Department of Children and Family Services (DCFS) to request an investigation of petitioner's "home and ability to provide for the child." After petitioner was served with the paternity lawsuit and received a visit from a DCFS case worker, petitioner requested the restraining order.

Respondent denied that he had ever been abusive toward petitioner. He also disputed her claim that petitioner had seen him intoxicated, because "I have been sober for 9 years." Respondent attached to his statement booking reports and arrest records relating to petitioner. He also included phone numbers for character references, and stated that a letter was attached

from the manager of the grocery store where he works, but the letter is not in the record on appeal. Respondent said he was concerned for K.'s safety "should he be remanded solely to [petitioner's] custody." Respondent said that in his paternity case, "I am fighting for the custody of my son."

C. Hearings

At the hearing scheduled for January 31, 2017, petitioner requested a continuance. The court granted petitioner's request, reissued the temporary restraining order, and continued the hearing to February 22, 2017. The court noted that a hearing on respondent's request for custody and visitation in his paternity action also was set for February 22. The minute order from this date states that both petitioner and respondent appeared, and "[e]ach party is given a copy of the Notice of the New Hearing Date."

At the beginning of the hearing on February 22, 2017, the court said, "The court is hearing the domestic violence matter first. We also have on calendar [in the paternity action] a request by [respondent] to be given sole legal and physical custody of the minor child." The court continued, "So we'll address that after I make a decision on the domestic violence cases [*sic*]. Obviously, that would have an impact . . . on the custody and visitation arrangements that are made." The court noted that petitioner sought the DVRO the same day that she filed a response in the paternity case.

Petitioner called her mother, Maria, as a witness. Maria testified that respondent went to her residence on Christmas, and "started to speak to my daughter with a very loud voice, shouting." Maria said she asked respondent to stop coming to her house "because you are a violent man and you have scared us

all." She also said that respondent told her he attacked petitioner by grabbing petitioner's neck. Maria said she was afraid of respondent.

Respondent, acting in pro per, questioned Maria on cross-examination. Maria confirmed that respondent house sat and took care of her dog while Maria was in Mexico and petitioner was in jail. She said that respondent bought a baby crib and assembled it at Maria's residence, and that respondent stayed at the hospital for three days after petitioner gave birth. Respondent also visited on Christmas, and "since things weren't done the way he wanted, then he would start getting violent." Respondent asked Maria why she did not call the police when the alleged violence occurred. Maria said she told petitioner to call the police, but she always said no. Maria said she did not know details about petitioner's drug use, but knew she was "in treatment with a doctor" to "avoid having temptations."

The court questioned Maria after cross-examination, and Maria said that petitioner told her that respondent was dangerous and he threatened her. Maria said she learned about respondent's violent behavior and threats before she went to Mexico and left her house and dog in his care.

After petitioner testified that respondent attacked her, the court cut off petitioner's testimony by saying he had read the declaration and she should only testify about issues she wanted to add to those statements. Petitioner said respondent attacked her in June 2016, and when asked why that was not in the declaration, petitioner said that "so many incidents had happened that I really forgot." Petitioner said respondent followed her on the street once, telling her to get an abortion, calling her a slut, and grabbing her wrists. Petitioner also said

that she recalled an incident in September 2016 when she had her phone in her hand, and "I remember him grabbing the phone and just throwing it to the ground and crushing it with his foot." Petitioner submitted an email from respondent, sent in June 2016, which said, "I know I broke your phone. I'll give you 50 bucks or I'll just buy you a phone and put you on my plan." Petitioner did not address the date discrepancy in her testimony.

Petitioner testified that in September 2016 respondent came to her residence, and he was "yelling outside[,] throwing rocks at my window, banging on both doors." The court said that petitioner was "conflating the incident" with one in her declaration, pointing out that the declaration stated that respondent was banging on the door and throwing rocks in January 2017.

Petitioner said a DCFS representative visited her home in January 2017, saying that a safety check was warranted based on information received in a call. Petitioner did a drug test pursuant to DCFS's request, and later received a letter from DCFS saying that there was no open case. The court admitted the letter as an exhibit, noting that the letter stated the allegation had been deemed inconclusive, and no safety plan was put into place.

Petitioner proffered a September 2016 email from respondent, which said that petitioner should get an abortion, because "I would rather not have a baby with someone on heroin." Petitioner also proffered a declaration from a doctor stating that petitioner was taking suboxone to address drug addiction, and that petitioner had been in treatment since her pregnancy. Petitioner testified that she had not used illegal drugs since she began treatment. Petitioner testified that she

was "very afraid" of respondent, because "he might attack me, he might be stalking me."

In addition, petitioner testified that respondent emailed her on February 7, 2017, after the temporary restraining order had been issued. The court asked respondent about the email, and he said he sent it as a group message to friends, and maybe petitioner was on his friends list.

On cross-examination, respondent asked petitioner if she called the police when he allegedly attacked her by grabbing her neck and pushing her down. Petitioner said no. Respondent asked whether petitioner had ever "shown any kind of happiness with me, hugging me" or "[k]issing me" throughout her pregnancy. Petitioner responded, "I'm afraid of you." To rebut this statement, respondent submitted photos of them together, which the court described. In one, petitioner and respondent were "standing together by a Christmas tree and she's clearly pregnant." Another two pictures showed petitioner and respondent together, and "they look very happy." Respondent said the pictures "show that she looks pretty happy with me on Christmas and at the hospital. She's holding me and we're holding our baby together."

Petitioner said she did not remember respondent buying her a phone. Petitioner also said she did not remember asking respondent for financial help, but said she might have "done that once" because "[y]ou kept pushing me. You kept appearing out of nowhere." The court admitted into evidence text messages from petitioner in June 2016 asking respondent for help.

Respondent asked petitioner why she did not call the police on Christmas, and petitioner said she was thinking about it, but then respondent stormed out. Petitioner also said respondent

picked her up from the hospital and took her home. On re-direct, when counsel asked why petitioner did not pursue a restraining order earlier, petitioner said respondent kept promising to change. Petitioner rested.

Respondent called Rita B. as a character witness, and also proffered a "reference letter" by Rita. After determining that Rita had never seen petitioner and respondent together, the court said that her testimony "doesn't help me decide if I should keep you and [petitioner] apart." The court dismissed Rita. Respondent then called Mike W., who also had not seen petitioner and respondent together, but respondent said he spoke with Mike about their relationship. Mike testified that he met respondent about ten years earlier through Alcoholics Anonymous; Mike was respondent's sponsor. Mike had never met petitioner. Mike said he and respondent had talked about respondent's relationship with petitioner, and respondent was concerned about K.'s safety and petitioner's possible drug use. Mike said that respondent's demeanor was calm during these discussions, and Mike had never witnessed respondent get angry or be violent.

Respondent called another friend, Andreis K., to testify. Andreis said she had known respondent for nine years as a friend, and she employed him two days a week at her cleaning company. Andreis said respondent talked about buying a crib and was excited about the birth of the baby. She also said she had never witnessed petitioner and respondent together.

When it was respondent's turn to testify, the court asked if he had anything to add to his declaration and the evidence presented, and respondent said no. Petitioner's counsel cross-examined him, and asked whether respondent agreed to stay

away from petitioner and Maria. Respondent said yes. Then the court questioned respondent, who denied that he was ever intoxicated when he visited petitioner. He also denied that he pushed petitioner down and took her belongings. Respondent said he visited petitioner and bought baby supplies because he believed he was K.'s father from the beginning of the pregnancy.

Respondent said that when he went to petitioner's residence on Christmas, the visit began normally but then Maria began to tell him when he could visit the baby. Respondent said, "I put my foot down and said, 'This is my kid. I want to be here for the kid." He said Maria got upset, and started yelling and threatening him, saying that petitioner would "put him on child support. We're going to rob you for everything you got." Respondent said, "I was holding the baby at the time and I gave the baby back to [petitioner]." Petitioner told respondent, "If you go to court you're going to make a big mistake."

Respondent admitted to breaking petitioner's phone, but said he had accidentally dropped it and the screen cracked. He also admitted that he said to petitioner in an email, "I'm sorry I grabbed you the way I did," but said, "[I]t was more grabbing her, holding her, giving her love. That's the only time I grabbed her was to show her some love." He also admitted throwing pebbles at her window, but said often in their relationship he would toss pebbles at petitioner's window at night to alert petitioner to his presence without waking Maria. He said if he had really thrown "rocks," as petitioner said, there would be damage, and here there was none. Respondent also said he was not the parent with drug issues and a criminal history; he had a clean background and a strong work history. Respondent offered to submit evidence of

petitioner's criminal history, but the court said that those records would not be helpful.

Throughout the hearing, the court limited questioning relating to respondent's relationship with K. For example, when questioned about the relevance of a question to Maria, respondent said, "This is just for personal relationship of me and my kid." The court said, "All right. Well, that's a different issue." Later, respondent asked the court, "[Y]ou said I can only ask questions based on domestic violence, right? Is that it?" The court said respondent could ask questions relevant to petitioner's drug use for credibility purposes. When respondent asked petitioner about buying the crib and other baby supplies, the court said, "What you did to help your child isn't relevant to whether I need to keep the two of you apart to prevent any further acts of violence. So let's find something else to talk about."

When respondent attempted to introduce the "reference letter" written by witness Rita, the court declined to admit it, saying, "Actually, this is a letter that actually would probably be best introduced in the paternity case, not in this case. This has to do with whether or not I should issue a restraining order." ~ After dismissing Rita as unhelpful to the restraining order issues, the court said, "We may need to hear from her later on, not today, but in the paternity case." When respondent asked witness Mike if he thought respondent would be a good father, the court said, "No. That's not today's hearing." When respondent considered calling another friend as a witness, the court said that hearing from respondent's friends would not "help me determine whether I need to issue a restraining order." As respondent began testifying about the actions he had taken as a father, the court

said, "Again, the issue involving the restraining order has to do regarding these alleged incidents . . . prior to the date of birth." When respondent brought up the paternity test, the court said, "We'll deal with the paternity test in the paternity case."

D. Ruling

The court stated its ruling from the bench. Because the nuances of the court's reasoning are relevant to the issues petitioner asserts on appeal, we quote the court at length:

"Well, this is not an easy decision. I have testimony from petitioner and her mother as to incidents which occurred with the respondent in which they allege he used physical force against the petitioner, although she says it was the day that she told him he was not the father and he reacted and took her purse and such. This occurred in a public place.

"The other incidents that they've testified to, the allegation of – that he put his hands around her neck, and that he shouted and was loud and abusive the way he dealt with the petitioner, they testified to all of that.

"And the respondent here says that none of this happened the way that it's portrayed. He says that he was never told that he child was not his, so that incident never happened.

"He denies putting his hands around her neck. He talked about her phone got broken, although that was an argument, of course. And what I have here is not so much of a night and day situation as it's one full of a lot of grays.

"The question I have is whether or not I need to issue a restraining order now or to provide for a period of separation in

order for the parties to address the causes of the violence between them.[3]

"But before I get to whether or not I need to have a period of separation, I have to determine whether or not there was actually violence between the parties.

"The petitioner has the burden. I have not been presented with any police reports, any 9-1-1 calls, any photographs of injuries which could have occurred in all these incidents that were described.

"The court noted, and I think respondent inadvertently addressed this issue, he said that in December when he said he was going to have to go to court to determine his rights, he was threatened that if he did that they would go after him. He says he was threatened by the petitioner and her mother that they'd go after him.

"And I think it's significant that this restraining order request was filed the same day she was served with the paternity action, and the same day she served her response.

"I want to make clear to you, [respondent], that your behavior during this period is not that of a shining knight as you portrayed it. I'm very concerned for the welfare of this small child, given this very tumultuous relationship that's demonstrated really very much the lack of trust between his parents.

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[3] The court was apparently referencing section 6220, which states that the purpose of the DVPA is to "prevent acts of domestic violence" and "provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence."

"I have evidence from the petitioner that she was receiving medication for a heroin addiction or certainly some addiction to some opioid, because I recognize that substance – that medication as one I've read about of being used to help people deal with opioid addiction.

"Her doctor says she's been on it since she was – she's seen her throughout her pregnancy she's been on it.

"The respondent claims in his declaration that that – that she in fact continued to use illegal drugs throughout the pregnancy and he saw her at one point partying with friends with alcohol and paraphernalia.

"I think, unfortunately, both sides are exaggerating their cases to make the other person look terrible, which is not a great start to the journey you're going to have to take over the next 18 years raising your son together, which we'll have to address in the paternity case. Because of my difficulty with the credibility of the witnesses I heard, as well as the parties themselves, the respondent has provided me with pictures which evidence that he used basically, actually somewhat effectively, to impeach the petitioner as to how the relationship was during the pregnancy.

"So at this point in time I am not going to issue a restraining order mainly because of my concern that it would have a very serious impact on [respondent's] work, but also because of its impact under Family Code section 3044[4] on the

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[4] Section 3044, subd. (a) states, "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 . . ., 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

decisions the court can make in the paternity case, and I don't wish to be handicapped at this point.

"I have to warn you, [respondent], that this isn't a get out of jail free card. If I ever have credible evidence of any kind of acts of violence or verbal abuse, any harm comes to [petitioner], I won't hesitate in issuing a restraining order. So you've got 18 years when you and she are going to have to raise this child. And we'll have to address that unfortunately on another day, because we're out of time today. I do think you should be allowed to see your son."

Respondent asked if he could see K. briefly that day, and the court said, "All right. What we need to do is the next time we come back we'll have to figure out some kind of visitation schedule." Respondent talked about signing K.'s birth certificate and confirming paternity through a DNA test, and the court said, "No more time. We'll have time to deal with that the next time you're in court."

The court then said, "I've got to figure out when you can see your son," and asked respondent about his work hours. Respondent agreed that he could see K. on his days off, and he and the court talked about having a third party present during visitation "only until we get the paternity case heard." Petitioner's counsel asked if she could object, and the court said, "No. I'm not hearing the paternity case right now." Petitioner's counsel said that without a finding of paternity, it was not appropriate for the court to make pendente lite orders. The court responded, "All right. I'll find if he's the father in the paternity case. There's no question he is. There are DNA tests that show

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of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence."

he is. So we are done." The court repeated the visitation schedule. The court asked counsel for dates for the paternity hearing, and petitioner's counsel responded by objecting that the DNA test was inadmissible. The court cut her off, and said that if she did not agree with the ruling, she could file a writ petition. "But I have found that he is the father. He filed the paternity action. [¶] She didn't challenge it in her response. . . . So I am finding – he's the presumed father under 7603 [*sic*]."[5] Respondent offered DNA test results, and the court said, "We'll deal with the test stuff when you guys come back in the paternity case. But I'm finding now that you're probably the initial father. If you're not, you've certainly been acting as the presumed father." The court ordered one visit between K. and respondent for February 27 (five days after the hearing), and set the hearing in the paternity case for February 28.

The minute order for the hearing stated that the request for a restraining order was denied because "Petitioner has not sustained her burden of proof." On April 24, 2017, petitioner filed a notice of appeal.

DISCUSSION

Petitioner asserts several grounds of error. She asserts that the court erred by denying her request for a DVRO because the court considered improper factors in making its decision. In addition, petitioner contends that the trial court exceeded its jurisdiction by "entering visitation orders to a non-parent" without providing petitioner with notice and a hearing. Finally, she contends the court erred "by making a paternity

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[5] Section 7603 addresses parents who have not appeared before the court, and therefore appears inapplicable under the circumstances.

determination during the hearing." Respondent did not file a brief. We consider each of petitioner's arguments separately.[6]

A. The court did not err in denying petitioner's request for a DVRO

Petitioner asserts that the trial court erred in denying her request for a DVRO. She contends that in making its determination, the court was constrained to considering only whether there was "reasonable proof of a past act or acts of abuse" (§ 6300). She asserts that the court was "not permitted to import other elements in its determination of abuse under the DVPA." Petitioner cites two specific errors. First, she asserts that the court misapplied the law in an effort to "circumvent" section 3044. Second, she contends that the court improperly relied on issues "entirely irrelevant to the DVPA," including the parties' motives and respondent's employment.

"[A] trial court has broad discretion in determining whether to grant a petition for a restraining order" under the DVPA. (*In re Marriage of Fregoso and Hernandez* (2016) 5 Cal.App.5th 698, 702.) The language of the DVPA itself provides the trial court with broad discretion, stating that the court "may" issue a restraining order where statutory criteria are met. (See, e.g., §§ 6300; 6301, subd. (a); 6320, subd. (a); 6340, 6346.) Thus, "[o]n review of an order granting or denying a protective order under the DVPA, we consider whether the trial court abused its discretion." (*Marriage of Fregoso and Hernandez, supra*, 5 Cal.App.5th at p. 702.) In general, "[a] ruling that constitutes an abuse of discretion has been described as one that is 'so irrational

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[6] Petitioner's opening brief combines the claims of error regarding visitation and paternity. As these were separate findings by the court, we consider them separately.

or arbitrary that no reasonable person could agree with it.'" (*Sargon Enterprises, Inc. v. University of Southern Cal*. (2012) 55 Cal.4th 747, 773.)

"The trial court's exercise of its discretion is measured against its 'consisten[cy] with the statute's intended purpose.'" (*Fischer v. Fischer* 22 Cal.App.5th 612, 625.) The purpose of the DVPA "is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (§ 6220.) These "two explicit statutory purposes" of the DVPA "both referenc[e] the future. In short, while past acts of abuse 'may' form an adequate evidentiary basis on which to issue a domestic violence restraining order, the purpose of such an order is still entirely prospective" in seeking to prevent future abuse and providing for a separation of the parties involved. (*Fischer, supra,* 22 Cal.App.5th at p.625.)

Petitioner argues that the trial court abused its discretion because it "misappl[ied] law in order to circumvent Family Code section 3044." In its oral ruling denying petitioner's request for a DVRO, the court said it would not issue the restraining order, in part, "because of its impact under Family Code section 3044 on the decisions the court can make in the paternity case, and I don't wish to be handicapped at this point."

Section 3044, subdivision (a) states, "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 . . . 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 . . . . This presumption may only be rebutted by a preponderance of the evidence."

The court's mention of section 3044 in the context of ruling on the DVRO was not an abuse of discretion. Under the DVPA, the court is required to "consider the totality of the circumstances in determining whether to grant or deny a petition for relief." (§ 6301, subd. (c).) Here, the circumstances involved a pending paternity action and custody request by respondent. Indeed, the court did not use the most judicious or accurate phrasing when referring to the potential effect of a DVRO ruling by stating that it would be "handicapped" under section 3044. However, in light of the court's other findings, such as the credibility determination discussed more fully below, we are not persuaded that the court's reference to the effect of section 3044 constituted reversible error.

Petitioner also argues that the court erred when it referenced the possible effect of a DVRO on respondent's employment, and by discussing petitioner's perceived motives in filing the request. She argues that these are "legally irrelevant considerations," and the court's reliance on them constitutes an abuse of discretion.

In support of her argument, petitioner cites *Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077 (*Quintana*), in which a wife sought a DVRO to protect her from an abusive husband. The court noted that the couple's children were in Mexico, and denied the DVRO on that basis, stating, "'I didn't see why should she even be in this court since she should be where her children are,'" and all she had to do to be free from her husband's violence was to "'go back to where she came from, where her children are.'" (*Id*. at p. 1079.) The court also said, "I'm not going to afford her the benefit of the court's protection when her children are

abandoned in Mexico." (*Ibid*.) The Court of Appeal held that "the trial court abused its discretion by deciding this case on facts entirely irrelevant to the [DVPA]," and therefore, "the trial court's comments were not merely legally unsound, but offensive." (*Ibid*.)

This case is not similar to *Quintana*. Here, the record demonstrates that the court considered issues relevant to the DVPA in making its ruling. It correctly recited the purpose of the DVPA from section 6220 regarding preventing future violence. It also accurately noted petitioner's request, made clear that it read the parties' written statements, viewed the proffered evidence, and listened to the witnesses. This case is therefore not like *Quintana*, where the court's comments had nothing to do with the violence between the parties.

Petitioner argues that it is "unclear whether the trial court even considered [respondent's] abusive conduct" in denying the DVRO. We disagree. The court's comments in making its ruling indicate that the court considered the evidence presented, and found that the circumstances did not warrant a DVRO. The court said it had concerns about the witnesses' credibility, stating that "both sides are exaggerating their cases to make the other person look terrible." The court noted numerous conflicts in the evidence, such as petitioner's recounting of a serious assault in a public place, but with no supporting evidence of a police report, 911 calls, or injuries. Although petitioner said she was afraid of respondent throughout her pregnancy, respondent submitted pictures of them together looking happy before the baby was born, which the court found effectively impeached her. When petitioner and respondent argued about visitation with K., petitioner threatened to retaliate if respondent sought a court

order; the court noted that petitioner asserted a need for court protection immediately after respondent filed his paternity action. The court also noted that if there were any "credible evidence" of violence it would not hesitate to issue a restraining order, implying that the court found the evidence before it *not* credible. "[T]he trial court was in the best position to evaluate credibility and to resolve factual disputes" (*In re Marriage of Evilsizor and Sweeney* (2015) 237 Cal.App.4th 1416, 1426), and we do not revisit credibility determinations on appeal.

Moreover, as noted above, the DVPA is forward-looking, and here the evidence did not support a finding that the parties were at risk of future violence. The parties both stated that they were no longer in a relationship, and they did not live together. In his response to the DVRO request, respondent agreed to stay away from petitioner and Maria, and there was no evidence presented to suggest that he would not do so. The most recent source of conflict was that respondent wanted to see K., and the parties could not agree on a visitation schedule. Presumably that issue would be addressed by the pending court proceedings to determine paternity, custody, and visitation. In short, the record does not contain evidence indicating that a court order was needed to prevent future violence between the parties.

Petitioner argues that the court erred by stating that it was considering the impact a DVRO could have on respondent's employment. As discussed above, the court may consider the totality of the circumstances in ruling on a request for DVRO. The court therefore had discretion to consider the impact of the restraining order on respondent, including the possible impact on his employment. (See, e.g., *Rybolt v. Riley* (2018) 20 Cal.App.5th 864, 874 (*Rybolt*) ["[T]he burdens the protective order imposes on

the restrained person, such as interfering with job opportunities[,] are . . . relevant considerations" in issuing a DVRO]; see also *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1291 [same].) Given that the court's mention of respondent's employment was only one of many factors the court considered in reaching its conclusion, the trial court did not err by mentioning the potential impact of a DVRO on respondent's employment.

The record therefore does not demonstrate that the court abused its discretion in reaching its conclusion. The order denying petitioner's request for a DVRO is therefore affirmed.

B. The trial court erred in making a paternity finding

Petitioner asserts that the trial court erred in making a paternity finding near the end of the hearing. She argues that the court did not consider any evidence relating to respondent's paternity, yet the court found that respondent was K.'s father. She states that this order was made in violation of her right to notice and a hearing.[7] We agree that the order was erroneous.

Throughout the hearing, the trial court avoided issues relating to respondent's parent-child relationship with K., stating

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[7] Petitioner asserts that the court's order on this issue "deprived [her] of her constitutional . . . rights to due process." She does not expand on this argument in her opening brief. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations.] Hence, conclusory claims of error will fail." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Because petitioner has not asserted any authorities in support of a claim of constitutional error, we do not consider that contention.

that paternity would be determined at a later date. Yet at the end of the hearing, the court made several statements regarding respondent's paternity: "I'll find if he's the father in the paternity case. There is no question he is. There are DNA tests that show he is. So we are done." "I have found that he is the father. He filed the paternity action." "So I am finding – he's the presumed father under 7603 [*sic*]." "I'm finding now that you're probably the initial father. If you're not, you've certainly been acting as the presumed father." "[I]n all likelihood he's the father."

Petitioner states that the manner in which a court may make a paternity determination during a DVRO hearing "is a question of law that has not been settled." Indeed, section 6323, subdivision (b)(1) states that "the court shall not make a finding of paternity in [an ex parte] proceeding" under the DVPA. The DVPA is silent as to whether a court may make a paternity finding following a noticed hearing. (See §§ 6340-6347.) The Uniform Parentage Act states that in an action under that Act, "[t]he natural parent . . . shall be given notice of the action . . . and an opportunity to be heard." (§ 7635, subd. (b).)

However, even if the court had been statutorily authorized to make a paternity finding at the hearing, the manner in which the court made its determination is concerning. Each time the parties' presentation of evidence approached issues relating to respondent's parent-child relationship with K., the court redirected the testimony to the DVRO issues only. At the end of the hearing, the court changed course and made a series of statements concerning paternity, stating that respondent was K.'s presumed father, "there's no question that he is," and "[t]here are DNA tests that show he is." The court did not admit DNA tests into evidence, however.

In addition, pursuant to statute, the only applicable basis for finding that respondent was K.'s presumed father would be if respondent "openly holds out the child as his . . . natural child." (§ 7611, subd. (d).) Yet when respondent attempted to question petitioner and other witnesses about his relationship with K., the court restricted the questioning and testimony to issues relating to the relationship between petitioner and respondent only.

Thus, the statutory basis for the trial court's determination is unclear, and the manner by which it reached its conclusion is troubling. Although a trial court has "the inherent authority and responsibility to fairly and efficiently administer the judicial proceedings before it," that authority is not without limits. (*California Crane School, Inc. v. National Commission for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22.) The ability to present evidence fully implicates the fundamental fairness of a proceeding. (See, e.g., *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) The paternity finding, entered without affording the parties the opportunity to present evidence or cross-examine witnesses on that issue, cannot stand. (See, e.g., *Fewel v. Fewel* (1943) 23 Cal.2d 431, 433 [custody order entered after depriving parties of the opportunity to present evidence must be reversed].)

We therefore find that the trial court erred by making findings as to respondent's paternity at the February 22, 2017 hearing. We note, however, that our holding relates to the finding the trial court reached in this hearing only; no other issues are before us. The record in respondent's paternity case is not before us and we are unaware of the proceedings in that action. To the extent that a court has made an appropriate

finding of paternity at any other hearing, our holding has no effect on that finding.

C. The trial court erred in granting visitation to respondent

Petitioner also asserts that the trial court erred in granting visitation to respondent, arguing that because the paternity finding was improper, the court essentially granted visitation to a non-parent. Petitioner also asserts that she was not afforded proper notice or a hearing as to the visitation order. We agree that the trial court overstepped its bounds because respondent did not request visitation in his response to the DVRO request.

Typically, we review custody and visitation orders under the deferential abuse of discretion test. (*Rybolt, supra,* 20 Cal.App.5th at p. 878.) For visitation orders, "[t]he precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; see also § 3020, subd. (a) [the court's focus when making orders regarding custody or visitation is the best interest of children]; § 6223 [visitation orders under the DVPA are subject to § 3020].)

Under section 6346, the court has authority to issue visitation orders following notice and a hearing "when [the] party who has requested custody or visitation" meets certain criteria. Here, respondent had not requested visitation, and there was no notice that the court would consider visitation issues at the hearing. In respondent's form response to petitioner's DVRO request, he also left blank the section relating to custody and visitation orders. Respondent stated in his declaration, "I feel my

son needs to be with me at all times," but he did not request that he be awarded visitation with K. Thus, there is no indication on the record that the parties received notice that the court would be determining visitation issues at the February 22, 2017 hearing.

Moreover, neither party presented any evidence at the hearing relating to whether visitation with respondent would be appropriate. As noted above, in making a visitation order the court is required to consider the best interest of the child. Here, however, no evidence was presented about K.'s best interest. Every time the parties or witnesses addressed respondent's relationship with K., the court directed the parties to avoid the issue and focus only on the relationship between petitioner and respondent. In light of the manner in which this hearing proceeded, the court erred in ordering visitation between K. and respondent.

As with our holding regarding the paternity determination above, we emphasize that our holding regarding visitation addresses only the hearing in the record before us. To the extent that a court has made appropriate visitation orders at any other hearing, our holding here shall have no effect on such orders.

DISPOSITION

The court's finding of paternity and order for visitation from the February 22, 2017 hearing are reversed without prejudice to any valid finding of paternity or visitation order in any proceeding involving these parties. The court's order denying a domestic violence restraining order is affirmed. Petitioner shall bear her own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.